The role of treaties in building international watercourse regimes: a legal perspective on existing knowledge

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Abstract

The global water policy agenda has long called for a holistic approach to water resources management. However, key challenges remain in turning policy into practice, not least in managing conflict and enhancing cooperation over international watercourses. Towards such an endeavour, a better understanding of the role of watercourse treaties is needed. To date, much of the non-legal literature has failed to capture fully the unique characteristics of the international legal system. Conversely, much of the legal scholarship has failed to account for the social, economic and political context in which law operates. The paper therefore calls for a nuanced approach to the study of watercourse treaties. An approach is suggested that is sensitive to the normative content of watercourse treaties, the ‘package’ of norms, the multi-level governance context and the influence of treaties in shaping state behaviour throughout the entire regime building process.

Keywords: Conflict; Cooperation; Global and regional regimes; Governance; International law; International politics; Transboundary rivers; Treaties

1. Introduction

An increasing number of scholars from various disciplines are turning their attention to the issue of how states interact over their shared international watercourses (Delli Priscoli & Wolf, 2009). In addition, a more limited sub-set of literature has sought to understand the role of treaties in managing conflict and enhancing cooperation over such waters (e.g. Wouters, 1997; Hamner & Wolf, 1998; Tanzi & Arcari, 2001; Giordano, 2003; Rieu-Clarke, 2005; Conca et al., 2006; McCaffrey, 2006; Caponera, 2007; Kistin et al., 2009).

To date, much of the literature from non-lawyers has failed to capture fully the unique characteristics of the international legal system, while much of the legal literature has not fully accounted for the social, economic and political context in which the law operates. A fundamental question that remains to be answered fully is how and to what extent does treaty law play a unique role in shaping state behaviour.

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over international watercourses? This paper offers an explanation of how far the literature has come in addressing the latter question and maintains that while useful inroads have been made, lawyers and non-lawyers alike need jointly to develop a more sophisticated approach to understanding the role of treaties in promoting the equitable and reasonable use of international watercourses.

2. The global water policy agenda

On the occasion of the International Decade for Action on Water 2005–2015, the UN General Assembly Resolution 58/217 remarked, “water is critical for sustainable development, including environmental integrity and the eradication of poverty and hunger and is indispensable for human health and well-being” (UNGA, 2004). Similarly, Agenda 21 notes that, “the extent to which water resources development contributes to economic productivity and social well-being is not usually appreciated, although all social and economic activities rely heavily on the supply and quality of freshwater” (UNCED, 1992). However, throughout the world lack of access to safe and sufficient water constitutes a major impediment to sustainable development and security. UNEP observes that:

The quantity and quality of surface- and groundwater resources and life-supporting ecosystem services are being jeopardized by the impacts of population growth, rural to urban migration and rising wealth and resource consumption, as well as by climate change. If present trends continue, 1.8 billion people will be living in countries or regions with absolute water scarcity by 2025 and two-thirds of the world population could be subject to water stress (UNEP, 2007).

In response to the above issues, the Johannesburg Plan of Implementation of the World Summit on Sustainable Development called upon states to, “develop and implement national/regional strategies, plans and programmes with regard to integrated river basin, watershed and groundwater management” (UN WSSD, 2002). The need for integrated water resources management (IWRM) was recognized earlier by Agenda 21, which stated that, “the holistic management of freshwater as a finite and vulnerable resources… is of paramount importance for action” and “the fragmentation of responsibilities for water resources development among sectoral agencies is proving … to be an even greater impediment to promoting integrating water management than had been anticipated” (UNCED, 1992).

Picking up on the issue of water being a finite and vulnerable resource, the Global Water Partnership (GWP) notes that, “the effects of human activities leads to the need for recognition of the linkages between upstream and downstream users of water. Upstream users must recognize the legitimate demands of downstream users to share the available water resources and sustain usability…. This clearly implies that dialogue or conflict resolution mechanisms are needed in order to reconcile the needs of upstream and downstream users” (GWP, 2000). Despite these policy statements, much remains to be done in order to turn policy into action.

