



Research papers

Anchoring water diplomacy – The legal nature of international river basin organizations

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ARTICLE INFO

Keywords:

River basin organization
Transboundary water management
Water diplomacy
Law of international institutions
Water law

ABSTRACT

Water diplomacy needs institutional anchoring. International River Basin Organizations (RBOs) – being the result of diplomatic efforts by riparian states intending to create a framework for cooperation between themselves over shared water bodies – can provide such institutional anchors. RBOs ensure that agreements to cooperate are turned into a long-term commitment by riparian states to jointly manage shared water resources and, in turn, foster mutually beneficial cooperation over time. RBOs have been the subject of detailed examinations of their conceptual core, of their manifold functions, of their effectiveness in achieving their goals and so forth. However, the legal nature of these entities has so far received limited attention notwithstanding its significance in empowering RBOs to act as institutional anchors for water diplomacy. Legitimate questions arise, for instance, in relation to their legal personality, or lack thereof, or to matters such as immunities and privileges. This paper will review key legal aspects of RBOs and illustrate them with examples. A sound understanding of such issues is crucial to supporting fruitful discussions between state members about the legal design of an RBO in order to fulfill their particular needs in the context of water diplomacy.

1. Introduction

Water diplomacy needs institutional anchoring. International River Basin Organizations (RBOs) may provide such institutional anchors. They are the institutional outcome of diplomatic efforts by riparian states intending to create a framework for cooperation over shared water bodies and to implement treaty provisions that have been entered into on a long-term institutional basis. At the same time, they house water diplomacy efforts themselves, aiming at ensuring the cooperative and sustainable management of their respective basin. Yet, the institutional anchoring of water diplomacy in RBOs is challenging. Among the many challenges RBOs and their member states might be facing, the internal legal and institutional nature of RBOs determines whether, and to what extent, they can provide effective and functioning institutional anchors for water diplomacy.

At the heart of diplomacy is, in broad terms, the concept of the ‘conduct of relationships, using peaceful means by and among international actors’ (Cooper et al., 2013, 2). While both academia and policy makers are increasingly focusing on water diplomacy, there is no consistent definition of it and concepts and definitions vary considerably across different research and policy institutions (Molnar et al., 2017). Water diplomacy is understood for the purpose of this article to include the conduct of relationships between riparian states of shared

water resources to enhance cooperation between them in relation to the joint management of those resources but with regard to goals beyond the water sector, namely regional stability and peace (Schmeier, 2016). International actors in water diplomacy, as in diplomacy more generally, include states and the institutions they create to deal with common matters – RBOs. RBOs may be classified as international organizations, which is why the law of international organizations and related legal and institutional matters are of great relevance to ascertain whether and to what extent RBOs may be effective anchors for water diplomacy.

RBOs are such anchors in that they provide a platform for member states that have established them to engage regularly and on the basis of clearly defined legal and institutional structures in water cooperation and diplomacy matters. They do so pursuant to the rules of procedure agreed in their constituting instruments, which set out the manner in which they are to operate. In this context, RBOs also play a key role in addressing and assisting with the mitigation of disagreements or conflicts that can occur in a shared basin through actions permitted by the rules of the organization, e.g. by engaging in data gathering, analysis and exchange activities or by managing pre-defined processes such as prior notifications. This makes RBOs and their individual staff essential actors in water diplomacy. It is, therefore, vital that the practical aspects of such organizations, and the processes of interaction they

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manage, are carefully considered and crafted so that they may function as smoothly as possible to achieve their intended purpose.

Indeed, both theoretical findings and empirical evidence reveal that RBOs have not always been able to fulfill their role of facilitating effective water diplomacy and of promoting cooperation effectively. Among the many reasons for this, legal characteristics have been of importance in numerous cases: For instance, in the Nile River Basin a lack of clarity over the legal status of the Nile Basin Initiative (NBI) has sometimes prevented it from taking a more active role in ongoing conflicts between some of the riparians. Similarly, water resources shared between the US and Mexico, where the mandate of an RBO has not been sufficiently clearly defined, have suffered from a lack of proactive engagement of the RBO in water diplomacy. And in the Mekong River Basin, disagreements over whether tributaries fall under the scope of the 1995 Mekong Agreement continue to hamper the Mekong River Commission (MRC)'s effectiveness.

