Can International Water Law be a Tool for Water Diplomacy?

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To reduce conflict and promote effective management of transboundary water resources, there have been growing calls for riparian states to re-think how they engage in negotiations and to re-consider the benefits that might be realized through greater cooperation. To what degree does international water law enhance or impede this call? This paper attempts to answer this question by comparing the key principles of international water law, as set forth in the 1997 United Nations Convention on Non-Navigational Uses of International Watercourses, with the core elements of the Water Diplomacy Framework (WDF), a negotiated mutual gains approach for managing complex water problems developed by Islam and Susskind (2012). The rights and obligations set forth in UN Watercourses Convention – such as equitable and reasonable utilization, no significant harm, and timely notification and consultation – certainly do not mandate a mutual gains approach. Nevertheless, these key legal principles can be interpreted to support certain aspects of the WDF, such as value creation, collaborative adaptive management, and joint fact-finding and scenario planning. The WDF’s emphasis on non-state stakeholder inclusion, convening and society learning, however, do not resonate as well with the UN Watercourses Convention. Nevertheless, states may find that incorporating these ideas will improve their ability to discharge their responsibilities under international water law. Moreover, international water law does not forbid them from taking these steps.

1. Introduction

Transboundary water governance is a challenge to practitioners and scholars interested in finding solutions to the world’s water crisis. This paper examines the role of international water law in facilitating effective cooperation in the management of transboundary water resources.

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Riparian nations have historically been much more likely to cooperate than fight over water.² Little evidence exists that disputes over water will lead to out-right war between nation-states,³ despite oft-quoted statements to the contrary.⁴ At the same time, relationships between riparian countries are complex and often highly influenced by regional power dynamics.⁵ Water may be linked in other ways to conflict, including being used as political leverage and by non-state actors such as terrorists.⁶ What is the role of the law in sorting out such conflicts? The existence of a legal agreement on how transboundary water should be managed is not necessarily an accurate indicator of level of cooperation that exists, nor does it mean there is an absence of conflict.⁷ Similarly, the absence of conflict does not necessarily imply that the riparian nations are fruitfully collaborating.⁸ While law is not essential to cooperation, a legal framework can create a more predictable and stable environment which in turn can reduce conflict.⁹ As a means of improving cooperation, there have been growing calls for riparian states to re-think how they engage in transboundary water negotiations and to re-consider the benefits that might be realized through greater cooperation. Such conflict could be mitigated by encouraging riparian states to approach transboundary negotiations from a mutual gains perspective, that is, from a perspective that emphasizes how broader benefits for all can create greater individual benefits through improved cooperation.¹⁰ The Water Diplomacy Framework developed by Islam and Susskind in 2012 outlines a negotiated approach to managing complex transboundary water problems that embraces the mutual gains approach. This paper assesses the degree to which international water law enhances or impedes the call for a non-zero sum, mutual gains orientation to transboundary water negotiation and management. It compares the core elements of the Water Diplomacy Framework (WDF) to the key tenets of international water law as set forth in the 1997 United Nations (UN) Convention on Non-Navigational Uses of International Watercourses (hereinafter: UN Watercourses Convention).

2. International Water Law: Brief History and Key Principles

The codification and progressive development of international water law began shortly after the creation of the International Law Association (ILA) and the International Law Institute (ILI), which were both founded in 1893. In 1911, the ILI promulgated the Madrid principles, while in 1967 the ILA adopted the Helsinki Rules, a close pre-cursor to the current UN Watercourses Convention. In 1970, the United Nations considered the Helsinki Rules but they were not adopted for several reasons, including concerns about the drafting process and the ‘drainage basin’ approach.¹¹ Due to a failure to reach agreement on the Helsinki Rules, the UN appointed the ILC to codify and progressively develop international water law. The ILC finally agreed upon draft articles after 23 years, five rapporteurs and fifteen reports.¹² On May 21, 1997, the UN General Assembly adopted the Convention on the Law of Non-Navigational Uses of Inter-