The fact that river basins ignore political boundaries constitutes one of the greatest challenges in turning IWRM into practice. The sheer number of international watercourses heightens the challenge. Throughout the world there are 263 international river basins shared by 145 countries and representing 45.3% of the Earth’s land surface (excluding Antarctica) (Wolf et al., 1999) and an as yet undetermined number of transboundary aquifers. Moreover, almost 100 countries have at least half their territory in international river basins (Wolf et al., 1999). Most states are therefore reliant on international
watercourses for at least part of their water needs and many states throughout Africa, Asia, Europe and North and South America are heavily reliant on such waters.

There are many ongoing or potential disputes over international watercourses across the world (UNWDR, 2006). For example, in the Middle East the rights pertaining to the Jordan River are contested between Israel, Lebanon and Syria (Economist, 1995). In West Africa, the impact of heavy floods was at the heart of a recent dispute between Burkina Faso and Ghana, the latter accusing the former of aggravating floods in Ghana by opening flood gates on a dam upstream (BBC, 2007). In Europe, the Danube river basin, shared by 19 states, is home to a number of disputes, including the Gabčíkovo-Nagymaros Dam Project between Hungary and the Slovak Republic which remains a source of tension despite an International Court of Justice ruling in 1997 (ICJ, 1998; Shepherd, 2006). South America has witnessed several disputes over international watercourses, including a case between Argentina and Uruguay currently being heard by the International Court of Justice (ICJ, 2006). The above examples represent just a few of the past and ongoing disputes over the world’s international watercourses (Wouters, 1997; Wolf et al., 2003; McCaffrey, 2006).

3. Existing treaty practice over international watercourses: basin, regional and global approaches

At the basin level the role played by treaties has been limited. Hamner & Wolf conclude that 86% of existing water treaties concluded since 1945 are bilateral (Hamner & Wolf, 1998). UNEP’s Atlas of International Freshwater Agreements estimates that 158 of the world’s 263 international river basins lack any form of cooperative management framework and most of the remaining “lack the tools necessary to promote long-term, holistic water management” (UNEP, FAO & OSU, 2002). Such findings, however, fail to take into account, first whether transboundary agreements are indeed needed amongst the basin states and second, the influence of regional or global agreements and customary international law on these basins.

At the regional level, there have been notable developments in treaty practice related to international watercourses. For example, both the 2000 EC Water Framework Directive and the 1992 UN ECE Helsinki Convention arguably shape the evolution of basin-specific regimes in Europe (Rieu-Clarke, 2008). Similarly, in Southern Africa the 2000 Revised SADC Protocol seeks to ensure a “coordinated and environmentally sound development of the resources of shared watercourses systems in the SADC region” (SADC, 2000). However, much more work needs to be done to assess the effectiveness of these regional instruments in strengthening basin arrangements and to consider whether they might provide a model by which other regions could cooperate over their own international watercourses.

At the global level significant efforts have been undertaken progressively to codify and develop the law of the non-navigational uses of international watercourses, but formal support for the resultant instrument, that is, the 1997 UN Watercourses Convention, is low. Codification efforts were initiated in the 1950s by the UN General Assembly and the International Law Commission (ILC) and culminated in 1997 with the adoption of the UN Watercourses Convention by a vote of 103 states in favour, 3 against and 19 abstentions (Rieu-Clarke, 2008). However, since its adoption, the 1997 UN Watercourses Convention has had an uncertain impact. While many commentators point to the alleged content of the 1997 UN Watercourse Convention as being the driving factor in the lack of state uptake, no detailed analysis exists (Salman, 2007; Biswas, 2008; Delli Priscoli & Wolf, 2009). Despite a widespread recognition of the need to strengthen governance arrangements and the endorsement of 103 states within
the General Assembly, why then has there been such reluctance for states to ratify the 1997 UN Watercourses Convention? Finding an answer to this question can surely provide valuable insights into state perceptions related to managing conflicts and enhancing cooperation over international watercourses (Loures et al., 2008).

4. Alternative perspectives on the role of international (treaty) law in understanding conflict and cooperation over international watercourses

Numerous disciplines and perspectives have advanced knowledge and understanding of conflict and cooperation over international watercourses, including economics, engineering, geography, politics and law. However, truly interdisciplinary work remains at an embryonic stage.

