PART 10

Viewing the Convention from Outside the UNECE

CHAPTER 29

The Water Convention from a North American Perspective

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1 Introduction

In 2003, Articles 25 and 26 of The Convention on the Protection and Use of Transboundary Watercourses and International Lakes (The Convention) were amended to allow states *outside* of the United Nations Economic Commission for Europe (UNECE) region[1] to become party to the Convention. These amendments – which went into force on February 2013 – turned the Convention into a globally applicable legal framework for transboundary water cooperation, thereby 'rescaling' this legal instrument from the regional to the global. At the end of 2013, – the International Year of Water Cooperation – non-UNECE countries became eligible to join the Convention.

The decision to open up the Convention beyond the UNECE member countries is noteworthy for at least two reasons. First, it is a testament to the confidence that the member parties (and its governing body) have in the usefulness and applicability of the Convention. Second, the decision is reflective of a broader trend: the rescaling of water governance, in which *supra*-national and global actors (as well as local actors) are playing more important roles than in the past.[2] The move to rescale the Convention by including new actors thus holds significant promise both practically – in terms of the creation of a network for information related to transboundary water governance – and conceptually in terms of envisioning the world's water sources as interconnected, nested, and politically and hydrologically 'border*less*'.

1 The UNECE has 56 members and its region covers more than 47 million square kilometres. Its member States include the countries of Europe, but also countries in North America (Canada and United States), Central Asia (Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan) and Western Asia (Israel) (UNECE 2013).

2 Maria Carmen Lemos and Arun Agrawal, 'Environmental Governance' 31 *Annu. Rev. Environ. Resour.* 297 (2006); Norman, Emma S., Karen Bakker, and Christina Cook, 'Introduction to the Themed Section: Water Governance and the Politics of Scale'. (2012) 5 Water Alternatives, 52.

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In this chapter, we explore the Water Convention through the lens of the experience of Canada-US transboundary water management. For over a century, Canada and the United States have managed transboundary waters in accordance with the 1909 Boundary Waters Treaty (herein, the Treaty).[3] The Treaty is often seen as one of the world's preeminent transboundary water mechanisms. Below, we critically examine the Treaty and explore what lessons it might have to offer. We then explore the similarities and differences between the Convention and the Canada-US Boundary Waters Treaty.

2 Rescaling Environmental Governance

The idea of 'scaling up' the Convention beyond the UNECE region is consistent with wider trends in water governance in which decision-making is decentered and rescaled (often simultaneously) to *supra*-national and sub-national bodies. This process, termed *glocalization* by geographer Erik Swyngedouw[4] challenges conventional theories of governance – particularly the regime approach – which holds the nation-state as the central locus of political power.[5] Environmental governance, much like other types of governance, has undergone transformation in recent decades from a nation-centered approach to one that is moved to scales both larger and smaller.[6] In the case of the former, UNECE is an example of the kind of international governance mechanism to which increasing numbers of nations are now subscribing. Another example of this phenomenon is the European Union Water Framework Directive, where planning is carried out at an international basin scale and coordinated by the European Union.[7] Simultaneously, environmental governance has

3 Emma S. Norman and Alice Cohen and Karen Bakker, *Water Without Borders? Canada, the United States, and Shared Water* (University of Toronto Press 2013).

4 Erik Swyngedouw, 'Governance Innovation and the Citizen: The Janus Face of Governance-Beyond-the-State' 42 *Urban Studies* 1991 (2005).

5 Juliet J. Fall, 'Artificial States? on the Enduring Geographical Myth of Natural Borders?' 29 *Political Geography* 140 (2010); Kathryn Furlong, 'Neoliberal Water Management: Trends, Limitations, Reformulations', 1 *Environment and Society: Advances in Research* 46 (2010).

6 R.A.W. Rhodes, 'The New Governance: Governing without Government', 44 Political Studies 652 (1996); Kathryn Furlong, 'Neoliberal Water Management: Trends, Limitations, Reformulations', 1 *Environment and Society: Advances in Research* 46 (2010).

