

Still not in force: Should States support the 1997 UN Watercourses Convention?

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On 21 May 1997, at the UN General Assembly, an overwhelming majority of States voted for the adoption of the United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses - a global overarching framework governing the rights and duties of States sharing freshwater systems.¹ To date, the Convention counts 17 contracting States² - 19 short of the number required for entry into force.³ This article examines whether and why States should support the Convention towards ensuring its entry into force. We first look at the governance of international watercourses, in order to illustrate the relevance of the Convention. The paper also examines the Convention's drafting and negotiation process, the subsequent practice of States, some possible reasons slowing down ratifications, and the likelihood of entry into force in the foreseeable future. Noting the widespread State support for the Convention in 1997, we conclude that, while various reasons have possibly prevented that support from translating into entry into force, the need for an effective UN Watercourses Convention has not diminished. In view of current human and environmental threats to the world's

¹ Convention on the Law of Non-Navigational Uses of International Watercourses (New York, 21 May 1997) (not yet in force) (UN Watercourses Convention).

² Status of Multilateral Agreements deposited with the Secretary General (United Nations, undated), found at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-12&chapter=27&lang=en.

³ See UN Watercourses Convention, n. 1 above, Article 36(1).

water resources, coupled with the poor governance of transboundary watersheds, the potential role that the Convention could play, once in force and widely ratified, as discussed below, may in fact be more critical than ever.

INTERNATIONAL WATERCOURSES AROUND THE WORLD

The UN Watercourses Convention aims to govern and inform the use, management, and protection of the world's international watercourses, for present and future generations, taking into account the special situations and needs of developing countries.⁴ Globally, there are 263 internationally shared watersheds, which drain the territories of 145 countries and represent 45.3 percent of the Earth's land surface (excluding Antarctica), or 62 percent of the land mass of Africa, 60 percent of South America, 54 percent of Europe, 39 percent of Asia and 35 percent of North America.⁵ Among watercourse States, 39 nations have more than 90 percent of their territory within those basins.⁶ Hence, inter-State cooperation towards the sustainable management of transboundary water supplies, in accordance with the UN Watercourses Convention and other applicable international legal instruments, is a topic of crucial importance, especially in the context of the current global water crisis. A recent UNEP study warned that:

⁴ Ibid., Preamble and Article 1.

⁵ A.T. Wolf *et al.*, 'International River Basins of the World', 15:4 Int'l J. Water Resources Dev. (1999), at 391-392.

⁶ Ibid.

The quantity and quality of surface- and groundwater resources, and life-supporting ecosystem services are being jeopardized by the impacts of population growth, rural to urban migration, and rising wealth and resource consumption, as well as by climate change. If present trends continue, 1.8 billion people will be living in countries or regions with absolute water scarcity by 2025, and two-thirds of the world population could be subject to water stress.⁷

This crisis, especially when examined in the context of climate change, has led some experts to predict increasing disputes and even wars within and between States over dwindling water supplies. For example, UN Secretary-General Ban Ki Moon has warned that, ‘water scarcity threatens economic and social gains and is a potent fuel for wars and conflict.’⁸ Similarly, in 1995, the Vice-President of the World Bank, Ismail Serageldin, predicted that, ‘many of the wars this century were about oil, but those of next century will be over water.’⁹ The former UK Defence Secretary, John Reid, has proclaimed that climate change will lead to ‘water wars’ and British armed forces must be ready to tackle such conflicts.¹⁰ At the same time, others have cautioned against such predictions,

⁷ UNEP, *Global Environment Outlook 4 – Environment for Development* (UNEP, 2007), at 116. See also *World Water Assessment Programme, 2nd UN Water Development Report: Water, A Shared Responsibility* (United Nations, 2006), found at <<http://www.unesco.org/water/wwap>>; UNDP, *Human Development Report 2006 – Beyond Scarcity: Power, Poverty and the Global Water Crisis* (UNDP, 2006), found at <<http://hdr.undp.org/en/media/hdr06-complete.pdf>>; P. H. Gleick *et al.*, *The World’s Water: The biennial Report on Freshwater Resources 2006-2007* (Island Press, 2006).

⁸ L. Lewis, ‘Water shortages are likely to be trigger for wars, says UN chief Ban Ki Moon’, *The Times* (4 December 2007), found at <<http://www.timesonline.co.uk/tol/news/world/asia/article2994650.ece>>.

⁹ Quoted in B. Crossette, ‘Severe Water Crisis Ahead for Poorest Nations in Next Two Decades’, *New York Times* (10 August 1995), found at <<http://query.nytimes.com/gst/fullpage.html?res=990CE1D9143EF933A2575BC0A963958260>>.

¹⁰ ‘Water Wars: Climate change may spark conflict’, *The Independent* (28 February 2006), found at <<http://environment.independent.co.uk/article348177.ece>>.

underscoring that, ‘the record of acute conflict over international water resources is historically overwhelmed by the record of cooperation.’¹¹

Irrespective of whether the gloomy predictions presented above become reality, disputes over international watercourses have occurred frequently around the world. For example, in the Middle East, Israel, Lebanon and Syria contest the rights pertaining to the Jordan River.¹² Turkey’s South-eastern Anatolia Project on the Tigris-Euphrates basin has proved a source of controversy downstream, in Iraq and Syria.¹³ In Africa, Nigeria’s hydro-agricultural and energy investments in the Niger basin are under threat from planned dam developments in Niger and Mali.¹⁴ In the Volta basin, Ghana has recently accused Burkina Faso of aggravating floods downstream by opening flood gates on a dam within the latter’s territory.¹⁵ Further south, the Okavango has long been a source of controversy between Angola, Botswana and Namibia.¹⁶ In East Africa, the Nile has sparked numerous inter-State disagreements, despite ongoing attempts to conclude a

¹¹ M.A. Giordano and A.T. Wolf, ‘Sharing waters: Post-Rio international water management’, 27 *Nat. Resources F.* (2003), 163, at 165.

¹² ‘Water in the Middle East: As thick as blood’, 337:7946, *The Economist* (23 December 1995), 57, at 57.

¹³ A. Kibaroglu, *Building a Regime for the Waters of the Euphrates-Tigris River Basin* (Kluwer, 2002).

¹⁴ M. Niassé, Transboundary River Basins, in *Atlas on Regional Integration in West Africa* (ECOWAS-SWAC/OECD, 2006), found at <<http://www.oecd.org/dataoecd/41/45/38409569.pdf>>.

¹⁵ BBC News, ‘African floods prompt aid appeal’ (21 September 2007), found at <<http://news.bbc.co.uk/1/hi/world/africa/7005969.stm>>.

¹⁶ P. Ashton, ‘The search for an equitable basis for water sharing in the Okavango River Basin’, in Mikiyasu Nakayama (ed.), *International Waters in Southern Africa* (United Nations University Press, 2003), 164.

basin-wide treaty.¹⁷ In Europe, the Gabčíkovo-Nagymaros Dam Project, in the Danube basin, remains a source of tension between Hungary and the Slovak Republic.¹⁸ In Central Asia, the most notable water-related disputes concern the Aral Sea region.¹⁹ In Asia's south-east, the Mekong basin has proved contentious particularly in relation to hydropower development.²⁰ The situation is not different in the Americas,²¹ including a recent case between Argentina and Uruguay, currently before the International Court of Justice.²² Unfortunately, the above examples represent just a few of such disputes.²³

¹⁷ See J. Brunnée and S. J. Toope, 'The Changing Nile Basin Regime: Does Law Matter?', 43 *Harv. Int'l L.J.* (2002), 105; J. Waterbury, *The Nile Basin, National Determinants of Collective Action* (Yale University Press, 2002).

