

# The Rising Role of Regional Approaches in International Water Law: Lessons from the UNECE Water Regime and Himalayan Asia for Strengthening Transboundary Water Cooperation

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*The contribution of regional approaches to the international law of transboundary watercourses is currently being investigated with elevated interest. The United Nations Economic Commission for Europe (UNECE) area and Himalayan Asia are two key focus regions for testing new legal approaches and enhancing understanding of how existing regional regimes function and contribute to the development of international water law. The UNECE Water Convention, together with an entourage of hard and soft water instruments, appears to be the most sophisticated legal regime addressing freshwater cooperation. Within Himalayan Asia, where the water crisis is augmenting the already tense political situation, the current state of affairs for implementing a more progressive regional approach is examined. Studying the structurally different and challenging Himalayan context furthers our understanding of hurdles regarding the transferability of regional concepts. This article identifies gaps in our current perception of the role for regional approaches in international water law and outlines pathways for addressing them.*

## INTRODUCTION

The previously steady development of the international legal architecture for transboundary water cooperation has recently accelerated towards reaching long-anticipated aims and evolved to address newly arising global environmental and political challenges. These significant changes are taking place within an increasingly complex and fragmented multilevel governance framework, where coherence and institutional coordination are lacking between the different bodies of international law addressing ground and surface waters; between water laws at global, regional, basin and national levels; and between water law and other areas of international environmental law directly related to water (e.g., the international climate change and biodiversity regimes or across sectors for water, energy and food). Adding to this complex situation is the emerging trend of an increasing involvement of a diverse set of actors influencing the development and implementa-

tion of substantive and procedural rules of international water law.<sup>1</sup> Given that the world's future developmental path 'is likely to increase tensions over water both between countries that share transboundary water sources, and within countries where sectors or communities find themselves in increasing competition',<sup>2</sup> cooperation over transboundary waters is arguably one of the most pressing challenges of our time. Hence, despite the potential political obstacles and the complexity of the task, international law has to assist in paving a path which guides States towards mutually advantageous models of cooperation. Given the challenges in strengthening international cooperation at the global level, renewed interest in regional approaches to global governance generally,<sup>3</sup> and specifically in relation to international law<sup>4</sup> and international water law,<sup>5</sup> have emerged over the last decades.

Nye defined an international region as 'a limited number of states linked by a geographical relationship and by a degree of mutual interdependence', and international regionalism as 'the formation of interstate associations or groupings on the basis of regions'.<sup>6</sup>

<sup>1</sup> J. Brunnée and S.J. Toope, 'The Changing Nile Basin Regime: Does Law Matter?', 43:1 *Harvard International Law Journal* (2002), 105.

<sup>2</sup> B. Lee *et al.*, *Resources Futures* (Chatham House, 2012), at 46.

<sup>3</sup> A. Hurrell, 'Explaining the Resurgence of Regionalism in World Politics', 21:4 *Review of International Studies* (1995), 331; E.D. Mansfield and H.V. Milner, 'The New Wave of Regionalism', 53:3 *International Organization* (1999), 589.

<sup>4</sup> H. Ruiz Fabri, 'Reflections on the Necessity of Regional Approaches to International Law through the Prism of the European Example: Neither Yes Nor No, Neither Black Nor White', 1:1 *Asian Journal of International Law* (2011), 83.

<sup>5</sup> P. Wouters, 'Universal and Regional Approaches to Resolving International Water Disputes: What Lessons Learned from State Practice?', in: International Bureau of the Permanent Court of Arbitration (ed.), *Resolution of International Water Disputes: Papers Emanating from the Sixth PCA International Law Seminar, November 8, 2002* (Kluwer Law International, 2003), 111, at 209; L. Boisson de Chazournes, *Freshwater and International Law: The Interplay between Universal, Regional and Basin Perspectives* (United Nations World Water Assessment Programme, 2009).

<sup>6</sup> J.S. Nye, *International Regionalism: Readings* (Little, Brown, 1968), at vii.

However, these definitions have not been accepted unanimously, as the rise in the foundation of regional organizations did not always trigger an increase in regionalism. More recent understandings of regionalism move beyond the State as the solitary actor to include both formal and informal interactions between State and non-State actors.<sup>7</sup> The concept of a 'regional approach' to international law has been used interchangeably with the concept of a 'regional arrangement' to mean

a limited grouping of three or more States that have some geographical association and have formally come together in order to collectively pursue activities of common concern. Regional arrangements can be constituted through detailed legal agreements or through political agreements that are of an international nature, designed to commit the signatories to specific courses of action.<sup>8</sup>

This article applies the above definition to regional approaches to international water law, but we note the absence of non-State actors as a shortcoming to this definition. The article explores the effect of distinctive regional arrangements to regulate transboundary waters on international water law, and examines whether such regional approaches fill substantive gaps in the international legal framework or whether there are also points of conflict with other instruments of international water law. It is hoped that in searching for answers to these questions, the article contributes to the development of an analytical framework for studying regional approaches to cooperation in international law.

It is beyond the scope of the article to give an exhaustive analysis of the effect of regional approaches on all substantive and procedural rules and principles of international water law. Instead, at the heart of this inquiry is an examination of how an international legal principle – the general obligation to cooperate – has been interpreted and implemented with respect to shared freshwater resources in two diverse regions of the world, the pan-European United Nations Economic Commission for Europe (UNECE) area and Himalayan Asia.

The UNECE is selected for examination due to having developed one of the most sophisticated regional multilevel governance regimes for transboundary water cooperation, which already makes a significant contribution to international water law and which could foreseeably play an even greater role in the future, especially with its new global membership aspirations and other innovative developments discussed below. The case of Himalayan Asia demonstrates unparalleled water quantity and quality challenges within a

politically charged environment, where distinct approaches to transboundary water cooperation have developed and where existing principles of international water law have been severely put to the test, revealing weaknesses but also opportunities for future legal development in a region supplying water to 22% of the global population.<sup>9</sup>

The objective of this article is not to compare and contrast the substantive and procedural content of the legal frameworks in these two distinct regions directly against each other as the two cases sit on opposite sides of the spectrum when it comes to their level of cooperation on transboundary waters, their level of legal and institutional development and even their interpretation or acceptance of principles of international water law. Instead, it is hoped that by analyzing the contribution of these two distinct regimes, we can see how unique regional approaches could have a different impact on the direction of international water law. Therefore, our conclusions will be of great interest to general debates in international water law.

## THE GENERAL OBLIGATION TO COOPERATE IN INTERNATIONAL LAW

International environmental governance in general, and transboundary water management in particular, has long been dominated by the either/or debate on sovereignty *versus* the joint management of natural resources. While most States have now accepted a more nuanced interpretation of sovereignty, the debate about how sovereignty over freshwater resources should be interpreted today is still of the highest significance. Critically, the notion of sovereignty carries a responsibility to cooperate with it. As indicated by Article 1 of the UN Charter: 'The purposes of the United Nations are: . . . (3) To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character.'<sup>10</sup>

This unspecified duty to cooperate was partially clarified by the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,<sup>11</sup> which stipulates that

States have the duty to co-operate with one another, irrespective of the differences in their political, economic and

<sup>7</sup> L. Fawcett, 'The History and Concept of Regionalism', *European Society of International Law Conference Paper Series* (2012), at 4.

<sup>8</sup> R. Burchill, 'Regional Approaches to International Humanitarian Law', 41:2 *Victoria University of Wellington Law Review* (2010), 205, at 209.

<sup>9</sup> D. Grey and G. Connors, *The Water Security Imperative: We Must and Can Do More* (World Water Council, 2009), at 60.

<sup>10</sup> Charter of the United Nations (San Francisco, 26 June 1945; in force 24 October 1945), Article 1.3.

<sup>11</sup> UN General Assembly, Declaration of Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (UNGA Resolution A/RES/2625(XXV), 24 October 1970).

social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences.<sup>12</sup>

While the Declaration does not constitute binding international law, its universal recognition as a standard of conduct and its perception as an elaboration of principles of international law give it considerable legal weight. The general obligation to cooperate is also at the heart of the *MOX* case before the International Tribunal for the Law of the Sea, in which Ireland claimed that the United Kingdom failed to cooperate as demanded by the rules of the United Nations Convention on the Law of the Sea<sup>13</sup> with regard to matters of communication and the exchange of information.<sup>14</sup> In its order, the Tribunal endorsed the cooperation between States as a general principle of international law, and thus ordered Ireland and the United Kingdom to cooperate and enter into consultations.<sup>15</sup> According to Judge Wolfrum, the duty to cooperate

balances the principle of sovereignty of States and thus ensures that community of interests are taken into account vis-à-vis individualistic State interests. It is the matter of prudence and caution as well in keeping with the overriding nature of the obligation to cooperate that the parties should engage therein.<sup>16</sup>

It follows that there is a need to ultimately arrive at a stage where the concept of State sovereignty is understood as one of 'cooperative sovereignty'.<sup>17</sup> This necessity becomes particularly blatant when addressing the difficulty of managing common pool resources, where the collective action problem leads to unsatisfactory outcomes.<sup>18</sup> Rather than treating sovereignty as a stumbling block in international negotiations – due to its apparent incompatibility with relinquishing freedoms and making concessions – acknowledging that the responsibility to cooperate is a key element of sovereignty itself seems to be a more promising strategy in addressing the

tragedy of the commons.<sup>19</sup> Hence, international law should provide a path for moving from 'sovereignty as independence' to 'sovereignty as interdependence'.

This realization, however, does not make the implementation of the general obligation to cooperate easier. While we can witness progress where the benefits for cooperation are quantifiable and the positive impact can already be seen in the short term – for instance, in global trade<sup>20</sup> – international environmental law still seems to be far away from a perception of cooperative sovereignty.<sup>21</sup>

The constant push and pull of environmental cooperation and State sovereignty in the political sphere has brought a certain level of uncertainty amongst international legal scholars as to whether the duty to cooperate is indeed a binding legal obligation as opposed to a mere goal or a guideline for conduct.<sup>22</sup> The main question is: Can one assert that States must (rather than merely should) cooperate; and, if so, can this obligation actually be imposed on States and be legally enforced?<sup>23</sup> It is this debate which renders the precise status of the duty to cooperate under international law uncertain. While it succeeds in balancing the principle of 'sovereignty over natural resources' and the 'no significant harm' rule, cooperation is too broad to qualify as a rule.<sup>24</sup> Its status as a general principle of international law, rather than a customary rule, however, does not diminish its pivotal role in international law and politics – especially as more and more States now realize that cooperating with their neighbours on transboundary issues is ultimately in their self-interest.