In relation to international law, Brunée & Toope (2002), comment that:

…the typical international relations characterization of international law has been unduly formalistic and positivist. This narrow conception of law has been fed, at least in part, by predominant explanatory models within the discipline of international law itself. It has prevented international lawyers from recognizing the full range of contributions of legal norms to regime evolution and from seizing opportunities to promote normative development.

Certainly most legal scholarship related to international watercourses would fit into the above explanation. Following a report from the UN Secretary General in 1963 concerning, “the legal problems relating to the utilization and use of international rivers”, it was recommended by the UN General Assembly that the ILC, “take up the study of the law of non-navigational uses of international watercourses with a view to its progressive development and codification” (UNGA, 1971). As a result of 20 years of study, led by five eminent international lawyers acting as Special Rapporteurs, the ILC adopted a draft set of articles, which after receiving comments by states and subsequent revisions became the basis upon which states negotiated the 1997 UN Watercourses Convention. Scholarly writing has closely mirrored efforts by the ILC and UN General Assembly to codify and develop progressively the law relating to international watercourses. Through an analysis of treaties, case law and other forms of state practice, numerous writers have sought to identify both existing and emerging international law relating to international watercourses (e.g. Wouters, 1997; Bogdanovic, 2001; Tanzi & Arcari, 2001; Rieu-Clarke, 2005; McCaffrey, 2006; Caponera, 2007; McIntyre, 2007). This research has provided a significant contribution to understanding the current status and normative content of international law in the field.

However, talking in general terms, Keohane (1989) maintains that little work has been done to examine the interaction between formal legal norms and the environment in which they operate. Such an approach appears to be reflected within the context of international watercourses. As Conca et al. (2006) note “legal scholarship... has focused substantially more attention on the evolution of legal principles

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1 In this context normative content is meant to mean the ability of a particular rule or principle to confer rights and obligations to those to whom it is addressed, the breach of which would constitute a violation of international law.
for shared river basins. Less clear is the extent to which these principles are taking root in specific political relationships among river sharing states’.

Commentators from non-legal disciplines have sought to fill this gap in legal approaches. In considering the relationship between international law and international relations, realist theory considers international law to be epiphenomenal and the pursuit of power as being central to explaining state behaviour (Morgenthau, 1985). Echoing realist theory, Zeitoun & Mirumachi (2008) argue that “transboundary [water] interaction is above all a political process subject to the whims of power”. This sentiment is also supported by Bernaur (1997), who in commenting on the evolution of the literature, maintains that:

Natural scientists, engineers and international lawyers often seem to know the answer, as the significant body of literature on river management in these disciplines indicates. Their advice, however, obviously remains unheard or does not help to produce the desired results, for global freshwater resources are under growing stress as we approach the twenty-first century. The latter development suggests that effective management of transboundary freshwater is not merely a legal or technological problem, but rather primarily a political one—that is, a problem of designing and operating effective social institutions to govern the use of freshwater resources [emphasis added].

In focusing on power dynamics, much of the so-called “hydropolitics” literature is taken up with discourse on the likelihood of “water wars” (Homer-Dixon, 2001; Dinar & Dinar, 2003; Wolf et al., 2003) with limited analysis of the existing or potential role that treaties can play in managing conflict or enhancing cooperation.

Compared to realist theory, liberal theory has offered a more active, but still formalistic interpretation of the role for international law as a set of functional rules for realizing both individual and collective interests. Much of the multi-disciplinary work has centred on “regimes” or “institutions”, defined as “principle, norms, rules and decision-making procedures around which actor expectations converge in a given issue-area” (Krasner, 1982). However, Reus-Smit (2004) notes that, while accepting a role for international law in explaining state behaviour, IR scholars have “shied away from engaging international legal theory, preferring to link with game theory and rational choice garnered principally from micro-economics”. The result is that while liberal theory can offer valuable tools for analysing the development, effectiveness, robustness and resilience of regimes (Hasenclever et al., 1997; Young, 1997; Kütting, 2000; Jagerskog, 2002), the precise and distinct role of treaty law within such regimes—or law in general for that matter—remains underexplored. Vinogradov (2007) provides an interesting insight into how a more joined up approach to the study of regimes and international water law might evolve.