Thus far, limited academic attention has been devoted to this topic. A more thorough review is therefore warranted to enhance the understanding of the impact of the legal nature of RBOs on their ability to play a role in water diplomacy. This article offers a starting point for this review by providing an overview of key issues from the perspective of the law of international organizations. After linking the law of international organizations to research on RBOs, it focuses on specific dimensions of RBOs that have been identified as RBO-internal legal and institutional factors that influence an RBO's ability to be an effective anchor for water diplomacy: The legal status of an RBO and its mandate and the privileges and immunities it has been granted by its member states (and most notably the host state). In doing so, the article ultimately argues that the legal nature of RBOs needs to be better understood not only by international lawyers, but by all those engaged in international river basins, whether water managers or diplomats, because of its potential impact on effective institutional anchoring for water diplomacy by RBOs.

2. The institutional anchoring of RBOs – the international law perspective

The concept of institutional anchoring of cooperation between riparian states to shared watercourses began to develop in Europe in the early 19th century with the Treaty of Vienna of 1815¹ and the establishment of the Rhine and Danube commissions, which centered on navigation. Over time, the focus shifted to other uses with potential impact on riparians and, thus, to non-navigational uses of shared watercourses. The notion of joint institutions remained. Already in 1911, the Institut de Droit International, in its Madrid Declaration,² considered their relevance and recommended to riparians to appoint permanent joint commissions with decision-making powers or advisory competences on matters relating to transboundary water resources (Art. 7).³ Thus, joint institutions and their objectives of cooperation between riparians have been in the minds of water managers and lawyers for over two centuries.

Scholars from both legal and water management backgrounds have acknowledged that institutionalized cooperation between states is “a natural and logical outgrowth of heavy reliance upon shared water resources” (McCaffrey, 2007; 156) and that institutions are a “mitigating factor in conflict, since they promote basin-wide interstate co-

operation and thereby increase water security” (Jägerskog, 2002; 78). Most recently, in the emerging water diplomacy debate, scholars as well as practitioners have assigned RBOs a key role in water diplomacy processes (MRC, 2016; Schmeier, 2016; Molnar et al., 2017).

While there is no customary rule in international water law requiring the establishment of joint institutions over shared watercourses,⁴ both the United Nations (1997) Convention on the Non-navigational Uses of International Watercourses (1997 Convention)⁵ and the 1992 United Nations Economic Commission for Europe (UNECE) Convention on the Protection and Use of Transboundary Watercourses and International Lakes (1992 Convention) call for their establishment.⁶ Some regional legal instruments require the same, whether the 2000 EU Water Framework Directive (Art. 3), or the 2000 Southern African Development Community (SADC)'s Revised SADC Protocol on Shared Water Resources (Art. 5(3)).

As regards academic examinations of the legal dimensions of RBOs and their impacts on RBOs' role to be effective anchors for water diplomacy, while the various dimensions of RBOs (and their underlying agreements) have been studied extensively – ranging from their emergence and why states in some basins chose to establish RBOs yet not in others (Bernauer, 1997; Song and Whittington, 2004; Tir and Ackermann, 2009) to questions relating specific design features of RBOs (Chenoweth and Feitelson, 2001; Boisson de Chazournes, 2002; Mostert, 2005; Dombrowsky, 2007; Zawahri, 2009; Gerlak et al., 2011; GIZ, 2014; Blumstein and Schmier, 2017) – examinations of legal aspects from the perspective of international institutional law has been so far limited. If addressed at all, legal dimensions of RBOs have featured in more general studies of RBOs, generally when analyzing different legal and institutional features of RBOs and their influence on, for instance, the functionality or the effectiveness of an RBO (Schmeier, 2013). Alternatively, they have been part of broader publications rather than being the focus of standalone papers as with Caponera's (1992) work on principles of water law and administration. They have also been addressed through more general discussions of international water law, where concerns over effectiveness of the management of shared watercourses have drawn authors to discuss the role of institutions (Boisson de Chazournes Laurence, 2013; Brown, 2013⁷). More general international law and institutional scholarship have not shown extensive interest in RBO – unless when considering them as technical (and thus sometimes ‘partial’) institutions (Pennetta, 2015, 71).

Overall, analyses of the legal dimensions of institutionalized

⁴ The details of such institutions is also not set out in customary law (Boisson de Chazournes, 2002; Commentary to the Berlin Rules, 2004).

⁵ The 1997 Convention is in fact based on existing state practice including the many RBOs established before the adoption of the Convention such as those already of the Danube, Rhine and Oder, and more.

