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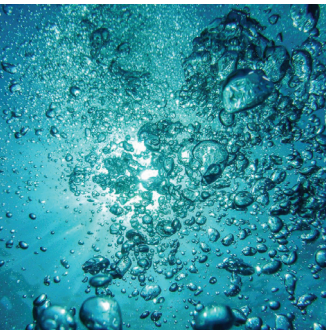

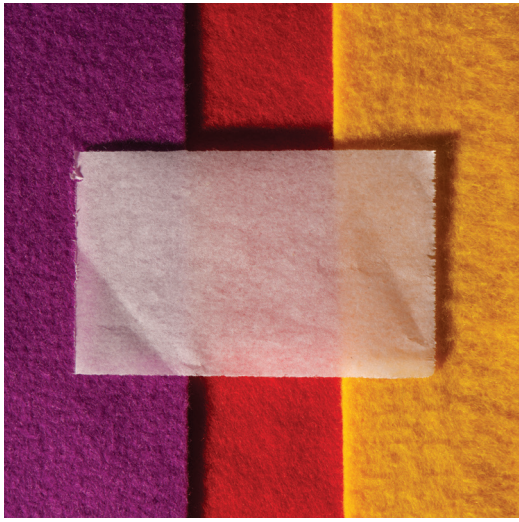

Dispute Settlement Mechanisms applicable to International (Transboundary) Water Resources

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1. Introduction

In 2020, Ethiopia started filling the Grand Ethiopian Renaissance Dam (GERD) on the Nile river, which comprises a major Ethiopian development project viewed of national and sovereign significance. The dam has raised concerns in particular for Egypt who claim historic treaty rights to Nile waters. The tensions between the two countries escalated in 2020, when Ethiopia started filling the dam in the absence of any agreement with Ethiopia. Although Ethiopia has argued that the hydroelectric GERD will not significantly affect the flow of water into the Nile, Egypt depends almost entirely on the Nile waters for household and commercial uses, and sees the dam as a major threat to its water security which it understands to be protected by treaties. The dispute also affects Sudan who also rely significantly on Nile water, and where the dam could bring economic and material benefits (such as cheaper electricity and reduced flooding), but also poses risks (new forms of flooding, or water shortages).

However, over the last year tensions have escalated significantly, with some progress at different times in the attempt to reach an agreement between the two countries. Law has been a significant component of the dispute in a number of ways. First, international law sets some framework for joint management of shared water resources. Second, the issue of whether a formal agreement between Ethiopia and Egypt needs to be put in place, is itself now a contentious issue, Egypt wanting such an agreement and Ethiopia largely wishing to establish at most principles, rather than law.

These types of issue are likely to arise more frequently in a situation of climate change, and pressure on water resources. They are likely to require mediation and agreement between states sharing water resources. Yet, whether to sign a formal agreement, how far it can predict and provide for uncertain future events – such as drought or needs rather a mechanism of ongoing diplomacy, and how to ensure compliance with any joint commitments, are issues that themselves become substantive issues in any negotiation.

With this type of dispute in mind, this report sets out in very general terms the international legal framework that supports dispute resolution, focusing in particular on a range of dispute mechanisms that are available to states with transboundary water disputes that could be considered to be part of any 'tool kit' of conflict avoidance or resolution.

2. Dispute Resolution and Transboundary Riparian Disputes

The flow of freshwater across the basin and through two or more national territories creates hydrological interdependence among states sharing a river. While states share the common benefits of abundant natural water flows and riparian ecosystems, they are also bound to share the pressures created by water scarcity. Riparian states may disagree on the manner in which their neighbours use and manage the shared water resource within their own territories, as the water used and/or polluted in one state is likely to affect availability in downstream states. However, upstream states can also be affected by their downstream neighbours, through prior uses of the water that may create (historical) rights over water resources, arising from such uses.[1] States' claims of sovereignty over the natural resources within their territories are common assertions concerning all resources, including water, and may create tensions between two or more riparians. As Waterbury notes, nationalism and states' interests often preclude collective action.[2] Water flows are variable and often unpredictable, but hydrological interdependence across basins has, more often than not, led to cooperation among riparian states. Wolf reports that:

> The historical record shows that international water disputes do get resolved, even among bitter enemies, and even as conflicts erupt over other issues. Some of the most vociferous enemies around the world have negotiated water agreements or are in the process of doing so.[3]

The development and codification of international law applied to international watercourses, sponsored by the United Nations General Assembly, started in the 1950s. The process has given rise to substantive and procedural rules that both upstream and downstream riparians owe to each other.[4] Notably, the substantive principles of reasonable and equitable utilisation and no-harm, and the procedural obligations of prior notification and the duty to cooperate, are customary international norms that have been codified in global and regional agreements, such as the 1997 United Nations Convention on Non-Navigational Uses of International Watercourses (UNWC) – a global framework for the management and utilisation of transboundary waters – and the Indus Treaty between India and Pakistan – at the regional level – among many others. Section 2 briefly addresses the normative content of these rules, albeit a comprehensive analysis is outside the remit of this paper. The question this paper aims to discuss is what mechanisms, if any, international law offers to settle international water disputes when states disagree on how the rules on utilisation, management and principle of no-harm are to be interpreted and applied.

In the absence of specific international agreements for the protection and management of shared waters,[5] signed between the disputing parties – providing for a specific dispute settlement mechanism (DSM) – reference can be made to Article 33 (1) of the United Nations Charter which provides for a general framework to settle international disputes:

> 'The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.' [6]

'DSMs' are generally divided into two groups: (i) diplomatic (moving from negotiation, mediation and conciliation) and (ii) jurisdictional (arbitration and adjudication/judicial settlement). See table one below.

Dispute Settlement Mechanisms Progression	
Negotiation (diplomatic):	Undertaken by the disputing states only, prior to other dispute settlement method
Diplomatic means of DS with non-binding effects	
Mediation, Good Offices and Conciliation, Fact Finding:	Undertaken by disputing states with the assistance of a third party
Jurisditional mean of DS with binding effects	
International Court , Arbitration	Parties consent to bring their dispute to a tribunal institutional or ad-hoc

Table one: Dispute Settlement Mechanisms

These mechanisms are not exclusive, and one can be followed by another. Choosing specific mechanisms of dispute settlement involves a balancing exercise of various sensitive factors, either overlapping or in tension. These factors include economic and political concerns, historical considerations, the existence of relevant international organizations and their function, the nature and intensity of national public interest, scientific and other evidentiary uncertainties, calculations of national interest (securitisation), the character of the relevant legal norms, and the binding character (or not) of the final decision (or recommendation).[7] These factors are common to most international disputes and certainly very much related to disagreements between riparian states, where competition for water resources, lack of trust between the countries, and threats across borders all exacerbate political tensions.[8]

This Report analyses DSMs available under public international law applicable to international or transboundary freshwater disputes i.e. International Water Law (IWL). Section 3 briefly introduces the legal framework of substantive and procedural norms, as codified by the UNWC, Section 4 looks at the general definition of dispute and discusses it in the context of transboundary waters. Section 5, analyses diplomatic and jurisdictional DSMs, following the framework of UNWC Article 33 on dispute settlement. It assesses the relative weight of political and other sensitive factors within each mechanism in the context of international or transboundary water disputes.

3. The legal framework of international water law: Substantive and Procedural Norms

The 1997 UNWC has been in force since 2014,[9] and the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (UNECE Convention), opened for accession to all UN member States since 2016.[10] Both serve as global frameworks for the utilisation, protection and management of international watercourses. For the purpose of this paper, it suffices to note that the Conventions shared the same foundational principles of transboundary management and cooperation. While the UNWC emphasises the principle of equitable and reasonable utilisation, the UNECE Convention focuses on the prevention of transboundary impact and environmental protection, linked to water quality.[11]

This section considers the foundational principles set out by the UNWC, which apply only to the contracting parties, yet as the UNWC codifies rules customary international law, these are also applicable to non-contracting parties.[12] As stated in the previous sections, two key substantive principles of IWL inform the hydro relations between upstream and downstream riparian states. IWL also prescribes procedural obligations, which states should observe if they are to implement planned measures on transboundary waters.

The principle of equitable and reasonable utilisation codified in Article 5 of the Convention, states:

1. Watercourse states shall in their respective territories utilise an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse states with a view to attaining optimal and sustainable utilisation thereof and benefits therefrom taking into account the interests of the watercourse states concerned, consistent with adequate protection of the watercourse [...].[13]

The principle of equitable and reasonable utilisation, as codified in Article 5, serves two purposes. On one hand, it establishes a legal obligation to use the shared waters in an equitable and reasonable manner vis a vis other riparians. In assessing whether the use of shared water resources is in fact equitable and reasonable, upstream states would need to consider certain relevant factors e.g. physical, social and economic. Article 6 of the UNWC sets out a non-exhaustive list of factors to be considered.[14] On the other hand, the provision of Article 5 introduces the notion of equitable participation, which implies an expectation of cooperation between riparian states i.e. taking affirmative steps, individually or jointly, considering the factors referred to in Article 6.[15] There may be cases where riparian states do not cooperate by way of joint mechanisms or exchange of information, in such cases an accurate assessment by the upstream states, of whether the use of the shared waters is equitable and reasonable, may be challenged by the downstream state. In practice, at the time of negotiations, these considerations are hardly linear, as they shift as states bargain the allocation of shared waters, making the cooperation process highly technical or complicated.[16]

The second principle is the no-harm principle, codified in Article 7 of the UNWC:

1. Watercourse states shall, in utilising an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse states.

2. Where significant harm nevertheless is caused to another watercourse state, the states whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures, having due regard for the provisions of Article 5 and Article 6, in consultation with the affected state, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.