¹⁸ ICJ 25 September 1997, *Hungary v. Slovakia (Gabčíkovo-Nagymaros Case)*, [1994] ICJ Rep. 151.

¹⁹ See D. Kemelova and G. Zhalkubaev, 'Water, Conflict, and Regional Security in Central Asia Revised', 11 *N.Y. Envtl.L.J.* (2003), 479; E. W. Sievers, 'Water Conflict and Regional Security in Central Asia', 10 *N.Y.U. Envtl.L.J.* (2002), 356; J.C. McMurray and A. D. Tarlock, 'The Law of Later-Developing Riparian States: The Case of Afghanistan', 12 *N.Y.U. Envtl. L.J.* (2005), 715.

²⁰ See A. B. Wyatt and I.G. Baird, 'Transboundary Impact Assessment in the Sesan River Basin: The Case of the Yali Falls Dam', 23:3 *Int'l J. of Water Resources Dev.* (2007), 427; L.W. Davis, 'Reversing the Flow: International Law and Chinese Hydropower Development on the Headwaters of the Mekong River', 19 *N.Y. Int'l L. Rev.* (2006), 1.

²¹ See, e.g., D. Ross, 'International Management of the Flathead River Basin', 1 *Colo. J. Int'l Envtl. L. Pol'y* (1990), 223.

²² ICJ, Press Release 'Argentina institutes proceedings against Uruguay and requests the Court to indicate provisional measures' (4 May 2006), found at <<http://www.icj-cij.org/docket/index.php?pr=1010&p1=3&p2=1&case=135&p3=6>>.

²³ See generally, P. K. Wouters, Foreword, in P. K. Wouters (ed.), *Selected Writings of Professor Charles B. Bourne*, International and National Water Law and Policy Series, Vol 1, (Kluwer, 1997), at xiii; S. C.

The next section considers the role and relevance of law and good governance in aiding States in the prevention and resolution of water-related disputes.

Water Crisis and Governance

The water crisis is often described as a crisis of governance.²⁴ Arguably, improving the way in which water is governed, at the local, national and international levels, would yield the greatest potential gain in addressing that crisis.²⁵ In this sense, numerous international policy documents recognise the need for improved freshwater governance.²⁶ According to the 2001 International Conference on Freshwater, for example:

McCaffrey, 'Water, Politics and International Law', in P. H. Gleick (ed.), *Water in Crisis: A Guide to the World's Freshwater Resources* (Oxford University Press, 1993), 92; A. T. Wolf, 'Conflict and Cooperation over International Waterways', 1 *Water Pol'y* (1998), 251; A. T. Wolf, *et al.*, 'International Waters: Identifying basins at risk', 5 *Water Pol'y* (2003), 29; S. C. McCaffrey, 'Water disputes defined: characteristics and trends for resolving them', in International Bureau of the Permanent Court of Arbitration (ed.), *Resolution of International Water Disputes* (Kluwer, 2003), 49.

²⁴ See World Water Assessment Programme, n. 7 above, at 44. 'Water Governance,' as broadly defined, encapsulates 'the range of political, social, economic and administrative systems that are in place to regulate the development and management of water resources and provision of water services at different levels of society.' P. Rogers and A. W. Hall, *Effective Water Governance*, GWP TEC Background Papers No. 7, found at <<http://www.gwpforum.org/servlet/PSP?iNodeID=215&itemId=197>>.

²⁵ See P. K. Wouters and A. S. Rieu-Clarke, 'The Role of International Water Law in ensuring 'Good Water Governance': A call for renewed focus and action', 15 *Water L.* (2004), 89; P. K. Wouters and A. Allan, 'What Role for Water Law in the emerging 'good governance' Debate?', 15 *Water L.* (2004), 85.

²⁶ 2nd World Water Forum, 17-22 March 2000, Ministerial Declaration of the Hague on Water Security in the 21st Century, found at <<http://www.waternunc.com/gb/secwwf12.htm>>; International Conference on Freshwater, 3-7 December 2001, Water – Key to Sustainable Development: Bonn Keys, found at <<http://www.water-2001.de/outcome/>>; World Summit on Sustainable Development, 26 August–4

The essential key is stronger, better performing governance arrangements. National water management strategies are needed now to address the fundamental responsibilities of Governments: laws, rules and standard setting; the movement from service delivery to the creator and manager of an effective legal and regulatory framework.²⁷

Despite a generally recognised need to strengthen governance arrangements related to water resources, a recent UNEP study observed that, ‘although there have been positive developments in recent decades, only one third of the world’s transboundary basins have established treaties, basin commissions or other forms of cooperative management frameworks. Even where intergovernmental agreements exist, they seldom address today’s challenges to water management.’²⁸ Similarly, a 2001 Declaration of African Ministers notes that, ‘most international [African] basins are without any agreements on equitable use or environmental protection. Few have effective institutional arrangements for consultation or cooperation. Procedures for avoiding or resolving international disputes over water are largely lacking.’²⁹

The above findings gain special relevance when one considers that laws and institutions – both central tenets of governance – are among the most important factors in influencing relations between States sharing water resources. Recent research indicates that the role of laws and institutions exceeds more traditionally cited factors, such as

September 2002, Plan of Implementation, UN Doc. A/Conf.199/20 (4 September 2002); 3rd World Water Forum, 16-23 March 2006, Ministerial Declaration, found at <<http://www.world.water-forum3.com>>.

²⁷ See International Conference on Freshwater, n. 26 above.

²⁸ UNEP, Global International Waters Assessment, *Challenges to International Waters – Regional Assessments in a Global Perspective* (UNEP, 2006), 12 (GIWA).

²⁹ See International Conference on Freshwater, n. 26 above, Declaration of African Ministers responsible for Water Resources, found at <http://www.thewaterpage.com/Documents/bonn_africa.doc>.

climate, water availability, population density, political orientation, and levels of economic development.³⁰ This recognition further underscores the need to strengthen the law governing international watercourses – a need that the General Assembly identified as early as the 1950s, when it initiated its work on the codification and development of international water law, leading up to the adoption of the UN Watercourses Convention.

Work of the ILC and General Assembly

In 1959, the General Assembly decided to ‘initiate preliminary studies on the legal problems relating to the utilisation and use of international rivers with a view to determining whether the subject [was] appropriate for codification.’³¹ The next step was a report by the UN Secretary-General, discussing the legal problems arising from the utilisation of international rivers, which he submitted to the General Assembly in 1963.³² Following that report, the General Assembly recommended that the ILC should, ‘take up

³⁰ M. A. Giordano & A. T. Wolf, ‘Sharing Waters: Post-Rio International Water Management’, 27 *Nat. Resources F.* (2003), 163; see also S. Vinogradov, *et al.*, *Transforming Potential Conflict into Conflict Potential: The Role of International Water Law* (UNESCO-IHP, 2003), found at <<http://unesdoc.unesco.org/images/0013/001332/133258e.pdf>>; P. K. Wouters, ‘Water Security: What role for international water law?’, in F. Dodds and T. Pippard (eds.), *Human and Environmental Security: An Agenda for Change*, (Earthscan, 2005), 166.

³¹ Preliminary studies on the legal problems relating to the utilisation and use of international rivers (UNGA Res. 1401 (XIV), 21 November 1959).

