Institutional and Legal Frameworks for Water Dispute Resolution and Prevention

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ARTICLE: Institutional and Legal Frameworks for Preventing and Resolving Disputes Concerning the Development and Management of Africa's Shared River Basins *

Editor's Note: For a visual reference to major waterbodies, countries, and geographic areas in Africa which are discussed throughout this article, see map of Africa, infra, following the article.

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SUMMARY:

... Arid and semi-arid regions continue to suffer from water resource constraints, particularly quantity problems. ... Finally, Part 8 draws out implications for a more significant World Bank role in promoting cooperation in other transnational African river basin management and development initiatives. ... Some customs persist, as it is still a practiced positive custom to enforce and honor oral water and management agreements among members of families and lineages in some basin countries. ... Although neither regional nor international institutions have yet to play significant roles in promoting cooperation in water development and management among African river basin nations, international institutions have been much more effective in supporting such basin nations financially and technically. ... However, the Bank is now increasing its role in this field by functioning as a facilitator in promoting cooperation in two transnational water resource management projects in Africa: the Lake Victoria Environmental Management Project and Lake Malawi Biodiversity Conservation Project. ... Although the ICJ has not yet adjudicated disputes concerning transnational African river basin management and development, it lacks an effective dispute resolution framework. ... Implications for a More Significant Role by the Bank in Promoting Cooperation in Transnational African River Basin Management and Development Initiatives ...
I. Introduction and Background

Arid and semi-arid regions continue to suffer from water resource constraints, particularly quantity problems. Nonarid climatic regions, especially those located within the Niger and Congolese Basins, suffer from increased pollution and exploitation of international waterways, which decrease the availability of clean water. Because all African countries share one or more river basins, development activities involving most water resources affect relations within and between diverse interest groups and various sectors at the local, national, and regional levels. Therefore, there is an urgent need to enforce laws and agreements concerning water use, ownership, and management at the grassroots, national, and African levels.

In recognizing the risk of water scarcity problems, experts have predicted that "wars of the next century will be over water." This warning came from the World Bank at a water conference in Stockholm. The ten Nile Basin nations continue to disagree over the use, management, and ownership of the Nile waters that are currently controlled primarily by Egypt and Sudan. In coming years other riparian countries - particularly Ethiopia, from which eighty-five percent of the Nile's water flows - will increase their claim to a more equitable share. Similarly, the ten Niger Basin nations have not been able to cooperate in the management of that river, which suffers from pollution and degradation. No major regional disputes have arisen from the alleged damages suffered by lower riparian nations, including Nigeria. However, with increased development and usage of the Niger, disputes are likely to arise unless countries prevent them by enhancing the legal and regulatory frameworks as well as developing sound institutional (e.g., technical/monitoring) capacity to use and manage the river.

An increased potential for water development and management disputes in Africa exists mainly because of increases in population growth, demand for increasingly scarce water resources, and competition over such resources for development initiatives. Therefore, developing and enforcing water agreements is critical to basin nations. National expertise with respect to water issues is a necessary prerequisite to effective transnational cooperation. Only with this expertise can countries develop and implement effective solutions to water use and management disputes, both at the international level and within national boundaries among districts, regions, provinces, governmental institutions, or varied sectors.

In recognizing the importance of sound water resources in client countries, the World Bank developed water resource-related operational policies (OPs), Bank procedures (BPs), and good practices (GPs) for international rivers. The Bank OPs came into effect in 1994, replacing the operational directives. The OPs provide, inter alia, guidance on how to prevent disputes by promoting cooperation, while the BPs provide guidance to Bank staff on those implementation measures to be followed when putting OPs into effect. Operational policy 7.50 specifies that the Bank is ready to assist basin nations in achieving joint cooperation and goodwill. The existence of sound institutional and legal frameworks for preventing and resolving water use and management disputes among basin nations will facilitate the process of executing these Bank instruments.

If institutional frameworks are ineffective and legal frameworks are unenforced, African river basin nations cannot have joint cooperation in developing and managing their shared water resources. Therefore, this article identifies problems in the legal and institutional frameworks that must be resolved to promote cooperation at the local, central, and regional levels and considers the resulting implications for the World Bank's role in promoting such cooperation.

The purpose of this article is threefold: (1) to examine the availability and effectiveness of institutional frameworks for preventing and resolving disputes over the use and management of Africa's shared waters, (2) to assess the availability and degree of enforcement of relevant water laws, and (3) to deduce implications for a more active and
significant World Bank role in promoting cooperation in transnational African river basin development and management. The main shared rivers addressed in this article are the Nile, Niger, Senegal, and Zambezi. This article is based on several sources including the author's personal memory and experience at the Bank, several Bank documents, literature published by international law jurists and development professionals, and surveys of the Bank's principles and practices.

Structurally, Parts 2 and 3 deal with local and central levels of government, their key institutional and legal frameworks, and the World Bank's role with regard to those frameworks. Parts 4 and 5 focus on regional and international levels of government, their institutional frameworks for resolving disputes, and the roles of international bodies in settling disputes at these levels. Part 6 discusses the World Bank and two case studies of the Bank's role in promoting transnational cooperation in two African and two Asian river basins. Part 7 summarizes the article's main points and proposes measures for promoting greater cooperation. Finally, Part 8 draws out implications for a more significant World Bank role in promoting cooperation in other transnational African river basin management and development initiatives.

II.

Availability and Effectiveness of Institutional Frameworks at the Local and Central Levels

Effective coordination and communication among water institutions is vital at both local and central levels, especially between and among grassroots communities and central institutions. In particular, central government administrative, enforcement, law-making, and adjudicating institutions need to enhance their relationships with local grassroots communities with respect to water dispute concerns. "Local" refers to grassroots communities in either rural or urban areas, while "central" refers to institutions at the national level. Although the World Bank has proven to be more effective in dealing with central governments, it should enhance its performance in dealing with local grassroots communities, especially those in the rural and the urban poor areas. The Bank also should develop its relationship with the private sector, a key player in water use and development.

A. The Local Level

During the precolonial era, the institutional framework for dealing with resource issues included resolution of disputes before local chiefs and respected elders. n17 The colonial system introduced a more formalized process of dispute resolution through native and area courts at the local level. n18 Before this imposition, a local chief or elder who was respected by members of the community was empowered to prevent and resolve disputes over the use and management of water resources and land in accordance with customary laws. n19 The local chief also administered water resources on behalf of the community. n20 To ensure the impartiality and accountability of authority, a community imposed sanctions (dismissal) upon these chiefs or elders who abused their power. n21

This institutional framework was effective in preventing and resolving the few disputes that arose during the precolonial period. Local communities often respected the judgment and decision of their local chief in the rare cases that disputes arose. n22 However, as a result of colonial influence, the institutional framework became less effective due to decreased respect for decisions made by local chiefs/elders and the degradation of the local system through the erroneous application of statutory and common laws. The loss of respect for decisions by chiefs and elders stemmed from two main causes: first, the chiefs and elders lost most of their powers to the administrative bodies that were created by the colonial administration; n23 second, the new colonial administrative system provided a more centralized form of dispute prevention and resolution as well as water resources management. n24

B. The Central Level

The primary institutions available at the central level include administrative institutions involved in managing and/or developing shared water resources n25 as well as water law enforcement institutions. n26 Other important
institutions include the judiciary responsible for interpreting water laws and adjudicating grievances as well as the lawmakers charged with formulating laws. n27

The current water administrative, law enforcement, law-making, and judicial institutions are ineffective due to unsoundness n28 and a lack of coordination, which bedevil their performance. n29 Usually, several governmental institutions of various sectors n30 manage, develop, and enforce water laws without regard to coordination among them. n31 Law enforcement institutions also need to be more independent and transparent in enforcing water laws. n32 Partly because of interinstitution power struggles over increasingly scarce water resources, there is an increase in water disputes among competing users. n33

In most basin countries n34 the judicial systems are dysfunctional and most judges are unable to perform their designated function of interpreting water laws and adjudicating water disputes independently and effectively. The main reason is that high-level government administrative institutions n35 usually undermine the independence of such judicial functions. n36 Consequently, water lawmaking does not involve an independent process partly because the administrative institutions serve to undermine the functions of water lawmaking institutions. n37

[*337] Because communities do not adequately trust that the judicial process is independent and fair, recourse to a judicial process is often limited, leading to inadequate case law/precedent in both urban and rural communities. Inadequate community awareness of legal rights and duties and infrequent citizen participation aggravate the ineffective system. n38 Such communities are unable to monitor the performance and ensure the transparency of water law enforcement agencies and the judiciary. n39 Thus, the institutions are now more likely to abuse their powers than they were during the precolonial era.