There has been a long-standing disagreement between upstream and downstream riparians on the allocation of transboundary waters, in the belief that reasonable utilisation benefits upstream states, while no-harm protects downstream states. While the first group adheres to the principle of absolute territorial sovereignty, the second subscribes to the principle of absolute territorial integrity.[17] Both principles are questionable because they would recognise the unfettered rights of each group of states. The theory of water allocation most widely endorsed by the community of states is limited territorial sovereignty,[18] reflecting the principle of reasonable and equitable utilisation.

While no use of an international watercourse enjoys inherent priority, due regard should be given to vital human needs, as noted in Article 10 of the UNWC. This principle may be relevant when states address their human rights obligation to secure access to water. Importantly, ecosystems services and water sustainability have increasingly acquired importance within the management of water resources; both as one of the factors to be considered under the principle of equitable and reasonable utilization,[19] and under Part IV, which sets out the foundations for the protection and preservation of ecosystems of international watercourses as an extension of the principle of equitable and reasonable utilization.[20]

The last foundational principles to be briefly addressed in this section are the procedural requirements established in Part III of the UNWC (Planned Measures). These requirements are of pivotal importance to the effective implementation of the substantive principles enshrined in the Convention, Articles 5 and 7 in particular.[21] The obligations of prior notification, consultation and negotiation are owed to all riparian where there is a risk that the state, adopting planned measures, is likely to cause significant harm to its co-riparian states. Article 11 of the UNWC states that:

> Watercourse States shall exchange information and consult each other and, if necessary, negotiate on the possible effects of planned measures on the condition of an international watercourse.[22]

Further, Article 12 notes:

> Before a watercourse state implements or permits the implementation of planned measures which may have a significant adverse effect upon other watercourse states, it shall provide those states with timely notification thereof.

Article 11 serves as a bridge between substantive provisions (in Part II UNWC) and procedural obligations of information and cooperation (in Part III UNWC).[23] It reflects the principles entrenched in Article 8 (General obligation to Cooperate)[24] and Article 9 (Regular exchange of data and information).[25] Article 12 'is the centrepiece of a regulatory framework to assist States in maintaining an 'equitable balance' between 'their respective uses of an international watercourse.' [26]

UN Water reports that of all transboundary basins, only 59% have an operational agreement for water cooperation.[27] This data shows that the system of transboundary water cooperation remains fragmented, with 40 per cent of international basins lacking any type of cooperative framework. Furthermore, it has been observed that in practice riparian states often adopt bilateral agreements for allocation and management of multilateral river basins. For example, of the around 106 basins covered by agreements, approximately two-thirds do not include all basin states.[28] The effect of leaving some states outside of an allocation and management framework – as non-party – can have a few consequences: firstly, it may expose the non-party riparian to increased risks of reduce flow and environmental harm, due to lack of coordination and cooperation; second, it may foreclose the use of water where historical rights exist downstream; third, while non-party riparians may not be bound by the principles of IWL negotiated in the water agreement, the customary law principles may not offer a clear normative content, creating uncertainty if a dispute arises.

4. Disputes related to international or transboundary freshwater resources

The term 'dispute' covers a wide range of disagreements, questions and controversies that may arise between states and which may be solved by reference of the law or ex aquo et bono (according to the right and good). McCaffrey addresses the broader term dispute in a social context, which helps then to understand the technical/legal context of legal dispute in a narrower sense:

Disputes begin as grievances. A grievance is an individual's belief that he or she (or a group or organization) is entitled to a resource which someone else may grant or deny. People respond to such beliefs in various ways […]. They may register a claim to communicate their entitlement to the most proximate resource of redress, the party perceived to be responsible […] A dispute exists when a claim based on a grievance is rejected either in whole or in part. It becomes a civil legal dispute when it involves rights or resources which could be granted or denied.[29]

The term legal dispute was defined by the Permanent Court of Arbitration as 'a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.' [30]

Riparian states have the flexibility to agree on different methods of dispute settlement to solve distinct types of disputes, or phases of disagreement leading to a dispute – in a stricter sense. The Indus Treaty, for instance, refers to the terms (i) question concerning the interpretation of the treaty or a question of fact. This early stage of a dispute will be examined by the Permanent Indus Commission. Where the Commission does not reach an agreement, a (ii) disagreement arises, which is in turn dealt with by a neutral expert. Where no solution could be reached or the expert so advises, the situation could then be treated as a (iii) dispute, to be solved by a seven-member Court of Arbitration.[31]

Disputes often involve the existence of an underlying 'conflict.' Importantly, conflict does not necessarily refer to violent conflict for the control of water resources, something that both practitioner and academic communities point out is surprisingly rare.[32] In the context of tensions between riparian states, the term 'conflict' has fuzzy contours as it may involve one or more interests of a very sensitive nature i.e. of socio-political, economic, cultural, religious view or interests over water and its multipurpose - sometimes fragmented - management.[33] As Griffin observes, highlighting the sensitive nature of transboundary water relations and their link to people and communities:

> 'people think of water resources as public property. They feel entitled to water. They have an opinion about it. Because they drink it and know that life isn't possible without it, they can get emotional about water.'

Transboundary water disputes are deeply interdisciplinary, because they require holistic considerations, which are not only rooted in international rules and principles of water allocation and uses, but also in domestic and community or cultural concerns.[34] Disputes may arise out of issues regarding:

(i) Water quality (pollution), where water quantity within the basin is adequate;

(ii) Water quantity, where water flows fluctuate from too much or too little, leading to stress in hydro relations between states (e.g. dams and diversion);

(iii) Boundary issues in transboundary rivers or where a determination of whether or not the watercourse is international or not may have implications over the use of the watercourses.[35]

As discussed in earlier treaties, custom and principles of international law are the main sources of substantive law applicable in transboundary water relations among riparian states.[36] Where the parties have not reached an international agreement stating their shared commitments on the use and management of shared waters, other sources of international law such as customary international law and general principles of law may still guide the conduct of riparian states.[37] There may be circumstances in which the parties disagree on the exact content of the rules they have agreed on, or where riparian states do not consider themselves bound by any rule or principle related to the use and management of transboundary waters, or where one state fails to notify other riparian states the development of projects, which may alter the flow and availability of shared waters. All these situations may give raise to disputes between riparian states.

DSMs applicable to international water disputes – discussed in the next section – are not different from those used under general international law. This being so, DSMs in transboundary water can incorporate specific considerations addressing issues of hydro-interdependence, adjudicators expert in IWL, flexible rules. By way of example the Permanent Court of Arbitration offers specialised rules for the resolution of disputes relating to the environment and/or natural resources, such disputes may also be adjudicated by specialised members of the PCA, such as scientists, engineers and other experts.

5. Dispute Settlement Mechanisms in Transboundary Water Disputes

This section follows the UNWC framework of dispute settlement mechanisms established in Article 33, which in the absence of a specific agreement between the riparian states could be used as a procedural guidance. Most international agreements, both on transboundary waters or other issues, require de State parties to negotiate first, thus diplomatic negotiation constitutes an essential first step towards the resolution of disputes, only if negotiations fail the parties may resort to diplomatic and jurisdictional (adjudication or arbitration) means. The next sub-sections analyse these DSMs, it is important to clarify that Negotiation is a diplomatic means of dispute resolution, yet it is analysed in a separate sub-section to highlight its bilateral (only disputing parties) character.

5.1. Negotiations

Negotiations (also negotiations and consultations) are generally held by relevant governmental agencies dealing with the issue at hand. Negotiations have a dual role of dispute prevention and dispute resolution, because in some settings negotiations can lead to a watercourse agreement. As stated in Section 2, most treaties require states to negotiate before they engage in other DSMs. While negotiation is a diplomatic method of dispute resolution, as is the case of mediation and conciliation, negotiations do not engage the assistance of a third party. As such, the outcome of negotiations and consultations, is the result of disputing parties' own process.

