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Normative Features of the Water Convention

Attila Tanzi

Alexandros Kolliopoulos

and

Nataliya Nikiforova[*]

1. Introduction

Multilateral environmental treaties usually set out a normative goal while allowing the Parties a margin of flexibility concerning the normative and institutional ways and means to achieve it. Such flexibility aims to facilitate compliance by taking into account case-specific circumstances, be it of a hydrogeological, economic, or social nature, including the technological, financial or administrative capacity of the States concerned.

The Water Convention – which originated as a pan-European regional instrument has now evolved into a global one –[1] is not an exception to the above paradigm. Its principal aim being the prevention, control and reduction of transboundary impact with respect to transboundary watercourses and international lakes. This legal instrument provides for both substantive and procedural provisions specifying and articulating the general rule of no-harm. The Convention's whole structure is that of a framework instrument, i.e. one not purporting to set out an exhaustive and 'once and for all' legal regulation of its subject-matter (2). This legally dynamic feature of the Convention is precisely expressed through the flexible interplay between legal principles, on the one hand, and legal rights and obligations, on the other – with the former informing the application of the latter (3). The ensuing regulatory scenario is one based on legal obligations of a due diligence

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[*]The views expressed by the second and third of the authors are strictly personal and do not reflect those of the Ministry of Foreign Affairs of Greece, or of the United Nations or its Member States, respectively.

[1] The amendment to the articles 25 and 26 of the Water Convention opening it to accession by all United Nations Member States entered into force on 6 February 2013, see Chapter 2 of this collection.

nature, leaving room to the Riparian Parties to, individually and jointly, identify the appropriate measures to be adopted in any given particular case (4).

2. The framework nature of the Water Convention

The Water Convention is a framework agreement,[2] providing binding legal guidance to the Parties which are called upon to further develop its rules both *inter se* – i.e. amongst Riparian Parties - and *inter omnes partes*, i.e. amongst all Parties, through the adoption of normative instruments, such as Protocols, guidelines and model provisions. In order to achieve both functions, the Convention provides for appropriate institutional mechanisms. This dynamic function of the Convention is in line with the evolving nature of many of its obligations, as well as with the prominent role of the principle of cooperation, enunciated in article 2 para. 6, requiring the Riparian Parties, *inter alia*, to 'develop harmonized policies, programmes and strategies'.

The framework nature of the Convention is a diffused feature of multilateral environmental agreements allowing for flexibility in their application and development. Other means providing for the adaptation of environmental treaties to the developments falling within their scope of application comprise technical annexes subject to a simplified amendment procedure, or enabling clauses authorizing the Meeting of the Parties to elaborate detailed rules on a particular matter.[3] This latter mechanism can be found in article 7 of the Water Convention, with respect to the elaboration of additional rules in the field of responsibility and liability.

Framework agreements, while making possible the adaptation of their regulatory setting to scientific developments and increasing public awareness on environmental protection in specific areas relevant to the agreement in point, allow for the will of States to undertake more stringent obligations with regard to a particular matter falling within its general scope.[4] To that end, key goal oriented legal principles and rules are set out which may be later supplemented within the institutional framework of their Meetings of the Parties and subsidiary organs in different ways and through different means, such as additional protocols, soft law guidelines and model provisions.[5] Conventional practice shows a fairly wide spectrum of variety of such environmental framework agreements, some of them setting out only very general and goal oriented commitments, such as the 1985

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[2] See in general F. Romanin Jacur, *The Dynamics of Multilateral Environmental Agreements. Institutional Architectures and Law-making Processes*, Editoriale Scientifica, Napoli, 2013. See, in particular for the Water Convention, 2013 *Guide to Implementing the Water Convention*, paras. 54-55, p. 9 <http://www.unece.org/index.php?id=33657> accessed 30 March 2013.

[3] See E. Brown Weiss, *The Evolution of International Water Law* (2007) 331 RCADI 163, 265.

[4] See M. Fitzmaurice, *International Protection of the Environment* (2001) 293 RCADI 9, 100.