C. The World Bank Role

The World Bank has not yet played a significant role in promoting cooperation in water development and management by strengthening the institutional frameworks at the local grassroots level. The Bank should continue to strengthen its credibility and expertise in addressing water resources management issues concerning local grassroots communities, especially rural ones. n40 There is also a need to strengthen relations with the private sector, a key stakeholder in water use and development. Since the Bank is intergovernmental in nature, n41 it is better able to negotiate with governments and promote cooperation among governmental institutions at the central level. n42 For instance, the Bank is, inter alia, supporting basin countries n43 at the central level in developing sound national institutional frameworks for water resources management. Regional initiatives, such as the Lake Victoria and Lake Malawi projects, also include components to enhance the national institutional frameworks for managing water resources within the countries concerned. n44

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III.

Availability and Degree of Enforcement of Legal Frameworks at the Local and Central Levels

There is an urgent need to reconcile conflicts between the modern water statutes prevailing primarily at the central level and the different native customs that exist at the local grassroots level. Although the World Bank has proven to be more effective in strengthening centralized lawmaking and enforcement, it must enhance its role in dealing with such issues as they affect local grassroots communities.

A. The Local Level

During the precolonial era, communities respected and applied their respective customary laws. n45 The precolonial native water laws of most African river basin communities (e.g., those along the Niger, Nile, and Zambezi Rivers) were
the result of entrenched customs and traditions. n46 These precolonial customs prohibited any form of activity that the local communities believed would result in a dispute over the communal use or management of water and land resources. n47 Furthermore, although these customs and traditions were initially unwritten, n48 they were enforced and backed by sanctions. n49 The oral nature of this customary law evolved during the postcolonial era when several researchers restated and codified customary laws in the form of written customs and traditions. n50 Despite the codification of some customs, most remain unwritten. n51

The conflicts between the older customary laws and the adopted common law/statutory systems contribute to the inadequate enforcement of those customary laws that were enforced and respected prior to the colonial era. n52 Similarly, the degradation of positive aspects of customary laws by judicial systems aggravates the inadequate enforcement. n53 For instance, while some higher court judges have correctly eliminated some negative aspects of customs, n54 they have also incorrectly eliminated some positive aspects of well-respected customs and traditions, n55 particularly the custom of attributing social and aesthetic value to shared waters. n56 This custom was backed by sanctions that deterred communities from ineffectively managing their water resources. n57 Some customs persist, as it is still a practiced positive custom to enforce and honor oral water and management agreements among members of families and lineages in some basin countries. n58

B. The Central Level

Several African countries have developed legal frameworks for resolving water disputes. n59 These frameworks are partly in the form of legislation and derive from a combination of both customary and adopted foreign laws. n60 Most former colonies of Portugal and France n61 imported those civil law systems, while former British colonies n62 imported English common law systems. n63

[*340] In modern times, water statutes are still generally enforced and respected to a lesser extent than customs. n64 The poor enforcement of modern statutes is due mainly to four factors. The first factor is the conflict between precolonial native customs n65 and both English common law and civil law systems. n66 Most African countries have yet to reconcile any conflicts between their co-existing customary laws and their adopted legal systems. n67 Lesotho represents an exception, as the 1978 Lesotho Water Act n68 uses customary law to vest rights to some rural land and water in the office of the local chief, as guardian and trustee for the community. n69 The Act incorporates some customary rules and practices. n70 Communities recognize and accept the Lesotho Water Act, especially those aspects that are reconciled with their customs. n71 Nevertheless, the Act is still not rigorously enforced. n72

The second main reason for inadequate enforcement of modern statutes is the limited community recognition of existing laws compounded by inadequate citizen participation in policymaking. Most members of local communities, especially the rural, illiterate, and less-fortunate urban citizens whom the laws affect, do not know or understand their rights and obligations under the imported laws. Because these citizens do not understand their rights, they do not participate in monitoring potential violations of the modern water laws, resulting in the unenforcement of such laws.

[*341] The third, related reason for poor enforcement of modern statutory law is the inability of countries to prevent disputes by conducting effective environmental assessments. Except for a few African nations (including Egypt, Kenya, and South Africa), most basin countries do not have the technological capacity to determine the extent and gravity of impacts that development activities have on shared regional waters. n73 Therefore, countries are unable to adequately enforce agreements because they neither share enough environmental information nor are they able to mitigate the adverse impacts of development activities on waterways. n74

The fourth factor contributing to the inadequate enforcement of modern water statutes involves severe deficiencies in the provisions of most water statutes that aggravate unenforcement. These deficiencies include granting the government partial or total immunity from legal suits and failing to define an appropriate water rights system that prevails. n75 African water laws often fail to clarify the institutional arrangements and relationships and omit defined jurisdictional boundaries of water use, ownership, and management between and within various regions of a country.
The nations sharing Africa's rivers can draw positive lessons from the judicial system in India.

C. The World Bank Role

Although the Bank has not yet played a significant role in strengthening the relevant legal frameworks for water resource management and development at the grassroots level, it is playing such a role at the central level in several countries. In particular, the Bank supports basin countries in developing sound national policies and enforceable legal frameworks for water resources management. For example, the Lake Victoria and Lake Malawi projects undertaken by the Bank include components to enhance the legal frameworks of the countries concerned.

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IV. Availability and Effectiveness of Institutional Frameworks for Dispute Prevention/Resolution at the Regional and International Levels

Although neither regional nor international institutions have yet to play significant roles in promoting cooperation in water development and management among African river basin nations, international institutions have been much more effective in supporting such basin nations financially and technically. Moreover, there is an increased potential for assistance to African countries in the future, particularly from the World Bank.

A. The Regional Level

From the 1960s to the 1990s, several African regional institutions have been established to promote regional (transnational) cooperation in water development and management. The Organization of African Unity (OAU) was established to, inter alia, promote African cooperation by addressing economic, social, political, and legal concerns in African development. In 1964, the Niger Basin Authority was created to, inter alia, promote joint cooperation in managing and developing the Niger River. The Southern African Development Community (SADC) was established in 1992 (replacing the Southern African Coordination Conference) to, inter alia, promote cooperation in supporting the economic growth and development of member states.

These regional bodies have been ineffective for four main reasons. First, they fail to prevent water disputes by adequately sharing scientific information and conducting environmental assessments. Second, the institutions lack clear mandates defining the performance of regional dispute resolution functions. Third, the institutions have not developed and mobilized sufficient technical and financial expertise to perform relevant evaluative tasks. Fourth, regional institutions suffer from a dearth of infrastructural support, hindering effective communication and dissemination of information between participating nations.