³ C. H. Kahl, States, Scarcity, and Civil Strife in the Developing World, Princeton 2006); (suggesting that increased competition as a result of drought could foster civil war); M. Zeitoun, N. Mirumachi, Transboundary Water Interaction I: Reconsidering Conflict and Cooperation, in: International Environmental Agreements: Politics, Law and Economics 8 no. 4 (2008), pp. 297–316; quoting United Nations Secretary General Ban Ki Moon’s op-ed in the Washington Post as stating that ‘Darfur is an environmental crisis—a conflict that grew at least in part from desertification, ecological degradation and a scarcity of resources, foremost among the water’.
⁵ M. Zeitoun, N. Mirumachi, supra note 3; (noting that contemporary discourse on climate security is “dominated by a state-centric approach”) but that “conflicts in Assam in India, Darfur in Sudan, Kenya, Mali, and Mauritania, all central cases in the environmental security literature, were at least initially interethnic conflicts without explicit state involvement”). U.S. Intelligence Community Assessment, Global Water Security, ii.
⁷ M. Zeitoun, N. Mirumachi, supra note 4, p. 302. (“Kistin (2007, p. 8) calls us to move ‘beyond the notion of cooperation as treaties to a more dynamic view of transboundary water cooperation as an on-going and non-linear process in which state and non-state actors establish, challenge, modify and legitimize multi-layered governance structures.”)
¹¹ C. H. Kahl, States, Scarcity, and Civil Strife in the Developing World, Princeton 2006); (suggesting that increased competition as a result of drought could foster civil war); M. Zeitoun, N. Mirumachi, Transboundary Water Interaction I: Reconsidering Conflict and Cooperation, in: International Environmental Agreements: Politics, Law and Economics 8 no. 4 (2008), pp. 297–316; quoting United Nations Secretary General Ban Ki Moon’s op-ed in the Washington Post as stating that ‘Darfur is an environmental crisis—a conflict that grew at least in part from desertification, ecological degradation and a scarcity of resources, foremost among the water’.
national Watercourses. At the UN, 103 countries voted in favor, 3 voted against (Burundi, China and Turkey), and 27 countries abstained. The Convention needs to be ratified by 35 parties to enter into force. As this article was going to press in 2014, 33 states had become parties to the Convention.

Although the UN Watercourses Convention is not yet in force, the central principles are generally recognized by scholars as reflecting customary international law. Moreover, the Gabčíkovo-Nagymaros decision issued by the International Court of Justice (ICJ) in 1997, which concerned a dispute between Hungary and Slovakia over a project on the Danube River, provided a stamp of approval to the Convention. Although it had only just been adopted by the UN General Assembly months earlier, the International Court of Justice in the Gabčíkovo-Nagymaros decision cited the UN Watercourses Convention, suggesting that it is was relevant both to international water law and to treaty interpretation.

Three primary principles of international water law are at the heart of the UN Watercourses Convention. First, states are expected to use an international watercourse in a way that is equitable and reasonable vis-à-vis other states sharing the watercourse. Second, states should take all appropriate measures to prevent causing significant harm to co-riparian states. Third, states should consult with the other international watercourse states and provide prior, timely notification about any new use or change in an existing use of an international watercourse that could have significant adverse effects on co-riparian states.

The principles of equitable and reasonable utilization and of no significant harm reflect a compromise between two extreme historical positions: territorial sovereignty and territorial/riparian integrity. A classic upstream position, territorial sovereignty holds that a state is entitled to take whatever measures it wants within the confines of its own state borders. Also known as the “Harmon doctrine,” the doctrine was epitomized by the position of former U.S. Attorney General Judson Harmon in a dispute between the U.S. and Mexico over the allocations of the Rio Grande. In contrast, territorial integrity (sometimes known as riparian integrity) is a classic downstream position that favors historical uses of water. The current principles of international water law are consistent with a compromise concept of limited territorial sovereignty. As stated by the 1957 Lake Lanoux arbitration panel, which concerned a dispute between France and Spain, “[t]erritorial sovereignty acts as a presumption. It must yield to all international obligations, whatever their origin, but only to them.”

This article focuses on the UN Watercourses Convention, which defines a “watercourse” as a “system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus” (Article 2). However, in 2009, the UN General Assembly adopted a resolution on the law of transboundary aquifers. While many of the provisions are similar between the Law of Transboundary Aquifers and the UN Watercourses Convention, one key distinction is that the former provides that “each aquifer State has sovereignty over the portion of a transboundary aquifer or aquifer system located within its territory,” which is arguably contrary to existing international law principles.

The next section considers the increasing focus on value-enhancing negotiations in transboundary water management, before returning to a discussion of where international water law fits within these trends.

### 3. The Water Diplomacy Framework and Mutual Gains Negotiated Approaches to Transboundary Water Management

The Water Diplomacy Framework (WDF) developed by Islam and Susskind in 2013 offers a negotiated approach to managing complex water problems. The WDF builds on the growing calls for using mutual gains negotiated approaches in transboundary water disputes to overcome the historically zero-sum orientation wherein parties perceive that gains to one party necessarily result in losses to other parties. For example, under the ‘benefits-sharing’ theory developed by Sadder and Grey, neighboring states can focus on the different types of benefits that can be derived from efficient and

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14 S. M.A. Salman, supra note 12, p. 4. (noting that after the vote, several countries indicated that they had intended to vote for it, which brought the number of the countries voting for the Convention to 106, and decreased the abstentions to 26).