³² Report of the Secretary-General on the legal problems relating to the utilisation of international watercourses (UN Doc. A/5409, 15 April 1963).

the study of the law of the non-navigational uses of international watercourses with a view to its progressive development and codification.³³

In 1991, following almost 20 years of study of State practice led by five eminent international lawyers acting as Special Rapporteurs, the ILC adopted a draft set of Articles on first reading.³⁴ In light of comments and observations by States,³⁵ the ILC adopted a revised set of draft Articles in 1994, along with a recommendation that a convention be elaborated on the basis of their text.³⁶

³³ Progressive development and codification of the rules of international law relating to international watercourses (UNGA Res. 2669(XXV), 21 July 1971).

³⁴ Draft Articles on the Law of the Non-navigational Uses of International Watercourses, in Report of the ILC on the work of its forty-third session, 46 UN GAOR Supp. (No. 10) at 29, (UN Doc. A/46/10, 10 September 1991) (1991 ILC Draft Articles). The Special Rapporteurs were Richard Kearney, Stephen Schwebel, Jens Evensen, Stephen McCaffrey and Robert Rosenstock.

³⁵ See The Law of the Non-navigational Uses of International Watercourses - Comments and Observations Received from Governments (UN Doc. A/CN.4/447 & Add 1-3, 3 March 1993). See also The Law of the Non-navigational Uses of International Watercourses – Replies of Governments to the Commission’s Questionnaire (UN Doc. A/CN.4/294 & Add. 1, 1 April 1976). The Law of the Non-navigational Uses of International Watercourses (UN Doc. A/CN.4/314, 23 June 1978). The Law of the Non-navigational Uses of International Watercourses – Replies of Governments to the Commission’s Questionnaire (UN Doc. A/CN.4/324, 13 July 1979) The Law of the Non-navigational Use of International Watercourses – Replies of Governments to the Commission’s Questionnaire (UN Doc. A/CN.4/329 & Add. 1, 3 July 1980). The Law of the Non-navigational Uses of International Watercourses – Replies of Governments to the Commission’s Questionnaire (UN Doc. A/CN.4/352 and Add. 1, 8 February 1982).

³⁶ Draft Articles on the Law of the Non-navigational Uses of International Watercourses, found in *Report of the ILC on the work of its forty-sixth session* (A/CN.4/SER.A/1994/Add.1 (Part 2), 1996), 49 UN GAOR Supp. (No. 10) at 210 (1994 ILC Draft Articles).

Having considered the 1994 Draft Articles, the General Assembly decided to convene its Sixth Committee (legal) as a working group of the whole, open to all Member States and specialised agencies, to follow-up on the ILC's recommendation.³⁷ In justifying its decision, the General Assembly explained that, 'despite the existence of a number of bilateral treaties and regional agreements, the use of international watercourses is still based in part on general principles and rules of customary law.'³⁸ The Sixth Committee met in two sessions, and the Convention was finally adopted in May 1997.

The Convention is therefore the result of a long process within the ILC and the General Assembly – a process that arguably culminated in the most authoritative text to date on the current status of the law governing the non-navigational uses of international watercourses.

We should also underscore the decision to elaborate a *Convention*, as opposed to non-binding guidelines, given the General Assembly's approach to other recommendations by the ILC. For example, in regards to the ILC Draft Articles on the Responsibility of States for International Wrongful Acts, the General Assembly requested the Secretary-General 'to invite Governments to submit their written comments *on any future action* regarding the Articles.'³⁹

If the work of the ILC relating to the law of the non-navigational uses of international watercourses had been intended to be used by States merely as a guide for elaborating more specific watercourse agreements then presumably the 1994 ILC Draft

³⁷ Draft Articles on the law of the non-navigational uses of international watercourses (UNGA Res. 49/52, 9 December 1994).

³⁸ *Ibid.*

³⁹ Responsibility of States for Internationally Wrongful Acts (UNGA Res. 59/53, 16 December 2004)

[emphasis added].

Articles would have been sufficient for that purpose. However, the General Assembly's decision to elaborate a Convention on the matter implies that, at least in 1994, States recognised the need for a binding legal instrument at the global level to support the codification and progressive development of international water law.

A further issue to consider is, therefore, whether State opinion towards the need for such a global instrument waned, either as a result of the negotiation process or due to the final product, as discussed in the following sections.

Content of the Convention

Purpose of the Convention

The UN Watercourses Convention seeks to lay down the basic international norms governing the non-navigational uses of international watercourses.⁴⁰ The key aim of the Convention is to 'ensure the utilisation, development, conservation, management and protection of international watercourses and the promotion of the optimal and sustainable utilisation thereof for present and future generations'; whilst 'taking into account the special situation and needs of developing countries'.⁴¹

Substantive Norms

The cornerstone of the UN Watercourses Convention is the principle of reasonable and equitable use, according to which States must 'utilise an international

⁴⁰ For a detailed analysis of the Convention, see A. Tanzi and M. Arcari, *The United Nations Convention of the Law of International Watercourses – A framework for sharing* (Kluwer, 2001). See also P. K. Wouters, *The Legal Response to International Water Conflicts: The UN Watercourses Convention and Beyond*, 42 *Ger. Y.B. Int'l L.* (1999), 293.

⁴¹ See UN Watercourses Convention, n. 1 above, Preamble.

watercourse in an equitable and reasonable manner.’⁴² In weighing up what is equitable and reasonable, States must take into account all relevant social, environmental and economic factors and circumstances.⁴³

Another key principle of the Convention is the so-called no harm rule, which requires States to ‘take all appropriate measures to prevent the causing of significant harm to other watercourse States.’⁴⁴ In order to align the ‘no harm’ rule with equitable and reasonable utilisation, the Convention provides that some harm may be tolerated if it can be proven that such harm is consistent with the principle of equitable and reasonable utilisation.⁴⁵

The Convention also contains rules relating to the protection and preservation of international watercourses and their ecosystems. Article 20, in particular, sets out a general rule that States must ‘individually and, where appropriate, jointly, protect and preserve the ecosystems of international watercourses.’⁴⁶ Articles 21-23 of the Convention contain specific provisions relating to the prevention, reduction and control of pollution, the introduction of alien or new species, and the protection and preservation of the marine environment.

Procedural Rules and Dispute Settlement

The procedural rules of the Convention find their roots in a general obligation upon States to ‘cooperate on the basis of sovereign equality, territorial integrity, mutual

⁴² Ibid., Article 5.

⁴³ Ibid., Article 6.

⁴⁴ Ibid., Article 7.

⁴⁵ Ibid., Article 7(2).

⁴⁶ Ibid.

benefit and good faith in order to attain optimal utilisation and adequate protection of an international watercourse.⁴⁷ Pursuant to this general obligation, the Convention contains specific provisions for, *inter alia*, the notification of, and consultations and negotiations on, planned measures; the establishment of management mechanisms; and the regular exchange of data and information.⁴⁸

Consistent with the UN Charter, the UN Watercourses Convention also obliges States to settle any dispute by peaceful means, such as through negotiation, good offices, mediation, conciliation, arbitration or adjudication.⁴⁹ In the event that a dispute remains unresolved by the above-mentioned means, for a predetermined period, the Convention provides for the establishment of a ‘Fact-finding Commission’, upon request from any of the parties to the dispute. With the full cooperation of the States involved, the Commission’s role is to investigate the dispute and produce a report setting forth its findings and recommendations on how to achieve an equitable solution. The parties are obliged to consider the Commission’s recommendations in good faith.⁵⁰

Contentious Issues

A number of issues proved contentious during the negotiation of the UN Watercourses Convention.⁵¹ Those that generated greatest controversy were the Convention’s relationship with existing and future watercourse agreements; the balance

⁴⁷ Ibid., Article 8(1).

⁴⁸ Ibid., Articles 9, 11-19, and 24.