Within the specific context of international watercourses Wolf et al.’s (2003) empirical work related to treaties stands out. In providing a unique compilation of existing treaties the Transboundary Freshwater Disputes Database (TFDD) provides the foundations upon which analysis of treaty law can be advanced. In addition, Wolf et al. (2003) sought to analyse treaties alongside a database of conflict and cooperative events over water. Wolf et al.’s analysis concluded that “institutional capacity within a basin, whether defined as water management bodies or treaties, or generally positive international relations are as important, if not more so, than the physical aspects of a system”. While such an analysis assists in understanding the important role of “water management bodies” and “treaties” in the context of international watercourses, further analysis is needed to understand the unique role that treaties play vis-à-vis other cooperative measures. Moreover, a greater understanding of one key feature of
watercourse treaties is needed, that is, while they may generally be seen as an indicator of conflict they may also be a source of conflict (Warner & Zeitoun, 2008). The latter phenomenon is clearly illustrated by the role that the 1959 agreements between Egypt and Sudan have played within the evolution of a Nile Basin regime.

Wolf et al.’s work represents a growing recognition of the need to understand better the role of watercourse treaties, as well as the political context in which they operate. Conca et al. (2006) have built upon Wolf’s work by noting that “the mere presence of an agreement tells us nothing about its capacity to ‘swim upstream’ normatively speaking against prevailing distribution of power and (unmodified) interests... particularly useful here would be analysis that examined whether the articulation of principles at the basin level tracks power relations among, or political and economic characteristics of, basin states”. Content thus appears to be as important as form.

Focussing on content, Dombrowsky (2008) analyses three dimensions of international organizations: membership, substantive scope and form. Dombrowsky analysed 86 international watercourse organizations for, inter alia, “the issue most frequently mentioned in treaties” and the range of issues. A similar approach is taken by other non-legal writers to analyse treaties, where functional scope is prioritized over normative scope (Hamner & Wolf, 1998; Kistin et al., 2009). Such analysis could be strengthened by considering not only the functional content of treaties, but also whether provisions contained in agreements confer rights and obligations on their parties under international law, that is, their (legal) normative scope, the relationship between binding provisions and the broader legal framework in which a particular agreement operates.

To some extent, Conca et al. (2006) offer such an analysis by examining the “principled content” of 62 agreements during the period 1980 to 2000. The aim of the analysis was to determine whether such basin agreements are “converging on common principles for shared river governance”. Unfortunately, Conca et al.’s research makes no distinction between treaties that have entered into force and those that have not. Similarly, the interplay between treaty law and customary law is lacking and the relative weighting of certain rules and principles vis-à-vis others is largely missing (Wouters, 2008). Moreover, the work fails to account for regional treaties, such as the 1992 UN ECE Helsinki Convention or the 2000 Revised SADC Protocol, or the linkages between basin, sub-basin and bilateral treaties where more than one agreement applies to a particular international watercourse. However, where Conca et al.’s work stands out is in its recognition that single level analysis fails to capture the “pattern of complex institution”. While not in itself fully capturing the global, regional and basin level dynamic, the work convincingly argues for the need to develop multi-level governance analysis further in relation to international watercourses.

5. An alternative perspective on the role of treaties in managing conflicts and enhancing cooperation

IR constructivist theory potentially offers some interesting avenues for better understanding of the role of treaties in managing conflict and enhancing cooperation. In picking up on the limits of realist and liberal theory to an understanding of international law in general, Reus-Smit (2004) note that “the idea that politics is simply power or utility-maximizing action and that international law is at worst epiphenomenal and at best a set of functional rules has been challenged over the past decade by a new wave of constructivist international theory” (Reus-Smit, 2004).
In its focus on the identities of actors as generators of interests and such interests as being constructed through social interaction—constructivism offers a broader perspective on the role of treaties throughout the entire regime building process. By examining the various stages of norm development and the actors, motives and dominant mechanism that shape such development, Finnermore & Sikkink’s (1998) work on norm dynamics provides a broader framework by which to understand the role of international law general and treaties in particular. Bruneé & Toope (2002) are therefore able to draw upon constructivism to understand better the role of law in developing a Nile regime.

The latter work concludes that law has the power to influence individual and collective identities of states, to enable and constrain international discourse by establishing what counts as persuasive argument or rhetoric and, through its inherent and specific form of legitimacy, promote adherence. Franck’s (1989) work on legitimacy is also insightful here in maintaining that the process by which laws emerge and the content of legal norms can influence their “compliance pull”. Clearly, such a role for law goes beyond the limited influence that law is commonly afforded by many commentators both legal and non-legal alike.