17 Id.; And Case Concerning the Gabčíkovo-Nagymaros Project, Judgement of 25 September 1997.

18 For an in-depth treatment of international transboundary law, see generally S. C. McCaffrey, supra note 16. And UN Watercourse Convention, Art. 5 f.


20 Ibid.; See also E. J. Thorson, Sharing Himalayan Glacial Meltwater: The Role of Territorial Sovereignty, in: Duke J. Comp. & Int’l L. 19 (2009): pp. 493–499; (noting that the Convention reflects the principle of limited territorial sovereignty, which is a compromise position of absolute territorial sovereignty, often advocated by upstream users, and absolute territorial integrity, generally promoted by downstream users); C. Leb., supra note 9 describing “equitable utilization,” “good neighborliness” and the “duty to cooperate” as the “triangle of cornerstone principles” of international water law.

21 N. Islam, The Law of Non-Navigational Uses of International Watercourses: Options for Regional Regime-Building in Asia, in: Kluwer Law International (2010), p. 102. (quoting Harmon as stating “the fact that the Rio Grande lacks sufficient water to permit its use by the inhabitants of both countries does not entitle Mexico to impose restrictions on the United States which would hamper the development of the latter’s territory or deprive its inhabitants of an advantage with which nature has endowed it and which is situated entirely within its territory. To admit such a principle would be completely contrary to the principle that the United States exercises full sovereignty over its natural territory.”)

22 S. C. McCaffrey, supra note 16, p. 223.


collaborative use of a river, rather than focusing simply on the allocation of water.26 Similarly, Gryzowski, McCaffrey, and Paisley note that the mutual gains approach to negotiation, and the theory that underlies it, can lead to better outcomes because parties generally have more than one goal or concern in mind.27 For example, the Columbia River is an oft-cited example of the equitable sharing of downstream benefits: in exchange for upstream projects that benefit U.S. hydropower production and irrigation water management, Canada receives financial compensation and power generated by U.S. power plants.28 These calls for mutual gains approaches to negotiation are consistent with other trends within water management.29 The benefits-sharing or mutual-gains approach is also in sync with increasing policy and scholarly discussions about the water-energy-food nexus. If one country’s topography is well-suited to hydropower, while its neighbor has fertile and arable land, the parties might consider managing the water to achieve both goals and then trading the ultimate goods, energy and food.30 In addition, the concept of ‘virtual water’, i.e. water embedded in products such as food, has helped to highlight the critical role of thinking beyond water itself.31 The underlying premise of the WDF is that water is a flexible resource and that parties need to use this flexibility to expand the metaphorical pie.32 Through a mutual gains approach, the parties can brainstorm options for expanding the supply of water. For example, additional water can be ‘created’ through conservation, wastewater recycling, technological advances such as desalination, and by imagining new agricultural or industrial processes that use water more efficiently, thereby freeing up more water for other purposes.33 Value creation is often the result of trades because parties to a negotiation often have different priorities, interests and values. Such value-enhancing approaches to negotiation can be improved by a professional mediator and exposure to jointly-selected experts.34 Second, the WDF posits that because water problems are dynamic, non-linear and uncertain, effective management plans require collaborative adaptive management.35 This approach assumes that water management strategies that are initially developed – and may be codified in a legal agreement – will not be perfect on the first try. Such efforts should be viewed as ‘experiments’ that can provide insights that allow the parties to refine their understanding of the dynamics involved. The emphasis on collaborative adaptive management is tied to WDF’s grounding in network theory: water problems are influenced by a variety of natural, societal and political factors that interact in a dynamic and non-linear network.36 Islam and Susskind argue the dominant water management paradigm, Integrated Water Resources Management,37 has failed to be effective because it is based on systems engineering. As a result, it unrealistically assumes that water problems can be conceived as bounded systems with well-understood cause-and-effect dynamics.38 In other words, a static water management plan that fails to allow the parties to adapt and change their strategies is doomed to fail. Transboundary legal agreements can reinforce this if they do not provide appropriate means for collaborative adaptive management and continued adjustment of the terms of formal agreements.