⁴⁹ Ibid., Article 33(1)-(2).

⁵⁰ Ibid., Article 33(2)-(10).

⁵¹ See S.M.A. Salman, ‘The United Nations Watercourses Convention Ten Years Later: Why Has its Entry into Force Proven Difficult?’ 32 *Water Int’l* (2007), 1.

between equitable and reasonable utilization, and the no harm rule; and the appropriateness of the dispute settlement mechanisms.

Existing and Future Agreements

Article 3(1) of the UN Watercourses Convention provides that, ‘in the absence of an agreement to the contrary, nothing in the present Convention shall affect the rights or obligations of a watercourse State arising from agreements in force for it on the date on which it became a party to the present Convention.’ In addition, Article 3(3) stipulates that ‘watercourse States may enter into one or more agreements ... which apply and adjust the provisions of the present Convention to the characteristics and uses of a particular international watercourse or part thereof.’⁵²

Article 3 seeks to capture the framework nature of the UN Watercourses Convention, by providing sufficient flexibility to accommodate specific circumstances at the regional and basin levels.⁵³ The text also aims to address the concerns of those States that felt that a mandatory review of the 3,600 or so existing watercourse agreements, upon entry into force of the Convention, would be unduly burdensome.⁵⁴ Other States,

⁵² See UN Watercourses Convention, n. 1 above.

⁵³ In this sense, see C. Yamada, Statements of Understanding pertaining to the Texts of the Draft Convention, in *Report of the Sixth Committee convening as the Working Group of the Whole*, (UN Doc. A/51/869, 11 April 1997), 4, at 5, providing that, ‘The present Convention will serve as a guideline for future watercourse agreements and, once such agreements are concluded, it will not alter the rights and obligations provided therein, unless such agreements provide otherwise.’

⁵⁴ See Egypt’s statement explaining its abstention, in United Nations General Assembly, 51st Session, 99th Plenary Meeting (U.N. Doc. A/51/PV.99, 21 May 1997) (Voting Records), 10

however, felt that parties should be under a clear obligation to harmonise existing agreements with the Convention.⁵⁵

Article 3 was therefore the product of two very divergent views and unsurprisingly did not satisfy all. Ultimately, 35 countries voted in favour of the revised text, while 3 countries voted against (Ethiopia, France and Turkey), and 22 abstained.⁵⁶

Equitable and Reasonable Utilisation, and No Significant Harm

The most contentious issue during negotiations was the relationship between equitable and reasonable utilisation and the no harm rule. The debate centred on which norm should take precedence. In an attempt to solve the debate, Article 7(2), focussing on the relationship between those two norms, was significantly amended from its earlier versions in the 1991 and 1994 ILC Draft Articles. The inclusion of the phrase ‘having due regard for the provisions of Article 5 and 6’ was seen to give precedence to the principle of equitable and reasonable utilisation over the rule of no significant harm.⁵⁷

The revised set of Articles 5 to 7 was adopted by 38 votes in favour, 4 (China, France, Tanzania and Turkey) against and 22 abstaining.⁵⁸ Following the vote, a number of States voiced their concern over Articles 5 to 7, maintaining that a more balanced text was needed.⁵⁹

⁵⁵ See Ethiopia’s statement explaining its abstention, in *ibid.*, 9-10.

⁵⁶ Sixth Committee of the United Nations General Assembly, Summary Record of the First Part of the 62nd Meeting (UN Doc. A/C.6/51/SR.62, 29 August 1997), 6.

⁵⁷ See, e.g., S. C. McCaffrey and M. Sinjela, *Current Development: The 1997 United Nations Convention on International Watercourses*, 92 *Am. J. Int’l L.* (1998), 97, at 101-02.

⁵⁸ See Sixth Committee, n. 56 above, at paragraph 3.

⁵⁹ *Ibid.*, paragraphs 11, 15-24, 28-32.

Compulsory Dispute Settlement

The third major controversial issue centred on whether dispute settlement provisions were appropriate within a framework agreement, and the extent to which such measures should be compulsory. Ultimately, the text of Article 33 was adopted by 33 votes to 5 (China, Colombia, France, India and Turkey), with 25 abstentions.⁶⁰

As adopted, Article 33 creates time-bound steps for peaceful dispute settlement. Notably, it allows for States to unilaterally initiate fact-finding procedures when they fail to reach an agreement through other available mechanisms after a determined period. The idea is to prevent the dispute from turning into a real conflict, while achieving an equitable resolution, based on an accurate knowledge and impartial assessment of the facts. While parties must consider the fact-finding report in good faith, such a report is not binding upon them.

Voting Records and Subsequent Reaction to the Convention

General Assembly Voting Record

The Convention was sponsored by 38 States, and adopted by a vote of 106 States in favour, 26 abstentions, and 3 votes against (from Burundi, China and Turkey).⁶¹

While it is unclear why Burundi voted against the Convention, having not actively participated in the working group, Turkey and China explained their respective positions. For China, the text did not reflect a broad consensus amongst States, in that it failed to provide for a proper balance between the interests of upstream and downstream riparians, and because mandatory dispute settlement mechanisms were unacceptable within a

⁶⁰ *Ibid.*, 87.

⁶¹ Voting Records, n. 54 above, at 2, and 7-8.

framework Convention. Turkey's negative vote was largely based on its position towards the aforementioned contentious issues, particularly the relationship between the principles of equitable and reasonable use and no-harm, the compulsory dispute settlement, and the Convention's status in relation to existing and future watercourse agreements. Turkey also argued that the procedural rules relating to planned measures went beyond the scope of what should be included in a framework convention.

Of the numerous abstaining States that offered an explanation as to their voting, many reiterated their concern over the contentious issues outlined above. Particularly subject to controversy was the question of whether the Convention appropriately balances the interests of upstream and downstream countries when determining the relationship between the no-harm rule and the equitable utilization principle.⁶² However, such criticisms often fail to note that, in recognizing equitable and reasonable utilization as its cornerstone, the Convention is consistent with actual State practice. In other words, the Convention's approach, 'which clearly established a *process* for reconciling competing uses, seems not only preferable, but also closer to what will usually happen in practice.'⁶³

One further notable concern related to time constraints and the lack of consensus. Such concern was noted by Tanzania and France – the latter stating that, 'the haste in negotiations had created serious procedural discrepancies which affected the credibility of the resulting text.'⁶⁴ The Chinese delegate alluded to similar concerns in the deliberations over Articles 5 to 7, stating: 'In view of the results of the vote ... she

⁶² Ibid.

⁶³ See S.C. McCaffrey and M. Sinjela, n. 57 above, at 101-102.

⁶⁴ Ibid.

wondered about the anticipated effects of the convention and the number of countries which would be in a position to accept it [T]he measure of resorting to a vote [rather than consensus] was a dangerous departure from the traditions of the sixth committee.⁶⁵

Despite such concerns and some level of opposition, the overwhelming number of States that voted in favour of the Convention suggests that there was ultimately significant support for its text as adopted in 1997.

Signatories and Contracting States

More than 10 years after the Convention was negotiated, it only counts 17 contracting States (see table). The most recent accession was from Tunisia, in 2009, which had signed the Convention in 2000. Uzbekistan has also become a contracting

⁶⁵ See Sixth Committee, n. 56 above, at para. 3.