[5] See A. Kiss, 'Les traités-cadres : une technique juridique caractéristique du droit international de l'environnement' (1993) XXIX Annuaire français de droit international 792, 793 ; Fitzmaurice (n 4) 103 ; A. Chanaki, *L'adaptation des traités dans le temps* (Bruylant 2013) 255. .

Vienna Convention for the Protection of the Ozone Layer – though providing the forum for the elaboration and adoption of the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer;[6] while others go further in spelling out specific rights and obligations for the Parties, such as the 1992 Framework Convention on Climate Change.[7]

The Water Convention follows the second pattern. Next to the general principles spelt out in article 2, it provides for a significant number of self-standing substantial provisions addressed, either to each Party *ut singuli* – such as those contained in article 3 – or collectively to the Riparian parties of a given transboundary basin, such as those of article 9.[8] At the same time, the Water Convention provides for a multiple-step regulatory process at two distinct levels *ratione personarum*, although strictly interconnected with each other: namely, the first one among all its Contracting Parties (i) and the second one among the Riparian Parties (ii).

i) In order for the Convention to best adjust to changing circumstances, scientific developments as well as the normative evolution in the field of international water law, article 17, para. 2(a), vested the Meeting of the Parties with the power to 'review the policies for and methodological approaches to the protection and use of transboundary waters of the Parties with a view to further improving the protection and use of transboundary waters'. Further to that, a whole range of other provisions – such as article 3, para. 3, on the definition of water-quality objectives and water-quality criteria under the Guidelines of its annex II, or article 9, para. 2, point (e) on the elaboration of emission limits, are signs of the instrument's openness to accommodate innovations in scientific knowledge.

In line with the dynamic features of a framework Convention, article 17, para. 2(a), which, in combination with article 19 point (c), allows the Secretariat of the Convention to perform any functions which may be determined by the Meeting of the Parties. In practice the Secretariat has provided the legal basis for the provision of legal and technical assistance to the Contracting Parties whenever required. The same provisions have also provided the legal basis for the adoption by the Meeting of the Parties of a significant number of soft and hard law normative instruments prepared and negotiated within the Working Groups of the Convention with the

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[6] 26 ILM 1516 and 1550, respectively.

[7] 31 ILM 849. On the different shapes of framework agreements see N. Matz-Lück, 'Framework Conventions as a Regulatory Tool' (2009) 1 Goettingen Journal of International Law 439, 448; D. Bodansky, *The Framework Convention/Protocol Approach*, WHO/NCD/TFI/99.1 (1999), 19 <http://apps.who.int/iris/bitstream/10665/65355/1/WHO_NCD_TFI_99.1.pdf?ua=1> accessed 26 March 2014.

[8] 'The legal framework of the Convention is more detailed than average umbrella agreements, therefore it offers more legal guidance; this is especially true with respect to provisions contained in Part II' (*Guide to Implementing the Water Convention* (n 2) para. 55, p. 9).

active involvement of the Secretariat and under the supervision of the Bureau of the Convention.

Such instruments range from legally binding instruments, such as the 1999 Protocol on Water and Health and the 2003 Kiev Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters to those of a soft-law nature, such as the 1996 Guidelines on Monitoring and Assessment or to model provisions such as the 2012 Model Provisions on Transboundary Groundwaters.[9]

Some of those instruments have originated from cooperative discussions between the Parties within the subsidiary organs in which the need has emerged for new regulatory guidance. Other instruments have been prompted by unforeseen events requiring an adequate normative response. On this score, one may recall that it was the catastrophic Baia Mare incident of 2000 which set in motion the preparation and adoption of the 2003 Kiev Protocol; While the flood events of 2002 led to the adoption of the 2006 Model Provisions on Transboundary Flood Management. In addition to the above, normative activities under the Convention have also been undertaken to cope with new challenges not foreseen at the time of its adoption, such as payment for ecosystem services,[10] or climate change.[11]

ii) The Water Convention requires the Riparian Parties, under article 9, para. 1, to conclude basin-specific agreements, so as to fine-tune its provisions and adapt its principles to the circumstances pertaining to each specific transboundary water basin shared by Riparian Parties. As underlined in the Guide to Implementing the Water Convention, 'many specific bilateral and multilateral agreements that have already been concluded under the auspices of the Convention specifically refer to the latter as their parental instrument drawing on its general aims and on most of its provisions'.[12]

