Transboundary Jurisdiction and Watercourse Law: China, Kazakhstan, and the Irtysh

ERIC W. SIEVERS[†]

SUMMARY

I. INTRODUCTION: THE FIFTH LARGEST RIVER IN THE WORLD 2

II. SOVEREIGN KAZAKHSTAN ON THE EDGE OF CHINA'S TENTH FIVE-YEAR PLAN 3
- *A. Internationalizing Post-Soviet Politics* 5
- *B. Bargaining in a Short Legal Shadow* 7

III. WHAT IS TRANSBOUNDARY WATERCOURSE LAW? 13
- *A. Customary Law* 14
  1. Limited Territorial Sovereignty, Equitable Use, and Sustainable Development 15
  2. The Notice Rule 17
  3. The Consultation Rule 17
  4. The Succession Rule 17
  5. The Community of Navigation Rule 19
  6. The Human and Environmental Disaster Rules 21
  7. General International Environmental Law 22
- *B. Competing Visions of the Progressive Development of Watercourse Law* 23
  1. The Global Vision of Watercourse Law 23
  2. The Western Vision of Watercourse Law 24
- *C. Shallow Shoals of Evolving Watercourse Law* 25
  1. Abrogated Scholarship 25
  2. The Meaning of "Existing Uses" 25
  3. Weak Jurisdiction 28

IV. REMEDY AND RECOURSE 29
- *A. Conventions* 29
- *B. Treaties and Forum Shopping* 34
- *C. Advisory Opinion* 35
- *D. Legal Arguments in a Legal Forum* 36
- *E. Global Administration and the Court of Public Opinion* 39

V. CONCLUSION: TRANSBOUNDARY JURISDICTION 40

---

† Ph.D., Massachusetts Institute of Technology; J.D., Yale Law School; M.A., Norwich University; B.A. Swarthmore College. Associate, Davis Center for Russian Studies of Harvard University; Associate, Almaty, Boston, and New York offices of LeBoeuf, Lamb, Greene, and MacRae, L.L.P. Research in Central Asia conducted 1998–2000 under U.S. EPA STAR Fellowship, NSEP Graduate International Fellowship, and National Research Council Governance in Post-Communist Societies Fellowship. Thanks to Vadim P. Nee and other staff of the Law and Environment Eurasia Partnership for helpful assistance on early drafts, to Professor Durwood Zaelke for guidance, and to LeBoeuf's International Boundaries and CIS practice groups for the time to write this article, in which all errors and opinions are those solely of the author.

I. INTRODUCTION: THE FIFTH LARGEST RIVER IN THE WORLD

Arising in a sparse border region of Mongolia and China, the Black Irtysh[1] flows for 700 kilometers before crossing Kazakhstan's border to empty into Lake Zaisan, one of the thirty largest lakes in the world. On the other side of Lake Zaisan, the river, now the Irtysh proper, forms Kazakhstan's industrial heartland, crosses into Russia, joins the Ob River, and finally empties into the Arctic Ocean. The Irtysh flows from the most populous state in the world, through one of the least densely populated, into the largest state. Mongolia, Kazakhstan, and Russia, occupying the eighteenth, ninth, and first spots in terms of size, respectively, have less than two, five, and eight residents per square kilometer. In contrast, China, the third largest state, averages roughly 125 persons per square kilometer. The world's fifth largest river,[2] the Irtysh, flows north; does not contain within its drainage basin, which is the size of India, the capital of any state; and is the only river to flow through three of the planet's ten largest states.

China is now diverting the Black Irtysh under a project that threatens both water levels in the Irtysh-Ob Basin and the millions of people and dozens of ecosystems that line the Irtysh's 5,000-plus kilometer length. This article argues that China's project, a "totalitarian, gigomaniac monument which is against nature,"[3] violates customary international law both in its conception and in China's dealings with co-riparians. Yet, ironically, the emerging international law of watercourses may, in time, support China because of structural weaknesses in this law.

In their simmering dispute over this diversion, the states involved ignore—or pretend to ignore—international law, both treaty-based and customary. Coming at the end of the United Nations' "Decade of International Law," on the heels of two framework transboundary[4] watercourse treaties,[5] and soon after two watercourse cases in the International Court of Justice,[6] this disregard for international watercourse law is curious. Yet this disregard illustrates that—Pollyannaish scholars and international agencies notwithstanding—international law often fails to direct or substantially inform decision-making in many contemporary situations.

The task of redeeming a role for the application of international law in non-European watercourse disputes is challenging, but not impossible. Specifically, beyond more effective international institutions, such an effort would involve recapturing the original role of scholars in the development of international law and recognizing recent developments in international law as urging acceptance of a mechanism of transboundary jurisdiction for some watercourse disputes.

---

1. In Chinese, the Black Irtysh is Kara Ertix. Kara is Turkic for "black," and Ertix is a variant of Irtysh.

2. Depending on criteria (length, flow, area of drainage basin), the Irtysh is listed as high as three and as low as twenty on lists of the world's largest rivers. In terms of drainage basin, the Irtysh, at 3,000,000 km^2, occupies the fifth spot, behind the Amazon, Nile, Mississippi, and Congo. JOYCE L. VEDRAL ET AL. EDS., WORLD RESOURCES 1998–99 309 (1998). Many experts assign it the fourth spot. L.I. Agafonov, *Vodnost Obi i klimat planety tesno svyazany* [*The Flow of the Ob and the Planet's Climate are Closely Connected*], VODA ROSSII [THE WATERS OF RUSSIA] at 4, http://www.rosniivkh.uran.ru/water_199905_rus.htm (May 1999) (on file with author).

3. Czechoslovak President Vaclav Havel thus described the Gabcikovo-Nagymaros Dam Project in the early 1990s. Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 37 I.L.M. 162, 182 (1998).

4. While this article prefers the term "transboundary watercourse," "international watercourse" should be read as a synonym, as is the case in existing law.

5. *E.g.*, Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Mar. 17, 1992, 31 I.L.M. 1312 (Oct. 23, 2000) [hereinafter TWIL Convention]; U.N. Convention on the Law of the Non-navigational Uses of International Watercourses, G.A. Res. 51/229, U.N. GAOR, 51st Sess., 99th mtg., U.N. Doc. A/RES/51/229 (1997) [hereinafter NUIW Convention].

6. *See generally* Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 37 I.L.M. 162 (concerning the Danube River) (1998); Kasikili/Sedudu Island (Bots. v. Namib.), 39 I.L.M. 310, 381 (2000) (concerning the Chobe River).

II. SOVEREIGN KAZAKHSTAN ON THE EDGE OF CHINA'S TENTH FIVE-YEAR PLAN

While plans had long been laid and the Kazakhstan government probably knew of these plans, in late 1998 Kazakhstan's press broke a story that shocked the Kazakhstan and Russian publics. One of Asia's longest rivers was being diverted to irrigate China's depopulated west. The billion-dollar Project 635 anticipates diverting, initially, from 5%–10% of the flow of the Black Irtysh to Ulungur Lake.[7] From there, this water will be channeled to meet the needs of the Karamai petroleum fields and to irrigate 140,000 hectares in Xinjiang Province[8] via a canal that will be 300 kilometers long and twenty-two meters wide.[9] China will then increase the scale of its diversion to up to 50% of the flow of the Black Irtysh.[10] The Tenth Five-Year Plan (2001–2005) devotes more explicit attention to western China than to any other area of the People's Republic of China.[11] Developing western China has been an increasingly important priority for China in recent years. Now, under the new Five-Year Plan, it is a pinnacle goal.

The Black Irtysh irrigation project is thus part of a larger effort to lay the foundation for increasing the agricultural and industrial foundations of western China. It is also an effort to dilute and appease Xinjiang's Muslim minorities,[12] and in this sense, it is not necessarily for the benefit of "local" populations. To wit, China has relocated millions of

---

7. Vladimir Turov, *Kak Rossiyu ostavlyayut za "vodo-zaborom"* [*How Russia is Left Out of the Water Grab*], NEZAVISIMAYA GAZETA, http://news.eastview.com/99/NGA/05/data/n083-41.htm (May 12, 1999) (on file with author).

8. *Id.*

9. Aleksei Baliev & Arkadii Medvedev, *Reki sami ne umirayut. Ikh ubivayut* [*Rivers Don't Just Die. Someone Kills Them*], ROSS. GAZETA, http://news.eastview.com/99/RGA/02/data/rg021258.html (Feb. 12, 1999) (on file with author). The canal already existed in more modest form, so the project is most accurately described as a dramatic enlargement of the 1970s-era canal. *See* Aleksander Gabchenko, Bezvizovye reki [Rivers without Visas], NOVOSTI NEDELI, http://www.nn.kz/cgi-bin/newsweek.cgi?menu=view&id=FAyKVBWkoL (Nov. 7, 2000).

10. Guesses vary from 10% to more than 50% as both Kazakhstan and Russian journalists clearly expect the worst from China. One journalist cites 25–40% as the initial diversion. Boris Kuzmenko, *Druzhba druzhboi, a vodichka vroz. Paradoksy sosedskikh vzaimootnoshenii* [*Friendship is Friendship, but Stay Away from My Water. Paradoxes of Neighborliness*], INTERFAKS AIF, http://news.eastview.com/pp/IAI/05/data/i020_011.html (May 14, 1999) (on file with author). Some sources state that 10 km^3 flow yearly across China's border. Many contend this constitutes the bulk of the Irtysh's flow. *Id. See also* VEDRAL ET AL., *supra* note 2, at 309. The Director of the Hydrogeology Laboratory at Kazakhstan's Institute of Geography states that the yearly flow should be roughly 7.8 km^3, but that flow in recent years has fallen to 5 km^3. A. A. Tursunov, *Gidroekologicheskie problemy Respubliki* [*Hydroecologic Issues in the Republic of Kazakhstan*], TSENTRALNAYA AZIYA I KAVKAZ (1998), *at* http://www.ca-c.org/journal/13_1998/st_09_tursunov.shtml (on file with author).

11. One of the ten sections of the official outline of this plan is devoted to Western China, and other sections focus sustained attention on the need to harness water resources, including a statement that "no time can be lost in constructing pivotal projects on major rivers." Zhu Rongji, Premier's Report on the Outline of the Tenth Five-Year Plan for National Economic and Social Development (2001-2005), Report before the Fourth Session of the Ninth National People's Congress (March 5, 2001), *in* CHINA DAILY, http://www1.chinadaily.com.cn/highlights/docs/2001-04-30/3550.html (Apr. 30, 2001) (on file with author). Regarding Western China, the plan anticipates "major breakthroughs within five to ten years." *Id.*

12. The major minority ethnic group is the Uighurs, but other minority groups include Kazakhs, Kyrgyz, and Tajiks, and until recently, these groups formed a majority of the population of Xinjiang. Separatist uprisings in recent years trouble Beijing. *See* Alexei D. Voskressenski, *Current Concepts of Sino-Russian Relations and Frontier Problems in Russia and China*, 13 CENTRAL ASIAN SURVEY 361–81 (1994). A major component of China's foreign policy regarding Kazakhstan concerns extracting guarantees from Astana that it will not tolerate any expatriate Uighur organizing on its territory. All of the "Shanghai Five" (China, Kazakhstan, Kyrgyzstan, Russia, and Tajikistan) share the goal of precluding a revival of political Islamic sentiment within their borders. Since Xinjiang is the most backward of China's regions, successful transfer of China's recent economic successes westward may quell dissent in Xinjiang.

Han Chinese to Xinjiang, and it plans to relocate millions more. This background of movements of people and shifting of policy lends strong support to persistent rumors that China also plans to divert much of the flow of the Ili River, among other transboundary rivers, south of the Irtysh in Kazakhstan.[13]

To the extent that these plans elicit concerns that China is anti-environment or anti-sustainable development, the situation in the Irtysh Basin lends credence to China's general protests about the inequity of restrictions placed on the development opportunities of developing states under the pretext of global environmental concerns. After all, the USSR pursued a pre-environmental-age spate of development projects in the Irtysh Basin that helped make the basin one of the most impressive industrialized regions in Asia, containing some of the largest industrial concerns in the world in the Kazakh SSR cities of Pavlodar, Semipalatinsk, and Ust-Kamenogorsk. Most pertinent to a discussion of equity, during their own Tenth Five-Year Plan, the Soviets saw the first year of operation of a massive canal, the largest in the former Soviet Union, to divert Irtysh water to irrigation and industrial purposes around Karaganda, Kazakhstan's second largest city. This Irtysh-Karaganda Canal no longer diverts the volume of cubic kilometers of water of past years, largely due to Kazakhstan's post-Soviet economic troubles. Yet both economic recovery in Kazakhstan and the expected water needs of the new capital, Astana, rely on this canal[14] and explain 2001 fiscal year allocations of several million dollars for the canal's repair.[15]

However, the water is no longer there to divert. Since the construction of the Irtysh-Karaganda canal in the early 1970s, water levels in the Irtysh have dropped slightly because of the utilization of the river's hydroelectric potential, which alters seasonal flows and increases aggregate losses to evaporation and filtration, and dramatically because of the increasing use of the Black Irtysh for agriculture on the Chinese side of the border in the past decade. As a result of the decreased water levels, Kazakhstan's commercially significant river ports have difficulty operating. Russia receives two cubic kilometers less water from Kazakhstan today than in the past.[16] The large Irtysh Cascade in Kazakhstan that includes the Bukhtarmin, Ust-Kamenogorsk, and Shulbinsk hydroelectric stations may fail if the water level drops further.[17] Moreover, an analysis contained within Kazakhstan's

---

13. In the 1970s, the Chinese diverted part of the Ili River with adverse consequences for the residents on the Soviet side of the border. Turov, *supra* note 7. The flow of the river across the border fell from 17.8 km^3 to 12.7 km^3. Tursunov, *supra* note 10. The Ili currently transports roughly 12 km^3 annually over the border. *V Alma-Ate prokhodit vtoroi raund Kazakhstansko-Kitaiskikh peregovorov po problemam transgranichnykh rek* [*The Second Round of Kazakhstan Chinese Talks on Transboundary River Issues is Underway in Alma-Ata*], EKSPRESS K, Nov. 24, 1999, http://www.alatau.ru/scripts/web.exe/doc?id=100718&cp=win&scale=1 [hereinafter *V Alma-Ate*]. Twenty-four rivers flow across the China-Kazakhstan border. *Stroitelstvo plotiny na reke Irtysh na territorii kitaya ne sposobno nanesti uscherb ekologii ozera Zaisan i ekonomicheskim interesam Kazakhstana,—zayavlyaet Ministerstuo inastrannykh del RK* [*The Construction of the Dam on the Irtysh River in China is not Capable of Harming Lake Zaisan's Ecology or the Economic Interests of Kazakhstan, States the Ministry of Foreign Affairs of Kazakhstan*], KHABAR, http://www.khabar.kz/archive/result/default.asp?id=6172 (July 14, 2001) [hereinafter *Stroitelstvo plotiny*].

14. Kuzmenko, *supra* note 10.

15. *Obschie raskhody byudzheta stolitsy Kazakhstana—Astany—v 1998–2000 godakh sostavili 51,1 mlrd. tenge* [*General Budget Expenditures for the Capital of Kazakhstan, Astana, for the Years 1998–2000 Amounted to 51.1 Billion Tenge*], TRANSKASPIISKII PROEKT, *at* http://www.transcaspian.ru/cgi-bin/web.exe/rus/7452.html (Nov. 8, 2000) (on file with author).

16. Georgii Dmitrievich Bessarabov & Aleksander Dmitrievich Sobyanin, *Vodnye problemy KNR: Kazakhskii i rossiiskii aspekty* [*Water Issues of China: Kazakh and Russian Perspectives*], TRANSKASPIISKII PROEKT, *at* http://www.transcaspian.ru/cgi-bin/web.exe/rus/15806.html (May 17, 2001) (on file with author).

17. Two of these stations are currently part of a twenty-year concession from Kazakhstan to AES Altai Power (now AES Silk Road), a subsidiary of AES, an American firm. Interfax News Agency, *American AES Invests $150 MLN in Kazakh Energy Sector*, Aug. 12, 1999, 1999 WL 22855005. AES assets in Kazakhstan amount to $11 billion, and the company controls essentially the entire electricity grid along the Irtysh in Kazakhstan. *See* AES Silk Road Group, *Regions, Kazakhstan*, *at* http://www.aes.kz/eng/silk_road/regions/

1998 report to the Secretariat of the United Nations Framework Convention on Climate Change suggests that Kazakhstan's mitigation costs for every cubic kilometer of Irtysh water lost may climb as high as $1.35 billion.[18]

A. Internationalizing Post-Soviet Politics

Because this article is primarily about Kazakhstan, it deserves pointing out that the Irtysh bridges comparative politics and international relations in Kazakhstan.[19] The Irtysh controversy externalizes some of the fundamental weaknesses of the current Kazakhstan political environment, such as the entrenched non-meritocratic oligarchy, the lack of international law scholars, and the lack of awareness of how to manipulate the levers of international organizations. Yet, the controversy also showcases some of the strengths of Kazakhstan, such as an active press, interested non-governmental organizations (NGOs), and top-notch scientific expertise.

The Irtysh diversion is an important, local political issue because the Irtysh is the only sizeable source of drinking water for the Pavlodar Region.[20] Thus, it was no accident that two days after the failed March 2001 consultations with China, discussed below, Foreign Minister Erlan Idrisov found himself far from the capital in a meeting with the governors of the districts lining the Irtysh, explaining Kazakhstan's "adapted conception of foreign policy."[21]

Further, the Irtysh diversion is a hot national issue. In Kazakhstan, the Irtysh controversy is historically linked to the opposition to President Nursultan Nazarbaev. Murat Auezov, one of Nazarbaev's rivals and the former Ambassador to China, is now Executive Director of George Soros's Kazakhstan Open Society Institute. Auezov paints a devastating picture of the Chinese government as stonewalling prevaricators and the Kazakhstan government as incompetent collaborators.[22] Insisting in 1999 that the diversion was

---

aesinkz.shtm. AES could raise the issue of compensation if its concession was frustrated by a fall in the river level, or, more likely, it could seek U.S. State Department intercession, either way adding to Kazakhstan's Irtysh headaches.

18. INITIAL NATIONAL COMMUNICATION OF THE REPUBLIC OF KAZAKHSTAN UNDER THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE 68 (1998), http://www.unfccc.de/resource/docs/natc/kaznc1.pdf (on file with author) [hereinafter FRAMEWORK CONVENTION]. This figure exceeds China's alleged expenditures on the diversion by 35% and is derived from the Communication's description of aggregate costs ($8.027 billion) to implement four measures (runoff regulation, water economization, runoff diversion, and increased use of groundwater) to recover 5.97 km^3 of the Irtysh's flow. *Id.* The total flow of the Irtysh through Eastern Kazakhstan is 33.66 km^3. *Id.* at 38. *But see* Tursunov, *supra* note 10 (giving a different figure of 25.7 km^3).

19. *See generally* INTERNATIONALIZATION OF ENVIRONMENTAL PROTECTION 19–41 (Miranda A. Schreurs & Elizabeth C. Economy eds., 1997) (stating the relationship between comparative politics and international relations in China's international environmental politics).

20. Nurbek Isaev, *Okruzhayuschaya nas bolnaya sreda* [*Our Troubled Environment*], DELOVAYA NEDELYA, June 16, 2000, *at* http://www.dn.kz/arch/2000/24_00/main/econom02.htm (on file with author).

