
GLOBALIZATION AND WATER RESOURCES MANAGEMENT: THE CHANGING VALUE OF WATER

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GLOBALISATION, INTERNATIONAL WATERCOURSES AND THE SOURCES OF INTERNATIONAL LAW

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ABSTRACT: This paper outlines the key consequences of globalisation on the law of international watercourses and the sources of international law. The paper discusses the meaning of globalisation generally before considering its impact on international law. Having gained an understanding of the fundamental issues surrounding globalisation and international law, the paper goes on to look at the sources of international law, and discusses how they might have changed as a consequence of globalisation. Finally, the paper deals with the consequences of globalisation on the way in which the law of international watercourses is created. In conclusion, the paper finds that while globalisation has had considerable consequences on the law of international watercourses, the traditional sources of international law remain valid.

KEY TERMS: Globalisation, International Law, International Watercourses, Legal Norms, Soft Law

INTRODUCTION

Globalisation has had a considerable impact on global society. The purpose of this paper is to look at whether these impacts have affected the process by which international legal norms are created, and if so, what consequences that has for the law of international watercourses. The paper will therefore consider the meaning of globalisation and, its influence on international law, the sources of international law, and finally the law of international watercourses.

WHAT IS GLOBALISATION?

Globalisation describes a phenomenon whereby international actors interact with each other. These interactions include restructuring the world economy, protecting the environment and ensuring certain human rights. Technological changes have been a driving force behind the globalisation process (Gamble, 2000). Technological advances in travel and communication have resulted in the growth of international finance and trade markets, as well as increased co-operation between international actors and greater transparency. The single most important recent advance in communications has been the growth of the Internet. The Internet has improved access to information for international actors and provided organisations and individuals with a means to express their views on global matters and hear the opinions of others. Technological advances have also increased the number of risks to the global society (e.g., ozone depletion), and enhanced our understanding of global concerns (e.g., research into climate change).

GLOBALISATION AND INTERNATIONAL LAW

An inherent, and fundamental, consequence of globalisation is that it involves the global community interacting with each other. Regulating such interactions is a vital element of maintaining the global community – international

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actors must possess both rights and obligations within a global context. Traditionally, the international actors possessing rights and obligations under international law were limited to States. The 1927 S.S. Lotus case, in its classic view of international law thus stated that, 'International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims' (PCIJ, 1927).

Globalisation has altered this classic view of international law, and its scope, in a number of ways (Brown-Weiss, 2000). A major change to the structure international law has been the increase in the number of States – due mainly to de-colonisation and the break up of the Soviet bloc (Cassese, 1986). While this change is not strictly a result of globalisation, the fact that globalisation results in greater interdependence between the global community makes it a relevant. With greater interdependence between State, international law must accommodate the interests and values of a community possessing wider diversity in political, cultural and legal traditions, as well as experiencing different levels of development (Mickelson, 1998). Globalisation has also resulted in the introduction of new fields of international law, and the development of other areas of international law. Greater economic interdependence has led to developments in international economic law, while greater awareness and understanding of global concerns has led to advances in the law of environmental protection and the protection of human rights (Sands, 1995). Finally, increased interdependence has led to changes in the nature and function of international actors (Gamble, 2000). There has been an increase in standing structures dealing with matters between States themselves, and between States and non-governmental actors. Whereas traditionally international law concerned State-State relations, nowadays non-State actors are playing an increased role. For example, international organisations enjoy legal personality (e.g., EU is able of signing treaties on behalf of States); Non-governmental organisations play a role in the development and enforcement of international law (e.g., NGO's role in drafting of the Kyoto Protocol (Brown-Weiss, 2000); transnational companies and development agencies influence the implementation and development of international law; and individuals are subject to rights and obligations (e.g., individuals may be charged with international crimes (Times, 2001).

Globalisation has therefore contributed to changing the subjects, the structure and the content of international. The next section will look at how these changes have affected the sources of international law.

THE SOURCES OF INTERNATIONAL LAW

The sources of international law determine how international law is created. The traditional sources of international law find expression in Article 38 of the 1945 Statute of the ICJ (ICJ, 1945). Although Article 38 is directed solely at the ICJ, it is widely as representative of the sources of international law (Danilenko, 1993). Article 38(1) stipulates that:

“The Court whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
- b. international custom, as evidence of general practice accepted as law;
- c. the general principles of law recognised by civilised nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

According to Article 38, the primary sources of international law are therefore conventions, international custom, and general principles of law, while judicial decisions and teaching of the most highly qualified publicists are secondary sources.

