



GROWING COHERENCE IN INTERNATIONAL WATER LAW: SADC AS EXEMPLAR OF THE TREND

***International Water Cooperation and
Transboundary Aquifers***
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Overview

- IWL as a 'Culture of Communication'
- Fragmentation or Convergence of IWL?
 - Fragmentation
 - Solutions: multiple levels of governance (global, regional, basin-level); consistent / evolving interpretation; penetration of cross-cutting norms;
 - Convergence
 - Increasing Coherence of IWL
 - 'Structurisation' of IWL
- Conclusions: SADC Case Study



International Water Law as a 'Culture of Communication'

- 'Shared Understanding' - Common Language (Interactional Theory of International Law-Making)
 - Accepted (if normatively uncertain) concepts:
 - Art. 5 UNWC – Equitable and Reasonable Utilisation
 - Art. 7 UNWC – Prevention of Significant Transboundary Harm
 - Art. 8 UNWC – Duty of Cooperation (*Lac Lanoux*)
 - Flexible framework for articulation of values
 - Art. 6 UNWC – ERU Factors [Art. 3(8)(a) SADC; Art, 13(3) ZAMCOM]
 - Arts. 9, 11-19, 32-33 UNWC – Procedural Cooperation



International Water Law as a 'Culture of Communication'

- Language increasingly technically developed
 - Arts. 5 & 6 UNWC – ERU (Art. 10(2) VHNs / HRW)
 - Art. 12 UNWC – Notification (TB EIA – *Pulp Mills Case* [2010])
 - Art. 20 – Ecosystems Approach (Env Flows – *Kishenganga Arbitration* [2013]; Ecosystems Services – Millennium Ecosystems Assess. [2005]; 1993 UNECE Guidelines re Ecosystem Approach)
 - Ongoing elaboration:
 - Conventional Practice
 - ORASECOM Guidelines re Notification & TB EIA; MRC
 - UNECE Helsinki Conv. - Protocols / Model Provisions
 - Judicial Practice
 - Federal / International Tribunals



International Water Law as a 'Culture of Communication' [2]

- Starting point for all Transboundary 'Cooperation':
 - Notification / Response [Art 4.1 SADC; Art 16 ZAM]
 - Which States / activities? - precautionary principle; ecosystems approach; EIA thresholds; RBOs
 - Form of notification? - good faith, info. re nature of activity, risks, potential injury to State & watercourse (threshold lower than Art.7 – prevention); prompt / early (prior to permitting / implementation); reasonable time for response; duty to refrain [Transboundary E(S)IA]
 - Information Exchange [Art 15 OR; Art 12 IncomatiM]
 - Conditions, emissions, permits / regulations, measures
 - Readily available info, useful and comprehensible
 - Consultation & Negotiation [Art 16.5 ZAMCOM]
 - Not consent, good faith / meaningful negotiations, reasonable efforts to accommodate; no requirement to reach agreement; duty to refrain; 3rd WC States (UNWC Art 4(2)); consultation → negotiation - UNWC Art. 17(1)
 - Dispute Resolution [Art 8 OR; Art 21 ZAM; Art IM]
 - Independent fact-finding



Fragmentation of International Water Law? Solutions!

- Fragmentation – interdependence of ecological processes
 - ILC Report (2006), (Koskenniemi)
 - Treaty Congestion – parallel rules / overlap
 - Solutions
 - *Lex specialis; lex posterior*
 - ‘systemic integration’ – interpretive mechanism under 1969 Vienna Conv. Art. 31(3)(c) – *Iron Rhine; Kishenganga* (multi-level governance)
 - **N.B.** Internal / external coherence of instruments of IWL : global, regional, river-basin – *Pulp Mills*



Convergence of International Water Law? Coherence!

