

SIMON MARSDEN • ELIZABETH BRANDON

# TRANSBOUNDARY ENVIRONMENTAL GOVERNANCE IN ASIA

Practice and Prospects with the UNECE Agreements



# Transboundary Environmental Governance in Asia

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Agreements

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## Preface and Acknowledgements

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This book grew from shared interests in international and regional law, global governance and environmental regimes. Each of us had recently completed a book project: *Transboundary Environmental Governance: Inland, Coastal and Marine Perspectives* (Marsden, with Warner, Ashgate Publishing, 2012); *Global Approaches to Site Contamination Law* (Brandon, Springer, 2013); and we wanted to collaborate on another, building on and developing this work.

Before commencing the book, Marsden had experience with several of the United Nations Economic Commission for Europe (UNECE) agreements (Environmental Impact Assessment (*EIA*), Strategic Environmental Assessment (*SEA*), and *Public Participation*, and developing interests in the *Water*, and *Water and Health* agreements); Brandon had experience with pollution and contamination regulation, which made enquiry into the remaining agreements very practical (*Pollutant Release and Transfer Registers*, *Industrial Accidents*, *Civil Liability*, and *Air Pollution*). The division of labour was therefore logical and straightforward, with collaboration on the remaining chapters to pull it all together.

It became apparent early on that, other than consideration of the relationship between two of the agreements (typically the *EIA* and *Public Participation* treaties), there had been no scholarly work on the combined effect of all of the agreements. The majority of existing research was also Europe focused, where most of the members of the UNECE are located. The focus on Asia came from the interests of each of us in the region in general and previous research. It became a practical prospect given UNECE membership of states in the Caucasus and central Asia, other UNECE Asian members with involvement in the development of one or more of the agreements (Turkey), or indeed those who had perhaps signed if not ratified the various agreements (Russia). The fact that Turkey and Russia are both European and Asian states is furthermore illustrative of the Eurasian dimensions of the UNECE.

The specific focus on practice made excellent sense given that implementation and compliance is the weakest part of environmental law, whether internationally or domestically. The fact that almost all of the agreements had provision for – either in the treaty text or as a result of

decisions of the meetings or conferences of the Parties – periodic reporting of implementation together with a non-compliance procedure, also indicated the potential for comparative analysis. Central Asia was suggested by one of the reviewers of the proposal as a case study for the combined effect of the agreements, which, as a fast-developing region emerging from the former Soviet Union, could potentially highlight challenges applicable elsewhere.

As to prospects, the global opening of the *Water* and *EIA* conventions in 2013 and 2014, and interest shown in these by non-UNECE Asian states suggested there was significant potential to give consideration to the broader application of the agreements, both in parts of Asia not part of the UNECE and globally. The absence of treaty-making efforts by the other four United Nations regional commissions, the interest shown by other states in some of the agreements (particularly the *EIA*, *SEA*, *Public Participation* and *Water* agreements); and the clear need for improved transboundary environmental governance in relation to the others (*Air Pollution* and *Industrial Accidents*) not open to global membership, suggested this should also form a key part of the deliberations.

We would like to thank the Elgar team (Ben Booth in particular), for support, encouragement and patience with respect to the book project, which has been delayed due to work, family and health issues. We are particularly grateful to the reviewers of the original and revised proposal for their consideration and wisdom which improved the focus. We are indebted to our key supporters and mentors: Mr Nick Bonvoisin, who as Secretary to three of the five treaties (currently the *Water Convention*), and their linked protocols, has willingly shared invaluable experience; Research Professor Timo Koivurova, Arctic Centre, University of Lapland, whose knowledge of international environmental law is matched only by his ability to explain its intricacies in simple terms, and is always a source of ongoing help; Professor Susan Breau, Law School, University of Reading, for her guidance in connection with global law and governance; and Adjunct Professor Rob Fowler, formerly Chair of the IUCN Academy of Environmental Law, who has assisted us both at various stages of our academic careers.

The manuscript was completed in September 2014 in Adelaide and Hong Kong and is dedicated to our parents:

Edward and Sylvia Marsden, and Trevor and Jan Brandon.