Because most basin countries lack the capacity to share environmental and scientific data on the impacts of shared water use and development initiatives, they are unable to prevent or mitigate damage that may be caused by such initiatives. Most regional institutions, including the Niger Basin Authority and the SADC, have been further hampered by a lack of both clear mandates and adequate funds. Despite such problems, and in contrast with most institutions, however, the SADC has generally been successful in promoting cooperation in the development and management of the Zambezi River and other water resources.

A clear mandate does not, per se, guarantee the effectiveness of a regional institution. The OAU demonstrates this point, as its commission has a clear mandate to, inter alia, resolve water- and nonwater-related disputes between member states. Although the OAU has resolved some nonwater-related disputes, it has not been effective in preventing or resolving water disputes, mainly because of inadequate financial, institutional, and technical expertise.
B. The International Level

Although several international institutions, including those established by the United Nations and the World Bank, have been involved in dispute prevention and resolution, involvement with respect to African river basins has not been significant. The key United Nations institution discussed in this section is the International Court of Justice (ICJ), and the relevant World Bank institutions examined are the International Center for the Settlement of Investment Disputes (ICSID), the International Bank for Reconstruction and Development (IBRD), and the International Development Association (IDA).

The ICJ has yet to play an effective role with respect to resolving regional water-related disputes in Africa, partly because of jurisdictional and procedural restrictions and state (nation) sovereignty issues that weaken its effectiveness. The ICJ only has jurisdiction to hear disputes between states; it lacks jurisdiction to hear cases brought by an aggrieved individual or a community within a country. Without the consent of the parties to a dispute, the ICJ lacks compulsory jurisdiction to hear any case.

Furthermore, in asserting their sovereign rights, states are reluctant to recognize the jurisdictional authority of the ICJ and often refuse to comply with its interim measures and decisions. However, a theoretical enforcement framework exists through ICJ procedures and the UN Security Council. The ICJ has formulated a means of preventing the frustration of proceedings by allowing it to move against absent parties under certain circumstances. To ensure compliance with ICJ decisions, Article 94(2) of the United Nations Charter stipulates that if any party fails to perform the obligations imposed upon it by the Court, the other party has recourse to the Security Council, which may, if it deems it fit, make proposals or take measures to give effect to the judgment. The Security Council, with its political clout, adds to the weight that countries attach to ICJ decisions and maintains international peace and security.

Although the ICJ has never decided a dispute concerning an African river basin, it recently adjudicated a transnational water dispute in Europe for the first time. In September 1997, the Court ruled on a dispute between Hungary and Slovakia concerning the respective rights and duties of both countries in relation to the use and ownership of shared water resources (the Danube River). This case may be a model for the ICJ's involvement with African river basins.

The World Bank in 1966 established the ICSID to deal primarily with disputes between investors and governments. Although the ICSID itself does not arbitrate or conciliate, a conciliation commission and an arbitral tribunal established under the aegis of the ICSID perform those functions. This article refers generally to both the IDA and IBRD as the "World Bank" partly because, in practice, both institutions are lumped together as one for structural and operational purposes at the World Bank Africa region department. However, in principle the IDA and IBRD are not one body. Based on established financial and technical criteria, the IDA supports poorer African river basin countries, while the IBRD supports relatively wealthier middle-income countries.

As with the ICJ, the ICSID system has jurisdictional and procedural restrictions that undermine its effectiveness in preventing and resolving disputes. The ICSID has jurisdiction to hear only investment disputes between a contracting state (country) and a national of another contracting state; it lacks jurisdiction to hear cases between a contracting state and its own national. Furthermore, the ICSID requires the consent of parties to be a conciliator or arbitrator. Despite these deficiencies, the ICSID procedure has been strengthened by formulating procedures that prevent parties from frustrating a proceeding and promoting independence from the control of national court proceedings.

C. The Role of International Institutions
The IBRD/IDA has yet to play an effective mediatory role in transnational African water resources as it did in Asia in the 1960s. Some experts assert that with the creation of the ICSID, fewer disputes have arisen for the IBRD/IDA to be involved in. However, the Bank is now increasing its role in this field by functioning as a facilitator in promoting cooperation in two transnational water resource management projects in Africa: the Lake Victoria Environmental Management Project and Lake Malawi Biodiversity Conservation Project. The Bank is the implementing agency while the Global Environment Facility (GEF) is the financing mechanism for both projects.

V. Availability and Degree of Enforcement of Legal Frameworks for Dispute Resolution at the Regional and International Levels

Although there are several African regional agreements pertaining to African watercourses, case law in the region remains undeveloped. International water law that is more developed includes case law and established principles governing the use and management of international watercourses. However, none of the international law cases involve African river basins. Both the regional and international agreements that exist have been inadequately enforced among African basin nations.

A. The Regional Level

Several African nations have negotiated water-related agreements providing a dispute resolution clause to promote cooperation in transnational water resources development and management. These agreements include those concerning the Niger River basin, the Senegal River basin, the SADC protocol, and the Zambezi River basin. In contrast with most African basin nations, the ten Nile River basin nations have not entered into any formal regional agreement concerning their shared waters. However, in 1929 and 1959, Egypt and Sudan made bilateral agreements apportioning the Nile River. Attempts by the ten riparian nations to negotiate the TECCONILE and Nile 2002 conferences, which commenced in 1992, further signal a positive step toward negotiating the use and management of the Nile waters.

Most river basin agreements have been inadequately enforced due to three key factors. The first factor is the exclusion of some key nations as a party to relevant agreements. The second is the assumption of treaty obligations without genuine commitment to introducing compliance and enforcement measures. An absence of equitable and well-defined national and regional water boundaries and principles governing the definition of such boundaries is the third factor.

The first factor is illustrated by the situation on the Nile River. Egypt and Sudan's exclusion of the Nile's other eight riparian nations in their 1929 and 1959 agreements creates a potential to aggravate conflicts among all Nile riparian countries concerning the enforcement of the two agreements. Both agreements are binding and in force as between Egypt and Sudan but are not enforceable against the eight excluded riparian nations. Negotiations among all riparians will become necessary as the excluded nations "begin to develop their water resources."

The second reason for inadequate enforcement of agreements is that several African nations are partly induced by financial or political leverage to sign and ratify agreements without considering their capacity for and interest in enforcing rights and obligations pursuant to the agreements. Realistically, apart from the force of public opinion, there is no effective monitoring and compliance system to ensure that obligations assumed under treaties are enforced within national boundaries. The SADC has recognized this compliance problem and is working on plans to restructure and expand the legal mandate of its unit to better address treaty compliance and dispute resolution issues.

Finally, inadequate enforcement results partly because most riparian nations have not clearly defined the water boundaries within national and regional levels. There is also disagreement about the scope and nature of applicable principles governing the allocation and use of shared waters.
B. International Law of Water Resources

Several international laws pertaining to water resources are available. The major international laws include case law, the 1966 Helsinki Rules of the International Law Association (ILA), the 1961 and 1979 Resolutions of the Institute of International Law, the International Law Commission's (ILC) draft rules, the 1997 UN Convention on the Law of Non-Navigational Uses of International Watercourses (UN Convention), and Stockholm Principle 21.

International case law with respect to African river basins remains undeveloped. However, several international but non-African cases support the rule that a country is responsible for all activities taking place within its territory and may be held liable should damage caused to other states reach a pollution threshold, even if that state has done all it could to prevent the harm. International case law recognizes that the allocation of property rights over shared waters is based on the principle of equitable apportionment.

For instance, in the Lake Lanoux Arbitration, the tribunal held, inter alia, that in developing water diversion works within its territory, France had an obligation to consult Spain, which shared the waters, and to safeguard Spain's rights to the watercourses.