Treaty Practice
Dispute Settlement Clauses Involving Joint Commissions

- **Mekong Agreement (1995):** the Commission shall first make every effort to resolve the issue as provided in Articles 18.C and 24.F (Article 34).
- **Almaty Agreement (Aral Sea Basin - 1992):** All disputes shall be settled by the heads of national water agencies, (with involvement of third party, if necessary) [...] (Article 13)
- **Indus Treaty (1960):** "questions" are handled by the Commission [...] (Article IX)
- **Zamcom Agreement (2005):** 1) Enter into consultations and negotiations [...] (Article 22(1))
- **Rhine Convention (1998):** 1) the parties concerned will strive for a solution by means of negotiations [...] (Article 16)

(emphasis added)

Generally, negotiations are likely to reach an agreement when parties perceive that the benefits of an agreement would outweigh the losses of not negotiating.[38] However, possible benefits of negotiations are often negated by lack of trust between the parties. In such cases, third-party intervention may be beneficial to solve the dispute.

Parties may find a common point of disagreement as a starting point, and work through other concerns that may arise throughout the discussions, even when the differences seem to be unsurmountable. In the Lac Lanoux negotiations phase, Spain invoked the right to veto all the works affecting the transboundary waters, while France invoked 'a complete freedom of action.' [39] The exchanges about the use of the water started in 1917, following the conclusion of the Treaty of Bayonne (1866) and its Additional Act of the same date.[40] After 40 years of negotiations the parties reached a compromis to arbitrate the dispute in 1956, pursuant to an Arbitration Treaty concluded between France and Spain in 1929.[41] This solution can be considered to be successful where parties have been reluctant to give consent and abide by binding dispute settlement mechanisms. Two important issues can be highlighted from the example of Lac Lanoux, one substantive and the other procedural. First, Spain had opposed the development of the project undertaken by France on the basis that Spain had to agree to the development of such project. The Tribunal disagreed with Spain, noting that this would be the same as admitting a 'right to assent' or a 'right to veto',[42] which would paralyse the exercise of territorial competence of one State at the discretion of other.[43] Second, the procedural issue is of interest for the way in which the case enable France and Spain to resolve their transboundary water dispute through arbitration, even without any specific dispute settlement provision in the applicable substantive treaty. Despite this absence they gave consent to an arbitration agreement contained in other instrument of a more general nature. This case will be further discussed in Section 5.3. below.

The Indus Water Treaty negotiations between India and Pakistan (1960)

When British India was partitioned into the dominion States of India and Pakistan in 1947, the new international border cut across the Indus system,[44] leading immediately to disputes between the two states concerning flows of water from India to Pakistan.[45] In 1951, after several failed attempts in bilateral meetings, the World Bank (WB) — then the International Bank for Reconstruction and Development — wrote to the prime ministers of India and Pakistan offering its good offices. In March, 1952, this offer was accepted, the WB's offer considered three conditions: First, that there was enough water in the Indus basin for both States; second, the basin would be treated as a single unit, i.e. the negotiations would involve all rivers; and third, the negotiations would have a technical rather than political focus.[46] In 1954, the WB Bank offered a plan under which India would benefit of the three eastern rivers of the system,[47] and Pakistan from the three western rivers.[48]

Pakistan's officals were concerned about the loss of access to the Eastern rivers. This concern was eventually accommodated by assisting Pakistan to build 'replacement works' and to make 'reasonable adjustments.[49] In 1955, the WB requested development plans allowing for the construction of storage reservoirs from India and Pakistan, and the Bank itself subsequently began to seek funds from the international community to finance these facilities. Due to the significant differences between the individual plans produced by India and Pakistan, the Bank developed a compromise plan.

In 1959, the president of the Bank visited India and Pakistan to present the WB's proposal to each party. In August, 1959, Australia, Canada, New Zealand, the UK, the US, and West Germany agreed to contribute funds to finance the facility. Finally, on 19 September, 1960, the Prime Ministers of India and Pakistan signed the Indus Waters Treaty. This is one example of a transboundary water agreement also signed by a third party – the World Bank, playing a significant role in dispute resolution through mediation and economic assistance.

Among other characteristics the Treaty includes a cooperation and information exchange mechanism for the use and management of the rivers, the Permanent Indus Commission, which includes a commissioner from each country.[50]

Negotiation may also be difficult to achieve, for example, when one party denies that a dispute exists, advances unreasonable claims, or unduly delays the discussion either because the party is unclear itself of the relevant issues under discussion or conducts negotiations in bad faith.[51] The duty to negotiate in good faith and meaningfully has become an international law principle, addressed by tribunals in a number of transboundary water disputes. The arbitral tribunal in Lac Lanoux stated that negotiations are not mere formalities, 'The rules of reason and good faith are applicable to procedural rights and duties relative to the sharing of the use of international rivers.' [52] In a similar fashion, the ICJ in Gabčikovo-Nagymaros observed that the process of negotiation and consultation required 'the mutual willingness to discuss in good faith actual and potential environmental risks.' [53]

In many cases, riparian states will have uneven bargaining powers and different capacities as regards legal and technical expertise in the matters involved. This can be an issue in negotiations, but can also be used positively to provide for shared benefit of the basin's co-riparian states. Such is the case of the Senegal River basin, where Guinea, Mali, Mauritania and Senegal, reached high levels of cooperation leading to the creation of the Organisation pour la Mise en Valeur du Fleuve Sénégal in 1972 and to the shared the ownership of the dams, built along the river, by Mauritania, Mali and Senegal.[54]

5.1.1. Joint Watercourse Institutions and River Basin Organisations (RBO)

The constitution, conformation and mandate of RBOs may vary, depending on the agreement of the states that establish them. Shared watercourses governance mechanisms seek cooperation through the joint management of the international watercourse. As it is often the case in water disputes, where the situation requires continuous supervision and exchange of information, states can and have institutionalised negotiations through the creation of mixed and joint commissions.[55] For instance the Canada–United States International Joint Commission, created in 1909, deals with a variety of issues, including pollution in the boundary waters;[56] the Indus Treaty Commission with a sophisticated dispute settlement mechanism, the Mekong River Commission, and many others.

Negotiations involving RBOs allow the parties to control the process and involve their own expert agencies, or even let them lead the negotiations, removing some of the political connotations, where possible. Most transboundary water agreements have created joint watercourses institutions or commissions; in this regard, states may prefer to resort to negotiations involving joint institutions, so as to avoid a third-party interpretation of the sometimes-vague standards of international water law.[57]

Article 33 of the UNWC makes specific reference to joint commissions involvement in the resolution of disputes. RBOs or joint institutions' role could be defined – in most cases - as quasi third-party is the settlement of watercourses disputes, when specific mandate has been conferred to the Secretariat by the contracting parties. Joint institutions may assist riparian states during the process of initial consultations or negotiations, joint institutions or RBOs may also be specifically requested to perform certain actions by courts or tribunals after adjudication proceedings.[58] McCaffrey notes that 'where disputes have arisen… expert bodies in particular joint commissions…are generally best equipped to conduct fact-finding…and resolve questions concerning the obligations of the state.' [59]

5.2. Diplomatic dispute settlement mechanisms with the involvement of third-party

Following the structure of Article 33 UNWC as a framework for the settlement of disputes, where the parties cannot reach an agreement by negotiation 'they may jointly seek the good offices of, or request mediation or conciliation by, a third party, or make use, as appropriate, of any joint watercourse institutions.' (On RBOs see Section 5.1.1) [60]

Treaty Practice
Third Party Involvement by Diplomatic means

- **UNECE Water Convention (1992):** The Parties shall seek a solution by negotiation or by any other means of dispute settlement acceptable to the parties to the dispute […] Article 22(1).
- **Mekong Agreement (1995): […]** The Governments may request the assistance of mediation (Article 35)
- **Almaty Agreement (Aral Sea basin – 1992):** All disputes shall be settled by the heads of national water agencies, with involvement of third party, if necessary (Article. 13)
- **Indus Treaty (1960): […]** "differences" are to be resolved by a Neutral Expert (Article IX)
- **Sava River Basin Agreement (2002):** […] 2) may jointly seek good services, mediation or conciliation from a third party (Article 22 (2))

The common feature of *mediation, good offices and conciliation* is that the recommendations of the third party or institution are not binding on the disputing states. The key role of third parties is to facilitate and improve dialogue between disputing states. Ultimately, the implementation of any recommendation issued by mediators or conciliators remains under the control and willingness of the disputing parties. The main difference between these three mechanisms is the level of the involvement and the role that third party or institution assisting the states adopts.

While good offices offers a facilitator for the discussion, a mediator can have a more active role in the negotiations e.g. agenda setting, fact-finding schedules, etc; both mediation and good offices can be undertaken by a neutral state, a joint institution, international organisations (e.g. the United Nations), individuals – often backed by or appointed by an international organisation or as a state representative - and non-governmental organisations (e.g. the International Committee of the Red Cross, mainly mediating armed conflict disputes). In some instances, the mediator does not only facilitate the discussion but can also suggest terms of settlement.