In the area of international water law, both global instruments – the 1997 UN Watercourses Convention<sup>25</sup>

<sup>12</sup> Ibid.

<sup>13</sup> United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; in force 16 November 1994).

<sup>14</sup> P. Sands, *Principles of International Environmental Law*, 2<sup>nd</sup> edn (Cambridge University Press, 2003), at 251.

<sup>15</sup> According to the Tribunal, 'the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the [Law of the Sea] Convention and general international law'. International Tribunal for the Law of the Sea, 3 December 2001, *The MOX Plant Case (Ireland v. United Kingdom)*, Order, found at: <[http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_10/Order.03.12.01.E.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/Order.03.12.01.E.pdf)>, at paragraphs 82–83.

<sup>16</sup> Ibid., Separate Opinion of Judge Wolfrum; found at: <[http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_10/sep.op.Wolfrum.E.orig.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/sep.op.Wolfrum.E.orig.pdf)>.

<sup>17</sup> F.X. Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law* (Kluwer Law International, 2000).

<sup>18</sup> G. Hardin, 'The Tragedy of the Commons', 162:3859 *Science* (1968), 1243, at 1248.

<sup>19</sup> See F.X. Perrez, n. 17 above, at 343. See also C. Schreuer, 'State Sovereignty and the Duty to Cooperate: Two Incompatible Notions?', in: J. Delbrück (ed.), *International Law of Cooperation and State Sovereignty: Proceedings of an International Symposium of the Kiel Walther Schücking-Institute of International Law, May 23–26, 2001* (Duncker & Humblot, 2002), 163.

<sup>20</sup> For a detailed discussion on this topic, see J.H. Jackson, *Sovereignty, the WTO and Changing Fundamentals of International Law* (Cambridge University Press, 2006).

<sup>21</sup> See, e.g., Worldwide Fund for Nature (WWF), 'WWF Rio+20 Closing Statement' (21 June 2012) found at: <[http://wwf.panda.org/wwf\\_news/?2205343/WWF-Rio20-closing-statement](http://wwf.panda.org/wwf_news/?2205343/WWF-Rio20-closing-statement)>.

<sup>22</sup> See J. Delbrück, 'The International Obligation to Cooperate: An Empty Shell or a Hard Law Principle of International Law? A Critical Look at a Much Debated Paradigm of Modern International Law', in: H.P. Hestermeyer et al. (eds.), *Coexistence, Cooperation and Solidarity, Volume 1* (Martinus Nijhoff, 2012), 3.

<sup>23</sup> P. Wouters et al., *Sharing Transboundary Waters: An Integrated Assessment of Equitable Entitlement – The Legal Assessment Model* (UNESCO, 2005), at 23.

<sup>24</sup> A. Rieu-Clarke, R. Moynihan and B.-O. Magsig, *UN Watercourses Convention: User's Guide* (IHP-HELP Centre for Water Law, Policy and Science, 2012), at 123.

<sup>25</sup> Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997; not yet in force) ('UN Watercourses Convention'), Article 8.1.

and the 2008 Draft Articles on the Law of Transboundary Aquifers<sup>26</sup> – promote the general obligation to cooperate. Article 8.1 of the UN Watercourses Convention provides that: ‘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.’<sup>27</sup> This general obligation to cooperate contains the procedural duties of prior information and of prior consultation,<sup>28</sup> which aim to operationalize the rather vague principle.<sup>29</sup> While the provisions on cooperation in the UN Watercourses Convention surely had a positive impact on the implementation of the general principle in the area of transboundary waters,<sup>30</sup> it still leaves a lot to be desired when it comes to fundamentally changing the way States perceive their national sovereignty over freshwater resources. One shortcoming of the UN Watercourses Convention is that States still have much discretion with regard to the particular means of cooperation. The setting up of joint institutions, for instance, is not compulsory,<sup>31</sup> even though their immense benefit for transboundary freshwater management has long been proven.<sup>32</sup> Merely recommending the establishment of joint river basin organizations was probably as far as the Convention could go in order to still receive widespread global political support. While this hitch is common for many global frameworks, the strength of a regional approach could be to overcome this political hurdle and thus to strengthen the legal basis of the obligation to cooperate. The urgency to act jointly on more issues which bar unilateral action – like the

management of transboundary freshwater resources – might be more obvious in a regional setting. This is why the next sections will look at two regional approaches to cooperation on transboundary freshwater issues, and analyze whether there are signs of States heading towards an understanding of cooperative sovereignty.

## THE UNECE WATER REGIME: LESSONS LEARNT AND FUTURE PROSPECTS

Countries in the UNECE region depend on transboundary cooperation in the more than 150 transboundary rivers, 50 large lakes and over 170 transboundary aquifers that crisscross the diverse geographic, political and economic landscapes of this pan-European region. Nearly a third of Europe’s 730 million people live in countries already suffering from high levels of water stress, and in the UNECE region 120 million people do not have access to safe drinking water.<sup>33</sup> Despite these enduring problems the 1992 United Nations Economic Commission for Europe’s Convention on the Protection and Use of Transboundary Watercourses and International Lakes<sup>34</sup> (UNECE Water Convention) has been hailed as a valuable model of regional cooperation in the field of transboundary water resource management and environmental protection.<sup>35</sup> The approach to transboundary water cooperation developed in the UNECE pan-region is multilayered and cross-sectoral, but only scarce research exists analyzing the UNECE Water Convention and other UNECE water-related hard and soft law instruments as a comprehensive treaty regime.<sup>36</sup> This section first clarifies which

<sup>26</sup> Draft Articles on the Law of Transboundary Aquifers, in: International Law Commission, Report on the Work of Its Sixtieth Session (5 May–6 June and 7 July–8 August 2008) (UN Doc. A/63/10, 2008), 19, Article 7.1: ‘Aquifer States shall cooperate on the basis of sovereign equality, territorial integrity, sustainable development, mutual benefit and good faith in order to attain equitable and reasonable utilization and appropriate protection of their transboundary aquifers or aquifer systems.’

<sup>27</sup> UN Watercourses Convention, n. 25 above, Article 8.1.

<sup>28</sup> *Ibid.*, Articles 11–19.

<sup>29</sup> See A. Rieu-Clarke, R. Moynihan and B.-O. Magsig, n. 24 above, at 125.

<sup>30</sup> C. Leb, ‘The UN Watercourses Convention: The Éminence Grise behind Cooperation on Transboundary Water Resources’, 38:2 *Water International* (2013), 146.

<sup>31</sup> UN Watercourses Convention, n. 25 above, Article 8.2 reads: ‘In determining the manner of such cooperation, watercourse States may consider the establishment of joint mechanisms or commissions, as deemed necessary by them, to facilitate cooperation on relevant measures and procedures in the light of experience gained through cooperation in existing joint mechanisms and commissions in various regions.’

<sup>32</sup> See, e.g., J. Lautze *et al.*, ‘International River Basin Organizations: Variation, Options and Insights’, 38:1 *Water International* (2013), 30; S. Schmeier, *Governing International Watercourses: River Basin Organizations and the Sustainable Governance of Internationally Shared Rivers and Lakes* (Routledge, 2013); S. Schmeier, ‘Navigating Cooperation beyond the Absence of Conflict: Mapping Determinants for the Effectiveness of River Basin Organisations’, 4:1–2 *International Journal of Sustainable Society* (2012), 11.

<sup>33</sup> United Nations World Water Assessment Programme, *The United Nations World Water Development Report 4: Managing Water under Uncertainty and Risk, Volume 1* (UNESCO, 2012), at 190.

<sup>34</sup> Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 17 March 1992; in force 6 October 1996) (‘UNECE Water Convention’). As of November 2013, the Convention’s parties include 39 States as well as the European Union.

<sup>35</sup> A. Tanzi, ‘Regional Integration and the Protection of the Environment: The UNECE Process on Water Law’, 10 *Italian Yearbook of International Law* (2001), 71.

<sup>36</sup> The definition of a ‘regime’ employed in this article follows a combined international law and international relations literature approach to understanding regimes as ‘sets of norms, decision-making procedures and organisations coalescing around functional issue-areas and dominated by particular modes of behaviour, assumptions and biases’. This definition is preferred for several reasons, including its acknowledgement of the role of both State and non-State actors as participants in regime development, but also its understanding of international legal regimes not as static but as dynamic, evolving legal processes. See S. Krasner, ‘Structural Causes and Regime Consequences: Regimes as Intervening Variables’, in: S. Krasner (ed.), *International Regimes* (Cornell University Press, 1983), 1, at 3; M.A. Young, ‘Introduction: The Productive Friction between Regimes’, in: M.A. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, 2012), 1, at 11. For regime analysis in international water law, see P. Wouters and

hard and soft legal instruments are considered to form the scope of the UNECE water regime, and then explores how the general obligation to cooperate in international water law has been implemented through the existing rules and institutional mechanisms of the internal dimension of the UNECE regime. The discussion then identifies the necessary elements and methods that would form part of a future research agenda which seeks to develop a more extensive understanding of the interplay between the internal and external dimensions of this regime. Deconstructing the dimensions of this regime is necessary for understanding its full potential contribution to the development of international water law and to other regions beyond the UNECE. The case of the Western Bug basin at the border to the EU is then examined through these internal and external dimensions. Finally, the future-orientated activities of the UNECE water regime are discussed with a view to understanding how the regime intends to develop its mandate beyond the UNECE region.