21. *Ministr inostrannykh del E. Idrisov posetil Vostochno-Kazakhstanskuyu oblast* [*Minister of Foreign Affairs Ye. Idrisov Visited the Eastern Kazakhstan Region*], Press-relizy Ministerstva inostrannykh del Respubliki Kazakhstan [Press releases of the Ministry of Foreign Affairs of the Republic of Kazakhstan], *at* http://www.mfa.kz/offical/press3.html#text80 (last visited Sept. 12, 2001) (on file with author).

22. Russian journalists are more direct, suggesting that Kazakhstan politicians allow Chinese expansionism because the Chinese "sweeten the pill" through personal bribes. Aleksei Gulyaev, *Kitai-Kazakhstan: Pogranichnyi spor prodolzhaetsya* [*China and Kazakhstan: The Border Dispute Continues*], IZVESTIYA, http://news.eastview.com/99/IZV/04/data/i078-23.html (Apr. 30, 1999) (on file with author).

commanded to begin by China's 1999–2000 fiftieth anniversary celebrations,[23] Auezov won out in public opinion over technical specialists who suggested that diversion would take many years and he therefore succeeded in making the issue a priority in the public mind.

Auezov claims that Kazakhstan was aware of suspicious activity on the Irtysh in the early 1990s. His first ambassadorial act in 1992 was to present a proposal to China on "the joint use of border rivers."[24] Having expected an answer within two months and despite his pressing, Auezov left China in 1995 with no answer.[25] Auezov ties this early-decade lack of diplomatic etiquette to late-decade movements of people. "From the flooded areas of China, day and night, an endless stream of vehicles enters Xinjiang Province bordering Kazakhstan. In the last six months of [1998] alone, three million people officially relocated from Inner China to Xinjiang, and in reality there were many more."[26] Auezov jokes that the Irtysh will soon be so shallow that chickens will wade across it at Omsk, Russia.[27] Lamenting a total lack of political will from Astana and Moscow, Auezov declares, "the leaders of Kazakhstan and Russia must take forcible measures."[28] Most in northern Kazakhstan agree.

While the Kazakhstan press covers and agitates on the issue of the Irtysh, and several non-governmental organizations (NGOs) actively lend their voices, the government refuses to elevate the Irtysh problem to a tangible national priority.[29] Instead, the Kazakhstan government takes pains to focus on the exaggerations of the press and NGOs.[30] More substantive recognition of the issue would entail acknowledging the perspicacity of opposition groups pushing the issue.

At the same time, since those who study the issue of the Irtysh inevitably conclude that nothing good bodes for Kazakhstan, the Irtysh has been a hot potato within the Kazakhstan government. Responsibility for managing the issue is regularly foisted on less and less capable and diplomatically aware state agencies, agencies that are less and less able to resist being, eventually, a scapegoat—from the Ministry of Foreign Affairs to the Ministry of Natural Resources and Environmental Protection to the Water Resources Committee of the latter ministry. One cannot help but conclude that China must have few complaints about how Kazakhstan's political and state institutions have organized themselves to address transboundary river diversions.

---

23. Sergei Borisov, *Kitaitsy mogut vypit Irtysh* [*The Chinese Might Drink Up the Irtysh*], OBSCHAYA GAZETA, Oct. 28, 1999, http://news.eastview.com/99/OGA/10/data/043-20.html (on file with author). *See also* Janibek Suleev, *My unichtozhim vremenschi kovost kak forma sosnaniya* [*We'll Wipe Out the Myopic Mindset*], 451 PO FARENGEETU, http://eurasia.org.ru/1999/analitica/04_09_Vnp0205.htm (April 1999).

24. Erik Nurshin, *Eto li tsena suvereniteta?!* [*Is this the Price of Sovereignty?!*], XXI VEK http://eurasia.org.ru/archives/october/Kit0021.htm (Oct. 15, 1998) (on file with author).

25. Borisov, *supra* note 23.

26. *Id.* China's relocation, though violently protested by native communities in the region, has been justified as necessary to save the lives of flood victims from other parts of China. Before the floods, the same movements were officially explained as the result of (allegedly) booming trade with Kazakhstan. Nurshin, *supra* note 24.

27. Borisov, *supra* note 23.

28. *Id.*

29. Kazakhstan journalists who have turned to the Chinese Embassy for information have been rebuffed with the explanation that the embassy has no appropriate technical experts. Kuzmenko, *supra* note 10.

30. *See* Makhambet Auezov, *Debyut Ministra* [*The Minister's Debut*], DELOVAYA NEDELYA, http://www.dn.kz/arch/1999/44_99/peace07.htm (last visited Oct. 10, 2001) (on file with author). Here, Foreign Minister Idrisov contends that Kazakhstan contributes 80% of the Irtysh's water, refuting the common refrain that 60% of the Irtysh's flow originates in China. *Id.*

B. Bargaining in a Short Legal Shadow

Despite its sovereign status, Kazakhstan has virtually ignored the law of sovereign states in pursuit of preventing China from diverting the Irtysh. In many respects, Kazakhstan's dealings with China resemble those of the Kazakh SSR with the Kremlin during *perestroika*; however, at that time, the Kazakh SSR had inestimably fewer recourses to international law. Yet, while Kazakhstan's options and status have changed, its leadership and methods remain essentially those of 1989. Straightforward power politics circumscribe Kazakhstan's view of its range of possibilities.

Kazakhstan's senior foreign policy officials are Sinologists by training, a bit Sino-centric, singularly in awe of China, and perhaps even irrationally desperate to avoid any sort of confrontation with China. The major Irtysh riparians are members of the "Shanghai Five," an organization consisting of China and the former Soviet republics bordering China.[31] It is often explicitly within this non-English speaking grouping that Kazakhstan voices many of its concerns.

China is indeed very important to Kazakhstan. China's 1997 acquisition of the Uzen Oil Field, among other investments, made it one of the largest foreign direct investors; Kazakhstan citizens often voice fears of being deluged with immigrants from China. Moreover, Kazakhstan is only now settling down after China claimed almost a thousand square kilometers of Kazakhstan's territory and ended up actually getting several hundred, perhaps not coincidentally along the Black Irtysh.[32] Finally, at independence, Kazakhstan emphatically expressed the hope that China would cease nuclear testing at the Lop-Nor test site near Kazakhstan, which China did in 1996.

It is, thus, not entirely surprising that Kazakhstan's reaction to China's plans has not involved a recourse to either the rhetoric or institutions of international environmental law. Instead, Kazakhstan's strategy embodies a traditional paradigm of *realpolitik* that channels domestic and international political concerns but discounts law. It equally discounts the use of subtle statements about the normative content of international law (through multilateral institutions, NGOs, or the press) to advance its political positions.

However, Kazakhstan's lack of faith in legal arguments and methods, while perhaps at least understandable in a post-communist era, contrasts sharply with its eagerness to appear active in regimes founded on global environmental accords. Since gaining independence, Kazakhstan has actively acceded to international environmental treaties, especially multilateral treaties.[33] In the national political life of Kazakhstan, reiterations of

---

31. *Cf.* Aleksander Sukhotin, *Bishkek—delo tonkoe* [*Bishkek—A Subtle Thing*], OBSCHAYA GAZETA, http://news.eastview.com/pp/OGA/08/data/034-11.htm (Aug. 26, 1999) (on file with author). Now the Shanghai Cooperation Organization, with the addition of Uzbekistan, focuses on trade and security concerns.

32. Gulyaev, *supra* note 22. *Cf.* Nurshin, *supra* note 24 (indicating China may have already begun gold mining and harvesting endangered Altai knapweed (*Leuzea carthamoides*), a natural "Viagra," in the ceded territory). Early Russian explorers noted that Maral deer wildly consumed this plant during mating season, which led to the plant's discovery as a natural cure to impotence. *Ne "Viagra", a Maralii koren* [*Not "Viagra," but Knapweed*], *at* http://dachnickam.ru/celina/text/zdorov00.htm (last visited July 20, 2001) (on file with author).

33. These include, through the end of 2000, not counting non-ratified treaties, several minor environmental treaties, and memoranda of understanding, ratifying the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access To Justice in Environmental Matters, June 25, 1998, 38 I.L.M. 57 (1999) (Oct. 23, 2000), accepting the Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818 (Aug. 19, 1994) (through procedures violating the Constitution), acceding to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087 (Apr. 6, 1999), acceding to the Convention on Long Range Transboundary Air Pollution, Mar. 16, 1983, 1302 U.N.T.S 218 (Oct. 23, 2000), acceding to the TWIL Convention, *supra* note 5 (Oct. 23, 2000), acceding to the Convention on the Transboundary Effects of Industrial Accidents, Mar. 17, 1992, 31 I.L.M. 1330 (Oct. 23, 2000), acceding to the

Kazakhstan's sovereign status are common, and such multilateral treaties are seen as ensuring Kazakhstan's continued independence.

Yet despite Kazakhstan's scale of activity in acceding to international regimes, it exhibits a less impressive record of meaningful participation. It evidences little compliance at the local level and implements almost no provisions of international obligations in its recent national environmental laws.[34] It neither seeks out nor cares much about positions on regime committees and standing bodies. For most treaties, Kazakhstan does not pay dues and is a passive bystander (or its delegates are shopping) during conferences of the parties.[35] In March 2000, faced with dues in excess of $21 million and suspension of its membership in many international organizations, Kazakhstan announced that it would meet its obligations in only 21% of the treaty regimes to which it had acceded.[36]

For the first three years of the Irtysh controversy, Kazakhstan essayed primarily to convince Russia to take its side. Russian press and NGOs,[37] alerted by Kazakhstan colleagues, voiced condemnation of the project.[38] However, Irtysh water is just not among the Kremlin's most pressing calamities; Moscow has kept silent on the issue.[39] More interestingly, Kazakhstan has inquired into whether Kyrgyzstan could threaten China with river diversion; the rivers shared by these two states mostly flow from Kyrgyzstan into

---

Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, 30 I.L.M. 800 (Oct. 23, 2000), ratifying the Convention to Combat Desertification, June 17, 1994, 33 I.L.M. 1328 (July 7, 1997), ratifying the Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849 (May 4, 1995), participating in the Global Environment Facility, *at* http://www.gefweb.org/participants/Conventions/conventions.html (explaining what the GEF is) (last visited Oct. 16, 2001) (Mar. 30, 1998), acceding to the ozone regime, *at* http://www.unep.ch/ozone/treaties.shtml (discussing the conventions and protocols making up this regime) (last visited Oct. 16, 2001) (Oct. 30, 1997 and later dates for protocols and amendments), and acceding to the Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37 (July 29, 1994). The dates in parentheses following each treaty correspond to national acts, not registration by depositories. These dates of accession and ratification have been compiled by the author as a part of a collaborative project and are current as of Nov. 2000. Status of International Environmental Accords in Central Asia (Table 1), *in* LAW AND ENVIRONMENT EURASIA PARTNERSHIP, GLOBAL ACCORDS AND ECOLOGICAL HUMAN RIGHTS: ADVOCACY FOR RULE OF LAW AND ENVIRONMENTAL REFORM IN CENTRAL ASIA (2000) (unpublished project report for the John D. and Catherine T. MacArthur Foundation) (on file with author); *see also* ERIC W. SIEVERS, THE POST-SOVIET DECLINE OF CENTRAL ASIA: SUSTAINABLE DEVELOPMENT AND COMPREHENSIVE CAPITAL (forthcoming March 2002).

34. *See, e.g.*, Ob okhrane okruzhayuschei sredy [Law on Environmental Protection of July 16, 1997], *translated and reprinted in* RUSSIA & THE REPUBLICS: LEGAL MATERIALS (John N. Hazard & Vratislav Pechota eds., 1998).

35. *Cf.* FRAMEWORK CONVENTION, *supra* note 18, at 57. Kazakhstan was the only non-host developing state to announce voluntary emissions reductions at the 1998 UNFCCC Conference of the Parties. Yet, it did so at the urging of the United States to attract U.S. emissions trading funds. Kazakhstan's 2000 carbon emissions are roughly 60% of its 1990 baseline due to post-Soviet decline. 1994 emissions were under 80% of the 1990 baseline. *Id.* at 44.

36. Oleg Khe, *Kazakhstan iz-za neuplaty chlenskikh vznosov peresmatrivaet svoe uchastie v mezhdunarodnykh organizatsiyakh* [*Because of Its Failure to Pay Dues, Kazakhstan is Reconsidering Its Participation in International Organizations*], PANORAMA, http://www.panorama.kz/info/index.asp?yearfolder=2000&num=11&NumArticle=02 (March, 2000) (on file with author).

37. For example, on October 23, 1999, 200 environmental NGOs from Kazakhstan, Russia, and Europe appealed to all three states to conduct trilateral talks (involving NGOs) and base a watercourse agreement explicitly on the 1992 U.N. Convention on the Protection and Use of Transboundary Watercourses and International Lakes. *Obraschenie uchastnikov Mezhdunarodnoi konferentsii "Dni Volgi-99" o stroitelstve kanala "Chernyi Irtysh-Karamai"* [*Resolution of the Participants of the 1999 Volga Day Conference on the Construction of the Black Irtysh-Karamai Canal*], *at* http://uic.nnov.ru/PUSTYN/ecovolga/kamray.ru.html (Oct. 23, 1999) (on file with author).

38. The project may reduce the level of the Irtysh at Omsk by 60 cm, rendering current intake equipment for the city water supply useless. The Regional Environmental Protection Committee projects that the drop will interrupt shipping. Turov, *supra* note 7. While Russia's government remains silent, Omsk Governor Leonid Polezhaev promised to appeal to an "international court" if China proceeds as planned. *Id.*

39. However, initial reports indicated Russion support for trilateral negotiations. *See* Turov, *supra* note 7.

China.[40] Despite close ties with Kazakhstan,[41] Kyrgyzstan refrains from issuing such threats to China.[42]

As a result, with no reference to watercourse or environmental treaties and only vague references to international norms,[43] Kazakhstan's strategy has involved requesting negotiations. Moreover, Kazakhstan only began actively seeking cooperation from China after vocal protests by local newspapers and NGOs,[44] who alleged a plot to appease China and suppress information. Ironically, many of these protests urge Kazakhstan to defend itself with legal tools. One of the first such protests appeared in October 1998 in the opposition newspaper *XXI Vek*. In *Is This the Price of Sovereignty?!*, Erik Nurshin revealed the outlines of China's plans and accused the government of betraying its citizens to placate China.[45] Nurshin's article, while the first, was also the best because it alone adequately presented the legal aspects of the diversion under international law. "Under international agreements, one party does not have the right . . . to substantially impair the functioning of a river without [consulting] the other party."[46] Nurshin also comments that neither Kazakhstan's president nor Kazakhstan's foreign minister had even mentioned the Irtysh during recent addresses to the United Nations General Assembly.[47]

Bilateral negotiations (without Russia) began in May 1999 in Beijing, and it was only there that Kazakhstan received information sufficient to fulfill China's notification requirement.[48] China stated plans to divert 450 million cubic meters of water through the Karamai Canal in 2000 and to expand this diversion to one cubic kilometer by 2020.[49] In

---

40. That China is a lower riparian with respect to post-Soviet rivers other than the Amur is largely unknown to Westerners. *See* Aaron Schwabach, *The United Nations Convention on the Law of Non-navigational Uses of International Watercourses, Customary International Law, and the Interests of Developing Upper Riparians*, 33 TEX. INT'L L.J. 257 (1998) [hereinafter Schwabach 1998] (suggesting that China is only a lower riparian with regard to the contiguous Amur). In fact, twelve major rivers, including the Black Irtysh (from Mongolia), flow into China. Kyrgyzstan is the upper riparian for three of these, including the second and fourth largest, which transport over 5 km^3 annually into China. Kazakhstan is an upper riparian for two, the Haba and Tekes, with a combined annual flow of over 2.3 km^3. The Haba is the third largest river flowing into China. The most important transboundary river, in size and economic importance, for which China is a lower riparian, is the Pearl River, which flows from Vietnam. Food and Agriculture Organization of the United Nations, *China*, FAO AQUASTAT, *at* http://www.fao.org/waicent/faoinfo/agricult/agl/aglw/aquastat/china/chin-rfr.htm (on file with author).

41. The presidents of the two states are in-laws; the marriage of their children in 1998 was hailed throughout the former Soviet Union as a "royal wedding." Moreover, as of 2001, the legislature of Kyrgyzstan was threatening to impeach President Akaev for "unconstitutionally" agreeing with China to cede to China 9000 hectares of land in 1999. The legislature seeks annulment of the agreement, refuses to ratify it, wonders aloud why it was never provided with copies of the agreement, and persists in keeping the story on the front pages of Kyrgyzstan's newspapers. *See* Liz Fuller, *Kyrgyz Parliament Considers Impeaching President*, RFE/RL NEWSLINE, *at* http://www.rferl.org/newsline/2001/05/090501.html (May 9, 2001) (on file with author).

42. *See* Baliev & Medvedev, *supra* note 9 (positing that the foreign ministries of Russia, Kazakhstan, and Kyrgyzstan sent unanswered diplomatic notes to Beijing asking for clarifications of China's project in 1998).

43. A representative of the Prime Minister of Kazakhstan stated, "The Irtysh is a transboundary river and a state through which a transboundary river flows has the right to use such water resources to the extent that such use does not cause harm to the water-use needs of another state." Turov, *supra* note 7.

44. *See Obraschenie k Pravitelstvu i Parlamentu Respubliki Kazakhstan* [*Appeal to the Government and Legislature of the Republic of Kazakhstan*], ECOEKHO, http://www.sys-pro.com/~ecocenter/news/ee2_99/obraschen2.html (last visited Sept.12, 2001) (on file with author). The NGOs call on Kazakhstan to reveal its planned response measures since a diversion of even 6% of the Black Irtysh would result in "irreversible consequences." *Id.*

45. Nurshin, *supra* note 24. Setting the tone for roughly half of all early articles about this subject, the majority of the article is devoted to an interview with Murat Auezov.

46. *Id.*

47. *Id.*

48. Of course, neither side assessed the information in these terms.

49. *V Alma-Ate*, *supra* note 13.

preparing for these negotiations, Kazakhstan drafted a bilateral agreement on the use and conservation of transboundary waters,[50] but China passed. China also assured Kazakhstan that it had no plans to divert any part of the Ili River.[51]

In 1999, Kazakhstan amended its thirty-year state action plan, adopted in 1998, to include attainment of "acceptable agreements on transboundary watercourses" as a national security priority for the 2000–2002 period.[52] Previously, the plan emphasized that only international agreements for "southern" (i.e., Syr Darya River) and "western" (i.e., Caspian Sea) waters were national priorities. The pre-amendment language only reinforces the suspicion that the Kazakhstan government was intentionally ignoring the Irtysh issue. Indeed, despite the fact that Kazakhstan was engaged in negotiations with China and revising its foreign policy, then Kazakhstan Foreign Minister (now Prime Minister) Kasymzhomart Tokaev commented soon after the end of the first round of negotiations that China's diversion, even as planned, posed no substantial economic or environmental threat to Kazakhstan.[53]

The second round of negotiations took place in November 1999 in Almaty. Astana's goals at this round were to secure China's signature on a "framework" agreement and establish a Joint Irtysh Management Authority.[54] It attained neither goal.

