



# The Supreme Court, International Law, and Transboundary Aquifers

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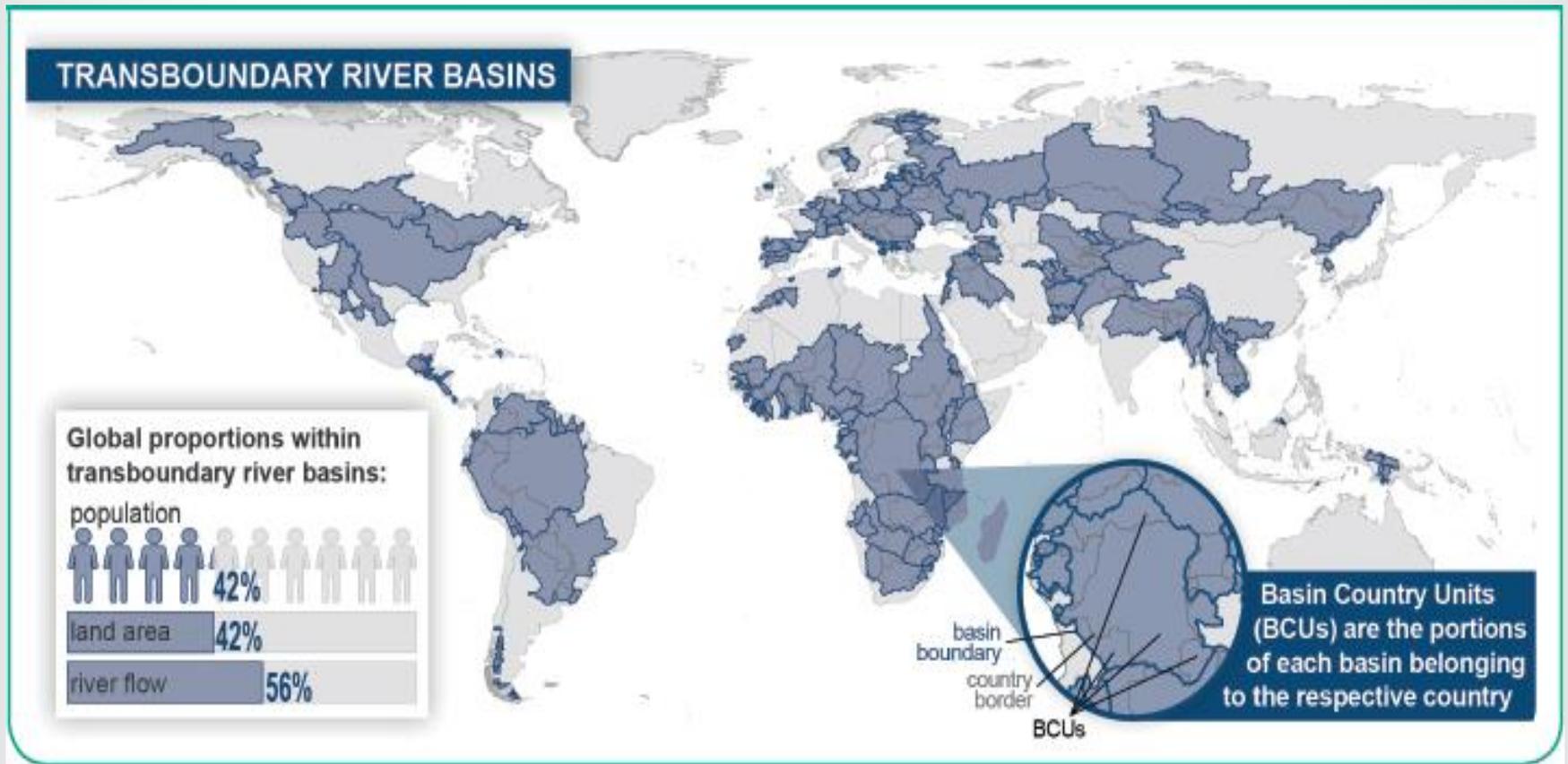
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Groundwater Security Workshop



