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UNMASKING THE SUBSTANCE BEHIND THE PROCESS: WHY THE DUTY TO COOPERATE IN INTERNATIONAL WATER LAW IS REALLY A SUBSTANTIVE PRINCIPLE

TAMAR MESHEL[*]

INTRODUCTION

The core principles of international water law[1]–equitable and reasonable utilization,[2] no significant harm,[3] and the duty to cooperate–are generally considered to have customary law status.[4] This body of law has played a meaningful role in in-

[*] Assistant Professor, University of Alberta Faculty of Law.1.'International water law' refers to the body of law governing non-navigational water uses, and should be distinguished from international law governing navigation, maritime issues, and the High Seas. *See generally ICWC Course: Int'l Water L.,* Stockholm International Water Institute, http://www.siwi.org/icwc-course-international-water-law/ (last visited March 5, 2019).

2. The equitable and reasonable utilization principle is rooted in the sovereign equality of states. It entitles each basin state to a reasonable and equitable share of an international watercourse and obligates it to use the watercourse in a manner that is equitable and reasonable vis-à-vis other states sharing it. *See* Mohammed S. Helal, *Sharing Blue Gold: The 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses Ten Years On*, 18 COLO. J. INT'L ENVTL. L. & POL'Y 337, 342-43 (2007); Muhammad Mizanur Rahaman, *Principles of International Water Law: Creating Effective Transboundary Water Resources Management*, 1 INT'L J. SUSTAINABLE SOC'Y 207, 210 (2009); Stephen McCaffrey, *The Law of International Watercourses: Present Problems, Future Trends, in* A LAW FOR THE ENVIRONMENT: ESSAYS IN HONOUR OF WOLFGANG E. BURHENNE 113 (Alexandre Kiss & Francoise Burhenne-Guilmin eds., 1994).

3. The no significant harm principle has its roots in the Latin maxim *sic utere tuo ut alienum non laeda* and is generally viewed as a customary norm of international environmental law, prohibiting states from using their territory in such a way as to cause harm to another state. *See generally* Catherine Redgewell, *Sources of International Environmental Law: Formality and Informality in the Dynamic Evolution of International Environmental Law Norms* & Jutta Brunnée, *The Sources of International Environmental Law: Interactional Law, in* THE OXFORD HANDBOOK ON THE SOURCES OF INT'L L. 939-986 (Samantha Besson & Jean d'Aspremont, eds., 2017).

4. *See, e.g.*, Stephen C. McCaffrey, *International Water Cooperation in the 21st Century: Recent Developments in the Law of International Watercourses*, 23 RECEIL 4, 5 (2014); Stephen C. McCaffrey, *The UN Convention on the Law of the Non-Navigational Uses of International Watercourses: Prospects and Pitfalls*, in INTERNATIONAL WATERCOURSES-ENHANCING COOPERATION AND MANAGING CONFLICT, 17, 26 (Salman M. A. Salman & Laurence Boisson de Chazournes eds., 1998); Gabriel Eckstein, *Water Scarcity, Conflict, and Security in a Climate Change World: Challenges and Opportunities for International Law and Policy*, 27 WIS. INT'L L. J. 409, 419, 434 (2009–2010).

terstate fresh water resource management and dispute prevention.[5] However, relatively little scholarly attention has been paid to the role of these legal principles in the *resolution* of interstate fresh water disputes, if and when they do arise.[6] In this article and others,[7] I offer a fresh perspective on the three core principles of international water law in order to reinforce their role in the resolution of such disputes.

Dispute settlement is one of the main functions of international law, and international law has played an increasingly important role in the resolution of inter-

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5. See, *e.g.*, SALMAN M. A. SALMAN & DANIEL D. BRADLOW, REGULATORY FRAMEWORKS FOR WATER RESOURCES MANAGEMENT: A COMPARATIVE STUDY (Salman M. A. Salman et al. eds., 2006); Water Res. Lab., Helsinki Univ. of Tech, MANAGEMENT OF TRANSBOUNDARY RIVERS AND LAKES (Olli Varis et al. eds., 2008); SUSANNE SCHMEIER, GOVERNING INTERNATIONAL WATERCOURSES: RIVER BASIN ORGANIZATIONS AND THE SUSTAINABLE GOVERNANCE OF INTERNATIONALLY SHARED RIVERS AND LAKES (2013); Alexander Ovodenko, *Regional Water Cooperation: Creating Incentives for Integrated Management*, 60 J. CONFLICT RESOL. 1071 (2016); Marleen van Rijswick et al., *Ten Building Blocks for Sustainable Water Governance: An Integrated Method to Assess the Governance of Water*, 39 WATER INT'L 725 (2014).

6. On other efforts to prevent and resolve fresh water disputes see, *e.g.*, SHLOMI DINAR, INTERNATIONAL WATER TREATIES: NEGOTIATION AND COOPERATION ALONG TRANSBOUNDARY RIVERS (2008); Molly Espey & Basman Towfique, International Bilateral Water Treaty Formation, 40 WATER RESOURCES RES. W05S05 (2004); Shira Yoffe, Aaron T. Wolf & Mark Giordano, Conflict and Cooperation over International Freshwater Resources: Indicators of Basins at Risk, 39 J. AM. WATER RESOURCES ASS'N 1109 (2003); Sara M. McLaughlin & Paul R. Hensel, International Institutions and Compliance with Agreements, 51 AM. J. POL. SCI. 721 (2007); Paul R. Hensel, Sara McLaughlin Mitchell & Thomas E. Sowers II, Conflict Management of Riparian Disputes, 25 POL. GEOGRAPHY 383 (2006); Stephen E. Gent & Megan Shannon, Decision Control and the Pursuit of Binding Conflict Management: Choosing the Ties that Bind, 55 J. CONFLICT RESOL. 710 (2011); and Marit Brochmann & Paul R. Hensel, Peaceful Management of International River Claims, 14 INT'L NEGOT. 393 (2009).

On the limitations of international law in the resolution of fresh water disputes see, *e.g.,* Frederick W. Frey, *The Political Context of Conflict and Cooperation Over International River Basins* 18 WATER INT'L 54, 58 (1993); Aaron T. Wolf, *International Water Conflict Resolution: Lessons from Comparative Analysis*, 13 INT'L J. WATER RESOURCES DEV. 333, 336-37 (1997); Erik Mostert, *A Framework for Conflict Resolution*, 23 WATER INT'L 206, 207 (1998); Marty Rowland, *A Framework for Resolving the Transboundary Water Allocation Conflict Conundrum*, 43 GROUND WATER 700 (2005); Anna Spain, *Beyond Adjudication: Resolving International Resource Disputes In an Era Of Climate Change*, 30 STAN. ENV'T L. J. 334, 378 (2011); Salman M.A. Salman, *Good Offices and Mediation and International Water Disputes, in* THE INT'L BUREAU OF THE PERMANENT CT. OF ARB./PEACE PALACE PAPERS: RES. OF INT'L WATER DISP. 155 (Kluwer L. Int'l, 2002); Melvin Woodhouse & Mark Zeitoun, *Hydro-hegemony and International Water Law: Grappling with the Gaps of Power and Law*, 10 WATER POL'Y 103 (2008); Bjorn-Oliver Magsig, *Overcoming State-Centrism in International Water Law: Regional Common Concern as the Normative Foundation of Water Security*, 3 GOETTINGEN J. INT'L L. 317 (2011); Bruce Lankford, Does Article 6 (Factors Relevant to Equitable and Reasonable Utilization) in the UN Watercourses Convention Misdirect Riparian Countries?, 38 WATER INT'L 130 (2013).