# Abbreviations

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ADB	Asian Development Bank
APELL	Awareness and Preparedness for Emergencies at Local Level
ASEAN	Association of South East Asian Nations
Bvos	Basin water organisations
CBD	Convention on Biological Diversity
CC	Compliance Committee
CEP	Committee on Environmental Policy
CITES	Convention on International Trade in Endangered Species
CLRTAP	Convention on Long-Range Transboundary Air Pollution
CoE	Council of Europe
COP	Conference of the Parties
CSCE	Conference on Security and Cooperation in Europe
CSS	Country Safeguards System
EBRD	European Bank for Reconstruction and Development
EC	European Community
ECJ	European Court of Justice
EEC	Eurasian Economic Community
EECCA	Eastern Europe, the Caucasus and Central Asia
EIA	Environmental impact assessment
EMEP	European Monitoring [and] Evaluation Programme
EMMP	Environmental Mitigation and Management Plan
ESM	Environmentally sound management
EU	European Union
GAP	Global air pollution
GIZ	German International Cooperation
GMO	Genetically modified organism
GTI	Greater Tumen Initiative
IANS	Industrial Accident Notification System
IC	Implementation Committee

ICJ	International Court of Justice
ICP	International Cooperative Programme
ICSD	Interstate Commission on Sustainable Development
iCwC	Interstate Commission for Water Coordination
IEEP	Institute for European Environmental Policy
IFAS	International Fund for Saving the Aral Sea
IFI	International financial institution
IGO	Intergovernmental organisation
IUCN	International Union for the Conservation of Nature
IWGCL	Intergovernmental Working Group on Civil Liability
IWRM	Integrated water resources management
JC	Joint Committee
LRTAP	Long-Range Transboundary Air Pollution
MDB	Multilateral development bank
MDG	Millennium Development Goal
MEA	Multilateral environmental agreement
MOP	Meeting of the Parties
MoU	Memorandum of understanding
MRC	Mekong River Commission
NATO	North Atlantic Treaty Organisation
NCP	Non-compliance procedure
NEASPEC	Northeast Asia Subregional Programme on Environmental Cooperation
NEPA	National Environmental Policy Act
NIR	National implementation report
NO <sub>x</sub>	Nitrogen oxide
NPD	National Policy Dialogue
OECD	Organisation for Economic Cooperation and Development
OSCE	Organisation for Security and Cooperation in Europe
OVOS	Assessment of environmental impacts
PIC	Prior informed consent
POP	Persistent Organic Pollutant
PRTR	Pollutant Release and Transfer Registers
REC	Regional Environment Centre (for Eastern and Central Europe)
SEA	Strategic environmental assessment

SER	State Environmental Review
TC	Transnational corporation
UK	United Kingdom (of Great Britain and Northern Ireland)
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCHE	United Nations Conference on the Human Environment
UNDP	United Nations Development Programme
UNECA	United Nations Economic Commission for Africa
UNECE	United Nations Economic Commission for Europe
UNECLAC	United Nations Economic Commission for Latin America and the Caribbean
UNEP	United Nations Environment Programme
UNESCAP	United Nations Economic and Social Commission for Asia and the Pacific
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNESCWA	United Nations Economic and Social Commission for Western Asia
UNFCCC	United Nations Framework Convention on Climate Change
UNITAR	United Nations Institute for Training and Research
UNSD	United Nations Conference on Sustainable Development
USA	United States of America
VOC	Volatile Organic Compound
WB	World Bank
WG	Working Group
WGD	Working Group on Development
WGE	Working Group on Effects
WGI	Working Group on Implementation
WGSR	Working Group on Strategies and Review
WHO	World Health Organization
WSSD	World Summit on Sustainable Development



# Contents

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<i>Preface and Acknowledgements</i>	vi
<i>List of abbreviations</i>	viii
<i>Table of international cases, treaties and other international instruments</i>	xi
PART I TRANSBOUNDARY ENVIRONMENTAL GOVERNANCE	
1. Introduction	3
2. Institutions and regimes	25
PART II TREATIES AND PROTOCOLS	
3. The Public Participation Convention and Pollutant Release and Transfer Registers Protocol	59
4. The Environmental Impact Assessment Convention and Strategic Environmental Assessment Protocol	105
5. The Industrial Accidents Convention and Civil Liability Protocol	137
6. The Water Convention and Water and Health Protocol	167
7. The Air Pollution Convention and Associated Protocols	201
PART III COMBINED EFFECT AND OUTLOOK	
8. Practice and capacity building in Central Asia	241
9. Conclusions	298
<i>Bibliography</i>	314
<i>Index</i>	333