Third, the WDF advocates for joint fact-finding and scenario planning to generate a deeper understanding of relevant issues. The scientific and technical information required to address complex water problems is almost always subject to multiple interpretations. A transparent and open joint fact-finding process can help to build confidence in the underlying science involved as well as trust among the parties that they need to resolve disputes.39 In addition, joint fact-finding can often produce local or indigenous knowledge that might otherwise be excluded from highly technical discussions. Scenario planning, unlike traditional forecasting, allows the parties to formulate and work with multiple estimates of what the future might hold without having to choose ‘one best’ forecast; i.e. if water levels in the basin fall below a certain amount, plan X would be adopted; if they rise above that level, plan Y would be more appropriate. This approach to forecasting enables the parties to respond to the uncertain and non-linear nature of water problems while also providing for a level of predictability.

26 C. W. Sadoff, D. Grey, supra note 10, p. 393. ("Generally it is more economically efficient to promote food and power security, which focuses on a state’s capacity to secure its food supply either through trade or production—whichever is most cost effective.").
28 Id., p. 149.
34 J. Delli Priscoli, A. T. Wolf, supra note 2, p. 44. ("Though individuals can accomplish unassisted integrative bargaining, as the number of stakeholders in water resources grow, the issues become more complex, and the resources dwindle, and third- or neutral-party assistance is often needed. Few evaluations exist of interest-based negotiations used in water resources. They show how shared interests, which seem obvious after agreement, are hard for parties to discover during negotiations without assistance.").
36 Id., p. 10. ("The WDF posits that complex water problems might be more effectively managed by thinking about water as a flexible resource and invoking three key assumptions about water networks: (1) water networks are open and continuously changing as a function of the interactions among natural, societal, and political forces; (2) water network characterization and management must account for uncertainty, non-linearity, and feedback; and (3) the management of water networks ought to be adaptive and negotiated using a “non-zero-sum” approach.").
39 Id., p. 224.
Fourth, under the WDF, all individuals and groups who may be impacted by water management decisions, e.g. stakeholders, are given a chance to participate in the negotiation process. This approach is tied to WDF’s critique of Integrated Water Resources Management, which assumes that “actors in any society can and will seek to reach common understandings and coordinate their actions through reasoned argument, consensus, and cooperation.” Yet, in reality, this type of political integration is not easily achieved. Rather, different stakeholders usually have competing interests – and there is no one ‘ideal’ way to allocate water. Diverse stakeholders can contribute to a growing knowledge base in distinct ways and provide critical information that might otherwise be excluded. Having the full range of stakeholder interests represented is likely to improve the credibility of any agreement reached, which can help to prevent groups from trying to block implementation of a decision, thereby reducing the costs of enforcement. Appropriate stakeholder representatives can be identified through a preliminary assessment of stakeholder interests prepared by a ‘professional neutral’, i.e. mediator.

Fifth, the WDF advocates for informal problem-solving that will allow stakeholders to generate suggested solutions or ways of resolving disagreements without the normal barriers that accompany formal or official decision-making. In other words, settings need to be created for stakeholders to brainstorm ways to create value. Such informal problem-solving needs to be linked to – and can only supplement, not replace – more formal statutory or regulatory decision-making processes.

Sixth, the WDF recommends that parties in a water management network periodically take the time to reflect on the experience. By seeking to capture what they are learning and building a growing knowledge base, systematic reflection can also strengthen ties between academic scholars and practitioners, with the result that theory and practice can inform one another. Such reflection can improve societal learning and inform future approaches to water management.

4. Linking International Water Law to the Water Diplomacy Framework

This section considers how international water law coincides or conflicts with the six central themes in the Water Diplomacy Framework outlined above: (1) value creation; (2) collaborative adaptive management; (3) joint fact-finding and scenario planning; (4) stakeholder representation; (5) convening: linking informal problem-solving to formal decision-making; and (6) societal learning. For each theme, relevant articles from the UN Watercourses Convention are analyzed.

4.1. Value Creation

International water law has the potential to foster a value-enhancing, benefits-sharing approach to transboundary water management, a key tenet of the WDF. The two seminal principles of the UN Watercourses Convention, equitable utilization and no significant harm, provide the flexibility needed to consider not only the current benefits and drawbacks associated with planned measures – but also the creation of additional value among the parties. This is not to say that international law necessarily mandates value creation, but it provides the ability to move beyond just thinking about legal rights.

Under the UN Watercourses Convention, states are allowed to use an international watercourse in a way that is equitable and reasonable with respect to other states sharing the watercourse. Equitable utilization does not imply an equal division of water. Article 5 states in part that “an international watercourse shall be used and developed by watercourse States with a view to attaining optimal and sustainable utilization and benefits therefrom, taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse.” In many respects, this goal is entirely consistent with the WDF. By striving to create “optimal and sustainable” value that accounts for broader “benefits” associated with water use, Article 5 could be interpreted as encouraging parties to frame their negotiations in a mutual gains fashion that fosters creative thinking about the flexible nature of water. In other words, equitable utilization does not simply refer to the way that water is allocated – but also to how it is used. If the physical geography of a basin is such that it makes more economic sense for an activity, such as irrigation or hydropower, to take place within the confines of one border, the benefits of using that water, for example for crops or energy, can and should be shared across borders.