7. The present article focuses on the duty to cooperate. I discuss the equitable and reasonable utilization and no significant harm principles in Tamar Meshel, *Swimming Against the Current: Revisiting the Principles of International Water Law in the Resolution of Transboundary Fresh Water Disputes,* 61(1) HILJ (forthcoming, 2020).

national disputes generally, as well as disputes concerning shared resources.[8] International law can provide well-defined rights and obligations to help overcome power imbalances, domestic constraints, and competing sovereign interests, all of which play a prominent role in interstate fresh water disputes.[9] Legal principles can also provide a measure of predictability, objectivity, and stability to interactions between states, and can therefore serve as critical "reference points" and useful guiding tools in the resolution of interstate fresh water disputes.[10] Indeed, once an interstate dispute has arisen out of conflicting water uses and each state has become convinced that its vital interests are at stake, the resolution of the dispute on the basis of scientific analysis and cooperative action alone can become extremely difficult.[11] In such circumstances, states should be able to rely on legal principles that limit their unilateral claims to shared water resources.[12] While international law in and of itself may not provide complete solutions to interstate fresh water disputes, it is unlikely there is a solution at all to such disputes without international law.[13]

The duty to cooperate is a well-established general principle of international law.[14] It has been viewed as the "linchpin for the peaceful relations between nation states" and has been invoked, *inter alia*, in relation to the environment, human rights, development, and dispute settlement.[15] The traditional purpose of the duty to cooperate in international water law is to regulate states' interactions in the ongoing management of shared fresh water resources, but it features far less prominently in the actual *resolution* of interstate fresh water disputes. In this article, I argue that this limited view of the duty to cooperate impedes the effective use of international water law in such resolution. Rather, the duty to cooperate should be

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8. *See* Benedict Kingsbury, *The International Legal Order*, N.Y.U. - INST. FOR INT'L L. & JUSTICE, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=692626; Dominique Alheritiere, *Settlement of Public International Disputes on Shared Resources: Elements of a Comparative Study of International Instruments*, 25 NAT. RES. J. 701, 701 (1985).

9. *See* EYAL BENVENISTI, SHARING TRANS-BOUNDARY RESOURCES: INTERNATIONAL LAW AND OPTIMAL RESOURCE USE (2002); Beth Simmons, *See You in "Court"? The Appeal to Quasi-Judicial Legal Processes in the Settlement of Territorial Disputes, in* A ROAD MAP TO WAR: TERRITORIAL DIMENSIONS OF INTERNATIONAL CONFLICT 205 (Paul F. Diehl ed., 1999).

10. NAHID ISLAM, THE LAW OF NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES: OPTIONS FOR REGIONAL REGIME BUILDING IN ASIA, 177 (2010). *See also* CHRISTINA LEB, COOPERATION IN THE LAW OF TRANSBOUNDARY WATER RESOURCES 30-31 (Cambridge Univ. Press ed., 2013); *Report of the International Law Commission on the work of its thirty-first session*, 1979 Y.B. Int'l L. Comm'n, 166, paras. 32, 34 U.N. Sales No. E.80.V.5 [hereinafter *1979 Report*].

11. *1979 Report, supra* note 10, at 164, para. 85.

12. William W. Van Alstyne, *The Justiciability of International River Disputes: A Study in the Case Method,* 13 DUKE L. J. 307, 309 (1964).

13. Edda Kristjansdottir, *Resolution of Water Disputes: Lessons from the Middle East, in* RESOLUTION OF INTERNATIONAL WATER DISPUTES 355 (Int'l BureauPerm. Ct. Arb, 2003).

14. *See* Christina Leb, *One step at a time: International law and the duty to cooperate in the management of shared water resources,* 40 WATER INT'L 21, 23 (2015).

15. Patricia Wouters, *Dynamic cooperation' in international law and the shadow of state sovereignty in the context of transboundary waters*, 3 ENV. LIABILITY 88, 89-92 (2013).

viewed in interstate fresh water dispute resolution as complementary to the no significant harm principle, and as imposing on states specific obligations in the dispute resolution process itself.[16]

After briefly describing the evolution of the duty to cooperate in international law generally, I turn to examine its development and traditional role in international water law. I argue that the function of the procedural obligations of the duty to cooperate in relation to the due diligence obligations of the no significant harm principle is currently unclear. I propose to approach the duty to cooperate as both informing the due diligence obligations of the no significant harm principle, and as an independent duty that can be violated in its own right. Viewed in this way, the duty to cooperate complements the no significant harm principle where the latter is not triggered since there is no "risk of significant harm".[17] I then propose an additional function for the duty to cooperate in the interstate fresh water context by imposing two specific obligations on state parties in the dispute resolution process itself: to make every effort to enter into provisional arrangements until a final resolution is achieved, and to not jeopardize or hamper the reaching of such final resolution.

II. THE DUTY TO COOPERATE IN INTERNATIONAL LAW

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16. Some scholars view the duty to cooperate as a substantive principle in the management of international fresh water resources. *See, e.g.,* Patricia Wouters & Dan Tarlock, *The Third Wave of Normativity in Global Water Law - The duty to cooperate in the peaceful management of the world's water resources: An emerging obligation erga omnes?*, 23 WATER L. 51 (2013); Attila M. Tanzi, "Substantializing the Procedural Obligations of International Water Law Between Retributive and Distributive Justice" in Hélène Ruiz Fabri, *et al*, eds, *A Bridge Over Troubled Waters: Dispute Resolution in the Law of International Watercourses and the Law of the Sea* (Leiden: Brill-Nijhoff, forthcoming 2019) (on file with author); Owen McIntyre, "The World Court's Ongoing Contribution to International Water Law: The Pulp Mills Case between Argentina and Uruguay" (2011) 4:2 *Water Alternatives* 124 at 143. *See also,* Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica), [2015] ICJ Rep 665, Separate Opinion of Judge Donoghue at para 9 ("I do not find it useful to draw distinctions between 'procedural' and 'substantive' obligations, as the Court has done"). Others distinguish between the 'substantive' equitable and reasonable utilization and no significant harm principles and the 'procedural' duty to cooperate. *See, e.g.,* STEPHEN C. MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 464 (Oxford Univ. Press, 2nd ed. 2007) (although McCaffrey notes that that "the line separating obligations that are substantive from those that are procedural is not always a clear one . . . the 'substantive' obligation of equitable and reasonable utilization may itself be thought of as a process; and the 'substantive' obligation not to cause significant harm also serves to trigger a process.")..

17. In the context of international watercourses, the no significant harm principle is triggered where a state can show a "risk of significant harm", *i.e.* that it has sustained or is likely to sustain "significant harm". "Significant harm" requires something more than "trivial" but need not be at the level of "substantial". If the complaining state meets this threshold, the acting state would have to show that it has acted diligently in order to comply with the no significant harm principle. McCaffrey, *supra* note 16, at 409, 432. A "risk of significant harm" refers to "the combined effect of the probability of occurrence of an accident and the magnitude of its injurious impact" and requires "high probability of causing significant harm." Int'l Law Comm'n, Rep. on the Work of its Fifty-Third Session, U.N. Doc. A/56/10, at 152 (2001) [hereinafter Draft Articles on Prevention].

Interstate cooperation has been defined as "the process by which states take coordination to a level where they work together to achieve a common purpose that produces mutual benefits that would not be available to them with unilateral action alone."[18] International law has evolved, and continues to evolve, around this flexible concept of cooperation. In the past century, a "paradigm shift" has taken place from a "law of co-existence" to a "law of co-operation," evidenced, in part, by an increasing imposition of obligations to cooperate on states.[19]

The law of co-existence, composed of rules of abstention aimed at identifying limits to state sovereignty, was linked to the obligation to refrain from interfering in the sovereignty sphere of others. The law of cooperation, by contrast, is composed of positive obligations of assistance reflected, *inter alia*, in the establishment of the League of Nations and its successor the United Nations.[20] Indeed, one objective of the UN Charter is "to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character."[21] Many post-Charter instruments similarly reflect states' general obligation to cooperate, further contributing to its solidification as one of the most significant norms of contemporary international law.[22]

This general duty to cooperate has given rise to a large body of norms of cooperation in the international environmental law context as a result of states' common interest in the protection of the natural environment.[23] This body of norms is reflected in many international instruments and has been reinforced by international judicial and arbitral decisions.[24] Moreover, in the specific context of cooperation

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18. Christina Leb, *One Step at a Time: International Law and the Duty to Cooperate in the Management of Shared Water Resources*, 40 Water International 21, 22 (2015).