⁶ Notably in the case of the former it is an encouragement (note Art. 8.2, which refers to joint mechanisms or commissions and Art. 24.2) whereas in the latter it is a mandatory requirement (Art. 9.2 contains a non-exhaustive list of functions of a joint body though no indications of the expected structure of the institution and of more technical aspects of its operations. This is clarified in the United Nations Economic Commission for Europe (UNECE) Implementation Guide of 2009, which lists four common characteristics of such commissions including: (1) a permanent body meeting reasonably regularly; (2) composed of representatives from the riparian states from water related agencies; (3) with decision-making, executive and subsidiary bodies (e.g. working or expert groups, etc.); and (4) a secretariat. Note Art. 1.5, which defines what is a joint body, namely ‘any bilateral or multilateral commission or other appropriate arrangements for the cooperation between the Riparian Parties.’

⁷ Both present the history and evolution of basin organizations and commissions, as does Caponera (1992), with Brown Weiss noting the transition from navigation to the broader range of activities that RBOs now cover. She also considers their functions and effectiveness whereas Boisson de Chazournes examines their role as a forum for dialogue, cooperation and dispute resolution (2002) as well as their contribution to developing and implementing international law.

¹ See article CVIII to CXVI relating to navigation issues of shared rivers and the appointment of commissioners meeting on a regular basis (FAO Legislative Study 65).

² Declaration of Madrid, 20 April 1911.

³ International Regulation regarding the Use of International Watercourses for Purposes other than Navigation. It has previously proposed riparian commissions in relation to navigation only in 1867 (International Regulation on River Navigation, Resolution of Heidelberg, 9 September 1887 in FAO Legislative Study 65).

cooperation over shared water resources are rare and most often only related to other research questions. Accordingly, an examination of the legal features of RBOs (or the lack thereof) and the implications they can have on an RBO's role as the institutional home for water diplomacy has often been neglected. This gap is what the remainder of this paper aims to fill.

3. Key features of RBOs under the law of international organisations

This section applies insights from the law of international organizations to RBOs as specific types of international organizations. It focuses on those features of international law that are of particular relevance to those engaged in water diplomacy – whether from the water management or the foreign policy perspective. These are the nature of RBOs as international organizations, their legal personality and their organizational design, their mandate and their ability to create norms as well as their privileges and immunities.

3.1. Defining RBOs as international organizations

Before examining the different legal aspects relevant to the role of RBOs in water diplomacy, it is important to establish their legal nature as an international organization. This should be based on the examination of the key elements of the law of international institutions determining what constitutes an international organization. Although there is no agreed definition (Klabbers, 2015a), the following guiding elements have been identified: (1) a treaty between states creating the organization; (2) the organization possesses at least one organ; (3) and the organization has a 'volonté distincte', in other words it has a will distinct from that of its member states (Klabbers, 2015a).⁸

Based on the above and on concepts from international relations theory, RBOs can be defined as “institutionalized forms of cooperation that are based on binding international agreements covering the geographically defined area of international river or lake basins characterized by principles, norms, rules and governance mechanisms” (Schmeier et al., 2016). Among the different elements identified by Schmeier et al. (2016), three relate directly to legal dimensions, and mirror the elements of an international organization mentioned above: the binding international agreement; infrastructure,⁹ namely the organizational bodies of an RBO; and ‘actor quality’, in other words the ability of the organization to act independently of other stakeholders (Schmeier et al., 2016).

3.1.1. Legal personality

A central element of an international organization is its legal personality, which distinguishes it from its members, thus enabling it to function independently from them (Sands and Klein, 2009, 482) and from other types of international entities (Sands and Klein, 2009, 473), and makes it a subject of international law with rights and duties (Brownlie, 2008, 677). Though often mentioned in the treaty establishing the organization, legal personality is not always explicitly granted (Klabbers, 2015a, 18) yet it may be presumed unless otherwise demonstrated (Klabbers, 2015a, 22). Once it has been established, consequences derive from that status within international and national legal orders.

With regards to RBOs as specific types of international

organizations, legal personality has been explicitly stated in many of the underlying agreements that established them. A detailed provision outlining the scope of the legal personality of an RBO is, for instance, Article 1 of the 1972 Convention Portant Creation de l'Organisation pour la Mise en Valeur du Fleuve Senegal (OMVS), which enables the OMVS, in order to fulfil its purpose, to “(a) enter into contracts; (b) purchase and sell movable and immovable assets necessary for its normal operation; (c) receive donations, subsidies, inheritance and other gifts; (d) obtain loans; (e) request technical assistance; (f) initiate legal proceedings.” Other types of clauses include, for instance, Art. 11 of the 1995 Mekong Agreement, which states that the MRC “shall, for the purpose of the exercise of its functions, enjoy the status of an international body”. Likewise, the 2000 ORASECOM Agreement states that Orange-Senqu River Commission (ORASECOM) “shall be an international organization and shall possess international legal personality” (Art. 1.2). In the case of the International Sava River Basin Commission (ISRBC), it has been granted ‘international legal capacity’ (Art. 15.2 of the 2002 Framework Agreement on the Sava River Basin).