In addition, the Convention (article 9, para. 2) requires Riparian Parties sharing any given transboundary water basin to set up a joint body while setting out the main tasks of such bodies. It is to be stressed that such a form of institutional cooperation is mandatory for the Riparian Parties, while this is not the case under article 24 of the 1997 UN Watercourses Convention. Indeed, such bodies represent the pivotal institutional mechanisms essential in the furtherance of cooperation

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[9] For the complete list of all the instruments adopted so far under the auspices of the Convention see *Guide to Implementing the Water Convention* (n 2) para. 57, p. 9–10.

[10] See the 2007 *Recommendations on Payments for Ecosystem Services in Integrated Water Resources Management* <http://www.unece.org/fileadmin/DAM/env/water/publications/documents/PES_Recommendations_web.pdf> accessed 30 March 2014.

[11] See the 2009 *Guidance on Water and Adaptation to Climate Change* <http://www.unece.org/fileadmin/DAM/env/water/publications/documents/Guidance_water_climate.pdf> accessed 30 March 2014.

[12] See *Guide to Implementing the Water Convention* (n 2) para. 28, p. 29.

between the Riparian Parties and the practical implementation of its principles. This feature renders the Water Convention a unique instrument regarding cooperation at basin level.

The guidance provided by the Water Convention in the field of transboundary water cooperation is a legally binding one, in the sense that the Riparian Parties have to develop their cooperation within the legal parameters of the Convention. Indeed, article 9, not only requires Parties to enter into agreements to that effect, but also to 'adapt existing ones, where necessary to eliminate the contradictions with the basic principles of the Convention', thus stressing that its framework is a compelling one.[13] Moreover, article 9, para. 1, provides that watercourse agreements should 'embrace relevant issues covered by this Convention', so as to avoid partial arrangements undermining in practice the holistic and multidimensional character of the legal regulation provided for in the Water Convention. By this token the Water Convention ensures normative consistency between basin-specific agreements on transboundary waters and contributes to the avoidance of fragmentation in the field of international water law.

3. Normative diversity within the Water Convention

The provisions of the Water Convention encompass a large variety of normative standards, both with regard to their qualification as principles or rules (i) as well as with regard to their scope of application *rationae personae* (ii).

i) The Water Convention, despite its framework character, does not contain only goal oriented legal principles, but also a set of provisions whose classification calls for a wide spectrum of relevant qualifiers. On that score, one may consider first of all its *grundnorm*, i.e. the prevention obligation spelt out in article 2, para. 1, prescribing the Parties to 'take all appropriate measures to prevent, control and reduce any transboundary impact'. Apart from providing a complex due diligence obligation,[14] article 2 para. 1 also contains a goal oriented rule of policy.[15] Furthermore, article 2 provides for the ancillary principles to be pursued in order to achieve that goal. Article 5(2) therefore requires Parties to implement the Convention in conformity with the following three basic environmental law principles: the precautionary principle, the polluter-pays principle and the sustainable development principle in its intergenerational dimension. The due

[13]Article 3 para 2 of the 1997 New York Convention does not follow the same pattern with respect to existing agreements, as it only encourages States '…where necessary, [to] consider harmonizing such agreements with the basic principles of the present Convention'.

[14] See *infra*, para. 4.

[15] As stressed by Ronald Dworkin in its well-known distinction between legal rules and legal principles (the latter comprising also 'policies' setting out specific goals), 'some goals are negative, in that they stipulate that some present feature is to be protected from *adverse change*' (*Taking Rights Seriously* (Duckworth 1977) 22 emphasis added).

diligence nature of key obligations under the Convention implies a certain degree of comparative relativity in their application based on each basin-specific circumstance, as well as on the individual capacity of each given Party. While the above general principles also contribute to constrain the boundaries of such a relativity, hence contributing to the determination of the contents of the degree of the required due diligence.