19. Erik Franckx & Marco Benatar, *The "Duty" to Co-Operate for States Bordering Enclosed or Semi-Enclosed Seas*, 31 Chinese (Taiwan) Y.B. Int'l L. & AFF. 67 (Ying-jeou Ma ed., 2013).

20. Leb, *supra* note 10, at 33.

21. U.N. Charter art. 1, ¶3.

22. *See generally* Charter of the Org. of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3; Charter of the Org. of African Unity, May 25, 963, 479 U.N.T.S. 39; G.A. Dec. 25/85, U.N. Doc A/RES/25/2625 (Oct. 14, 1970); G.A. Dec. 60/7, U.N. Doc A/RES/S-6/3201 (May 1, 1974). There is ongoing debate on whether the general obligation to cooperate constitutes an "autonomous legal obligation" or a principle of international law that gives rise to more specific obligations but is not in itself an independent obligation. For present purposes, I treat it as a general obligation with a legal nature of its own. *See* Leb, *supra* note 10, at 80-81.

23. Leb, *supra* note 10, at 34.

24. Examples of international instruments include: U.N. Conference on the Human Environment, *Stockholm Declaration*, U.N. Doc A/CONF.48/14/Rev.1 (Ch. I), princ. 24 (June 5-16, 1972); U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. I), princ. 27 (Aug. 12, 1992); U.N. Convention on the Law of the Sea arts. 123, 197, Nov. 16, 1994, 1833 U.N.T.S. 397; U.N. Convention on Biological Diversity, art. 5, Jun. 5, 1992, 1760 U.N.T.S. 143; UNEP, *Report of the Governing Council*, U.N. Doc. A/32/25, ch. VII (Sept. 2, 1977). Examples of international judicial and arbitral decisions include: Trial Smelter Case (U.S. v. Can.), Vol. III R.A.I.I. 1905 (1938 & 1941); North Sea Continental Shelf (Ger./Den., Ger./Neth.), Judgment, 1969 I.C.J. 327, 3 (Feb. 20); Fisheries Jurisdiction (U.K. & N.Ir. v. Ice.), Judgment, 1974 I.C.J. 395, 3 (Jul. 25); MOX Plant (Ir. v. U.K.), Case No. 10, Order of Nov. 13, 2001, 10 ITLOS 2001,

over shared or common natural resources, the *Charter of Economic Rights and Duties of States* provides in Article 3 that "[i]n the exploitation of natural resources shared by two or more countries, each State must co-operate on the basis of a system of information and prior consultations in order to achieve the optimum use of such resources without causing damage to the legitimate interest of others."[25]

III. THE DUTY TO COOPERATE IN INTERNATIONAL WATER LAW

In the context of *managing* interstate fresh water resources, cooperation among states has become increasingly formalized, culminating in a universal recognition that the duty to cooperate is crucial to international water law.[26] First mentions of cooperation appeared in the Institute of International Law's (IIL) 1911 *Madrid Declaration*, which recommended the establishment of permanent joint commissions for the purpose of interstate cooperation on water issues.[27] The IIL's 1961 *Salzburg Resolution* and the International Law Association's (ILA) 1966 *Helsinki Rules* introduced additional norms of cooperation among basin states, including rules for notification, consultation, and negotiation for states wishing to utilize shared waters in a manner that seriously affects other states.[28]

A general duty to cooperate in good faith on international fresh water issues

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89. *See also* ISLAM, *supra* note 10, at 125; PHILIPPE SANDS ET AL., PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW, 204-205, (3rd ed., 2012).

25. G.A. Res. 3281 (XXIX), art. 3, Charter of Economic Rights and Duties of States (Dec. 12, 1974).

26. Christina Leb, *The UN Watercourses Convention: the éminence grise behind cooperation on transboundary water resources*, 38 WATER INT'L 2, 146, 147 (2013).

27. INST. OF INT'L L., *International Regulation regarding the Use of International Watercourses for Purposes other than Navigation - Declaration of Madrid*, Vol. 24 Madrid Ses. 1911 365 (Apr. 20, 1911), http://www.fao.org/docrep/005/W9549E/w9549e08.htm#bm08.1.2.

28. INST. OF INT'L L, *Resolution on the Use of International Non-Maritime Waters*, Res. Salzburg (Sept. 11, 1961), http://www.fao.org/docrep/005/w9549e/w9549e08.htm; INT'L L. ASS'N, *The Helsinki Rules on the Uses of the Waters of International Rivers*, 57 Conf. Rep. 1967 (Aug. 1966), http://www.unece.org/fileadmin/DAM/env/water/meetings/legal_board/2010/annexes_groundwater_paper/Annex_II_Helsinki_Rules_ILA.pdf; Leb, *supra* note 10, at 148-149; INT'L L. ASS'N. The IIL adopts resolutions of a normative character pursuant to work undertaken by its scientific commissions. These Resolutions are then brought to the attention of governmental authorities, international organizations, and the scientific community. Their aim is to highlight the characteristics of the *lex lata* in order to promote its respect and to make determinations de *lege ferenda* in order to contribute to the development of international law. *See History of Institut De Droit International.* http://www.idi-iil.org/en/histoire/. The objectives of the ILA are "the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law," which it carries out by way of consultation to UN agencies, work undertaken by international committees, and biennial conferences. *See International Law Association "ILA" Mission Statement*, http://www.ila-hq.org/en/about_us/index.cfm. The ILA embarked in 1954 on a study of the legal aspects of the use of the waters of international drainage basins. Three committees have been engaged in this work. The first committee produced the 1966 *Helsinki Rules*; the second formulated a number of articles amplifying particular aspects of the *Helsinki Rules*; and the third committee continued this work of amplification. Charles B. Bourne, *The International Law Association's Contribution to International Water Resources Law*, 36 NAT. RESOURCES J. 155, 155 (1996).

was first set out in the ILA's 1972 *Supplementary Rules Applicable to Flood Control*, stipulating that "basin States shall co-operate in measures of flood control in a spirit of good neighborliness, having due regard to their interests and well-being as co-basin States."[29] This general duty was also recognized in the 1977 Report of the United Nations Water Conference, which required and defined both regional and international cooperation on shared water sources.[30] The general duty to cooperate was further recognized with respect to pollution of rivers and lakes in the IIL's 1979 *Athens Resolution*.[31] This resolution identified specific measures for implementing cooperation, including regular exchange of data, coordination of research and monitoring programs, and provision of technical and financial aid to developing countries.[32] The ILA's 1982 *Montreal Rules on Water Pollution in an International Drainage Basin* similarly confirmed a general duty to cooperate with regard to pollution of international fresh water resources. Article 4 of the *Montreal Rules* provides that "[i]n order to give effect to the provisions of these Articles, States shall cooperate with the other States concerned." In the commentary to this Article, the ILA justified the inclusion of a general duty to cooperate by stating it was considered "generally accepted as a fundamental principle."[33]

The evolution of the International Law Commission's (ILC)[34] work on the *Draft Articles on the Law of the Non-navigational Uses of International Watercourses* (*Draft Articles*), which formed the basis for the main international instrument codifying the core principles of international water law–the *United Nations Convention on the Law of the Non-navigational Uses of International Watercourses* (*UNWC*)[35]–similarly illustrates the progressive recognition of cooperation as a core component of international water law.[36] In 1981, the second Special Rapporteur working on this topic, Stephen Schwebel, proposed the concept of "equitable participation" to reflect the shift in the international community to a position of affirmative promotion of cooperation with respect to shared water resources.[37] Ac-

29. INT'L L. ASS'N, *Supplementary Rules Applicable to Flood Control*, art. 2 (1972).

30. Rep. of the U.N. Water Conf. [UNWC], at 51-57, U.N. Doc. E/CONF.70/29 (1977).

31. Stephen M. Schwebel (Special Rapporteur), *Third report on the law of the non-navigational uses of international watercourses*, ¶ 259, U.N. Doc. A/CN.4/348 (Dec. 11, 1981).