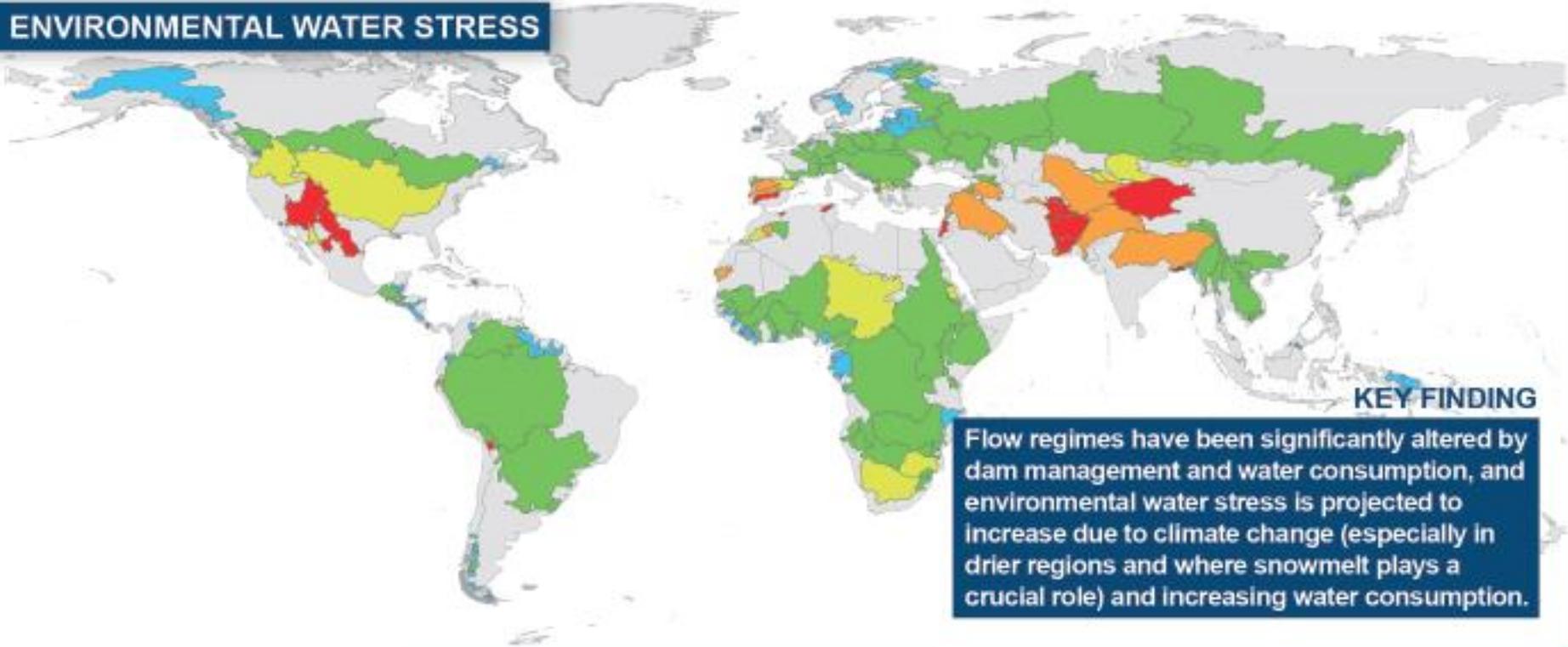


# 286 International Water Basins



# Transboundary Basins Under Stress

## ENVIRONMENTAL WATER STRESS



# Two key questions for the regulation of aquifers

- 1. Is the aquifer an interstate resource?
- 2. If yes, then it must be equitably apportioned – but what does that mean for groundwater?

# Mississippi v. Tennessee

- Supreme Court Explains How to Identify and Interstate Aquifer:
  - – Must be “transboundary” or “multistate”
  - Groundwater “flows naturally between the States”
  - Actions in one State “reach through the agency of natural laws to affect the portion of” the aquifer in another State

# Mississippi v. Tennessee

- The Supreme Court held that “the waters contained in the Middle Claiborne Aquifer are subject to equitable apportionment”
- This means “States have an equal right to make a reasonable use of” the Aquifer
- But the Court did not explain what that means in practice