It is important to note that good offices and mediation can often underlie vested interests and motives of the third party involved, the interests can be historical, religious or political.[61] The latter was the case in the India - Pakistan conflict over Kashmir, the Soviet Union – the mediator – had also a political interest in bringing stability to the region, so as to avoid 'the risk of Chinese intervention, while […] advancing Soviet influence in the region.' [62] The hydro-scientific nature of transboundary disputes often requires highly qualified institutions, individuals or third states with specialised expertise or experience in the issue to lend neutral and technical advice to the parties.[63] In the Baglihar Dam difference between India and Pakistan, the neutral expert was a professor at the Federal Institute of Technology in Lausanne, Switzerland.

Conciliation brings the parties together to resolve the dispute of their own volition through negotiation and compromise. The parties may agree on the terms of reference and powers conferred upon the conciliators. A commission or a sole conciliator can, if the parties so agree, investigate the factual and legal background, suggesting terms of settlement. Since the conciliator controls the proceedings, she/he should have a reasonable period of time to present a final report, recording the finding of fact and/or law and any agreements reached between the parties. Commentators observe that conciliation is rarely used because it imposes more formalities than negotiation and mediation, yet it falls short of the binding effects of adjudication. As Klein explains:

> [Conciliation] is a suitable compromise in the context of treaty negotiations as between States agitating for either negotiations or adjudication. Yet subsequently, when States are in dispute, they either do not wish to engage in the formalities of conciliation, preferring negotiation, or, if they are to go to the effort that conciliation requires, may prefer a legally binding outcome for the result of those efforts.[64]

By way of example, a conciliation commission, under United Nations Convention on the Law of the Sea (UNCLOS), 'shall hear the parties, examine their claims and objections, and make proposals to the parties with a view to reaching an amicable settlement'.[65]

Comparative Table of Diplomatic Dispute Settlement Methods

Good Offices

- Method | 3rd party acts as a go between
- Can be a neutral state, joint institution, int'l org
- Must be acceptable to parties
- Control | Parties / 3rd party role finished once negotiations start
- Cost | Low

Mediation

- Method | More active 3rd party participation in negotiations 'sponsors', facilitators'- but remain 'honest brokers' Mediator can suggest solution
- Consent of all parties required Either party can initiate
- Control | 3rd party / parties retain significant control
- Cost | low

Conciliation

- Method | Impartial 3rd party (normally commission, but can be sole) investigates facts and law and suggest terms of settlement
- Control | Conciliator
- Cost | Medium

United Nations Watercourses Convention User's Guide: Dispute Resolution Process of Article 33. [66]

By way of conclusion, it is worth reiterating the main advantages of diplomatic means of dispute resolution. The disputing parties remain in control of the proceedings, while the intervention of a third party seeks to improve dialogue to aid the parties achieving a joint solution to their difference or dispute.

There may be instances in which one of the disputing states fails to engage meaningfully in the process of conciliation, knowing its lack of binding nature. IWL could look at other areas of natural resource management DSMs – such Law of Sea – in order to observe some of the variations of conciliation, which could prevent parties to become dismissive of such proceedings.

Compulsory Conciliation under United Nations Convention on the Law of the Sea (UNCLOS)

Timor Leste – Australia

Compulsory conciliation, conducted pursuant to the United Nations Convention on the Law of the Sea (UNCLOS), was first utilised in the maritime delimitation dispute between Timor-Leste and Australia, leading to a successful resolution of this dispute.

The dispute arose from Australia and Timor-Leste (and Indonesia before it) each claiming the same area of the Timor Sea as their exclusive economic zone (EEZ).[67] Two months prior to Timor-Leste gaining independence as a sovereign state in 2002, Australia issued a declaration excluding the ICJ's jurisdiction, under Article 36(2) of the Court's Statute, from compulsory jurisdiction (entailing binding decisions) on matters such as maritime boundary disputes, disputes relating to exploitation of contested maritime areas, and maritime boundary disputes. Under Article 298(1)(a) UNCLOS, however, a state that makes such a declaration obligates itself to accept submission of a dispute covered thereby to conciliation under Section 2 of Annex 5 UNCLOS upon the request of another party to the dispute. Accordingly, Australia had bound itself to participate in conciliation should Timor-Leste ever make such a request.

Australia and Timor-Leste had concluded various agreements establishing joint zones for the exploitation on natural resources. The maritime delimitation issue of overlapping EEZs, however, had been left unresolved for the next 14 years. With no other avenue of dispute resolution available, Timor-Leste initiated compulsory conciliation proceedings in 2016, concerning the EEZ delimitation dispute. On September 2016, a five-member conciliation commission ('Timor Sea Commission') unanimously decided, contrary to Australia's initial objection, that it had jurisdiction to conduct the conciliation.

As discussed above the function of conciliation is not to adjudicate a dispute, but to bring the parties together to resolve the dispute through negotiation and compromise. The conciliation commission "shall hear the parties, examine their claims and objections, and make proposals to the parties with a view to reaching an amicable settlement".[68] The proceedings were confidential as a way to preserve the legal position of the states, in the event the conciliation failed. As one of the early steps in its operations, the Timor Sea Commission recommended a number of confidence-building measures, including that the parties terminate the CMATS Treaty, that they maintain the 'Timor Sea Treaty' instead, and that Timor-Leste terminate the two arbitral proceedings that were ongoing at the time. All three recommendations were adopted. Following the issuing of these *confidence-building measures,* the work of the Timor Sea Commission progressed rapidly. By September 2017, work was underway on the drafting of a new treaty, and, by October 2017, the parties were in complete agreement as to the draft text.

On March 2018, Timor-Leste and Australia signed the Treaty on the 'Timor Sea Maritime Boundary.' Importantly, the report adopted by the Commission is not a binding on the parties, but it is an instrument on the basis of which the parties are to negotiate in good faith.[69]

The last method referred in this section is impartial *Fact Finding* – also referred to as inquiry. Comparable to compulsory conciliation under UNCLOS, fact finding under the UNWC is also a compulsory mechanism of dispute settlement for transboundary water disputes:

> '[…] if after six months from the time of the request for negotiations referred to in paragraph 2, the parties concerned have not been able to settle their dispute through negotiation or any other means referred to in paragraph 2, *the dispute shall be submitted, at the request of any of the parties to the dispute, to impartial fact-finding* […].' [69]

McCaffrey explains that 'facts are of critical significance' in connection to the application of substantive obligations set out in the UNWC discussed in Section 2. Referring to the purpose of the provision, the ILC Report on Transboundary Waters points out that through an objective knowledge of the facts states may solve the dispute in an expeditious manner, avoiding further scalation.[71] For instance, the interpretation and application of the principle of equitable and reasonable utilisation in the context of a dispute can prove difficult and sensitive where the factual scenario is shaped by submissions and evidence of each disputing party.[72] As interstate dispute resolution mechanisms nearly always involve a political dimension, there is likely to be some conflation between legal, factual and political arguments, and an adjudicator will have to attempt to separate political issues from legal-factual ones, while remaining responsive to political sensitivities.

The UNWC provides for the establishment of a three-member commission, one from each country and a chair from a third country, elected by the other two nominated commissioners or by the Secretary General of the UN, when the nominated commissioners do not agree on the appointment of the chairperson.[73] Typically fact-finding commissions require information from the parties, including access to their territories, sites and installations. From this perspective, while parties may have some degree of influence or an incentive to politicise certain data, impartial fact-finding commissions are expected to ensure depolitisation of the proceedings by arranging visits or gathering their own data where possible.

The scope of fact finding is restricted to determinations of points of fact. Thus, it can be used along other methods of dispute settlement, both diplomatic and jurisdictional. The rationale is to assist the parties in the exchange of information so as to facilitate a common understanding.[74] However, facts and 'data' are never neutral – different parties will be likely to use different types of (legitimate) measurement which appear to favour their case what data should be relied on is itself often a matter to be negotiated and arbitrated, as the example below illustrates. Ultimately, while findings and recommendations submitted by the commission are not binding to the parties, they must be considered in good faith in negotiating a settlement and third-party neutrality brings some level of leverage on state arguments.

Neutral Expert – Fact finding
Indus Baglihar Dam (Pakistan v India)

The Baglihar dam and hydroelectric project were conceived by India in 1992, using the waters of the Chenab River. On the same year India informed Pakistan, who objected the project in various meetings of the Indus Waters Commission and through exchange of letters. The Chenab River is part of the Indus River system governed by the Indus Waters Treaty (1960) between India and Pakistan. In 2000 Pakistan invoked the Treaty requesting India to stop the development of the project. In 2005 after unsuccessful negotiations and pursuant to Article IX of the Treaty, Pakistan requested to refer the 'difference' to a neutral expert. After consultations with the parties the World Bank appointed Raymond Lafitte, Professor at the Federal Institute of Technology in Lausanne, Switzerland.