However, as a result of the third round of negotiations held in June 2000 in Beijing, Kazakhstan's government, now under increasing pressure from the public, suggested that China had agreed to bind itself to divert no more than one cubic kilometer of water.[55] Kazakhstan's experts still had difficulty reconciling the immense size of the Karamai Canal with this comparatively modest diversion.[56] Ironically, and perhaps symbolic of Kazakhstan's inability to link its domestic policies with its foreign policy, in 2000, Kazakhstan opened a 750-meter long bridge, the largest in the former Soviet Union, which spans the Irtysh at Semipalatinsk.[57]

---

50. Special Ambassador Ibragim Amangaliev suggested the agreement might be signed after the "fifth or sixth" round of negotiations and that the entire negotiations would be "senseless" if Russia did not participate. Nikolai Druzd, *Reshenie problemy transgranichnykh rek poka otkladyvaetsya* [*The Resolution of the Problem of Transboundary Rivers is Being Put Off for Now*], PANORAMA, http://www.panorama.kz/info/index.asp?yearfolder=1999&num=46&NumArticle=14 (Nov. 26, 1999). Amangaliev also stated, "There are international conventions drawn up to settle such issues. In line with them, the sides undertake not to inflict any losses on each other. If something like that happens the sides will have to compensate. But now, neither we nor China are signatories to such a convention." *BBC Worldwide Monitoring* (Kazakh Television Channel One broadcast, May 17, 1999).

51. *V Alma-Ate*, *supra* note 13.

52. *Prilozhenie N 3 k Ukazu Presidenta Respubliki Kazakhstan ot 28 yanvarya 1998 g. N3834*, Postanovlenie Pravitelstva Kazakhstan ot 29 dekabrya 1999 goda N 2014 O Programme deistvii Pravitelstva Kazakhstan na 2000–2002 gody, vvedenie, natsionalnaya bezopaznost [*Appendix #3 to the Decree of the President of Kazakhstan from the 28th of April, 1998, #3834*, Government Resolution 2014 of the Republic of Kazakhstan, Dec. 29, 1999, On the 2000–2002 Action Program of the Government of the Republic of Kazakhstan, Introduction § 1, national security] (on file with author).

53. *Kazakhstan Plays Down Impact of China River Plans*, REUTERS NEWS SERVICE, *at* http://www.geocities.com/The Tropics/Beach/1696/news/Kazakhstan_Plays_Dow_River_Plans.htm (May 19, 1999).

54. *V Alma-Ate*, *supra* note 13.

55. Vladimir Chernyshev, *Kak podelyat Chernyi Irtysh: Vdol ili poperok?* [*How to Divide the Black Irtysh: Across or Sideways?*], TRANSKASPIISKII PROEKT, *at* http://www.transcaspian.ru/cgi-bin/web.exe/rus/835.html (June 7, 2000) (on file with author).

56. *Id.*

57. This $220 million bridge was constructed under a thirty-year development loan from Japan and opened in October 2000. *V Semipalatinske zavershilos stroitelstvo samogo krupnogo v SNG mosta cherez Irtysh* [*Construction of the CIS's Largest Bridge Has Been Completed across the Irtysh in Semipalatinsk*], TRANSKASPIISKII PROEKT, *at* http://www.transcaspian.ru/cgi-bin/web.exe/rus/prn00006741.html (Oct. 18, 2000) (on file with author).

Nevertheless, after the third round, it appeared that Kazakhstan had secured a binding commitment from China on the Irtysh, would soon have a framework treaty for all transboundary rivers, and did not need to worry about the Ili. It appeared that Kazakhstan had secured these concessions without bringing Russia's diplomatic machinery into the fray and without sending out any information about the issue to or bothering to cultivate the attention of either the world press or environmental NGOs. The vitality of its non-confrontational and generous approach to China notwithstanding, a Ministry of Foreign Affairs press release boasted of the "certainty that future Irtysh negotiations will be trilateral with the Russians participating."[58]

In other words, by mid-2000, Kazakhstan appeared to have the tasks of forging international law and managing China well in hand. Indeed, during 2000, Kazakhstan's government began to suggest in public that law would be at the center of all issues concerning its 8,700-mile borders, including all issues of transboundary watercourses.[59]

In fact, none of this was true. On the eve of the fourth round of negotiations, Foreign Minister Idrisov disappointed his constituents. In an interview provocatively entitled *Do We Have an Active Position in Foreign Affairs?* that was published in an opposition newspaper, Idrisov admitted that no binding agreement existed.[60] Suddenly, the word "negotiations" disappeared from reports, replaced by "consultations." After two years of so-called negotiations, Kazakhstan, in fact, had nothing: no framework agreement, no binding agreement on the Irtysh, no assurance that the Ili would be spared, no help from Russia, no international NGOs on its side, and virtually no information at all in English on the problem. At best, it had a few encouraging words from Chinese negotiators.

Perhaps as an effort to change tactics, during the fourth round of "consultations" in Almaty, even the state newspaper *Kazakhstanskaya Pravda* chimed in with phrases that a year before could be found only in the opposition press, such as the contention that if China proceeded with plans to divert 40% of the Irtysh's flow, a "global environmental catastrophe" would ensue.[61] The article also concluded that Kazakhstan cannot allow more than 6% of the Irtysh's flow to be diverted without risking local extirpation of muskrat.[62] Moreover, Kazakhstan reopened allegations of China's plans to divert the Ili and added that

---

58. *O khode delimitatsii gosudarstvennoi granitsy PK s sopredelnymi stranami i ob ispolzovanii vodnykh resursov transgranichnykh rek PK i KNR* [*Progress on Delimiting the State Borders of the Republic of Kazakhstan with Neighboring Countries and on Utilization of the Water Resources of the Transboundary Rivers of the Republic of Kazakhstan and PRC*], Press-relizy Ministerstva inostrannykh del Respubliki Kazakhstan [Press Releases of the Ministry of Foreign Affairs of the Republic of Kazakhstan], *at* http://www.mfa.kz/offical/press2.html#text2 (last visited Sept. 12, 2001) (on file with author).

59. Aman Kusainov, *Eto sladkoe slovo-granitsa* [*"Border": An Ever-so-Sweet Word*], TRANSKASPIISKII PROEKT, *at* http://www.transcaspian.ru/cgi-bin/web.exe/rus/prn00006263.html (Oct. 4, 2000) (on file with author).

60. Evgenii Kosenko, *Aktivno li nasha pozitsiya vo vneshnikh otnosheniyakh?* [*Do We Have an Active Position in Foreign Affairs?*], VREMYA, at 11, http://kztime.virtualave.net/Archive2000/10-26-00/kto43.htm (Oct. 26, 2000) (on file with author).

61. Kseniya Kaspari, *Po obe storony reki: Problemu sovmestnogo ispolzovaniya vodnykh resursov reshayut Kazakhstan i Kitai* [*From Both Sides of the River: Kazakhstan and China Resolve Issues of Their Joint Use of Water Resources*], KAZAKHSTANSKAYA PRAVDA, http://www.kazpravda.kz (Nov. 5, 2000) (on file with author). The pro-government newspaper *Panorama* carried a similar article, but also detailed the composition of the negotiating delegations for the November 1–7 negotiations and stated that China planned to divert 20% of the Irtysh. *See* Kuat Ibraev, *Kazakhstan i Kitai reshayut problemu transgranichnykh rek* [*Kazakhstan and China Decide the Problems of Transboundary Rivers*], PANORAMA, Nov. 3, 2000, http://www.panorama.kz/info/index.asp?yearfolder=2000&num=43&NumArticle=19 (on file with author).

62. Kaspari, *supra* note 61.

such a diversion could turn Kazakhstan's Lake Balkhash, one of the twenty largest lakes in the world, into another Aral Sea.[63]

Earlier indignation aside, the March 2001 consultations were the most quiet to date. The Chinese signed nothing, and they had not allowed Kazakhstan experts to visit their canal installations, which the Kazakhstan press had earlier and pervasively reported as a major concession from the Chinese. Almost as if giving up in desperation, the official and uniquely brief communiqué from the Kazakhstan Ministry of Foreign Affairs celebrated that the talks had been "cordial"; repeated that visits to installations were planned for 2001; and claimed that the sides were studying a plan for the joint utilization of one of the smaller transboundary rivers, the Ulken-Ulasty.[64]

By 2001, Kazakhstan had nothing, but China had a complete canal. Nevertheless, Kazakhstan continues to adhere to its early promise to keep the issue bilateral. The world continues to be unaware of the issue. To this observer, it appears Kazakhstan has not derived valuable lessons in international relations from its ordeal. Supporting this perception and eliciting a sense of déjà vu, Kazakhstan's ambassador to China boasted of impending success well after the March 2001 talks. He claimed that, as a result of these talks, a framework agreement was virtually "complete" and that all Kazakhstan had agreed to in return was to abandon hopes of Russian diplomatic involvement and to cede an additional 500 square kilometers of land to China.[65]

In June 2001, Kazakhstan's chief Irtysh official, the chairperson of the Water Resources Committee Amanbek Ramazanov, returned from China with three alleged diplomatic coups for Kazakhstan. In a flurry of Soviet-era "doublespeak" in late June, Ramazanov revealed that China did not plan to divert three to five cubic kilometers of water, but only slightly less than one cubic kilometer,[66] which he claimed was less than 10% of the flow from China.[67] In celebration of this news, no one seemed to remember that the initial diversion was always supposed to be less (and not just slightly) than one cubic kilometer of water and that even 0.8 cubic kilometers still exceeds 10% of the flow from China.[68] Only a few months earlier the government itself had claimed through the *Kazakhstanskaya pravda* state newspaper that a 6% diversion would lead to a catasrophe.[69] Nevertheless, *Kazakhstanskaya pravda* chided the alleged public opinion that the Chinese

---

63. Ibraev, *supra* note 61. Approximately 54% of Balkhash's yearly inflow of water from all sources consists of Ili water crossing the Chinese border. Bessarabov & Sobyanin, *supra* note 16. Expanding on this article's earlier discussion of inequity, a hydroelectric project on the Ili three decades ago in the Kazakh SSR led to a sharp decline of Lake Balkhash for several years. *Id.*

64. *IV-yi raund konsultatsii ekspertov RK i KNR po voprosam ratsionalnogo ispolzovaniya vodnykh resursov transgranichnykh rek* [*The Fourth Round of Talks between Kazakhstan and Chinese Experts on the Topic of Rational Use of Transboundary River Water Resources*], Press-relizy Ministerstva inostrannykh del Respubliki Kazakhstan [Press releases of the Ministry of Foreign Affairs of the Republic of Khazakhstan], *at* http://www.mfa.kz/offical/press3.html#text76 (last visited Sept. 12, 2001) (on file with author). *See generally* Erlan Imanbaev, *S uchetom istoricheskikh traditsii Kazakhstan i Kitai obsudili problemy transgranichnikh rek* [*Taking into Account Historical Traditions, Kazakhstan and China Discussed Problems of Transboundary Rivers*], TRANSKASPIISKII PROEKT, *at* http://www.transcaspian.ru/cgi-bin/web.exe/rus/14483.html (Apr. 13, 2001) (on file with author).

65. Liz Fuller, *Kazakhstan, China Make Progress in Transborder River Talks*, RFE/RL NEWSLINE, *at* http://www.rferl.org/newsline/2001/06/120601.html (June 12, 2001) (on file with author).

66. *Zabor vody v Kitai po kanalu Irtysh-Karamai ne ugrozhaet ekologii Kazakhstana, zayavil predstavitel pravitelstva respubliki* [*The Diversion of Water in China through the Irtysh-Karamai Canal Does Not Threaten Kazakhstan's Environment, States a Representative of the Republican Government*], KASPIISKOE INFORMATSIONNOE AGENSTVO [CASPIAN NEWS AGENCY], *at* http://www.caspian.ru/cgi/article.cgi?id=2853 (June 26, 2001) (on file with author) [hereinafter *Zabor vody*].

67. *Interview with Amanbek Ramazanov* (KTK television broadcast, June 26, 2001), Dow Jones Interactive Publications Library.

68. *See* Tursunov, *supra* note 10.

69. Kaspari, *supra* note 61.

were going to divert the Irtysh's entire flow and presented the fact that they do not plan to do so as a victory.[70]

Ramazanov also said that, based on his study of the Chinese installations, the canal did "not present an environmental threat"[71] and would not inflict economic damage to Kazakhstan.[72] Ramazanov implied intimate familiarity with the canal although his "study" was in Beijing, not anywhere near the actual diversion. Finally, Ramazanov boasted that the Chinese had been convinced to accept that all twenty-four transboundary rivers would now be called "transboundary" in the future and that the two states would "begin" exchanging information about these rivers in October 2001. Despite the importance of being able to call transboundary rivers "transboundary rivers" in future low-level consultations, Kazakhstan still lacked any binding agreement, any framework treaty, any third party support, or any international awareness of its plight.

Shortly before this article went to press, the Premier of the State Council of China made an official visit to Kazakhstan,[73] drawing new attention in Kazakhstan to the state of Irtysh negotiations. At the time of this September visit, the Kazakhstan government claimed that it had, just the night before, signed a bilateral agreement with China on transboundary rivers.[74] As of early November, neither the agreement nor its content had been released to the public, and the government had fallen completely silent on the issue. My effort to receive the text of the agreement from the Ministry of Foreign Affairs or to confirm the existence of the agreement only yielded an informal acknowledgement from the Ministry of Foreign Affairs that some sort of agreement does exist, but that neither state has ratified it. In my opinion, this agreement will turn out to contain no provisions that will change the status quo.

III. WHAT IS TRANSBOUNDARY WATERCOURSE LAW?

Treaties related to water are numerous. They include regulation of the world's oceans through the 1982 United Nations Convention on the Law of the Sea[75] and seventeen regional seas programs,[76] as well as regulation of freshwater through two framework conventions and 2,000 bilateral and multilateral treaties regulating at least 242 transboundary watercourses.[77] These transboundary watercourses occupy an important place in the international relations of states. More recent treaties comprehensively regulate

---

70. *Slukhi okazalis prevelichennymi* [*The Rumors Were Exaggerated*], KAZAKHSTANSKAYA PRAVDA, http://www.kazpravda.kz/14_07_2001/nr.html (July 14, 2001).

71. *Zabor vody*, *supra* note 66.

72. *Interview with Amanbek Ramazanov*, *supra* note 67. The Ministry of Foreign Affairs soon echoed his claims in full. *Stroitelstvo plotiny*, *supra* note 13.

73. *Prezident Kazakhstana vstretilsya s premerom Gossoveta KNR* [*The President of Kazakhstan Met with the Premier of the State Council of China*], KASPIISKOE INFORMATSIONNOE AGENSTVO, *at* http://www.caspian.ru/cgi/lenta.cgi (Sept. 14, 2001).

74. *Id.*

75. U.N. Convention on the Law of the Sea, Oct. 7, 1982, 21 I.L.M. 1261.

76. U.N. Environment Programme in Geneva, *Regional Seas*, *at* http://www.unep.ch/seas/main/hoverv.html (last visited July 10, 2001) (on file with author).

77. Colleen P. Graffy, *Water, Water, Everywhere, Nor Any Drop to Drink: The Urgency of Transnational Solutions to International Riparian Disputes*, 10 GEO. INT'L ENVTL. L. REV. 399, 423 (1998). Also, while the U.N. Treaty Series comprehensively covers many of these treaties including those not in English, even spotty surveys in English identify hundreds of such treaties. See The International Water Law Project, *at* http://www.internationalwaterlaw.org (last visited July 10, 2001), and The Transboundary Freshwater Dispute Database, *at* http://terra.geo.orst.edu/users/tfdd (last visited July 10, 2001), the latter for non-navigational use treaties. Neither of these sources identifies any of the Irtysh and Ili treaties discussed below.

a dozen or so of these watercourses, often through establishment of basin management authorities to which riparians have ceded some sovereign powers.[78]

Yet, despite this level of activity, transboundary water law is still nascent, and it remains an open question, a question as yet curiously and almost entirely absent from case law, whether state practice has given rise to a substantial number of norms of transboundary water law. With the existence of such norms unclear, it also remains an open question to what degree the last decade's two framework multilateral watercourse treaties, discussed below, codify existing law or contribute to the progressive development of international law.

Putting aside that concern for the moment, treaty and custom are continuing to mold an increasingly standardized set of rules to regulate disputes over and to direct management of transboundary watercourses. Today, the state of transboundary watercourse law lies somewhere along a continuum between unrestrained state discretion, a customary rule against any inequitable utilization that infringes on co-riparian interests, and, at the outer fringes, an *erga omnes* prohibition, based on the concept of common heritage, against degradation of riparian ecosystems.

Obliquely, this article attempts to answer the question of whether current transboundary watercourse law has developed a comprehensive set of rules to prohibit a state from implementing a project whose environmental and human costs on downstream neighbors exceed domestic benefits.

A. Customary Law

In reviewing the customary law of transboundary watercourses, this section limits itself generally to those rules that are central to watercourses and not to more general rules of customary environmental law. For space considerations, this section merely glosses the implications and current status of possible environmental customs, such as environmental impact assessment and sustainable development, and selects these over other perhaps more interesting components of general international environmental law simply because they are applicable to the Irtysh.

Evidence of customary law, while ultimately founded in the actions and *opinio juris* of states, can be gleaned from a variety of sources,[79] including historically important and representative treaties, arbitration and court judgments, and recent framework watercourse treaties, such as the 1997 United Nations Convention on the Law of the Non-navigational Uses of International Watercourses (the NUIW Convention).[80] While all the Irtysh riparians actively negotiated the NUIW Convention, none has ratified the Convention, although

78. A disproportionate number of such rivers are in the West. *See* The International Water Law Project, *supra* note 77; The Transboundary Freshwater Dispute Database, *supra* note 77. Examples include the International Commission for the Protection of the Danube River and the International Joint Commission (U.S.-Can.). However, a notable exception is the 1973 La Plata River Treaty, which embraces community of interests (for navigation, pollution, and other issues) and presages much of the NUIW Convention's consultation requirements, as well as including a provision for compulsory ICJ jurisdiction. Treaty of the La Plata River and its Maritime Limits, Nov. 19, 1973, Arg.-Uru., 13 I.L.M. 251 [hereinafter 1973 La Plata Treaty].

79. "Soft" sources of legal obligations are generally discounted in this article. Sources related directly to riparian disputes include The Helsinki Rules, 52 INT'L L. ASS'N 477, 484 (1966) (agreement regulating the uses of the waters of international rivers) and the Rules on Water Pollution in an International Drainage Basin, 60 INT'L L. ASS'N 533 (1982). See generally Graffy, *supra* note 77, for a general review of soft law sources of international water law.

80. NUIW Convention, *supra* note 5.

Kazakhstan did vote for its adoption.[81] China was one of only three states to vote against the NUIW Convention.[82] Accordingly, the NUIW Convention is of, at best, questionable applicability to the Irtysh diversion dispute as a treaty. However, as a codification of customary law, it directly applies to the Irtysh controversy.[83] Even though the NUIW Convention is not in force, those of its provisions that merely codify existing customary law already bind all states.[84]

Although transboundary watercourse law is an esoteric branch of international public law, with the *Gabcikovo-Nagymaros* case, it had its day in court. While the International Court of Justice (ICJ) stopped short of making any sweeping rulings on the content of international customary watercourse law, it accorded notable deference to the NUIW Convention as a document that codifies customary law. As a result, the *Gabcikovo-Nagymaros* case and the NUIW Convention together allow for a fuller explication of watercourse custom than would have been possible five years ago.