# Table of international cases, treaties and other international instruments

---

## International Cases

<i>Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, opinion of 8 July 1996</i> (ICJ Reports 1996, 226) .....	32
<i>Case Concerning Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)</i> , decision of 25 September 1997 (ICJ Reports 1997, 7) .....	32
<i>Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)</i> , Judgment of 20 April 2010 .....	8, 32, 119, 273
<i>Case Concerning Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)</i> , Judgment of 31 March 2014 .....	32, 119

## International Treaties and Other International Instruments

1948 <i>Universal Declaration of Human Rights</i> (1948) GA res. 217A (III), UN Doc A/810 at 71 .....	11
1969 <i>Convention on the Law of Treaties</i> (Vienna, 23 May 1969) 1155 UNTS 331, in force 27 January 1980 .....	256
1971 <i>Convention on Wetlands of International Importance, especially as Waterfowl Habitat</i> (Ramsar, 2 February 1971), 11 ILM 963, in force 21 December 1975 .....	27, 302
1972 <i>Stockholm Declaration</i> 11 ILM 1416 (1972) .....	16, 108
<i>Convention Concerning the Protection of the World Cultural and Natural Heritage</i> (Paris, 16 November 1972) 1037 UNTS 151, in force 17 December 1975 .....	26
1973 <i>Convention on International Trade in Endangered Species of Wild Fauna and Flora</i> (Washington DC, 3 March 1973), 993 UNTS 243, in force 1 July 1975 .....	27
1974 <i>Nordic Environmental Protection Convention</i> (Stockholm, 19 February 1974), UNE EPL, Vol 1, 1975-1976 p 44, in force 5 October 1976 .....	108
1979 <i>Convention on the Conservation of Migratory Species of Wild Animals</i> (Bonn, 23 June 1979), 19 ILM 15, in force 1 November 1983 .....	27
<i>Convention on Long-range Transboundary Air Pollution</i> (Geneva, 13 November 1979), 1302 UNTS 217, in force 16 March 1983 ....	4, 32, 171, 201, 254, 306
1982 <i>United Nations Convention on the Law of the Sea</i> (Montego Bay, 10 December 1982), 1833 UNTS 3, in force 16 November 1994 .....	33

- 1984 *Protocol on Long-term Financing of the Cooperative Programme for Monitoring and Evaluation of the Long-range Transmission of Air Pollutants in Europe* (Geneva, 28 September 1984) 1491 UNTS 167, in force 28 January 1988 .....201
- 1985 *Convention for the Protection of the Ozone Layer* (Vienna, 22 March 1985), 1513 UNTS 323, in force 22 August 1988 .....28
- Protocol on the Reduction of Sulphur Emissions or their Transboundary Fluxes by at least 30 Per Cent* (Helsinki, 8 July 1985) 1480 UNTS 215, in force 2 September 1987 .....202
- Association of South East Asian Nations, *Agreement on the Conservation of Nature and Natural Resources*, opened for signature 9 July 1985, 15 EPL 64 (1985), not in force .....28, 302
- 1987 *Protocol on Substances that Deplete the Ozone Layer* (Montreal, 16 August 1987), 1522 UNTS 3, in force 1 January 1989 .....28, 222
- 1988 *Protocol on the Control of Emissions of Nitrogen Oxides or their Transboundary Fluxes* (Sofia, 31 October 1988) 1593 UNTS 287, in force 14 February 1991 .....202
- 1989 *Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* (Basel, 22 March 1989), 28 ILM 657, in force 5 May 1992 .....27
- Conference on Security and Cooperation in Europe, *Concluding Document of the Vienna Meeting 1986 of Representatives of the Participating States of the Conference on Security and Co-operation in Europe*, Vienna, 1989 .....16
- 1991 *Convention on Environmental Impact Assessment in a Transboundary Context* (Espoo, 25 February 1991), 30 ILM (1991) 802, in force 27 June 1997 .....4, 36, 59, 105, 171, 242, 300
- Protocol on the Control of Emissions of Volatile Organic Compounds or their Transboundary Fluxes* (Geneva, 18 November 1991) 2001 UNTS 187, in force 29 September 1997 .....202
- 1992 *United Nations Declaration on Environment and Development*, Rio de Janeiro, 1992. UN Doc A/CONF.151/5/Rev.1 (1992) .....64
- Convention on the Transboundary Effects of Industrial Accidents* (Helsinki, 17 March 1992), 2105 UNTS 457, in force 19 April 2000 .....4, 106, 137, 168, 257
- Convention on the Protection and Use of Transboundary Watercourses and Lakes* (Helsinki, 17 March 1992), 31 ILM (1992) 1312, in force 6 October 1996 .....4, 43, 137, 167, 246, 305
- United Nations Framework Convention on Climate Change* (Rio de Janeiro, 9 May 1992), 1771 UNTS 107, in force 21 March 1994 .....27
- Convention on Biological Diversity* (Rio de Janeiro, 22 May 1992), 31 ILM 822, in force 29 December 1993 .....27, 214, 300
- Agreement on Cooperation in the Field of Joint Management and Conservation of Interstate Water Resources* (Almaty, 18 February 1992) accessed 20 November 2014 at <http://www.caee.utexas.edu/prof/mckinney/papers/aral/agreements/ICWC-Feb18-1992.pdf> .....245
- 1994 *Protocol on Further Reduction of Sulphur Emissions* (Oslo, 14 June 1994) 2030 UNTS 122, in force 5 August 1998 .....202