Despite its transboundary scope, or rather, in order for its transboundary normative goals to be achieved, the Water Convention provides for a host of legal rules with fairly stringent obligations to be implemented at the national level. Some of those obligations are very specific, such as that to apply at least biological treatment (article 3, para. 1(e)), while others allow for a greater margin of discretion, such as the definition of water-quality objectives (article 3, para. 3). This rather compelling framework for national policies and measures in relation to transboundary waters is bound to positively affect also the domestic dimension of water management, given that 'enhanced national capacity, once acquired in relation to freshwaters having transboundary character, not only applies automatically to the domestic parts of an international water body, but can just as well be applied to waters having a purely domestic dimension'[16].

ii) As it has already been stressed,[17] the Water Convention provides for two categories of addressees for its obligations: those set out in its Part I (articles 2-8) relate to all Parties, whereas those of its Part II (articles 9-16) relate to the Riparian Parties of a given transboundary water basin.[18] The obligations of Part I partake of two sub-categories: those of articles 3 and 4 are individual ones, in the sense that each Party to the Convention sharing transboundary waters should diligently implement in its respective share of the water basin the measures prescribed in those provisions, irrespective of its level of cooperation with the other co-riparians, so as to avoid or minimize transboundary impact. Such obligations are thus undertaken by Parties *ut singuli* and not conditioned upon the context between the co-riparians. Other provisions in Part I, such as those contained in articles 5 and 6, are geared towards the promotion of cooperation, with special regard to exchange of information among all the Parties of the Convention, which basically operate through the active role of the Secretariat or the work of the subsidiary organs of the Convention.

The obligations in Part II relating to the Riparian Parties are of a different nature. They have been conceived so as to implement – through the mechanisms

[16] See *Guide to Implementing the Water Convention* (n 2) para. 33, p. 5.

[17] See *supra*, para. 2.

[18] This division has been introduced during the second special session of the Working Party entrusted with the elaboration of the Convention. See UNECE, *Senior Advisers to ECE Governments on Environmental and Water Problems, Working Party on Water Problems –Report of the Second Special Session* (15 November 1990) ECE/ENVWA/WP.3/10, para. 8, p. 2.

and substantive obligations set out in articles 9–16 – the general obligation of cooperation at basin level under article 2, para. 6, of the Water Convention. Some of those obligations, such as those of article 9, are obligations to be fulfilled jointly by Riparian Parties, while others, such as that to inform without delay the other Riparian Party about any critical situation under article 14, are obligations to be complied with individually, but are also meant to be implemented in the context of efficient cooperation among the co-riparians. The Water Convention is rather stringent with regard to the institutional aspect of cooperation between the Riparian Parties, insofar as article 9 is mandatory about the conclusion of watercourse agreements and the establishment of joint bodies. In addition, some cooperation obligations of a material nature, rather than procedural, such as the one to establish joint monitoring programmes (article 11) or that to exchange information (article 13) are extremely detailed, thus providing precise guidance to the Riparian Parties.

4. Due diligence nature of the obligations under the Convention

The core obligation of the Water Convention set out in article 2, para. 1, is the duty to 'prevent, control and reduce any transboundary impact', otherwise known as the no-harm rule. The distinguishing legal nature of this provision is determined by the expression whereby the Parties shall 'take all appropriate measures' aimed at achieving the prevention, control and reduction of transboundary impact. Such a formula renders the obligation in point one of due diligence as opposed to an absolute obligation of prevention of transboundary impact. Assessment of the scope of application and contents of the due diligence standard of conduct required from the Parties under obligation at issue requires further analysis of key provisions of the Convention.

4.1. The notion of due diligence

The notion of due diligence in international law has been increasingly applied in the sphere of environmental law especially in relation to the no-harm rule in a transboundary context. The core feature of the primary obligations of due diligence as opposed to absolute obligations, or obligations of result, is one impacting on the application of the secondary rules on State responsibility to the State of origin in the event of occurrence of transboundary harm.[19] In the case of absolute obligations of harm prevention, a State would be held *strictly liable* – i.e. under a *strict liability* regime – for the damage caused upon the sheer occurrence of a transboundary impact in relation to activity carried out on its territory, or even outside, for activities carried out under its control, irrespective of whether all due diligence preventive measures have been adopted, only provided the causal link has been established

[19] See *Guide to Implementing the Water Convention* (n 2) para. 63, p.10.