Despite the increased role of non-State actors in international law generally, States remain the dominant actors in international law creation. The role of non-State actors in international law creation is largely limited to influencing the development of law, and putting pressure on States to change the law. States however decide what does, and what does not, become international law.

Custom

International custom is defined, under Article 38, as ‘evidence of general practice accepted as law.’ Customary international law consists of two elements: a general practice (or State practice); and an acceptance that such practice is law (or *opinio juris*) (ICJ, 1969). Due to customary international law’s ability to enact universally binding legal norms, it is one of the principal sources of international law (Bernhardt, 1992).

State practice

The acts and omissions of State representatives contribute towards the formation of customary international law (Akehurst, 1977). For customary international law to exist it is unnecessary for all States to participate in the practice. The requirement is rather that a large majority of interested States must adhere to the practice (ICJ, 1969). If only a limited number of States have a real interest in a matter, little State practice will be required. Absolute rigorous conformity with the rule is also unnecessary (ICJ, 1986). The amount of practice necessary will depend on the particular case. Establishing a new norm may require less than revising an old norm, although at least some repetition must occur (Mendelson, 1998).

Opinio Juris

State practice by itself will be insufficient to establish a norm of customary international law; such practice must be accepted as law. The requirement that the practice be accepted as law leads to two further conditions: the practice must obviously be capable of becoming law; and the international community must accept the legal norm. The first of these two conditions separates acts of legal consequence from matter of politics or comity. The second of the two conditions, acceptance by the international community, is not tantamount to requiring universal acceptance (ICJ, 1969). Acceptance by interested States and acquiescence by the rest of the community will suffice. In many cases acquiescence will not be the same as knowing and voluntary consent (Charney, 1993). However, given a community of around 190 States it would be impossible for all States, to be aware of all State practice, all of the time (Malunczuk, 1997).

Increased interdependence and cooperation between States, as a result of globalisation has not altered the concept of customary international law, although it has affected how it is used. The greater number of interactions between States, and the improved accessibility to information has meant that in some respects it is easier to assess state practice and *opinio juris*. However, the increased number of States representing a greater diversity in values and interests makes it harder for States to agree on customary international law.

Treaties

Treaties, or international conventions, are defined as being, ‘an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation’ (UN, 1969). The globalisation era has seen a proliferation in treaty-making practice. Treaties have proved particularly important where there has been a need to regulate new areas of global concern, such as ozone depletion and climate change. Given the requirement for custom to be formed over a certain period of time and the need for repetition, treaties have been preferred for their ability to conclude clear and precise rules over matters requiring a quick response (DiMaggio, 1993).

However, in contrast to customary international law, treaties are only binding on those consenting to be bound by their terms. A common tendency in recent years has been to use multilateral treaties as a means of codifying and developing existing international law. (Brown-Weiss, 2000). The proliferation of multilateral, and bilateral, treaties has in turn influenced the development of customary international law.

The Relationship between Treaties and Custom

Provisions of treaties may declare, crystallise or develop norms of customary international law (Degan, 1997). When a provision of a treaty declares an existing norm of customary international law the treaty may be used as evidence of State practice or *opinio juris*. If the provision of the treaty does indeed represent a norm of customary

international law, parties to the treaty will be bound both by the treaty provision and customary international law; non-parties to the treaty will only be bound customary international law (ICJ, 1986). Evidence of whether a provision in a treaty norm does indeed represent customary international law can be found, for example, in the *travaux préparatoires*, voting and negotiating records at diplomatic conferences, commentaries to the treaty, and the treaty text itself (Danilenko, 1993).

General Principles

There has been considerable debate over the nature of international law obligations derived from 'the general principles of law recognised by civilised nations' (Bernhardt, 1992) This debate is however mostly of academic value as the International Court of Justice (ICJ), for instance, rarely finds recourse to the general principles of law, having usually found a rule under customary or conventional law. Much of the debate surrounding general principles of international law has focused on identifying their origin. One view maintains that general principles of international law are derived, or ascertained, from generally recognised principles of the domestic law of States (Charney, 1993). Under this approach it is not necessary that a principle be observed by all States as long as a representative majority, which includes the main forms of civilisation and the principal legal systems of the world, adhere to the principle. Another view maintains that general principles of international law can also be derived from international relations and the particularities of the international legal system (ICJ, 1980).