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7 Olivier Kramsch, 'Reimagining the Scalar Topologies of Cross-border Governance: Eu(ro)regions in the Post-Colonial Present', 6 *Space & Polity* 169 (2002); Corey Johnson, 'Politics, Scale, and the EU Water Framework Directive', in Emma S. Norman and Alice Cohen and Karen Bakker (eds), *Negotiating Water Governance: Why the Politics of Scale Matter* (Ashgate Forthcoming 2014).

experienced a shift toward more sub-national scales: community based watershed groups, community forests, and regionally-based environmental groups have all become increasingly important actors in the environmental arena.[8]

The issue of rescaling is relevant to a comparative discussion of the Boundary Waters Treaty and the Water Convention for two reasons. The first is that the Water Convention is an example of 'scaled up' water governance. The second is that, as detailed below in the Canada-US example, rescaling of environmental governance is relatively recent and hence was not accounted for in the 1909 Boundary Waters Treaty. As discussed below, the response within North America to rescaling – which has included a variety of 'soft law' and informal working arrangements at a variety of scales – might be relevant to the UNECE Water Convention.

As the introductory chapters of this volume detail, the Convention was originally born out of the UNECE's desire to strengthen cooperation among riparian countries. In the late 1980s, a series of policy documents were prepared that began to spell out the principles regarding cooperation of Transboundary Waters. The UNECE countries negotiated the text of a legally binding document, which was signed in Helsinki on 17 March 1992 and has been in force since 6 October, 1996.

Currently, 38 UNECE Countries[9] and the EU are Parties to the Convention. However, with the passage of the amendments to Articles 25 and 26, the Convention has positioned itself to become a globally applicable legal instrument by allowing United Nations Members States to join the Convention.

2.1 *Spreading the Word of Open Membership*

The Implementation Committee of the UNECE Water Convention held its first meeting in Geneva on June 5, 2013. The Committee self-describes its role as: 'a unique advisory procedure, which distinguishes this body from other similar mechanisms, enables Committee to engage with countries seeking to resolve water issues in a non-confrontation manner and also provides opportunities for the involvement of non-Parties in the procedure upon their consent'.[10]

8 James McCarthy, 'Scale, Sovereignty, and Strategy in Environmental Governance' 37 *Antipode* 731 (2005); Emma S. Norman and Karen Bakker, 'Transgressing Scales: Water Governance Across the Canada–US Borderland' 99 *Annals of the Association of American Geographers* 99 (2009); Alice Cohen, 'Rescaling Environmental Governance: Watersheds as Boundary Objects at the Intersection of Science, Neoliberalism, and Participation' 44 *Environment and Planning A* 2207 (2012).

9 Out of 56 UNECE member countries.

10 United Nations Economic Commission for Europe, 'Implementation Committee' (*UNECE* 2013). <http://www.unece.org/env/eia/implementation/implementation_committee_meetings.html> accessed 22 May 2014.

The committee consists of nine members who act in their personal, rather than national, capacity. The members are generally experts in international water law and hail from nine UNECE countries: Netherlands, United States of America, Italy, Bulgaria, Kazakhstan, Finland, Germany, Belarus, and Slovakia.

The Implementation committee holds an important role of both supporting member countries as they employ the Water Convention to resolve existing transboundary issues, put mechanisms (treaties or agreements) in place to mediate future disagreements, and to encourage non-UNECE members to join the Convention.

The Amendments to Articles 25 and 26 of the Convention speak to the last point related to encouraging non-UNECE membership. In Article 25, after paragraph 2, new paragraph 3 reads:

> Any other State, not referred to in paragraph 2, that is a Member of the United Nations may accede to the Convention upon approval by the Meeting of the Parties. In its instrument of accession, such a State shall make a declaration stating that approval for its accession to the Convention had been obtained from the Meeting of the Parties and shall specify the date on which approval was received. Any such request for accession by Members of the United Nations shall not be considered for approval by the Meeting of the Parties until this paragraph has entered into force for all the States and organizations that were Parties to the Convention on 28 November 2003.