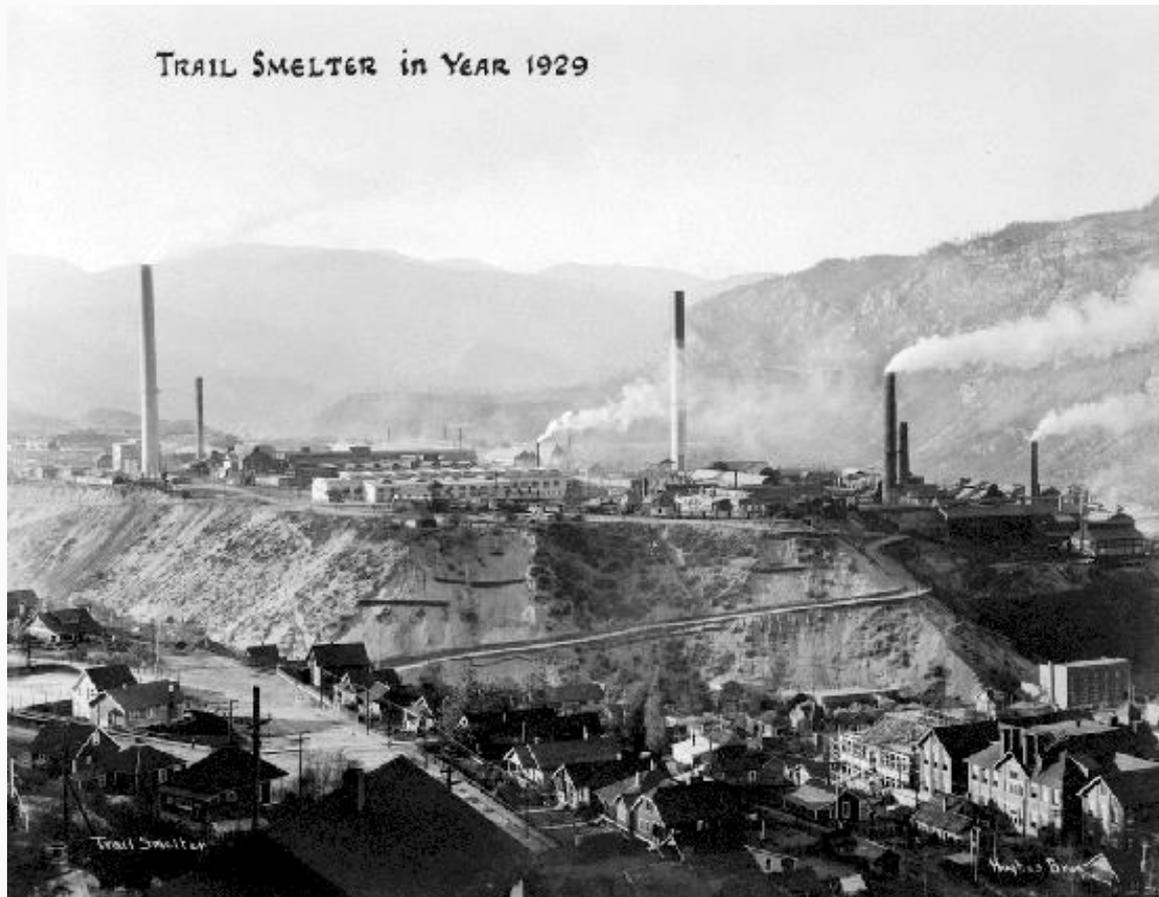
# How is “Equitable Apportionment” applied to groundwater?

- Always depends on the circumstances of the case
- The Court will develop it in a case-by-case basis
- May develop the way that international law and practice have developed.

# Dialogue Between International and US Transboundary Water Law

- The US develops international law principles because it adjudicates transboundary water disputes
- Principle of no harm: US v. Canada: Trail Smelter Arbitration

# US v. Canada: Trail Smelter Arbitration (1941)



# Trail Smelter Arbitration

U.S. Supreme Court interstate pollution cases:

“may legitimately be taken as a guide in this field of international law, for it is reasonable to follow by analogy, in international cases, precedents established by that Court in dealing with controversies between States of the Union or with other controversies concerning the quasi-sovereign rights of such States...”