Table 1: UN Watercourses Convention: Ratification Status

Participant	Signature	Ratification, Acceptance (A), Accession (a), Approval (AA).
Côte d'Ivoire	25 Sep. 1998	
Finland	31 Oct. 1997	23 Jan. 1998 A
Germany	13 Aug. 1998	15 Jan. 2007
Hungary	20 July 1999	26 Jan. 2000 AA
Iraq		9 July 2001 a
Jordan	17 Apr. 1998	22 June 1999
Lebanon		25 May 1999 a
Libya		14 June 2005 a
Luxembourg	14 Oct. 1997	
Namibia	19 May 2000	29 Aug 2001
Netherlands	9 Mar. 2000	9 Jan. 2001 A
Norway	30 Sep. 1998	30 Sep. 1998
Paraguay	25 Aug. 1998	
Portugal	11 Nov. 1997	22 June 2005
Qatar		28 Feb. 2002 a
South Africa	13 Aug. 1997	26 Oct. 1998
Sweden		15 June 2000 a
Syria	11 Aug. 1997	2 Apr. 1998
Tunisia	19 May 2000	22 Apr. 2009
Uzbekistan		4 Sep. 2007 a
Venezuela	22 Sep. 1997	
Yemen	17 May 2000	

State recently, even though it had originally abstained from voting. Among those countries that have acceded to or have ratified the Convention, Iraq and Lebanon did not participate in the Convention's voting at the General Assembly. An additional five countries that had signed the Convention have not yet deposited the appropriate instrument of ratification, acceptance, accession or approval.

While it might be no surprise that the Convention has not been endorsed by those States that voted against it – or even by some of the abstaining countries – this does not explain the inaction on the part of those that voted in favour and have not yet joined the Convention. Even more curious is the fact that, out of the 38 governments sponsoring the text, only ten have subsequently become contracting States. This begs the questions of subsequent treaty practice, as well as of what may be the reasons possibly slowing down the process for entry into force of the Convention, as discussed below.

UN Watercourses Convention and Subsequent Treaty Practice

Since its adoption, the UN Watercourses Convention has influenced negotiations on regional, basin-specific and bilateral agreements. For example, the Member States of the Southern African Development Community revised their 1995 Protocol on Shared Watercourses Systems in 2000 largely to ensure that its provisions reflected those of the Convention.⁶⁶ Other examples of agreements drawing significantly from the Convention include the 2002 Framework Agreement on the Sava River Basin,⁶⁷ the 2002 Incomati and Maputo Agreement,⁶⁸ the 2003 Protocol for the Sustainable Development of Lake

⁶⁶ SADC Revised Protocol on Shared International Watercourses (Windhoek, 7 August 2000).

⁶⁷ Framework Agreement on the Sava River Basin (Kranjska Gora, 3 December 2002), found at <<http://faolex.fao.org/docs/pdf/mul45452.pdf>>.

⁶⁸ Tripartite Interim Agreement for Co-operation on the Protection and Sustainable Utilisation of the Water Resources of the Incomati and Maputo Watercourses (Johannesburg, 29 August 2002), found at <www.dwaf.gov.za/Docs/Other/IncoMaputo/INCOMAPUTO%20AGREEMENT%2029%20AUGUST%202002.doc>.

Victoria,⁶⁹ the 2004 Agreement on the Establishment of the Zambezi Watercourse Commission,⁷⁰ and the 2007 Convention on the Volta River.⁷¹ The UN Watercourses Convention was also endorsed by the International Court of Justice in the 1997 Gabčíkovo-Nagymaros case.⁷²

Such support is not limited to those States that voted in favour of the Convention. For example, while China voted against the Convention in 1997, it has subsequently concluded several bilateral agreements with neighbouring States. Such treaties include the 2001 Agreement between Kazakhstan and China on Cooperation in the Use and Protection of Transboundary Rivers, which obliges its Parties to ‘adhere to the principles of equity and rationality, as well as closely cooperate in a sincere, neighbourly, and friendly manner.’⁷³ This provision is closely aligned with Articles 5 and 8 of the UN Watercourses Convention. In its turn, Turkey has subsequently expressed a desire to join the European Union. Upon doing so, Turkey would be subject to the more stringent provisions contained in the 2000 EU Water Framework Directive⁷⁴ and the UNECE

⁶⁹ Protocol for the Sustainable Development of the Lake Victoria Basin (Arusha, 29 November 2003), found at <<http://faolex.fao.org/docs/pdf/mul41042.pdf>>.

⁷⁰ Agreement on the Establishment of the Zambezi Watercourse Commission (Kasane, 13 July 2004), found at <<http://www.zacpro.org/downloads/ZAMCOM%20AGREEMENT.pdf>>.

⁷¹ Convention on the Status of the Volta River and the Establishment of the Volta Basin Authority (Ouagadougou, 19 January 2007) (on file with authors).

⁷² See *Gabčíkovo-Nagymaros Case*, n. 18 above.

⁷³ Agreement on management and protection of transboundary rivers, Kaz.-P.R.C. (Astana, 12 September 2001), found at <<http://faolex.fao.org/docs/texts/bi-65815.doc>>.

⁷⁴ Council and European Parliament Directive 2000/60/EC of 23 October 2000, establishing a framework for Community action in the field of water policy, [2000] O.J. L 327/1.

Water Convention.⁷⁵ For example, while the UN Watercourses Convention governs water pollution in its Article 21, the two aforementioned European legal instruments contain much stricter and more detailed obligations on the topic.

Arguably, therefore, even though not yet in force, the UN Watercourses Convention has been, at least to some degree, performing one of its key functions as a framework instrument – that of informing inter-State negotiations on watercourse agreements. However, a significant number of international watercourses still lack adequate legal frameworks to ensure the equitable and sustainable use of their waters.⁷⁶ As discussed below, therefore, entry into force could significantly contribute to greater levels of awareness and understanding of the Convention and thus boost the adoption of watercourses agreements on the basis of its text.

Possible reasons slowing down the ratification process

One possible reason behind the low number of contracting States could be ‘treaty congestion’. The UN Watercourses Convention was adopted at a time when international law relating to the environment and development was undergoing significant change. The 1990s witnessed the negotiation and conclusion of global agreements relating to climate change,⁷⁷ biodiversity⁷⁸ and desertification⁷⁹; as well as non-binding instruments,

⁷⁵ Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 17 March 1992) (in force 6 October 1996) (UNECE Water Convention).

⁷⁶ See GIWA, n. 28 above, at 35.

⁷⁷ UN Framework Convention on Climate Change (New York, 9 May 1992) (UNFCCC); Protocol to the UN Framework Convention on Climate Change (Kyoto, 11 December 1997).

⁷⁸ UN Convention on Biological Diversity (Rio de Janeiro, 5 June 1992) (CBD).

such as the Rio Declaration on Environment and Development, the Forest Principles and the Agenda 21.⁸⁰ This proliferation of international agreements and ‘soft-law’ instruments has led to the phenomenon described as ‘treaty congestion.’ Already in 1993, Edith Brown Weiss noted that,

... treaty congestion leads to overload at the national level in implementing the international agreements. A country needs sufficient political, administrative, and economic capacity to be able to implement agreements effectively. Today a large number of international environmental institutions, including most pointedly the numerous secretariats servicing international environmental agreements, have some claim on the administrative capacity of national States.⁸¹

The UN Watercourses Convention was adopted in the latter half of the 1990s, at the tail end of many other agreements relating to the environment and development. Treaty congestion could, therefore, be a possible reason why States have not been more proactive in joining the Convention.

It is worth mentioning, however, that entry into force of the UN Watercourses Convention could support the implementation of other multilateral environmental agreements (MEAs) that touch on water-related issues. Such treaties include the Ramsar

⁷⁹ Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (Paris, 17 June 1994) (UNCCD).

