9. Regional contributions to international water cooperation: the UNECE contribution

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INTRODUCTION

One may detect multifarious regional trends in water cooperation made up of bilateral or multilateral water agreements. In some regions of the world such trends have developed more than in others. Some common features may be found among water agreements in different (or the same) regions, according to their different scope, i.e. boundary demarcation, navigation, water allocation, pollution control or ecosystem protection. One may refer in that respect to the thorough analysis made by Professor Brown Weiss in her invaluable course on “The Evolution of International Water Law”, given at The Hague Academy in 2009.¹

The fact remains that each water agreement—though it may share common features with other water agreements with partly, or totally, different riparian States in the same region—has specific characteristics of its own, being usually a basin-specific agreement.² Therefore, even

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² So much so, that it is generally assumed that the basic substantive principles of international water law—the equitable utilization principle and the no-harm rule—have been consolidated in such general and abstract terms so as to be suitable for case-specific application to widely differing drainage basins around the world. This approach has been confirmed in 2009 in the Guide to Implementing
the most important water agreements or arrangements among numerous riparian parties reflect a collective regulatory framework addressing individual basin States having, at the most, a sub-regional dimension. By way of example, one may refer to the Mekong River Agreement or the Nile Basin Initiative. Somewhere in between such settings and a fully fledged regional framework one can pinpoint the sub-regional legal framework stemming from the 2010 Revised Protocol on Shared Watercourses in the Southern African Development Community (SADC).

The focus of this chapter is directed, rather, to the contribution that an extended regional institutional setting may make to the promotion of water cooperation in its regional scope and, possibly, worldwide. Universal institutions may play a significant role in enhancing water cooperation in different regions of the world. One may think of UNEP, UNDP, FAO, the World Bank, the GEF or UNESCO, among others. However, the scope of the present chapter is confined to purely regional institutional and regulatory frameworks. It appears inevitable that the degree of such a contribution will be proportional to the degree of political and economic integration in a given region. Conversely, the case can be made that the development of regulatory standards on water cooperation in a given regional setting will enhance political and economic integration in that particular region.

Against this background, the UN Economic Commissions for individual regions at different regional levels appear to be particularly relevant. Among them, the UN Economic Commission for Europe (UNECE) deserves special attention for its advanced developments in the field of water cooperation, among others, and its ambition to extend the reach of its regulatory setting in this field to the global dimension. So far, the 1992 UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes (henceforth, Helsinki Convention) may well have served as a model for water cooperation at the global level. Its contribution to the international water law process at the global level will soon be enhanced by the entry into force of the amendments that extend accession to the Convention to States that do not belong to the UNECE.
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While the EU institutional framework will not be addressed here, as it would deserve a wholly separate treatment, before addressing the UNECE contribution in the matter under consideration, a brief reference will be made to the other two UN regional Commissions contributing in different ways to the international water law process at the regional level.

ECLAC AND ESCWA

Among the areas in which the UN Economic Commission for Latin America and the Caribbean (ECLAC) has been working in order to enhance regional integration through the promotion of common regulatory standards, the use, management and protection of natural resources stands high on the list of priorities. Within that area of interest, over the last few years, water has become prominent. However, one should note that ECLAC appears to have been working gently—and rather indirectly—with a view to preparing the ground to promote inter-State cooperation, particularly in the water sector.

ECLAC has been, and still is, mostly active through training and dissemination of regulatory standards on water management and water services—including on prevention and settlement of investment disputes related to such services—at the level of individual States. Such a soft approach seems to be due to the specific and traditional Latin American attachment to the concept of State sovereignty, particularly in the field of natural resources. However, this has not prevented Latin American countries to resort most recently to the ICJ on transboundary water issues, such as navigation (Costa Rica v. Nicaragua) or environmental protection (UN Doc. ECE/MP.WAT/14).

Art. 21, para. 4 of the Helsinki Convention provides that an amendment “shall enter into force for the Parties to the Convention which have accepted it on the ninetieth day after the date on which two thirds of those Parties have deposited with the Depositary their instruments of acceptance of the amendment.” At the time of the completion of the present writing, 25 Parties have ratified those amendments, out of 26 Parties required for their entry into force. It appears that the ratification process is currently under way in a significant number of countries. This suggests the imminent prospect of the entry into force of those amendments, a goal that the fifth session of the Meeting of the Parties in 2009 aimed to reach by late 2012.

7 See www.eclac.org.
8 Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), 2009 I.C.J. 213 (July 13).
issues and water (Argentina v. Uruguay),\textsuperscript{9} or to enter into multilateral framework agreements paving the way to further cooperation, such as the 2010 Agreement on the Guarani Aquifer between Argentina, Brazil, Paraguay and Uruguay.\textsuperscript{10}

One could tentatively make the case that the ECLAC training and dissemination activities, though they are focused at the domestic level of individual countries, contribute—by furthering common regulatory standards—to promote better understanding of international water law as a means for inter-State cooperation, as well as dispute prevention and settlement.