The UNECE water regime has become a regional regime with global aspirations. In 2012, State parties to the UNECE Water Convention accepted a 2003 amendment that will allow for accession by non-UNECE States.<sup>37</sup> At the same time, the 1997 UN Watercourses Convention – a global regime which has not yet entered into force – may finally reach the required number of 35 contracting parties to become legally binding.<sup>38</sup> Transitioning from the current scenario of no globally endorsed, legally binding instrument for transboundary water management to a potential scenario of two instruments with a potential global mandate, is highly possible.<sup>39</sup> It is thus imperative to fully understand the distinctive role of the UNECE water regime.

S. Vinogradov, 'Analysing the ECE Water Convention: What Lessons for the Regional Management of Transboundary Water Resources?', 11 *Yearbook of International Co-Operation on Environment and Development* (2003), 55; S. Vinogradov, 'Regime Building for Transboundary Waters: The Evolution of Legal and Institutional Frameworks in the ECECA Region', 18 *Journal of Water Law* (2007), 77.

<sup>37</sup> UNECE, Meeting of the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Amendment to Article 25 of the Convention (UN Doc. ECE/MP.WAT/2003/4, 13 September 2003). The amendments to the UNECE Water Convention opening it for accession to all UN Member States entered into force on 6 February 2013. UNECE Decision VI/3, in: Decisions and Vision for the Future of the Convention – Addendum to Report of the Meeting of the Parties on its Sixth Session (UN Doc. ECE/MP.WAT/37/Add.2, 19 September 2013) ('UNECE, Decisions and Vision').

<sup>38</sup> As of January 2014, there are 33 contracting parties to the Convention. See UN Treaty Collection Database, found at: <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-12&chapter=27&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-12&chapter=27&lang=en)>.

<sup>39</sup> This scenario is discussed elsewhere in this special issue, with a focus on the compatibility of both instruments and how they might be implemented in a coordinated manner from an institutional perspective. See A. Rieu-Clarke and R. Kinna, 'Can Two Global UN Water Conventions Effectively Co-exist? Making the Case for a 'Package Approach' to Support Institutional Coordination', 23:1 *Review of European, Comparative and International Environmental Law* (2014); and S.C. McCaffrey, 'International Water Cooperation in the Twenty-first

The UNECE, which was established to support international cooperation on a broad spectrum of issues within the divergent political and economic contexts of Eastern and Western Europe, has addressed transboundary water cooperation since its inception in 1947.<sup>40</sup> Over a period of more than 30 years, supported by both UNECE member States and non-State actors,<sup>41</sup> a substantial body of soft legal instruments was developed, leading to the adoption of the 1992 Convention. Since its adoption, numerous additional instruments supporting the implementation of the Convention have been, and continue to be, developed both within the internal and external dimensions of this regime, which together contribute to its overall effectiveness in addressing crosscutting water-related transboundary problems in the UNECE region.<sup>42</sup>

## THE CONTRIBUTION OF THE INTERNAL DIMENSION OF THE UNECE WATER REGIME TO TRANSBOUNDARY WATER COOPERATION

The internal dimension of the regime is understood here as the rich body of soft law decisions, reports, recommendations and other instruments leading to the adoption of the UNECE Water Convention, the Convention itself, as well as subsequent supplementary binding protocols, non-binding guidelines and recommendations. The key internal hard legal instruments include the Protocol on Water and Health<sup>43</sup> and the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters.<sup>44</sup> The key internal non-legally

Century: Recent Developments in the Law of International Watercourses', 23:1 *Review of European, Comparative and International Environmental Law* (2014).

<sup>40</sup> The UNECE currently has 56 member States: See UNECE website, found at: <[http://www.unece.org/oes/member\\_countries/member\\_countries.html](http://www.unece.org/oes/member_countries/member_countries.html)>. For an historical discussion, see Y. Berthelot and P. Rayment, 'Looking Back and Peering Forward: A Short History of the United Nations Economic Commission for Europe, 1947–2007' (UN Doc. ECE/INF/2007/4, April 2007), at 33.

<sup>41</sup> A variety of non-State actors have been instrumental to the development of this regime. Particularly central figures include two financial institutions: the World Bank and the Global Environment Facility (GEF). The World Bank has had long involvement with the establishment and implementation of transboundary water agreements and/or financing development of transboundary water use within the UNECE region and beyond. With respect to the GEF, a 2012 UNECE Water Convention MOP Decision was taken to adopt a closer working relationship with the institution. See UNECE, Decisions and Vision, n. 37 above.

<sup>42</sup> See P. Wouters and S. Vinogradov, n. 36 above, at 55.

<sup>43</sup> Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (London, 17 June 1999; in force 4 August 2005).

<sup>44</sup> Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters (Kiev, 21 May 2003; not yet in force).

binding instruments range from the recently adopted model provisions on transboundary groundwater (2012),<sup>45</sup> and guidance documents on implementing the Water Convention (2013),<sup>46</sup> water supply and sanitation in extreme weather events (2011)<sup>47</sup> and climate change adaptation (2009),<sup>48</sup> to instruments on transboundary flood management (2007)<sup>49</sup>, the ecosystem approach (1993 and 2007)<sup>50</sup> and water quality and pollution.<sup>51</sup>

The external dimension of the UNECE water regime refers to the two water-related UNECE instruments that have been adopted outside the scope of the UNECE Water Convention and other water-specific instruments concerning transboundary water cooperation at international, European and basin levels. The external dimension of the UNECE water regime is expansive, and a full inventory is beyond the scope of this article. However, key instruments are discussed in the final part of this section.

Returning to the internal dimension of the UNECE water regime, what follows is a brief overview of the rules and institutional mechanisms for cooperation found in the UNECE Water Convention. Article 9 is at the heart of provisions incorporating the general obligation of cooperation, with co-riparians being required to enter into agreements and establish joint bodies.<sup>52</sup> Joint bodies are then tasked with a non-exhaustive list of functions, including:

- (a) To collect, compile and evaluate data in order to identify pollution sources likely to cause transboundary impact;

- (b) To elaborate joint monitoring programmes concerning water quality and quantity;
- (c) To draw up inventories and exchange information on the pollution sources;
- (d) To elaborate emission limits for waste water and evaluate the effectiveness of control programmes;
- (e) To elaborate joint water-quality objectives and criteria regulations . . . and to propose relevant measures for maintaining and, where necessary, improving the existing water quality;
- (f) To develop concerted action programmes for the reduction of pollution loads from both point sources (e.g. municipal and industrial sources) and diffuse sources (particularly from agriculture);
- (g) To establish warning and alarm procedures;
- (h) To serve as a forum for the exchange of information on existing and planned uses of water and related installations that are likely to cause transboundary impact;
- (i) To promote cooperation and exchange of information on the best available technology in accordance with the provisions of Article 13 of the Convention, as well as to encourage cooperation in scientific research programmes;
- (j) To participate in the implementation of environmental impact assessment relating to transboundary water, in accordance with appropriate international regulations.<sup>53</sup>

Article 10 further requires that all consultations between riparian parties be conducted through a joint body established under Article 9.<sup>54</sup> The comprehensive guidance for joint institutions in Article 9 is a crucial contribution made by the UNECE Water Convention to strengthening the procedural rules of international water law on cooperation. The equivalent provisions of the 'other' global treaty, the UN Watercourses Convention, are much less detailed, as mentioned before. The contribution that the UNECE Water Convention has made to the evolution of procedural rules of international water law on cooperation has transferable value beyond the UNECE region, where the mandatory obligations to enter into agreements and establish joint institutional arrangements (or revise existing arrangements) to include functions such as action programmes for the reduction of diffuse pollution, could be replicated in other basin or bilateral agreements. For example, in the Mesoamerican region, in the Paz, Lempa, Sixaola and Coatán river basins, the UNECE provisions on joint or harmonized impact assessments and the development of joint monitoring and joint information systems such as databases or geographical information systems could be adapted and utilized in the existing legal agreements for these basins, which would strengthen the rules on cooperation.<sup>55</sup>

Perhaps even more significant for the ongoing cooperative success of the UNECE water regime are the institu-

<sup>45</sup> UNECE, Draft Model Provisions on Transboundary Groundwaters (UN Doc. ECE/MP.WAT/2012/L.5, 14 September 2012).

<sup>46</sup> UNECE, *Guide to Implementing the Water Convention* (UNECE, 2013).

<sup>47</sup> L. Sinisi and R. Aertgeerts (eds.), *Guidance on Water Supply and Sanitation in Extreme Weather Events* (UNECE and World Health Organization, 2011).

<sup>48</sup> UNECE, *Guidance on Water and Adaptation to Climate Change* (UNECE, 2009), found at: <[http://www.unece.org/fileadmin/DAM/env/water/publications/documents/Guidance\\_water\\_climate.pdf](http://www.unece.org/fileadmin/DAM/env/water/publications/documents/Guidance_water_climate.pdf)>.

<sup>49</sup> Draft Guidelines on Sustainable Flood Prevention, in: UNECE, Meeting of the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (UN Doc. ECE/MP.WAT/2000/7, 14 January 2000), Annex.

<sup>50</sup> Guidelines on the Ecosystem Approach in Water Management (UN Doc. ECE/ENVWA/31, 1993), found at: <[http://www.unece.org/fileadmin/DAM/env/water/publications/documents/Library/Old\\_documents\\_found\\_library/ECE\\_ENVWA\\_31\\_eng.pdf](http://www.unece.org/fileadmin/DAM/env/water/publications/documents/Library/Old_documents_found_library/ECE_ENVWA_31_eng.pdf)>. See also UNECE, Recommendations on Payments for Ecosystem Services in Integrated Water Resources Management (UNECE, 2007), found at: <[http://www.unece.org/fileadmin/DAM/env/water/publications/documents/PES\\_Recommendations\\_web.pdf](http://www.unece.org/fileadmin/DAM/env/water/publications/documents/PES_Recommendations_web.pdf)>.

<sup>51</sup> Guidance instruments include those on water quality monitoring and assessment (1996), water quality criteria and objectives (1996), licensing of waste-water discharges from point sources (1996), water pollution from fertilizers and pesticides in agriculture (1995) and prevention of water pollution from hazardous substances (1994). These instruments can be found at: <<http://www.unece.org/env/water/publications/pub.html>>.