Further, paragraphs 2–6 of Decision III/1 of the third Meeting of the Parties to the Convention amending Articles 25 and 26 thereof read as follows:

2. *Calls upon* Parties to the Convention to deposit their instrument of acceptance of the amendment rapidly;
3. *Urges* any State or organization that ratifies, accepts or approves the Convection to simultaneously ratify, accept or approve the above amendment;
4. *Encourages* States situated outside of the UNECE region, in particular those bordering it, to accede to the Convention and, to that end, to seek the approval of the Meeting of the Parties;
5. *Invites* interested United Nations Member States to take part in its meetings as observers and to participate in the activities under the Convention's programme of work;

6. *Invites* the States bordering the UNECE region that have not done so already to enter into technical cooperation and bilateral or multilateral agreements with the riparian UNECE States, in accordance with the provisions of Part II of the Convention, without delay.[11]

The desire to expand membership is admirable, but it is worth posing the question of potential barriers. First, the members must be United Nations Member States and second, there is an emphasis on States bordering the UNECE region. For example, will countries with limited discretionary funds actually be able to afford such an undertaking? The geographical base of the UNECE in Europe poses significant transaction costs for any non-European State.; as with many international agreements, it will be more difficult for poorer members to join and to take full advantage of the agreement. It is unlikely that many countries in the Global South, for example, will have the funds to operationalize the Convention. For example, the Dniester River Basin Treaty – a bilateral treaty between Republic of Moldova and Ukraine – was recently implemented under the Convention. This is the first river basin agreement post-Soviet era. The Treaty, however, would not have been possible without significant financial contributions from donor countries – in this case, the Governments of Sweden, Switzerland and the United States.[12]

With respect to location, it is worth noting that, according to the 'no-harm doctrine', downstream countries would likely gain the most benefit from joining the Convention. Although this doctrine is important because it provides a mechanism for accountability, it may serve to deter upstream countries – especially polluting upstream neighbours – to sign on to the Convention.

These issues are, of course, not unique to the UNECE. In fact, they raise questions with which Canada and United States have grappled for decades. To explore these issues, we explore below some similarities and differences between the BWT and the UNECE, and share experiences in the North American context that might usefully inform debate around the UNECE amendments.

11 ECE/MP.WAT/14 <http://www.unece.org/fileadmin/DAM/env/documents/2004/wat/ece.mp.wat.14.e.pdf> accessed 27 May 2014.

12 UNECE (United Nations Economic Commission for Europe) and OSCE (office of the CO-coordinator of OSCE Economic and Environmental Activities), *Transboundary Diagnostic Study for the Dniester River Basin* (Cm, 2005).

3 The UNECE Convention versus the Canada-US Boundary Waters Treaty

The Boundary Waters Treaty was signed in 1909 by the United States and Great Britain (on behalf of Canada). The Treaty has two main functions.

The first function is to set the terms for the governance of waters that either flow across or along the Canada-US international boundary. Infrastructure development, diversions, or other alterations to watercourses taking place on one side of the border but affecting the other all fall under the purview of the Treaty. Importantly, water flows in both directions across the Canada-US border. Water flows north from the United States into Canada in, for example, the case of the Red River, while the Flathead River flows from Canada into the United States. In a handful of cases, rivers cross the boundary in multiple directions: the Milk River, for example, begins with three branches that join together in the United States, flow into Canada, run eastward for approximately 100 miles in Canada, and then flow back down into the United States.[13] Moreover, the border is punctuated by a number of lakes – most notably the Great Lakes – which are not subject to the same upstream / downstream dynamic as rivers. This mutual vulnerability means that the Treaty is relevant to parties on both sides of the border – a geographic arrangement that is arguably a key element of its long-standing success. This aspect of mutual vulnerability will play out differently in different UNECE transboundary relationships. In some cases, neighbouring countries may experience a sharper 'upstream party/downstream party' dynamic, which, we suggest, may make it difficult for upstream parties to find motivation to participate.