As to the Economic and Social Commission for Western Asia (ESCWA),\textsuperscript{11} its role in the field of water cooperation is particularly relevant with specific regard to the Arab Region, where the natural scarcity of water is all too well known. Recent developments in this field are noteworthy, even though they have not yet led to the adoption of regional instruments providing for compulsory water cooperation. The Water Resources Section of ESCWA, similarly to that of ECLAC, has been active in trying to increase the capacity of its members on water and environment-related issues by undertaking specific studies, organizing expert group meetings and training workshops, and eventually developing guidelines. The intermediate goal is to increase awareness and alert decision-makers, water professionals and the non-governmental and private sector on the seriousness of water issues in the region. The ultimate goals are to enhance the capacity of member countries to formulate and adopt integrated water resource management (IWRM) and to improve cooperation among member countries on shared water issues, including the prevention of water and environment-related disputes.

To that end, a Committee on Water Resources was established, which held its first session in 1997.\textsuperscript{12} One should emphasize the fruitful interaction on water cooperation between ESCWA and major political and expert bodies in the Arab region. In July 2010, the Arab Ministerial Water Council passed a resolution to “Invite the Center of Water Studies and Arab Water Security and the United Nations Economic and Social Commission

\textsuperscript{9} Pulp Mills on the River Uruguay (Argentina v. Uruguay), 2010 I.C.J. (Apr. 20).


\textsuperscript{11} See www.escwa.un.org.

\textsuperscript{12} See www.escwa.un.org/about/gov/committees/water.asp.
for Western Asia (ESCWA), in coordination with the Arab Center for the Studies of Arid Zones and Dry Lands (ACSAD) and the Stockholm International Water Institute (SIWI) to prepare a draft legal framework on shared waters within the Arab Region.” This Draft was discussed by the Technical Scientific Advisory Committee of the Ministerial Council in January 2011 and by an Intergovernmental Consultative Meeting on the Draft Legal Framework for Shared Water Resources in the Arab Region on 24–26 May 2011. The discussion aimed to explore options of contents and format for a regional water instrument for the Arab region.

THE UNECE AND THE PROMOTION OF WATER COOPERATION: INTRODUCTORY CONSIDERATIONS

The UNECE framework appears to have been crucial in the promotion of water cooperation in two respects. In the first place and more generally, it has significantly contributed to the very development and consolidation of international water law as such, which one may regard as a regulatory framework for cooperation and dispute prevention in itself. Indeed, the formulation and application of the two basic material principles of international water law—the equitable utilization principle and the no-harm rule—pivot precisely around the concept of water cooperation. The latter stands out at one and the same time as a goal in itself and as a means for the achievement of the overall rationale of international water law, i.e. the optimal utilization for all riparians concerned, and as a quintessential example of distributive justice. Indeed, as singled out in the Guide to Implementing the Convention, “[e]xperiences gained and analysis carried out concur with the view that collective and co-ordinated use, protection and management of transboundary waters through cooperation between riparians is the key to optimal utilization thereof for all parties involved.”

15 Supra note 2, § 22. This appears to have been clearly codified within the 1997 New York Convention, whose Art. 5, para. 1, in relevant part provides that “[i]n particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal and sustainable utilization thereof and benefits therefrom, taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse.” As explained by the ILC in the preparatory workings on the point at issue, “[a]ttaining optimal
From a legal point of view, cooperation appears to be the necessary catalyst for the concrete case-by-case operation of the no-harm rule and the equitable utilization principle. As authoritatively recalled with regard to the reconstruction of the historical evolution of the principles under consideration, the no-harm rule derives from a cooperation rationale insofar as it stems from the principle of good neighborliness, of which, in turn, the equitable utilization principle would be a prolongation.

The UNECE has provided a major contribution to the enhancement and consolidation of international water law with the adoption and entry into force of the 1992 Helsinki Convention, the non-binding preparatory process thereto and its follow-up, as will be further illustrated below. Suffice to anticipate at this stage that the crucial role of the Helsinki Convention in the enhancement of the international water law process is confirmed by its fully complementary role with respect to the 1997 UN Convention on the Law of Non-navigational Uses of International Watercourses (henceforth, New York Convention) as emphasized by the Final Declaration of the Second Meeting of the Parties of the Helsinki Convention, held at the Hague in 2000 on the basis of a study prepared by the present writer within the Task Force on Legal and Administrative Aspects of the Convention, the predecessor to the Legal Board. As we shall see below, the higher degree of specificity of the Helsinki Convention provides useful normative guidance for the interpretation and application of the no-harm principle.

Utilization and benefits does not mean achieving the ‘maximum’ use, the most technologically efficient use, or the most monetarily valuable use much less short-term gain at the cost of long-term loss. Nor does it imply that the State capable of making the most efficient use of a watercourse – whether economically, in terms of avoiding waste, or in any other sense – should have a superior claim to the use thereof. Rather, it implies attaining maximum possible benefits for watercourse States and achieving the greatest possible satisfaction of all their needs, while minimizing the detriment to, or unmet needs of, each (Report of the Int’l Law Commission on the Work of its Forty-Sixth Session, U.N. GAOR 49th Sess., Suppl. No. 10, U.N. Doc. A/49/10 (1994), at 218–219).


Id. at 141.


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of the general customary principles of international water law also enshrined in most general terms in the New York Convention.

In the second place and no less importantly, the contribution to the promotion of international water cooperation by the UNECE is to be found most directly in its regulatory setting concerning precisely cooperation, both under the 1992 Helsinki Convention with respect to transboundary waters and its 1999 London Protocol on Water and Health\(^2\) with respect to the domestic uses of water. The specific contribution of both instruments are separately addressed below.