<sup>52</sup> UNECE Water Convention, n. 34 above, Article 9.1–2.

<sup>53</sup> *Ibid.*, Article 9.2(a–j).

<sup>54</sup> *Ibid.*, Article 10.

<sup>55</sup> A. Rieu-Clarke *et al.*, *Climate Change and Water Governance Capacity: Ecosystem-based Adaptation in Mesoamerica* (IUCN, 2014).

tional mechanisms established under Article 17 of the Convention, providing for the Meeting of the Parties (MOP) and Article 19 establishing the Secretariat.<sup>56</sup> This institutional framework supports the implementation of, and compliance with, the internal elements of the regime, and is fundamental to promoting coherence between the internal and external elements of the UNECE water regime. The MOP is held every three years with a view to adopting a programme of work for the subsequent three-year period and reviewing the implementation of the Convention.<sup>57</sup> The programme of work that was agreed upon at the 2012 MOP includes several aspects that are key to the discussion below on the external dimension and the future role of the UNECE in transboundary water cooperation. For example, in the 2013–2015 period, strengthening multilevel coherence (between the UN Watercourses Convention and UNECE) and cross-sectoral coherence (through the Task Force on the Water-Food-Energy-Ecosystems Nexus) are the explicit focus, in addition to a programme of work on quantifying the benefits of transboundary cooperation.<sup>58</sup> These are just some examples of how the MOP establishes numerous additional technical and advisory bodies to address a range of issues. Further bodies include the Working Group on Integrated Water Resources Management, the Working Group on Monitoring and Assessment, the Implementation Committee, the Legal Board, the Joint Bureau of the MOP, a Task Force on Water and Climate, a Joint Ad Hoc Expert Group on Water and Industrial Accidents and an International Water Assessment Centre.<sup>59</sup> These bodies provide further institutional support for implementing the Convention's rules on cooperation, and allow the regime to evolve to address newly arising pan-regional and global challenges. The Convention's Implementation Committee is a recent development that helps parties in all questions regarding implementation of the Convention and facilitates the settlement of the various differences and disputes.<sup>60</sup> The potential contribution of these bodies to strengthening international water law beyond the UNECE region merits further examination.

## THE EXTERNAL DIMENSION OF THE UNECE WATER REGIME

Research seeking to address the gaps in our current understanding of the full contribution of this regional regime to international water law must consider the

external dimension of the UNECE water regime and its normative and institutional interactions with, and influence on, norms of transboundary cooperation at the international, basin and national levels. This article distinguishes four constituent parts of the external dimension of the UNECE water regime: a highly developed set of UNECE instruments that indirectly relate to transboundary water cooperation;<sup>61</sup> an extensive body of EU water law;<sup>62</sup> existing and independently functioning bilateral and other basin-level instruments;<sup>63</sup> and other global water and water-related multilateral environmental agreements.<sup>64</sup> An enquiry which considers

<sup>61</sup> This includes the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991; in force 10 September 1997); the Protocol on Strategic Environmental Assessment (Kiev, 21 May 2003; in force 11 July 2010); Convention on the Transboundary Effects of Industrial Accidents (Helsinki, 17 March 1992; in force 19 April 2000); the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters; Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters (Kiev, 21 May 2003; not yet in force); and the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998; in force 30 October 2001). Assessing the normative and institutional relationship between the UNECE Water Convention and other UNECE environmental legal instruments is vital to understanding the potential role of the UNECE water regime as a whole, and thus to its transferability beyond the UNECE region.

<sup>62</sup> The EU Water Framework Directive is the central legal instrument regulating water management and protection at the European Union level. Directive 2000/60/EC of 23 October 2000 Establishing a Framework for Community Action in the Field of Water Policy, [2000] OJ L327/1 ('EU WFD'). Other instruments of particular relevance include: Directive 80/68/EEC of 17 December 1979 on the Protection of Groundwater Against Pollution Caused by Certain Dangerous Substances, [1980] OJ L20/43; Directive 91/271/EEC of 21 May 1991 Concerning Urban Waste-Water Treatment, [1991] OJ L135/40; Directive 91/676/EEC of 12 December 1991 Concerning the Protection of Waters against Pollution Caused by Nitrates from Agricultural Sources, [1991] OJ L375/1; Directive 98/83/EC of 3 November 1998 on the Quality of Water Intended for Human Consumption, [1998] OJ L330/32; Directive 2006/118/EC of 12 December 2006 on the Protection of Groundwater against Pollution and Deterioration, [2006] OJ L372/19; and Directive 2007/60/EC of 23 October 2007 on the Assessment and Management of Flood Risks, [2007] OJ L288/27.

<sup>63</sup> The UNECE water regime has strengthened other basin and bilateral cooperation. Examples of agreements drawing from the Convention include: Convention on the Co-operation for the Protection and Sustainable Use of the Danube River (Sofia, 29 June 1994; in force 22 October 1998); Treaty on Cooperation on the Conservation and Sustainable Development of the Dniester River Basin (Rome, 29 November 2012; not yet in force) ('Dniester Treaty'); Memorandum of Understanding for the Management of the Drin Basin (Tirana, 25 November 2011); Convention on the Protection of the Rhine (Rotterdam, 22 January 1998, in force 12 April 1999); Framework Agreement on the Sava River Basin (Kranjska Gora, 3 December 2002; in force 3 December 2002), as well as others.

<sup>64</sup> This fourth element of the external dimension requires analysis of existing and potential interactions between the UNECE water regime and other multilateral environmental agreements relating directly (e.g., the 1997 UN Watercourses Convention) and indirectly to water (e.g., the UN Framework Convention on Climate Change and the Convention on Biological Diversity). In order to contribute to coherence rather than the continued fragmentation of international water law, increased attempts to strengthen potential synergies between

<sup>56</sup> UNECE Water Convention, n. 34 above, Articles 17 and 19.

<sup>57</sup> *Ibid.*, Article 17.1.

<sup>58</sup> UNECE Draft Programme of Work for 2013–2015 (UN Doc. ECE/MP.WAT/37/Add.1, 23 July 2013), found at: <<http://www.unece.org/environmental-policy/treaties/environment-conventions/all-strategies-plans-and-programmes.html>>.

<sup>59</sup> UNECE, 'Areas of Work of the Convention', found at: <<http://www.unece.org/env/water.html>>.

<sup>60</sup> Decision VI/1 Support to Implementation and Compliance (UN Doc. ECE/MP.WAT/37/Add.2, 2012).

both the independent role of these four constituent parts and the interplay between them would help clarify the existing and potential role of the UNECE water regime within and beyond the UNECE region. For example, this research could shed light on the contribution of the UNECE water regime for both EU and non-EU Member States or only non-EU Member States sharing transboundary rivers. It is perhaps in these partially or fully non-EU transboundary river basins where the UNECE water regime can play a more significant role. It is beyond the scope of this article to provide a full inventory and legal analysis of all river basins which fall into this categorization. However, one very demonstrative example of the normative and institutional role that the UNECE water regime can play in such basins is in the Western Bug river basin at the border between the European Union (EU) and the eastern non-EU countries – which is briefly discussed here.

## **THE ROLE OF THE UNECE WATER REGIME IN FOSTERING BASIN AND BILATERAL TRANSBOUNDARY WATER COOPERATION AT THE EU BORDER**

The Western Bug stretches across three countries with very different political and economic systems. Poland has acceded to the EU in 2004; Ukraine is part of the 'Eastern Partnership' and therefore seeks to show progress towards the environmental *acquis*;<sup>65</sup> and Belarus uses a separate legislative system. Therefore, in contrast to EU Member State Poland, Ukraine and Belarus have no implementing and reporting obligations under EU water law. There is currently no specific legal framework applying to all three riparians created primarily for the purpose of the shared transboundary management of the Western Bug. However, the three countries are members of the UNECE Water Convention, the Protocol on Water and Health and other key external water-related instruments, including the Aarhus and Espoo Conventions. Implementation of these instruments takes place primarily at the national level, and the case of Ukraine is examined below to ascertain the influence of UNECE norms at the national level. At the transboundary level, the UNECE has contributed significantly to bilateral cooperation between these

riparians. There is a bilateral agreement between Poland and Ukraine on cooperation in the field of water management, which provides for cooperation with respect to surface and groundwater quality and quantity aspects, monitoring, flood control and information exchange.<sup>66</sup> Additionally, a Polish-Ukrainian Committee for Co-operation in the Field of Boundary Waters was formed, with a range of working groups cooperating under this framework.<sup>67</sup> There is also a good level of bilateral cooperation between Ukraine and Belarus, including a bilateral working group between Ukraine and Belarus focusing on implementing an agreement between Belarus and Ukraine on the joint use and protection of transboundary waters.<sup>68</sup>

Shifting further down to the national level, where UNECE, international and EU legal instruments are to be implemented, the case of Ukraine demonstrates the continuing struggle of many former Soviet Union countries where, despite significant judicial and political reform since independence in 1991, many of the former Soviet-era administrative structures remain in practice.<sup>69</sup> Within this quagmire, the distinct normative and institutional influence of the different instruments of the UNECE water regime, EU water law and other multilateral environmental agreements is difficult to discern. Ukraine has undertaken significant but disjointed work to begin meeting objectives of the UNECE and EU instruments, and the country is not a signatory to the 1997 UN Watercourses Convention. At the general level of environmental cooperation between Ukraine and the EU, the 2012 signing of the EU and Ukraine of the Association Agreement establishing a comprehensive agenda for political association and economic integration, as well as Ukrainian approximation to the EU *acquis communautaire* (including the environmental *acquis*), provide a strong basis for future cooperation, including on transboundary water management.<sup>70</sup> Moving to the UNECE regime, the Ministry

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these regimes is necessary. The UNECE Task Forces on Water and Climate and on the Water-Food-Energy-Ecosystems Nexus are two areas where such work could be developed further.

<sup>65</sup> The 'environmental *acquis*' is the body of EU law focused on the environment. Approximation of the *acquis* through national legislation is a process involving the adoption of specific binding legal measures (quality and technical standards, testing and notification requirements, etc.) and country-specific decisions on discretionary and suggested legal measures. See: <[http://ec.europa.eu/environment/enlarg/benefit\\_en.html](http://ec.europa.eu/environment/enlarg/benefit_en.html)>.