Similarly, opinions of international tribunals recognize the application of the international law principle of good neighborliness. The Trail Smelter Arbitration and an ICJ decision, Corfu Channel, support the rule that it is illegal for states to use or permit the use of their territories for acts that would constitute harm to persons or to the environment in other countries.

In particular, Trail Smelter holds, inter alia, that under international and United States law, no state has a right to use or allow the use of its territory in such a manner as to cause injury by fumes to property or persons in another territory when the injury established is of serious consequence. Corfu Channel reinforces the Trail Smelter principle and broadens the doctrine of state responsibility to instances where nations have omitted to act or to prevent the act in their territory.

Additionally, the ILA’s 1966 Helsinki Rules recognize that the paramount principle in the sphere of international water resources is that of equitable utilization or apportionment. An existing use may have to defer to a new use in order to achieve an equitable apportionment of shared water resources. However, compensation must be paid for the impairment or discontinuance of the existing use.

The ILC draft rules and the UN Convention similarly accord primacy to an “obligation not to cause harm” over a “right to equitable utilization.” A river basin country that is first in time to use or develop the water has a right to establish an entitlement to the amount of water used, and other riparian nations would not be permitted to adversely affect that use without the agreement of the country that was first in time.

As with African regional agreements, most African nations have not effectively enforced international agreements and principles. These nations do not adequately enforce international laws partly because they consider some aspects of classical international law to be incompatible with their new status as sovereign nations and to be serving imperialistic interests of the international oligarchy. Similarly, in practice, most basin nations are reluctant to rigorously enforce Stockholm Principle 21. The principle provides that states have, in accordance with the UN Charter and principles of international law, “a sovereign right to exploit their own resources pursuant to their own environmental policies and a responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction.” The debate over the adoption of Principle 21 reveals that, although states may agree in principle to accept responsibility and to avoid extraterritorial harm caused by activities (such as water pollution) within their control, they are unable to agree on the scope of responsibility should damage occur.

The ILC/UN Convention approach appears to be realistic, appropriate, and consistent with some state practice in the area of pollution of the marine environment. However it seems inappropriate and unattractive where the country potentially harmed is weaker than the country causing the harm. The ILC rules, as incorporated into the UN Convention, may not be appropriately enforced in Nile River disputes for two main reasons: The approach seems to reward the countries (Egypt and Sudan) that are first in time to develop a shared river, and weaker Nile
Basin nations (such as Ethiopia) that are asserting the enforcement and primacy of the equitable utilization principle are less likely to succeed without some legal backing and pressure according primacy to the principle. n162 In contrast with weaker countries, a relatively powerful nation is better able to apply the necessary economic and political pressure to convince other nations to cease their inequitable utilization without the support of any legal principle. n163

VI. The Bank's Role in Promoting Transnational Cooperation in Two African and Two Asian River Basins

The World Bank is increasingly becoming actively involved in promoting cooperation in transnational water resources management in Africa. The Lake Victoria Environmental Management Program and the Lake Malawi/Nyasa Biodiversity Project are two major cases in point. These two African initiatives are concrete applications of the Bank's regional water resources management policy and are intended to be models for regional cooperation. However, the Bank has not yet played nearly as significant a role as it did in the 1960s and 1970s with respect to two Asian river basins, the Indus and Mekong.

A. Two African River Basins

The Lake Victoria project n164 is intended to, inter alia, enhance the national and regional institutional and legal capacity to manage the lake's shared water resources, including water quality, quantity, fisheries, and water hyacinth control. n165 The Bank and the GEF facilitated cooperation among the three participating countries (Tanzania, Kenya, and Uganda) in negotiating and preparing the transnational-national water resource management project. Because the Bank's mandate does not provide for lending funds or issuing grants directly to multiple member countries, n166 the Bank has come up with a creative mechanism for providing funds - through the GEF - directly to individual countries based on a number of considerations, including clarifying/assigning responsibility for carrying out the project. n167

Similarly, the Bank facilitated cooperation among Tanzania, Uganda, and Kenya when a dispute arose regarding which country should assume the main responsibility for water quality control. Following mutual agreement, Kenya became mainly responsible for water quality control, Uganda for fisheries and water hyacinth control, and Tanzania for serving the regional steering committee. Furthermore, the Bank facilitated an agreement with Burundi and Rwanda (two riparian countries of the Kagera River, a tributary of Lake Victoria) when the two countries initially challenged their exclusion from the Lake Victoria project. Ideally, Burundi and Rwanda should be participants in the weed management component of the project, because the water hyacinth entering Lake Victoria comes primarily from these two countries via the Kagera River. Burundi and Rwanda withdrew their objections at the behest of the Bank, having realized that their exclusion was partly to reduce the complexity of having more than three countries involved at the early stages of the project.

The Lake Malawi/Nyasa Biodiversity Conservation Project n168 represents another example of the Bank's role in promoting transnational water management cooperation. The main objectives of this project are to, inter alia, assist the three riparian nations, Malawi, Mozambique, and Tanzania, in enhancing capacity for scientific research; strengthening the policy, legal, and institutional frameworks for conservation; and protecting the biological diversity of the lake and its ecosystem. n169 As with the Lake Victoria project, the Lake Malawi project is financed through the GEF and implemented by the World Bank. n170

B. Two Asian River Basins

The Bank's active and significant role in promoting regional cooperation in the Indus and Mekong Rivers supports the proposition that the institution is today able to play a more active role in African river basins. n171 As early as the 1960s, the IBRD successfully mediated disputes between India and Pakistan over the use and distribution of the Indus River. n172 Similarly, in 1969, at the request of the United Nations and the Mekong Committee, World Bank
President Robert McNamara successfully facilitated cooperation between the basin nations of the Mekong River. The Bank's initial involvement with the Mekong basin was significant but different from its role in the Indus because it did not involve dispute resolution and was primarily concerned with technical assistance in revising a basin development (indicative) plan. The reason for this difference was that, at the time, the Mekong River was largely unexploited and had no riparian disputes.

In 1951, David Lilienthal, former chairman of the Tennessee Valley Authority, visited India and Pakistan. He prepared a technical report that included a proposal for the World Bank to assist both countries in developing the Indus River. Based on Mr. Lilienthal's ideas, Eugene R. Black, then president of the World Bank, facilitated a consensus between India and Pakistan in managing and developing the waters of the Indus River basin in 1952. The Bank responded to the dispute between India and Pakistan by procuring the participation of several countries to finance the construction of a dam and canal. Additionally, resolution of the dispute resulted in the signing of the Indus River Management and Development Treaty between the two countries in 1960. Based on the Bank's involvement, the two nations mutually agreed to insert in the Indus Treaty a stipulation that the dam and canal would be installed within ten years.

In 1969, at the request of the United Nations and the Mekong Committee, World Bank President Robert McNamara facilitated cooperation among three riparian countries sharing the Mekong River basin: Thailand, Cambodia, and Lao PDR. His involvement consisted of reviewing a Mekong Basin development (indicative) plan completed by the three countries in 1970 as well as mobilizing donor support for its implementation. The objectives of the review included directing the focus and efforts of the Mekong Committee plan of action and preventing unnecessary disputes over sharing the hypothetical benefits of the plan. The Bank succeeded in persuading the Mekong Committee, the UN, and the donor countries to postpone any measures on the plan's huge projects until needed by the basin countries. To date, there is an increased demand to develop the basin. The two other riparian nations, China and Myanmar, have been invited to join the agreement apportioning the Mekong that Thailand, Cambodia, Lao PDR, and Vietnam signed in 1995.