A SHORT OUTLINE OF THE ECE WATER LAW PROCESS

The four-decade-long UNECE water law process which led to the 1992 Helsinki Convention and to the 1999 London Protocol on Water and Health is exemplary of the modern trends in international law-making, with special regard to the protection of the environment. The features that stand out most prominently from this process consist in the intensive interplay between legally non-binding\(^2\) and conventional instruments, as well as between law-making, law-implementation and compliance.\(^2\)

\(^2\) See www.unece.org/env/water.html.
The Helsinki Convention and its Interplay with Legally Non-binding Instruments

Since the 1960s, the UNECE has been at the forefront of the promotion of a shift in the priorities of the international regulation of waterways from the traditional economic focus on equitable apportionment issues to an integrated approach to domestic, as well as transboundary, water management and protection that encompasses the relationship among other environmental components of the ecosystems of watercourses (i.e. riparian vegetation, wetlands and associated wildlife and habitats). This approach was reflected during the 1970s and 1980s in a number of UNECE declarations and recommendations concerning watercourses, which were based on a geographical approach to their scope no longer determined just by political and jurisdictional borders, but primarily by ecosystem boundaries. One may recall, inter alia: the 1976 Recommendations on long-term planning of water management; the 1980 Declaration of policy on prevention and control of water pollution; the Recommendations of 1981 on water pollution from animal production, or those of 1987 on rational use of water in industrial processes; and the 1987 Decision on principles regarding cooperation in the field of transboundary waters.24

Since the end of the 1980s, in line with the EC environmental policy and in anticipation of the results yielded at the global level in 1992 at the Rio Conference, UNECE has addressed environment and development issues as two sides of the same coin. More particularly, since 1987 the UNECE policy recommendations and guidelines relevant to water have focused primarily on sustainable water management and the protection of the environment against pollution from point and non-point sources.

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24 See the UNECE publication *Two Decades of Cooperation on Water: Declarations and Recommendations by the Economic Commission for Europe*, ECE/ ENVWA/2 (1988). See also the *ECE Water Series No. 1: Protection of Water Resources and Aquatic Ecosystems* (1993). The ecosystemic approach has further characterized the elaboration of the UNECE standards and guidelines in the field in the subsequent years (see the *ECE Water Series No. 2: Protection and Sustainable Use of Waters* (1995), as well as the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, adopted at Helsinki in 1992). As Teclaff put it, “[t]he ever-broadening scope of modern basin planning in an environmental context indicates progress toward a perception of the basin as an ecosystem. To look upon a river or lake basin as an ecosystem means to view it not merely as a unit in which water resources are interlinked, but as a unit in which many elements of the environment (fresh water, salt water, air, land and all forms of life) interact within the confines of the drainage area” (L.A. Teclaff, *The River Basin Concept and Global Climate Change*, 8 PACE ENV’T’L. REV. 370 (1991).
This was clearly the rationale of the 1989 Charter on Groundwater Management, as well as the 1990 Code of Conduct on Accidental Pollution of Transboundary Inland Waters.

Building on the above per se legally non-binding instruments, as well as on the growing consensus by the UNECE countries on such instruments as authoritative terms of reference, the Convention on the Protection and Use of Transboundary Watercourses and International Lakes was adopted at Helsinki on 17 March 1992, entering into force on 6 October 1996. The most prominent material rule of this Convention is one common to a large number of environmental treaties: namely, an obligation of prevention, control and reduction of transboundary impact. This provision was carefully crafted in order to follow an ecosystem approach, and adopted the precautionary principle, the polluter-pays principle and that of sustainable development. In order to complement such a due diligence
obligation\textsuperscript{31} with objective parameters, the Convention provides for the application of environmental impact assessment,\textsuperscript{32} the definition of water quality objectives and the adoption of water quality criteria.\textsuperscript{33} Finally, it provides for the development and implementation of best environmental practices for the reduction of inputs of hazardous substances from diffuse sources. Notably, the adoption of the Convention took place three months before the Rio Conference.\textsuperscript{34}

The most significant feature of the Convention can be said to pertain to its procedural rules. It provides for not only compulsory cooperation, but also compulsory institutional cooperation. That is to say that, under Articles 9 (para. 2) and 10, a clear-cut obligation is set out for co-riparians to enter into agreements establishing joint bodies. As to the scope of the tasks of such joint bodies, a non-exhaustive list of functions is set out in Article 9 (para. 2). Most importantly, Article 10 goes so far as to provide for the obligation that all consultations between its riparian Parties “be conducted through a joint body established under article 9 [. . .].”\textsuperscript{35} It should also be noted that within the framework of the Convention’s follow-up, the issue of institutional cooperation has reached top priority.


\textsuperscript{33} Art. 3 § 3. \textit{See also} the Guidelines for developing water quality objectives and criteria contained in Annex III to the Convention.