Under Annexure F of the Treaty the neutral expert has extensive powers to determine factual questions, including determination of available waters, withdrawals, releases, uses, and procedures for providing each party the opportunity to be heard.[75] In 2007, the expert issued a final determination, bringing the Baglihar Dam 'difference' to an end.[76] While it was reported that both parties accepted the decision in principle, during the Kishenganga Arbitration Pakistan further argued that the Baglihar Decision left Pakistan without physical protection against alteration of the Indus System.[77]

5.3. Jurisdictional dispute settlement mechanisms: Arbitration and judicial adjudication

Jurisdictional means of dispute resolution are adversarial in nature and subject to strict rules of procedure.[78] As Sir Jennings pointed out:

> 'The end result of this elaborate process of judicial decision-making – the judgement or the award – in a case that is suitable for the process, is virtually always unpredictable. That, paradoxically, is one reason why the decision will almost always be accepted without serious question on both sides. The judgements or awards that have been questioned have almost always been questioned not because there were disappointing or thought to be wrong or unjust, but because there was allegedly a breach of the rules of combat – a breach as we like to say of "due process".' [79]

Pursuant to paragraph Article 33 (10) of the UNWC, states-parties may declare in writing, at the time of accession that they recognise as compulsory, ipso facto and without special agreement (in relation to any party accepting the same obligation), submission of the dispute to the International Court of Justice or to Arbitration by an established and operating arbitral tribunal.

Treaty Practice
Jurisdictional Dispute Settlement Mechanisms

- **UNECE Water Convention (1992):** '[…] 2) 'opt in' formula for compulsory arbitration or adjudication.' (Article 22)
- **Indus Treaty (1960):** '"disputes" are to be referred to a seven-member Court of Arbitration.' (Article IX)
- **Treaty on the Lesotho Highlands Water Project (1986):** '(8) If a dispute cannot be resolved by negotiation between the Parties, such dispute shall be submitted to the Arbitral Tribunal as hereinafter provided.' (Article 16)
- **Rhine Treaty (1998)** '2. If the dispute cannot be settled in this manner, it shall, unless the Parties to the dispute decide otherwise, be submitted, at the request of one of them, to arbitration in accordance with the provisions of the Annex to this Convention, which shall form an integral part thereof.' (Article 16)

Resort to an international or regional court or to international arbitration is only possible where the parties have consented to the jurisdiction of that court or tribunal. There are several avenues to confer jurisdiction to an international court or tribunal.[80] For example, state's consent may be expressed by special agreement between the parties to the dispute; or the parties' consent to the jurisdiction of the court as provided for by an existing treaty or convention [81] (and where other means of dispute resolution have been exhausted); or by recognising the compulsory jurisdiction of the International Court of Justice in a unilateral declaration.[82] There are instances where the disputing parties have not consented to a jurisdictional and binding DSM in the watercourse agreement per se e.g. the Mekong Agreement [83] or a watercourse agreement does not exist between the parties in tension e.g. Ethiopia-Egypt-Sudan relating to the Nile.

Jurisdiction of a Tribunal in an existing Treaty
Lac Lanoux (France – Spain)

France and Spain settled their border issues through various instruments among which was the Treaty of Bayonne and the Additional Act, both of 1866. The latter dealt with the Regime and Enjoyment of Waters of Common Usage Between the Two Countries. Between 1917 and 1956 Spain and France held exchanges and negotiations concerning the utilisation of the waters of Lac Lanoux and the Carol River.

As discussed in Section 4.1, France and Spain had concluded an Arbitration Treaty in 1929 agreeing to submit to arbitration all disputes concerning a reciprocally disputed right, which could not be solved through diplomatic means.[84] The dispute revolved around the development of a infrastructure project proposed by the French government, which Spain feared would adversely affect Spanish rights and interests contrary to the Treaty of Bayonne and the Additional Act. After over 40 years of unfruitful negotiations the time was ripe for the France and Spain to resort to adjudication and in 1956, the parties signed a *Compromis*, agreeing to refer the issue to arbitration. The question put before the arbitral tribunal was whether France was in breach of the Treaty of Bayonne and the Additional Act, for failing to seek consent from Spain prior to the construction of works and use of the water of the Lac Lanoux that affected the Carol River System.

There are few additional examples where absent a watercourse agreement (or one without adequate DSMs) riparian states, disputing the use and management of an international watercourse could initiate proceedings to resolve the dispute under the dispute settlement provisions of another international treaty, under which the disputing parties had consented to adjudication of some sort. Importantly, such a clause needs to be broad enough to cover the watercourse dispute. This was the case in the dispute over the Status and Use of the Water of the Silala (Silala Dispute), where Chile brought a case against Bolivia requesting judgement of the ICJ on the status of the Silala waters, as an international watercourse and to determine Chile's rights as a riparian State. The dispute is was brought pursuant to Article XXXI of the American Treaty on Pacific Settlement (the Pact of Bogotá) of 1948. Both Chile and Bolivia have ratified the Pact of Bogotá in 1967 and 2011, respectively.[85] The Pact itself does not contain substantive obligations in connection to the nature and use of the waters of the Silala, as such it is a dispute settlement Treaty.[86] The Pact of Bogotá Article XXXI was also invoked by Costa Rica in the dispute brought against Nicaragua, over two incidents in connection with the construction of a canal across Costa Rican territory from the San Juan River to Laguna Los Portillos and certain related works of dredging on the San Juan River. The ICJ found jurisdiction over the dispute and delivered its judgement on the merits in favour of Costa Rica.[87]

In the African context, the Protocol of the Court of Justice of the African Union could lend itself as a dispute settlement treaty – similar to the Pact of Bogotá – invoked by states seeking to settle transboundary water disputes under general rules of international law which they consider might have been breached by co-riparian states. Article 19 (1) of the Protocol provides:

> 'The Court shall have jurisdiction over all disputes and applications referred to it in accordance with the Act and this Protocol which related to:
> (c) any question of international law […].
> 2. The Assembly may confer on the Court power to assume jurisdiction over any dispute other than those referred to in this Article' [88]

Regarding the decisions and determinations of international courts and tribunals, the judgements rendered by them are binding on the disputing states. Importantly, the interpretation of the legal rules and principles by international courts – especially the ICJ – will have a great deal of influence over the interpretation of similar rules and principles in subsequent disputes. Commenting on the principle *not to cause substantial harm* discussed in the Lac Lanoux dispute, Epiney explains:

> 'Lac Lanoux—concerned mainly two topics of international environmental law: on the one hand, the principle not to cause substantial damage to the environment of other States—or to areas beyond national jurisdiction—already stated in the Trail Smelter Arbitration; on the other hand, the principles for the use of shared natural, especially water, resources […]. For both areas, the award was and is of crucial importance and has influenced significantly the development of international law in these areas.' [89]

International arbitration is more flexible than judicial adjudication. Under judicial adjudication 'neither the composition of the court nor its rules and procedures are under the discretion of the conflicting States.' [90] Notably, under the Statute of the ICJ, a State party to a case before the Court which does not have a judge of its nationality on the bench may choose a person to sit as judge ad hoc in that specific case.[91]

In contrast, under arbitration proceedings, the disputing parties may agree, in consultation with the arbitral tribunal, on some procedural rules, the parties appoint and decide on the number of arbitrators, and the expertise required to best address legal and technical issues in dispute. In the Kishenganga Arbitration, for example, India and Pakistan could appoint scientific experts as part of the arbitral tribunal.[92]

Arbitration is said to be more expeditious than judicial adjudication, for instance, the number of members in an arbitral tribunal means it can be convened more easily (one or three and seven under the Indus Treaty, compared to a bench of 15 judges in the ICJ), and may have shorter deliberations. Meshel notes, however, that in some instances arbitration can turn into a judicialized procedure,[93] where inter-state arbitration involves two sovereign states and the arbitral proceedings use extreme formalism as a way of legitimating their role. Often the appointed arbitrators also serve as judges in international courts – due to their reputation and expertise – bringing with them the court's formal tradition.[94]

Comparative Table of Arbitration and Adjudication

Arbitration

- Method | Legal but more flexible than ICJ
- Requires consent of parties Under Art 33 (Annex) Arbitral Tribunal (AT) is 3 members (1 from each party + 1 neutral chair)
- AT determines own procedure / substance
- Can also use Premanent Court of Arbritration / PCA Optional Rules for Arbitration
- Control | AT / Binding decision / No appeal
- Cost | High

Adjudication

- Method | Requires submission to the ICJ Requires consent of all parties in accordance with Art 33 (10) or special agreement
- Control | ICJ / Binding decision / No appeal
- Cost | High

United Nations Watercourses Convention User's Guide: Dispute Resolution Process of Article 33. [95]

While there may be some hesitation of sovereign states to adjudicate environmental and international watercourse disputes before third party binding adjudication, courts and tribunals have delivered important judgements in the area of transboundary water disputes, which have clarified and developed – in some cases – rules and principles over the use, management and protection of shared water resources. By way of example, in the *Gabčikovo-Nagymaros* dispute between Hungary and Slovakia, while the ICJ adopted the customary law rules on equitable and reasonable utilisation and no-harm as referred to in the UNWC, the Court's judgement requested the parties to find a final solution through negotiations. The dispute remains unresolved to date, as the parties have not reached an agreement.[96] In the Pulp Mills dispute between Argentina and Uruguay the ICJ focused on the procedural obligation of prior notification and consultation owed by Uruguay to Argentina under the 1975 Statute of the River Uruguay and to their joint commission – Comisión Administrativa del Rio Uruguay (CARU), which under the Treaty serves as a framework of consultations, in particular considering that the plan works carried out by Uruguay on the mills were of sufficient importance. Likewise, the Court highlighted the relevance of notifying CARU with an environmental impact assessment in connection to the prevention of harm, prior to commencement of works.[97] Finally, the San Juan River dispute between Costa Rica and Nicaragua, can also shed light on the obligation to compensate for environmental damage, due to Nicaragua's unlawful activities carried out in the territory of Costa Rica. The Court was of the view that 'damage to the environment, and the consequent impairment or loss of the ability of the environment to provide goods and services, is compensable under international law.' [98]

6. Conclusions and Mediation Considerations

When the up-stream utilisation of shared water flows affects the availability of water to downstream neighbours, or vice-versa, tensions may arise, leading in turn to legal disputes. The hydro-dependency of riparian states with shared rivers make transboundary water disputes very sensitive, not only for the countries in dispute, but also – potentially – for other riparian states who may have a direct or indirect interest in the outcome of such a dispute. A second, consideration, of equal relevance, is the political, socio-economic, cultural and religious significance that water resources have for the populations of the countries in dispute.