1. Limited Territorial Sovereignty, Equitable Use, and Sustainable Development

Clarification of transboundary watercourse law depends in large part on state agreement about what foundational policy should inform this law. There exist four general candidates: absolute territorial sovereignty, absolute territorial integrity, limited territorial sovereignty, and community of interests.[85] Scholars generally agree that the first two approaches (which, in the first case, burden upstream states with no duties to downstream states and, in the second case, give downstream states an effective veto over proposed upstream uses) do not embody customary law and do not have a place in emerging treaties.[86]

In contrast, limited territorial sovereignty and community of interests enjoy support from scholarly circles and in practice, with the more conservative limited territorial

---

81. *General Assembly Adopts Convention on Law of Non-Navigational Uses of International Watercourses*, U.N. GAOR, U.N. Doc. GA/9248 (1997), *at* http://www.thewaterpage.com/UNPressWater.htm (last visited July 12, 2001).

82. While 103 states voted to adopt the NUIW Convention, only Burundi, China, and Turkey voted against it. Twenty-seven states abstained. *Id.* An important issue not examined here is whether, in the language of customary law, China may have "persistent objector" status.

83. *Cf.* Aaron Schwabach, *From Schweizerhalle to Baia Mare: The Continuing Failure of International Law to Protect Europe's Rivers*, 19 VA. ENVTL. L.J. 431, 455–56 (2000) [hereinafter Schwabach 2000] (stating that "[NUIW] cannot be said to reflect customary international law"). Schwabach's reasoning, however, contradicts the approach taken by international law to examine the interplay between treaties and codification of customary law. This approach is clear and explicit in Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 37 I.L.M. 162 (1998) and Kasikili/Sedudu Island (Bots. v. Namib.), 39 I.L.M. 310 (2000), where jurists look to specific articles or provisions of treaties. By contrast, Schwabach takes an all or nothing approach that is unsupported by norms of international legal analysis.

84. *See also* Kasikili/Sedudu Island (Bots. v. Namib.), 39 I.L.M. at 380 (separate opinion of Judge Kooijmans) (stating that the fact that NUIW Convention is not in force "does not mean, however, that a number of the principles, which are formulated in the Convention, have not yet become part of the corpus of international law").

85. *See* Gabriel Eckstein, *Application of International Water Law to Transboundary Groundwater Resources and the Slovak-Hungarian Dispute over Gabcikovo-Nagymaros*, 19 SUFFOLK TRANSNAT'L L. REV. 67, 72 (1995).

86. Absolute territorial sovereignty is often called the Harmon Doctrine. This doctrine has been almost universally rejected. Kasikili/Sedudu Island (Bots. v. Namib.), 39 I.L.M. at 381 (separate opinion of Judge Kooijmans). The NUIW Convention established China as something of a rogue state regarding watercourse law, because during negotiations it advocated the absolute territorial sovereignty rhetoric of the Harmon Doctrine. Schwabach posits that only Rwanda and China adhere to this doctrine. Schwabach 1998, *supra* note 40, at 279. See generally Eckstein, *supra* note 85, for an explication of the Harmon Doctrine.

sovereignty informing the greater mass of current customs,[87] but with community of interests quickly gaining ground. Indeed, for navigation issues, discussed below, community of interests long ago displaced limited territorial sovereignty.

Limited territorial sovereignty, broadly understood, places some restrictions on state discretion, primarily based on the principle of *sic utere tuo ut alienum non laedes*. In turn, community of interests requires that decision-making be undertaken collectively and in consideration of the best use of the entire basin. To distinguish between these two approaches, while limited territorial sovereignty does not burden states with any substantive obligation to maximize the efficiency of allocation of watercourse resources, community of interests takes efficiency as a starting point.

To the extent that limited territorial sovereignty is gradually giving way to community of interests, the current name for the shifting middle ground between the two is equitable utilization, also known as equitable and reasonable use. Article 5 of the NUIW Convention provides that:

> 1. Watercourse states shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse states with a view to attaining optimal and sustainable utilization thereof and benefits therefrom, taking into account the interests of the watercourse states concerned, consistent with adequate protection of the watercourse.
>
> 2. Watercourse states shall participate in the use, development, and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present convention.[88]

Article 5 codifies existing customary law; equitable utilization is a requirement under customary law.[89] As a result, at present, watercourse law possesses a framework principle, but this principle is founded not in a single clear policy, but rather in a policy that is cobbled together out of two often consonant, but ultimately dissimilar, policies. The two most recent ICJ cases to visit watercourse issues in detail provide support for the view that equitable utilization, despite its ambivalent ontogeny, is now custom.[90]

Because a principle of customary law is nonetheless abstract, for customary law to be substantive at an operational level there must also be rules. At the present stage of the evolution of transboundary watercourse law, in addition to the principle of equitable utilization, five customary norms appear solidly established. These include a requirement of notice prior to any diversion, a requirement of consultation prior to any diversion that will result in a substantive (i.e., material) decrease in the quality or quantity of waterflow to a lower riparian, automatic succession for treaties that regulate boundary waters and/or navigation, a presumption of illegality for any diversion that interrupts navigation, and a

87. "The approach generally taken to balance the rights of lower and upper riparian owners is one of limited territorial sovereignty." Schwabach 2000, *supra* note 83, at 449.

88. *See also* Kasikili/Sedudu Island (Bots. v. Namib.), 39 I.L.M. at 381.

89. *See* Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 37 I.L.M. at 201 (implying that Article 5 is binding); *see also* Malgosia Fitzmaurice, *Water Management in the 21st Century*, *in* LEGAL VISIONS OF THE 21ST CENTURY 425, 427–33 (Anthony Anghie & Gerry Sturgess eds., 1998).

90. "[A riparian has a] basic right to an equitable and reasonable sharing of the resources of an international watercourse." Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 37 I.L.M. at 190; *see also* Kasikili/Sedudu Island (Bots. v. Namib.), 39 I.L.M. at 380 (separate opinion of Judge Kooijmans) (stating that Article 5 is customary law and contending that state practice supports this view).

presumption of illegality for any diversion that will result in an environmental (i.e., a species extinction) or human (i.e., a loss of subsistence water supply) tragedy.

2. The Notice Rule

The notice rule, simply stated, holds that an upper riparian must provide formal notice to lower riparians prior to effecting any substantial project on a transboundary watercourse.[91] Under community of interests, lower riparians would ostensibly incur a similar obligation. While a co-riparian could react to such notice by claiming that a proposed project infringed on its interests, nothing more than notice is required if the quantity and quality of water, as well as freedom of navigation, are not adversely affected in other riparians' territories.

The accepted authority on this notice rule is the 1957 *Lake Lanoux Arbitration* between France and Spain.[92] In the tribunal's influential holding, France was required to give notice and nothing more to Spain about French plans to divert, but then restitute in full, a supply of water from the Carol River.

3. The Consultation Rule

Had France anticipated reducing the actual flow of water transversing into Spain, it would have been required to engage in prior consultations with Spain.[93] The consultation rule holds that prior consultations must be held or at least offered prior to the initiation of any project that may have a substantive impact on the freedom of navigation and/or a co-riparian's ability to enjoy its current quality and quantity of water.

Support for the long existence of this rule is founded in more than the *Lake Lanoux Arbitration*. In deciding a case concerning unilateral diversion of water from the Meuse, the Permanent Court of International Justice in 1937 held that as long as either party did not adversely affect the current, flow, or volume of water available to the other party, there was no breach of law.[94] More recently, in the *Gabcikovo-Nagymaros* case, the ICJ suggested that, for diversion projects in which the affected state played no role in contributing to or developing the project, serious prospective threats of species extirpation, ecological degradation, and disruption of navigation may alone constitute violations, if there have been no meaningful consultations.[95]

4. The Succession Rule

Under Articles 11 and 12 of the Vienna Convention on Succession of States in Respect of Treaties,[96] "succession of States does not affect . . . obligations [or] . . . rights established

---

91. Lake Lanoux Arbitration (Fr. v. Spain), 24 I.L.R. 101, 103, art. 11 (Arbitral Trib. 1957).

92. *Id.* This rule is also reflected in a United Nations General Assembly Resolution endorsement of "a system of information and prior consultation." G.A. Res. 3129 U.N. GAOR, 28th Sess., 2199th plen. mtg. at 48 (1973).

93. Lake Lanoux Arbitration, 24 I.L.R. at 114.

94. Diversion of Water from the Meuse (Neth. v. Belg.), 1937 P.C.I.J. (ser. A/B) No. 70 (June 28).

95. Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 37 I.L.M. at 182, 186.

96. Vienna Convention on Succession of States in Respect of Treaties, U.N. Conference on Succession of States in Respect of Treaties, U.N. GAOR, arts. 11–12, U.N. Doc. A/CONF.80/16/Add.2 (1977–1978) [hereinafter Vienna Convention].

by a treaty . . . relating to the use of any territory . . . and considered as attaching to that territory" [97] or "relating to the regime of a boundary."[98]

The ICJ's promotion of these articles as mere codification of a customary law of "automatic succession" is frequent and unequivocal.[99] If a treaty that concerns water rights or navigation on transboundary watercourses is in force at the time of succession, it qualifies as an Article 12 treaty.[100] Naturally, if such a treaty applied to a contiguous border river like the Horgos, a tributary of the Ili, on the China-Kazakhstan border,[101] it would simultaneously qualify as an Article 11 treaty.

I would go so far as to posit that, of the five rules mentioned, the rule of succession is the strongest. This rule is the one that a tribunal like the ICJ would equivocate least over supporting. However, that does not at all mean that it is the rule most understood or least often violated in practice. For example, Schwabach posits that Russia, not Ukraine, succeeded to the 1958 Danube Fisheries Convention.[102] Schwabach bases this assertion on information that was taken from a Columbia University website. Yet, Russia is not a Danube riparian who could succeed under the law of treaties by objective criteria. Indeed, technically, Russia did not succeed. Rather, in a clever bending of terminology accepted by other parties, the Russian Federation "continued the participation" of the USSR.[103] The key point here is that Russia did not enjoy an automatic right to be a party after the collapse of the USSR, but was accorded the privilege of doing so by the Convention's other parties. Whether Ukraine succeeded depends likewise not on this website but on whether this Convention fits the Article 11 and/or 12 criteria.

It was through the Article 11 and 12 criteria that Canada succeeded to the 1909 Boundary Waters Treaty, even though the original treaty was concluded with Great Britain.[104] At the risk of sounding tautological, the United Kingdom is not today a party to this Treaty even though Great Britain, not Canada, concluded the Treaty. This Internet "information" on the Danube Convention succession then is, apparently, merely the ridiculous result of uncritical application of the rule that the Russia Federation is the only successor to the USSR, a rule that simply does not extend to local and border treaties under customary international law.

However, this ridiculous result is not uncommon. Over the past three years, I have worked with a group of scholars in Central Asia (Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan) to catalog official documents, such as legislative ratifications, instruments of accession, and notes from secretariats, related to multilateral environmental treaties in that region.[105] The data that we uncovered systematically contradicted information distributed by both states and secretariats and also was immiscible with any scholarly work on state succession.

However, even though state practice with regard to post-socialist succession does not accord with what international lawyers would expect, we conclude that this in no way

---

97. *Id.* art. 12.

98. *Id.* art. 11.

99. *See, e.g.*, Gabcikovo-Nagymaros Project (Hung. v. Slovk.) 37 I.L.M. at 197–99.

100. *Id.*

101. There are two types of transboundary rivers; contiguous rivers form a border, while successive rivers flow across borders.

102. Schwabach 2000, *supra* note 83, at 444.

103. Interview with Professor Georgii G. Ivanov, former Permanent Representative of the USSR and the Russian Federation to the International Maritime Organisation, in Vladivostok, Russia (Sept. 17, 2001) (on file with author).

104. Treaty Relating to Boundary Waters, Jan. 11, 1909, U.S.-Gr. Brit., 36 Stat. 2448 [hereinafter Boundary Waters Treaty].

105. Some of this data appears in SIEVERS, *supra* note 33.

threatens the existing customary law. For international lawyers, this statement will seem paradoxical, but only because as a community, we presuppose that significant state or secretariat actions are the result of and mirror considered policy. In fact, the research to which I refer has shown that almost all deviations from norms of succession in Central Asia (and the resulting lack of any consistent principle or pattern to explain succession in the region)[106] have arisen from incompetence and ignorance of international law on the part of newly independent bureaucracies (which should not be surprising or embarrassing) and on the part of official representatives of the secretariats and depositories of environmental treaties (which is a more embarrassing situation).[107]

5. The Community of Navigation Rule

Accounting for and understanding the Community of Navigation Rule requires understanding the genesis of watercourse law. The rule holds that any action of a riparian state that limits a co-riparian's enjoyment of its freedom of navigation is presumed to be unlawful. This rule is not a positive rule, such as the tradition whereby watercourse treaties establish freedom of navigation on a watercourse,[108] but a negative rule, prohibiting any substantive worsening of conditions for navigation.

The historical roots of the rule rest in conditions that do not today vivify the hottest controversies about transboundary rivers. These roots are that, formerly, navigation was the most important use of such watercourses and that, formerly, non-riparians were often the major users of such rivers. Addressing the latter point, Britain's domination of Nile River navigation and British and French dominance of Danube navigation in the nineteenth and twentieth centuries are not relevant to modern customary law because of last century's *jus cogens* rejection of colonialism. This rejection lays the basis for the current content of the rule that limits rights of freedom of navigation to riparians.

The fact that recent treaties, like the NUIW Convention, stress that their lawmaking efforts are only for the "non-navigational uses" of transboundary watercourses illustrates the special and established weight of navigational rights. Most early watercourse treaties devoted primary attention to navigational questions;[109] the bulk of watercourse treaties establish the customary right of freedom of navigation for riparians on transboundary

---

106. Only some of the succession anomalies in Central Asia touch on Article 11 and Article 12 issues. Of these, the most interesting are those relating to the Ramsar Convention and the World Heritage Convention. Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Feb. 2, 1971, T.I.A.S. No. 11,084, 996 U.N.T.S. 245 [hereinafter Ramsar Convention]; UNESCO Convention for the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151 [hereinafter World Heritage Convention]. Both treaties essentially set aside nature reserves within states, and their Article 12 status is very uncertain. Whatever the status is, it should apply equally to both. No Central Asian states succeeded/acceded to the Ramsar Convention, but the Convention secretariat continues to list all the Ramsar territories that are in those states, while some Central Asian states did and some did not (which is patently illogical) succeed to the World Heritage Convention. For further explanation, *see infra* text accompanying notes 190–200; *see also* Akbar Rasulov, *Pravopreemstvo i Tsentralnaya Aziya* [*Succession and Central Asia*], *in* MEZHDUNARODNOE EKOLOGICHESKOE PRAVO I TSENTRALNAYA AZIYA [INTERNATIONAL ENVIRONMENTAL LAW AND CENTRAL ASIA] 146–64 (Eric W. Sievers et al. eds., 2001). Moreover, those that did succeed did so at different times from 1992–1994, *id.* at 161–63 (which is also illogical). Unfortunately Rasulov, a talented young Uzbek scholar, has not published this work in English.

107. SIEVERS, *supra* note 33.

108. Indeed, many treaties establish freedom of navigation but place no restrictions on activities of states that would impede navigation. *See generally* Treaty for Amazonian Cooperation, July 3, 1978, art. 3, 17 I.L.M. 1045, 1046.

109. Jesse H. Hamner & Aaron T. Wolf, *Patterns in International Water Resource Treaties: The Transboundary Freshwater Dispute Database*, COLO. J. INT'L ENVTL. L. & POL'Y 157, 158 (1997).

watercourses.[110] The 1909 Boundary Waters Treaty for the northern border of the United States also asserts a "right, which [a riparian] may have to object to any interference with or diversion of waters . . . the effect of which would be productive of material injury to the navigation interests on its own side of the boundary."[111]

Presaging its 1990s diplomatic hydrophobia, China signed, but did not ratify, the 1921 Convention and the Statute on the Regime of Navigable Waterways of International Concern.[112] This Convention codifies some of the custom of navigable watercourses. In particular, under Article 10:

> Each riparian State is bound, on the one hand, to refrain from all measures likely to prejudice the navigability of the waterway, or to reduce the facilities for navigation, and, on the other hand, to take as rapidly as possible all necessary steps for removing any obstacles and dangers which may occur to navigation.[113]

The Convention, which is otherwise unremarkable, codifies the customary law presumption of illegality of interference with navigation on transboundary watercourses. In the event of interference not consented to by co-riparians or founded in a state of necessity, affected states are, under the Convention, entitled to damages either for losses or for the costs of mitigation.[114]

In 1923, the Danube's Treaty of Trianon established that non-navigational uses of the Danube could take precedence over navigational uses, but only with the consent of all relevant co-riparians.[115] The subsequent Treaty of Paris reaffirmed the default rule of freedom of navigation on the Danube.[116] Moving to South America, the 1973 La Plata Treaty parties acknowledged "freedom of navigation, permanently and under all circumstances, on the River for vessels flying their flags"[117] and further established that in "no case and under no conditions may a regulation be adopted which might cause appreciable detriment to the navigation interests of either party."[118]

Judgments early in the century also recognized that limited territorial sovereignty fell short of the customary rules for navigation. The Permanent Court of International Justice held in 1929 that "community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others."[119]

---

110. *See, e.g.*, Schwabach 2000, *supra* note 83, at 440–41 (providing overview of such treaties affecting the Danube). *See* Boundary Waters Treaty, *supra* note 104, art. 1 (stating that "navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally").

111. Boundary Waters Treaty, *supra* note 104, art. 2.

112. Convention and Statute on the Regime of Navigable Waterways of International Concern, Apr. 20, 1921, 7 L.N.T.S. 37.

113. *Id.* art. 10.

114. However, "[r]eparation . . . is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself." Factory at Chorzów (Germany v. Pol.), 1927 P.C.I.J. (ser. A) No. 9, at 21 (July 26).

115. Treaty of Peace between the Allied and Associated Powers and Hungary, June 4, 1920, *reprinted in* MAJOR PEACE TREATIES OF MODERN EUROPE 1648–1967, at 1863 (Fred L. Israel ed., 1967) [hereinafter Treaty of Trianon].

116. Treaty of Peace with Hungary, art. 38, Feb. 10, 1947, 41 U.N.T.S. 168, T.I.A.S. No. 1651.

117. 1973 La Plata Treaty, *supra* note 78, art. 7.

118. *Id.* art. 14.

119. Territorial Jurisdiction of the International Commission of the River Oder (U.K. v. Pol.), 1929 P.C.I.J. (ser. A) No. 23, at 27 (Sept. 10).

Yet, perhaps most interesting in this regard is that in the past five years international rivers have suddenly become a frequent topic of ICJ litigation. Beyond the *Gabcikovo-Nagymaros* and *Kasikili-Sedudu Island* cases already discussed,[120] in 1999 ten ICJ cases invoked the term. Yugoslavia claimed, in each of its cases against ten NATO powers, that the use of force in Yugoslavia violated the customary rule obliging states to respect "freedom of navigation on international rivers."[121]

6. The Human and Environmental Disaster Rules

The obligation to refrain from causing an imminent and substantial environmental or human disaster is founded in the progressive development of environmental and human rights law in recent decades. [122] To begin with the environmental case, since all the Irtysh riparians are parties to the Convention on Biological Diversity (CBD),[123] they are clearly subject to the environmental obligation described above.