\textsuperscript{35} Such a rigid procedural requirement cannot be possibly considered anywhere near the state of general customary law. On this score, by way of example, it may be noted that in Art. 9 of the 1996 India-Nepal Treaty on the Mahakali River, which provides for the Mahakali River Commission, paragraph 6 provides that “[b]oth Parties shall reserve their rights to deal directly with each other on matters which may be in the competence of the Commission.” 36 I.L.M. 531, 541(1997).
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In so doing, the Helsinki Convention has paved the way for the promotion of sub-regional cooperation leading to important sub-regional integration, even if sectoral in nature. Some of the most significant joint bodies of the kind envisaged by the Convention existed before its adoption, and their successful experience has actually provided a useful background for its drafting. Other joint bodies have been set up before the actual entry into force of the Helsinki Convention—but after its adoption—hence corroborating the view that when the international political climate presents low ideological confrontation, there can be cooperation and the implementation of international treaty law can take place without ratification. This was the case of the International Commission for the Protection of the Oder Against Pollution (ICPOAP), established in 1996 between Poland, the Czech Republic, Germany and the EU. Similar consideration applies to the Interstate Commission for Water Coordination (ICWC), set up by the Agreement on Cooperation in the Management Utilization and Protection of Water Resources in Interstate Sources and concluded by five Central Asian countries (Kazakhstan, Kyrgyz Republic, Tajikistan, Turkmenistan and Uzbekistan) on the Aral Sea Basin on 18 February 1992, a few weeks before the adoption of the Helsinki Convention.

A special confirmation that the Convention has produced a notable “fall out” conducive to watercourse cooperation agreements long before its entry into force is provided by the cooperation practice carried out by the Russian Federation with its co-riparians since their signature of the

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37 Dubicki & Nalberczynski, Development of the International Cooperation in the Oder River Basin, in MANAGEMENT OF TRANSBOUNDARY WATERS IN EUROPE, (Landsberg-Ucziciwek, Adriaanse & Enderlein eds.), at 177.

Convention in 1992 and, more so, since the ratification in 1993. While it is apparent that one of the main aims of the Helsinki Convention is that of providing guidance for the negotiation of water law cooperation agreements, as well as for the prevention or settlement of water law disputes, its function in providing standards for domestic legislation and administrative action in the field should not be underestimated.

Concluding on the interaction between UNECE instruments that are *per se* legally non-binding and those of a conventional nature, it is noteworthy that not only has a consistent body of non-binding UNECE Recommendations and decisions provided the background work for the adoption of the 1992 Helsinki Convention, but the same kind of legally non-binding instruments have also been and are being produced and used after its adoption. Examples include: the 1993 Guidelines on the ecosystem approach in water management;\(^{40}\) the 1996 Guidelines on water quality monitoring and assessment of transboundary rivers;\(^{41}\) the 1996 Guidelines on licensing wastewater discharges from point sources into transboundary waters;\(^{42}\) the 2000 Guidelines on monitoring and assessment of transboundary groundwaters\(^{43}\) and the 2002 Guidelines on monitoring and assessment of transboundary and international lakes;\(^{44}\) the 2006 Model provisions on transboundary flood management;\(^{45}\) and the 2009 Guidance on water and adaptation to climate change.\(^ {46}\) One may also mention the preparatory work for the elaboration of model rules on transboundary groundwater to serve as guidance for future groundwater agreements submitted for adoption to the next Meeting of the Parties in 2012.\(^ {47}\)

Such instruments clearly aim to further the guideline function of the Convention. Most importantly, the Meetings of the Parties to the Helsinki Convention that take place every three years exert a monitoring function on the application of existing recommended guidelines and promote the


\(^{40}\) UN Doc. ECE/ENWA/31.

\(^{41}\) UN Doc. ECE/CEP/11.

\(^{42}\) UN Doc. ECE/CEP/11.


\(^{45}\) UN Doc. ECE/MP.WAT/19/Add.1, at 19.

\(^{46}\) ECE/MP.WAT/30.

\(^{47}\) On file with the Author.
elaboration of new ones. To that end, proposals are also made with a view to elaborating legally binding instruments as separate from recommended codes. This was the case of the decision taken by the First Meeting of the Parties to start the preparation of the Protocol on Water and Health. However, on account of the above-mentioned attitude of the Parties to the present Convention, as well as of the UNECE Members that are not Parties to it, one may gather the impression that the conventional format of a text aims to enhance its authority irrespective of its legally binding force under treaty law.

The Relationship Between the Helsinki Convention and the New York Convention on International Watercourses

As to the interaction between the UNECE and the international water law process at the global level, special importance is to be attached to the relationship between the 1992 Helsinki Convention and the 1997 New York Convention on International Watercourses. The former has certainly benefited from the over two-decade-long preparatory work of the latter, and the Helsinki Convention can well be said to have resulted in a much more stringent and detailed text than the New York Convention. This should not come as a surprise, since it is inevitable that the search for the lowest common denominator among the different positions of the negotiating delegations is more difficult within a universal forum than at the regional level. This is so even if the UNECE framework is somewhat improperly defined as European, as its regional scope still goes beyond that of the EU.

The already mentioned report on the relationship between the two Conventions in point was drafted to address actual and prospective queries, especially those coming from countries in transition, on the following issues: a) the appropriateness, from a legal viewpoint, of becoming a Party to both Conventions having regard to: primarily, i) the compatibility

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48 See Helsinki Declaration § 11, available at www.unece.org/env/water/cooperation/area414.html. However, it may be noted that the 1997 Final Declaration referred to the preparation of “an international instrument to address the problem of water-related diseases to be submitted for adoption at the 1999 London Ministerial Conference on Environment and Health.” Consequently, it had left unprejudiced the question of the format of the instrument to be finally adopted. On the London Protocol, see Tanzi, Reducing the Gap between International Water Law and Human Rights Law: The UNECE Protocol on Water and Health, 12 I.C.L.R. (2010).