# US Supreme Court's Rule of Equitable Apportionment / Use

- Indus Commission (1942)
  - Recommends application of principles from, e.g., *Kansas v. Colorado*, 206 U.S. 46 (1907), *Wyoming v. Colorado*, 259 U.S. 419 (1922)
- Argentina Supreme Court (*La Pampa v. Mendoza*) (1987)
  - Follows *Colorado v. New Mexico*, 467 U.S. 310 (1984)
- UN Freshwater Convention

# International Law in US Supreme Court Jurisprudence

- Court sees itself as “[s]itting, as it were, as an international, as well as a domestic tribunal” in interstate water cases. *Kansas v. Colorado*, 185 U.S. 125 (1902)

# International Law in US Supreme Court Jurisprudence

“[O]ur jurisdiction [is not] ousted, even if, because Kansas and Colorado are States sovereign and independent in local matters, the relations between them depend in any respect upon principles of international law. International law is no alien in this tribunal. ... International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.” *Kansas v. Colorado* (1902)

# International Law in US Supreme Court Jurisprudence

- States have used international law to argue their cases
  - Colorado invoked Harmon Doctrine as reflecting international law. *Kansas v. Colorado*, 185 U.S. 125 (1902); *Wyoming v. Colorado*, 259 U.S. 419 (1922)
- Court has looked to international state practice. *Texas v. New Mexico*, 462 U.S. 554, 568-569 & n.15 (1983), (citing the “practice in international law”)

# Key Sources of International Law of Freshwater

- Treaties
  - Bilateral and basin wide treaties
  - UN Convention on the Law of Non-navigational Uses of International Watercourses 1997
- Customary international law (“a general practice accepted as law”)
- Determinations of International Court of Justice and other international tribunals

# Bilateral and Basin Treaties

- Between 1820 and 2007, states concluded 688 agreements addressing international freshwater in 113 basins, covering almost 70 percent of the world's transboundary basin area
- Pace of treaty making increased after WWII

# UN Convention on the Law of Non-navigational Uses of International Watercourses

- Adopted 1997
- 26 parties; Entered into force August 17, 2014
- Provides substantive and procedural obligations
- Many of its provisions represent customary international law

# Substantive Obligations

- Object of “attaining optimal and sustainable utilization” Art. 5(1)
- Equitable and reasonable utilization. Art. 6(1)
  - Social and economic needs
  - Population dependent on watercourse
  - Existing and potential uses; Effect of use in one state on another state
  - Conservation
  - Availability of alternatives

# Substantive Obligations (2)

- Obligation to prevent harm to other riparian states. Art. 7(1)
- State must “take all appropriate measures ... to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.” Art. 7(2)

# Substantive Obligations (3)

- Emerging obligation to protect international watercourses and their ecosystems. Arts. 20-21.

# Procedural Obligations

- Obligations include
  - Cooperation
  - Prior notification of planned measures
  - Consultation with other riparian states, and
  - Exchange data and information on a regular basis.

## Procedural Obligations (2)

- UN Watercourses Convention “General Obligation to Cooperate.”
  - “Watercourse states shall cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilisation and adequate protection of an international watercourse.” Article 8 (1)
- Article 8(2) suggests establishing joint mechanisms or commissions.

# ILC Draft Articles on the Law of Transboundary Aquifers

- Adopted in 2006 by the International Law Commission
- Article 4:  
Aquifer States shall utilize transboundary aquifers or aquifer systems according to the principle of equitable and reasonable utilization

# ILC Draft Articles Define Equitable Utilization of Groundwater

1. Use “in a manner that is consistent with the equitable and reasonable accrual of benefits therefrom to the aquifer States concerned;”
2. “Aim at maximizing the long-term benefits derived from the use of water contained therein;”

Art. 4.

# ILC Draft Articles Define Equitable Utilization of Groundwater (2)

3. “establish individually or jointly a comprehensive utilization plan, taking into account present and future needs of, and alternative water sources for, the aquifer States;
4. States “shall not utilize a recharging transboundary aquifer or aquifer system at a level that would prevent continuance of its effective functioning”

# Possible Solution: Interstate Compacts

- Groundwater agreements between states are arguably the best way to safeguard water resources and plan for the future
- Require agreement of states and federal government
- May incorporate hydrologic models, data collection

# Thank you

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