The utilisation of shared waters by states involves the observance of rules of management and equitable utilisation agreed in international and regional watercourses conventions (e.g. UNWC, the UNECE Convention or the Indus Treaty between India and Pakistan). However, where states have not entered such agreements they are still bound by the rules and principles or customary international law on watercourses. This Report has primarily addressed disputes where states have not have concluded watercourses agreements, by looking at the guiding substantive and procedural principles codified in the UNWC (i.e. equitable and reasonable utilisation, no-harm and prior notification), and setting out the DSMs, provided for under Article 33 of the Convention.

Given the Report's main contribution of exploring the DSMs available to riparian states, it considers specific examples (treaty practice), where states parties to watercourses agreements commit to diplomatic (non-binding) and jurisdictional (binding) mechanisms. It shows that countries enjoy ample freedom designing DSMs that serve their specific needs and geopolitical circumstances, such is the case of the Indus Treaty that identifies different stages of a dispute (questions, differences and disputes per se) conferring powers to settlement the dispute to the Indus Commission first, neutral experts and an arbitration court subsequently.

Mediation Consequences

The Report indicates that the line between 'formal mechanisms' and 'informal ones' is not a rigid one, and does not necessarily align with 'more effective' and 'less effective' interstate agreements. Indeed, Abbott et al point out that any international agreement contains a range of ways in which 'compliance pull' can be maximised, only one of which is the formal legal nature of the agreement.[99] They identify three main ways in which interstate agreements exert what they call 'compliance-pull' on the states that sign them.

(i) By having clear and specific commitments where the obligations of each party is clear, and therefore observance or non-observance can be clearly seen;
(ii) By having a form of legalisation which increases the reputational risk of breaching any commitment; and
(iii) By having third parties involved in aspects of implementation and monitoring.

Abott et al convincingly suggest that while the strongest agreements will be strong in all three dimensions, there is not simple equation between any one of these ingredients and compliance-pull: rather deficits in one area can be remedied by another. So for example, a very precise and clear set of commitments with no legal status, can sometimes work better than a vague agreement which has legal status; a strong bi-lateral commitment to a trusted judicial or arbitral third party enforcement mechanism can similarly compensate for deficits in legal status or the detail with which parties have been able to predict and provide for uncertain future events (such as issues of drought and climate change might create with regard to shared water courses).

Disaggregating what causes 'compliance pull' and induces parties to stick to the commitments they agree can be useful to negotiating agreement because it provides a way of working with reluctance in one of these areas, by considering how the compliance pull of the other two can be increased. So reluctance to formalise an agreement, for example because issues like future drought are difficult to plan for and data is uncertain, can be in a sense compensated for, by agreeing a clear process with an element of external third party involvement, for how this issue will be addressed and what processes will be triggered that can be as or more effective in protecting a neighbouring state than formalising commitments that may have to be renegotiated in any case, if how something like drought and climate change plays out in unexpected ways.

The existence of a watercourse agreement, however drafted, does not of course guarantee the settlement of potential disputes. It is the good faith and willingness of the riparian states that make these mechanisms effective and ultimately legitimate. Where no DSM seems to be available, riparian states may give consent to settle transboundary water disputes by referring to other international conventions of a general scope that the parties may have entered to, such as the Pact of Bogotá, the Protocol of the African Union, or arbitral agreements of general nature (such is the case of Lac Lanoux arbitration and Bolivia- Chile dispute, discussed in Section 5.3).

As noted in the various examples discussed in Section 5 a number of watercourses agreements do not refer transboundary water disputes to jurisdictional DSM i.e. international courts or arbitration. However, almost invariably watercourses agreements include negotiations or consultations as 'first-step' DSM. As an extension of the obligation to cooperate, negotiation has proven one of the most effective mechanism for addressing water disputes, and it is always preferred before using other DSMs. A new approach referred to as water diplomacy is thus emerging.[100] As Wolf explains, once cooperative water regimes are established, often through international treaty and conventions, they have proved to be resilient over time. This has been observed even when the parties have a low level of trust, are hostile riparians, or conflict arises over other issues, different from water resources.[101] In a recent keynote speech Professor Mbengue notes:

'Solidarity is perhaps the ultimate way to transcend the clash, or potential clashes between national sovereignty and international cooperation, it is the compass that can build bridges between national sovereignty and international cooperation [...]' [102]

Bibliography

1 As Salman shows: "It is much less obvious, and generally not realized, that the upstream riparians can be affected, or even harmed, by the foreclosure of their future uses of water, caused by the prior use, and the claiming of rights to such water by the downstream riparians" Salman, S. 'Downstream riparians can also harm upstream riparians: The concept of foreclosure of future uses' 2010, Water International, 35(4), 350, 351.

2 Waterbury, T., 'The Nile: National determinants of collective action' (Yale University Press, 2002).

3 Wolf, A., 'A long term view of water and international security,' (2009) Journal of Contemporary Water Research & Education (142), 67, 68.

4 For an account of the process of codification of customary rules related to the use and protection of shared waters see McCaffrey, S., 'The Codification of Universal norms: a means to promote cooperation and equity?,' in L. Boisson de Chazournes et al (eds) *International Law and Freshwater* (Edward Elgar: 2013), Ch 7, 125.

5 By way of example regional water agreements include the Indus Treaty between India and Pakistan, the Columbia River Treaty between US and Canada, the 1973 Boundary Treaty between Uruguay and Argentina. Multilateral Framework Agreements, include the 1997 UNWC and the 1992 UNECE Water Convention.

6 The Charter of the United Nations was signed on 26 June 1945

7 Stephens, T., 'International environmental disputes: To sue or not to sue?' In N. Klein (Ed.), *Litigating International Law Disputes: Weighing the Options,* (Cambridge: Cambridge University Press, 2014), 284, at 285-286; See also Klein N., 'Whales and Tuna: The Past and Future of Litigation between Australia and Japan', (2008–9) 21 Georgetown International Environmental Law Review 143, at 150.

8 Wolf, A., n.3, 67 - 68.

9 Convention on the Law of the Non-Navigational Uses of International Waters, New York, 21 May 1997, has currently 37 Parties Available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-12&chapter=27&lang=en#1 last visited 30 January 2021.

10 The 1992 UNECE Convention is an international treaty and intergovernmental platform which aims to ensure the sustainable use of transboundary water resources by facilitating cooperation. It was initially negotiated and concluded as a regional instrument. In 2016 it opened up for accession to all UN Member States.

11 McCaffrey S. 'Implementation and Relationship to the UNECE Water Convention' (2016) Environmental Policy and Law, 46 (1), 36.

12 UNWC Article 2 (c). See Rieu Clarke, A. et al 'the UN Watercourses Convention online users guide,' Available at https://www.unwatercoursesconvention.org/the-convention/part-i-scope/article-2-use-of-terms/

13 United Nations Watercourses Convention (in force 2014). The factors that are relevant to the equitable and reasonable utilization are summarised in Article 6 of the UNWC, they include: (i) natural characteristics, which includes environmental services, (ii) social and economic needs of the state concerned, (iii) population dependence on the watercourse, (iv) the effects of the use on other watercourse states, (v) alternatives available to a planned or existing use.