<sup>66</sup> Agreement between the Government of Ukraine and the Government of Poland on Cooperation in the Field of Water Management in Frontier Waters (Kiev, 10 October 1996).

<sup>67</sup> For further information on the cooperative process, see T. Nalecz, 'Sustainable Use and Protection of Groundwater Resources – Transboundary Water Management – Belarus, Poland and Ukraine', 441 *Bulletin of the Polish Geological Institute* (2010), 107.

<sup>68</sup> Agreement between the Government of the Republic of Belarus and the Cabinet Ministers of Ukraine Concerning Joint Use and Protection of Transboundary Waters (Kiev, 16 October 2001; in force 13 July 2002).

<sup>69</sup> For a more detailed analysis of the legacy of the Soviet structure on water management, see I. Khmelko, 'Administrative Decentralization in Post-communist Countries: The Case of Water Management in the Ukraine', 1:1 *Journal of Political Science, Government and Politics* (2012), 1.

<sup>70</sup> The new Association Agreement builds on recent cooperation between Ukraine and the EU under the auspices of the European Neighbourhood Policy and through the implementation of the previously agreed EU-Ukraine Action Plan. In line with these activities, a law was enacted on the 'State Programme of Adaptation of Ukraine Legislation to the Legislation of the European Union (Law No. 1629-

for Environmental Protection of Ukraine has been responsible for implementing the UNECE Convention and Protocol on Water and Health, and has made some progress on meeting targets, according to the UNECE. However, implementation of these standards and rules is lacking.<sup>71</sup> In addition, Ukraine is a party to the Aarhus Convention, and has taken steps towards aligning some aspects of its national legislation and practice with the rules and principles of this water-related UNECE instrument. However, the latest country report suggests significant problems with implementation and compliance.<sup>72</sup>

Under the rubric of the UNECE Water Convention and related UNECE conventions, as well as the Neighbourhood Programme of the European Regional Development Fund, Ukraine has improved its national and transboundary water management and participated in several significant projects and activities regarding the Western Bug.<sup>73</sup> However, there is potential for a much greater role of the UNECE water regime in this basin, particularly through providing the institutional support and normative framework for a transboundary agreement between all three riparians. The UNECE and various basin-level instruments have successfully influenced international cooperation in other partially EU or non-EU transboundary river basins in the former Soviet Union countries; and they may provide transferrable lessons for the further development of transboundary cooperation over the Western

Bug river. Several examples that also involve Ukraine include the recent bilateral treaty signed between Moldova and Ukraine on the Dniester River basin.<sup>74</sup> A further positive example is the Tisza River basin, where Member States cooperate under the framework of the Danube River Protection Convention and the International Commission for the Protection of the Danube River to implement the EU Water Framework Directive, including the development of joint river basin management plans. The UNECE has also contributed to the development of a transboundary water agreement between Russia and Ukraine.<sup>75</sup>

The case of the transboundary water cooperation at the border between the EU and Eastern Europe in the Western Bug demonstrates that the interaction between the external and internal dimensions of the UNECE water regime will need to be better understood and coordinated to strengthen implementation of the different UNECE and EU water-related instruments discussed above. A better understanding of this interaction is also needed in order to understand which aspects of the UNECE regime can realistically be transferred to transboundary river basins that have no or almost no underlying EU water law basis.

## **THE FUTURE ROLE OF THE UNECE WATER REGIME WITHIN AND BEYOND THE REGION**

The parties to the UNECE Water Convention have voted to open up this international legal framework and institutional platform to all UN member States. Already over 40 countries from outside the pan-European region have actively participated in the regime's activities – for example, through pilot projects.<sup>76</sup> In addition, at the most recent MOP, the first UNECE workshop on 'River Basin Commissions and Other Joint Bodies for Transboundary Water Cooperation: Legal and Institutional Aspects' was hosted, in which several countries expressed formal interest in acceding to the Convention.<sup>77</sup> There is momentum to share the experiences of this regional approach with transboundary water cooperation at the global, other regional and basin levels.

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IV)' (18 March 2004). The law provides for the development of a programme of approximation of the domestic legal framework for environmental protection to the *acquis communautaire* during the period 2004–2007. As a result of this law, proposals were made to amend the key legal document for water management in the Ukraine – the Water Code of Ukraine of 6 June 1995, No 213/95-BP – but this process is still ongoing.

<sup>71</sup> See also Ministry of Environmental Protection of Ukraine, *Summary Report about Progress in Implementation of Protocol on Water and Health* (Ministry of Environmental Protection of Ukraine, 2010), found at: <[http://www.unece.org/fileadmin/DAM/env/water/Protocol\\_reports/reports\\_pdf\\_web/Ukraine\\_summary\\_report\\_en.pdf](http://www.unece.org/fileadmin/DAM/env/water/Protocol_reports/reports_pdf_web/Ukraine_summary_report_en.pdf)>.

<sup>72</sup> The Ukrainian Constitution establishes the right of public access to environmental information. Provisions are included in other Ukrainian laws that ensure rights to obtain free access to environmental information, and procedures for requesting and obtaining such information. However, with regard to water management there is lack of transparency in the allocation of responsibilities between several different administrative levels, no tradition of local and regional self-governance and very little evidence of stakeholder participation. European Commission, *Implementation of the European Neighbourhood Policy in Ukraine, Progress in 2011 and Recommendations for Action* (European Commission, 2012) found at: <[http://ec.europa.eu/world/enp/docs/2012\\_enp\\_pack/progress\\_report\\_ukraine\\_en.pdf](http://ec.europa.eu/world/enp/docs/2012_enp_pack/progress_report_ukraine_en.pdf)>. See also N. Hagemann *et al.*, 'The Long Road to Improving the Water Quality of the Western Bug River (Ukraine): A Multi-scale Analysis', *Journal of Hydrology* (forthcoming).

<sup>73</sup> Mott MacDonald, *Water Governance in the Western EECCA Countries* (European Commission, 2008), found at: <[http://www.wgw.org.ua/publications/Water%20Governance%20West%20Progress%20Report\\_2.pdf](http://www.wgw.org.ua/publications/Water%20Governance%20West%20Progress%20Report_2.pdf)>, at 54.

<sup>74</sup> Dniester Treaty, n. 63 above. The Treaty provides a framework for cooperation on water pollution prevention and control, water flow regulation, conservation of biodiversity and protection of the Black Sea environment. It also addresses the monitoring of data exchange, public participation and cooperation in emergency situations and sets up a joint institution.

<sup>75</sup> Agreement between the Government of Ukraine and the Government of the Russian Federation Concerning the Joint Use and Protection of Transboundary Waters (Kiev, 19 October 1992; in force 19 October 1992).

<sup>76</sup> UNECE, 'Pilot Projects on and Capacity-building for Monitoring and Assessment', found at: <[http://www.unece.org/env/water/monitoring\\_pilot\\_activ.html](http://www.unece.org/env/water/monitoring_pilot_activ.html)>.

<sup>77</sup> See: <[http://www.unece.org/env/water/workshop\\_joint\\_bodies\\_2013.html](http://www.unece.org/env/water/workshop_joint_bodies_2013.html)>.

The UNECE Secretariat recently held workshops on transboundary water cooperation in Latin America,<sup>78</sup> and the Workshop 'River Basin Commissions and Other Joint Bodies for Transboundary Water Cooperation: Legal and Institutional Aspects' held in Geneva was attended by numerous non-UNECE States from Latin America, the Middle East, Africa and – of particular relevance to this article – Himalayan Asia (including Afghanistan, Thailand, Bangladesh and Burma), which participated in discussions on the transferability of the UNECE water regime beyond the UNECE region.<sup>79</sup>

The potential role of the UNECE regime is significant in terms of its scope to apply the highly developed procedural rules and institutional mechanisms to strengthen international water law at the global, other regional and basin levels, and thereby enhance political support for transboundary water cooperation worldwide. The UNECE water regime also sits within the broader UNECE regional governance framework, thus benefiting from integrated cross-sectoral regional dialogues, which lead to concrete forms of integrated cooperation and capacity-building activities on a whole range of transboundary environmental issues concerning energy, water and other natural resources.<sup>80</sup> This level of integration is more difficult to achieve at the global level, and the normative influence of this cross-sectoral approach represents a significant contribution of the UNECE regional water regime to strengthening international water law.

## THE POTENTIAL FOR A REGIONAL APPROACH TO WATER IN HIMALAYAN ASIA

Himalayan Asia<sup>81</sup> experiences several of the global challenges that put pressure on transboundary water management – that is, climate change, population growth, urbanization and economic development – while at the same time regional cooperation is being hampered by

political tensions between several States – for example, the conflicts in the volatile parts of Kashmir and Tibet.<sup>82</sup> Most countries in Himalayan Asia have seen their renewable freshwater resources and water availability drop continuously over the last decades.<sup>83</sup> The pressures of decreasing freshwater quality and increasing competition for the resource not only affect the States in their respective national development since the inherent feature of water transforms these domestic challenges into regional ones. The glaciers of the Tibetan Plateau (also referred to as the 'Third Pole') feed the headwaters of the mighty rivers Yellow, Yangtze, Mekong, Salween, Irrawaddy, Ganges-Brahmaputra and Indus, which more than 1.5 billion people (22% of the global population) directly depend upon.<sup>84</sup> Regardless of whether China's and India's emphasis on large-scale infrastructure is the most sensible option for their own socio-economic and environmental future,<sup>85</sup> it already has a huge impact on States downstream within their shared river basins.<sup>86</sup> The governments' ambitious plans to step up hydropower capacity and realize inter-basin water transfers will certainly increase the geopolitical risks of international freshwater interaction in Himalayan Asia since the actions of the two hegemonies either directly or indirectly affect the whole region.<sup>87</sup>

Insights on how countries in Himalayan Asia perceive the general obligation to cooperate in international water law can be gained by looking at the negotiation and ratification process of the UN Watercourses Convention. One of this region's countries (China) voted against the adoption of the Convention, five (Afghanistan, Bhutan, Burma, India and Pakistan) abstained or were absent and six (Bangladesh, Cambodia, Laos, Nepal, Thailand and Vietnam) voted in favour. However, to date, none of the latter has ratified the Convention. Given the key role China plays in Himalayan Asia's water politics, its statement on the Convention is of particular interest here.