VII. Conclusion

Key problems in the institutional and legal frameworks for river basin management at the local and central levels reveal the need to adopt a realistic institutional and enforceable legal reform process tailored to meet indigenous needs and concerns. Ideally, foreign experts should be used, especially where local experts are either inadequate or unavailable. At the local level, institutional frameworks for dispute prevention and resolution that were effective during the precolonial era are now ineffective, mainly because central institutions have undermined the powers of local chiefs. Similarly, the legal frameworks, especially some positive aspects that were enforceable during the precolonial era, are no longer readily enforceable and are weak because of degradation by the judicial system.

Water laws and institutions are available, but the institutions are ineffective and laws are inadequately enforced. Problems in the available institutional and legal frameworks at the regional level further demonstrate the need to strengthen the enforcement of available laws and enhance both the soundness and performance of existing institutions. Except for the Nile, most African river basins have entered into relevant regional agreements. However, existing regional and international agreements have been inadequately enforced. Although the ICJ has not yet adjudicated disputes concerning transnational African river basin management and development, it lacks an effective dispute resolution framework. However, the Security Council may be effective in ensuring compliance with ICJ decisions.

Although several regional and international institutions support various river basin nations in their cooperatively managing shared rivers, there has not yet been significant support given to African river basin nations. Unlike regional institutions, international institutions have provided more financial and technical assistance to transnational water resources management and development initiatives.

Although the World Bank did in the 1960s in Asia. The Bank is currently playing an effective facilitating role by
technically supporting and implementing two GEF-financed transnational environmental management projects in Africa. Although it is still too early to predict the success of these projects, they provide model frameworks for other African river basin countries seeking GEF financing and Bank implementation for transnational water resources management projects.

[*359]

VIII.

Implications for a More Significant Role by the Bank in Promoting Cooperation in Transnational African River Basin Management and Development Initiatives

Evidence demonstrates that the key factors supporting the Bank's role in Africa include its sound financial and technical expertise and its intergovernmental nature. The Bank's past significant and effective role as mediator in Indus River basin suggests that the Bank has great potential to play a significant and effective role in Africa today. Assuming that the Bank intends to play a more effective role in African river basins, it needs to address its internal problems and enhance its collaboration with regional and other international institutions in providing support to transnational water projects.

This article proposes that the Bank address its internal problems by carrying out several measures. Most importantly, it needs to continue its efforts to enhance its credibility in addressing environmental, social, private sector, and grassroots aspects of water resources management and development. The private sector and grassroots communities are key players in water use and development in most river basin nations. Enhanced credibility will enable the Bank to be more effective in promoting cooperation. Credibility can be enhanced through relevant training and the hiring of skilled staff.

The Bank should also reduce the rigid structure and eliminate the nonregional (country-specific) structure of its Africa department. These frameworks do not provide a conducive environment for the Bank to technically and financially support transnational cooperation in shared water resources management and development. The structures of the country and technical departments are carved without regard to location and the relationship among river basin nations. In practice and in principle, a country director in the Africa department does not authorize any loans to be paid directly to a group of riparian countries for joint river basin management or development.

Furthermore, the Bank needs to eliminate the restricted scope and application of its financial instruments. These instruments do not permit the Bank to lend directly to multiple countries or to riparians involved in joint transnational initiatives, undermining the Bank's effectiveness in promoting joint regional cooperation. Several Bank project managers have devised innovative means of supporting regional water initiatives, but such means still restrict the Bank's effectiveness and impact.

The Bank must clarify its charter prohibiting assistance to countries in issues concerning political affairs. This mandate creates confusion as to whether the Bank should get involved with certain transnational water projects. It is often difficult to delineate between political affairs and social, economic, and environmental issues. Realistically, most transnational water resources initiatives have political implications, including conflicts among various sectors, governmental institutions, and communities. Ironically, the two water projects that the Bank is implementing, the Lake Victoria and Lake Malawi initiatives, have such political implications. The Bank must similarly clarify the time or scope of its role in dispute prevention and resolution in its mandate or policies (OP 7.50). The current lack of clarity adversely affects the Bank's effectiveness and its potential role in promoting cooperation in transnational river management and development.

[*361] Undoubtedly, the Bank stands to gain by addressing its problems. As a financial institution, the Bank benefits from preventing and settling disputes among its client countries concerning the development and management
of shared waters. Such disputes may pose a major obstacle to the flow of the Bank's financial resources to and from such countries. n201 Furthermore, if the Bank does not improve its current role in the transnational water resources field, its role may become marginalized in the future. The Bank is only one of the players in the field. n202 The market for services in this field is growing and becoming more competitive. The Bank must adopt these recommendations and other measures to be at the cutting edge in adjusting to changes in the global economy so as to maintain its status as a sound development and financial institution.

[*362]

Annex 1 n203
Status of Water Law and Regulation in Selected African Nations

SEE ORIGINAL  [*363]

Status of Water Law and Regulation in Selected African Nations

SEE ORIGINAL  [*364]

Status of Water Law and Regulation in Selected African Nations

SEE ORIGINAL  [*365]

Status of Selected International River Basin Organizations and Agreements (Bilateral and Multilateral) in Sub-Saharan Africa

SEE ORIGINAL  [*366]

Status of Water Law and Regulation in Selected African Nations

SEE ORIGINAL  [*367]

Status of Water Law and Regulation in Selected African Nations

SEE ORIGINAL  [*368]

Major Regional (African Region) River Basins Shared by More Than One African Nation (Basin area in excess of 199,999km$^2$)

SEE ORIGINAL  [*369]

Map

SEE ORIGINAL

Legal Topics:

For related research and practice materials, see the following legal topics:

FOOTNOTES:
n1. For example, those located within the Sahelian belt and in the Eastern and Southern Africa subregions.


n3. See id.


n6. See id.


n8. The countries have been trying to resolve their differences by negotiating at a series of Nile conferences. See id. at 77.


n11. See Sharma et al., supra note 2, at xiv--xv.

n12. This expertise includes a strengthened institutional capacity to negotiate and regulate regionally.


n15. See id. at OP 7.50. See also id. at BP 7.50, GP 7.50. The OPs and BPs also provide guidance and procedures for notification and exception to notification of riparian nations prior to developing a Bank-financed project on a shared waterway. For instance, paragraph 4 of OP 7.50 provides, inter alia, that a country that is a beneficiary of a Bank-financed project on a shared international river notify other riparian nations of the
proposed project. See id. at OP 7.50, para. 4. See also id. at BP 7.50.

n16. For the purposes of this article, "joint cooperation" refers to dispute prevention and resolution.

n17. See Sharma et al., supra note 2, at 54; Caponera, supra note 13, at 97--98.

n18. See Sharma et al., supra note 2, at 54; Caponera, supra note 13, at 98.

n19. See Caponera, supra note 13, at 67--68, 98. Examples are the customary systems of Lesotho, Ghana, Tanzania, and Nigeria.

n20. See id. at 98.

n21. See id.

n22. See id.

n23. See id.

n24. See id. at 80, 100.

n25. See id. Several countries, including Nigeria, Zambia, and Ghana, have established environmental protection agencies charged with, inter alia, the main responsibility of managing and protecting water resources. However, several institutions of varied sectors (e.g., mining, energy, water supply, and sanitation) continue to perform such management functions simultaneously with development functions. Nigeria also has river basin management institutions that perform conflicting functions of water pollution control and water resources development such as building dams. See Federal Environmental Protection Agency Decree (Nigeria) (1988) (on file with author); River Basin Development Authorities Decree (Nigeria) (1987) (on file with author); Zambia Environmental Support Program, World Bank, Africa Region, Eastern and Southern Africa, Agriculture Operations, Staff Appraisal Report No. 16239-ZA (May 7, 1997) (on file with author) [hereinafter Zambia ESP].