49 Since its membership includes Canada, Israel and the USA.

50 See supra note 19.
between the two instruments in point *inter se*; on a subsidiary basis, *ii)* the relation of those instruments to pre-existing watercourse agreements; *iii)* their relation to future watercourse agreements; *b)* interpretative problems in the implementation of provisions of the two instruments under review, which bear on the same issues. Now that the entry into force of the 2003 amendments allowing for accession to the Helsinki Convention outside the UNECE region is imminent, the main interest of the findings of that study pertains to the complementary contribution of the two instruments in point to international customary water law, next to the guidance for a harmonious implementation of the two Conventions by the States that have ratified both Conventions or will do so in the future.

Fully in line with the principle of harmonization spelled out by the ILC in its study on the fragmentation of international law, the report has emphasized that the two texts under review are not only mutually compatible, but also complementary to each other. In particular, the Helsinki Convention generally appears to offer additional guidelines for the application and interpretation of the New York Convention. By way of example, the “eco-standards” set out in Article 2 of the former—i.e., the principles of the best available technology, the best environmental practices, the previous environmental impact assessment and the precautionary principle—have been found in the report as useful terms of reference for the determination of an equitable utilization, as well of the due diligence standards of prevention of significant harm under Articles 5 and 7, respectively, of the New York Convention. On the other hand, Article 7 (para. 2) of the New York Convention has lent itself to considerations on the consequences of the actual or prospective occurrence of harm with a view to providing guidance to the joint bodies set up under the Helsinki Convention, or even for bilateral negotiations between its Parties, in the case of differences concerning an existing or a planned use of an international watercourse. Such considerations appear to be aimed at providing a flexible framework for balancing the equities at stake, next to the more rigid one based on State responsibility, or even less so, on a strict liability regime. To that end, reference can also be found in the report to the internalization of the remedies for the victims of transboundary harm referenced in Article 32 of the New York Convention.

The report has demonstrated that the two instruments provide an

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51 See supra note 6.

important synergic contribution to the ongoing customary law process in the field of international water law. It has argued that when their provisions cannot be proved to evidence a given consolidated customary rule, their authoritative guideline function in *de lege ferenda* terms can be instrumental in the generation of new customary law. This would also enhance non-Party States’ spontaneous abidance by their standards. The report has underlined the fact that this reasoning has been followed by the ICJ with the regard to the 1997 New York Convention in the *Gabcikovo-Nagymaros* case.\(^{53}\)

**The Helsinki Convention and the 1999 London Protocol on Water and Health**

The 1999 Protocol on Water and Health purports to “complement [the Helsinki] Convention with further measures to strengthen the protection of public health.”\(^{54}\) To that end, the Protocol specifies the general obligation of prevention, control and reduction of transboundary impact set out in Article 2 of the Helsinki Convention.

Focusing on the cooperation that marks the slant of the present publication, one should note that, while the general principle of cooperation is obviously key to the international law of transboundary watercourses, it appears most significantly expanded under the Protocol in point, and also with respect to the primarily domestic application of its key provisions. In fact, in accordance with its Article 11, the Protocol requires Parties to take coordinated action not only in terms of international cooperation in support of its objectives, but also (upon request) in terms of implementing national and local plans. With regard to cooperation at the international level, Article 12 requires Parties to cooperate and assist each other in relation to the development of targets and indicators, the establishment of coordinated surveillance and early-warning systems and the exchange of information. Moreover, Parties are to mutually assist each other to respond to outbreaks and incidents of water-related diseases by using, *inter alia*, prompt and clear notification mechanisms.

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\(^{53}\) After recalling the passage of the *River Oder* decision in which the PCIJ had upheld the principle of the equality of rights between co-riparians within the context of the law of river navigation, the World Court has referred to the 1997 UN Convention review as evidentiary of the consolidation of this principle within the context of international law on non-navigational uses of international watercourses (*I.C.J. Reports* 1997, p. 191). *See also* UN Doc. ECE/MP.WAT/2, *supra* note 45.

\(^{54}\) *See* § 8.
In addition to that, special obligations are imposed by Article 13 to Parties bordering the same transboundary waters. They must: exchange information, share knowledge and consult each other; endeavor to establish joint or coordinated water-management plans, surveillance and early-warning systems; and formulate contingency plans for the purpose of responding to outbreaks and incidents of water-related disease. Most importantly, Parties are also under the obligation to adapt their existing agreements in order to eliminate any contradictions with the basic principles of the Protocol.

The Protocol introduces the obligation of cooperation and of mutual assistance in a rather innovative manner with regard to the implementation of its provisions at the national and local levels. However, one is to note that cooperation at such levels is compulsory only upon request by the interested Party.55 Further to the just mentioned obligations “upon request,” the First Meeting of the Parties decided in January 2008 to establish an Ad Hoc Project Facilitation Mechanism (AHPFM) to assist eligible countries to successfully and properly implement the Protocol.56 The effectiveness of this mechanism is still to be tested.