Second, the Treaty enabled the establishment of the International Joint Commission (IJC). The IJC is headed by scientific experts – in this case, 'Commissioners' – who act in their capacity as scientific experts rather than as national representatives (more on this below). The creation, funding, and ongoing support for a political body designated to oversee the Treaty has, we suggest, been central to its success. In particular, the fact that the IJC is well respected on both sides of the border has contributed significantly to its longevity and ongoing relevance. There is one important limitation on the IJC's activities, however: it only investigates or makes recommendations about potential Treaty issues *if empowered to do so by both national governments* through a formal 'reference' process. That is, if only one government references

13 Nigel Bankes and Elizabeth Bourget, 'Apportionment of the St. Mary and MilkRivers', in Emma S Norman, Alice Cohen, and Karen Bakker (eds), *Water without Borders? Canada, the United States, and Shared Waters* (University of Toronto Press, 2013).

a particular issue to the IJC, the IJC cannot strike a committee and carry out an investigation. This particular stipulation is both a strength and weakness of the Treaty: while it means that a party's actions cannot be studied against the will of one or another national governments (thus mitigating concerns about potential challenges to national sovereignty), it also gives national governments the ability to act unilaterally with the knowledge that a particular action can go ahead without IJC intervention. However, such unilateral action has – at least to date – been surprisingly relatively rare (the case of the Devils Lake diversion is a recent example of such an outlier[14]).

With these points in mind, we turn here to an exploration of how the UNECE is similar or different from the Canada-US Treaty.

3.1 *Similarities*

One similarity between the two agreements is the appointment of politically neutral adjudicators. We suggest that this political neutrality (i.e. politically neutral Commissioners) has been central to the longevity and relative success of the Treaty and the IJC. The six Commissioners (three from each country), each must take an oath of office wherein each incoming commissioner makes a 'solemn declaration in writing that he will faithfully and impartially perform the duties imposed upon him under this treaty, and such declaration shall be entered on the records of the proceedings of the Commission' (BWT, Article XII).[15] We suggest that this political neutrality has been critical to the ongoing relevance of the IJC, particularly in light of the need for references from both national governments. If the IJC were perceived to be acting in favour of one or another national government, references to the organization would dry up almost immediately and both the IJC and the Treaty would be ignored.

A second similarity is the non-binding nature of the agreements. Again, we suggest that this has been central to the ongoing relevance of the IJC: were the Commission's recommendations binding, national governments could be reticent to refer particular issues to the Commission. Stipulations that IJC recommendations are non-binding mean that references to the Commission do not pose a threat to the sovereignty of either nation. Though this raises potential questions about the effectiveness of the organization, in the last one hundred

14 For a more thorough discussion of the Devils Lake case, see Norman Brandson and Robert Hearne, 'Devils Lake and Red River Basin', in Emma S. Norman, Alice Cohen, and Karen Bakker (eds), *Water without Borders? Canada, the United States, and Shared Waters* (University of Toronto Press 2013).

15 We recognize here the gendered language used in the Treaty but are replicating it here for historical accuracy.

years there have been only three instances where national governments have not followed IJC recommendations. This record suggests that the power of expert-led, politically neutral experts is deeply respected on either side of the border. Although the model has been successful thus far, questions can be raised about the effectiveness of an entirely non-binding agreement. The combination of a non-binding agreement with the requirement for joint references to the IJC has mitigated concerns about potential intrusions on national sovereignty. At the same time, the strictly voluntary referencing system and the discretion that national actors have in acting (or not) on IJC recommendations does lay the groundwork for conflicts in which there is no recognized arbitrator with final authority. In addition, it can also be argued that countries only enter into a reference if they are willing to accept the outcome – and, where the risk is too great that the outcome will not favor the country, a reference is avoided (arguably, this is the case in the Flathead River Basin). We offer no definite solutions to this conundrum here, but encourage UNECE decision-makers to consider the implications of binding and non-binding decision-making structures.

With respect to similarities, it may also be helpful to note that both the Water Convention and Treaty were created in federal contexts in which different legal regimes (and sometimes more than one legal regime) are applicable to water in different nation-states. For example, the Canadian common law approach to water law applies in all provinces with the exception of Quebec (governed by civil law);[16] and two systems of water rights – riparian rights in the eastern part of Canada 'first-in-time, first-in-right' systems in the west – are in use.[17] Both the Treaty and Convention were crafted in the context of distinct legal regimes, and both seek to enhance negotiation and conflict-resolution capacity while respecting the legal regimes of the respective parties. The Convention and Treaty, in other words, complement rather than supplant local and national regulations and laws. From this perspective, the Convention and Treaty do not signal the 'hollowing out' of water governance, but rather a 'scalar thickening' of water governance mechanisms.