A further promising avenue for advancing a deeper understanding of the role of treaties in managing conflict and enhancing cooperation can be offered by the framework of hydro-hegemony advanced by the London Water Research Group (Zeitoun & Warner, 2006). In summing up the essence of the hydro-hegemony framework, Zeitoun and Warner write:

*The absence of war does not mean the absence of conflict or the presence of “peace”. Similarly, the existence of a treaty or some form of cooperation over transboundary water does not mean the absence of conflict. Cooperation, after all, is not always voluntary—a hegemon can make other parties do what they would otherwise not do.*

The hydro-hegemony framework provides a useful platform by which to understand the role of treaties in managing conflict and enhancing cooperation. A key question to address within the framework is whether watercourse treaties have the power to “counter-hegemony” and in turn, make watercourse states “do what they would otherwise not do”. Or in other words can treaties influence hegemons to ensure equitable sharing of international watercourses. The work of writers such as Bruneé and Toope and Franck tend to support such a role for treaties, but more analysis is needed.

Interestingly, in the context of developing the hydro-hegemony framework, Warner & Zeitoun (2008) also pick up on the fact that “much of the approach to hydro-hegemony has focused on the basin level, which is a highly specific level of analysis unique to water politics”. Such sentiments reiterate the need to account for various scales in the analysis of conflict and cooperation in general and in the analysis of the role of watercourse treaties in particular.

6. Conclusion

Existing knowledge and understanding from various perspectives provides useful insights into the role of treaties in managing conflict and enhancing cooperation over international watercourses. However, as this body of literature expands, there is a need to focus attention more attention on a number of key areas. First, more attention needs to be placed on content. Treaty analysis should ascertain whether certain treaty provisions confer rights and obligations, the breach of which constitutes a violation of
international law, prior to considering whether such rules or principles have affected state behaviour. In so doing, a more accurate understanding of whether treaty norms play a distinct role in shaping state behaviour will be possible.

Second, the effectiveness of certain rules or principles will be heavily reliant on supporting norms. For example, implementing the principle of equitable and reasonable utilization will be largely contingent on the supporting procedural and institutional mechanisms established within a particular treaty regime (Bourne, 1972). Linkages between treaty norms must therefore be taken into account. Towards this endeavour, the analytical framework—founded upon issues of scope, substantive norms, procedural and organizational rules and dispute settlement mechanisms—developed by the Centre Water Law, Policy & Science, University of Dundee, UK, offers a basis for such analysis (Wouters et al., 2005). However, such an analysis must be coupled with an examination of how such norms, or sets of norms, have an impact on social, political and economic systems.

Third, there is a need not only to consider the linkages between treaty provisions, but also the relationship between treaties at various governance levels. Central to this analysis is a greater understanding of the role that global conventions, for example the 1997 UN Watercourses Convention, 1971 Ramsar Convention and regional conventions, for example, 2000 Revised SADC Protocol and 1992 UN ECE Helsinki Convention, have at the basin or sub-basin level. Similarly, when conducting basin level analyses, the impact of non-water specific treaties at various levels on basin practice, for example the 1992 Biodiversity Convention and the 1992 Climate Change Convention, should be noted. A range of national laws will also affect state behaviour at the (international) basin level.

Last and closely related to the need for more multi-level legal analysis is a call to understand better the influence of law, not only in articulating the collective interests of states, but also in, “establishing what counts as persuasive argument or rhetoric”. For example, can global or regional agreements influence the negotiation of basin-specific treaties and if so how and to what extent? Also, how does the particular process or content of a treaty affect its compliance pull?

Applying a nuanced interdisciplinary approach through systematic, empirical and case study analysis might help answer some of these questions and help provide concrete policy recommendations concerning both how (process) states negotiate basin treaties and what (content) normative provisions are effective.

As Zeitoun & Mirumachi (2008) note “a more robust and nuanced understanding is required for analysis and policy to reflect thenuance of transboundary waters conflict and cooperation”. As a sub-set of such analysis, a more “joined up” understanding of the role of treaties in water conflict and cooperation is needed.

References


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