32. *The pollution of rivers and lakes and international law*, 58 ANNUAIRE DE INSTITUT DE DROIT INTERNATIONAL (1979), https://www.internationalwaterlaw.org/documents/intldocs/IIL/IIL-Resolution_of_Athens.pdf (reproduced in *Id.* at art. VII).

33. INT'L L. ASS'N, *Report of the Sixtieth Conference held at Montreal,* 535-48 (1982).

34. The ILC was established by the UN General Assembly to undertake the mandate of the Assembly to "initiate studies and make recommendations for the purpose of. . .encouraging the progressive development of international law and its codification." The task of the Commission in relation to a given topic is completed when it presents to the General Assembly a final product on that topic, which is usually accompanied by the Commission's recommendation on further action with respect to it. G.A. Res. 174 (II), at 105 (Nov. 21, 1947).

35. G.A. Res. 51/229, (Jul. 8, 1997) [hereinafter UNWC].

36. *Draft articles on the law of the non-navigational uses of international watercourses and commentaries thereto and resolution on transboundary confined groundwater*, 2 Y.B. Int'l L. 89; G.A. Res. 174 (II).

37. Schwebel, *supra* note 31, at ¶ 85.

cordingly, Schwebel introduced a duty to participate as a procedural component to operationalize the duty of cooperation.

In 1982, Jens Evensen, the subsequent Special Rapporteur, was the first to include an article explicitly defining the principle of cooperation in this context.[38] He introduced a new chapter on "Cooperation and Management in Regard to International Watercourse Systems," which stipulated specific cooperation obligations and rights, including consultation, negotiation, and prior notification of planned measures. This chapter was required, Evensen submitted, since the "indivisible unity" of watercourses meant that cooperation among states was essential for effective management and optimal utilization, as well as for reasonable and equitable sharing in this utilization.[39] In the ILC 1983 session, member states further stressed the need "to formulate a positive rule calling for co-operation among the States concerned; States had a legal duty to co-operate in the solution of problems resulting from uses of the waters of international watercourses."[40]

Such a duty was indeed included in the *UNWC*, requiring watercourse states to "cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilization and adequate protection of an international watercourse."[41] The evolution of the ILC's *Draft Articles* and the *UNWC* therefore reflects the acceptance of cooperation as a core principle of international water law.[42] This acceptance is further evidenced by other conventions and instruments, such as the 1992 *UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes* (*UNECE Convention*),[43] the 2004 *Berlin Rules* of the ILA,[44] and the 2008 ILC *Draft Articles on the Law of Transboundary Aquifers*,[45] as well as basin-specific water agreements such as the *Nile Cooperative Framework Agreement*.[46]

The general duty to cooperate on shared fresh water gives rise to two categories of procedural obligations. The first category includes obligations relating to the ongoing management of interstate fresh water resources, such as the duty to

38. Jens Evensen (Special Rapporteur), *First report on the law of non-navigational uses of international watercourses*, ¶ 107, U.N. Doc. A/CN.4/367 (Apr. 19, 1983).

39. *Id*. at ¶¶ 103-06; *see also* Leb, *supra* note 10, at 28.

40. *Report of the International Law Commission to the General* Assembly, 2 Y.B. Int'l L. Comm'n 72, ¶ 247, U.N. Doc. A/CN.4/SER.A/1983/Add.1 (1983).

41. UNWC, *supra* note 35, art. 8, ¶1.

42. Leb, *supra* note 10, at 78-79.

43. Convention on the Protection and Use of Transboundary Watercourses and International Lakes art. 9, Mar. 17, 1992, 1936 U.N.T.S. 269 [hereinafter UNECE Convention].

44. INT'L L. ASS'N, *Berlin Rules on Water Resources*, art. 11 (2004).

45. Shared nat. resources: comments & observations by Gov'ts on the draft articles on the laws of transboundary aquifers, Int'l L. Comm'n, Rep. on the Work of Its Sixtieth Session, U.N. Doc. A/CN.4/595, art. 7 (Mar. 26, 2008).

46. NILE BASIN INITIATIVE, *Agreement on the Nile River Basin Cooperative Framework,* art. 3 (2001). *See* Stephen McCaffrey (Special Rapporteur), *Third report on the non-navigational uses of international watercourses,* U.N. Doc. A/CN.4/406, annex 1 (Apr. 8, 1987) for a list of international agreements containing provisions concerning cooperation on watercourses.

negotiate water agreements and to regularly exchange data and information.[47] These obligations apply to such resources, regardless of the existence of a dispute, and are therefore not the focus of the present analysis. The second category includes procedural obligations that relate more directly to potential interstate fresh water disputes and generally arise where there are new uses or modification of existing uses, such as the obligation to notify, consult, and conduct an environmental impact assessment.[48]

These latter obligations are frequently implicated in interstate fresh water disputes and inform the due diligence requirement of the no significant harm principle.[49] Under the *UNWC*, these procedural obligations also exist independently from the due diligence obligations of the no significant harm principle, and may therefore be invoked in the absence of harm.[50] The duty to negotiate, for instance, comes into play with regard to "the *possible effects* of planned measures."[51] The requirement to notify the results of "any environmental impact assessment" is similarly triggered "[b]efore a watercourse State implements or permits the implementation of planned measures which may have a significant *adverse effect*."[52] Therefore, violation of these obligations, which may occur regardless of any risk of significant harm, would in and of itself give rise to an internationally wrongful act under the *UNWC*.

This approach finds support in the International Court of Justice's (ICJ) decision in the *Pulp Mills* case, where the Court recognized that states' "procedural" obligations have an independent existence and can be violated regardless of any violation of their "substantive" obligations.[53] The Court further recognized that these procedural obligations are linked to states' due diligence obligations to prevent significant harm, but did not find that a failure to meet procedural duties nec-

47. *E.g.*, UNECE Convention, *supra* note 43, arts. 2, 12 (other obligations arising under the duty to cooperate in the management of international fresh water resources include the duty to conduct research on shared fresh water resources), and arts. 9, 11 (the duty to establish joint programmes for monitoring the conditions of such waters).; UNWC, *supra* note 35, art. 25 (the duty to cooperate on the regulation of the flow of transboundary waters).

48. UNWC, *supra* note 35, arts. 11-19; UNECE Convention, *supra* note 43, arts. 9-10; McCaffrey, *supra* note 16, at 465. While these obligations are not explicitly set out under the general duty to cooperate in the *UNWC*, they are best understood "as a specific application of the general principle of cooperation", McCaffrey, *supra* note 16, 470. It may be useful to group them under this duty since, first, it is well established both in international law generally and in international water law, and second, treating these procedural obligations as arising under the duty to cooperate would clearly distinguish them from the due diligence requirements of the no significant harm principle and clarify that they come into play regardless of such harm and that a failure to comply with them would constitute an internationally wrongful act. *Id*.

49. Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 14, ¶ 204 (Apr. 20).

50. McCaffrey, *supra* note 16, at 473-75.

51. UNWC, *supra* note 35, art. 11 (emphasis added).

52. UNWC, *supra* note 35, art 12 (emphasis added).

53. *See Pulp Mills*, 2010 I.C.J. at ¶¶ 78-79.

essarily implies a violation of the no significant harm principle.[54] Moreover, in accordance with the agreement between Argentina and Uruguay, the ICJ noted that Uruguay's obligation to inform the parties' joint institution was triggered as soon as it had a sufficiently developed plan of the activity, in order to allow for a proper assessment of its impact. At this stage, the Court added, "the information provided will not necessarily consist of a full assessment of the environmental impact of the project."[55] Similarly, the Court noted that the parties' obligations to notify and consult each other were designed to "assess the risks of the plan," and therefore were triggered before the risk of significant harm was actually established.[56] With respect to the requirement to conduct an environmental impact assessment, the Court found it applies where the planned activity is liable to "cause harm to a shared resource and transboundary harm" or "may have a significant adverse impact in a transboundary context," setting out a lower threshold than the "risk of significant harm" required to invoke states' due diligence duties under the no significant harm principle.[57] The ICJ's decision in *Pulp Mills* is therefore in line with the approach adopted in the *UNWC* of treating states' "procedural" and "substantive" principles as related yet distinct, and setting out a lower threshold for triggering the former.