As to its physical scope of application, the Protocol follows a wider approach than that of the Helsinki Convention. While introducing the principle of integrated management of water resources, it provides that:

Such an integrated approach should apply across the whole of a catchment area, whether transboundary or not, including its associated coastal waters, the

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55 Under Article 14, this applies to the promotion and the preparation of plans and schemes, the formulation and execution of projects, the establishment of surveillance and early-warning systems, contingency plans and response capacities, the preparation of implementing legislation, education, preventing and monitoring techniques.

56 As the AHPFM provides a useful framework for countries to request support in setting their targets and target dates, it can be considered the key factor for a proper implementation of the Protocol. The AHPFM is composed of two elements: a Facilitator and a Clearing House mechanism. The role of the former is to identify strategic areas of international assistance, to review and analyze project proposals submitted by eligible countries and relevant NGOs, and to assist them in drawing up and streamlining these proposals to meet the requirements of donor countries and organizations. The Clearing House is an open-ended body under the Meeting of the Parties with members from Parties and non-Parties (both from donor and recipient countries) and from global and regional financing institutions, relevant international organizations, competent international non-governmental organizations and international foundations with cooperation programs of recognized importance for water and health. The Clearing House aims to identify priority activities of non-infrastructure intervention for countries with economies in transition in certain areas and to assess the relevance of project proposals submitted to the Facilitator.
whole of a groundwater aquifer or the relevant parts of such a catchment area or groundwater aquifer.57

The Protocol adopts the precautionary principle, the polluter-pays principle and the principle of sustainable development58 as they are set out in the Convention.59 It also seems to add to the Convention what appears to be a combined reformulation of the equitable utilization principle and the no-harm rule,60 while the reference to the “principles of international law” in Article 5 (e) leaves unprejudiced the delicate balance reached in the 1997 New York Convention between the principle of equitable utilization and the no-harm rule.61

One is to note that the Protocol has a more explicitly twofold dimension with respect to the Helsinki Convention: a domestic one pertaining to the regulation of internal waters,62 and a transboundary one. In both cases the Protocol appears to contain substantive obligations of a more stringent character. Furthermore, one is to note that the drafters of the Protocol have expressly provided that, in case of a discrepancy between a provision contained in the Protocol and those of the Helsinki Convention, or of other watercourse agreements, the more stringent provisions will prevail.63

As to the transboundary scope of application of the Protocol, it adds further substance to the due diligence obligation of prevention of transboundary impact set out in the Convention by specifying water quality and quantity objectives and criteria in relation to water-related diseases. The Protocol appears to lower the “significant threshold” of permissible harm.64 The only possible drawback in the more stringent standards of the

57 Art. 5(i).
58 See art. 5(a)–(b), (d), respectively.
59 See supra notes 29–30.
60 Art. 5(e).
61 See A. Tanzi, supra note 14, at 453.
62 As to the application of the Helsinki Convention to inland waters, see Helsinki Declaration adopted on 4 July 1997 at the end of the First Meeting of the Parties (UN Doc. ECE/MP.WAT/2).
63 Art. 4 of the Protocol provides that “[t]he provisions of this Protocol shall not affect the rights and obligations of any Party to this Protocol deriving from the Convention or any other international agreement, except where the requirements under the Protocol are more stringent than the corresponding requirements under the Convention or that other existing international agreement” (Para. 9). It also provides that “[t]he provisions of this Protocol shall not affect the rights of the Parties to maintain, adopt or implement more stringent measures than those set down in this Protocol” (Para. 8).
64 See K. Sachariew, The Definition of Thresholds of Tolerance for...
Protocol may lie in the fact that this would make it more difficult for the Protocol to provide a model outside the UNECE area.

The Interaction Between Law-making, Law-implementation and Compliance

The Helsinki Convention follows a pattern—common to most modern environmental agreements—that has a direct impact on cooperation. The most relevant feature in this respect is the institutional follow-up to the Convention, consisting of the Meeting of the Parties to be held every three years. Under Article 17, the main purpose of such Meeting is to “keep under continuous review the implementation of this Convention.” To that end, this provision offers an ample basis for establishing an unlimited number of “specific committees in all aspects pertinent to the purposes of this Convention.” Formal amendments may be proposed, and “any additional action that may be required for the achievement of the purposes of this Convention [can be] considered and undertaken” in such forums.

These opportunities have been amply seized and four Task Forces were set up by the First Meeting of the Parties on the following issues: i) monitoring and assessment; ii) laboratory on quality management and accreditation; iii) legal and administrative aspects of the Convention; and iv) water and health. The working bodies under the institutional setting under the Convention (such as working groups, task forces and expert groups) have changed with time, reflecting the flexibility and adaptive

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65 Art. 17 § 2, for our purposes, goes on to provide that at such Meetings the Parties “shall: (a) Review the policies and methodological approaches to the protection and use of transboundary waters of the Parties with a view to further improving the protection and use of transboundary waters; (b) Exchange information regarding experience gained in concluding and implementing bilateral and multilateral agreements or other arrangements regarding the protection and use of transboundary waters to which one or more of the Parties are party; (c) Seek, where appropriate, the services of relevant ECE bodies as well as other competent international bodies and specific committees in all aspects pertinent to the achievement of the purposes of this Convention; [. . .] (e) Consider and adopt proposals for amendment to this Convention; (f) Consider and undertake any additional action that may be required for the achievement of the purposes of this Convention.”