- 1995 *Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin* (Chiang Rai, 5 April 1995), unreported, in force 5 April 1995 .....9, 28, 302  
*Agreement on the Establishment of the Tumen River Area Development Coordination Committee* (New York, 6 December 1995), unreported, in force 6 December 1995 .....9, 28, 302  
*Agreement on the Establishment of the Consultative Commission for the Development of the Tumen River Economic Development Area and Northeast Asia* (New York, 6 December 1995), unreported, in force 6 December 1995 .....9, 28, 302
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*Protocol to the United Nations Framework Convention on Climate Change* (Kyoto, 11 December 1997), 37 ILM 22, in force 16 February 2005 .....28
- 1998 *Protocol on Heavy Metals* (Aarhus, 24 June 1998) 2237 UNTS 4, in force 29 December 2003 .....202  
*Protocol on Persistent Organic Pollutants* (Aarhus, 24 June 1998) 2230 UNTS 79, in force 23 October 2003 .....27, 202  
*Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (Aarhus, 25 June 1998) 2161 UNTS 447, in force 30 October 2001 .....4, 59, 106, 171, 242, 300  
*Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade* (Rotterdam, 10 September 1998), 38 ILM 1, in force 24 February 2004 .....27
- 1999 *Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and Lakes* (London, 17 June 1999), UNTS 2331, 202, in force 4 August 2005 .....6, 32, 168, 303  
*Protocol to Abate Acidification, Eutrophication and Ground-level Ozone* (Gothenburg, 30 November 1999) 2319 UNTS 81, in force 17 May 2005 .....202
- 2000 *Protocol on Biosafety to the Convention on Biological Diversity* (Cartegena, 29 January 2000), 2226 UNTS 208, in force 11 September 2003 .....40
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*International Treaty on Plant Genetic Resources for Food and Agriculture* (Rome, 3 November 2001), in force 29 June 2004 .....27
- 2002 *Association of South East Asian Nations, Agreement on Transboundary Haze Pollution* (Kuala Lumpur, 10 June 2002), unreported, in force 2003 ...28, 227, 302
- 2003 *Framework Convention for the Protection of the Marine Environment of the Caspian Sea* (Tehran, 4 November 2003), unreported, in force 12 August 2006 .....9, 28, 285, 302  
*Protocol on Pollutant Release and Transfer Registers to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (Kiev, 21 May 2003), unreported, in force 8 October 2009 .....18, 62, 254, 303

- Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context* (Kiev, 21 May 2003) unreported, in force 11 July 2010 .....6, 31, 60, 106, 301
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- 2013 *Minamata Convention on Mercury* (Kumamoto, 10 October 2013) unreported, not in force .....214

## European Union Legislation

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- 2000 *Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy*, [2000] OJ L327/1, 1–73 .....180
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- 2012 *Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC Text with EEA relevance*, [2012] OJ L197/1, 1–37 .....139