The obligations imposed by the CBD are stated strongly, and Article 22 provides that the provisions of the CBD shall not affect the rights and obligations of contracting parties, deriving from any existing international agreement "except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity."[124] The obligations imposed by the CBD are, thus, compelling and should not be ignored in any determination defining inter-state rights and obligations, if such determination entails a risk of damage to ecosystems, which it was the object of the CBD to prevent.[125]

Accordingly, to the extent that other environmental conventions create or codify similar requirements regarding certain types of species (i.e., migratory species), ecosystems (i.e., wetlands), or pollutants, the environmental obligation can be expanded within a watercourse basin even in the absence of a specific treaty, or amendments to a treaty, regulating that transboundary watercourse.

Similarly, a riparian cannot subject a neighboring riparian's population to substantial and imminent danger through unilateral use of a watercourse.[126] Such danger could arise through denying a population its ability to meet its "vital human needs" (i.e., subsistence irrigation or drinking water), which are accorded paramount importance under Article 10 of

---

120. *See supra* Parts III.A, III.A.3 and note 6.

121. Legality of Use of Force (Yugo. v. Belg.), 38 I.L.M. 950, 952 (1999). Citations for the remaining nine cases (against Canada, France, Germany, Italy, the Netherlands, Portugal, Spain, the United Kingdom, and the United States) have been omitted because the request in each case for provisional measures was decided on the same day and because each case contained this Yugoslavian argument verbatim. In its materials, no state has yet denied the existence of this obligation, although at the initial jurisdiction stage of the proceedings no such denial was actually required.

122. In the *Gabcikovo-Nagymaros* case, the Court established that a "state of ecological necessity" could only exist if a threat was both substantial and imminent. Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 37 I.L.M. at 182–86. By analogy, since states of necessity are "a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation," this may overstate the requirements for "disasters," but certainly does not understate them. *Id.* at 184. However, that the standard is quite clearly not one of optimality or utility illustrates that this rule is firmly within the limited territorial sovereignty paradigm.

123. Convention on Biological Diversity, June 5, 1992, U.N. Doc. DPI/1307, 31 I.L.M. 818 [hereinafter CBD].

124. *Id.* art. 22.

125. Kasikili/Sedudu Island (Bots. v. Namib.), 39 I.L.M. at 400 (separate opinion of Judge Weeramantry).

126. This article's general lack of attention to possibilities for lower riparians to harm upper riparians (for example, through dams that create upstream flooding) is merely for the sake of simplicity.

the NUIW Convention,[127] or through some other action (i.e., causing flooding). General norms of humanitarian law and the human right to water[128] underlie this norm.

7. General International Environmental Law

Taking equitable utilization and the five rules listed above as the core of modern transboundary watercourse law, some other norms begin deductively to reveal themselves. While the scope of such norms is probably wider than discussed here, in an effort to avoid being Pollyannaish, these norms only include a few other articles of the NUIW Convention, sustainable development, and environmental impact assessment.

The concept of equitable utilization, especially as currently envisioned by the scholars and judges cited here, as a merging of environmental and economic concerns is intrinsically close to the principle of sustainable development. Indeed, the *Gabcikovo-Nagymaros* court comes very close to stating explicitly that sustainable development is a customary norm.[129]

Articles 4, 6, 7, 8, and 12 of the NUIW Convention codify existing customary law. Article 4 disallows the exclusion of any riparian state from negotiations for and party status to any agreement that applies to or affects the entirety of a watercourse.[130] This rule logically flows from the interaction of the principle of equitable utilization and the consultation rule.

Article 6 lists seven types of factors relevant to an analysis of equitable utilization;[131] since this list derives from and reflects the experiences of state negotiations involving transboundary watercourses, it constitutes a general statement of customary law. Because a "reasonable" standard explicitly attaches to Article 5,[132] Article 6 is an indispensable corollary to Article 5. Essentially, Article 6 clarifies that dismissal of attention to any of these seven fairly self-evident factors would be prima facie unreasonable.[133]

Article 7 merely restates and explicates the established customary principle of *sic utere tuo ut alienum non laedes*.[134] Article 8 simply states that in pursuing equitable utilization, states should cooperate, a restatement of the customary requirement for peaceful

127. In stressing the paramount importance of "vital human needs," the NUIW Convention may in fact be restating customary law. Gleick makes this argument by pointing out that the 1977 Mar del Plata Statement recognized the right of people "to have access to drinking water in quantities and of a quality equal to their basic needs," and then arguing that successive similar statements reinforce this right. Peter Gleick, *The Human Right to Water*, 1 WATER POL'Y 487, 493, 493–94 (1999), *available at* http://www.pacinst.org/gleickrw.pdf. Gleick is correct that "vital human needs" reflect custom, but incorrect in implying that Article 10 of the NUIW Convention codifies customary law. The NUIW Convention's elevation of basic/vital human needs to an importance above all other concerns is not supported by precedent. In the additional sources Gleick cites (namely the 1992 Agenda 21, U.N. Conference on Environment and Development, U.N. GAOR, U.N. Doc. A/CONF.151/26/Rev. 1 (1993), and the 1997 *U.N. Comprehensive Assessment of the Freshwater Resources of the World*, U.N. Commission on Sustainable Development, 5th Sess., U.N. Doc. E/CN.17/1997/9 (1997)), protection of ecosystems is listed as an equivalent priority. Thus, Article 10 of the NUIW Convention, being the only modern source of which the author is aware in which human needs explicitly trump environmental needs, is really an innovation and not a reflection of a customary rule.

128. See *id.* for an analysis of this right.

129. The judgment merely implies sustainable development. Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 37 I.L.M. at 195 (citing unnamed "new norms and prescriptions of international environmental law"). However, Judge Weeramantry fills in this gap with a very sweeping endorsement of sustainable development as a fundamental principle that "command[s] recognition in international law." *Id.* at 205 (separate opinion of Judge Weeramantry).

130. NUIW Convention, *supra* note 5, art. 4.

131. *Id.* art. 6.

132. *Id.* art. 5.

133. *Id.* art. 6.

134. *Id.* art. 7.

resolution of disputes.[135] Finally, Article 12 restates the notification rule, but for measures that would produce a "significant adverse effect."[136] While on the one hand, this would seem to contradict the notification rule as described above, the article continues on to state that notification must be accompanied by "available technical data and information," which essentially means that the article is a combination of the consultation requirement and the general customary rule that negotiations be meaningful.

In addition to these rules, there now exists a customary obligation to conduct an environmental impact assessment (EIA).[137] Especially in "the transboundary context, the duty to conduct an EIA is probably now a requirement of customary law."[138] To the extent that this is true, lower riparians must be accorded the opportunity to consult with project planners, comment on the assessment, and provide technical and other information relevant to the assessment, and especially relating to consequences of the planned project, that may not be in the possession of the planning state.

B. Competing Visions of the Progressive Development of Watercourse Law

In 1970, the United Nations General Assembly urged the International Law Commission to begin efforts to codify the law of the non-navigational uses of international watercourses.[139] Almost three decades later, the General Assembly adopted the NUIW Convention.

1. The Global Vision of Watercourse Law

The NUIW Convention is explicitly a framework convention for the management and protection of international watercourses, and riparian states are entitled to conclude "watercourse agreement[s]" for individual watercourses.[140] Beyond its customary core, this convention advances a set of rules, which are very briefly glossed below, and reflect the progressive development of international law.

For example, the NUIW Convention requires a state to conduct an EIA prior to implementing any project that may have a significant adverse effect on lower riparians and pushes beyond custom by requiring an implementing state to provide notification and technical information to affected riparians.[141] Moreover, project implementation may not begin during a six to twelve month comment period for lower riparians.[142] Moving further beyond custom, the NUIW Convention requires riparians to enter into cooperative consultations, to prevent significant harm to lower riparians, to negotiate in good faith, and

---

135. *Id.* art. 8.

136. NUIW Convention, *supra* note 5, art. 12.

137. *See* Alexandre Timoshenko, *The Problem of Preventing Damage to the Environment in National and International Law: Impact Assessment and International Consultations*, 5 PACE ENVTL. L. REV. 475, 480 (1998).

138. DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 367 (1998).

139. Stephen McCaffrey & Robert Rosenstock, *The International Law Commission's Draft Articles on International Watercourses: An Overview and Commentary*, 5 REV. EUR. COMMUNITY & INT'L ENVTL L. 89 (1996).

140. NUIW Convention, *supra* note 5, art. 4.

141. *Id.* art. 12.

142. *Id.* art. 14(b).

to disclose relevant data to each other on request.[143] Finally, in the event of persistent disagreement, it provides for the option to establish a fact-finding commission.[144]

2. The Western Vision of Watercourse Law

Many would posit that these rules of the NUIW Convention reflect the future content of customary watercourse law. However, there exists a strong competing vision of that future content. Several years prior to the NUIW Convention, the UNECE assisted with the conclusion of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (the TWIL Convention).[145] Unlike the NUIW Convention, this Convention is only open to UNECE states, which include European countries, the United States, Canada, and the nations of the former Soviet Union. All the states of the former Soviet Union are part of Europe for UNECE purposes and are encouraged to accede to UNECE treaties.[146] The TWIL Convention is in force, has many more signatories and parties than the NUIW Convention, and challenges some of the core provisions of the NUIW Convention. Russia and Kazakhstan are TWIL Convention parties.[147]

The NUIW Convention is less attentive to environmental concerns than the TWIL Convention. Within the body of the conventions, which are of equivalent length, "environment" appears seven times more frequently in the TWIL than in the NUIW Convention. In turn, the NUIW Convention devotes more care to provisions related to development. This difference highlights a North/South tension between environmental and developmental goals.

The aim of the TWIL Convention is to have "ecologically sound and rational water management . . . environmental protection . . . [and] restoration of ecosystems."[148] The TWIL Convention urges states to engage in EIAs, monitoring, research, comprehensive and early exchange of information, and the establishment of joint management bodies to coordinate management of individual watercourses.[149] The TWIL Convention also requires disclosure of information to the public and allows, like the NUIW Convention, ratifying states to submit to the compulsory jurisdiction of arbitration or the ICJ in the event of a dispute not resolvable through consultation and negotiation.[150]

While both conventions are in agreement to the extent that they reflect the core customs of watercourse law outlined in the last section, they diverge beyond that core. TWIL more fully embraces community of interests and sustainable development by recasting the traditional definition of sustainable development, *mutatis mutandis*, to fit the

143. *Id.* arts. 6(2), 7(1), 8(1), 9(2).

144. *Id.* art. 33.

145. TWIL Convention, *supra* note 5.

146. In the most eastern example, in early 1999, Kyrgyzstan acceded to the Convention on Long-Range Transboundary Air Pollution, Mar. 16, 1983, 1302 U.N.T.S. 218. This ratification was signed by President Akaev on Jan. 14, 2000 and passed by the Legislative Assembly on Nov. 10, 1999 and by the Council of People's Representatives on Dec. 17, 1999. O Prisoedinenii Kyrgyzskoi Respubliki k Ramochnoi Konventsii OON ob uzmenenii klimata i Konventsii YeEK OON no transgranichnomu zagriszneniu vozdukha no bol'shie rasstoiania [On the Accession of the Kyrgyz Republic to the U.N. Framework Convention on Climate Change as well as to the EEC/U.N. Transboundary Convention on Air Pollution] (on file with author); SIEVERS, *supra* note 33.

147. Russia ratified the TWIL Convention on Nov. 2, 1993. Kazakhstan ratified the TWIL Convention on Jan. 11, 2001. UNECE Water Convention, *Convention on the Protection and Use of Transboundary Watercourses and International Lakes: Status and Ratification of the Convention*, http://www.unece.org/env/water/status/lega_wc.htm (last modified Feb. 9, 2001).

148. TWIL Convention, *supra* note 5, art. 2.

149. *Id*. arts. 4–6.

150. *Id*. arts. 16, 22.

context of water.[151] However, most importantly, nothing like Article 10 on "vital human needs" of the NUIW Convention[152] is found in the TWIL Convention. Not only does TWIL not elevate human needs over environmental needs, TWIL simply ignores human needs. If anything, the TWIL Convention moves, to a small degree, towards establishing the paramount importance of environmental needs: "The application of this Convention shall not lead to the deterioration of environmental conditions nor lead to increased transboundary impact."[153]

C. Shallow Shoals of Evolving Watercourse Law

The effectiveness of transboundary watercourse customs as a component of international law is frustrated by a lack of clarity that reaches to the core definitions of international law. Specifically, the actual content of the custom has yet to be written authoritatively, and scholars have ceded their functional role of providing the empirical information needed for an accurate assessment of custom.[154]

1. Abrogated Scholarship

To take this latter point first, something must be lacking in international watercourse regimes if a major river diversion can go unnoticed by almost every "expert" in international watercourse law for years and if the affected states make no reference to international environmental law. Despite the scale and consequences of this project, it remains curiously unknown outside the Russian-speaking world.[155] To the extent this silence is symptomatic, the English-speaking scholarly community[156] has turned away from a dedication to, and peer respect for, compilation of accurate survey information and too much toward an attempt to arrogate for itself quasi-judicial authority.[157] Ironic as it may be in this information age, the opportunity for a tribunal to assess custom, especially the kind of custom at the heart of this article, along traditional lines has now dissipated.

2. The Meaning of "Existing Uses"

In addition to problems of determining state practice, uncertainty about the meaning of "existing uses" threatens to allow states, such as China, to use texts, such as the NUIW

---

151. *Id.* art. 2.5(c).

152. NUIW Convention, *supra* note 5, art. 10.

153. TWIL Convention, *supra* note 5, art. 2.7.

154. While not the subject of this article, the reason why the opinions of scholars are listed as a source of international law is not due to the inductive moral assessments that characterize possibly even the bulk of English language international law scholarship (certainly the bulk of international human rights law scholarship). Rather, in the days preceding electronic databases, tribunals interested in the practices of states could only turn to international law specialists for the kind of encyclopedic and specific information on state practice needed for a determination. International law scholars provided the stuff from which deduction could proceed.

155. The project is kept silent within China, and neither international legal scholars, regional area specialists, nor international agencies have devoted notable attention to the project.

156. One wonders, not so innocently, how it came to pass that so many American "international" law scholars of repute are so comfortably and unabashedly monolingual and what perverse consequences for the scholarly community issue from such insularity of language, not to mention these scholars' scant command of social science research skills developed in other disciplines.

157. See PAUL W. KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP (1999) for an analysis of the perverse consequences generated by the quasi-judicial mode.

Convention, to undermine the underlying principles of reason and equity at the heart of such conventions. Proponents of the NUIW Convention should not despair over China's current belligerent stance against the Convention. While China puffs against the Convention in order to shield its Irtysh interests, it will need to embrace the Convention in coming years in order to advance those very same interests.

China objected to the draft text's bias in favor of lower riparians and posited that "territorial sovereignty is a basic principle of international law. A watercourse state enjoys indisputable territorial sovereignty over those parts of international watercourses that flow through its territory."[158] However, China's objections during the NUIW Convention debates were probably not motivated by general policy concerns, but by specific mercantile concerns related to the Irtysh diversion and a deliberate effort to establish persistent objector status.

Yet once China manages to move several million people into the Irtysh diversion area, and once these people are dependent on the diversion project for life, under the NUIW Convention's Article 10 preference for "vital human needs,"[159] the Convention will, as it were, switch sides. Then China will be eager to accede to the NUIW Convention since China's use of the Irtysh to support the modest (by comparison with Kazakhstan and Russia) livelihoods of a "local" population "dependent" on this source of water will be of decisive importance. Since under the NUIW Convention the relative weight of each competing watercourse use claim depends on its relative importance, if China can avoid providing any fallback sources of water for its Xinjiang immigrants, the population dependency of this area will eventually trump any other factor. Accordingly, in the event of a future conflict over whether water should be allocated to Kazakhstan hydroelectric facilities or resuscitated Russian industry, international customary law and the NUIW Convention will decide in favor of the Chinese farmers.

Thus, while the NUIW Convention hopes to improve decision-making at the pre-project level, it also creates perverse incentives for states to embark on questionable projects, such as the Irtysh diversion. The principal flaw leading to this result is that the population dependency requirement lacks any sort of anchor in pre-project conditions.

As Judge Weeramantry has stated, "'[d]evelopment' means, of course, development not merely for the sake of development and the economic gain it produces, but for its value in increasing the sum total of human happiness and welfare."[160] If that is, indeed, the legal metric for deciding transboundary rights to allocations of water resources, then China has the internal capacity to arrogate virtually all the water resources on its northern and western borders. In its disputes with any of its sparsely populated northern or western neighbors, China can shift more people than its neighbors to local regions to tip the scales of Weeramantrian equity in its own favor.

However, such an ostensible utilitarian victory for human happiness does not accord well with either the basic idea of the equality of sovereign states or the larger needs of environmental conservation and sustainable development. My effort here is not to suggest that Judge Weeramantry is myopic. After all, Judge Weeramantry also writes that it is "the correct formulation of the right to development that that right does not exist in the absolute

---

158. Schwabach 1998, *supra* note 40, at 276.

159. In the event of a conflict between various watercourse uses, "vital human needs" trumps other factors. *See* NUIW Convention, *supra* note 5, at art. 10(2). Of note is Article 6(1)(c) of the NUIW Convention, which establishes as a factor relevant to a determination of whether a state's use of watercourse resources is equitable and reasonable, "the population dependent on the watercourse in each watercourse State." *Id.* art. 6(1)(c).

160. Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 37 I.L.M. at 206 (separate opinion of Judge Weeramantry).

sense, but is relative always to its tolerance by the environment."[161] Rather, it is to suggest that Judge Weeramantry is playing both ends against the middle and that this aptly illustrates how international law has yet to pioneer adequate means to balance competing environmental and development claims; sustainable development has yet to be infused with much substance.

Returning to Irtysh tactics, China merely needs to weather criticism long enough and to implement its plans rapidly enough in order to legalize its claim to Black Irtysh waters. To expand its claim, the Chinese could note that the Irtysh populations of Kazakhstan and Russia are not increasing,[162] and that because of post-Soviet dislocations, the water needs of these two states have declined since 1990.

The crux of the problem is in the interpretation of such provisions as Article 5(2)(d) of the Helsinki Rules, which provide that a factor relevant to determining equitable utilization of water resources is "the past utilization of the waters of the basin, including in particular existing utilization."[163] The framework conventions contain similar language. Existing uses are important in practice because a common scheme for water resource sharing is to preserve existing uses and then evenly split any remaining resources between the riparians.[164] What neither the Helsinki Rules nor their TWIL and NUIW successors provide is any clarification as to whether the dichotomy between past and existing was intended to be as short as ten years. It should not. In fact, the distinction between past and present should not be tied to years at all, but to infrastructure.

The ambition of the rule this article advances is to attain equity and to establish predictability with respect to the allocation of legal rights to foster efficiency and to limit deadweight losses under the rule of law. This proposed rule does not take on a formidable opponent; the current rule on past and existing uses, without infrastructure, urges conflict. Inviting sovereign states to lodge competing historical claims and puff up present claims is a patently bad mechanism for minimizing conflict; it may even be one of the best recipes for inciting intractable conflicts. For precisely this reason, the twenty-first century docket of the ICJ remains tilted toward border disputes and its list of cases is sadly consonant with lists of armed conflict. This "history game" also invites states to take advantage of temporary changes in the water use practices of neighbors, such as can be provoked by floods, wars, or, in the case of Kazakhstan and Russia, severe internal economic dislocations.