⁸⁰ Declaration of the UN Conference on Environment and Development (UN Doc. A/Conf.151/26 (Vol.I), 1992); Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests (UN Doc. A/Conf.151/26 (Vol.III), 1992); Agenda 21: A Programme for Action for Sustainable Development (U.N. Doc. A/Conf.151/26 (Vol. II), 1992).

⁸¹ E. Brown Weiss, ‘International Environmental Law: Contemporary Issues and the Emergence of a New World Order’, 81 *Geo. L.J.* 675 (1993), 697.

Convention,⁸² the World Heritage Convention,⁸³ the Convention on Biological Diversity (CBD),⁸⁴ the UN Framework Convention on Climate Change (UNFCCC),⁸⁵ and the UN Convention to Combat Desertification (UNCCD).⁸⁶ In this sense, a study by the Foundation for International Environmental Law and Development (FIELD) on MEAs and water resources management concluded that ‘there is a need for a coherent, transparent and participatory global framework to strengthen policy co-ordination and the implementation of water-related decisions ... at the UN level.’⁸⁷ Widespread support for the UN Watercourses Convention could therefore be a catalyst for facilitating such a co-ordination role.⁸⁸

⁸² Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar, 2 February 1971). See *ibid.*, Article 5. Around 30 percent of Ramsar sites are located in international river basins.

⁸³ Convention on the Protection of the World Cultural and Natural Heritage (Paris, 23 November 1972). A number of sites relevant to transboundary waters fall under the provisions of this Convention, including the Iguazu National Park, the Upper Middle Rhine Valley, the Dresden Elbe Valley, Lake Malawi, Danube Delta and the Victoria Falls.

⁸⁴ See CBD, n. 78 above, Article 14(c).

⁸⁵ See UNFCCC, n. 77 above, Article 4(e).

⁸⁶ UNCCD, n. 79 above, Article 2(2).

⁸⁷ FIELD, *Implementation of Multilateral Environmental Agreements for Efficient Water Management* (FIELD, 2005), at 4.

⁸⁸ For more information on the relationship between the UN Watercourses Convention and other MEAs, see F. R. Loures *et al.*, *Everything you need to know about the UN Watercourses Convention* (WWF, 2009), found at <http://assets.panda.org/downloads/wwf_un_watercourses_brochure_for_web_1.pdf>. See also S. Breils *et al.*, *CBD Technical Series No. 40: Transboundary water resources management: the role of*

Another reason why the UN Watercourses Convention has not been widely ratified may relate to lack of awareness and capacity. Such a finding was evident from a recent survey of West African States. That survey found that few ministries responsible for water-related issues in that region were aware of the content, relevance and sometimes even existence of the Convention.⁸⁹ Given the current water crisis, and the recognised need for good governance, it is disappointing that more States are not aware of the potential value the Convention. Moreover, there seems no obvious reason why other global environmental issues should be afforded any greater priority than the current water crisis, as key topics warranting regulation at the global level in the context of an international treaty.

Regarding lack of capacity, in particular, West African States have already recognized the need to look more closely at the UN Watercourses Convention and promote its widespread ratification across the region. At the same time, however, these countries have called for greater support from the international community to aid their governments, both technically and financially, through the ratification process.⁹⁰

international watercourse agreements in implementation of the CBD, (CBD, 2008), found at

<<http://www.internationalwaterlaw.org/bibliography/WWF/cbd+iwl.pdf>>.

⁸⁹ A. Garane, *UN Watercourses Convention: Applicability and Relevance in West Africa* (2008), found at <http://www.internationalwaterlaw.org/bibliography/WWF/RA_West_Africa.pdf>. See also interview by Keith Hayward with Patricia Wouters, in A. S. Rieu-Clarke, 'Entry into force of the 1997 UN Watercourses Convention: barriers, benefits and prospects', *Water* 21 (December 2007), 12.

⁹⁰ 2007 Dakar Call for Action on the Ratification of the UN Watercourses Convention by West African States, done at the Workshop 'The Relevance of the 1997 UN Watercourses Convention within West Africa' (Dakar, Senegal, 20-21 September 2007) (Dakar Call for Action) (on file with authors).

Finally, for many years, the Convention lacked any champions, both among governments and international organizations. While some key individual governments, UN bodies, such as UNEP, or regional organisations, such as the European Community, have been behind the swift (or, at least, more effective) ratification process of other multilateral agreements, no such support had been afforded to the UN Watercourses Convention until recently. It was only during the last few years that the international community has come together around the goal of accelerating the Convention's ratification process. For instance, in 2006, the World Wide Fund for Nature (WWF) – an environmental non-governmental organization – launched an international initiative to raise awareness of the Convention, promote its entry into force and future implementation, and assist States through the ratification process. Other stakeholders have progressively joined the initiative, which has produced some tangible results over the years. For example, the initiative has mobilized several key stakeholders to support the process, including among the current contracting States (including the Netherlands, Sweden), some relevant UN agencies (such as UN Development Programme), and intergovernmental organizations (including the Economic Community of West African States). Furthermore, the initiative comprises technical and financial assistance to States in several regions, including Latin America, Africa, and Asia. This component has enabled countries such as Ghana, Benin, Niger, and Papua New Guinea to engage in an informed and multi-stakeholder consultation and decision-making process and, more recently, to trigger the necessary procedures for acceding to the Convention.⁹¹

⁹¹ For more information about the global initiative, its partners and some interesting materials produced, visit UN Freshwater Agreements Initiative, *UN Watercourse Convention* (WWF, undated), found at

Benefits of Entry into Force

This section examines the key question of what would be the value added by entry into force of the Convention – as opposed to simply having it as a reference and non-binding framework – in light of the ever-pressing need to strengthen the legal governance of international watercourses.

A Tool to Spur Negotiations on Regional, Basin and Sub-Basin Agreements

As noted above, while some States have relied upon the Convention to conclude watercourse agreements, such reliance has so far been limited, and many watercourses still lack an adequate legal framework to ensure their equitable and reasonable utilisation. The entry into force of the Convention would not only show that States are strongly committed to addressing the water crisis as a *global* issue, but would strengthen the role of international law in enhancing cooperation between watercourse States. In this context, the entry into force of the Convention, followed by appropriate levels of support to its widespread implementation, could serve as an added political impetus in establishing and, where necessary, strengthening regional, basin and sub-basin agreements.

Such a role for a global framework treaty was a major reason for countries like Finland, Germany and the Netherlands to support the Convention.⁹² Those countries have already concluded agreements with their neighbours, consistent with the provisions of the

<http://www.panda.org/what_we_do/policy/international_water_law/un_watercourses_convention/>.

⁹² See Ulkoasianministeriö, Yleissopimus Kansainvälisten Vesistöjen Muuhun Kuin Liikennekäyttöön Sovellettavista Säännöistä Allekirjoittaminen, (9 October 1997) (on file with authors); Ulkoasianministeriö, Yleissopimus Kansainvälisten Vesistöjen Muuhun Kuin Liikennekäyttöön Sovellettavista Säännöistä, Hyväksyminen (9 January 1998) (on file with authors).

UN Watercourses Convention.⁹³ Therefore, in those cases, there would be no direct added value in becoming a contracting State. The relevance of the Convention for those countries relates more to foreign relations than to domestic benefits. By joining it, they reaffirm their recognition of the Convention's value to the rest of the world, where sound watercourse agreements are largely lacking.