Judicial Decisions and Writings of Publicists

As a secondary source of international law, the role of judicial decisions and the writings of publicists is not to make law but rather to testify as to its existence. The theory behind this approach is that where the conclusions of a monograph or the decision of a Court are supported by quoted material and logically and convincingly reasoned, there is no reason why this research should not be relied upon, particularly if the conclusions derive from an authority such as the ICJ, or from a well respected writer (Zemanek, 1997). However the relevance of these secondary sources of international law may be diminishing due to the growth of accessible primary sources (Jennings & Watts, 1992).

The work of the International Law Commission and other non-governmental organisations plays a similar role to judicial decisions and the writings of publicists. Besides from providing direct evidence of customary international law through, for example, questionnaires to States, the International Law Commission and similar institutions will declare existing law and seek to develop international law (Jennings & Watts, 1992).

Legal Norms v. Non-Legal Norms

As stated earlier, the introduction of new States and new areas of global concern has put pressure on States to reform international law (Cassese, 1986). Broadly speaking, this pressure comes from two camps, developing States and non-State actors. As well as seeking to regulate conduct through the traditional sources of international law, these new international actors have turned to the use of non-binding agreements (Shelton, 2001). While these agreements are not legally binding they influence the development and interpretation of international law, as well as laying down standards of good governance (Bernhardt, 1992). Moreover, non-State actors, such as transnational corporations and non-governmental organisation may play a significant role in their formation. Some writers have claimed that the growth in non-legal norms has blurred the threshold between law and non-law (Weil, 1983).

INTERNATIONAL WATERCOURSES AND THE SOURCES OF INTERNATIONAL LAW

The law of international watercourses has not been isolated from the changes resulting from globalisation. In particular, the law of international watercourses has been affected by the development of new areas of international concern, the increase in treaty making, a greater number of actors and increased cooperation generally. The impact of these developments on customary international law is readily apparent.

Perhaps the single most important recent development is the completion of the 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses (UN, 1997). While the UN Watercourses Convention has only been ratified by six Parties, the Convention, and process behind its completion, provide important evidence of customary international law (Wouters, 1999). Evidence of the actions and claims of States can be ascertained not only from the text of the Convention itself, but also the negotiations of States at various stages of development, including the work of the International Law Commission and the UN General Assembly (McCarffrey & Sinjela, 1998). The work of the International Law Commission on the law of international watercourses, and especially the thirteen reports by the Special Rapporteurs (1977-1994), are also an important secondary source of the law of international watercourses. The importance of the 1997 UN Watercourses Convention has been affirmed the International Court of Justice decision in the Gabcikovo-Nagymaros case (ICJ, 1997), which provides further evidence of customary international law.

Evidence of the law of international watercourses may also be derived from the adoption of numerous regional and river basins specific treaties, including the UN/ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes (UN/ECE, 1992) and its Protocol on Water and Health (UN/ECE, 1999); the EU Water Framework Directive (EU, 2000); the Convention on the Protection of the Rhine (Rhine, 1998); the Agreement on Cooperation for the Sustainable Development of the Mekong River Basin (Mekong, 1995); the SADC Protocol on Shared Watercourse Systems (SADC, 1995); the Agreements on the Meuse and Scheldt (Meuse, 1994); and the Convention on Cooperation for the Protection and Sustainable Use of the River Danube (Danube, 1994).

Treaty arrangements have been supplemented by a host of non-binding agreements, and other forms of international cooperation. Such non-binding agreements have included the Rio Declaration (Rio, 1992); Agenda 21 (Agenda 21, 1992); Dublin Statement (Dublin, 1992); and the Hague Ministerial Declaration (Hague, 2000); and several high profile international conferences, including the World Water Forums (WWF, 2001); and the forthcoming Bonn International Conference on Freshwater (Bonn, 2001). The number of international actors dealing with transboundary freshwater issues has also expanded. The increased number of States has led to an increase in the number of transboundary watercourses (Wolf, 2000). The number of organisations dealing with water issues has also risen sharply in recent years (IWRA, 2001 & Bjorklund, 2000). As has the number of transnational corporations and development agencies dealing with fresh water issues and influencing the law of international watercourses (Yaron, 2000).

CONCLUSION

This paper has shown that globalisation has had a significant influence on international law, the sources of international law and the law of international watercourses. This influence has fallen short of changing the traditional sources of international law, but the paper has shown that when studying the law of international watercourses it is important to take into account changes in the use of the sources of international law, the nature and function of international actors, the new areas of international concern and the differing methods of international communication.

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