However, legal personality does not have a uniform content in international law (Sands and Klein, 2009, 477). Consequently, the provisions of its constituent instrument determine the extent of rights, and duties of an organization, bearing in mind that powers may be explicit or may be reasonably deduced from its functions and purpose so as to enable it to effectively discharge its tasks (Sands and Klein, 2009, 483). This has been an area in which the International Court of Justice (ICJ) has played a key role in establishing the theoretical backdrop for assessing the extent and basis of the powers of an organization.¹⁰ From the initial theory of conferred powers, those explicitly granted to it by state members, the Court dealt with the limitation this theory presented in the case of unforeseen circumstances by developing the idea of implied powers, enabling an organization to use powers not explicitly granted but necessary to achieve its objectives (Klabbers, 2015a, 23). This, of course, creates tension with states members who have felt their control over organizations erode as the latter expand the scope of their activities. The paradox of ‘sovereign reluctance’ illustrates this tension: states may be reluctant to grant powers to an organization, despite the practical necessity for them to cooperate (Blokkeers, 2015, 3). This also raises the issue of an organization engaging in ultra vires activities, beyond its powers, with the possibility of those actions being deemed invalid (Klabbers, 2015a; 83) and thus impacting on the operations and functioning of the entity.

One fundamental expression of legal personality is its treaty-making powers, namely the ability to enter into agreements with other subjects of international law such as states or other international organizations. The organ entitled to exercise this competence should be specified by the rules regulating the organization (Sands and Klein, 2009, 485) and it is the organization, rather than its state members, that will be bound by the treaty because it has a separate legal personality (Sands and Klein, 2009, 486). At a minimum, organizations will enter into a headquarters, or seat, agreement with their host state (Klabbers, 2015a, 101).

While many agreements establishing RBOs grant these organizations legal personality, capacities implied by the legal personality of RBOs may also be explicitly outlined and limited if parties to the agreement so decide. For instance, the capacity to conclude agreements with other actors can be restricted to certain specific actors. Art. 11 of the 1995 Mekong Agreement limits the capacity of the MRC to “entering into agreements and obligations with the donor or international community”. Thus, other organizations are de iure completely excluded, as are third party states including non-member riparians. In this case, it seems that state members have clearly indicated that they intend to retain a degree of control over the . De facto, however, the has

⁸ Notably the Vienna Convention on the Law of Treaties of 1969 defines an international organization as an ‘intergovernmental organization’ (Art. 2.1(i)).

⁹ Infrastructure, based on concepts of international regime theory, refers to the institutional and organizational dimensions of RBOs and thus mainly the organizational bodies that ensure their functioning over time by implementing the agreements member states have come to when establishing RBOs. Secretariats are of particular importance for such infrastructure.

¹⁰ See the Advisory Opinion on the Reparation for Injuries suffered in the Service of the United Nations [1949] ICJ Repts 179.

entered into a number of agreements (or non-binding Memoranda of Understanding) with different types of organizations as well as third party countries. Likewise, the ISRBC is expressly authorized to conclude a seat agreement with the host country (Art. 19.2). However, it also has the ‘capacity necessary for the exercise of its functions’, a basis for the Commission to exercise certain powers not explicitly outlined.

Where legal personality (and related capacities such as the ability to enter into agreements) has not been granted, this presents real challenges for RBOs. The most famous example is the NBI, which de iure remains a transitional body to coordinate water resources management efforts at the technical level between the countries until an international organization is established for the basin through an agreement, a scenario yet to materialize as the Comprehensive Framework Agreement, designed for the Nile basin, is far from entering into force. This has significant impacts on its ability to interact with the international community (states and international organizations) – especially with international finance institutions and donors as they may not enter into binding agreements with the NBI.

Overall, the legal personality of RBOs is thus of great importance to them as water diplomacy actors. Only if they are equipped with adequate legal personality may they engage actively in diplomatic processes. This is of particular relevance given the role of non-riparian and/or non-state actors in water diplomacy in many basins – including third party countries as well as other types of international organizations – with which RBOs often have to engage when addressing conflicts or promoting negotiations.