66 Art. 17 § 2(c).

67 Id. at § 2(e).

68 Id. at § 2(f).

69 See supra note 62, at 12.
potentials of the Convention’s institutional structure. For example, in 2003 the Third Meeting of the Parties established a Legal Board to deal with legal questions related to the work under the Convention. Among the major achievements of the Legal Board, one should note the elaboration of the Model provisions on transboundary flood management adopted in 2006 and of the Guide to Implementing the Convention adopted in 2009. As we shall see further below, the Fifth Meeting of the Parties has mandated this body with the task of proposing a formula for the possible establishment of an “Implementation Committee” with a view to assist Parties and, possibly, non-Parties with solving problems of implementation of the Convention. The work in progress in this area is briefly illustrated below.

Non-compliance: responsibility and liability

Indeed, among the major developments under way, particularly through the Legal Board, one is to stress the just mentioned preparatory work for the establishment of an “Implementation Committee,” possibly to be adopted by the Sixth Meeting of the Parties to be held in 2012. At the present stage—subject to further negotiations within the Legal Board and the next Meeting of the Parties—it appears that the would-be Implementation Committee, while confirming the non-confrontational and non-adversarial character of most, if not all, existing compliance review bodies, would be composed of members serving in their personal capacity. Among its trigger mechanisms one finds self-submission by

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70 The institutional structure of the Convention, headed by the Meeting of the Parties and its Bureau, currently includes the Working Group on Monitoring and Assessment, the Working Group on Integrated Water Resources Management, the Task Force on Water and Climate, the Legal Board, and the Joint Expert Group on Water and Industrial Accidents. These bodies are serviced by the secretariat located in UNECE, Geneva. Since 2000, the International Water Assessment Centre (IWAC) acts as a collaborative centre of the Water Convention and supports its activities in several thematic areas.

71 See Doc. ECE/MP.WAT/15/Add.1, Annex III, para. 3.

72 See supra note 45.

73 See supra note 2.

74 See Doc. ECE/MP.WAT/29/Add.1, at 5.

75 See the last available version (at the time of delivery of the present chapter) of the document “Possible drafting language for a mechanism to facilitate and support implementation and compliance,” submitted by the Chair of the Legal Board for its Eighth Meeting held in Geneva on 24 and 25 February 2011, UN Doc. ECE/MP.WAT/AC.4/2011/3.

76 Id. at 3, as amended during the discussion at that Meeting (on file with the Author).
International law and freshwater

a Party experiencing problems with implementation of and, possibly, compliance with the Convention. One also finds Party-to-Party submission and self-trigger of the Committee when the latter becomes aware of possible difficulties in a Party’s implementation of, or compliance with, the Convention.77 While these trigger mechanisms would be in line with existing practice in the field, the present draft introduces a piece of novelty consisting of an advisory procedure that may be asked by one or more Parties.78 When the advice requested by a Party would concern any other Parties, or even non-Parties, any such Parties or non-Parties would participate in the advisory procedure only upon their consent.79 This procedure could result in advice and assistance to facilitate implementation and/or compliance, including assistance in: seeking support from specialized agencies; facilitating technical and financial assistance, including technology transfer; suggesting domestic regulatory measures or the negotiation of cooperation agreements; requesting or assisting the Party or Parties concerned to develop an action plan; inviting the Party or Parties concerned to submit an action plan to facilitate implementation of and compliance with the Convention; and inviting the Party or Parties concerned to submit progress reports on its or their efforts in implementing or complying with the Convention.80 Under any other procedure the Committee could also recommend to the Meeting of the Parties to take measures of the kind just indicated or to issue a statement of concern or even declarations of non-compliance (or cautions) to publicize cases of non-compliance, or even to suspend the rights and privileges accorded to the Party concerned under the Convention.81 One may also single out a 2010–11 study—also undertaken by the Legal Board upon request by the Fifth Meeting of the Parties—of the state of the art of the international law process on transboundary groundwater,82 including the achievements reached by the International Law Commission

77 Id. at 7 passim.
78 Id. at 6.
79 Id. at 7, as amended during the discussion at that Meeting (on file with Author).
80 Id. at 13.
81 Id. at 13.
Regional contributions to international water cooperation

In its Draft Articles of 2008,83 on the basis of such a study the Legal Board is preparing a systematic set of model treaty rules on transboundary groundwater to be submitted to the Sixth Meeting of the Parties for adoption and recommendation to the Parties and non-Parties to the Convention.

However, the absence at present of a compliance mechanism within the framework of the Helsinki Convention—or, even more so, the establishment of an Implementation Committee—cannot be taken as a reason to do away with the general rules on State responsibility in case of breaches of the obligations provided therein. This is confirmed by Article 22 of the Helsinki Convention and Article 20 of the London Protocol on settlement of disputes, which, among different forms of dispute settlement, provide for adjudication and arbitration (though on an optional basis). The drafters would not have envisaged those forms of dispute settlement had they considered the provisions of the two instruments unsuited to violation. Given the mainly preventive nature of the material obligations of the Helsinki Convention and of the London Protocol, as well as of those that may be derived from the substantive body of UNECE guidelines in the present field, State responsibility would arise for breach of due diligence obligations.84 The compulsory institutional cooperation between co-riparians provided for by the Helsinki Convention, as well as the emphasis placed during its follow-up activities on implementation and compliance, may hopefully render the issue of the international State responsibility deriving from breaches of the Convention less acute.