<sup>78</sup> The workshop on transboundary water cooperation 'Latin American and Pan-European Regions: Sharing Experiences and Learning from Each Other' took place from 11 to 12 June 2013 in Buenos Aires, Argentina. See: <[http://www.unece.org/transboundary\\_water\\_cooperation\\_workshop\\_eclac.html](http://www.unece.org/transboundary_water_cooperation_workshop_eclac.html)>.

<sup>79</sup> List of Participants, 1<sup>st</sup> Workshop 'River Basin Commissions and Other Joint Bodies for Transboundary Water Cooperation: Legal and Institutional Aspects', found at: <[http://www.unece.org/fileadmin/DAM/env/water/meetings/joint\\_bodies/FINAL\\_list-of-participants-1st\\_Workshop\\_River\\_basin\\_commissions\\_23-24\\_September\\_2013\\_rev.pdf](http://www.unece.org/fileadmin/DAM/env/water/meetings/joint_bodies/FINAL_list-of-participants-1st_Workshop_River_basin_commissions_23-24_September_2013_rev.pdf)>.

<sup>80</sup> UN, *UN Regional Commissions and the Millennium Development Goals: A Regional Approach to a Global Problem* (UN, 2005), found at: <[http://www.unece.org/fileadmin/DAM/commission/MDGs/Brochure\\_MDG\\_E.pdf](http://www.unece.org/fileadmin/DAM/commission/MDGs/Brochure_MDG_E.pdf)>, at 2.

<sup>81</sup> While 'Himalayan Asia' is an insufficiently defined region, this section looks at the transboundary freshwater interaction between Afghanistan, Bangladesh, Bhutan, Burma, Cambodia, China, India, Laos, Nepal, Pakistan, Thailand and Vietnam.

<sup>82</sup> For an in-depth study on water issues in Asia, see Asian Development Bank, *Asian Water Development Outlook 2013: Measuring Water Security in Asia and the Pacific* (Asian Development Bank, 2013).

<sup>83</sup> *Ibid.*, at 29. For up-to-date country-by-country data, see World Bank, 'Renewable Internal Freshwater Resources per Capita', found at: <<http://data.worldbank.org/indicator/ER.H2O.INTR.PC>>.

<sup>84</sup> See D. Grey and G. Connors, n. 9 above, at 60.

<sup>85</sup> J. Berkoff, 'China: The South-North Water Transfer Project: Is It Justified?', 5:1 *Water Policy* (2003), 1, at 5; A.R.M. Khalid, 'The Interlinking of Rivers Project in India and International Water Law: An Overview', 3:2 *Chinese Journal of International Law* (2004), 553, at 553; K. Pomeranz, 'Asia's Unstable Water Tower: The Politics, Economics and Ecology of Himalayan Water Projects', 16 *Asia Policy* (2013), 4.

<sup>86</sup> J.C. Keetelaar, 'Transboundary Water Issues in South Asia' (PhD Thesis, Erasmus University Rotterdam, 2007), at 23; H.S. Sen, 'The Drying up of River Ganga: An Issue of Common Concern to Both India and Bangladesh', 99:6 *Current Science* (2010), 725.

<sup>87</sup> Leadership Group on Water Security in Asia, *Asia's Next Challenge: Securing the Region's Water Future* (Asia Society, 2009), at 15.

With the region's hegemon emphasizing 'indisputable territorial sovereignty' and bilateral agreements in commenting on why it did not vote in favour of the Convention,<sup>88</sup> one wonders what the future prospects of a more regional approach are. Treaty practice does not allow for excessive optimism either, as most of the water-sharing agreements in the region struggle with issues of non-inclusiveness, inflexibility, false predictions about the future hydrology and socio-economic realities, lack of joint vision and poor implementation at the national level.<sup>89</sup> Indications of the shortcomings of treaty law in the region are the current and smouldering disputes surrounding the development of the Mekong and Indus rivers – both equipped with water-sharing agreements which are often being praised as success stories.<sup>90</sup>

While most water-sharing agreements (not only in Himalayan Asia) have their weaknesses, one should not underestimate the impact these legal frameworks have on the transboundary water interaction in the region. The negotiation of treaties, their signatures and, ultimately, their implementation depend to a large extent on issues outside the actual water box. Often, the right timing is perceived as more important than the actual legal content, as, arguably, an imperfect treaty might be better than none. However, in view of the fact that today's international water law in Himalayan Asia is rather hostile towards the idea of a more regional approach to transboundary freshwater interaction, the question arises what role international law can play here in moving towards regionalism.

Previous work has analyzed the extent to which the concept of water security can act as a change agent for the future development of international water law, and how the normative foundation of water security should be defined in international law.<sup>91</sup> While the approaches of 'common area' and 'common heritage' are limited to a

certain geographical area (open access or beyond the limits of national jurisdiction) and its resources, and the concept of 'community of interest' has traits which are being perceived as too sovereignty intrusive, the notion of 'regional common concern' seems more promising with regard to the challenges of transboundary freshwater management.<sup>92</sup> The conclusion that some particular challenge is being perceived as a matter of common concern results in the appreciation that it can no longer be considered as a mere national issue. It also triggers a shift from the orthodox reciprocity and material benefit sharing we often find in treaties to joint action in the long-term interest of community.<sup>93</sup> This is evident in the inclusion of the principle of intergenerational responsibility.<sup>94</sup> Furthermore, framing water security as a regional common concern opens up the enormous potential of including actors and interests beyond the basin. This is due to the fact that a region is not a narrowly defined geographical area – contrary to a basin – but instead can be interpreted in exactly the way a particular community of States deems appropriate in order to manage their water challenges in a peaceful manner. This, in turn, may add a new dimension to international freshwater interaction, which is commonly being perceived as a zero-sum game where competing interests of riparians regarding their desired uses are being negotiated. Instead, the inclusion of non-riparian interests in the design and performance of international water agreements can play a key role in addressing common security interests of all involved.<sup>95</sup> On these grounds, the notion of a 'regional common concern' has been suggested as the most suitable conceptual vehicle for the endeavour to achieve common water security – one that will also bring about a more regional approach to international water law in general.<sup>96</sup>

While a regime based on regional common concern might be an interesting theoretical exercise, the question of how it could emerge and evolve in a climate where the political willingness among the various riparian countries to change course still seems to be lacking is vital for the further development of the concept. Are there any signs that can be interpreted as potential pathways towards a new approach based on regional common concern? While there has been some research

<sup>88</sup> United Nations General Assembly, 51<sup>st</sup> Session, 99<sup>th</sup> Plenary Meeting (UN Doc A/51/PV.99, 21 May 1997), found at: <[http://www.un.org/ga/search/view\\_doc.asp?symbol=A/51/PV.99](http://www.un.org/ga/search/view_doc.asp?symbol=A/51/PV.99)>.

<sup>89</sup> B.-O. Magsig, 'International Water Law and the Quest for Common Security' (PhD Thesis, University of Dundee, 2013), at 185.

<sup>90</sup> See, e.g., Permanent Court of Arbitration, *Indus Waters Kishenganga Arbitration (Pakistan v. India)*, Partial Award, 18 February 2013, found at: <[http://www.pca-cpa.org/showpage.asp?pag\\_id=1392](http://www.pca-cpa.org/showpage.asp?pag_id=1392)>; R.E. Grumbine, J. Dore and J. Xu, 'Mekong Hydropower: Drivers of Change and Governance Challenges', 10:2 *Frontiers in Ecology and the Environment* (2012), 91, at 91; S. Schmeier, *Resilience to Climate Change-induced Challenges in the Mekong River Basin: The Role of the MRC* (World Bank, 2011); R.P. Cronin, 'China and the Geopolitics of the Mekong River Basin: Part I', *World Politics Review* (2012); F.E. Johns et al., 'Law and the Mekong River Basin: A Social-Legal Research Agenda on the Role of Hard and Soft Law in Regulating Transboundary Water Resources', 11:1 *Melbourne Journal of International Law* (2010), 154; P. Bagla, 'Along the Indus River, Saber Rattling over Water Security', 328:5983 *Science* (2010), 1226; R.R. Iyer, 'Briscoe on the Indus Treaty: A Response', 46:3 *Economic and Political Weekly* (2011), 68.

<sup>91</sup> See B.-O. Magsig, n. 89 above.

<sup>92</sup> B.-O. Magsig, 'Overcoming State-centrism in International Water Law: "Regional Common Concern" as the Normative Foundation of Water Security', 3:1 *Göttingen Journal of International Law* (2011), 317, at 342.

<sup>93</sup> IUCN Commission on Environmental Law and International Council of Environmental Law, *Draft International Covenant on Environment and Development*, 4<sup>th</sup> edn (IUCN, 2010), at 40.

<sup>94</sup> M.K. Tolba, 'The Implications of the "Common Concern of Mankind" Concept on Global Environmental Issues', 13 *Revista IIDH* (1991), 237, at 238.

<sup>95</sup> J. Brunnée and S.J. Toope, 'Environmental Security and Freshwater Resources: A Case for International Ecosystem Law', 5 *Yearbook of International Environmental Law* (1994), 41, at 75.