14 S. McCaffrey, 'The UN Convention on the Law of the Non-Navigational Uses of International Watercourses: Prospects and Pitfalls, ' in S. Salman and L. Boisson de Chazournes (eds.) *International Watercourses' Enhancing Cooperation and Managing Conflict* (World Bank, Proceedings of World Bank Seminar, 1998), 17, 20; A. Rieu Clarke, A. et al 'The UN Watercourses Convention online users guide,' Available at: http://www.unwatercoursesconvention.org/the-convention/part-ii-general-principles/article-5-equitable-and-reasonable-utilisation-and-participation/5-1-1-theories-of-allocation/

15 S. McCaffrey, n.4, 17 – 20. See also A. Rieu Clarke, A. et al 'The UN Watercourses Convention online users guide,' Available at: http://www.unwatercoursesconvention.org/the-convention/part-ii-general-principles/article-5-equitable-and-reasonable-utilisation-and-participation/5-1-1-theories-of-allocation/

16 Lankfort B. 'Does Article 6 (Factors Relevant to Equitable and Reasonable Utilization) in the UN Watercourses Convention misdirect riparian countries?' 2013, Water International 38(2). Lankfort discusses modelling exercises in Botswana (2011) where stakeholders and government officials tend to maximise water allocation in negotiations by submitting ambitious growth plans for various sectors in the country e.g. irrigation, hydropower, ecosystems, consumption, etc.

17 S. Salman, n. 1, 351.

18 Principle 2 of the Stockholm Declaration on the Human Environment (1971); the Rio Declaration on Environment and Development (1992), states: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of natural jurisdiction." (Emphasis added)

19 Article 6 of the UNWC includes ecosystems and environmental sustainability as relevant factor and circumstances to be considered when determining equitable and reasonable utilisation under Article 5.

20 Part IV of the UNWC includes provisions related to the states' due diligence obligations to prevent pollution, to avoid significant harm through changes to the balance of ecosystems, to protect and preserve the marine environment, among others. See Rieu Clarke, A. et al 'the UN Watercourses Convention online users guide,' Available at: https://www.unwatercoursesconvention.org/the-convention/part-iv-protection-preservation-and-management/

21 See Rieu Clarke, A. et al 'the UN Watercourses Convention online users guide,' Available at: https://www.unwatercoursesconvention.org/the-convention/part-iii-planned-measures/

22 UNWC, Article 11

23 UNWC. See Rieu Clarke, A. et al 'the UN Watercourses Convention online users guide,' Available at https://www.unwatercoursesconvention.org/the-convention/part-iii-planned-measures/article-11-information-concerning-planned-measures/11-1-commentary/

24 The duty to cooperate is a substantive provisions of Article 8 which states: "1. Watercourse states shall cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilisation and adequate protection of an international watercourse.
2. In determining the manner of such cooperation, watercourse states may consider the establishment of joint mechanisms or commissions, as deemed necessary by them, to facilitate cooperation on relevant measures and procedures in the light of experience gained through cooperation in existing joint mechanisms and commissions in various regions."

25 L. Caflisch 'Prior Notice and related issues' in *Research handbook of International Water Law*, S. Mc Caffrey et al. (Edward Elgar: 2019), 113.

26 L. Caflisch n.25, 114.

27 See United Nations, UN Water, Sustainable Development Goals, Indicator 6.5.2 – Transboundary water cooperation. Available at: https://www.sdg6data.org/indicator/6.5.2

28 UNWC. See Rieu Clarke, A. et al 'the UN Watercourses Convention online users guide,' Available at: https://www.unwatercoursesconvention.org/importance/the-legal-architecture-for-transboundary-waters/

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30 *The Mavrommatis Palestine Concessions (Greece v. Great Britain)* Permanent Court of International Justice, Judgment N.2 of 30 August 1924.

31 Indus Treaty (1960), Article IX.

32 As Zeitoun and Mirumachi argue: "The view that water is an increasingly likely source of violent conflict appears to be part of a very broad and pervasive mindset, perpetuated in part by sensationalist media pieces." Zeitoun, M. and Mirumachi N. 'Transboundary water interaction I: reconsidering conflict and cooperation,' (2008) International Environmental Agreements, 8, 297, 298.

33 Wolf, A. n.3, 67, 68.

34 By way of example, dams frequently have the effect of displacing entire communities, affect livelihoods by changing levels of salinity and water morphology, affecting fisheries and irrigation.

35 See J. Gupta, 'The Watercourses Convention, Hydro-hegemony and Transboundary Water Issues,' the International Expectator, (2016) vol 51(3), 118; T. Meshel, 'The Evolution of Interstate Arbitration and the Peaceful Resolution of Transboundary Freshwater Disputes,' (2016) Journal of Dispute Resolution, vol. 2016(2).

36 The sources of public international law are codified in the Statute of the International Court of Justice, Article 38.

37 See the Statute of the International Court of Justice, Article 38.

38 Merrils J.G., *'International Dispute Settlement'* (Cambridge University Press: 2011, 5th Ed), 12.

39 Merrils n.38, 12.

40 *Lake Lanoux Arbitration* (France v. Spain), (1957) 12 R.I.A.A. 281; 24 I.L.R. 101, Decision of 16 November 1957, p.4.

41 *Lake Lanoux Arbitration* (France v. Spain), (1957) 12 R.I.A.A. 281; 24 I.L.R. 101, Decision of 16 November 1957.

42 The procedural obligation of prior consultation is not be construed as a 'right to veto' by the potentially affected riparian. For example, the Mekong Agreement specifically clarifies: "Prior consultation is neither a right to veto the use nor unilateral right to use water by any riparian without taking into account other riparians' rights" (Part II-Definitions).

43 *Lake Lanoux Arbitration* (France v. Spain) (1957) 12 R.I.A.A. 281; 24 I.L.R. 101, Arbitral Award, November 16, 1957, p.23.

44 The system stretches 3,200 kilometres, originating in the Himalayas of the Tibetan Plateau and runs across northern India, Jammu and Kashmir, and Pakistan, before terminating at the Arabian Sea near Karachi. Both Pakistan and India are heavily dependent on this system, with 65% and 36% of the territory of each State, respectively, lying within its basin. See Observer Research Foundation, Stimson, and Sustainable Development Policy Institute, 'Connecting the Drops: An Indus Basin Roadmap for Cross-Border Water Research, Data Sharing, and Policy Coordination', 2013, available at https://www.stimson.org/2013/connecting-drops-indus-basin-roadmap-cross-border-water-research-and-policy-coordination-0/, at 13.

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46 U.Z. Alam, n. 45, 344.

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51 P. Wouters et al, 'Sharing Transboundary Waters An Integrated Assessment of Equitable Entitlement: The Legal Assessment Model LAM,' (International Hydrological Programme (IHP) of the United Nations Educational, Scientific and Cultural Organization (UNESCO: 2005), 131.

52 *Lake Lanoux Arbitration* (France v. Spain) (1957) 12 R.I.A.A. 281; 24 I.L.R. 101, Arbitral Award, November 16, 1957, 16.

53 Case concerning the *Gabčikovo-Nagymaros Project (Hungary/Slovakia),* Judgement IJC Report of 25 September of 1997, para 112.

54 United Nations Department of Economic and Social Affairs, The Senegal River. Available at: https://www.un.org/waterforlifedecade/water_cooperation_2013/senegal_river.shtml

55 Merrils J.G. n.38, 8.

56 Article 4 of the Boundary Water Treaty (1909) states: […] "the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other."

57 Meshel (2016) n. 35.

58 See Rieu Clarke, A. et al 'the UN Watercourses Convention online users guide,' Available at: https://www.unwatercoursesconvention.org/the-convention/part-vi-miscellaneous-provisions/article-33-settlement-of-disputes/

59 McCaffrey S., 'The Law of International Watercourses' (Oxford University Press: 2007, 2nd ed), 511.

60 UNWC Article 33(2).

61 See various examples in J.G. Merrils J.G., n. 38, 28-29.

62 Merrils J.G. n 38, 28. See also W. Zartman and S. Touval 'International Mediation: Conflict Resolution and Power Politics,' (1985) Journal of Social Issues, 41(2), 27.

63 See Box on the negotiations leading to the Indus Treaty between India and Pakistan.

64 Klein N., 'Timor Sea Conciliation: A Harbinger of Dispute Settlement under UNCLOS' in Helen Ruiz Fabri, et al. (Eds.) *A Bridge over Troubled Waters Dispute Resolution in the Law of International Watercourses and the Law of the Sea* (Brill: 2020), Ch4, 106.

65 UNCLOS, Annex V, Article 5.

66 UNWC User's guide, available at: http://www.unwatercoursesconvention.org/images/2012/10/6-8.png

67 The general rule under UNCLOS is that each coastal State is entitled to claim an EEZ extending up to 200 nautical miles from its baseline. However, the application of this rule in certain parts of the Timor Sea where the distance between Timor-Leste and Australia's respective baselines is less than 400 nautical miles resulted in overlapping claims by these two States. This dispute was exacerbated by the fact that much of the area in contention was rich in hydrocarbon deposits.

68 UNCLOS, Annex V, Article 5.

69 For a comprehensive discussion on the Timor-Leste Australia conciliation background and proceedings see: N. Klein, 'Timor Sea Conciliation: A Harbinger of Dispute Settlement under UNCLOS' in Helen Ruiz Fabri, et al. (Eds.) *A Bridge over Troubled Waters Dispute Resolution in the Law of International Watercourses and the Law of the Sea* (Brill: 2020), CH4.

