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# Reframing the transboundary water discourse: Contextualized international law in practice

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## Abstract

Can international law provide new insights for better understanding transboundary water practice? Selecting China as one of the most challenging case studies, the article explores the possible elements of a reconceptualized approach to international freshwater management. This study demonstrates how the legal discourse surrounding regional transboundary waters can be reframed using the concept of contextualized international law to offer increased opportunities for improved transboundary water cooperation.

## 1 | INTRODUCTION

Shared freshwater resources affect the health and wealth of millions around the world. Adequate quantities and qualities of water contribute positively to the economic, environmental and social welfare of human and environmental populations within and beyond national borders. Despite the clear need for effective transboundary water cooperation, and the abundance of rules and State practice in this field, this goal remains elusive. Why is this, and how might it be addressed? Could international law provide fresh insights into why riparian nations fall short of successful transboundary water cooperation? With a view to exploring these questions more fully, this article selects China as a case study. The country is particularly relevant given its abundance of transboundary water basins and dearth of transboundary water agreements. China's 'upstream dilemma'<sup>1</sup> pits the considerable national development imperatives of the world's most populated country against a significant and vast array of downstream interests on river systems serving more than 40% of the global population.<sup>2</sup>

Some of the greatest rivers in the world originate in China – the Indus, Ganges, Brahmaputra, Irrawaddy, Salween, Mekong, Yellow and Yangtze.<sup>3</sup> Many of these suffer from compromised water security and degraded ecosystems.<sup>4</sup> China and its burgeoning population (over 1.4 billion) share diminishing freshwater resources<sup>5</sup> with 14 riparian nations – Afghanistan, Bhutan, India, Kazakhstan, Kyrgyzstan, Laos, Mongolia, Myanmar, Nepal, North Korea, Pakistan, Russia, Tajikistan and Vietnam.<sup>6</sup> The transbound-

<sup>3</sup>China Water Risk, 'Geopolitical Risks: Transboundary Rivers' (9 February 2012) <<http://www.chinawaterrisk.org/resources/analysis-reviews/geopolitical-risks-transboundary-rivers/>>.

<sup>4</sup>Y Feng, D He and W Wang, 'Identifying China's Transboundary Water Risks and Vulnerabilities – A Multidisciplinary Analysis Using Hydrological Data and Legal/Institutional Settings' in Wouters et al (n 1) 146.

<sup>5</sup>China Water Risk, 'No Water, No Growth – Does Asia Have Enough Water to Develop?' (21 September 2018) <<http://www.chinawaterrisk.org/resources/analysis-reviews/no-water-no-growth-does-asia-have-enough-water-to-develop/>>. See also summary of China's domestic and international freshwaters in: R Kinna and A Rieu-Clarke, *The Governance Regime of the Mekong River Basin: Can the Global Water Conventions Strengthen the 1995 Mekong Agreement?* (Brill 2017) 8–13; H Zhang and M Li, 'Thirsty China and its Transboundary Waters' in H Zhang and M Li (eds), *China and Transboundary Water Politics in Asia* (Routledge 2018) 3, 3 and 5.

<sup>6</sup>Y Su, 'China's International Water Relations' in S McCaffrey, C Leb and RT Denoon (eds), *Research Handbook on International Water Law* (Edward Elgar 2019) 447; JE Nickum, 'The Upstream Superpower: China's International Rivers' in O Varis, AK Biswas and C Tortajada (eds), *Management of Transboundary Rivers and Lakes* (Springer 2008) 227. See also C Du and H Zhong, 'Study on Transboundary Water Issues in China' in 2011 International Symposium on Water Resource and Environmental Protection (Institute of Electrical and Electronics Engineers 2011) 40.

<sup>1</sup>The notion of the 'upstream dilemma' is discussed in P Wouters, H Chen and JE Nickum, *Transboundary Water Cooperation Principles, Practice and Prospects for China and its Neighbours* (Routledge 2018). See also JL Turner et al, 'China's Upstream Advantage in the Great Himalayan Watershed' (2013) 16 *Asia Policy* 11.

<sup>2</sup>Statistics Times, 'List of Asian Countries by Population' <<http://statisticstimes.com/demographics/asian-countries-by-population.php>>.

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ary basins reach into three more countries – Bangladesh, Cambodia and Thailand.<sup>7</sup> Most of Asia relies on freshwater resources flowing from China. Less than 1% percent of China's national water comes from outside of its borders, while it contributes significantly to river basins originating in its territory.<sup>8</sup> Nine provinces and autonomous regions<sup>9</sup> across the country are located within transboundary watersheds, which include a vast array of contiguous and successive rivers, lakes and aquifers with diverse geophysical qualities.<sup>10</sup>

Water-related pressures within China are compounded by quantity and quality issues; 11 of China's 31 provinces suffer from water scarcity,<sup>11</sup> with adverse impacts on human and environmental welfare.<sup>12</sup> Some 28,000 waterways have vanished from China's map.<sup>13</sup> Efforts to tackle over-use and severe pollution were introduced in the 'Red Lines' approach detailed in China's 12th Five-Year Plan (FYP) – 'one of the most important documents on the planet' for global sustainability.<sup>14</sup> The Red-Line approach requires ongoing monitoring across three key areas – water use, water-use efficiency and pollution.<sup>15</sup> In the current 13th FYP, China continues to address these issues, with an increased focus on tackling

pollution.<sup>16</sup> While some progress has been made through the national implementation of the FYPs,<sup>17</sup> China's water problems<sup>18</sup> threaten to be exacerbated by its continued economic development and the emerging climate crisis.<sup>19</sup> At the transboundary level, China's 'upstream dilemma' complicates things even more.<sup>20</sup> The main challenge in this context is how to meet growing demand within China while taking into account the needs of downstream neighbours?<sup>21</sup> Key issues relate primarily to China's continued (mostly unilateral) dam building,<sup>22</sup> which its southern riparian neighbours claim has compromised the quality and quantity of flow, adversely affecting human and environmental populations downstream.<sup>23</sup> Without transboundary water agreements on most of its shared freshwater resources, China's development actions upstream continue to be called into question.<sup>24</sup>