Such reasoning also came up during the drafting process of the Convention. In commenting on the 1994 ILC Draft Articles, Germany recognised that the work of the ILC and the General Assembly met 'a global need for regulation in this matter'⁹⁴ Similarly, the United Kingdom noted that, while not a major international watercourse State, it welcomed that work as 'a valuable contribution to the international protection of the environment.'⁹⁵

It is thus surprising that other developed States, particularly those with a strong international development agenda in the water sector, have not followed suit and acceded to the Convention. For many countries, water is an integral part of international aid policies.⁹⁶ Such policies have seen a shift from technical solutions to a management

⁹³ See, for instance, UNECE Water Convention, n.75 above; Agreement on a Finnish-Norwegian

Transboundary Water Commission (Helsinki, 5 November 1980), found at

<<http://www.ymparisto.fi/default.asp?node=19139&lan=en>>.

⁹⁴ See The Law of the Non-navigational Uses of International Watercourses - Comments and Observations Received from Governments, n. 35 above, at 151.

⁹⁵ Ibid., at 168.

⁹⁶ Major donors in the water sector include the European Union and many of its Member States, such as France, Germany, and the United Kingdom, as well as Japan and the United States. See Julia Benn, Water aid and development: improving the flow, OECD Observer (March 2003), found at <<http://www.oecdobserver.org>>. See also Communication from the Commission to the Council and the

focus, with emphasis on equity and sustainability. Most countries pay particular attention to the need for integrated water resources management and for strengthening cooperation over international watercourses, as a basis for sustainable development at the regional level.⁹⁷

Where appropriate watercourse agreements already exist, therefore, the Convention would appear redundant for certain developed countries in terms of their own transboundary watersheds. Nonetheless, those States would still have an interest in joining and promoting the Convention. Such an interest would arise from their widely recognized commitment to the rule of law, as well as to their foreign affairs policy goals pertaining to international peace, worldwide energy and food security, and sustainable development. The widespread support for the Convention by countries in that position, as evidenced by their decision to become contracting States, highlights the Convention's role in spurring negotiations on additional and enhanced watercourse agreements.

Clarification and strengthening of customary international law

A further effect of the Convention entering into force would be its impact on clarifying and strengthening customary international law. The remit given to the ILC by the General Assembly was to codify and, where appropriate, progressively develop the law of the non-navigational uses of international watercourses.⁹⁸

European Parliament on Water Management in Developing Countries: Policy and Priorities for EU

Development Cooperation, COM(2002) 132 final (12 March 2002).

⁹⁷ See World Water Assessment Programme, n. 7 above.

⁹⁸ See Progressive development and codification of the rules of international law relating to international watercourses, n. 33 above.

The Convention provides a basis by which to clarify and resolve potential ambiguities within watercourse agreements and has thus a key role to play even in basins where such agreements already exist. In terms of clarifying international law, an example can be found in the obligation to notify neighbouring States within the basin that may be affected by planned measures. While the obligation to notify is widely accepted as representing customary international law, the precise content of that rule remains unclear.⁹⁹ For instance, what is the level of potential harm that would trigger this rule? What form should notification take? When should such notification take place? How should States treat a reply to notification, or absence thereof? Widespread and representative support for the Convention by watercourse States would help to clarify existing international law regarding the duty to notify and, where appropriate, progressively create new customary international law.

Widespread and representative support for the Convention would also help strengthen customary international law in that it would ensure that emerging norms proposed by the ILC became part of the corpus of international law by the most expeditious means.¹⁰⁰

On the other hand, prolonged non-entry into force could have the opposite effect on emerging customary international law. Non-entry into force could also throw into question the status of existing customary international law. In other words, the lack of support for the Convention amongst watercourse States, emerging from non-entry into

⁹⁹ C. Bourne, 'Procedure in the Development of International Drainage Basins: Notice and Exchange of Information', in P. K. Wouters, *Selected Writings of Professor Charles B. Bourne*, n. 23 above, at 143.

¹⁰⁰ See ICJ 20 February 1969, *FRG v. Dem.*; *FRG v. Neth. (North Sea Continental Shelf Cases)*, [1969] ICJ 3, at Paragraph 71.

force, could growingly be interpreted as a sign of widespread dissatisfaction with the content of the agreement. This process could eventually put into question the status of the law and further contribute to inter-State disagreements and unilateral actions by more powerful riparian States.¹⁰¹

In that regard, it is worth clarifying that, while the ratification process of the UN Watercourses Convention has been slow, it has never come to a stall. This becomes evident by Tunisia's recent ratification in May 2009. In this sense, the concern expressed in the above paragraph should not be understood as an argument to question the Convention's authority. Rather, that point aims to underscore the importance and urgency of bringing the Convention into force, so that it can contribute more effectively to the clarification and strengthening of customary international water law.

Furthermore, there are precedents for global treaties whose processes for entry into force were also lengthy. Nonetheless, the long duration of the ratification process did not prevent those treaties from eventually becoming effective and receiving widespread State support for their subsequent implementation. This is the case, for example, with the UN Convention on the Law of the Sea.¹⁰² Signed in December 1982, that Convention did not enter into force until November 1994. It counts today 158 parties.

¹⁰¹ See J. G. Lammers, Presentation 'Potential Effects from Non-Entry into Force', at the Seminar 'The UN Watercourses Convention: Legacy, Prospects and Value for the Realization of International Policy Goals', during the 2008 World Water Week (Stockholm, Sweden, 17-23 August 2008), found at <[http://www.worldwaterweek.org/Downloads/UNWC_Seminar_Lammers\[1\].pdf](http://www.worldwaterweek.org/Downloads/UNWC_Seminar_Lammers[1].pdf)>.

¹⁰² United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982) (in force 16 November 1994, found at <http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf>.

A Level Playing Field for Governing Basins without Agreements and for Negotiating Future Agreements

Recent studies indicate that only 40 percent of the world's international watercourses are subject to management frameworks codified in watercourse agreements. Even where those treaties exist, 80 percent are bilateral, although more States are often part of the basin in question.¹⁰³ Hence, there is a significant regulatory gap in the governance of the world's transboundary basins that the UN Watercourses Convention could help address. However, the Convention needs to be in force and widely ratified to have binding effects among parties and to serve as a compelling source of international customary law binding even on non-parties.

Furthermore, entry into force could enhance the Convention's potential to act as a basis by which States can negotiate more specific instruments at the regional, basin and sub-basin levels. Such a benefit would be particularly advantageous where all States within a region or basin were a party to the Convention. In such cases, the Convention would serve as a universally agreed legal framework from which to start negotiations.

In addition, the Convention offers a mechanism by which to promote consistency among existing agreements in those situations where a riparian State shares more than one basin with different countries. For example, in obliging States to utilise their international watercourses in an equitable and reasonable manner, the Convention ensures that the interests of all co-riparians, as well as all the environmental and social needs at stake, are duly accounted for in the allocation and benefit-sharing processes.

¹⁰³ See GIWA, n. 28 above.

Development of Treaty Law

Upon entering into force, the Convention would provide a global basis by which to further strengthen and develop treaty law at the global level in the field. In this sense, during the Convention's drafting process within the ILC, the Nordic countries referred to the role that the Convention could play in coordinating the 'work carried out by many international organs'.¹⁰⁴

In fact, the Convention has already performed this function in the case of the recently completed ILC Draft Articles on the Law of Transboundary Aquifers.¹⁰⁵ These draft articles draw heavily from the Convention, applying and adjusting its provisions to the special case of transboundary groundwater. Because, however, the Convention is still not in force, it is possible that the draft articles are eventually adopted as a separate, independent treaty, rather than a protocol to the Convention. This outcome would run counter to the goal of promoting integrated water resources management. Hence, once in force, the Convention will be politically better suited to serve as a mother treaty for future protocols adopted with the intent of progressively developing treaty law in the field.