- Elaboration of key / emerging substantive IWL norms
 - *Kishenganga Arbitration*(env flows); EcosysServices
 - Biodiversity Conv.; Ramsar/CMS/Heritage; Marine
- Elaboration of procedural IWL norms
 - ORASECOM (SADC) Guidance EIA & Notification
- Internal integration of IWL norms
 - Integration of procedural IWL norms – *Pulp Mills*
 - Integration of substantive/procedural IWL- *Pulp Mills*
- External integration of IWL norms
 - Intl Environmental Law; Intl Natural Resources Law
 - Intl Human Rights Law [Art. 10 UNWC; GC15];



Convergence of International Water Law? Structurisation!

- Emerging 'structurisation' of IWL (Castro)
 - Plurality of sources of law
 - *Ad hoc*, sectoral nature of legal order ('normative *bric-à-brac*)
 - Evolving into 'an eclectic regulatory continuum ... secured by principles that are common to other segments of the international law of natural resources and the environment' (1992 UNECE Art. 2.5 – precaution, polluter-pays, inter-gen equity; Art 12 ZAMCOM; Art 3.2 LIMCOM)



Convergence: Global Water Resources Instruments

	1997 UNWC	1992 Helsinki Convention	2008 ILC Draft Arts on TB Aquifers		
Equitable Utilisation	Arts. 5,6	Art. 2.2(c)	Arts. 4, 5		
Duty of Prevention	Art. 7	Art. 2.1	Art. 6		
Duty of Co-operation	Art. 8	Arts. 2.6, 9, 11	Art. 7, 16		
Environ / Ecosystem	Arts. 20-3	Arts. 2.2, 3	Arts. 10, 11, 12		
Prior Notification	Arts. 11-16	Art. 9.2(h), (j)	Art. 15.1, 15.2		
Consult/ Negotiate	Art. 17	Art. 10	Art. 15.3		
Exchange Information	Art. 8	Arts. 6, 9.2(c), 13	Art. 8		
Dispute Settlement	Arts. 30-33	Art. 22, Annex IV	Art. 15.3		



Convergence: SADC Region Water Conventions

Note: The OKACOM and LIMCOM Agreements are not analysed in detail as both Agreements are primarily concerned with institutional structure, powers and functions, rather than with setting down substantive and procedural obligations applicable to the parties.

	UNWC	2000 SADC Protocol	ORASECOM Agreement	Incomati-Maputo	ZAMCOM Agreement
Equitable Utilisation	Arts. 5,6	Art. 3(7)(8)	Art. 7.2	Art. 3(b)	Arts. 12, 13,14.1
Duty of Prevention	Art. 7	Art. 3(10)	Art. 7.3	Art. 3(c)	Art. 14.2, 4
Duty of Co-operation	Art. 8	Art. 3(5)	Art. 7.1	Arts. 4,5,7	Art. 14.5
Environ / Ecosystem	Arts. 20-3	Art. 3,	Art. 7.12-15	Arts. 6, 8	Art. 14.3
Prior Notification	Arts. 11-16	Art. 4	Art. 7.5-10	Art. 13	Art. 16
Consult / Negotiate	Art. 17	Art. 4	Art. 8.1	Art. 15(1)	Art. 16.5
Exchange Information	Art. 8	Art. 3(6)	Art. 7.4, 7.11	Art. 12	Art. 15
Dispute Settlement	Arts. 30-33	Art. 7	Art. 8.2-3	Art. 15	Arts. 20-21



Conclusion: 'A lot done, more to do!'

- Universality
 - Entry into force of UNWC (31 Parties - imminent?)
 - Globalisation of 1992 UNECE Convention
 - 2008 ILC Draft Articles on Transboundary Aquifers
 - Consistent regional / watercourse conventions
- Predictability
 - Common (universal) understanding of conventional and customary principles (ERU; Prevention; Co-op)
- Elaboration
 - Conventional Guidance / Judicial Deliberation
 - Compliance Mechanisms [UNECE Implement Cttee]
 - Decision-support & Negotiation Tools / Models