Article 5 also recognizes that parties may come to the table with differing interests. This resonates with the WDF’s approach to water management. There is no one formula that should always be applied; rather, a number of factors need to be considered in assessing what is equitable in each situation. As outlined in Article 6, these include natural factors such as geographic and hydrographic features; social and economic needs; dependent populations; effects on other State; existing and potential uses; conservation and development of water resources; and availability of alternative measures. Under Article 10, no one use enjoys priority over

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43 Professors Islam and Susskind have developed several ways to foster this societal learn. They run a yearly ‘train the trainers’ workshop that teaches practitioners from around the world the elements of the Water Diplomacy Framework, and also provides a forum them to share real-world experiences with water management. They have also created several information-sharing and network-building online platforms, such as Aquapedia, www.waterdiplomacy.org.
44 UN Watercourses Convention, Article 5; A. Gryzbowski, S. C. McCaffrey, R. Paisley, supra note 10, p. 141.
45 This idea can be traced to cases from the Western part of the United States. See, e.g., SCOTUS, Kansas v. Colorado, 206 U.S. 46, 97, 1907.
46 SCOTUS, Nebraska v. Wyoming, 325 U.S. 589, 1945, modified, 345 U.S. 981, 1953. (“Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to a downstream area if a limitation is imposed on the former…”) (as quoted in McCaffrey 386-87).
another, but in the event of a conflict, special regard shall be
given to “vital human needs.” 47
The concept of equitable utilization is also supposed to take
account of potential future uses of water by riparian states. In
the Gabčíkovo-Nagymaros decision issued by the Interna-
tional Court of Justice in 1997, Hungary had halted its
agreed-to portion of a bilateral project citing environmental
concerns. However, the ICJ held that Czechoslovakia could
not simply proceed with a new version of the project because
Hungary’s refusal to continue the project did not amount to a
forfeiture of “its basic right to an equitable and reasonable
sharing of the resources of an international watercourse.” 48
The principle of equitable and reasonable utilization, must
be balanced with a provision that requires states to take “all
appropriate measures” to prevent causing “significant harm”
to co-riparian states (Article 7). If significant harm nevertheless
results, then the state causing the harm has an obligation to
“eliminate or mitigate such harm and, where appropriate,
to discuss the question of compensation.”

The no-harm principle, or sic utere tuo, is a well-recognized
principle of international law. 49 As Trial Smelter Arbitration
tribunal held, “no State has the right to use or permit the use
of its territory in such a manner as to cause injury by fumes
in or to the territory of another or the property or persons
therein, when the case is of serious consequence and the in-
jury is established by clear and convincing evidence.” 50

The Watercourses Convention does not completely prohibit
any harm. 51 Rather, the Convention requires “appropriate
measures” to prevent significant harm, and then remedial
measures if harm still occurs. In this respect, the no signific-
ificant harm principle is also consistent with the “good neigh-
borliness principle,” a doctrine that means “being a good
neighbor means not only refraining from causing significant
physical harm to other states in the vicinity, but also tolerat-
ing a certain level of harm emanating from activities in those
states.” 52

Because the principle of avoiding significant harm does not
function as a per se veto, it can perhaps best be understood as
a factor in achieving the overall goal of equitable and reason-
able utilization. 53 The determination of what is equitable and
reasonable utilization of a watercourse depends in part on an
assessment of existing and historical uses. Thus, a down-
stream country’s increased reliance on an international wa-
tercourse could shift this assessment in the future, creating,
in effect, a system akin to “prior appropriation.” 54 In such an
instance, the harm to the upstream country would be legal,
rather than factual in nature. 55

The no-harm principle appears consistent with the WDF:
while greater value cannot be created if one party experi-
ences significant harm, it may be that tolerating a certain
level of harm is required to enable effective trades. A mutual
gains approach to negotiation does not mean that every party
obtains everything it wants; rather, it means that the solution
generated by the parties is substantially better for all sides
that what they would achieve if no agreement were
reached. 56 In reality, it is very difficult for states to relinquish
prior uses (since this could be perceived as creating signifi-
cant short-term harm). 57 While the mitigation and compen-
sation remedies in Article 7 of the UN Watercourses Con-
vention are important in the event that significant harm does
occur, the WDF would suggest that the parties use the possi-
bility of harm as an opportunity to create value.