<sup>96</sup> See B.-O. Magsig, n. 89 above, at 145.

on cross-border governance in Asia,<sup>97</sup> only a few scholars have looked into the development of a regional regime.<sup>98</sup> Clearly, the chances for agreeing on a comprehensive regional freshwater agreement and implementing it overnight are rather slim. However, a more gradual development towards closer regional cooperation on freshwater issues is by no means illusive. To prevent regional water security from deteriorating, international water law has to provide a framework capable of accommodating the much-needed changes in transboundary water interaction while respecting the regional particularities – both hydrological and political. The severity of the water crisis has shown that the time is ripe for a fundamental change in how the region is managing its transboundary watercourses; and several initiatives in the region are already working towards this.<sup>99</sup> For instance, few experts would have considered it possible for China and India to ever agree on sharing information regarding the state of their glaciers.<sup>100</sup> While this kind of trust-building is a valid step towards a more regional approach to freshwater interaction, it needs to be tied into an institutional mechanism in order to be of long-term value. Here, regional organizations can play an important role since they allow for gradual strengthening and deepening of relations on a whole range of different topics. This is of particular importance given that both China and India have a long history of committing to address water conflicts through bilateral negotiations rather than supporting regional solutions.<sup>101</sup>

To arrive at a framework that overcomes this prejudice against regional approaches, one has to find a starting point that already offers at least some of the necessary features. In this regard, it is worth taking a closer look at the Association of Southeast Asian Nations (ASEAN). This geopolitical and economic organization was founded in 1967 by Indonesia, Malaysia, the Philippines,

Singapore and Thailand, and now includes Brunei, Burma, Cambodia, Laos and Vietnam.<sup>102</sup> The reason for choosing the framework of ASEAN as a potential avenue for promoting the concept of water security as a common concern to all States of Himalayan Asia is that it possesses the necessary political clout to involve both China and India – and thus become the core of Asian efforts towards regionalism.<sup>103</sup> While neither of the two hydro-hegemony of Himalayan Asia are members of ASEAN, they are nonetheless actively involved – mainly through the ASEAN+3 (China, Japan and South Korea) and ASEAN+6 (Australia, China, India, Japan, New Zealand and South Korea) initiatives, which have been established to create an integrated market in the Asia-Pacific region, as well as through the ASEAN Regional Forum, which is a formal and official platform for strengthening dialogue in Asia Pacific region.<sup>104</sup> One of ASEAN's near-term goals is setting up the ASEAN Economic Community – as early as by 2015 – which envisages a single market, a highly competitive economic region, a region of equitable economic development and a region that is fully integrated into the global economy.<sup>105</sup> While historically the regional integration has mainly been driven by economic considerations, the cooperation among ASEAN countries has continually broadened and deepened to include other topics as well.

In 1976, the Treaty of Amity and Cooperation in Southeast Asia was signed by the founding members of ASEAN and adopted fundamental principles of their inter-State relations, the 'ASEAN way': mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations; the right of every State to lead its national existence free from external interference, subversion or coercion; non-interference in internal affairs; settlement of differences or disputes in a peaceful manner; renunciation of the threat or use of force; and effective regional coop-

<sup>97</sup> See, e.g., G.S. Cheema, C.A. McNally and V. Popovski (eds.), *Cross-border Governance in Asia: Regional Issues and Mechanisms* (United Nations University Press, 2011).

<sup>98</sup> One of the few exceptions looks at biodiversity in the Himalayas: A.M. Bhattarai, *Protection of Himalayan Biodiversity: International Environmental Law and a Regional Legal Framework* (Sage, 2010). For an interesting, yet unrealistic, proposal for a sub-regional regime governing the river systems of the Ganges and Brahmaputra, see Strategic Foresight Group, *The Himalayan Challenge: Water Security in Emerging Asia* (Strategic Foresight Group, 2010).

<sup>99</sup> See, e.g., the International Centre for Integrated Mountain Development (ICIMOD) which 'aims to assist mountain people [in the Hindu Kush Himalayas] to understand these changes, adapt to them, and make the most of new opportunities, while addressing upstream-downstream issues'. ICIMOD, 'About ICIMOD', found at: <<http://www.icimod.org/>>.

<sup>100</sup> J. Lamont, 'India and China Co-operate over Himalayan Glaciers', *Financial Times* (2 August 2009).

<sup>101</sup> P. Wouters and H. Chen, 'China's "Soft-Path" to Transboundary Water Cooperation Examined in the Light of Two UN Global Water Conventions: Exploring the "Chinese Way"', 22:2–3 *Journal of Water Law* (2013), 229 See also P. Wouters, this issue.

<sup>102</sup> Among its main goals are 'to accelerate the economic growth, social progress and cultural development in the region . . . ; to promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries of the region and adherence to the principles of the United Nations Charter; . . . to promote active collaboration and mutual assistance on matters of common interest in the economic, social, cultural, technical, scientific and administrative fields; . . . to maintain close and beneficial cooperation with existing international and regional organizations with similar aims and purposes, and explore all avenues for even closer cooperation among themselves'. Association of Southeast Asian Nations (ASEAN), 'About ASEAN', found at: <<http://www.asean.org/asean/about-asean>>.

<sup>103</sup> E.Z. Bower, *ASEAN's Opportunity to Become the Core of Asian Regionalism* (Center for Strategic and International Studies, 2 April 2010), found at: <<http://csis.org/publication/aseans-opportunity-become-core-asian-regionalism>>.

<sup>104</sup> 'ASEAN+6 Start Regional FTA Talks', *The Jakarta Post* (10 May 2013).

<sup>105</sup> ASEAN, *ASEAN Economic Community Blueprint* (ASEAN, 2008), at 5.

eration.<sup>106</sup> Interestingly, China and India were the first nations outside ASEAN to sign the Treaty in 2003. While some would argue that the 'ASEAN way' might constitute a stumbling block for overcoming the prevailing focus on national interests and arriving at a truly regional approach to transboundary water management, several initiatives within the ASEAN regime paint a brighter picture.

The ASEAN Ministerial Meeting on Environment (AMME), for instance, was established in 1981 with the aim of discussing environmental issues affecting the group of States. In 2002, AMME agreed to enhance regional environmental cooperation by focusing on ten areas, with freshwater resources being one of them.<sup>107</sup> In 1983, the ASEAN Group on Nature Conservation proposed a set of principles and objectives for the selection, establishment and management of protected areas in the ASEAN region, stressing that due to the fact that the member States share a common natural heritage, they should cooperate in their efforts to protect the region's biodiversity.<sup>108</sup> According to the 2003 ASEAN Declaration on Heritage Parks, member States agreed that 'common cooperation is necessary to conserve and manage the ASEAN Heritage Parks for the development and implementation of regional conservation and management action plans as well as regional mechanisms complementary to and supportive of national efforts to implement conservation measures'.<sup>109</sup> In 1985, several member States signed the ASEAN Agreement on the Conservation of Nature and Natural Resources.<sup>110</sup> Among other things, it stipulates that:

Contracting Parties shall especially co-operate together and, where appropriate, shall endeavour to co-operate with other Contracting Parties, with a view to: (a) the conservation and management of (1) border or contiguous protected areas; (2) shared habitats of species listed in Appendix 1; (3) shared habitats of any other species of common concern.<sup>111</sup>

While the text of the Treaty might suggest close cooperation between ASEAN countries in the area of nature conservation, it has not entered into force since only three of the six signatory States (Indonesia, the Philippines and Thailand) have ratified it. Other agreements and initiatives on environmental cooperation under the umbrella of ASEAN include the 1995 Cooperation Plan on Transboundary Pollution,<sup>112</sup> the 2002 Agreement on Transboundary Haze Pollution,<sup>113</sup> the ASEAN Wildlife Enforcement Network launched in 2005<sup>114</sup> and the 2007 ASEAN Declaration on Environmental Sustainability.<sup>115</sup>

With regard to freshwater resources, the environmental ministers of ASEAN adopted the 2005 ASEAN Strategic Plan of Action on Water Resources Management, which is aimed at promoting the vision for water in Southeast Asia by 2050: 'The attainment of sustainability of water resources to ensure sufficient water quantity of acceptable quality to meet the needs of the people of Southeast Asia in terms of health, food security, economy and environment.'<sup>116</sup> In the most recent meeting of AMME, ministers agreed to 'enhance existing transboundary water cooperation within ASEAN which aims to reduce poverty, protect natural resources, prevent crisis and resolve conflicts between countries'.<sup>117</sup> However, these initiatives to strengthen cooperation have not been implemented yet as the current struggles for the region's freshwater resources show.

This is why selective bilateral partnerships are still the norm when it comes to transboundary freshwater management in Himalayan Asia. The reasons for this are twofold. At the international level, States still see transboundary water interaction as a zero sum game as

<sup>106</sup> Treaty of Amity and Cooperation in Southeast Asia, as amended by the First Protocol amending the Treaty of Amity and Cooperation in Southeast Asia, 1987, the Second Protocol amending the Treaty of Amity and Cooperation in Southeast Asia, 1998 and the Third Protocol amending the Treaty of Amity and Cooperation in Southeast Asia, 2010 (Denpasar, 24 February 1976; in force 21 June 1976).

<sup>107</sup> 'The Ministers also noted that the newly established ASEAN Working Group on Water Resources Management to be chaired by Thailand would further strengthen cooperation among member countries in research, conservation and information exchange on integrated water resources management.' ASEAN, 'Press Release: 7th Informal ASEAN Ministerial Meeting on the Environment' (21 November 2002), found at: <<http://www.asean.org/news/item/press-release-2>>.

<sup>108</sup> Appendix 2: Principles, Criteria and Guidelines for the Selection, Establishment and Management of Network Reserves, in: *Proceedings on the Workshop on the Guidelines and Criteria for the Selection and Establishment of ASEAN Heritage Parks (20–22 September 2000)*, found at: <[http://www.arcabc.org.ph/arcabcweb/pdf/sea\\_20\\_09\\_00/establishment\\_ASEAN\\_Heritage\\_Parks.pdf](http://www.arcabc.org.ph/arcabcweb/pdf/sea_20_09_00/establishment_ASEAN_Heritage_Parks.pdf)>.

<sup>109</sup> ASEAN Declaration on Heritage Parks (18 December 2003), found at: <<http://www.asean.org/news/item/asean-declaration-on-heritage-parks>>.

<sup>110</sup> ASEAN Agreement on the Conservation of Nature and Natural Resources (Kuala Lumpur, 9 July 1985; not yet in force).

<sup>111</sup> *Ibid.*, Article 19.3(a).

<sup>112</sup> ASEAN, *ASEAN Cooperation Plan on Transboundary Pollution* (ASEAN, 1995).