3.1.2. Institutionalization – the role of RBOs’ organizational design

A requirement to qualify as an international organization is that it possesses a distinct will, a concept challenging to ascertain (Klabbers, 2015a). The distinct will of an international organization is also often associated with a degree of institutionalization and, in particular, the role of the secretariat. International organizations generally comprise three bodies: the first is typically the plenary body in which all state members are represented, with a mandate on larger political issues. This is often referred to as a Meeting or a Conference of Parties. The second is an executive organ, which implements decisions by the plenary body and is tasked with preparing the organization’s overall course of action (Klabbers, 2015a, 71–72). The third is an administrative organ in the form of a secretariat (Blokkeers, 2015, 7). There may be other types of bodies, such as a court, and the organization may sometimes decide to create additional organs or sub-organs (Klabbers, 2015a, 73).¹¹

The independence of a secretariat, which is impartial because it does not serve the interests of a particular member state but that of all (Sands and Klein, 2009, 308), is a key characteristic of international organizations (Blokkeers, 2015, 7). That impartiality is a clear indication that one of the organs of an organization has a will distinct of its members and hence organizations that have such a body are likely to fulfil this requirement.

As in the case of international organizations generally, an important element of the legal status of RBO relates to the level of legalization and institutionalization of an organization. Caponera used the broad term ‘international water resources administration’ to refer to any form of institutional arrangement (1992, 229).

Two dimensions of institutionalization reflecting the level of an RBO’s distinct will may be identified. Firstly, an RBO can be examined according to the extent of institutionalization, with scholars generally distinguishing between committees, commissions and authorities. Committees tend to have a limited organizational set-up with meetings

of member states’ representatives at a more or less regular basis only (but no joint body such as a secretariat), and often no legal personality. The Franco-Swiss Consultative Commission on Fishing in Lake Geneva¹² or the German-Czech Boundary Waters Commission,¹³ both focusing on very specific technical matters requiring regular technical exchanges, fall into that category. Commissions, the most common form of institutionalized cooperation over shared water resources, present a greater degree of independence and most often possess legal personality in international law, though they are focused on coordination with no supranational mandate. Authorities, on the other hand, are considered to be autonomous international organizations of a supranational nature generally with high levels of independence and power vis-à-vis their member states. This type of RBOs is most common in Western and Central Africa, mainly in basins where RBOs focus on the development of water resources in the context of more general socio-economic development and integration efforts in which RBOs play a key role such as the Autorité du Bassin du Niger (ABN) or the OMVS. Authors that have addressed the institutionalization level of RBOs tend to argue that higher levels of institutionalization and centralization offer higher coordination levels and facilitated communication (Marty, 2001, 47/48; Schmeier, 2013, 46). Concurrently, empirical evidence suggests there are limits to such benefits. Ever increasing levels of institutionalization do not necessarily increase the effectiveness of RBOs in dealing with transboundary issues faced by their riparian members as shortcomings in the coordinated management of some watercourses governed as observed in the case of highly institutionalized bodies such as the Niger or the Senegal Rivers.

Secondly, the organizational design or set-up of an RBO – as of international organizations more generally as described above – provides important indications about its institutionalization. It largely reflects more general international practice with a plenary organ representing member states and determining the overall direction of the RBO and its work (often called a council or commission), a more technical body (a committee) and a secretariat. Typically, these bodies and their respective roles and responsibilities are defined in the constitutive agreement. Some RBOs have less bodies, some more, reflecting their specific mandate and related level of institutionalization. Some scholars have argued that the level of institutionalization ultimately reflects the degree and intensity of cooperation between riparians (Hearn et al., 2014; 103). However, a clear link between the level of institutionalization – and in particular the number and the functions of an RBO’s bodies – and an RBO’s effectiveness in water diplomacy activities cannot be established (Schmeier, 2013).

What research has established, nonetheless, is the fundamental role of an RBO secretariat, which fulfils a number of functions that ensure the institutional independence of RBOs in governing shared water resources. Typically, this body not only provides administrative and financial services relating to the management of the RBO’s work and its programs and projects, but also plays an important role in data gathering and sharing, water resources planning or communication with stakeholders (Schmeier, 2013; 94–96). Some RBO secretariats have successfully initiated or steered water diplomacy processes in a basin. This has proven particularly important in times of conflict. In the Mekong River Basin, for instance, the MRC Secretariat has played an important role in guiding the prior notification and consultation processes for three mainstream dams so far and contributed – to varying degrees of effectiveness – to mitigating conflicts around these dams between its member states (Blumstein and Schmier, 2017). Ultimately, the level of institutionalization of an RBO will be a key factor shaping its ability to

¹¹ For instance a new body was created under the 1992 Convention: in 2012 state members agreed to create the ‘Implementation Committee’ which is not a body that was created in the original agreement (Decision VI/1 in ECE/MP.WAT/37/Add.2).