Yet the latest international fresh water decision of the ICJ in the *San Juan River* cases seems to blur this approach, as the Court employed somewhat contradictory language when describing the parties' obligations.[58] With respect to the obligation to conduct an environmental impact assessment, the Court noted that, "a State must, before embarking on an activity having the potential *adversely to affect* the environment of another State, ascertain if there is a risk of significant transboundary harm" in order to "fulfil its obligation to exercise due diligence in preventing" such harm.[59] This pronouncement suggests that the Court, similarly to its decision in *Pulp Mills*, viewed the obligation to conduct an environmental impact assessment as requiring a lower threshold – that of an "adverse effect" – while the due diligence obligations under the no significant harm principle arise only where such assessment indicates a "risk of significant transboundary harm."

However, the Court ultimately found, regarding Nicaragua's dredging program, that "[i]n light of the absence of risk of *significant transboundary harm*, Nicaragua was not required to carry out an environmental impact assessment," while Costa Rica's construction of the road "carried a risk of significant trans-

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54. *Id.* at ¶¶ 72-74, 78-79. *See generally* Jutta Brunnée, *Procedure and Substance in International Environmental Law: Confused at a Higher Level?*, ESIL REFLECTION, Jun. 2016, http://www.esil-sedi.eu/node/1344.

55. *See Pulp Mills*, 2010 I.C.J at ¶ 105.

56. *Id.* at ¶¶ 94, 104-05, 115.

57. *Id.* at ¶¶ 72-74, 78-79, 203-04.

58. Brunnée, *supra* note 54.

59. Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.) *and* Construction of a Road in Costa Rica along the San Juan River (Nicar. v. Costa Rica), Judgment, 2015 I.C.J. 665, ¶¶ 104, 153, (Dec. 16) (emphasis added).

boundary harm. Therefore, the threshold for triggering the obligation to evaluate the environmental impact of the road project was met."[60] Furthermore, despite this finding that there was a risk of significant harm from Costa Rica's road construction that triggered its obligation to undertake an environmental impact assessment, the Court concluded that absent evidence of "actual" significant transboundary harm, Costa Rica did not violate the no significant harm principle.[61] These conclusions suggest, rather confusingly, that the Court viewed the threshold for triggering the environmental impact assessment obligation to be a "risk of significant transboundary harm" rather than the lower "adverse effect," and the requirement for violating the no significant harm principle to be "actual" harm rather than breach of due diligence obligations.

Whereas the Court's language with respect to the obligation to conduct an environmental impact assessment was unclear, the same cannot be said of its position regarding the obligations to notify and consult. The Court found in this regard that "[i]f the environmental impact assessment confirms that there is a risk of *significant transboundary harm*, the State planning to undertake the activity is required, in conformity with its due diligence obligation, to notify and consult in good faith with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk."[62] The Court therefore clearly applied a higher threshold to these obligations, conditioning their triggering on there being a risk of significant transboundary harm.

Even though the *San Juan River* decision was rendered later in time, the approach of the ICJ in *Pulp Mills* seems preferable. First, by setting out a lower threshold for the application of the duties to notify, consult, and conduct an environmental impact assessment, the *Pulp Mills* decision is more in line with the *UNWC*. It also reflects the general significance of the duty to cooperate in international law, and is more conducive to achieving cooperation in the resolution of disputes.[63] This decision is also more practical and realistic, since it is difficult to imagine how a state could conclude there is, or is not, a risk of significant transboundary harm without first undertaking an environmental impact assessment and consulting other potentially affected states.[64] The Court in *San Juan River* noted that "to conduct a preliminary assessment of the risk posed by an activity is one of the ways in which a State can ascertain whether the proposed activity carries a risk of significant transboundary harm,"[65] but this reasoning seems vague and circular. In addition, it is unclear when states would ever have the occasion to notify and consult if these obligations are conditioned on an environmental impact assessment that the acting state can unilaterally decide not to undertake since there is

60. *Id.* at ¶¶ 105, 156.
61. *Id.* at ¶¶ 216-17.
62. *Id.* at ¶¶ 104, 108, 168 (emphasis added).
63. *See Nicar. v. Costa Rica*, 2015 I.C.J. at ¶ 21 (separate opinion by Donoghue, J.).
64. *See id.* at ¶ 22.
65. *Nicar. v. Costa Rica*, 2015 I.C.J. at ¶ 154.

no "risk of significant harm."

I therefore propose to resolve the confusion arising from the *San Juan River* decision along the lines of the *UNWC* and the ICJ's position in the *Pulp Mills* case. Accordingly, the procedural obligations arising under the duty to cooperate, including the obligations to notify, consult, and conduct an environmental impact assessment, should apply separate and apart from the due diligence requirements of the no significant harm principle, and come into play regardless of any risk of significant harm. These procedural obligations would therefore have a dual role. They would not only inform the due diligence standard that states are required to comply with once there is a "risk of significant harm," but they would also require states to cooperate when a new measure is planned even if no such risk arises, so long as the planned measure might have an "adverse effect."[66] In this way, the duty to cooperate would complement the no significant harm principle in interstate fresh water disputes where a state is able to show a potential "adverse effect" not rising to the level of a "risk of significant harm" that would trigger the latter principle.[67] A failure to comply with these obligations would be considered as a violation of the duty to cooperate, giving rise to state responsibility for an internationally wrongful act.[68]

Accordingly, where a state plans a new measure that might have an "adverse effect" on other states, the environment, or the fresh water resource, which is a low standard to meet, the duty to cooperate would require it to notify, consult, and undertake an environmental impact assessment. If the assessment then indicates a "risk of significant harm" resulting from the new measure, the no significant harm principle would be triggered, requiring the planning state to exercise due diligence to prevent such harm. This would entail not only consultation and negotiation, but also "the adoption of appropriate rules and measures. . .[and] a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party."[69]

This approach accomplishes several objectives. First, it detaches obligations arising under the duty to cooperate from the notion of harm, thereby preventing a violating state from evading responsibility for breach of such obligations merely because there is no actual or potential harm. As noted by Judge Dugard in his Separate Opinion in the *San Juan River* cases, treating the environmental impact assessment obligation as independent would prevent a state from arguing, in hindsight, that in the absence of proven harm at the time of the proceedings "no duty of

66. In addition to the *UNWC* and the ICJ decisions mentioned above, the threshold of "adverse effect" has been incorporated in various forms in many international agreements. *See* Draft Articles on Prevention, *supra* note 17, at 158 n.900 (for a list of agreements).

67. McCaffrey, *supra* note 46, at 24, ¶ 42.

68. McCaffrey, *supra* note 16, at 470.

69. *Arg. v. Uru.,* 2010 I.C.J. at ¶ 197.

due diligence arose at the time the project was planned."[70] I propose extending this rationale also to the other obligations arising under the duty to cooperate with respect to planned measures, namely the duties to notify and consult. Second, this approach is also helpful where states, judges, or arbitrators are reluctant, or find it difficult, to establish that significant harm has been, is being, or is likely to be caused by another state.[71] Violations of procedural obligations can be more easily established, and holding states responsible for such obligations may prompt them to cooperate, correct harmful conduct, or take more effective preventive measures in the future.[72] Finally, this approach shifts the emphasis from a 'negative' duty to avoid harm to a 'positive' duty to cooperate, requiring states to take concrete steps to protect a shared fresh water resource even if no significant harm is caused or is likely to be caused.[73]

IV. THE DUTY TO COOPERATE IN THE DISPUTE RESOLUTION PROCESS

In addition to complementing the no significant harm principle, the duty to cooperate can also play a more meaningful role in the actual dispute resolution process. Cooperation is especially difficult to achieve once a dispute has arisen, particularly where there is no agreement that governs the fresh water resource at issue.[74] Less than half of interstate surface water resources are governed by an agreement, and only about one-fourth of such agreements include all relevant states.[75] Only a handful of international aquifers and groundwater basins in the world are subject to a legal arrangement, and some of these arrangements are not binding.[76] Even where an agreement is in place and refers to the duty to cooperate, such reference may be limited to the general management of the shared resource and not address cooperation in the dispute resolution process itself.