between the activity in point and the transboundary damage.[20] Strict liability cannot be considered to apply under general international law and it may be found at the conventional level exceptionally with regard to ultra-hazardous activities, such as in the 1972 Convention on International Liability for Damage Caused by Space Objects, whose article II provides that a State is 'absolutely liable to pay compensation for damage caused by its space object on the surface of the Earth or to aircraft in flight'.[21]

On the contrary, where the duty to prevent is couched by means of an obligation of diligent conduct, like in the Water Convention, the State would only be internationally responsible for a breach of that obligation, hence, for not meeting the burden of proof of having taken 'all appropriate measures' to prevent, control and reduce transboundary impact in relation to the activities carried out on its territory ultimately leading to the occurrence of transboundary impact. Thus, article 2, para. 1, rather than establishing an obligation of result, imposes on States a certain standard of diligence with a view to preventing transboundary impact. Such a standard is further articulated in articles 2 and 3.[22]

4.2. The scope of application of the due diligence

The first of the three interrelated obligations set out in article 2, para. 1, is the one requiring States to take 'all appropriate measures' to prevent transboundary impact. The due diligence character of the obligation of prevention, evidenced by the concept of 'appropriateness', determines the content of the duty, but also informs the timeframe of its application. It is in the due diligence rationale of the rule that Parties are required to exercise the duty of taking preventive measures not only in case of an imminent threat of transboundary harm, but also, if not rather, well in advance of the occurrence of such a threat. We are, therefore, confronted with an immediately applicable, continuing obligation, aimed at anticipating and preventing transboundary impact, which the State party is expected to comply with right from the time of completion of the process of ratification or accession to the Water Convention.[23]

If despite taking all appropriate measures, a Party fails to prevent the occurrence of transboundary impact, such occurrence triggers the related obligation of taking all appropriate measures to reduce and control the impact in question. The three obligations set out in the article 2, para. 1, are not transposable, in the sense that in the event of transboundary impact, even if the origin State has taken all appropriate measures to prevent its occurrence, it would be required to take,

[20] See A. Tanzi, Liability for Lawful Acts, *Encyclopedia of Public International Law*, Oxford, 2012, online edition <http://www.mpepil.com>
[21] Ibidem.
[22] See *Guide to Implementing the Water Convention* (n 2) para. 62, p.10.
[23] Ibidem, para. 66, p.11.

unilaterally or in cooperation with the victim State, all the appropriate measures to minimize the magnitude and the consequences of such impact. Hence, the due diligence in the context of the Water Convention extends from the obligation of prevention to that of control and reduction of such impact.

Article 2, para. 2, supplements the above general obligation through a set of concrete obligations specifying the due diligence standards in point with special regard to the following: prevention, control and reduction of water pollution which has a potential of transboundary impact; ensuring the ecologically sound use of transboundary waters, the rational water management, conservation of water resources and environmental protection; ensuring a reasonable and equitable use of transboundary waters; ensuring conservation and, where necessary, restoration of ecosystems. As emphasized by the expression 'in particular', the above list is not exhaustive. Parties, therefore, are to take all the measures available to them that are appropriate under the given circumstances.

As already anticipated, article 2, para. 5, refers to the basic principles of international environmental law – precautionary principle, polluter-pays principle and principle of sustainable water use – as an overarching guidance to Parties in determining the required diligent conduct. The inclusion of the precautionary principle is particularly informative in this regard as it calls for a stricter approach to the application of the due diligence standards of prevention.[24]

Article 2, para. 6, introduces the general duty of cooperation – one of the main pillars of the Convention's normative structure. Cooperation between Riparian Parties figures as a mean for jointly identifying and implementing the measures that would be deemed appropriate to prevent, reduce and control transboundary impact.[25] Cooperation should also be taken as a limit to the margin of appreciation by the individual Parties concerning the determination of the diligence due also in relation to their capacity, insofar as there is a minimum duty to cooperate with co-riparians regardless of one State's level of economic, technological and administrative development.