¹² Established between France and Switzerland under the Agreement regarding Fishing in Lake Geneva of 20 November 1980.

¹³ Established under the 1995 Treaty between the Federal Republic of Germany and the Czech Republic on Cooperation in the Area of Water management of Boundary Waters of 12 December 1995.

conduct water diplomacy activities.

3.2. RBO powers – Mandate and decision-making powers as key features for shaping water diplomacy processes

Whether or not an RBO is mandated to address certain issue-areas may be crucial for its overall effectiveness, particularly in water diplomacy. Therefore, most treaties establishing RBOs define the areas parties to the agreement agree to cooperate on and/or the RBO is mandated to work on more or less clearly. For instance, the 1995 Convention on the International Commission for the Protection of the Oder (ICPO) refers to the prevention of pollution of the River Oder and related areas of the Baltic Sea, clearly determining the functional mandate of the ICPO (Art. 1). Likewise, the 1994 Permanent Okavango River Basin Commission (OKACOM) Agreement refers to “matters relating to the conservation, development and utilization of water resources of common interest” as outlining the functional mandate of OKACOM (Art. 1.3). Other RBOs – mainly in Western and Central Africa – tend to have broader functional scopes with a focus on water resources development. The ABN, for instance, is mandated to “promote the cooperation among member States and to ensure an integrated development of the Niger Basin in all fields, by developing its resources particularly in the fields of energy, water resources, agriculture, animal husbandry, fishing and fisheries, forestry and forestry exploitation, transport, communications and industry” (Art. 3).

A lack of clarity in an RBO’s mandate may hamper its role as an institutional anchor for water diplomacy – especially in the issue area that is contested. The International Boundary and Water Commission (IBWC) between the US and Mexico has, for some years, been debating whether the management of groundwater falls under its mandate. Neither the 1889 Convention establishing the International Boundary Commission (IBC) nor the 1944 Treaty relating to the waters under its jurisdiction that extended its responsibilities and mandate to include water, explicitly mention groundwater.¹⁴ However, given the pressing issues around groundwater use, the IBWC has increasingly addressed groundwater as well. In 1973 already, Minute 242 of the IBWC¹⁵ referred to groundwater and issued recommendations limiting withdrawals in a certain local aquifer and calling for consultations between the parties in case of developments of groundwater resources (Eckstein, 2012). Whether the IBWC was overstepping its mandate was questioned. Interpretations of whether groundwater is covered or not vary across governments and stakeholders. Consequently, the IBWC was reluctant to address groundwater issues in greater detail and, in particular, in the form of specific policy actions. It is only recently, and because of pressing drought conditions and other signs of aquifer depletion that the IBWC has taken up the topic again. A Binational Study of the Transboundary San Pedro Aquifer was completed in 2016 (IBWC, 2016) and the IBWC is increasingly investigating what it is permitted legally (and politically) to do regarding this ever more urgent issue (Eckstein, 2012). A clearer mandate would have certainly allowed the IBWC to address earlier the now contested issue of groundwater management, potentially making an important water diplomacy contribution in the region.

A similar discussion has emerged over the mandate of the Lake Chad Basin Commission (LCBC) in the past years. While mandated to manage the water resources of the Lake Chad Basin for socioeconomic development and regional cooperation, member states have – under the threat of armed and terrorist groups such as Boko Haram – extended this mandate to regional security cooperation without formalizing it

legally through (re-)establishing a Multinational Joint Task Force (MJTF) charged with coordinating military efforts of some of the basin’s riparian states. Donor organizations, in particular, have been pondering lately whether such change in mandate will affect the LCBC’s capacity to fulfill its original mandate to manage water and natural resources potentially leading to its funding being reconsidered, or whether the LCBC might not in fact serve as a broader regional platform by default because of the lack of any other suitable regional cooperation platform in the region (Galeazzi et al., 2017). The latter perspective might, however, affect its role in water diplomacy because (technical) water issues are increasingly becoming politicized and securitized and may no longer receive appropriate attention from riparians.

Closely related to the nature of the organization is its ability to adopt norms and their nature. This, considered to be one of the most important functions of an organization (Di Stasi, 2015, 57), is determined by its establishing instrument. A norm created by an organization may or may not be binding on state members: where it is not binding it is considered to be ‘soft’ law and does not carry any legal weight (Di Stasi, 2015, 62).

The ability to adopt norms is important because of the need for flexibility as a necessary characteristic for effective institutional management to deal with unanticipated change (Hearns et al., 2014, 107). One way this may be achieved is through the ability to make binding decisions, which may amend existing normative frameworks. This is the case, for example, with the IBWC which can create ‘minutes’ that are binding on its signatories, the US and Mexico. These are examples of such instruments amending water allocations and addressing issues unforeseen at the time of signing of the underlying treaty in 1944¹⁶ (Hearns et al., 2014, 107).