## PART I

### Transboundary environmental governance



# 1. Introduction

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## I. OVERVIEW

Interest in global environmental governance has grown significantly in recent years, demonstrating its practical interest to scholars of international law and relations in particular,<sup>1</sup> as attempts are made to overcome largely state-based entrenched problems that have been recognised for some time.<sup>2</sup> Global environmental governance is therefore concerned with regulation in national as well as international contexts,<sup>3</sup> and responds and relates furthermore to issues of transnational environmental law which have also gained support.<sup>4</sup> This book is concerned with a related concept to global environmental governance and transnational environmental law, known as transboundary environmental governance. It examines this concept in practice in Asia, specifically with respect to matters of treaty implementation and compliance. Concerned mainly with governance across borders, examples in southeast Asia include the regulation of haze and other transboundary pollutants, water management (for instance in the Mekong river basin), trade in environmental

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<sup>1</sup> See for example Jean-Frédéric Morin and Amandine Orsini (eds), *Essential Concepts of Global Environmental Governance* (Routledge, Abingdon, UK and New York, USA 2015).

<sup>2</sup> In a national context, problems experienced in the USA have been found globally by other nations also. See *Breaking the Logjam: An Environmental Law for the 21st Century, Background of the Breaking the Logjam Project*, accessed 22 November 2014 at [http://www.law.yale.edu/documents/pdf/Alumni\\_Affairs/Esty\\_Breaking\\_the\\_Logjam\\_414.pdf](http://www.law.yale.edu/documents/pdf/Alumni_Affairs/Esty_Breaking_the_Logjam_414.pdf).

<sup>3</sup> As to globalisation and the importance of context in connection with global environmental governance, see Robert Lee and Ellen Stokes, 'Environmental Governance: Reconnecting the Global and Local' (2009) 36(1) *Journal of Law and Society* 1.

<sup>4</sup> For examples, see *Transnational Environmental Law* (Cambridge Journals), accessed 12 November 2014 at <http://journals.cambridge.org/action/displayJournal?jid=TEL>.



resources, and resolution of environment related issues in the South China Sea.<sup>5</sup>

In other parts of Asia, many of these issues are also present, with water quality issues dominant in international rivers and lakes (for instance the Caspian and Aral Seas), and the need to manage related pressures for infrastructure development, such as hydroelectricity. Coastal and marine issues, often involving disputed sovereignty claims,<sup>6</sup> are not discussed. This is mainly because they are beyond the scope of the five United Nations Economic Commission for Europe (UNECE) treaties,<sup>7</sup> which are the core focus of the book.<sup>8</sup> Until recently, the primary application of these agreements has been to European states, so it is important to be aware of the different regional contexts to environmental regulation between Europe and Asia, as well as the motivation for involvement of Asian states, which is essentially linked with social and economic development as well as environmental protection. However the possibility, and in some cases, reality, of accession to these five treaties by all United Nations (UN) member states furthermore emphasises the global

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<sup>5</sup> Antonio P Contreras, 'Transboundary Environmental Governance in Southeast Asia', in Amit Pandya and Ellen Laipson (eds), *Transnational Trends: Middle Eastern and Asian Trends* (The Henry L Stimson Center, Washington DC 2008), 156–9; see also Nathan Badenoch, *Transboundary Environmental Governance: Principles and Practice in Mainland Southeast Asia* (World Resources Institute, Washington DC 2002).

<sup>6</sup> For current discussion in an Asian context, see S Jayakumar, Tommy Koh and Robert Beckman, *The South China Sea Disputes And Law Of The Sea* (Edward Elgar, Cheltenham, UK and Northampton, MA, USA 2014); and Stefan Talmon and Bing Bing Jia (eds), *The South China Sea Arbitration: A Chinese Perspective* (Hart Publishing, Oxford 2014).

<sup>7</sup> In chapter order, see Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998) 2161 UNTS 447, in force 30 October 2001 (*Public Participation Convention*, Chapter 3); Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991), 30 ILM (1991) 802, in force 27 June 1997 (*EIA Convention*, Chapter 4); Convention on the Transboundary Effects of Industrial Accidents (Helsinki, 17 March 1992), 2105 UNTS 457, in force 19 April 2000 (*Industrial Accidents Convention*, Chapter 5); Convention on the Protection and Use of Transboundary Watercourses and Lakes (Helsinki, 17 March 1992), 31 ILM (1992) 1312, in force 6 October 1996 (*Water Convention*, Chapter 6); and the Convention on Long-range Transboundary Air Pollution (Geneva, 13 November 1979), 1302 UNTS 217, in force 16 March 1983 (*Air Pollution Convention*, Chapter 7).

<sup>8</sup> Coastal issues are, however, noted to some degree in connection with the *Water Convention*.