n26. See Caponera, supra note 13, at 80, 100. In some countries a law enforcement institution is either part of an environmental protection agency or part of varied sectors. In Nigeria, federal and state environmental protection agencies are in charge of water pollution control and enforcement. But the Federal Ministry of Water Resources also performs this function. See Federal Environmental Protection Agency Decree, supra note 25.

n27. In most countries, either the Cabinet of Ministers or the legislature approves laws drafted by a relevant institution. In some countries with a parliamentary system, such as Zambia, the Cabinet of Ministers approves water pollution laws that are drafted by a governmental institution. See Zambia ESP, supra note 25. The institution is normally an environment agency, a water sector institution, or a sector-based institution. Sectors include mining, agriculture, and sanitation.
n28. Here unsoundness is defined broadly to include incompetence resulting partly from the inexpe-
rience of relevant technical staff. Inexperience is often due to underutilization of relevant technical 
expertise.

n29. See Caponera, supra note 13, at 97.

n30. These sectors include environment, agriculture, mining, water supply, and sanitation.

n31. See id. See also supra notes 26, 27 and accompanying text for examples of various government 
institutions. There is also overlap of competencies in the water sector and poor planning.

n32. See Sharma et al., supra note 2, at 31--32.

n33. See id.

n34. These countries include Cameroon, Ghana, Kenya, Nigeria, and Tanzania.

n35. In Nigeria, these institutions include the office of the president or head of state and the governor's 
office.

n36. See Sharma et al., supra note 2, at 67.

n37. See id. Some basin countries like Nigeria have also adopted from the United States a system 
empowering the legislature with water lawmaking functions. However, in practice, the executive arm often 
exercises broad and conflicting powers and encroaches upon legislative functions.

n38. See id.

n39. See id. at 30--32.

n40. The Bank should improve communications skills and expertise in promoting cooperation between 
grassroots communities and their governments.

n41. Governments of countries, including African basin nations, are members of the Bank. Countries 
appoint government officials to represent country interests at meetings such as project approval meetings 
and those of the Board of Executive Directors of the Bank. See Michael D. Sandler, American Bar Association 
Section of International Law and Practice, Standing Committee on World Order Under Law Report to the House 

n42. See id.

n43. The countries include Angola, Ethiopia, Uganda, Malawi, Mozambique, Namibia, Tanzania, Zambia,
and Zimbabwe.

n44. See infra note 119.

n45. See Caponera, supra note 13, at 67--68.

n46. See id. at 66.

n47. See Sharma et al., supra note 2, at 54.

n48. See Caponera, supra note 13, at 66.

n49. See id. at 66--67.

n50. See id.

n51. See id.

n52. See Sharma et al., supra note 2, at 54. The precolonial era witnessed customary laws that were enforced to prevent and resolve disputes. The threat of social sanctions deterred inefficient management of the water resources. Consequently, water disputes rarely arose until the application of common laws and modern statutes during the colonial times. See id.

n53. See id. at 31--32, 67.

n54. See id. at 31--32, 54. A negative aspect of customs is that women are excluded from entering into oral agreements among family members governing the management and development of shared rivers. Other sets of cultural norms with negative aspects include superstitious beliefs and bigamy. See id.

n55. See Valentina Okaru, Effective Institutional and Legal Means of Controlling Water Pollution from Sewage: Nigerian and United States Experience (1994) (unpublished JSD thesis, Stanford Law School) (on file with the Stanford Law Library). These judges have erroneously applied the repugnancy doctrine to eliminate such positive customs and traditions. Pursuant to this English common law-based doctrine used to determine the admissibility of African customs and traditions, a judge has the authority and discretion to overrule any customary laws that the judge deems to be "repugnant to natural justice, equity and good conscience." Id. This doctrine is still applied in most former British colonies. See id.

n56. See id.

n57. See Sharma et al., supra note 2, at 54.
n58. Interview with key members of a family in Eastern Nigeria (June 1996). Rural communities respect oral water agreements among families and lineages concerning the use and management of shared waters such as ponds and lakes. The agreements sometimes concern fisheries management. The threat of social sanctions induces compliance with such oral agreements. See id. "A gentleman's word is his bond." Id.

n59. Several countries have developed statutes and water laws. See Caponera, supra note 13, at 99. These countries include Burkina Faso, Cameroon, Ghana, Kenya, Niger, Nigeria, Sudan, Tanzania, Togo, Uganda, and Zambia. See id. For a compilation of the status of water laws in the African river basins, see infra Annex 1.

n60. See Caponera, supra note 13, at 99. Customary laws have been recognized in the modern statutes, particularly as regards land tenure, grazing rights, and cultivation. However, there are still unresolved conflicts between the provisions of the two legal systems - customary and statutory. See id. In contrast with most countries, Lesotho has been relatively successful in reconciling some of the conflicts. See infra notes 72--75 and accompanying text.

n61. These countries include Cameroon, Burkina Faso, and Madagascar.

n62. These countries include Nigeria, Ghana, Kenya, and Zambia.

n63. See Caponera, supra note 13, at 97, 100.

n64. See id. at 67--68.


n66. Customary water laws are based on the assumption that water is communally owned and is a free social commodity, while modern water statutes are based on the assumption that water is a privately owned economic good that should be priced. See Caponera, supra note 13, at 76--78, 98--99. Pursuant to the common law riparian system, running water resources are not privately owned but are regarded as transient, and a riparian land owner may use the water provided that such use allows for the natural flow of water. See id. at 81. In civil law countries, the presumption is that water is in the public domain, and water use is subject to government permits/authorizations. See id. at 99.

n67. See Sharma et al., supra note 2, at 55.

n68. Water Resources Act, No. 22 of 1978 (on file with author).

n69. See Sharma et al., supra note 2, at 55.

n70. See id.
n71. See id.

n72. See id. at 67. Such unenforcement is primarily due to social, technical, and financial factors that militate against enforcement. Communities need to be made aware of their rights and obligations to enforce laws or to goad government enforcement agencies to act accordingly. See id. at 31.


n74. See id.

n75. See Okaru, supra note 55.

n76. See id.

n77. Indian judges are, in principle (Indian Constitution) and practice, adjudicating disputes involving both the usage of shared waters and the management of water resources among various state governments and other institutions within national boundaries. See Center for International Development and Conflict Management, Seminar of Ganges River Dispute (Feb. 8, 1995).

n78. The countries include Angola, Ethiopia, Uganda, Malawi, Mozambique, Namibia, Tanzania, Zambia, and Zimbabwe.

n79. See infra Part VI(A).

n80. "Regional" refers to within the Africa region, not the global level.

n81. See Rangeley et al., supra note 4, at 7--12.

n82. See id.

n83. See id.

n84. See id. at 11--12. For a list of the SADC member countries, see infra note 123.


n86. See id. at 90. See also Report of the Secretary-General on the Establishment of a Mechanism for Conflict Prevention, Resolution and Management, Organization of African Unity Council of Ministers, 58th

n87. This support includes roads, transport, telecommunications, and technology.

n88. These problems have been encountered in the Bank's implementation of the Lake Victoria and Lake Malawi projects. See infra Part VI(A). See also infra note 119.

n89. See Summary of World News (BBC radio broadcast, July 18, 1995). In recognizing the importance of enhancing the technical capacity of the Nile Basin states, Canada, Italy, and UNEP have set aside US$ 6.5 million to establish a database to develop water resources for the states and to diagnose Nile Basin environmental problems. See id.

n90. See Rangeley et al., supra note 4, at 9--12. The SADC is in the process of clarifying its water mandate. See Trolldalen, supra note 85, at 90. A regional water unit was established at the SADC office in Lesotho in 1995.