Article 3, para. 1, significantly contributes to the determination of the standard of the diligence due by requiring Parties to 'develop, adopt, implement and, as, far as possible, render compatible relevant legal, administrative, economic, financial and technical measures', in order to ensure minimizing contamination and reducing the risk of accidental water pollution. The qualifying language here might lead to the conclusion that the article 3 introduces an obligation of result by requiring States to 'ensure' compliance with certain standards. Yet, the Guide to

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[24] See A. Tanzi and M. Arcari, *The United Nations Convention on the Law of international Watercourses* (Kluwer Law International 2001) 154.

[25] See *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment,* I.C.J. Reports 2010, paras. 181–189.

Implementing the Water Convention describes the above mentioned obligations, as 'immediately applicable' within the framework of the due diligence rule.[26] Moreover, it is the general view of legal literature that actively enforcing such measures is part of a due diligence obligation.[27]

Paras. 2 and 3 of article 3, specify further concrete measures to be taken by Parties to properly implement the primary obligation of para. 1, as complemented by annex II (guidelines for developing best environmental practices) and annex III of the Water Convention (general guidance for developing water-quality objectives and adopt water-quality criteria).

4.3. The content of the due diligence

The provisions of the Water Convention can be said to provide sufficient guidance to determine the content of the due diligence standard of conduct. As already alluded, while the Convention requires States to exercise due diligence, the degree of diligence expected from each given State is somewhat relative since, as stressed by the International Law Commission (ILC), the diligence due is 'proportioned to the magnitude of the subject and to the dignity and strength of the power which is to exercise it'.[28]

In light of the above, two aspects are to be examined further separately: the proportionality of the standard of diligent conduct required in relation to the degree of risk of occurrence of transboundary impact, on the one hand, and to the capacity of the State to undertake all appropriate measures to prevent, control and reduce transboundary harm, on the other.

The ILC in its Draft Articles on Prevention of Transboundary Harm from Hazardous Activities has provided guidance on the criteria to assess the diligent nature of the conduct of a State in any given particular instance. The general rule there is that the degree of due diligence is to be appropriate and proportional to the degree of risk of transboundary harm. A higher degree of diligence is required in case of activities which may be considered ultrahazardous, in particular as regards the standard of care in designing and enforcing relevant policies. The ILC also outlined a series of factors which could guide States in their determination as to which measures be appropriate in each particular case, namely, *inter alia*: the size of operation, its location, the special climate conditions, and materials used in the

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[26] See *Guide to Implementing the Water Convention* (n 2) para. 68, p.12.

[27] See A. Tanzi and M. Arcari (n 25) 158 and O. McIntyre, *Environmental Protection of International Watercourses under International Law* (Ashgate 2007) 99.

[28] See *Draft Articles on the Law of the Non-navigational Uses of International Watercourses, commentary to article 7, para. 4, YILC 1994, vol. II, Part 2*, p. 103, for the definition of the due diligence standard by the Arbitral Tribunal in the 'Alabama' case (United States of America v. Great Britain), decision of 14 September 1872.

activity that might cause transboundary impact.[29] This approach is in line with the Water Convention whereby the standard of conduct has to be proportionate to the nature and degree of the risk of occurrence of transboundary impact in light of the specific circumstances of any given case, including the individual features of the relevant water basin. Major risks of transboundary impact, where the care due is greater, are, for instance, flooding from failure of a dam, or serious toxic pollution from failure in an industrial plant.[30] The requirement of undertaking an environmental impact assessment under article 3 para. 1 (h) of the Water Convention is particularly important for this purpose since, as confirmed by ILC, it 'enables the State to determine the extent and the nature of the risk involved in an activity and consequently the type of preventive measures it should take'.[31]

In assessing all the appropriate measures to prevent, control and reduce transboundary impact, Parties should follow the evolving trends in the field of technology, science and environmental standards. The Water Convention is explicit in this regard since article 3 introduces such evolutionary factors as 'best available technology' and 'best environmental practices' as specified in annexes I and II, respectively. Such references make the Convention particularly informative in the context of international environmental law as it is said to embody 'the most highly developed and sophisticated rules, approaches and standards for the environmental protection of international freshwater resources.'[32] In addition, the Convention's institutional structure provides practical support to the States in complying with the obligation of keeping updated on technological, scientific and environmental practices developments. To that end, within the framework of the subsidiary organs of the Convention, Parties are constantly developing non-binding, soft-law guiding instruments in the different areas of work and expertise under the Convention.[33]

The capacity of a State in identifying and implementing measures which are in line with the best available technologies and best environmental practices will depend, however, on the level of its economic, technological and administrative development - the higher the level of its development, the higher the standard of due diligence required in any given particular instance. Conversely, invoking the

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[29]See *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, commentary to article 3, para. 11, YILC 2001, vol. II, Part 2*, p. 154.