A better rule would link entitlements to existing infrastructure, which is less mercurial than year-to-year use.[165] Arguably, the early and strong role of navigation in customary watercourse law is linked to these very concerns; navigation has also implied investments and infrastructure.[166] Shared state appreciation for the need to protect such investments was

---

161. *Id.*

162. While neither Kazakhstan nor Russia planned this lack of population growth, its effect is consistent with the aspirations of sustainable development. However, its effect is also to reduce these states' water claims, which means that Kazakhstan and Russia are being punished for moving towards sustainability, an unfortunate precedent for international law.

163. The Helsinki Rules, *supra* note 79, art. 5(2)(d).

164. *See* Protocol between China and Russia for the Delimitation of the Frontier along the River Horgos, 221 Consol. T.S. 106 [hereinafter 1915 Protocol]; *see also* Agreement for the Full Utilization of the Nile Waters, Nov. 8, 1959, United Arab Republic-Sudan, 453 U.N.T.S. 51.

165. Of course, events such as accidents and wars that destroy infrastructure should not remove state entitlements as long as states pursue post-event efforts to restore infrastructure.

166. This genesis may be paralleled in law of the sea rules for identical reasons and therefore may be a useful analogy. Under Law of the Sea principles, "the right of innocent passage is not a 'gift' of the coastal state to passing vessels but a limitation of its sovereignty in the interests of international intercourse." William E. Butler, *Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy*, 81 AM. J. INT'L L. 331, 346 (1987).

in all likelihood precisely what affected navigation's hallowed status under customary watercourse law and the law of the sea. In previous centuries, riverborne trade was simply much more important than biodiversity concerns, rights to development, and hydroelectric facilities.

To apply this infrastructure approach in practice in the Irtysh controversy, calculation of the effects on shipping and navigation should take into account Kazakhstan's and Russia's continued enjoyment of "existing" uses of the river at a 1990 baseline instead of a 2000 baseline, since "existing" infrastructure does not require that use of that infrastructure be currently maximized. The investments of Kazakhstan and Russia in dams, factories, ports, recreation areas, and other installations stretch along the Irtysh for thousands of miles, and these states express every intention of continuing to use and rely on these installations. If and when this infrastructure actually erodes, Kazakhstan and Russian "existing use" should be lowered.

Such a system would provide greater predictably in the determination of entitlements and would also provide a market for efficient redistribution of such entitlements. An allocation based on time displays the distinct disadvantage, beyond unpredictability, of providing no ready or precise means of translating use into a commodity. Under an infrastructure definition of existing use, mutually beneficial exchange of "use" would be possible. For instance, China could bargain with Kazakhstan to remove an existing hydroelectric facility.

Otherwise, states can be expected to engage in particularly costly strategic behavior, such as the obfuscation and overdevelopment that exist today in the Irtysh basin. This type of strategic behavior is likely to degrade sustainability by encouraging states to react opportunistically to temporary changes in a co-riparian's water use. Such activity wastes resources and ensures at least occasional periods in which the aggregate resource use in a basin exceeds sustainability.

3. Weak Jurisdiction

Suppose that Kazakhstan decided to turn to a tribunal to play the "history game," point out the perverse consequences of NUIW provisions, and defend its rights. Assuming that China has even committed any breach of international law, merely the fact of a violation means little in terms of securing a remedy.

Indeed, the bulk of serious "violations" of international law go unaddressed for lack of either political will or a forum that has jurisdiction. Indeed, the *Gabcikovo-Nagymaros* case began with a fruitless filing by Hungary against Czechoslovakia in 1992,[167] a filing that the ICJ would have been forced to throw out for lack of jurisdiction if Hungary had not itself withdrawn it. Indeed, the critical quandary of any analysis of watercourse law is reconciling state behavior with the concept of law. The ease of finding examples of violation of the customary rules posited in this article means either that, in the watercourse field, states are generally hooligans or that the rules contained in this article are really not law at all.

The only reason why the *Gabcikovo-Nagymaros* and *Kasikili-Sedudu Island* disputes appeared before any court was because both of the parties assented through special agreements to such jurisdiction.[168] Such assent is the exception, not the rule. In the Kosovo cases, because the NATO states will not assent to jurisdiction, it is not likely, although not impossible, that the ICJ will find itself able to rule on whether NATO action violated the

167. Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 37 I.L.M. at 178.

168. *See* Gabcikovo-Nagymoros Project (Hung. v. Slovk.), 37 I.L.M. 162, 170 (1998); Kasikili/Sedudu Island (Bots. v. Namib.), 39 I.L.M. 310, 314 (2000).

international obligation to respect freedom of navigation on international rivers. Whatever China's opinions about NATO are in other settings, China will almost certainly take NATO's lead in watercourse jurisdiction.

IV. REMEDY AND RECOURSE

Despite the desires of its citizens, Kazakhstan lacks the political will to realize its actual potential to engage China effectively.[169] Whatever the motivations are of Kazakhstan's leaders, their apparent strategy of ignoring international law displays an important weakness—it seems not to be working. Yet, if Kazakhstan revisited its strategy and sought to apply international law, would it have the mechanisms required to establish jurisdiction and prove its contentions? In part, this question demands a review of the current treaties that bind China and Kazakhstan.

A. Conventions

In 1957, the USSR and China concluded a commercial navigation agreement for seven border rivers and lakes,[170] including the Black Irtysh and the Ili. This agreement, following precedent of earlier China-Eurasia treaties since 1727 that mention the geographic area containing the Irtysh,[171] contains no provisions about river flow.[172]

---

169. This observation is not to suggest that Kazakhstan should engage China. Kazakhstan, and Kazakhstan's citizens, have much at stake in terms of economics and security in maintaining cordial relations with Beijing.

170. Soglashenie mezhdu Pravitelstvom Soyuza Sovetskikh Sotsialisticheskikh Respublik i Pravitelstvom Kitaiskoi Narodnoi Respubliki o rezhime torgovogo sudokhodstva na pogranichnykh i smezhnykh s nimi rekakh i ozere [Agreement between the USSR and China Concerning Rules of Commercial Navigation on Waters, on or along Their Frontiers], Dec. 21, 1957, U.S.S.R.-P.R.C., 305 U.N.T.S. 215 [hereinafter 1957 Treaty] (on file with author).

171. The Aug. 20, 1727, Dogovor o rossiisko-kitaiskoi granitse [Agreement on the Russia-China Border], *at* http://www.american.edu/TED/ice/3sinosov.htm#Archives (last visited Oct. 30, 2001) [The Bura Treaty], which is roughly concurrent to the time when Russia began to come into control of the lands that comprise today's eastern borders of Kazakhstan, and the 1881 St. Petersburg Treaty (Art. 8), established the Russia-China border roughly in its present location with regard to the Irtysh. Under the St. Petersburg Treaty, in return for receiving territory along the Black Irtysh, Russia returned a larger area of land to China along the Ili, east of the Horgos. Of particular noteworthiness is that this Black Irtysh basin land received by Russia in 1881 is in part the land ceded to China by Kazakhstan in recent years. The last protocol to the St. Petersburg Treaty, occasioned because of changes in the course of the Horgos, was concluded in 1915 and confirmed (echoing St. Petersburg Treaty, Art. 7) that the Horgos River in its new course would define the boundary between the two states. An overview of all these treaties is contained in Vitalii Khlupin, *Tikhaya "agressiya": Problemy kazakhstano-kitaiskikh otnoshenii. Istoriya i sovremennost* [*"Passive Aggression:" Past and Present Problems of Kazakh-Chinese Relations*], http://www.iicas.org/AIBOLIT/aibolit.htm (last visited Sept. 14, 2001) (on file with author). *See* Treaty between China and Russia Respecting the Re-Establishment of Chinese Authority in the Country of Ili etc., Feb. 24, 1881, arts. 7, 8, 158 Consol. T.S. 79 [hereinafter St. Petersburg Treaty]; 1915 Protocol, *supra* note 164.

172. However, China and the USSR did create regimes for Far Eastern border rivers. In 1951, they created rules for navigation on the Amur, Ussuri, Argun, Sungacha, and Khanka. Soglashenie o poryadke plavanii po pogranichnym rekam Amur, Ussuri, Argun, Sungacha i ozeru Khanka i ob ustanovlenii sudokhodnoi obstanovki na etikh vodnykh putyakh [Agreement for Rules of Navigation for the Amur, Ussuri, Argun, and Sungacha Transboundary Rivers and Lake Khanka, as well as for the Establishment of General Shipping Norms on these Waterways], Jan. 2, 1951. Likewise, in 1986 they created a body to design a regime for the Argun and Amur rivers. Soglashenie mezhdu Pravitelstvom Soyuza Sovetskikh Sotsialisticheskikh Respublik i Pravitelstvom Kitaiskoi Narodnoi Respubliki o sozdanii Sovestko-Kitaiskoi komissii dlya rukovodstva razrabotkoi Skhemy kompleksnogo ispolzovaniya vodnykh resursov pogranichnykh uchastkov rek Argun i Amur [Agreement between the Governments of the USSR and China on the Creation of a Soviet-Chinese Commission for Developing Water Resources from the Argun and Amur Transboundary Rivers], Oct. 23, 1986. *See also* Soglashenie mezhdu

In terms of substantive obligations, the most that can be claimed of the 1957 Treaty is that it established the mutual importance of riparian trade and navigation and, consequently, obligated the states not to engage in actions on these watercourses that would run afoul of the customary rule against interfering with a co-riparian's enjoyment of freedom of navigation.[173]

However, the 1957 Treaty did not open the floodgates to bilateral trade; it was concluded on the eve of a decade-long diplomatic rift between China and the former Soviet Union. During this interval, both states engaged in violations of the customary rule of navigability. China unilaterally diverted the Ili, turning a "wild, bountiful and fish-filled Ili, on which merchant vessel caravans had traveled, into a river that can now be crossed by wading it."[174] In 1996, China responded negatively to a trade proposal from Kazakhstan regarding renewal of shipping on the Ili, citing the lack of water in the basin as too much of an impediment to infrastructure investment.[175] The Soviet Union was no less active in the Irtysh Basin; it constructed the Ust-Kamenogorsk Hydroelectric Station in 1953–1954 and followed this with the Bukhtarmin Station in the 1960s and the Shulbinsk Station in the late 1980s. The Bukhtarmin complex made Lake Zaisan one of the largest lakes in the world. These projects did not preclude shipping, but they did frustrate it, and they did create periods during peak construction in which the kind of trade envisioned by the 1957 Treaty was technically impossible.

In 1992, almost certainly as part of Russia's effort to fulfill its anticipated obligations under the TWIL Convention, Kazakhstan and Russia concluded the Agreement on the Joint Utilization and Protection of Transboundary Watercourses.[176] This agreement is symptomatic of active ongoing bilateral relations between the Russian Federation and Kazakhstan over their transboundary rivers and inherited Soviet-era environmental problems. For example, as a result of poor practices in the production of caustic soda at the Pavlodar Chemical Factory, over 900 metric tons of mercury are seeping towards the

---

Pravitelstvom Rossiiskoi Federatsii i Pravitelstvom Kitaiskoi Narodnoi Respublike o inventarizatsii dogovorov zaklyuchennykh mezhdu SSSR i KNR v period s 1949 po 1991 god, v forme obmena notami ot 28 aprelya 1999 g. [Agreement between the Governments of Russia and China on the Group of Treaties Recorded between the USSR and China for the Period 1949–1991, Based on the Exchange of Diplomatic Notes from April 28, 1999], Apr. 28, 1999, Russ.-P.R.C., 1 BYULLETIN MEZHDUNARODNYKH DOGOVOROV RF No. 42 (2000) (on file with author) [hereinafter 1999 Agreement]; Soglashenie mezhdu Pravitelstvom Rossiiskoi Federatsii i Pravitelstvom Kitaiskoi Narodnoi Respubliki o Sotrudnichestve v okhrane okruzhayuschei sredy i ratsionalnogo ispolzovanii transgranichnykh vod, May 7, 1997, Resolution 555, SOBR. ZAKONOD. [Agreement between Russia and China on Cooperation in Environmental Protection and the Rational Use of Transboundary Watercourses], May 7, 1997, Russ.-P.R.C., Resolution 555, art. 2334, COLLECTED LAWS RF, No. 20 (1997) (on file with author) [hereinafter 1997 China-Russia Watercourse Draft Treaty].

173. As an aside, from my own interviews with a variety of the Irtysh negotiators and other Kazakhstan officials, Kazakhstan sees no relevance in the 1957 Treaty, and the Foreign Ministry does not even possess a copy of the 1915 Protocol.

174. Nurshin, *supra* note 24.

175. *Ili* [*The Ili River*], OGNI ALATAU, Sept. 6, 1996 (available from the newspaper only).

176. Postanovlenie ot 8 avgusta 1992 g. N 564 g. Moskva, o podpisanii Soglasheniya mezhdu Pravitelstvom Rossiiskoi Federatsii i Pravitelstvom Respubliki Kazakhstan o sovmestnom ispolzovanii i okhrane transgranichnykh vodnykh obyektov [Government Resolution 564 of the Russian Federation: Agreement on the Joint Utilization and Protection of Transboundary Watercourses], Aug. 8, 1992, Kaz.-Russ. [hereinafter 1992 Kazakhstan-Russia Agreement] (on file with author); *see also* Aleksei Alekseev, *Proekt iz proshlogo* [*Project from the Past*], NEZAVISIMAYA GAZETA, http://news.eastview.com/99/NGA/06/data/n103_43.html (June 9, 1999) (on file with author). Russia has similar agreements with other countries, such as Mongolia, Postanovlenie ot 5 iulia 1994 g. N. 789, O podpisanii Soglasheniia mezhdu Pravitelstvom Rossiiskoi Federatsii i Pravitelstvom Mongolii po okhrane i ispolzovaniyu transgranichnikh vod [Resolution No. 789: On the Signing of an Agreement between Russia and Mongolia on the Protection and Use of Transboundary Waters], July 5, 1994 (on file with author), Ukraine (1992), Estonia (1997), and China (1997). The Mongolia Agreement expanded on 1974 and 1988 transboundary water agreements between the USSR and Mongolia.

Irtysh.[177] The Russian government has actively encouraged Kazakhstan to address this problem and may contribute to the financial resources that Kazakhstan will likely begin to receive in 2001 under a loan from the World Bank for a quarter-billion-dollar Northern Environment Management and Rehabilitation Project.[178]

While the 1992 Kazakhstan-Russia Treaty makes no reference to any multilateral water agreements, it commits the states to refrain from any activities that would adversely affect water quality or quantity, to share all relevant information, and to monitor water quality.[179] It also establishes a joint commission and requires the states to compensate each other for any harm caused, assessing the level of damage with the assistance of a bilateral panel of experts.[180]

Kazakhstan proposed a similar agreement with China in 1992, and the Chinese response to this proposal, for the years leading up to the time that the Irtysh diversion became known, was that it was "studying the issue."[181] Russia and China, however, did negotiate an agreement in 1994 to regulate and restore the living water resources in the border rivers of the Amur and Ussuri.[182] Since it impacts little on state rights to water, this agreement is not a general statement of watercourse policy, and it does not extend to the Irtysh River. In 1997, Russia succeeded in negotiating a more general Agreement On Cooperation in Environmental Protection and the Rational Use of Transboundary Watercourses with China.[183] However, despite this effort, China did not sign.[184]

---

177. Gennadii Benditsky, *Pavlodartsy edva ne prevratilis v afrikantsev: Chernyi mogilnik* [*The Inhabitants of Pavlodarsk Almost Blackened by the Blight of Local Chemical Dump*], VREMYA, http://kztime.virtualave.net/Archive2000/08-10-00/strana32.htm (Aug. 10, 2000) (on file with author). *See also* Isaev, *supra* note 20.

178. *See* World Bank Kazakhstan, *at* http://www.worldbank.kz/content/prep_eng.html#envir.

179. 1992 Kazakhstan-Russia Agreement, *supra* note 176.

180. *Id.*

181. Nurshin, *supra* note 24.

182. Soglashenie mezhdu Pravitelstvom Rossiiskoi Federatsii i Pravitelstvom Kitaiskoi Narodnoi Respubliki o Sotrudnichestve v oblasti okhrany, regulirovanii i vosproizvodtsve zhivykh vodnykh resursov v pogranichnykh vodakh rek Amura i Ussuri [Agreement between the Governments of Russia and China on Cooperation in Environmental Protection and Restoration of Living Water Resources in the Border Rivers of the Amur and Ussuri], May 27, 1994, Russ.-P.R.C. (on file with author).

183. 1997 China-Russia Watercourse Draft Treaty, *supra* note 172. The agreement would have established a joint management commission and bound the parties to emerging standard duties (essentially identical to those of the TWIL Convention) to inform, consult, and monitor. It does not contain any references to the TWIL Convention, and Russia proposed this text at essentially the exact moment that China was fighting the NUIW Convention. NUIW Convention, *supra* note 5. No worse moment could have been chosen to approach an already skittish China with a transboundary water agreement.

184. In similar China-Russia environmental undertakings, signature usually occurs within a few months of agreement on treaty text. This was the case with thematically and chronologically close treaties, such as the 1996 Lake Khanka Agreement, the 1997 Tiger Protection Protocol, and the 1997 Agreement on Boundary Island Governing Principles. Soglashenie mezhdu Pravitelstvom Rossiiskoi Federatsii i Pravitelstvom Kitaiskoi Narodnoi Respubliki o Zapovednike "Ozera Khanka" [Agreement between Russia and China on the "Lake Khanka" Reserve] [Lake Khanka Agreement], Apr. 25, 1996, P.R.C.-Russ., 1 BYULLETIN MEZHDUNARODNYKH DOGOVOROV RF 63–65 (on file with author); Protokol mezhdu Pravitelstvom Rossiiskoi Federatsii i Pravitelstvom Kitaiskoi Narodnoi Respubliki ob Okrane Tigra [Protocol between Russia and China on the Protection of the Tiger] [Tiger Protection Protocol], Nov. 11, 1997, P.R.C.-Russ., ROSS. GAZETA, No. 226 (on file with author); Soglashenie mezhdu Pravitelstvom Rossiikoi Federatsii i Pravitelstvom Kitaiskoi Narodnoi Respubliki o Rukovodyashchnikh Printsipach Sovmestnogo Khozyaistvennogo Ispolzovaniia Otdelnykh Ostrovov i Prilegayushchikh k nim Akvatorii no Pogranichnykh Rekakh [Agreement between Russia and China on the Governing Principles on Joint Economic Use of Indvidiual Islands and Their Contiguous Littoral Waters on Border Rivers] [Agreement on Boundary Island Governing Principles], Nov. 11, 1997, P.R.C.-Russ., ROSS. GAZETA, No. 226 (on file with author). There is no case in which an agreement was signed long after adoption of the text. There are other examples of watercourse treaties that have never been signed, such as a 1998 draft treaty on delimitation of the Tuman River between China, Russia, and North Korea. Government Resolution 891 of the

The bilateral China-Kazakhstan, China-Russia, and Kazakhstan-Russia water and environmental agreements, both signed and unsigned, do not refer to any multilateral watercourse treaties or international law. However, a 1998 Commonwealth of Independent States Agreement on Principles of Transboundary Watercourse Use is based explicitly on the 1966 Helsinki Rules, the TWIL Convention, and international custom.[185] The agreement commits the parties, which include Russia and Kazakhstan, to basic principles of monitoring, notification, precaution, consultation, and negotiation similar to those contained in the TWIL Convention. The agreement also requires the parties to compensate affected states for damages.