Another dimension of the power of RBOs relates to decision-making within the organization. While the underlying agreements usually define how decisions are taken (generally on the basis of the consensus or unanimity), issues have arisen when a signatory state to the underlying agreement has suspended or paused its membership. This has been particularly troubling for water diplomacy processes where the underlying agreement does not clearly define whether and how membership in the organization can be suspended or when the respective state did not follow the related processes. A blatant example is Kyrgyzstan’s suspension of its membership in the International Fund for Saving the Aral Sea (IFAS): Kyrgyzstan has not formally withdrawn from it or suspended its membership but has simply stopped participating in any of the organization’s governance or technical activities and meetings, accompanied with verbal statements by high government officials indicating an exit. Consequently, Kyrgyzstan’s status in the organization currently remains entirely open with uncertainty as to the implications for IFAS, notably its decision-making ability and the legal and political value of any such decisions.

If an RBO’s powers for making decisions – especially with regards to implementing what member states have agreed to and advancing water cooperation – are challenged in the manner described above, this RBO’s role in water diplomacy will clearly be limited. Since the main purpose of RBOs is to foster and coordinate better water cooperation between riparians, their potential inability to adapt to new circumstances, such as in the case of groundwater and the IBWC, may actively prevent them from providing a platform for water diplomacy activities.

3.3. Privileges and immunities - RBO internal housekeeping

For most international organizations, whatever issues they have been set up to deal with, headquarters agreements contain clauses regarding the privileges and immunities the organization and its staff may

¹⁴ The 1944 Treaty only refers to the Rio Grande, Colorado and Tijuana rivers.

¹⁵ IBWC (1973) Minute 242 Permanent and Definite Solution to the International Problem of the Salinity of the Colorado River, 30 August 1973, <https://www.ibwc.gov/Files/Minutes/Min242.pdf>.

¹⁶ Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, Treaty between the United States of America and Mexico, 14 November 1944.

benefit from¹⁷ as the agreement will carve out a special position for it on the territory of the host state (Klabbers, 2015a, 30; Blokkers, 2015, 8). Overall, these clauses are intended to support “the impartial, efficient and economical discharge of the functions of the organization concerned, and in particular what contributes to the effective independence of the organization from the individual control of its separate members exercised by means of their national law and executive authority as distinguished from their collective control exercised in a regular manner through the appropriate international organs.” (Jenks (1962) cited in Sands and Klein (2009, 516)). However, there are no particular rules in international law about their content: every institution will have to negotiate with its host state the rules that will relate to it, its staff, representatives of member states and experts on mission.

For the organization, such agreements usually provide immunity from suit implying that legal proceedings cannot be brought against it before domestic courts; inviolable premises and archives; fiscal and currency privileges; and freedom of communication (Sands, 2011; 466). It allows representatives of state members to attend meetings of the organization in a country other than theirs.¹⁸ Experts on mission on behalf of an organization may also benefit from certain immunities.¹⁹

One very important aspect deriving from the immunity from suit of an organization relates to its staff and the rules that apply to them (Klabbers, 2015a; Brownlie, 2008), particularly in the case of employment disputes as staff members may be unable to instigate proceedings in national courts (Klabbers, 2015b, 79). This has led some of the larger organizations, such as the UN, to establish their own internal procedures and dispute resolution fora to avoid facing a situation where justice might be denied to their employees. There has been a reported increase in the number of claims against international organizations before national and international courts in cases in employment matters such as the dismissal of officials or secretariat members and in some cases immunity for the organization has been rejected for want of another remedy for the applicant (Blokkers, 2015, 11; Klabbers, 2015b, 153).

Many – though not all – RBOs have also entered into host/seat agreements with states, which include privileges and immunities.²⁰ However, in most, if not all cases, the relation between the host state’s domestic legal system and the RBO’s internal rules and procedures may be ambiguous in many aspects, including employment law. As mentioned above, immunity from jurisdiction is intended to protect an organization from a situation, deemed undesirable, where local courts could determine the legality of its acts, including vis-à-vis its employees (Sands and Klein, 2009, 467) though of course an organization may also choose to waive its immunity (Sands and Klein, 2009, 470). However, this may hamper the functioning of an organization in the event of a dispute with an employee where resolution seems complicated in the absence of an obvious legal forum to resolve it, due to the ambiguities previously mentioned.