16 Of course, the common and civil law traditions in Canada have European roots (in Britain and France, respectively).

17 Karen Bakker and Christina Cook, 'Water Governance in Canada: Innovation in the Context of Jurisdictional Fragmentation' 27 *International Journal of Water Resources Development* 275 (2011); Carey Hill and others, 'Harmonization versus Subsidiarity: Emerging Trends in Water Governance in Canada' 33 *Canadian Water Resources Association Journal* 1 (2008).

Another similarity between the Treaty and Convention is thus a shared challenge (and opportunity): articulation with actors, organizations, and institutions at multiple scales. The experience of the Treaty may be of interest here, because the North American case has more than 100 years of experience with this issue. Indeed, since the 1909 Treaty went into force, there has been a proliferation of 'soft law' mechanisms that shape bi-national water governance: one recent survey identified 166 transboundary agreements (such as Memoranda of Understanding, Cooperation Agreements, and Exchanges of Notes) between *subnational* actors at the provincial/state or municipal scale, which complement and co-exist with the IJC and BWT.[18] The reasons for this proliferation of soft law instruments are complex, but include greater citizen involvement (originating in the 1960s citizen environmental movement in North America), coupled with greater state and provincial empowerment within both Canada and the United States. A third and important reason is the fact that soft law often arises in response to new concerns not addressed in the BWT. One might anticipate a similar evolution over time with respect to the Convention – but on a global scale. This raises multiple questions: for example, regarding the role of civil society, and the articulation of multiple scales of governance with the formal Treaty and Convention processes.

3.2 *Differences*

One key difference between the two agreements lies in their timing. Although this may seem like a facile distinction, the one hundred-year spread between the two agreements has meant that the UNECE has the capacity to incorporate issues that were not on the table at the time of the Treaty negotiation. For example, environmental concerns, the integration of groundwater and surface water, and Indigenous rights are entirely absent from the 1909 Treaty; all of these issues have since become critical components to contemporary water governance, and environmental governance more broadly. To its credit, the IJC has made strides in incorporating Indigenous groups in decision-making processes and has included environmental considerations in its recommendations despite their absence in the Treaty itself. For example, the creation of the Great Lakes Water Quality Accord and the International Watersheds Initiative show progress both in terms of water quality and inclusion of Indigenous groups in decision-making. Nevertheless, consideration of these issues remains at the discretion of the IJC rather than as a matter of mandatory inclusion. This situation speaks both to the importance of allowing the UNECE bodies some

18 Emma S. Norman and Karen Bakker, 'Transgressing Scales: Water Governance Across the Canada–US Borderland' 99 *Annals of the Association of American Geographers* 99 (2009).

discretion in their decision-making as time goes on, as well as to the importance incorporating regular reviews and updates in order to account for ongoing developments in national and international law, as well as in the scientific community.

Another issue with which the IJC has had to grapple with is the issue of Indigenous rights. To fully understand this issue, some background is necessary. In the North American context, Indigenous groups (First Nations and Native American tribes) have unique legal standing with respect to resource management, including water rights and fisheries. Increasingly, Indigenous governments are using established Treaty rights and their status as sovereign nations to influence water policy.

In the United States, federally recognized Indigenous communities have a sovereign status, which provides them with the right to a federal-federal relationship.[19] The Winters Doctrine [Winters vs. United States 207 U.S. 564 (1908)] clarified water rights for Indigenous communities as critical to continual survival and self-sufficiency. United States v. Washington 1974 (commonly referred to as the 'Boldt decision') was another landmark cases that reaffirmed Indigenous governments right to manage their fisheries. In Canada, Aboriginal rights are reaffirmed by the Constitution.[20] Section 35(1) of the Canadian constitution states that 'the existing Aboriginal and Treaty rights of the Aboriginal Peoples of Canada are hereby recognized and affirmed'.[21] The Canadian courts continue to broaden and strengthen these rights in ways that have important implications for resource – and especially water – governance. For example, the Supreme Court of Canada has affirmed the duty of the crown (government) to engage in 'meaningful and good faith consultation' with Indigenous peoples;[22] in some instances, Indigenous peoples have special legal standing, and are considered to be another 'order' (or 'level') of government in addition to municipal, provincial, and federal governments.[23]

19 Vine Deloria and Clifford M. Lytle, *American Indians, American Justice* (University of Texas Press, 1983).

20 Cole Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (University of British Columbia Press, 2002).

21 Kiera Ladner, 'Take 35: Reconciling Constitutional Orders', in Annis May Timpson (eds), *First Nations, First Thoughts: The Impact of Indigenous Thought in Canada* (University of British Columbia Press, 2009).