4.2. Collaborative Adaptive Management

While the UN Watercourses Convention does not obligate
states to engage in the type of collaborative adaptive man-
gement advocated by the WDF, several of the principal con-
cepts support the idea. Under Article 5, states are to “partici-
pate in the use, development and protection of an inter-
national watercourse,” which includes not only the “right to
utilize it” but also the “duty to cooperate in [its] protection
and development.” 58 59

Good faith cooperation between states, which is at the heart
of collaborative adaptive management, is necessary to imple-
ment the obligation of equitable and reasonable utilization.
Equitable and reasonable utilization is not a static notion, but
rather is best understood as a process requiring constant re-
assessment of the seven factors set forth in Article 6. 60 It can
be interpreted as an invitation for parties to come to the table
to continually assess the situation—an idea that is consistent
with collaborative adaptive management.

Because what is considered equitable and reasonable utiliza-
tion for a given watercourse changes over time, fulfillment
of this principle depends upon the regular exchange of read-
ily available data and information by riparian states. While

47 An unsettled area of law is the extent to which the UN Watercourses
Convention applies extra-territorially, and could be linked to questions
around the human right to water. In a seminal article from 1992-93 on
the human right to water, S. C. McCaffrey noted that “the mere sugges-
tion that one state might have a right to receive water from another may
be quite controversial”, S. C. McCaffrey, Human Right to Water:
Domestic and International Implications, in: Georgetown International
Environmental Law Review 5 (1992-1993), p. 2; See also C. Leb, supra
note 9, chapter 6.
48 S. C. McCaffrey, supra note 16, p. 216; See also Kansas v. Colorado,
206 U.S. 46, 97, 1907 (noting that the benefits to Colorado from use
of Arkansas River at that moment outweighed the potential future
detriment to Kansas).
49 Id., p. 416.
50 Trail Smelter (US vs Canada), 3 UN Rep. Int’l Arbitration Awards 1905
(1941).
51 The ‘abuse of rights’ theory would curb a state’s freedom to use its terri-
tory in any way it sought, which in the context of international water-
courses, would limit the application of the old Harmon doctrine of terri-
torial sovereignty. See Id., p. 418.
52 Id., p. 419.
53 Id., p. 436.
54 N. Islam, supra note 21, p. 145.
57 J. Deliti Priscoli, A. T. Wolf book Table 4.2 on “Unique Allocation Prac-
tice” (finding that transboundary watercourse treaties generally do not
relinquish prior uses).
58 In a new book on the duty to cooperate, C. Leb goes one step further
by suggesting that the duty to cooperate has gained even greater signi-
ficance than as a “general principle”, she describes its current status as
“somewhere in the grey zone between definitions of the concepts of
‘specific obligation’ and ‘legal principle’”, see C. Leb, supra note 9,
p. 81.
59 S. C. McCaffrey, supra note 16, p. 219. (citing the ICJ decision in
Gabikovo-Nagymaros, which in turn was quoting the ICJ decision in
North Sea Continental Shelf cases).
60 S. C. McCaffrey, supra note 16, p. 402.
states are supposed to use their best efforts to provide such data, they can require the requesting state to cover the reasonable costs of compliance. Equitable and reasonable utilization requires two-way communication between riparian states: they need to receive and provide information. While the requirement that information merely be readily available is reasonable, it also provides states with a tremendous amount of discretion regarding the level of cooperation and information sharing required. Moreover, under Article 31, a state is not obligated to provide data or information vital to its national defense or security. While this provision is no doubt reasonable, one of the biggest challenges to effective cooperation over watercourses is a lack of trust among the parties. Distrust can encourage parties to withhold information that would otherwise facilitate collaborative adaptive management.

The UN Watercourses Convention does recognize that ongoing cooperation is most likely to be effective when institutionalized. Under Article 8 of the UN Watercourses Convention, States not only have a general obligation to cooperate, but they “may consider the establishment of joint mechanisms or commissions, as deemed necessary by them, to facilitate cooperation on relevant measures”. While not explicitly required under international water law, several existing transboundary agreements, such as the 1960 Indus Water Treaty between India and Pakistan and the 1990 Boundary Waters Treaty between Canada and the United States, provide for joint institutions. Such joint mechanisms or commissions could open the door to the type of collaborative adaptive management envisioned by the WDF.