70 Article 33(3) UNWC.

71 Draft Articles on the Law of the Non-navigational Uses of International Watercourses and Commentaries thereto and Resolution on Transboundary Confined Groundwater, 1994, vol.II, Part 2. See also S. McCaffrey, 'The UN Convention on the Law of the Non-Navigational Uses of International Watercourses: Prospects and Pitfalls, ' in S. Salman and L. Boisson de Chazournes (eds.) I*nternational Watercourses' Enhancing Cooperation and Managing Conflict* (World Bank, Proceedings of World Bank Seminar, 1998), 17, 26.

72 S. McCaffrey n. 71.

73 UNWC Article 33 (4)(5).

74 S. McCaffrey n. 71.

75 UNWC User's Guide: Dispute Resolution Process of Article 33. Available at: http://www.unwatercourses convention.org/the-convention/part-vi-miscellaneous-provisions/article-33-settlement-of-disputes/33-1-7-fact-finding-and-inquiry/

76 See A.R Khattak. 'World Bank Neutral Expert's Determination on Baglihar Dam: Implications for India- Pakistan Relations' (2008), Pakistan Institute of International Affairs in Pakistan Horizon, 61(3).

77 United Nations Watercourses Convention User's Guide: Dispute Resolution Process of Article 33. Available at: http://www.unwatercoursesconvention.org/the-convention/part-vi-miscellaneous-provisions/article-33-settlement-of-disputes/33-1-7-fact-finding-and-inquiry/

78 Procedural rules are those rules that inform the arbitration or judicial proceedings. For example, time limits for submissions, formats for the presentation or evidence, the manner in which the parties may conduct their oral advocacy, etc. In some instances, such as arbitration, the disputing parties can agree on the selection of procedural rules (e.g. UNCITRAL Arbitration Rules); in other cases, the parties must follow the rules of the Court or Tribunal deciding the dispute e.g. the Statute and the Rules of Procedure of the International Court of Justice.

79 Jennings Sir R. 'Keynote Address' in International Bureau of The Permanent Court of Arbitration (eds) *Resolution of International Water Disputes,* Permanent Court of Arbitration/Peace Palace Papers Series, (Wolters Kluwer, 2002), 30.

80 See for instance the Statute of the International Court of Justice Article 36:
1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.
2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation: the jurisdiction of the Court in all legal disputes concerning:
a. the interpretation of a treaty;
b. any question of international law;
c. the existence of any fact which, if established, would constitute a breach of an international obligation;
d. the nature or extent of the reparation to be made for the breach of an international obligation.
3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time. [...] 6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.'

81 Statute of the International Court of Justice Article 36(1)

82 Statute of the International Court of Justice Article 36(2).

83 Mekong Agreement (1995), Article 35 (Resolution by Governments): 'In the event the Commission is unable to resolve the difference or dispute within a timely manner, the issue shall be referred to the Governments to take cognizance of the matter for resolution by negotiation through diplomatic channels within a timely manner, and may communicate their decision to the Council for further proceedings as may be necessary to carry out such decision. Should the Governments find it necessary or beneficial to facilitate the resolution of the matter, they may, by mutual agreement, request the assistance of mediation through an entity or party mutually agreed upon, and thereafter to proceed according to the principles of international law'.

84 B. MacChesney, 'Lake Lanoux Case (France – Spain), (1959) The American Journal of International Law, 53(1), 156, 159.

85 Another example outside the area of transboundary freshwaters, yet relevant in the context of this paper, is the dispute between Bolivia and Chile on the Obligation to Negotiate Access to the Pacific Ocean, where no specific DSM existed in the 1904 Treaty of Peace regarding this issue. In 2013 Bolivia instituted proceedings against Chile before the ICJ, concerning a dispute in relation to 'Chile's obligation to negotiate in good faith and effectively with Bolivia in order to reach an agreement granting Bolivia a fully sovereign access to the Pacific Ocean.' Bolivia asserted the jurisdiction of the Court under Article XXXI of the American Treaty on Pacific Settlement (Pact of Bogotá), which was challenged by Chile. Ultimately, while the ICJ upheld its jurisdiction to hear the case, it concluded that none of the legal bases, invoked by Bolivia, established an obligation for Chile to negotiate Bolivia's sovereign access to the Pacific Ocean. Source International Court of Justice: Available at: https://www.icj-cij.org/en/case/153.

86 Article XXXI of the Pact of Bogotá reads: 'In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize in relation to any other American State, the jurisdiction of the Court as compulsory ipso facto, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning:
(a) The interpretation of a treaty;
(b) Any question of international law;
(c) The existence of any fact which, if established, would constitute the breach of an international obligation;
(d) The nature or extent of the reparation to be made for the breach of an international obligation.'

87 *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua),* International Court of Justice, Judgment of 16 December 2015. Note that Nicaragua also instituted proceedings against Costa Rica for violations of Nicaraguan sovereignty and major environmental damages to its territory. The Court concluded on the merits that Nicaragua had not proved that the construction of the road caused significant transboundary harm.

88 Article 19(1)(c) of the Protocol of the Court of Justice of the African Union concluded on 11 July 2003, in force since 2009. For instance, the protocol could be applicable to the settle the potential dispute between Ethiopia and Egypt. One should note that while Egypt has signed and ratified the Protocol, Ethiopia has only signed the Protocol in 2004, but has not yet ratified it.

89 A Epiney, 'Lac Lanoux Arbitration' Max Planck Encyclopaedia of Public International Law (Oxford Public International Law, 2006). Available at: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e154

90 P. K. Wouters et al., 'Sharing Transboundary Waters an Integrated Assessment of Equitable Entitlement: The Legal Assessment Model' (UNESCO Working Series SC 2005/WS/13, 2005), at 132.

91 See Article 31, paragraphs 2 and 3, of the Statute of the ICJ, and the conditions set out under in Articles 35 to 37 of the Rules of Court.

92 The Arbitral tribunal (arbitration court) comprised of Sir Franklin Berman, Prof. Howard S. Wheater, Prof. Lucius Caflisch, Prof. Jan Paulsson, Judge Bruno Simma and H.E. Judge Peter Tomka, with the Permanent Court of Arbitration acting as the secretariat.

93 See T. Meshel, 'Inter-State Fresh Water Dispute Resolution: Some Reflections on River Basin Organizations as Arbitral Institutions' (2018) Yearbook of International Environmental Law, vol.29 (1), 55, at 66.

94 Meshel n. 93.

95 UNWC User's Guide available at: http://www.unwatercoursesconvention.org/images/2012/10/6-8.png

96 Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgement IJC Report of 25 September of 1997, para 131.

97 Pulp Mills on the River Uruguay (Argentina v. Uruguay), International Court of Justice, Judgement of 20 April 2010.

98 *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua),* International Court of Justice, Judgment of 16 December 2015, paras 39-43.

99 Abbott, K., Keohane, R., Moravcsik, A., Slaughter, A., & Snidal, D. (2000), 'The Concept of Legalization. *International Organization,'* 54 (3), 401- 419.

100 A notion of water diplomacy states: 'Water diplomacy can be described as a dynamic process that seeks to develop reasonable, sustainable, and peaceful solutions to water allocation and management while at the same time promoting regional cooperation and collaboration.' SIWI: Water Diplomacy Pathway to Peace? See also Vink M. 'The role of water diplomacy in peacebuilding' in Ashok Swain and Joakim Öjendal (eds) *'Routledge Handbook of Environmental Conflict and Peacebuilding'* (Routledge: 2018)

101 Wolf notes: 'International water regimes have continued to function in the Mekong basin since 1957, despite the Vietnam War; the Jordan basin (between Israel and Jordan) since 1955, even as these riparians until only recently were in a legal state of war; and along the Indus, even through India-Pakistan warfare' Wolf A. n.3.

102 Keynote and closing speech at the 10th Annual Cambridge International Law Conference, 20 March 2021.

About Us

PeaceRep is a research consortium based at Edinburgh Law School. Our research is rethinking peace and transition processes in the light of changing conflict dynamics, changing demands of inclusion, and changes in patterns of global intervention in conflict and peace/mediation/transition management processes.

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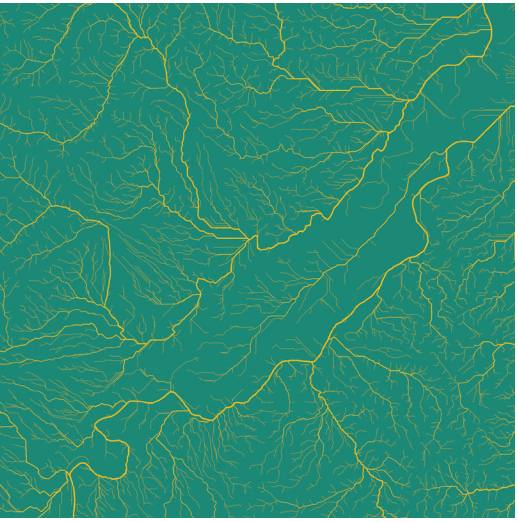

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