22 University of British Columbia Faculty of Law, *Primer: Canadian Law on Aboriginal and Treaty Rights* (Cm, 2009) paragraphs. 42 and 46.

23 Marc G. Stevenson and Jim Webb, 'Just Another Stakeholder? First Nations and Sustainable Forest Management in Canada's Boreal Forest', in Philip Joseph Burton (ed.), *Towards Sustainable Management of the Boreal Forest* (NRC Research Press, 2003).

The unique legal status of Indigenous governments in North America has driven significant policy change in recent decades, at both subnational and national levels. This is complicated by the fact that the US-Canada border often bisects traditional territories of Indigenous peoples.[24, 25] The legal obligations now placed upon governments in North America to address this issue imply that the question of Indigenous governance would thus be central to any discussion of North American states becoming parties to the UNECE.

The issue of Indigenous rights, of course, is not unique to North America. Hence, it might be useful within the context of the Convention to study the question of Indigenous transboundary water governance. One might reasonably ask whether and where Indigenous issues might be raised within the Convention with respect, for example, to 'equitable and reasonable use' – which requires attention to different users and their varying degrees of dependence on the resource (and hence their vulnerability to impacts) – or with respect to the issue of harm. It might also be argued that the Convention, through its principles, may provide substantive arguments to Indigenous communities when requesting from the relevant public authorities a better management of transboundary waters in their regions. To study the relevance of these issues to the Convention and the UNECE, it may be worth considering whether a Working Group could be established on Indigenous Transboundary Water Governance.

4 Conclusion

Written more than a century after the Boundary Waters Treaty, the Convention's cutting-edge approach to integrated water resources management offers a promising framework that will hopefully inspire reforms around the world. The Convention also offers an important mechanism for actors to ground their

24 Emma S. Norman, *Governing Transboundary Waters: Canada, the United States, and Indigenous Communities* (Routledge Press 2014); Emma S. Norman and Alice Cohen and Karen Bakker, *Water Without Borders? Canada, the United States, and Shared Water* (University of Toronto Press 2013); Mark Zeitoun and Karim Eid-Sabbagh and Michael Talhami, 'Hydro-hegemony in the Upper Jordan Waterscape: Control and Use of the Flows' 6 *Water Alternatives* 86 (2013).

25 Here, it is perhaps relevant to note that the United Nations Declaration of the Rights of Indigenous Peoples makes specific reference to the issue of Indigenous peoples whose traditional territories are divided by international borders in Article 36, point 1, page 13 (United Nations 2008).

claims through reference to a global framework for water management. As such, the 'rescaling' of the Convention offers important opportunities for meaningful progress on sustainable management of transboundary waters.

Who might benefit most from joining the Convention? Due to the 'no-harm' doctrine, downstream countries would clearly benefit. The Convention offers a new legal vehicle through which to advance claims – related both to water quantity and quality – of downstream users. In an optimistic scenario, the Convention could create the 'level playing field' that is so often lacking in transboundary water management negotiations.

Learning lessons from other transboundary governance mechanisms, such as the Boundary Waters Treaty, may help the Convention reach its potential more quickly. In this chapter, we discussed several issues, including binding and non-binding decision–making; barriers to participation and membership; Indigenous governance; and practical issues such as the cost of participation. More concretely, we also suggest that having working groups to encourage participation from people in the Global South (who may be excluded due to high cost) and Indigenous groups (who may be excluded due to their non-United Nations State status) are important issues to consider as the Convention moves forward to becoming a global mechanism. All of these issues are important to consider if the UNECE is to reach its potential as a global leader in transboundary water governance.

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