

UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE

The Economic Commission for Europe Water Convention and the United Nations Watercourses Convention

An analysis of their harmonized contribution
to international water law



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to international water law

Water Series Nº 6

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Foreword

A unique situation has arisen in the field of international law: there are now two agreements open to all United Nations Member States covering the same subject matter, the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes and the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses. Both treaties cover international watercourses, that is, freshwater, whether on the surface or underground, that is shared by two or more States. Scientists tell us, most recently in the 2014 reports of the Intergovernmental Panel on Climate Change, that these resources are coming under increasing stress, especially in areas that are already arid. But even ignoring climate change the math is quite simple: the amount of water on Earth is constant, and has been for billions of years, but the human population continues to increase, as do efforts to alleviate poverty and develop economically, which almost inevitably impact water resources. Thus regulation and management of this precious resource is more important than ever and, in particular, given the transboundary nature of water resources, the need for a coherent international legal regime.

So, are two treaties on the same subject that are open to all States in the world really necessary? In fact, could the coexistence of two such agreements give rise to confusion, or worse, conflicting obligations? Would it make any sense at all for one country to ratify both of them? These are the kinds of questions that the present volume addresses. And they are addressed in the very capable and experienced hands of one who has been closely involved in the development of both instruments. Professor Attila Tanzi was a member of the Italian delegation to the United Nations Working Group of the Whole which negotiated the 1997 Watercourses Convention and was an active participant in those discussions and, since 1998, has been involved in the work of legal bodies set up by the parties to the 1992 Water Convention, serving most recently as a member and Chair of the Legal Board of that agreement, which guides the Convention's interpretation and implementation.

While the two agreements cover the same subject matter, their approaches are quite different. Indeed, an untrained eye might conclude after a quick scan that their very purposes were entirely distinct from one another. However, a more careful review reveals that the two treaties have the same general object and purpose: the cooperative use, management and protection of international watercourses. Though their emphases and the methods they employ to achieve this end vary considerably from one another, their overall objective is the same. In this study Professor Tanzi helpfully distinguishes between the "economic" cast of the 1997 Convention and the "environmental" one of the 1992 agreement. In short, the former treaty may be said to focus more on allocation and the latter on environmental protection. And, as Professor Tanzi convincingly demonstrates, these qualities are not contradictory but rather complementary in nature. For example, both agreements enshrine the principle of equitable and reasonable use, but the 1997 Convention may be said to contain more detail on its content and implementation. Likewise, both treaties provide for the protection of aquatic ecosystems and the prevention of water pollution, but the 1992 Convention is far more comprehensive in this regard.

The drafting histories of the two instruments are of assistance in understanding the ways in which they approach the subject matter. The 1997 Convention was negotiated in the United Nations on the basis of a set of draft articles prepared over a 20-year period by the International Law Commission. The Commission's draft was, like all of the work of the Commission, an exercise in codification and progressive development of international law. Most of its provisions were not changed significantly in the negotiation of the 1997 Convention, which took place in two sessions, in 1996 and 1997. The resulting text thus retains the look and fundamental approach of a codification treaty, intended to be applicable worldwide. The 1992 Convention, on the other hand, was prepared within the United Nations Economic Commission for Europe (ECE) over a period of less than two years, on the basis of a draft produced by its secretariat, to address the needs and conditions of ECE countries. Many of these States are characterized by abundant rainfall and numerous watercourses. In the early 1990s the members of ECE were especially concerned with pollution prevention and environmental protection. It is therefore not surprising that the Convention emphasizes issues of interest to developed, generally well-watered countries with a long history of interaction in relation to transboundary waters, many of which were conscious of the need for environmental protection.

One of the great strengths of the 1992 Convention is that it is a “living document.” The treaty itself ensures this by establishing a secretariat (article 19) and providing for regular meetings of the parties (article 17). The secretariat provides strong support for sessions of the Meeting of the Parties, at which countries are to “keep under continuous review the implementation of [the] Convention”. As a codification convention, the 1997 treaty contains no such provisions, though it does provide for the possibility of the establishment of joint management mechanisms by the parties (article 24). It may be hoped that in view of the complementarity of the two agreements, and for the sake of consistency and efficiency, a secretariat might be established by the parties to the 1997 Convention when it enters into force, as well, and that that body would either coordinate closely with the secretariat of the 1992 Convention or even become a Part of it.

It is precisely this kind of need for close coordination of the development, interpretation and application of the two agreements that makes the present work so valuable. And in this connection I will end where Professor Tanzi begins, with a reference to the work of the International Law Commission on the topic of the fragmentation of international law. In that study the Commission pointed to the overarching principle of international law that when several norms relate to a single issue they are to be interpreted so that they are compatible to the extent possible. The present work shows why such an interpretation is not only possible but is virtually compelled by the very texts of the two agreements. With the impending entry into force of the 1997 Convention, this volume takes on even greater significance.



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Preface

Approximately 40 per cent of the world's population live in river basins that cross national borders. Transboundary river basins cover nearly one half of the earth's land surface and account for about 60 per cent of global freshwater flow. These basins link populations and create hydrological, social and economic interdependencies between countries. Transboundary water cooperation is therefore essential if we are to ensure the availability and sustainable management of water and sanitation for all. Legal agreements between and among countries can foster and secure transboundary water cooperation.

The opening of the United Nations Economic Commission for Europe (ECE) Convention on the Protection and Use of Transboundary Watercourses and International Lakes to all United Nations Member States in 2013, and the entry into force of the United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses in 2014, has transformed treaty law for international waters. At the same time, suddenly having two treaties addressing the topic at the global level could create confusion.

This analysis is therefore timely and essential reading for those wishing to understand the contribution of the two Conventions to international water law, and provides reassurance as to their complementarity. That complementarity was recognized by United Nations Secretary-General Ban Ki-moon when he urged in 2012 that "the globalization of the [ECE Water] Convention should also go hand-in-hand with the expected entry into force of the United Nations Watercourses Convention. These two instruments are based on the same principles. They complement each other and should be implemented in a coherent manner."

I would like to thank Professor Attila Tanzi, currently Chair of the Implementation Committee under the ECE Water Convention, for undertaking the drafting of this analysis and the many others who generously contributed to it.

It is my hope that this analysis will assist legislators, lawyers, policymakers and authorities to understand better the opportunities provided by the two treaties to strengthen transboundary water cooperation, peace and security.



Christian Friis Bach

Executive Secretary
United Nations Economic
Commission for Europe

Key treaties and soft law instruments

United Nations Economic Commission for Europe (ECE) Convention on the Protection and Use of Transboundary Watercourses and International Lakes (1992)

United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses (1997)

ECE-World Health Organization Regional Office for Europe Protocol on Water and Health (1999)

ECE Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters (2003)

Amendment to articles 25 and 26 of the Convention (2003), allowing all United Nations Member States to accede to the ECE Water Convention

Model Provisions on Transboundary Flood Management (2006)

Model Provisions on Transboundary Groundwaters (2012)

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