Implementation of the Convention

Moreover, a widely endorsed global instrument could provide States, and others involved in the work related to international watercourses, with a common platform by which to exchange experiences and ideas on how best to develop and implement the law governing international watercourses.

¹⁰⁴ See *The Law of the Non-navigational Uses of International Watercourses - Comments and Observations Received from Governments*, n. 35 above, at 164.

¹⁰⁵ International Law Commission, *Draft Articles on the Law of Transboundary Aquifers*, in *Official Records of the General Assembly*, 63rd Session, Supplement No. 10 (A/63/10) (19 September 2008).

At the regional level, the UNECE Water Convention has played a comparable, very useful role, and serves to exemplify what the UN Watercourses Convention could offer to the international community globally. The UNECE Water Convention has been in force for over 10 years and has been particularly successful in strengthening the legal arrangements for the management of ‘new’ international watercourses, following the breakup of the Soviet Union. This is the case, for example, with agreements governing the Kazakh-Russian and Russian-Ukrainian transboundary waters. The UNECE Water Convention also paved the way for the adoption of the EU Water Framework Directive, which builds on the experience and knowledge acquired through the implementation of that treaty.¹⁰⁶

While the latter Convention benefits from an institutional structure, which includes a Secretariat and the Meeting of the Parties, there is no reason why parties to the UN Watercourses Convention could not conduct such activities through informal networks, or even, in the future, consider amending that Convention in order to establish a more formal global institutional structure consistent with other MEAs.

Future Prospects

Given the above-mentioned benefits that entry into force of the Convention might bring, what is the likelihood that such an event might happen in the foreseeable future? It would appear that, at the global level, the importance of global water issues is gaining

¹⁰⁶ See 1992 UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes: A booklet for all who care about and work for clean water (United Nations Economic Commission for Europe, 2004), found at http://www.unece.org/env/water/documents/brochure_water_convention.pdf.

greater political currency, and cooperation between States over international watercourses is commonly recognised as an important aspect of ensuring sustainable development and the achievement of the Millennium Development Goals.¹⁰⁷

In addition, a number of international efforts have focussed on raising awareness of the Convention and urging States to consent to be bound by its terms. The World Commission on Dams, for instance, has noted that, ‘States should make every effort to ratify the Convention and bring it into force.’¹⁰⁸ Similarly, in March 2006, the UN Secretary-General Advisory Board on Water and Sanitation launched the Hashimoto Compendium of Actions, which, *inter alia*, calls upon States to join the Convention.¹⁰⁹ A recent workshop held in West Africa resulted in an appeal from representatives of key Ministries in Benin, Burkina Faso, Ivory Coast, Ghana, Guinea, Mali, Niger, Nigeria, Senegal and Togo for their governments to ratify or accede to the Convention within a reasonable timeframe.¹¹⁰ Also at the global level, the Convention was included in two recent UN Treaty events aimed at encouraging States to ratify or accede to some key multilateral agreements.¹¹¹

¹⁰⁷ See International Conference on Freshwater, n. 26 above.

¹⁰⁸ World Commission on Dams, *Dams and Development – A New Framework for Decision-making* (World Commission on Dams, 2000), at 253.

¹⁰⁹ UN Secretary-General Advisory Board on Water and Sanitation, *Hashimoto Compendium of Actions* (March 2006), found at <http://www.unsgab.org/docs/HAP_en.pdf>.

¹¹⁰ See Dakar Call for Action, n. 90 above.

¹¹¹ *Treaty Event, Focus 2007: Towards Universal Participation and Implementation - A Comprehensive Legal Framework for Peace, Development and Human Rights (25-27 September and 1-2 October 2007)* (UN, 2007), available at <http://untreaty.un.org/English/TreatyEvent2007/book_english.pdf>; *Treaty*

Such global efforts to champion the Convention appear to be having some impact. Just recently Uzbekistan became a contracting State. At an address to the Shanghai Cooperation Organisation, Uzbekistan's President Karimov noted that adhering to the principles outlined within the UN Watercourses Convention is the only way in which to ensure projects related to the use of water and energy resources within Central Asia can be conducted in an equitable and reasonable manner.¹¹²

Recently, the Convention also played a prominent role during discussions at the 5th World Water Forum, in Istanbul, Turkey (in March 2009). Calls for ratification took place during the parliamentary rounds¹¹³ and were included as a policy recommendation in both the Mediterranean and European regional papers.¹¹⁴ At the wrap-up session on transboundary waters, panelists reiterated a proposal for the UN Secretary-General to establish an interim body to support and promote the Convention.¹¹⁵ Finally, during a high-level event co-hosted by several international organizations and the Norwegian Government, several contracting States pledged to work with their neighbours towards

Event, Focus 2008: Dignity and Justice for all of us, 23-25 and 29-30 September 2008) (UN, 2008), available at <http://untreaty.un.org/English/CNs/2008/101_200/158E.pdf>.

¹¹² H.E. Mr. Islam Karimov, President of the Republic of Uzbekistan, , Address at the Delegation-level Meeting of the Council of Heads of the SCO Member States (16 August 2007), found at <<http://www.press-service.uz/en/gsection.scm?groupId=4656&contentId=31841>>.

¹¹³ R. Boyd, *et al.*, '5th World Water Forum Highlights', 82:18 *World Water Forum Bulletin* (19 March 2009), found at <<http://www.iisd.ca/yimb/water/worldwater5/>>.

¹¹⁴ 5th World Water Forum, *Regional Documents* (5th World Water Forum, undated), found at <<http://content.worldwaterforum5.org/files/RegionalDocuments/>>.

¹¹⁵ R. Boyd, *et al.*, '5th World Water Forum Highlights', 82:21 *World Water Forum Bulletin* (22 March 2009), found at <<http://www.iisd.ca/yimb/water/worldwater5/>>.

promoting additional ratifications. In addition, key government representatives from 12 other States signed postcards symbolizing their commitment to champion the Convention within their own governments.¹¹⁶

Conclusion

The UN Watercourses Convention represents a ready-made solution and, as such, a key mechanism to address the current water crisis and address future conflicts. This is true especially given the extent to which States are reliant on international watercourses, the current lack of sufficient and adequate legal frameworks for ensuring equitable and reasonable utilisation, and the significant amount of work that went into developing, negotiating and adopting the Convention.

Nonetheless, of the more than 100 countries that voted in favour of the Convention in 1997, only a few have become contracting States. Such a slow uptake of the Convention can likely be attributed to several reasons, including treaty congestion at the time of adoption, a subsequent lack of awareness of the value of the agreement, and no obvious champion promoting ratification until recently.

There remains a need for States to support a global convention on the non-navigational uses of international watercourses. Entry into force would, *inter alia*, boost the adoption and strengthening of watercourse agreements, clarify and accelerate the development of customary international law, provide a level playing field in governing inter-State relations in basins not subject to specific treaties, and offer a basis for the

¹¹⁶ WWF, 'Interest grows in neglected global water treaty' (WWF21 March 2009), found at <http://www.panda.org/about_our_earth/about_freshwater/freshwater_news/?159822/Interest-grows-in-neglected-global-water-treaty>.

development of global treaty law in the field, as well as for the coordinated implementation of related universal obligations pertaining to the non-navigational uses of international watercourses.

In a period where competition over water resources is ever increasing, and over 10 years after its entry into force, it seems imperative that countries take a more proactive position in regards to the UN Watercourses Convention. In other words, countries should consider becoming contracting States as soon as possible, as well as promoting the Convention's widespread ratification and supporting its future implementation.

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