n91. The SADC's goals include promoting cooperation in regional development (water and nonwater) programs; economic growth and interdependence; and interaction between national and regional development programs. See Rangeley et al., supra note 4, at 11--12.

n92. Proceedings for the settlement of disputes may be brought by the following means: jointly by the parties, by one of the parties, by the council of ministers, and by the assembly of the heads of state and government. See OAU Report, supra note 86, at 3--7; Organization of African Unity Charter, May 25, 1963, art. III, para. 4, and art. XIX, 479 U.N.T.S. 39.

n93. See OAU Report, supra note 86, at 42--44. Several members have failed to pay their dues. See id. at 5.

n94. See generally id.

n95. See Trolldalen, supra note 85, at 19.

n96. See Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.I.A.S. No. 993, art. 34 [hereinafter ICJ Statute]. An individual does not have any locus standi to institute proceedings before the ICJ. See also D. J. Harris, Cases and Materials on International Law 995 (1998).

n97. See ICJ Statute, supra note 96, art. 34. The Court has the right to play an advisory role and to issue an advisory opinion in inter-country disputes. See id., arts. 64--68; Harris, supra note 96, at 1035--40.

n98. See ICJ Statute, supra note 96, art. 36.

is an example of noncompliance with an ICJ decision from a non-African dispute. In that case, the United Kingdom brought a claim against Iran concerning the nationalization of Anglo-Iranian Oil Company. See id. The United Kingdom asked the Court for interim measures. See id. After the Court ordered interim measures, the defendant (Iran) objected to the Court's jurisdiction and decision generally. See id. Despite the objection, the Court made an order for interim measures. See id. But the Court later sustained Iran's objections to its jurisdiction and provided that the order will cease to be operative upon the delivery of its judgment. See id.; see also Harris, supra note 96, at 1000. This Iranian case is not unique; there have been several cases where a defendant has challenged the Court's jurisdiction or refused to comply with the Court's interim measures and decisions. See Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3 (July 25); Nuclear Test (N.Z. v. Fr.), 1973 I.C.J. 341 (Sept. 6). See Harris, supra note 96, at 1004.

n100. The Security Council has more teeth than the General Assembly. The Security Council played an active role during the 1991 Gulf conflict and recognized the environmental implications of military decisions. See Patricia W. Birnie & Alan E. Boyle, International Law & The Environment 130--31 (1992).

n101. See ICJ Statute, supra note 96, art. 53.

n102. U.N. Charter art. 94, para. 2.

n103. The Security Council is composed of five permanent members (the Republic of China, the United States, the Kingdom of Great Britain and Northern Ireland, France, and Russia) and ten nonpermanent members. The General Assembly elects the nonpermanent members, and the election process is often politicized. See id. art. 23.

n104. The Security Council acts in accordance with its powers stipulated in the following chapters of the United Nations Charter: (a) ch. 6, art. 42 (pacific settlement of disputes); (b) ch. 7, art. 51 (threats to peace, breach of peace, and acts of aggression); (c) ch. 8, arts. 53, 54 (regional agreements); and (d) ch. 12, arts. 83, 84 (international trusteeship system).


n106. The ICJ found that the two countries violated international law. See McCaffrey, supra note 105, at 291. The Court's decision was based partly on the need for the two countries to respect their 1977 treaty obligations to protect the environment in developing their shared water courses. See id. See also Ida L. Bostian, The International Court of Justice Decision Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia), Colo. J. Int'l Envtl. L. & Pol'y 1997 Y.B. 186 (1998). It is this author's view that this case demonstrates that the ICJ is increasingly placing more weight on the environmental protection of international watercourses. However, the Court's failure to order the two countries to close the dam is indicative of some limitation in the
Court's power to goad countries into compliance with their treaty obligations. But such a limitation may be attractive to some countries, including some African basin nations, which assert their right to sovereignty and self-determination and would like some discretion and flexibility in implementing the Court's decision "in good faith." This Hungary case may be a model for African river basin nations that face similar environmental and shared water disputes to seek recourse to the procedural and substantive legal process of the ICJ. In the future the Court's evolving role in this area of international watercourses and the environment may be better defined and shaped if more countries seek recourse to its procedure and mechanism.


n108. It is the ICSID administrators' task to ensure that the commission and tribunal perform the designated functions effectively. See Antonio Parra, The Role of the World Bank in the Settlement of International Investment Disputes 5 (1987) (unpublished paper, presented at the ABA National Institute on the Resolution of International Commercial Disputes, on file with the Colorado Journal of International Environmental Law and Policy). Some experts have asserted that the reason behind the World Bank forming the ICSID is to relieve the Bank of the "extra-curricular" burden of getting involved in settling investment disputes. See id. But it is this author's view that the Bank (IBRD/IDA) still has great potential to promote cooperation in transnational water development investments and water management initiatives because the institution is developmental, financial, intergovernmental, and technical in nature. See infra, Part VII.


n110. The IDA and IBRD have different articles of agreement. See Sandler, supra note 41, at 444--47.

n111. For example, the gross national product (GNP) per capita.

n112. See Sandler, supra note 41, at 446--47.

n113. See Convention, supra note 107, art. 25(1), 17 U.S.T. at 1270, 1280, 575 U.N.T.S. at 159, 174--75.

n114. See id.

n115. See, e.g., id. art. 38, 17 U.S.T. at 1285--86, 575 U.N.T.S. at 184--85 (granting the chairman power to appoint an arbitrator if one has not been appointed by the parties); id. art. 45(1), 17 U.S.T. at 1287, 575 U.N.T.S. at 188--89 (failure to appear is not deemed an admission of the other party's assertion); id. art. 53(1), 17 U.S.T. at 1291, 575 U.N.T.S. at 194--95 (award is binding on parties and shall not be subject to any appeal except as provided for in this convention).

n116. To prevent possible frustration from national courts, the ICSID system is not subject to the control of national courts. However, such courts may assist in the recognition and enforcement of ICSID awards. See id. art. 54(3), 17 U.S.T. at 1291--92, 575 U.N.T.S. at 194--95 ("execution of award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought").
n117. See infra Part VI(B).

n118. See Parra, supra note 108, at 5.


n122. See id. at 313--15. The three Senegal basin states (Mauritania, Mali, and Senegal) signed some agreements including the Convention Establishing the OMVS (Organisation pour la Mise en Valeur de Fleuve Senegal), adopted at Novakchott on Dec. 17, 1975; and the Convention Relating to the Status of the Senegal River, adopted at Novakchott (Mauritania) on Mar. 11, 1972. See id.


with the Colorado Journal of International Environmental Law & Policy) [hereinafter Nile 2002 Conference].

n128. See Sharma et al., supra note 2, at 51--52. This does not include the SADC protocol; it is still too early to determine the degree of enforcement of the dispute prevention/resolution clause of the protocol because it was signed in 1995.

n129. See McCaffrey, supra note 125, at 94. See generally Shady et al., supra note 7. The 1929 settlement allocated 12 times the amount of water to Egypt than the amount given to Sudan and preserved Egypt's historical and natural rights in the Nile waterways. Exchanges of Notes Between the UK and Egypt in Regard to the Use of the Waters on the River Nile for Irrigation Purposes, Cairo, May 7, 1929, 93 L.N.T.S. 44. The 1959 Agreement for the Full Utilization of the Nile Waters apportioned all available waters of the Nile, which had been estimated at 84 billion cubic meters per year (CMY). Agreement between the United Arab Republic and the Republic of Sudan for the Full Utilization of the Nile Waters, Cairo, November 8, 1959. Of the total 84 billion CMY, the agreement allots 55.5 billion CMY to Egypt. See id. See also McCaffrey, supra note 125, at 94.