<sup>113</sup> 2002 ASEAN Agreement on Transboundary Haze Pollution (Kuala Lumpur, 10 June 2002; in force 25 November 2003).

<sup>114</sup> For more information, see: <<http://asean-wen.org/>>.

<sup>115</sup> ASEAN Declaration on Environmental Sustainability (20 November 2007), found at: <<http://environment.asean.org/index.php?page=agreements:aseandeclarationenvsus>>.

<sup>116</sup> ASEAN Strategic Plan of Action on Water Resources Management (2005), found at: <<http://environment.asean.org/files/ASEAN%20Strategic%20Plan%20of%20Action%20on%20Water%20Resources%20Management.pdf>>.

<sup>117</sup> Bangkok Resolution on ASEAN Environmental Cooperation (26 September 2012), found at: <[http://www.asean.org/images/2012/news/documents/Agenda%2016%20-%20ADOPTED%20Bangkok\\_Resolution\\_12AMME%20-%2026Sep.pdf](http://www.asean.org/images/2012/news/documents/Agenda%2016%20-%20ADOPTED%20Bangkok_Resolution_12AMME%20-%2026Sep.pdf)>.

it is the limiting factor of their respective economic growth, while at the various national levels, the power interplay is preventing a joint approach due to the prevailing fragmentation caused by bureaucratic competition over functional responsibilities.<sup>118</sup> There is, however, a shimmer of hope for a more coherent and regional approach to freshwater management. The recently held 2<sup>nd</sup> Asia-Pacific Water Summit on 'Water Security and Water-related Disaster Challenges: Leadership and Commitment' was organized by the Royal Thai Government, in collaboration with the Asia-Pacific Water Forum and supporting international and regional nongovernmental organizations.<sup>119</sup> At the summit, Thailand's Prime Minister, Yingluck Shinawatra, stressed the importance of regional forums for the peaceful resolution of water conflicts, since '[n]o country in this region can handle these challenges alone'.<sup>120</sup> In the outcome document of the summit – the Chiang Mai Declaration – the heads of State and government declared the intention to 'enhance regional and international cooperation on sharing, exchange and dissemination of scientific and technical knowledge, as well as best practices, related to integrated water resources management'.<sup>121</sup> The declaration further invites the Asia-Pacific Water Forum to mobilize initiatives to support the recommendations and to consider establishing an Asian Water Information System.<sup>122</sup>

Yet, despite these promising soft law developments, it seems that the potential for States dependent on the rivers rising in the Himalayas agreeing on a truly regional legal framework for governing their transboundary water resources is rather elusive at present. However, given China's and India's growing role in the international arena, there might be a chance for making the case for a moral obligation of the two hydro-hegemony to move into the direction of regional common concern. Without a doubt, the two regional hydro-hegemony are among the rising powers in world politics, but do they also accept new responsibilities? So far, China's participation in global governance has been rather disappointing, and there is 'little evidence that it

will seek international leadership'.<sup>123</sup> With regard to his foreign policy, the new leader of the Chinese Communist Party, Xi Jinping, has made it clear that his nation will continue to 'never compromise its core interests' or swallow the 'bitter fruit' of accepting harm to its sovereignty, security and development.<sup>124</sup> India's strategy to claim its status as a 'great power' seems even less clear, as its hands are tied by domestic constraints.<sup>125</sup>

The contemporary concept of water security as regional common concern attempts to persuade States that a regional approach to water security not only serves the region as a whole, but ultimately also constitutes the best option for the respective national security interests when taking a long-term view. While both China and India seem to prefer a stable Himalayan Asia, which would allow them to sustain their economic growth, they still perceive threats to their security differently, and thus employ different strategies.<sup>126</sup> The concept of 'regional common concern', however, can only fully unfold if it is being implemented through concerted action at the regional level. Recalling the rather negative sentiment against the global framework of international water law – the UN Watercourses Convention – it does not require a strong imagination to envision the birth of an alternative approach to transboundary water issues in Himalayan Asia. Here, just like in other regions, States have an interest in developing a geographically confined form of special international law.<sup>127</sup> Considering the current political tensions between China and India, the recently signed accord on sharing hydrological information between the two States is an encouraging indicator of improved relations between the two hydro-hegemony.<sup>128</sup> It is the responsibility of international legal scholarship to support this process of nurturing regional norms and institutions by drawing lessons from other regional frameworks, like the UNECE Water Convention, as well as developing novel pathways towards an understanding of cooperative sovereignty, like perceiving water security as being a regional common concern.

<sup>118</sup> D. Suhardiman, M. Giordano and F. Molle, 'Scalar Disconnect: The Logic of Transboundary Water Governance in the Mekong', 25:6 *Society and Natural Resources* (2012), 572, at 573.

<sup>119</sup> R.R. Bhandary, T. Goldberg and D. Paul, 'Second Asia-Pacific Water Summit', 211:1 *APWS Bulletin* (23 May 2013), found at: <<http://www.iisd.ca/water/apws/2013/html/crsvol211num1e.html>>.

<sup>120</sup> 'Asia-Pacific Leaders Warn of Water Conflict Threat', *AsiaOne* (20 May 2013), found at: <<http://www.asiaone.com/News/AsiaOne+News/Asia/Story/A1Story20130520-424064.html>>.

<sup>121</sup> The Second Asia-Pacific Water Summit, Chiang Mai Declaration (20 May 2013), found at: <<http://apws2013.files.wordpress.com/2013/05/chiang-mai-declaration.pdf>>.

<sup>122</sup> *Ibid.*

<sup>123</sup> H. Wang and E. French, 'China's Participation in Global Governance from a Comparative Perspective', 15 *Asia Policy* (2013), 89, at 89.

<sup>124</sup> Economist Intelligence Unit, *China: New Leader Hints at Tough Foreign Policy* (Economist Intelligence Unit, 2013).

<sup>125</sup> A. Narlikar, 'India Rising: Responsible to Whom?', 89:3 *International Affairs* (2013), 595, at 613.

<sup>126</sup> See A.J. Tellis and S. Mirski (eds.), *Crux of Asia: China, India and the Emerging Global Order* (Carnegie Endowment for International Peace, 2013).

<sup>127</sup> D. Pulkowski, 'Theoretical Premises of Regionalism and the Unity of International Law', *European Society of International Law Conference Paper Series* (2012), at 3.

<sup>128</sup> Deccan Herald, 'India, China Ink Key Accord on River Information' (23 October 2013) found at: <<http://www.deccanherald.com/content/364758/india-china-ink-key-accord.html>>; R. Kabraji, *China-India Agreement: Interim Solution?* (Chatham House, 24 October 2013), found at: <<http://www.chathamhouse.org/media/comment/view/195091>>.

## CONCLUSION

The discussion in this article reveals very divergent approaches to implementing the general obligation to cooperate over transboundary freshwater resources in these two regions. The UNECE water regime is a success story demonstrating how a regional organization can push forward regional integration, and thus improve regional cooperation on transboundary waters. It has made a significant contribution to the procedural rules of international water law on cooperation, through its comprehensive guidance for joint institutions under Article 9 of the UNECE Water Convention, and its record of fostering the establishment and implementation of numerous basin and bilateral agreements within the pan-European region.

In addition the Convention's institutional mechanisms providing for the Meeting of the Parties and establishing the Secretariat, and its progressive institutional machinery to strengthen cooperation, draws mounting interest from States well beyond the realms of the UNECE region. With demand for freshwater projected to grow by 30%, and demand for energy and food by 50% by 2030,<sup>129</sup> the future success of all regional, basin and bilateral transboundary cooperation will depend to a great extent on parties' ability to incorporate the competing demands for water from energy, food and ecosystems into river basin management and to transition to a state of thinking where the benefits from the use of water are valued and allocated in an innovative, sustainable and equitable way. This requires greater coherence, synergies and interlinkages between fragmented environmental and economic regimes. The regional approach has proven to be an appropriate governance level for achieving this integration. The UNECE water regime has already made significant headway in this regard with numerous initiatives – including the Task Force on the Water-Food-Energy-Ecosystems Nexus – but the untapped potential for strengthening synergies within this regime and with other multilateral environmental agreements, directly or indirectly concerning water, is much greater.

While there is some scepticism about the capacity of ASEAN to be a leading force in regional integration of Himalayan Asia, more subtle processes, as highlighted above, are often being overlooked. Yet, it is through these small steps that perceptions to transboundary water cooperation within the region are being steadily transformed. Although ASEAN may have originally focused on economic issues, its very endurance has provided the region with an increasing sense of identity in what was hitherto a mere arbitrary geographical area.

The emerging interest of both hydro-hegemony, China and India, to engage in this process increases the importance of ASEAN as a key player in the region's transboundary water cooperation. Himalayan Asia, however, will not easily embrace the notion of cooperative sovereignty which comes from 'outside'. Hence, it is much more likely that States within the region develop their own concepts, based on their regional identity and specific political and cultural environment.

The example of the UNECE water regime can enlighten this process, as there are aspects of this regime which can provide valuable lessons to other regions in strengthening transboundary freshwater cooperation. The UNECE Water Convention's MOP, Bureau and working groups have driven forward a comprehensive body of soft law covering a diverse spectrum of issues from technical guidance on water-related disease surveillance to best practice ecosystem-based approaches to climate adaptation in transboundary river basins. Much of the content of these best practice instruments could be transferred to bilateral and basin agreements in both Himalayan Asia and beyond. In addition, the soft law approach in the UNECE regime has proved a successful way to overcome sovereignty issues in this region, and strengthen transboundary water cooperation. A similar approach would seem to offer a way to overcome the enduring sovereignty issues in Himalayan Asia.

This article has shown how regional approaches to transboundary water cooperation can also have the advantage of being developed within a broader regional governance framework, which can lead to concrete forms of integrated cooperation on a whole range of transboundary environmental issues concerning energy, water and other natural resources. This level of integration is more challenging to achieve at the global level, and the normative influence of this cross-sectoral approach represents a significant potential contribution of regional approaches to strengthening international water law.

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<sup>129</sup> J. Beddington, *Food, Energy, Water and the Climate: A Perfect Storm of Global Events?* (UK Government Office for Science, 2009).

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