I therefore propose a new function for the duty to cooperate, which imposes specific obligations on state parties in this process. Such obligations are recognized, to a limited extent, in previous interstate fresh water disputes. For instance, in the *Lake Lanoux* arbitration,[77] the tribunal pointed out the parties' failure to cooperate in the resolution of the dispute, noting unjustified delays, systematic refus-

70. *Nicar. v. Costa Rica*, 2015 I.C.J. at ¶¶ 9-10, 19 (separate opinion by Dugard, J.).

71. Brunnée, *supra* note 54.

72. *Id*.

73. *Id*.

74. Salman M.A. Salman, *Mediation of International Water Disputes – the Indus, the Jordan, and the Nile Basins Interventions*, *in* INTERNATIONAL LAW AND FRESHWATER: THE MULTIPLE CHALLENGES 360, 360-61 (Laurence Boisson de Chazournes, Christina Leb & Mara Tignino, eds., 2013).

75. Ken Conca, 5 Focal Points for U.S. Global Water Strategy, NEW SECURITY BEAT (Nov. 3, 2016), https://www.newsecuritybeat.org/2016/11/5-focal-points-u-s-global-water-strategy-and-submit-too/).

76. For a representative list of such arrangements, *see* Francesco Sindico & Stephanie Hawkins, *The Guarani Aquifer Agreement and Transboundary Aquifer Law in the SADC: Comparing Apples and Oranges?*, 24 RECIEL 318, 319 (2015).

77. *Lake Lanoux* (Fr. v. Spain), 12 R.I.A.A. 281, 306 (1957).

als to take into consideration proposals or interests of the other party, and a general lack of good faith, as examples of uncooperative conduct.[78] However, such cooperative obligations in the dispute resolution process have risen more frequently in the maritime boundary delimitation context.[79] Drawing on practices in this field could therefore prove useful in the resolution of interstate fresh water disputes.

As with international water law, the body of international law governing maritime boundary delimitation disputes initially developed on the basis of unilateral, exclusive, and sovereign rights.[80] Therefore, much like interstate fresh water disputes, many disputes concerning maritime boundary delimitation involve competing rights and claims to the use of waters, unilateral state action, and politically sensitive and highly complex issues.[81] Indeed, in its early work on the *Draft Articles*, the ILC had already recognized the potential benefits of drawing parallels with the field of maritime boundary delimitation. In his 1979 Report to the Commission, Special Rapporteur Stephen M. Schwebel noted the obvious similarities between the two fields:

The basic subject—water—is the same, although there are real differences between sea water and sweet water. The basic objective is identical: to lay down rules that govern uses of water by States. And, in both cases there must be a certain similarity of approach, that is to say, in the law of the sea there has been, and in the law of international watercourses there must be, conceptualization and formulation of legal principles that respond to the nature of water and to physical facts respecting it.[82]

Moreover, the body of law governing maritime boundary delimitation is better developed than international water law in terms of the clarity and rigor of its governing principles in general, and cooperative principles and procedures in particular.[83] Useful lessons may therefore be drawn from the dispute resolution regime set out in the 1982 *United Nations Convention on the Law of the Sea* (*UNCLOS*), considered one of the most advanced and complex global dispute resolution systems, and its use of the duty to cooperate.[84] Particularly instructive in this regard

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78. McCaffrey, *supra* note 16, at 470.

79. "Maritime delimitation" has been defined as "the process of establishing lines separating the spatial ambit of coastal State jurisdiction over maritime space where the legal title overlaps with that of another State." YOSHIFUMI TANAKA, PREDICTABILITY AND FLEXIBILITY IN THE LAW OF MARITIME DELIMITATION 197 (1st ed, 2006).

80. Ian Townsend-Gault, *Rationales for Zones of Co-operation*, *in* BEYOND TERRITORIAL DISPUTES IN THE SOUTH CHINA SEA: LEGAL FRAMEWORKS FOR THE JOINT DEVELOPMENT OF HYDROCARBON RESOURCES 114, 118 (Robert Beckman et al, eds., 2013).

81. Robert Beckman, *International Law, UNCLOS and the South China Sea*, *in* BEYOND TERRITORIAL DISPUTES IN THE SOUTH CHINA SEA: LEGAL FRAMEWORKS FOR THE JOINT DEVELOPMENT OF HYDROCARBON RESOURCES 47 (Robert Beckman et al, eds., 2013).

82. Stephen Schwebel (Special Rapporteur), *First report on the law of the non-navigational uses of international watercourses*, 145-46, U.N. Doc. A/CN.4/320 (May 21, 1979).

83. *Id.* at 146.

84. *See* United Nations Convention on the Law of the Sea sec. 5, Nov. 16, 1994, 1833 U.N.T.S. 397; Beckman, *supra* note 81, at 79.

are the *UNCLOS* provisions dealing with the delimitation of exclusive economic zones and continental shelves (Articles 74(3) and 83(3), respectively), which require that, "the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during the transitional period, not to jeopardize or hamper the reaching of final agreement. Such arrangements shall be without prejudice to the final delimitation."[85]

These provisions thus impose two interrelated obligations on states involved in a boundary delimitation dispute, derived from their duty to cooperate: the obligation to make every effort to enter into provisional arrangements until a final delimitation is agreed upon, and the obligation not to jeopardize or hamper the reaching of such final delimitation agreement. Both of these obligations could also be applied in the resolution of interstate fresh water disputes.

A. The duty to make every effort to enter into provisional arrangements

In the *UNCLOS* context, this duty is designed to promote interim regimes and practical measures for the provisional utilization of disputed areas pending delimitation, and at the same time to restrict certain activities in these areas in order to remove obstacles to delimitation.[86] Such provisional arrangements, moreover, are without prejudice to the final delimitation. This means that the disputing parties cannot be assumed to have accepted them as being final, that such arrangements do not have to be taken into account in the final resolution of the dispute, and that the parties are not estopped from taking a position on the final agreement that contradicts them.[87] The rationale for this duty is rooted in the recognition that arriving at an agreed delimitation can be a time-consuming process and that some form of interim solution pending the final delimitation is often required in order to avoid the suspension of economic development in a disputed maritime area, while also ensuring that such activities do not affect the reaching of a final agreement.[88]

The same rationale applies to the resolution of interstate fresh water disputes. Whatever process is employed in such resolution, it may extend over a long period of time, leaving the parties vulnerable to a deterioration in the hydrological condition of the disputed fresh water resource that may adversely affect their ability to

85. *Id.* at art. 74(3). The duty to cooperate is also relevant to other aspects of the UNCLOS, such as the prevention of maritime pollution. *Id.* at arts. 43, 199, 200, 201. It is also relevant to cooperation of states bordering enclosed or semi-enclosed seas. *Id.* at art. 123. *See also Mox Plant* (Ir. v. U.K.), Case No. 10, Order of Dec. 3, 2001, ITLOS Rep. 95, 110; *Land Reclamation by Singapore in and around the Straits of Johor* (Malay. v. Sing.), Case No. 12, Order of Oct. 8, 2003, ITLOS Rep. 9, 25.