n130. See McCaffrey, supra note 125, at 94.

n131. Id.

n132. Author's recollection from the African Ministerial Conference on Environment (AMCEN) in Nairobi, Kenya, March 1995 (notes on file with author). Several countries do not enforce and comply with their obligations assumed under treaties that they sign and ratify. See id.

n133. See Trolldalen, supra note 85, at 86--91.

n134. See id. at 88 (discussing the Bulawayo Water Diversion Project).

n135. Possible governing principles include equitable utilization, reasonable use, riparian doctrine, and customary law.


n140. Declaration on the Human Environment done at Stockholm on 16 June 1972, in Report of the United Nations Conference on the Human Environment, U.N. Doc. A/CONF.48/14/Rev.a (1973); See Birnie & Boyle, supra note 100, at 90. States have a sovereign right to exploit their own resources and a responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction. See id.


n142. See generally Lake Lanoux Arbitration, 12 R.I.A.A. 281; Territorial Jurisdiction of the Int'l Comm'n of the River Oder, 1929 P.C.I.J. (Ser. A) No. 23 (Sept. 10).

n143. Lake Lanoux Arbitration, 12 R.I.A.A. 281.

n144. See id. at 314--17.


n149. Corfu Channel, 1949 I.C.J. at 36.

n150. Helsinki Rules, supra note 136, art. IV at 486. See McCaffrey, supra note 125, at 98.

n151. See McCaffrey, supra note 125, at 98.
n152. See id.

n153. Draft Articles, supra note 138, arts. 5--7, at 3--4; UN Convention, supra note 139, arts. 5--7 at 705--06. The current rule is a deviation from the ILC's earlier position, which was similar to the ILA view according primacy to the equitable utilization principle. McCaffrey expressed the ILC's earlier position, which was that "the right of a system state to use the water resources of an international watercourse system is limited by the duty not to cause appreciable harm to the interests of another system state, except as may be allowable under a determination for equitable participation for international watercourse system involved." McCaffrey, supra note 125, at 99.

n154. See McCaffrey, supra note 125, at 99.

n155. See Godana, supra note 121, at 327.

n156. Bernie & Boyle, supra note 100, at 90.


n158. See Bernie & Boyle, supra note 100, at 228.

n159. See McCaffrey, supra note 125, at 99. "Weaker" can refer to GNP per capita, technological, financial, or military power.

n160. Although most of the ILC draft rules were used in the UN Convention, there are a few significant differences. See supra, notes 139, 153. See also Aaron Schwabach, The United Nations Convention on the Law of Non-Navigational Uses of Transboundary Watercourses, Customary International Law, and the Interests of Developing Upper Riparians, 33 Tex. J. Int'l L.J. 257 (1998).

n161. The rule seems to encourage a "race to the river" to develop. McCaffrey, supra note 125, at 99. See also Bernie & Boyle, supra note 100, at 228.

n162. See McCaffrey, supra note 125, at 99; Helsinki Rules, supra note 136, art. I at 484. Ethiopia continues to assert the primacy of 1966 Helsinki Rules of equitable utilization as the paramount principle of international water law. But Sudan and Egypt continue to object to such an assertion. Additionally, the countries debate the meaning of equitable utilization. See Nile 2002 Conference, supra note 127. Ethiopia also made this assertion at the 1996 World Bank--Financed Water Resources Management and Development Conference in Nairobi, Kenya.

n163. See McCaffrey, supra note 125, at 99.

n164. Quarterly Rep., 1996, supra note 119, at 43. The GEF Council approved the project in April, 1996.
n165. See id. at 42--43.

n166. International Development Association, Articles of Agreement (Sept. 24, 1960) art. V, sec. II, at 8 [hereinafter IDA Articles]. Although the IDA articles provide for funding to a regional organization, in practice the IDA and IBRD do not provide funds to such organizations.


n169. See id. at 2.

n170. See id.


n172. See id. at 4. Pakistan contested India's diversion of the river feeding Pakistan's irrigation schemes. In defense, India claimed a sovereign right over the waters passing through its territory. See id. This is one of the few cases involving the Bank as mediator.

n173. See id. at 7.

n174. See id.

n175. See id. at 9.

n176. See id. at 3.

n177. See id.

n178. See id. at 5. These countries are Australia, Canada, Germany, New Zealand, the United Kingdom, Italy, and the United States. See id.

n179. See id. at 4.

n180. See id. at 5.

n181. See id. at 7. These countries, as members of an interim Mekong Committee, revised an indicative plan
on the Mekong River basin in light of the changing economic, social, and political conditions in the region. See id.

n182. See id.

n183. See id.

n184. See id. at 9.

n185. See id. at 10. Vietnam subsequently joined the Mekong Committee. See id.

n186. This can be accomplished through the use of local experts, including water lawyers, water engineers, and social scientists.

n187. This occurs when judges apply the repugnancy doctrine. See Okaru, supra note 55.

n188. The ten riparian nations of the Nile River, therefore, must enter into a formal regional agreement governing the development and management of the river.

n189. The GEF is providing financial and technical assistance, as are some bilateral donors. See Malawi Project Document, supra note 119. See also Quarterly Rep., 1996, supra note 119. The World Bank has taken on the role as implementor and facilitator in the Lake Victoria and Malawi projects. See Malawi Project Document, supra note 119. See also Quarterly Rep., 1996, supra note 119.


n191. The Bank's sound financial and technical expertise enables it to accurately assess economic, social, environmental, scientific, and legal information required for determining the scope and gravity of disputes concerning shared rivers.

n192. See Sandler, supra note 41, at 446.

n193. These institutions include NGOs, the UN, the GEF, bilateral donors, and regional institutions. Such collaboration will facilitate the process of implementing such projects partly because of the reduction of any conflicts and overlaps in uncoordinated donor support.

n194. See Trolldalen, supra note 85, at 23--24.

n195. See IDA Articles, supra note 166, art. V. This assertion is also based on the author's personal memory regarding the Bank's practice. Although the IDA articles of agreement allow the Bank to provide loans to a regional organization, in practice, the organization does not provide funds to such organizations. Further, the
articles do not authorize the organization to provide loans directly to multiple countries or governments.

n196. These instruments restrict the Bank to providing funds for a specific country initiative.

n197. For instance, the Bank acts as implementor using the GEF or a bilateral donor as financier.

n198. See IDA Articles, supra note 166, art. V, sec. 6; Sandler, supra note 41, at 450. The mandate does not expressly prohibit the organization from supporting country-specific initiatives that involve technical, social, environmental, and economic concerns. The Bank must clarify the scope of political affairs that are prohibited and recognize that several of the projects it supports have political implications.

n199. See Malawi Project Document, supra note 119. See also Quarterly Rep., 1996, supra note 119.

n200. For instance, whether the Bank can act with or without a request for dispute resolution assistance from all the riparian countries of a particular river basin (such as the 10 Nile Basin nations) and/or less than all of the riparian countries in a particular river basin. It is uncertain if the Bank can expand its role beyond the provisions of OP 7.50 and its Charter.

n201. Some assert that more money flows into the United States than flows out to developing countries from World Bank operations. See Sandler, supra note 41, at 448.

n202. Several bilateral and regional donors, the GEF, and some international organizations (e.g., United Nations Development Programme) are involved.

n203. This annex is compiled from several sources, including Sharma et al., supra note 2; Rangeley et al., supra note 4; and the author's recollection of her work at the World Bank between 1994 and 1997 (staff appraisal reports, presentations by country representatives at Bank-financed water resources conferences, etc.).