China, of course, will not become a party to this CIS agreement. Yet, China is or could be entwined in a set of treaty regime rules indirectly applicable to transboundary waters under global environmental accords. Such treaties include the World Heritage Convention,[186] the CBD,[187] the United Nations Convention to Combat Desertification (UNCCD),[188] and the Ramsar Convention.[189]

Under the World Heritage Convention, states nominate sites for recognition as world cultural or environmental heritage. Under the Convention, parties commit "not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage . . . of other States Parties."[190] While Kazakhstan has yet to list any sites and none of China's twenty-seven sites are in Xinjiang, one of Russia's fifteen sites is an environmental site in the Irtysh Basin.[191] The Golden Mountains of Altai site embraces parts of the Altai ecosystem. However, as an element of the watershed of the Katun River, the site is distant from the Irtysh, and it would be difficult to argue that China's plans threaten it with "substantial or imminent" damage.

All the riparian states are also original parties to the CBD.[192] "In the case of imminent or grave danger or damage, originating under its jurisdiction or control, to biological diversity within the area under jurisdiction of other States . . . [,]" the CBD obligates states to " . . . notify immediately the potentially affected States of such danger or damage, as well as initiate action to prevent or minimize such danger or damage."[193] It is reasonably possible that China's actions constitute grave or immediate danger to the widely acknowledged endangered and endemic biodiversity of the Altai region and Ob-Irtysh

---

Russian Federation, O zaklyuchenii soglasheniya mezhdu Pravitelstvom Rossiiskoi Federatsii, Pravitelstvom Kitaiskoi Narodnoi Respubliki i Pravitelstvom Koreiskoi Narodnoi-Demokraticheskoi Respubliki ob opredelenii linii razgranicheniya pogranichnykh vodnykh prostranstv trekh gosudarstv na reke Tumannaya [Conclusion of the Agreement between Russia, China, and North Korea on the Boundary Demarcation of the Shared Waters of the Tuman River], Aug. 6, 1998, 28 NOVYE ZAKONY I NORMATIVNYE AKTY 112 (1998) (on file with author).

185. Soglashenie ob osnovnykh printsipakh vzaimodeistviya v oblasti ratsionalnogo ispolzovaniya i okhrany transgranichnykh vodnykh obyektov [Commonwealth of Independent States Agreement on Principles of Transboundary Watercourse Use], Sept. 11, 1998 (on file with author).

186. World Heritage Convention, *supra* note 106. China, Russia, and Kazakhstan have long been parties. UNESCO, *Convention concerning the Protection of the World Cultural and Natural Heritage*, Ratification Status, *at* http://www.unesco.org/whc/nwhc/pages/doc/dc_f5.htm (last updated Aug. 7, 2001).

187. CBD, *supra* note 123.

188. U.N. Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa, *opened for signature* Oct. 14, 1994, U.N. Doc. A/.AC.241/15/Rev.7, 33 I.L.M. 1328, *available at* http://www.unccd.int/convention/text/convention.php [hereinafter UNCCD]. Ratification Status, *at* http://untreaty.un.org/English/sample/EnglishInternetBible/partI/chapterXXVII/treaty25.asp (last visited Sept. 15, 2001).

189. Ramsar Convention, *supra* note 106.

190. World Heritage Convention, *supra* note 106, art. 6(3).

191. UNESCO, *The World Heritage List*, *at* http://www.unesco.org/whc/nwhc/pages/doc/dc_f3.htm (last modified Sept. 12, 2001).

192. CBD, *supra* note 123. Ratification Status can be found at http://www.biodiv.org/world/parties.asp (last modified July 20, 2001).

193. CBD, *supra* note 123, art. 14(d).

Basin. Accordingly, China has apparently violated the CBD notification and mitigation requirements. Should Kazakhstan enter into a dispute with China over this violation and the lack of an acceptable environmental impact assessment, the CBD requires that good faith negotiations be followed, if needed, by binding third party dispute resolution.[194] While such adversary tensions have not been pursued by any state to date through the CBD, they remain a possibility.

Kazakhstan and China became parties to UNCCD in 1997; Russia is among only a small handful of states that is not a party. In contrast to the World Heritage Convention and the CBD, the UNCCD lacks strong language on state obligations. However, the UNCCD's general purpose is to control desertification. Russian and Kazakhstan specialists agree that an Irtysh diversion would likely exacerbate serious desertification problems in the Irtysh basins of both states, both directly and due to expected regional warming trends produced by the climate change projected to occur with lowered river flow.[195] Kasym Duskaev of Kazakhstan's National Ecological Center on Sustainable Development predicts that the Irtysh diversion will lead to increased desertification in Kazakhstan and Russia.[196] Thus, even without specific language in the Treaty, China's project may give Kazakhstan grounds for protesting the diversion within the UNCCD regime, perhaps even with resort to the UNCCD's dispute resolution procedures.

Finally, while both China and Russia are parties to the Ramsar Convention,[197] Kazakhstan is not. However, it is a quasi-party in that, as a result of the dissolution of the USSR, it actually contains designated Ramsar sites that the Ramsar Bureau continues to consider part of the Ramsar regime.[198] Moreover, Kazakhstan has stated its intention to accede to Ramsar repeatedly, and it maintains close communications with the Ramsar Bureau.[199] Russia has four designated Ramsar sites in the Irtysh Basin. Under the Ramsar Convention, "parties shall consult with each other about implementing obligations arising from the Convention especially in the case of a wetland extending over the territories of more than one Contracting Party or where a water system is shared by Contracting Parties."[200] This provision gives both Kazakhstan and Russia occasion to argue that China is in violation of Ramsar.

The upshot of all this treaty text is that Kazakhstan and Russia, in their Irtysh activities, are bound together at several levels by clear and binding treaty provisions while China is largely bound only by general treaty restrictions. Those general treaty restrictions, while indirect and tenuous, may nevertheless provide some avenues to establish jurisdiction over the dispute.

194. *Id.* art. 27, Annex II(1)(1). Reservations made at the time of ratification can affect rights at this stage. China may have made reservations that could impede pursuit of this process. However, to the extent that CBD would allow Kazakhstan to publicize its issues, this treaty regime is on the whole a favorable prospect.

195. *See* Agafonov, *supra* note 2. Kazakhstan's own specialists predict substantial desertification from climate change and loss of up to one-quarter of the flow of the Irtysh, or roughly 8 km^3 annually, from climate change trends. FRAMEWORK CONVENTION, *supra* note 18, at 33–35, 38.

196. Baliev & Medvedev, *supra* note 9.

197. Ramsar Convention, *supra* note 106.

198. Ramsar Bureau, *The Ramsar List of Wetlands of International Importance*, *at* http://ramsar.org/key_sitelist.htm (last updated Oct. 12, 2001).

199. Personal communications between the author and the staff at Kazakhstan National Environmental Center for Sustainable Development in Kokshetau, Kazakhstan (1997–1999), and at the Ramsar Convention Bureau in Gland, Switzerland (1997–1999) (on file with author). The Kurgaljin/Tengiz lakes system and the Lower Turgai and Irgiz lakes system are both included in the Ramsar List. Ramsar Bureau, *Key Documents of the Ramsar Convention: The Ramsar List of Wetlands of International Importance*, *at* http://www.ramsar.org/index_list.htm (last visited Sept. 15, 2001). None of China's seven Ramsar sites are in the affected area. Mongolia is also a party with six sites. Russia has thirty-five sites. *Id.*

200. Ramsar Convention, *supra* note 106, art. 5.

B. *Treaties and Forum Shopping*

While China's violations of "law" may be located primarily in violations of customary duties, possibilities for legal forum shopping are most promising in connection with the otherwise tenuous treaties in force that evince connections to the Irtysh. Often, only the existence of some marginally relevant treaty allows a court or tribunal to justify its claim of jurisdiction in order to hear a case; some of the most important precedents in international law adhere to this ontogeny.[201]

In this regard, since none of the Irtysh riparian states has accepted the compulsory jurisdiction of the ICJ,[202] and since it is highly unlikely that China would assent to any sort of special agreement *compromis* for ICJ jurisdiction, one important legal forum is not available. Unless Kazakhstan (or Russia) can find a way to shape its initial claim within an existing treaty in force with China, no formal legal proceeding will be possible.

In this light, the 1957 Treaty is of special importance. Returning to the list of customary rules of Section II, watercourse treaties are presumed unaffected by state succession. While Kazakhstan was not the USSR's successor for treaties involving political status, debts, and similar general obligations, Kazakhstan did succeed to the 1957 Treaty.[203] Because the 1957 Treaty specifically establishes the Irtysh and the Ili as regulated watercourses, and because these rivers cross out of China into Kazakhstan, Kazakhstan succeeded to this Treaty.

However, the 1957 Treaty contains two disappointments. It is not multilateral, and it contains no dispute resolution provisions. In contrast, while UNCCD contains no ready triggers for its dispute resolution procedures, it is multilateral. Thus, the multilateral treaty dispute resolution options open to Kazakhstan, while even more attenuated, primarily involve the World Heritage Convention, the CBD, and the Ramsar Convention. Since threats to biodiversity are difficult to formulate, and since Kazakhstan has yet to designate sites under the other conventions, Kazakhstan possesses no realizable means of establishing its case in a multilateral forum either at present.

However, Kazakhstan and Russia could refer the Irtysh controversy to international dispute resolution under their 1992 Kazakhstan-Russia Treaty in an *inter partes* proceeding. Under Article 10 of this Treaty:

---

201. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 4, 5 (June 27) (opening statement of Pres. Singh) (finding that Article 24 of the Treaty of Friendship, Commerce, and Navigation satisfied the court's jurisdictional requirements).

202. *See* Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1999, U.N. Doc. ST/LEG/SER.E/18, U.N. Sales No. E.00.V.2. (2000), *available at* http://untreaty.un.org/English/sample/EnglishInternetBible/partI/chapterI/treaty4.asp. Of the post-Soviet states, only Estonia has accepted the ICJ's compulsory jurisdiction. *Id.* at 17.

203. There is no ready evidence that one of the parties has denounced it properly (here, the treaty provided this option after a three-month warning period; other treaties may not be denounceable) or that the parties have mutually agreed to terminate it. A treaty "may in fact be dormant, but—unless the parties by mutual agreement terminate the treaty—it continues to exist." Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 37 I.L.M. 162, 194 (1998). Thus, the 1915 Protocol and 1957 Treaty appear to be in force, although the suspended diplomatic relations between China and the USSR, as well as numerous dam and other projects on both sides of the border, would suggest at least the possibility of nullification by state action. However, in a 1999 agreement, Russia and China created lists of 1949–1991 China-Soviet treaties that remained in force and that had lapsed. 1999 Agreement, *supra* note 172. The parties listed the 1957 Treaty as still in force. *Id.* Even though this agreement did not involve Kazakhstan, it would, making certain assumptions, ostensibly estop China from arguing that the 1957 Treaty does not affect current China-Kazakhstan relations. These assumptions are that China has not denounced the treaty as to Kazakhstan since 1991 and that Kazakhstan has not made any statements to the effect that Kazakhstan did not succeed to or has denounced the 1957 Treaty. Objections from China, the stable state, that it never consented to be bound to this new state are irrelevant in the face of a newly-independent (or continuous) state's desire to continue the treaty.

> In the event that of situations that, as a result of transboundary water pollution, could lead to worsening conditions for water use, the Parties shall inform each other without delay and shall undertake on their respective territories any necessary measures to remove the causes, and prevent the consequences of, the water pollution.[204]

The Black Irtysh is already a heavily polluted river as it crosses into Kazakhstan. Pollutants include agricultural chemicals and heavy metals. If the Black Irtysh's flow is reduced, the concentration of pollutants can be expected to increase absent some sort of water treatment by China. No such Chinese plans have been rumored. Thanks to the vague wording and passive voice of Article 10, it could be argued that Kazakhstan carries an obligation vis-à-vis Russia to mitigate these increased levels of pollution. The issue of whether Russia can make this demand on Kazakhstan, and the related issue of who must underwrite the cost of these efforts, may be justiciable. Were Kazakhstan to initiate such a case and were China ultimately unable to sit idly by, since the outcome of the case would in so public a forum blame China, a mechanism of transboundary jurisdiction for international watercourse disputes will have been pioneered.

C. Advisory Opinion

With similar chances of success, Kazakhstan could also try to convince an authorized international agency to seek an advisory opinion[205] from the ICJ on the customary law of transboundary watercourses.[206] As a preliminary matter, the ICJ would consider whether the

---

204. 1992 Kazakhstan-Russia Agreement, *supra* note 176, art. 10.

205. Under Article 96(1) of the United Nations Charter, the Security Council and General Assembly may request an opinion, while under Article 96(2), United Nations agencies and organs authorized by the General Assembly may request advisory opinions "arising within the scope of their activities." U.N. CHARTER art. 96, para. 2. Of the nineteen organs and agencies currently so authorized, the three most amenable candidates might be the Economic and Social Council (UNESC); Food and Agriculture Organization of the United Nations (FAO); and United Nations Educational, Scientific, and Cultural Organization (UNESCO). For a list of authorized agencies and organs, see International Court of Justice, *Organs and Specialized Agencies of the United Nations Authorized to Request Advisory Opinions*, http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicorgansandspecialized.html (last visited July 6, 2001). In order for the ICJ to have jurisdiction to issue an advisory opinion, the requesting agency must show a clear relationship between the content of the question and its own specialized mission. The ICJ rejected WHO's request for an advisory opinion on the legality of the use of nuclear weapons since its mandate concerned the effects of the use of such weapons, but not the weapons themselves. Legality of the Use by a State of Nuclear Weapons in Armed Conflict (World Health Organization), 1996(I) I.C.J. 226 (July 8) [hereinafter Nuclear Weapons]. While the FAO's longstanding interest in environmental law and UNESCO's World Heritage concerns are clearly connected to Irtysh concerns, the Economic and Social Council is perhaps the best choice. The Council has previously requested an advisory opinion, at the time over the vigorous objections of Romania. Applicability of Article IV, Section 22, of the Convention on the Privileges and Immunities of the United Nations, 1989 I.C.J. 177 (Dec. 15). The consent of states is not necessary for advisory opinions, and state objections to the court's jurisdiction, while taken into consideration, are often unsuccessful. *See* Western Sahara, 1975 I.C.J. 12 (Oct. 16) (discussing Spain's unsuccessful objections); Nuclear Weapons, 1996(I) I.C.J. 226 (discussing how the United States and others objected unsuccessfully). In contrast to the narrow foci of FAO and UNESCO, UNESC's mandate and activities embrace the economic, political, social, and environmental aspects of development. Accordingly, UNESC is perhaps the only United Nations organ (outside the General Assembly itself) that meets both criteria (authorization and specialization) required for request of an advisory opinion. Since China would certainly veto any Security Council request, UNESC submission—possibly followed by General Assembly support, as in the Nuclear Weapons case—would be the most likely route for an advisory opinion.

206. While advisory opinions are not supposed to bind states, their effects are meaningful both for precedent and in individual state behavior. "The Court's Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an 'organ of the United Nations,' represents its participation in

advisory case was suitable for the court's docket. In order for the ICJ to accept an advisory opinion case, the case must pose a legal question[207] (instead of a political question), and the court's determination should not inappropriately interfere in ongoing political negotiations. Accordingly, the question posed to the court for determination would implicitly bear on the Irtysh diversion. Yet, it would explicitly be as broad as: "What obligations to protect the environment, to protect navigation, to conduct environmental assessments, to negotiate in good faith, and to consult with affected states exist under international law for an upper riparian who wishes to divert a transboundary watercourse?"

In any event, such an unfolding would have largely the same effect as an adjudication of the Irtysh controversy, and it would be a similarly, perhaps even more, important development in transboundary watercourse law.

D. Legal Arguments in a Legal Forum

Once in a tribunal, Kazakhstan possesses substantial arguments that China has violated international law. These arguments are founded in the principle that each riparian has a basic right to an equitable and reasonable share of a transboundary watercourse's resources.

To begin, China violated the notice rule. Not only did it not notify Kazakhstan or Russia of its plans regarding the Irtysh, it compounded its violation by refraining for years to disclose its projects and then refusing, until 1999, to acknowledge its plans after they came to light.

Next, China's failure to begin talks with Kazakhstan prior to initiating work on the diversion project violates the consultation rule. There could not have been any doubt in China that the project would effect a substantive change in the Black Irtysh's quantity and quality and affect both Kazakhstan and Russia. Again, China not only failed to enter into consultations, but willfully breached its duty by attempting, over many years, to keep its project secret. Consultations must occur before project implementation begins in order to avoid the deadweight losses that would occur if a project were abandoned after work had already begun. By China's choice alone there were no pre-project consultations; as a result, China should not be able to claim that its investments give it any sort of claim to proceed with the project now.

In order to make consultations meaningful, which is a general requirement under international law, China would have needed to do more than just invite Kazakhstan to enter into talks. Rather, China's obligation was to allow Kazakhstan access to the results of an EIA.[208] For such an EIA to be effective, it would have required technical information about Kazakhstan and Russian uses of the Irtysh and installations on the Irtysh, which China never requested.[209] In other words, if China could not provide Kazakhstan with the results of an

---

the activities of the Organization, and, in principle, should not be refused." Interpretation of Peace Treaties with Bulgaria, Hungary, and Romania, 1950 I.C.J. 65, 71 (Mar. 30).

207. Article 65 of the statute provides that the Court may give an advisory opinion on any legal question, but this often requires an initial determination that the question is ripe for review and not conflicting with other, possibly more suitable, international conflict resolution processes. International Court of Justice, Statute of the International Court of Justice, 59(II) Stat. 1063 (1945), Doc. 840, IV/1/69, 13 U.N.C.I.O. Docs. 319 (1945), *available at* http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstaute.htm#CHAPTER_IV (last visited July 16, 2001).

208. Judge Weeramantry argues that the obligation to conduct an environmental impact assessment is now part of customary international law. Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 37 I.L.M. 162, 214 (separate opinion of Judge Weeramantry).

209. While on the one hand, Chinese lack of information (accompanied by a willful refusal to inquire into this information) about how its diversion would affect Kazakhstan would appear to be a *prima facie* violation of

EIA because there was no EIA, or because the EIA did not cover transboundary impacts, China would not be absolved, but rather would be in violation of the customary rule on the necessity of EIAs.

In the curious case of delayed notification, a state compounds its EIA obligations. It is required to convey not only pre-project technical information, but also post-implementation information. States are obligated to conduct a "continuing environmental impact assessment"[210] for environmentally risky projects. A unilateral effort to shuffle water allocations in a basin as large as the Indian subcontinent qualifies *res ipsa loquitur* as an environmentally risky endeavor.