86. *See Guy. v. Surin*., 30 R.I.A.A. ¶ 460 (Perm. Ct. Arb. 2007); Rainer Lagoni, *Interim Measures Pending Maritime Delimitation Agreements*, 78 AM. J. INT'L L. 345, 354 (1984).

87. *See* Lagoni, *supra* note 86, at 359.

88. *See* Tara Davenport, *The Exploration and Exploitation of Hydrocarbon Resources in Areas of Overlapping Claims*, *in* BEYOND TERRITORIAL DISPUTES IN THE SOUTH CHINA SEA: LEGAL FRAMEWORKS FOR THE JOINT DEVELOPMENT OF HYDROCARBON RESOURCES 93, 100 (Robert Beckman et al, eds., 2013); *Guy. v Surin.*, 30 R.I.A.A. at ¶ 460.

use it, or to a *fait accompli* scenario in which a planned measure has been completed before the dispute is resolved. Therefore, the duty to cooperate should extend to the interstate fresh water dispute resolution process and impose on the state parties a duty to "make every effort" to enter into "provisional arrangements" to prevent such outcomes.

The term "every effort" in Articles 74(3) and 83(3) of the *UNCLOS* leaves room for interpretation by the disputing states, but also imposes on them a duty to negotiate in good faith and in a conciliatory manner.[89] Therefore, while states are not required to undertake specific actions to satisfy this obligation, it is not a mere recommendation but rather a mandatory rule whose breach would constitute a violation of international law.[90] Whether or not provisional arrangements are in fact necessary to protect the rights of the states concerned, and if so which, depends on the particular circumstances of each case. Nonetheless, the requirement that negotiation efforts be conducted "in a spirit of understanding and cooperation" reflects the traditional legal concept of "good faith."[91] The balance under this requirement between the obligation to negotiate in good faith and the absence of an obligation to reach a specific agreement was most recently articulated by the International Tribunal for the Law of the Sea as follows:

> [T]he obligation to negotiate in good faith occupies a prominent place in the [UNCLOS] Convention, as well as in general international law. . .The Special Chamber notes, however, that the obligation to negotiate in good faith is an obligation of conduct and not one of result. Therefore, a violation of this obligation cannot be based only upon the result expected by one side not being achieved.[92]

This general obligation to negotiate in good faith has also been recognized in the international water law context, and many instruments in this field provide for such negotiation as a possible mechanism for the resolution of disputes.[93] However, this general obligation has not given rise to the corollary duty to negotiate in good faith provisional arrangements pending the resolution of an interstate fresh water dispute. Such a specific duty is warranted since provisional arrangements and the process of their negotiation could facilitate the cooperative resolution of interstate fresh water disputes and ease tensions between the parties. Moreover, a duty to negotiate provisional arrangements in good faith could protect the state parties' mutual interests in the shared resource by preventing unilateral action without preju-

89. *Id.* at ¶ 461.

90. Lagoni, *supra* note 86, at 354.

91. *Id.* at 355. As evidenced, for instance, in the ICJ decisions in *U.K. v. Ice.*, 1974 I.C.J. at ¶¶ 73-75, 78-79(3), and in the *Ger. v. Den., Ger. v. Neth.*, 1969 I.C.J. ¶ 85.

92. *Dispute Concerning Delimitation of the Maritime Boundary between Ghana & Côte D'Ivoire in the Atlantic Ocean* (Ghana v. Côte D'Ivoire), Case No. 23, Order of Sept. 23, 2017, ITLOS Rep. ¶ 604.

93. Stephen M. Schwebel (Special Rapporteur), *Second report on the law of the non-navigational uses of international watercourses*, ¶¶ 170, 172, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (May 22, 1980); *Fr. v. Spain*, 12 R.I.A.A. at 285.

dicing the final resolution of their disputes. Provisional arrangements in this context could include, for instance, an interim joint plan for the shared use of the disputed water resource or for the sharing of benefits, or a temporary moratorium on further unilateral use of the resource.[94] Where state parties fail to agree on provisional arrangements and submit their dispute to binding third-party resolution, they could also request the court or arbitral tribunal to decide on the terms of such arrangements as an interim measure.[95]

B. *The duty not to jeopardize or hamper the reaching of a final agreement*

In the *UNCLOS* context, this duty, also known as the "obligation of mutual restraint," applies during the transitional period until final delimitation is agreed upon, particularly in the absence of a provisional arrangement.[96] This duty aims to prevent unilateral activities that might affect other parties' rights in a permanent manner, without stifling the ability to pursue economic development in a disputed area.[97] Therefore, the duty not to jeopardize or hamper the reaching of a final agreement would not preclude all unilateral activities in such an area, but only those activities that represent an irreparable prejudice to the final delimitation agreement, *i.e.* that lead to permanent physical impact on, or change in, the marine environment, or military activities directly related to the subject matter of the dispute.[98]

This non-aggravation duty also forms part of general international law.[99] For instance, the 1928 *General Act for the Pacific Settlement of International Disputes* requires parties to "undertake to abstain from all measures likely to react prejudicially upon the execution of the judicial or arbitral decision or upon the arrangements proposed by the Conciliation Commission and, in general, to abstain from any sort of action whatsoever which may aggravate or extend the dispute."[100] Similarly, the 1970 *Declaration on Friendly Relations* and the 1982 *Manila Declaration on the Peaceful Settlement of International Disputes* require state parties to an international dispute, as well as other states, to refrain from any action which may aggravate the situation so as to endanger the maintenance of international peace and security or impede the peaceful settlement of the dispute.[101] The purpose of these provisions is to ensure that while means of peaceful settlement are being

94. Davenport, *supra* note 88, at 100, 102.

95. IGOR V. KARAMAN, DISPUTE RESOLUTION IN THE LAW OF THE SEA 198 (Vaughan Lowe & Robin Churchill eds., 2012).

96. *Guy. v Surin.*, 30 R.I.A.A. at ¶ 469.

97. *Id.* at ¶ 470.

98. *Id.* at ¶¶ 467, 470; Lagoni, *supra* note 86, at 365-66.

99. For a list of conventions and treaties referencing this duty, *See South China Sea* (Phil. v. China), Case No. 2013-19, Award, at n.1468-69 (Perm. Ct. Arb. 2016).

100. General Act for Pacific Settlement of International Disputes art. 33(3), Sept. 26, 1928, 93 L.N.T.S. 343.

101. G.A. Res. 25/2625, at 5 (Oct. 24,1970); G.A. Res. 37/10, at 3-5 (Nov. 15, 1982).

used, the parties do not take action that might aggravate their dispute.[102] This duty in turn gives rise to two specific obligations: first, to refrain from changing the *de facto* situation that had given rise to the dispute, and second, to take preventive measures to avoid or lessen tensions.[103] The non-aggravation duty has also been applied in the judicial resolution of interstate disputes. For instance, the Permanent Court of International Justice stated in its decision on provisional measures in the *Electricity Company of Sofia and Bulgaria* case that "the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not to allow any step of any kind to be taken which might aggravate or extend the dispute."[104] The ICJ also referred to this duty in the *Case Concerning United States Diplomat and Consular Staff in Tehran*, where it held that "no action was to be taken by either party which might aggravate the tension between the two countries."[105] A similar duty was also included in the Arbitration Agreement between Croatia and Slovenia, which formed the basis for their recent arbitration concerning certain land and maritime boundary issues.[106] Article 10 of the Agreement, which Croatia later claimed to have been breached by Slovenia during the arbitration proceedings, provided that: (1) Both Parties refrain from any action or statement which might intensify the dispute or jeopardize the work of the Arbitral Tribunal. (2) The Arbitral Tribunal has the power to order, if it considers that circumstances so requite, any provisional measures it deems necessary to preserve the stand-still.[107]More recently, the non-aggravation duty was applied in the *South China Sea* arbitration. In this case, the Philippines claimed that China had breached Paragraph 5 of the 2002 *ASEAN-China Declaration on the Conduct of Parties in the South China Sea*, which required the parties

> to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner.[108]

On this basis, the Philippines argued that China violated its right to have the dispute settled peacefully by aggravating and extending the dispute through its dredg-

102. Rep. of the 1966 Special Comm. on Principles of Int'l Law Concerning Friendly Relations & Cooperation Among States on its Twenty-First Session, U.N. Doc. A/6230, at ¶ 237 (1966).