As to the development of a regulatory framework of civil liability of private operators for transboundary harm, the cooperative mechanisms of the Helsinki Convention and the UNECE Convention on the Transboundary Effects of the Industrial Accidents have produced the 2003 Kiev Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters.85 Unfortunately, it seems that the low degree of political awareness of States, operators, insurance companies and even supranational institutions involved will not facilitate its entry into force, just as with the majority of international conventional instruments on the matter in point.


84 See G. Pisillo Mazzeschi, supra note 31.

85 See www.unece.org/env/civil-liability/welcome.html.
CONCLUDING REMARKS ON THE UNECE AND THE GLOBAL DIMENSION OF THE WATER LAW PROCESS

In a contemporary perspective, the main focus concerning the impact of the UNECE water process at the global level is to be placed on the imminent prospect of the entry into force of the amendments to the 1992 Helsinki Convention, which allow for accession by countries outside the UNECE region. Indeed, what is now just a virtuous normative model of water cooperation at the global level would become a concrete normative and institutional option for co-riparians also outside the European region.

The function of normative guidance of the Helsinki Convention worldwide will be all the more enhanced by a joint interpretation and application in conjunction with the 1997 New York Convention of the kind presented above. Next to that, the added value of the Helsinki Convention at the global level would remain the institutional setting assisting Parties on the implementation and compliance with the general obligation of cooperation on transboundary watercourses. Indeed, non-European regions will be enabled to benefit, not only from the successful cooperation precedents under the Helsinki Convention that are already largely available in the Guide to Implementing the Convention, but also from the assistance deriving from its institutional framework.

As to the UNECE and the international institutional global dynamics relevant to water cooperation, one is to mention the actual and potential benefits the UNECE draws, or may draw, from global instruments.

It seems appropriate to refer to some exemplary forms of interaction between the UNECE and other international bodies in the field of technical, scientific and financial assistance to local projects falling within the UNECE area. As it appeared already from the first Meetings of the Parties to the Helsinki Convention, the contribution of international bodies in terms of financial and technical assistance to water projects in the UNECE area, global bodies—such as the GEF (Global Environment Facility) and the World Bank, UNEP and UNDP—are put on the same

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86 See supra note 6.
87 See supra note 19.
88 See supra note 2.
89 Established in 1992 as a pilot project to study new responses to global environmental challenges, including those related to international waters, in 1994 the GEF was made a permanent financial body with a $2 billion trust fund. Open to universal membership, it avails itself of the partnership of the World Bank, UNDP and UNEP as implementing agencies (see Instrument for the Establishment of the
Regional contributions to international water cooperation

level as the EU programs, such as the PHARE and the TACIS Programs. This seems most appropriate because those programs, rather than being competitive with or mutually exclusive to each other, more often than not operate through coordinated forms of division of labor and costs. The number of initiatives on the use and management of water resources in the Aral Sea Basin has been exemplary of such forms of inter-institutional cooperation. Against this background, the UNECE has invited global international financial bodies and funding mechanisms to give priority to joint country projects falling under the Helsinki Convention. What is most important to the lawyer, the preparatory and coordination roles performed by the UNECE focuses on the furthering of the water management legal framework of the projects eligible for funding. The conformity with international water law principles of a project is a necessary prerequisite for its approval under the so-called operational strategies of both the World Bank and the GEF.

However, one should not lose sight of the fact that, as of today, the above-referenced practice of interaction and mutual assistance has taken place through informal case-by-case arrangements. The case could be made that such an institutional kind of cooperation would be greatly furthered in terms of clarity, predictability and efficiency by the development of more formalized arrangements. The GEF has acknowledged this in its Restructured Global Environment Facility of 16 March 1994, in 33 I.L.M. 1283 (1994)). The goal of GEF and its implementing agencies is not just funding. By funding water projects subject to the requirements of their “operational strategies,” as well as through technical, economic and regulatory assistance, the GEF aims to promote transboundary co-operation for the sustainable use and development of international waters. See M.T. El-Ashry, The New GEF, 36 ENVIRONMENT 37 (1994); Jordan, Paying the Incremental Costs of Global Environmental Protection: The Evolving Role of the GEF, supra at 12; A.M. Duda & D. La Roche, Joint Institutional Arrangements for Addressing Transboundary Water Resources Issues — Lessons for the GEF, 21 NATURAL RESOURCES FORUM 127, 133 (1997).

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92 See A.M. Duda & D. La Roche, supra note 89.
of more formal arrangements to that effect. In that direction, one should hope that global financial institutions may become more formally explicit in their policies and guidelines concerning cooperation with the Helsinki Convention along the lines of the existing cooperation between the GEF and the UN Framework Convention on Climate Change and between the UN Convention to Combat Desertification and the Convention on Biological Diversity. This could be facilitated by the entry into force of the 2003 amendments opening the Water Convention to global participation.\footnote{See supra note 6.}