Given the assessments of Russian and Kazakhstan specialists about the impact of the project, China appears in violation of the rule that holds that any action of a riparian state that limits a co-riparian's enjoyment of its freedom of navigation is presumed unlawful. Since no mitigating states of necessity exist on China's side, this presumption seems unlikely to be rebutted effectively. The 1957 Treaty would appear to buttress this assertion, and it also adds another reason why China was bound to notify and consult prior to initiation of construction of its canal. Implementation of any treaty "requires a mutual willingness to discuss in good faith actual and potential environmental risks."[211]

Finally, it appears that China may also be in violation of the obligation to refrain from causing an imminent and substantial environmental or human disaster. The project almost certainly will cause some environmental harm in Kazakhstan's part of the Black Irtysh Basin, but it seems unlikely that this harm would rise to the standard of imminent and substantial. However, the thousands of Kazakhstanis living in that part of Kazakhstan could be placed in the way of serious harm, and this risk is more likely to rise to the standard of substantial. Yet Kazakhstan has known of China's project for considerable time and has had ample ability to take remedial measures (and even more importantly, has the capacity to take such measures). Accordingly, despite the fact that the diversion may ruin the lives of and force the eventual relocation of thousands of Kazakhstanis, it probably does not constitute a substantial and imminent human disaster under international law.

That one exculpatory loophole notwithstanding, China's efforts to date may even rise to the level of a gross violation. China did not notify either lower riparian, did not conduct a meaningful transboundary EIA, initiated work before fulfilling its notification duties, threatens to disrupt substantial navigation interests, and attempted for many years to withhold information about or even an acknowledgement of the scale of the project from lower riparians.

Even though China and Kazakhstan are now meeting over the Irtysh, these meetings do not bring China within the realm of compliance with international law. China's actions refute the very definition of negotiations. Parties "are under an obligation so to conduct themselves so that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it."[212] Unfortunately, China's position is closer to intractability than mere stubbornness. In the aggregate, China's actions leading up to and including the negotiation stage of conflict

---

the law, Chinese and Kazakhstan hydrologists have actively shared information for at least a decade and even published several books together on Central Asian watercourses. Tursunov, *supra* note 10.

210. Judge Weeramantry argues that, even if a treaty or rule requires only an initial environmental impact assessment, a state has "a duty of monitoring the environmental impacts of any substantial project during the operation of the scheme," or a duty of "continual environmental impact assessment." Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 37 I.L.M. at 214 (separate opinion of Judge Weeramantry).

211. *Id.* at 196.

212. North Sea Continental Shelf (F.R.G. v. Den. & F.R.G. v. Neth.), 1969 I.C.J. 47 (Feb. 20).

resolution with Kazakhstan exhibit such an array of breaches of international norms as to constitute aggression.[213]

Outside of China's impact on Kazakhstan itself, the world community should also be concerned with the environmental legal consequences of China's actions since some of these consequences may rise to the level of violations of multilateral environmental treaties and/or *erga omnes* violations.

The foundational structural principle of interstate environmental law is that:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[214]

This principle is related to the larger obligation of states to bring their actions into accord with the demands of sustainable development. States are also bound to obey the treaties to which they accede, even if their content is environmental. Thus, considering both sustainable development and China's party status in major environmental treaties, China may not pursue projects that exacerbate desertification, that degrade an internationally significant habitat for endangered migratory birds or the integrity of that ecosystem, or that exacerbate the negative effects of climate change[215] on Kazakhstan or Russia.[216] With reasonable certainty, the Irtysh diversion will do all of the above.

Interestingly, China's Tenth Five-Year Plan elevates sustainable development to the same level of priority as development of western China; "sustainable development" is the explicit focus of one of the ten sections of the plan.[217] However, China's policy and programmatic commitment to sustainable development end abruptly at China's borders, and nowhere in the plan is there any recommendation regarding sustainable development that is linked to anything other than a purely national benefit.

---

213. Perhaps it is no accident that Xue Hanqin's 1992 comments on the draft of the NUIW Convention refute the customary status of duties to exchange information and the need to continue to look to state practice for the normative content of the law. Xue Hanqin, *Relativity in International Water Law*, 3 COLO. J. INT'L ENVTL. L. & POL'Y 45, 54–55 (1992). In 1992, China was probably already in violation of duties to notify, consult, and exchange information. Yet, under Hanqin's convenient reasoning, if China can get away with the violation, it has done no wrong. *Id.* at 56.

214. United Nations Conference on the Human Environment: Final Document, Principle 21, U.N. Doc. A/CONF.48/14 (1972), *reprinted in* 11 I.L.M. 1416 [Stockholm Declaration]. Hanqin states that this principle "undoubtedly applies to the issue of international watercourses." Hanqin, *supra* note 213, at 51.

215. *Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of the Second Part of its Fifth Session, Held at New York from 30 April to 9 May 1992*, INC/FCCC, 5th Sess., pt.2, Annex 1, U.N. Doc. A/AC.237/18 (Part II)/Add.1 (1992). China ratified the Framework Convention on Climate Change on Jan. 5, 1993. *Framework Convention on Climate Change—Secretariat: Update on Ratification of the Convetion (as at Sept. 2000)*, *at* http://www.unfcc.de/resource/conv/ratlist.pdf (last visited July 9, 2001).

216. Similarly, China may not shift its national environmental problems to other countries. Having exceeded its carrying capacity in eastern ecosystems, China's diversion project is in part an effort to arrogate for itself the carrying capacity created by the Irtysh River. Expressed in such terms, China's actions are in effect no different than those of high-consumption Western countries. In both cases, states manage to shift to ecosystems beyond their borders the results of the lifestyles of their domestic populations. States are implicitly prohibited from such activities under international law, as expressed in the previous paragraph's excerpt from the Stockholm declaration.

217. *See* Rongji, *supra* note 11, § IX.

E. Global Administration and the Court of Public Opinion

Much of the preceding was, in effect, no more than an academic exercise in assessing the functional power of transboundary watercourse law. That remedies are unlikely through formal dispute resolution is perhaps the dominant characteristic of most transboundary watercourse tensions today. The more accessible levers of influence involve not courts or arbitration tribunals, but the increasingly vast and wide-ranging array of conferences of the parties of conventions and their specialized subsidiary bodies.

Kazakhstan's view of the international arena is more traditional. It generally views international relations as falling into either bilateral or multilateral settings. It largely ignores the emerging expert and quasi-independent world that can be called the jurisdiction of international administrative agencies. Yet it ignores this administrative world at its own peril. This administrative world is now, especially in the environmental sphere, sufficiently large, complex, and interconnected to deserve recognition as a separate arena of international relations.[218]

Indeed, international administrative settings allow Kazakhstan several platforms for negative publicity beyond immediately apparent outlets like the media, NGOs, and the United Nations General Assembly. While these latter three outlets are hallowed instruments of international life in the environmental arena, I posit that the subsidiary bodies and meetings of convention-based regimes are now the most important vehicles for states to pursue strategic activities aimed at modifying the behavior of developing states. The reason for this is that these bodies and meetings are tied directly to sources of environmental development funds. Especially as these bodies formalize and expand their relations with funding mechanisms like the Global Environment Facility,[219] this influence promises to expand, especially for states like China that consistently demand, as a right, financial aid from the West.

For example, under Article 11(4) of the World Heritage Convention, the World Heritage Committee[220] maintains a list of World Heritage in Danger.[221] Practice shows that states, especially jealously independent and sovereign states like China, find inclusion of any of their territory on this list to be very distasteful. While consultation with the host state is required, sites may be, and since 1991 have been, included on or nominated for inclusion on this list over the objections of the host state.[222] Accordingly, Kazakhstan could nominate

---

218. It may already be time to recognize that this administrative world is an international environmental equivalent to the controversial, but inevitable, ascendancy of the administrative state in American legal history, replete with essentially the same structural and theoretical pitfalls of legitimacy.

219. See generally David G. Victor, *The Operation and Effectiveness of the Montreal Protocol's Non-Compliance Procedure*, *in* THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS 137, 137–76 (David G. Victor et al. eds., 1998), for an excellent illustration based on the influence of the Montreal Protocol Implementation Committee on the Ozone Regime and showcasing the links to innovative Global Environmental Facility partnerships.

220. UNESCO, *World Heritage Committee, 1999–2001*, http://www.unesco.org/whc/committ.htm (last visited July 6, 2001). China will be one of the fifteen states on this committee until 2005, which would complicate any listing of one of its sites. The earliest that either Kazakhstan or Russia could be appointed to the committee would be 2001. *See id.* China, a very proactive member, has been on the committee since 1991. Michael Oksenberg & Elizabeth Economy, *China: Implementation Under Economic Growth and Market Reform*, *in* ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS 353, 375–76 (Edith Brown Weiss & Harold K. Jacobson eds., 1998).

221. UNESCO, *World Heritage Committee, 1999–2001*, http://www.unesco.org/whc/danglist.htm (last visited Oct. 11, 2001).

222. Edith Brown Weiss, *The Five International Treaties: A Living History*, *in* ENGAGING COUNTRIES, *supra* note 220, at 89, 98.

the Golden Mountains of Altai site, which is already recognized as World Heritage, for recognition as a site on the list of World Heritage in Danger. This action by Kazakhstan would be likely to provoke a discussion of China's project, even though there appears to be only an attenuated basis for arguing that the Irtysh diversion threatens this site. More particularly, Kazakhstan could attempt to list Lake Zaisan and similar sites along the Irtysh as World Heritage.[223] Having done so, it would then be able to call upon China to refrain from actions that would violate the principles of preservation of acknowledged World Heritage and could self-nominate Lake Zaisan for the List of World Heritage in Danger.

The Ramsar Convention offers a similar vehicle. Under the Ramsar Convention, a Montreux Record[224] lists wetlands in danger. Kazakhstan's Lower Turgai and Irgiz Lakes system was placed on this list in 1993; even though Kazakhstan was not even a state party at that time, such treatment accords Kazakhstan a *de facto* party status. Accordingly, Kazakhstan could attempt both to list Zaisan as a Ramsar and Montreux Record site or propose that Russia's Irtysh wetlands Ramsar site be listed in the Montreux Record.

Kazakhstan has been on the verge of acceding to the Ramsar Convention for several years. Ironically, one of the first wetlands Kazakhstan intended to list, even before the Irtysh diversion plans came to light, was Lake Zaisan.[225] Lake Zaisan is, according to the Ramsar Bureau, one of "the most important areas for birds in Western Asia."[226] At 5,500 square kilometers, Zaisan is also one of the thirty largest lakes in the world and considerably larger than America's Great Salt Lake.

While many more opportunities exist for Kazakhstan and other independent parties to publicize and to dramatize Kazakhstan's plight, the goal of all these non-legal and quasi-legal efforts would be to embarrass China into backing down.

V. CONCLUSION: TRANSBOUNDARY JURISDICTION

The 1992 Kazakhstan-Russia Treaty's dispute resolution provisions require only consideration of issues by the Joint Commission or negotiations between the parties' specialized state agencies.[227] However, given agreement between the parties, Kazakhstan and Russia preserve the right to choose a different or more formal dispute resolution forum to address the dislocations that will ensue from China's diversion of the Irtysh and to determine how Kazakhstan and Russia should apportion between themselves the costs resulting from these dislocations.

Of the options available, among the most interesting would be to refer this dispute to the jurisdiction of the Chamber for Environmental Matters of the ICJ by using a *compromis* special agreement.[228] Established in 1993, this seven judge chamber has yet to hear a case. In addition to highlighting environmental law, such an effort might also have the notable

---

223. While China could attempt to block any such listings, that attempt would help facilitate efforts of Kazakhstan to draw the attention of the world community to its plight.

224. Ramsar Bureau, *Key Documents of the Ramsar Convention: The Montreux Record*, *at* http://www.ramsar.org/key_montreux_record.htm (last modified June 21, 2001).

225. Personal communication between the author and Kazakhstan environmental officials, and unpublished environmental ministry documents on Ramsar implementation (on file with author). Ramsar requires that prospective parties join the regime with at least one designated wetland. Ramsar Convention, *supra* note 106, art. 2(4).

226. Parastu Mirabzadeh, *Wetlands in Western Asia*, *at* http://www.ramsar.org/about_western_asia_bkgd.htm (Oct., 2001).

227. 1992 Kazakhstan-Russia Agreement, *supra* note 176, art. 13.

228. *See* International Court of Justice, Statute of the International Court of Justice, 59(II) Stat. 1063, arts. 15–18, 26 (1945), *reprinted in* SHABTAI ROSENNE, PROCEDURE IN THE INTERNATIONAL COURT: A COMMENTARY ON THE 1978 RULES OF THE INTERNATIONAL COURT OF JUSTICE 38–39 (1983).

effect of submitting the dispute to ICJ jurisdiction without automatic Chinese judicial participation, if the ICJ Vice President Shi Jiuyong does not sit on this chamber. Such a situation would provide a strong incentive to China to intervene.

It is highly unlikely that determination of the issue of who should bear the costs of the Irtysh diversion could proceed without reference to at least some implicit judgment on the legality of China's actions. The risk of such an embarrassing ICJ (or, in the event ICJ did not accept the case, arbitration tribunal) assessment could provoke China's participation in proceedings *forum prorogatum*.[229]

As precedent, ICJ assent to hear such a case would potentially be as interesting a development for international watercourse law as the Rome Statute[230] has been for international human rights law. In effect, the precedent would create ICJ "transboundary jurisdiction" in any watercourse dispute in which at least two riparians both desired the ICJ's views and could base this desire on a treaty that included the compensation clause and passive voice of the 1992 Kazakhstan-Russia Treaty. Such latitude conflicts with current conceptions of the ICJ's jurisdiction,[231] but it is feasible. It is no less credible, and probably much more efficacious, than Yugoslavia's current effort to use the Genocide Convention[232] as the hook to establish ICJ jurisdiction in the Kosovo cases, and from there assert non-genocide claims.[233] It would also generally move transboundary watercourse law one step closer to community of interests and one inch further away from limited territorial sovereignty.

In May 2000, Kazakhstan's agricultural agencies reported that the Irtysh spring floodplain would cover only 65% of its normal area since the Irtysh's level has fallen twenty centimeters due to reduced inflow.[234] As a result, Kazakhstan faces difficulty in supporting its livestock with feed in the Pavlodar Region. At the same time, Kazakhstan's foreign policy seems, if anything, increasingly and irrationally deferential to China. In June 2001, Kazakhstan joined China in denouncing the United States' missile defense plans. This denouncement serves as an apparent sign of weakening U.S. influence in Kazakhstan.[235] Reacting to the spring 2000 problems described above, Kazakhstan created in 2001 an Irtysh Management Body to balance agricultural and energy needs within Kazakhstan.[236]

---

229. In other disputes with other parties, an opposing state might also have the incentive to accept ICJ jurisdiction in order to exercise the right to appoint a judge of its nationality to sit for the case. In the present dispute, this factor does not apply, because the current Vice President of the ICJ is from China.

230. Rome Statute of the International Criminal Court, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/9, July 17, 1998, 37 I.L.M. 999.

231. However, establishment of the International Criminal Court was equivalently unlikely, and to the extent that this new court largely overshadows the ICJ, the time is ripe for an (attempted) expansion of the ICJ's authority.

232. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 2, 78 U.N.T.S. 277, 21 I.L.M. 220 [Genocide Convention].

233. Two of the cases (Spain and the United States) have already been dismissed because of reservations in those states' ratifications of the Genocide Convention, but the other eight are still on the ICJ docket. *See* Jeremy T. Burton, *Depleted Morality: Yugoslavia v. Ten NATO Members and Depleted Uranium*, 19 WIS. INT'L L.J. 17, 17 n.1 (2000).

234. *Snizhenie urovnya vody v Irtyshe* [*The Falling Levels of the Irtysh*], 58 KAZAKHSTANSKAYA EKOPRAVDA, *at* http://www.ecostan.org/ecopravda/00/58.htm (May 13, 2000) (on file with author).

235. *Cf.* Viktor Bezborodov, *Shankhai: nadezhda na obschee reshenie obschikh problem* [*Shanghai: Hope for a General Solution to Common Problems*], SMI.RU, *at* http://www.smi.ru/2001/06/14/992534050.html (June 16, 2001) (on file with author) (suggesting that the United States' interests coincide with those of Russia and China in mobilizing the Shanghai Five as a mechanism to fight religious fundamentalism in Central Asia).

236. Postanovlenie Pravitelstva Respubliki Kazakhstan ot 23 aprelya 2001 goda N 540 Ob obrazovanii mezhvedomstvennoi komissii po organizatsii i provedeniyu kompensatsionnogo prirodookhrannogo popuska iz Irtyshkogo kaskada vodokhranilisch v poimu reki Irtysh [Decree of the Government of Kazakhstan from the 23rd of April, 2001, No. 540: On the Inter-Agency Commission for the Organization and Implementation of the

To address the foreign policy pitfalls described in this article, Kazakhstan would need to ensure that Sinologists do not continue to monopolize foreign policy, that customary international law assume a place of relevance in policy analyses, and that awareness be raised about the international administrative environment.

The Irtysh is, simply put, one of the world's major rivers. Accordingly, in coming years, the degree to which its riparians clarify their respective rights to its water resources, succeed in minimizing conflict, and succeed in guaranteeing the environmental sustainability of its important riparian ecosystems will be important barometers of the development of transboundary watercourse law. Likewise, it will be an important test of the ability of such law to reconcile development and environmental rights to achieve sustainable development.

This article has asked whether current transboundary watercourse law has developed a comprehensive set of rules to prohibit a state from implementing a project whose environmental and human costs on downstream neighbors exceed domestic benefits. Unfortunately, the law has not yet matured to that level.

The law stands in need of stronger jurisdictional levers commensurate to the fundamental principle of community of interests. Just as community of interests cannot allow a state to remain aloof from its co-riparians if it decides to embark unilaterally on utilization of river resources, transboundary jurisdiction, as described in this article, could provide a mechanism capable of better insuring that states do not remain aloof. While transboundary jurisdiction would make it more difficult for states to avoid dispute resolution, it violates no rules of international law because it still would allow a state at its own peril to avoid such dispute resolution. While such a distinction may seem academic, the Irtysh conflict alone strongly suggests that such a minor distinction could dramatically tilt existing scales.

The law also stands in need of clearer analytical tools for weighing competing uses. Traditional reference to existing uses only invites states to play what this article has called the "historical game." This game invites conflict and disagreement instead of quelling it and leads to protracted disputes. An understanding of existing uses as tied to existing infrastructure could reduce, but certainly not eliminate, opportunities for strategic behavior, increase the role of more objective technical expertise, and create a more manageable market in which to emplace interstate negotiations.

Yet, perhaps the best way to ensure that the Irtysh Basin is not irreversibly degraded is to ensure that the basin is treated as World Heritage. International legal scholars can and should acknowledge the importance of such heritage by helping to make accurate information about the Irtysh and other such rivers accessible. As a community, scholars have neglected (and, equally, neglected to develop the research skills necessary to) this task. Rather we, American international legal scholars, privilege less demanding, and sometimes bland, efforts to play at judging the state and direction of the law, while irresponsibly ignoring attention to deeper, more scholarly and important issues of history, culture, fact, and local realities.

That is unfortunate. The kind of effort advocated here would complement the efforts of local scientists and civil society and would provide an important bridge between these groups and international environmental administrative bodies. Here is where the scholarly community can truly make a contribution and where a contribution is truly needed.

Environmentally-Necessitated Release of Water from the Irtysh Cascades Reservoir to the Flood Plains of the Irtysh] (on file with author).