[30] See *Guide to Implementing the Water Convention* (n 2) para. 65, p.11.

[31]See *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, commentary to article 7, para. 1, YILC 2001, vol. II, Part 2*, p. 157-158.

[32]See McIntyre (n 28) 101–102. On the usefulness of the Water Convention for determining 'all appropriate measures' to be taken under article 7 of the 1997 United Nations Convention on the Law of International Watercourses, see A. Tanzi and M. Arcari (n 25) 156.

[33] See *supra* n 9.

State's level of development cannot be used to relieve a State from its due diligence obligations.[34]

The flexibility of the due diligence complex obligation in point is also conditioned in the Convention by the obligation of cooperation prescribed under article 2, para. 6, which requires Riparian Parties to comply with the minimum duty to cooperate on the basis of equality and reciprocity, in particular through entering in bilateral and multilateral agreements, 'in order to develop harmonized policies, programmes and strategies covering the relevant catchment areas, or parts thereof, aimed at the prevention, control and reduction of transboundary impact and aimed at the protection of the environment of transboundary waters or the environment influenced by such waters, including the marine environment'. Part II of the Convention further describes the procedural duties of Riparian Parties such as the requirement to hold consultations (article 10), carry out joint monitoring and assessment (article 11), undertake common research and development (article 12), exchange information (article 13), set up warning and alarm systems (article 14), provide mutual assistance (article 15) and make the information available to the public (article 16).

Compliance with the above procedural duties would assist the origin State in proving the fulfillment of its obligation to exercise due diligence in case of occurrence of transboundary impact.

Finally, having regard to the eventual impossibility for a Party to take and implement all appropriate measures under specific circumstances, such as the occurrence of an irresistible force or of an unforeseeable event beyond the control of a State, *force majeure* cannot be said to be a factor totally excusing a breach of the due diligence standards under the Water Convention[35]. In fact, it is arguable that under the Convention the secondary rules on State responsibility governing the consequences of a breach of an international obligation are subservient to the primary obligation of prevention of transboundary impact as a continuous and immediately applicable obligation, and to the ancillary primary obligation of taking 'all appropriate measures' to reduce and control the consequences the transboundary impact upon its occurrence.

5. Conclusion

The framework nature of the Water Convention makes it an attractive tool for States wishing to regulate their transboundary waters under the umbrella of a legally-binding instrument which allows for certain flexibility in its application, while

[34] See *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, commentary to article 3, para. 13, YILC 2001, vol. II, Part 2*, p. 155.

[35] See R. Pisillo-Mazzechi, 'The Due Diligence Rule and the Nature of the International Responsibility of States' (1992) 35 German Yearbook of International Law 9, 45.

at the same time providing for more stringent obligations within the legal parameters of the Convention.

The normative standards contained in the Water Convention, varying from overarching legal principles to concrete legal obligations, both of a substantive and a procedural nature, related to all Parties or to the Riparian Parties of a particular transboundary basin, are guided by the cardinal obligation of article 2, para. 1, of the Convention 'to take all appropriate measures to prevent, control and reduce any transboundary impact'. The due diligence nature of this obligation, as distinct from absolute obligations, requires a certain standard of conduct proportional to the degree of risk and capacity of the States.

In implementing their obligations, the Parties to the Water Convention benefit from institutional mechanism of the Convention. Indeed, the Meeting of the Parties and its subsidiary organs, in response to the evolving needs of the Parties, provide the latter with technical or legal assistance, develop different legally binding and non-legally binding guidance instruments and offer a platform for discussion and exchange of information between Parties but also non-Parties to the Convention.