The seat agreement of the International Commission for the Protection of the Danube River (ICPDR) is generally understood to supersede Austrian national law. However, there is no Austrian official

statement on this matter (except for its consent to the Danube Convention and its signature of the seat agreement). The ICPDR adopted internal regulations for staffing matters at the level of the Heads of Delegation giving considerable flexibility to the Executive Secretary to address specific employment matters under his authority. When an employment dispute occurred and the respective staff considered taking the issue to court, the question arose of whether Austrian labor law or ICPDR internal rules would apply to the dispute. Ultimately, the matter was never taken to court; it was solved by a mediation panel within the RBO leaving open whether Austrian courts had jurisdiction. The case nonetheless illustrates the importance of the relationship between the RBO’s internal procedures and the host state’s domestic law.

In the case of the MRC, an employment matter related to its Secretariat’s recent down-sizing also raised the issue of the prevalence of domestic law over its internal rules. The 1995 Mekong Agreement is silent – compared to other RBO agreements – on the privileges and immunities that come with MRC’s status as an international body (laid down in Art. 11 1995 Mekong Agreement). While more details are provided in other instruments (e.g. the 2003 Host Agreement between Lao PDR and the MRC), some questions remain open, including which legal framework would apply in cases of employment related issues as neither the 1995 Mekong Agreement nor the Seat Agreement (nor any other instrument) clarify the hierarchy of norms for such cases. The fact that Lao domestic employment law appears applicable may create a challenge for the MRC as an independent international organization.

Although seemingly dealing with internal housekeeping matters, privileges and immunities and the challenges they present when insufficiently defined, can significantly impact an RBO’s role in water diplomacy. This can be due to difficult relations with the host state if aspects of the seat agreement are contested or to other reasons. Given the many challenges around water diplomacy, these more “administrative” matters should be addressed from the beginning in order to avoid increasing tension between states or states and the RBO around matters not related to the joint water resources they are concerned with. Coherence and clarity about the applicable rules contribute to preventing potential conflict that may distract parties from dealing with the actual subject matter of their concern, namely shared water resources.

4. Conclusion

The International Law Commission, which drafted the 1997 Convention, highlighted the indispensable nature of joint institutions for the management of international watercourses (ILC Yearbook, 1990, 44). RBOs have been created to fulfill these expectations and ensure the cooperative management of shared water resources in different basins around the world, making them key anchors for water diplomacy. However, for RBOs to fulfill these roles effectively, the rules that apply to their functioning as international organizations need to be comprehensible to those who must comply with them as well as to those who depend on RBOs as institutional anchors for water diplomacy.

This article has reviewed some key elements of the law of international organizations relevant to RBOs as a specific type of international organizations and its relevance to the role of RBOs as institutional anchors for water diplomacy. An examination of key features of this area of public international law clearly complements the investigations undertaken to ascertain the effectiveness of RBOs given the potentially significant impacts on their operations, and consequently on their ability to achieve the objectives intended by their riparian members.

The analysis of the different elements of the legal nature of RBOs demonstrates that legal aspects play a more important role in the effectiveness of RBOs, especially in water diplomacy processes, than has generally been acknowledged by both academic scholars and policy makers. While a lack of clarity regarding the legal personality of an RBO can hinder its ability to act in the international system, insufficient

¹⁷ This is often also often incorporated into the law of the country where the organization is based to ensure that the relating rights and obligations are enforceable domestically (Sands and Klein, 2009, 492).

¹⁸ One may recall in this regard heads of states and other state representatives travelling to New York to attend meetings of the General Assembly in spite of the bilateral political climate between their country and the United States, which is permitted under the headquarters agreement between the UN and the US though often with geographical restrictions imposed.

¹⁹ This the case for UN peacekeepers that are not UN staff but perform tasks on its behalf.

²⁰ See for instance the Statute of the River Uruguay between Uruguay and Argentina of 26 February 1975. In other cases they may be in a separate agreements, as is the case with the OMVS and the Accord Relatif aux Privilèges et aux Immunités de l’OMVS du 18 avril 1977.

clarity on its mandate and powers can lead to disagreements on what areas the RBO should work on or not, possibly heightening conflict between riparian states. Moreover, inadequately outlined privileges and immunities may lead to administrative matters affecting the relationship between an RBO and its host state, and unsuitable institutional setups may hamper an RBO's ability to actively and effectively engage in water diplomacy processes.

The legal dimensions of RBOs as international organizations therefore need to be taken into consideration when establishing new RBOs and when assigning RBOs a new role – as is currently happening in the context of the water diplomacy discourse. Failure to do so may result not only in challenges regarding legal matters, but also affect overall cooperation in international basins.

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