103. *Id*.

104. *Electricity Company of Sofia and Bulgaria* (Belg. v. Bulg.), Order, 1939 P.C.I.J. (ser. A/B) No. 79, at 199 (Dec. 5). *See also LaGrand* (Ger. v. U.S.), Judgment, 2001 I.C.J. Rep. 466, ¶¶ 102-03 (June 27), and other ICJ decisions cited in the *Phil. v. China*, Case No. 2013-19 at n.1464.

105. *United States Diplomat & Consular Staff in Tehran* (U.S. v. Iran), Judgment, 1980 1.C.J. Rep. 3, ¶ 93 (May 24).

106. Croat. v. Slovn., Arb. Mat'l (European Comm. 2009) https://pcacases.com/web/sendAttach/2165.

107. *Id.*

108. *Phil. v. China*, Case No. 2013-19 at ¶ 1124.

ing, artificial island-building, and construction activities.[109] The arbitral tribunal noted in this regard that

> there exists a duty on parties engaged in a dispute settlement procedure to refrain from aggravating or extending the dispute or disputes at issue during the pendency of the settlement process. This duty exists independently of any order from a court or tribunal to refrain from aggravating or extending the dispute and stems from the purpose of dispute settlement and the status of the States in question as parties in such a proceeding.[110]

Moreover, the tribunal noted that this principle of international law "is inherent in the central role of good faith in the international legal relations between States" and applies also to the provisions of the treaty relating to dispute settlement, which require "the cooperation of the parties with the applicable procedure."[111] The tribunal also found that the final and binding nature of the arbitral award had "an impact on the permissible conduct of the parties in the course of proceedings. . .actions by either Party to aggravate or extend the dispute would be incompatible with the recognition and performance in good faith of these obligations."[112] Finally, the tribunal found that

> [i]n the course of dispute resolution proceedings, the conduct of either party may aggravate a dispute where that party continues during the pendency of the proceedings with actions that are alleged to violate the rights of the other, in such a way as to render the alleged violation more serious. A party may also aggravate a dispute by taking actions that would frustrate the effectiveness of a potential decision, or render its implementation by the parties significantly more difficult. Finally, a party may aggravate a dispute by undermining the integrity of the dispute resolution proceedings themselves, including by rendering the work of a court or tribunal significantly more onerous or taking other actions that decrease the likelihood of the proceedings in fact leading to the resolution of the parties' dispute.[113]

In the international fresh water context, the non-aggravation duty is reflected in Article 17(3) of the *UNWC*, which provides that during the course of consultations and negotiations "the notifying State shall, if so requested by the notified State at the time it makes the communication, refrain from implementing or permitting the implementation of the planned measures for a period of six months unless otherwise agreed."[114] This duty is limited, however, by the requirement that the notified state demonstrate its willingness to reach a "prompt and just" solution

109. *Id.* at ¶¶ 1134, 1166.
110. *Id.* at ¶ 1169.
111. *Id.* at ¶ 1171.
112. *Id.* at ¶ 1172.
113. *Id.* at ¶ 1176.
114. *Notification Process for Planned Measures: User's Guide Fact Sheet Series: Number 6*, UN WATERCOURSES CONVENTION, https://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-6-Notification-Process-for-Planned-Measures.pdf.

by pacific means, a determination left to the sole discretion of the notifying state in the absence of an impartial third-party decision-maker.[115]

I propose to strengthen the non-aggravation duty as set out in the *UNWC*, whether in the negotiation of future treaties or in state practice, along the lines of its use in the *UNCLOS*. First, it should be detached from a determination of the notified state's "willingness" to reach a "prompt and just" peaceful resolution.[116] Once the disputing states have commenced some form of dispute resolution process, this should be viewed as an indication of the notified state's good faith intentions and the notifying state should be required to take all steps necessary to prevent "irreparable prejudice to the final agreement,"[117] including the suspension of the disputed project or use if need be. Second, the duty should not be limited to a six-month period, which is in any event extremely short, but rather apply so long as the dispute resolution process is underway. At the same time, however, possible measures other than complete suspension, such as compensation or sharing of benefits, should also be considered where relevant, and in any event unilateral activities that do not represent "irreparable prejudice to the final agreement" should be allowed.

This broader non-aggravation duty in interstate fresh water dispute resolution would serve to reduce tensions and facilitate settlement.[118] It would also prevent states from exacerbating a dispute that they are in the process of resolving by taking unilateral action that would cause irreversible harm, such as polluting a shared water resource or exhausting it, or that would render moot the final resolution of the dispute, such as completing a dam or diversion project. The value of a non-aggravation duty in this context is evident, for instance, in the mediation of the *Indus River* dispute by the World Bank in the 1950s, which led to the signing of the 1960 *Indus Waters Treaty*. Although India and Pakistan were not subject to a duty of mutual restraint under international water law at the time, the success of the World Bank in facilitating the resolution of this dispute was partially credited to the fact that it managed to get both sides to agree not to take any action to reduce the flow of the waters to the other until a final agreement was reached, a commitment that is part and parcel of the non-aggravation duty.[119]

A caveat should be noted with respect to the parallels I have drawn between international water law and the *UNCLOS* system. Recall that the substantive and procedural rules governing the *UNCLOS* are practically universal and are more robust and developed than those of international water law. Disputes relating to maritime delimitation, moreover, are subject to an elaborate, compulsory, and binding

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115. William L. Griffin, *The Use of Waters of International Drainage Basins under Customary International Law*, 53 AM. J. INT'L L. 50, 79-80 (1959).

116. W.L. Griffin, *The Use of Waters of International Drainage Basins Under Customary International Law*, 53 Am. J. Int'l L. 50, 79 (1959).

117. *Guy. v Surin.*, 30 R.I.A.A. at ¶467, 470; Lagoni, *supra* note 86, at 365-66.

118. Davenport, *supra* note 88, at 104.

119. Salman, *supra* note 74, at 373.

dispute resolution system that includes a specialized tribunal, and benefit from established case law.[120] Therefore, the two cooperative obligations I propose above might be more easily applied in the maritime boundary delimitation context than in the context of interstate fresh water dispute resolution. Nonetheless, international water law can and should draw lessons from the *UNCLOS* experience in order to develop its own cooperative dispute resolution rules and practices, and the principles I discuss here could serve as a useful starting point.

V. CONCLUSION

The importance of the general duty to cooperate in international water law is rooted in the "indivisible unity" of watercourses, which requires cooperation for their ongoing use and management, as well as for the resolution of disputes.[121] In order to facilitate such resolution, however, the procedural obligations arising under the duty to cooperate, including the obligation to notify, consult, and conduct an environmental impact assessment, should be viewed as independent from, and complementary to, the no significant harm principle. They do not only inform the due diligence obligations of states once there is "risk of significant harm"[122] triggering this principle, but also come into play where there is transboundary "adverse effect."[123] In light of this lower threshold and their independent nature, violating these obligations should give rise to international state responsibility.

In addition, the duty to cooperate can serve a useful purpose in the interstate fresh water dispute resolution process itself by imposing specific cooperative obligations. These obligations would require states to make every effort to enter into provisional arrangements until a final resolution of the dispute is reached, and to not jeopardize or hamper such final resolution. This approach to the duty to cooperate extends it beyond the *management* of shared fresh water resources and the *prevention* of interstate fresh water disputes to their *resolution*, thereby reinforcing the role of international water law in this context.

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120. Karaman, *supra* note 95, at 1.
121. Evensen, *supra* note 38, at ¶ 107.
122. See *supra* note 17.
123. UNWC, *supra* note 35, art. 12.