Unless there is trust among the parties, and also a structure in place to institutionalize cooperation, it is difficult to manage the uncertain and non-linear nature of water problems. In reality, legal agreements tend to be static: decisions are entered into at one point in time, and reflect the then-current natural, social, economic or political dynamics. For example, in 1992, the newly independent nations in Central Asia entered into an agreement to maintain the Soviet-era water allocation amounts, which has created tensions as the needs of the upstream nations have changed. Although an inter-state water commission was created, it has not been effective for a host of reasons, including significant geopolitical tensions that foster mistrust among the parties. The concept of collaborative adaptive management is also tied to the UN Watercourse Convention’s provisions concerning consultation and timely notification. Under Article 11, states are to exchange information and consult each other, and if necessary, negotiate on the possible effects of planned measures. Article 12 requires that a state provide “timely notification” of planned measures that may have significant adverse effects upon other states. The threshold for notification under Article 12 is lower than in Article 7; notification should take place if an action may have significant adverse effects, which Article 7 focuses on significant harm. This obligation can also be seen as working in tandem with the doctrines of equitable utilization and no significant harm. A state needs to take care to avoid engaging in activities that could result in harm to co-riparians, by exercising due diligence to avoid depriving co-riparians of their equitable shares; conducting a transboundary environmental impact assessment, and if adverse effects might result, notifying other states of them. The Convention also includes a series of articles outlining the back-and-forth process of notification and reply (Articles 12-16). Finally, it describes the process for consultation and negotiation in good faith over the planned measures (Article 17).

States have an obligation to settle any disputes over a watercourse by peaceful means, as set forth in Article 33 of the UN Watercourses Convention. If the state parties are unable to reach an agreement through negotiation, they may jointly request mediation, use a joint watercourse institution, or agree to submit the dispute to arbitration or to the International Court of Justice (Article 33). If the parties are still unable to settle their dispute, a party can request that an impartial Fact-finding Commission be established; “composed of one member nominated by each Party and in addition a member not having the nationality of any of the Parties concerned chosen by the nominated members who shall serve as Chairman” (Article 33).

If watercourse states undertake a collaborative adaptive management approach as recommended by the WDF, the timely notification, consultation and negotiation provisions, along with the dispute resolution provisions, could be institutionalized within that framework. A collaborative adaptive management approach would enable the parties to build on the rights and obligations articulated in UN Watercourses Convention. By using a collaborative framework for dispute resolution, the parties may be able to turn points of contention into opportunities for value creation.
4.3. Joint Fact-Finding and Scenario Planning

One of the key insights from the Water Diplomacy Framework is that joint fact-finding and scenario planning can build trust between the parties. This, in turn, can facilitate value creation and collaborative adaptive management. The concepts of joint fact-finding and scenario planning are largely supported by the articles of the UN Watercourses Convention discussed above in Section 4.2 on Collaborative Adaptive Management, especially the duty to cooperate (Articles 5, 8).

Joint fact-finding also builds on the obligation of Article 9 to regularly exchange data and information. Rather than merely send information back and forth, the WDF would encourage riparian states to collectively identify information needs and then develop a plan for meeting them. Such fact-finding can be delegated to a group of technical experts, which may help to depoliticize the situation and discourage states from withholding information on national security grounds, as permitted by Article 31. The existence of an expert body can also provide an opportunity for experts from different countries to further develop trust among themselves. It can also facilitate resolution of certain disagreements at the technical level, before resorting to more formal dispute-resolution procedures which are ultimately more political.71 Such transparency in information gathering can help to create an environment where a mutual gains approach to negotiation is possible.

Joint scenario planning requires the parties to work together to sift through various forecasts and develop responses to each alternative future. This activity can help generate flexibility critical to fulfilling the principle (and process) of equitable and reasonable utilization. It can also help to avoid disputes by forcing parties to consider different ways of balancing the principle of equitable and reasonable utilization under different circumstances, without having to agree on one certain future (Articles 5, 6 and 7). As a result, scenario-dependent compensation or mitigation measures can be put in place in advance. While the parties can always fall back on the notification and dispute resolution provisions of the UN Watercourses Convention (Articles 11–19, 33), the WDF encourages parties to develop a pro-active plan for resolving problems before they even arise.

4.4. Stakeholder representation

A fundamental difference between the WDF and international water law concerns the parties involved in negotiations, joint fact-finding and scenario planning and, ultimately, in collaborative adaptive management. According to the WDF, value-creation is enhanced when all individuals, groups and interests likely to be affected by the water management plans are involved in helping to shape them. The framework recommends that a neutral facilitator be hired to conduct a stakeholder assessment to ensure that all the relevant voices are represented at the table. While this idea may initially be dismissed as idealistic, unrealistic and unwieldy, the WDF argues that this step is critical to the success of any complex water management project.72 Inclusion of diverse groups and interests ensures that the process is credible and reduces the chances that excluded actors will seek to block implementation through litigation or political protest. Possible stakeholders can include NGOs, industry representatives, and even sub-national political officials.73 For example, in September 2011, Indian Prime Minister Mamnoon Singh was poised to sign a new agreement with Bangladesh on the Teesta River only to have it fall through after protests by the Chief Minister of the Indian state of West Bengal Mamata Banerjee.74 In other words, it cannot be assumed that states will always be adequate representatives of all of the conflicting interests that might be impacted by a transboundary water project.

In contrast, the principal actors under international law are nation-states. Outside of the fields of human rights and self-determination, participation by individuals and groups in international law continues to be limited. Thus, the UN Watercourses Convention primarily concerns states. An exception is Article 32, which provides that persons (natural or juridical) should not be discriminated against in seeking access to legal systems regarding transboundary water harm. This reference to non-state actors was not without controversy; some states were uncomfortable granting aliens rights to their judicial system, while others were concerned that this could be a vehicle for harassment.75 Although the UN Watercourses Convention does not directly address non-state actors, states could go beyond the articulated rights in the Convention to achieve the broader goals of effective water management as set forth in the WDF. By conducting a stakeholder assessment and inviting relevant non-state actors to participate in at least part of the process, i.e. in generating ideas but not in making final decisions or commitments, states could be in a better position to discharge their responsibilities. This is particularly true for the obligation states have to “take into account all relevant factors and circumstances” when assessing whether utilization of an international watercourse is equitable and reasonable (Article 6). Inclusion of a broader array of stakeholders could help states understand the potential for significant adverse impacts (Article 12) and harm (Article 7).

Another stakeholder that often does not have “voice” is the environment. The UN Watercourses Convention includes a series of provisions concerning the natural environment, including the obligation to protect and preserve ecosystems (Article 20), prevent, reduce and control pollution (Article 21), prevent the introduction of alien species (Article 22), and protect the marine environment (Article 23). States may be in a better position to discharge these responsibilities if their negotiation, fact-finding and management plans include actors or organizations tasked with representing environmental interests.

71 Id., p. 511.
73 N. Islam, supra note 21. (discussing history of local participation in water management in Asia).
While the UN Watercourses Convention is clearly at odds with the WDF’s emphasis on stakeholder representation, states may still find it useful to consider this approach. Involving non-state actors in the process could not only help riparian nations fulfill their legal obligations, but also enable them to develop a more effective transboundary water management plan.

4.5. Convening: Link Informal Problem-Solving to Formal Decision-Making

Given the limited role of non-state actors in the field of international water law, the WDF’s emphasis on informal problem-solving becomes even more imperative from a policy standpoint. States may already have procedures under their own domestic laws for soliciting input from impacted parties, such as through notice and comment periods, public forms, and task-forces that involve both state and non-state actors. To enhance the “governance connection,” create legitimacy and build trust, these activities might well be linked to transboundary water negotiations and management plans that are the purview of state actors under international law.

4.6. Societal Learning

The WDF’s focus on societal learning is a worthy goal: collective reflection on successes and failures is a critical step that could certainly improve transboundary water management over time. In this respect, the WDF seeks to strengthen links between scholars and practitioners working on transboundary water issues. Unsurprisingly, there are no principles in the UN Watercourses Convention that provide direct support for this idea. Yet, to the extent that such reflection can be incorporated into efforts of collaborative adaptive management, states will be in a better position to discharge their legal obligations, most particularly the duty to cooperate.

5. Conclusion

In the wake of increasing demand for water and concern that disputes over scarce water resources could breed instability and conflict, there have been growing calls for mutual gains approaches to transboundary water negotiations that could foster cooperation. The Water Diplomacy Framework developed by Islam and Susskind posits that by adopting a non-zero sum approach to negotiation, cooperation over water can lead to solutions that increase the benefits for all parties. The core elements of the WDF are: value creation, collaborative adaptive management, joint fact-finding and scenario planning, stakeholder representation, convening, and societal learning.

This paper considers the extent to which international water law enhances or hinders the WDF approach. It compares the core elements of the WDF to the key principles of the UN Watercourses Convention, namely equitable and reasonable utilization, no significant harm, and obligations concerning timely notification, consultation and negotiation. While the rights and obligations set forth in UN Watercourses Convention certainly do not mandate the WDF approach, the key principles can be interpreted to enhance the goals of value creation, collaborative adaptive management and joint fact-finding and scenario planning. The WDF’s emphasis on non-state stakeholder inclusion, convening and society learning are not mentioned in the UN Watercourses Convention. Nevertheless, states may find that incorporating these ideas will improve their ability to discharge their responsibilities under international water law. Moreover, international water law does not forbid them from taking these steps.

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76 S. Islam, L. Susskind, supra note 25.