Following this summary of China's transboundary waters and key challenges, the next part summarizes the rules of international law that govern transboundary freshwater,<sup>25</sup> as the context for examin-

<sup>7</sup>H Chen, A Rieu-Clarke and P Wouters, 'Exploring China's Transboundary Water Treaty Practice through the Prism of the UN Watercourse Convention' (2013) 38 *Water International* 217. See also S Moore, 'Water Resource Issues, Policy and Politics in China' (Brookings Institution 2013). China has the world's fifth-largest national endowment of fresh water, but its 2000 cubic metre/person/year falls far below the global average of about 6200 cubic metre/person/year.

<sup>8</sup>Y He, 'China's Practice on the Non-navigational Uses of Transboundary Waters: Transforming Diplomacy through Rules of International Law' (2015) 40 *Water International* 312.

<sup>9</sup>These provinces and autonomous regions include Guangxi, Heilongjiang, Inner Mongolia, Jilin, Liaoning, Qinghai, Tibet, Xinjiang and Yunnan.

<sup>10</sup>China shares some eight major transboundary aquifers, including a major aquifer between China and Russia. See H Zaisheng et al, 'Review on Transboundary Aquifers in People's Republic of China with Case Study of Heilongjiang-Amur River Basin' (2008) 54 *Environmental Geology* 1411.

<sup>11</sup>China Water Risk (n 5).

<sup>12</sup>C Yu, 'China's Water Crisis Needs More than Words' (2011) 470 *Nature* 307; J Qui, 'China Faces up to Groundwater Crisis' (2010) 466 *Nature* 308.

<sup>13</sup>'28,000 Chinese Waterways Dry up amid Pollution Tidal Wave' (RT News, 30 March 2013). This article indicates that 'the number of rivers in China with catchment areas of over 100 square kilometers has halved compared to 60 years ago'.

<sup>14</sup>D Pamlin, 'Beijing's Plan Shows Path to the Future' (China Daily, 29 April 2016) <<https://www.chinadaily.com.cn/a/201604/29/WS5a2b6fd4a310eefe3e9a021a.html>>.

<sup>15</sup>China's 12th Five-Year Plan (2011–2015) <[http://cbi.typepad.com/china\\_direct/2011/05/chinas-twelfth-five-new-plan-the-full-english-version.html](http://cbi.typepad.com/china_direct/2011/05/chinas-twelfth-five-new-plan-the-full-english-version.html)> requires monitoring across three 'red lines' related to total water use, water use efficiency and for controlling pollution, with limits on each of these set for 2015, 2020 and 2030; See Global Water Partnership, 'China's Water Resources Management Challenge: The "Three Red Lines"' (2015) <[https://www.gwp.org/globalassets/global/toolbox/publications/technical-focus-papers/tfpchina\\_2015.pdf](https://www.gwp.org/globalassets/global/toolbox/publications/technical-focus-papers/tfpchina_2015.pdf)>. See also K Sun and J Chen, 'Evaluation Index Quantification for "The Three Red Lines" of Water Resources Management' (2011) 28 *Journal of Yangtze River Scientific Research Institute* 5 (explaining that 'the Three Red Lines', at the core of the 'most stringent water resources management policy' comprise three red lines restricting water resources exploitation and utilization; controlling water consumption efficiency; and limiting water resources pollution; and that implementation of each red line requires a corresponding quantified evaluation index).

<sup>16</sup>China's 13th Five-Year Plan (2016–2020) <[https://en.ndrc.gov.cn/policy/relase\\_8233/201612/P020191101482242850325.pdf](https://en.ndrc.gov.cn/policy/relase_8233/201612/P020191101482242850325.pdf)> builds on past FYPs and includes 25 targets aimed at addressing China's unsustainable growth, including water-related actions. See also D Seligsohn and A Hsu, 'How China's 13th Five-Year Plan Addresses Energy and the Environment' (10 March 2016) <<http://www.chinafile.com/reporting-opinion/environment/how-chinas-13th-five-year-plan-addresses-energy-and-environment>>; China's 14th Five-Year Plan (covering 2021–2025) is a current work in progress, including sustainable development objectives; see <[http://english.www.gov.cn/premier/news/201911/26/content\\_WS5ddd1626c6d0bcf8c4c17d87.html](http://english.www.gov.cn/premier/news/201911/26/content_WS5ddd1626c6d0bcf8c4c17d87.html)>; and I Neuweg and N Stern, 'China's 14th Plan, Sustainable Development and the New Era' (2019) <<http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2019/05/China-s-14th-plan-sustainable-development-and-the-new-era.pdf>>.

<sup>17</sup>J Wang, 'Managing China's Water Stress Drop by Drop, China Water Risk' (14 June 2018) <<http://www.chinawaterrisk.org/opinions/managing-chinas-water-stress-drop-by-drop/>>, looking at data from 2010 and 2015, concludes that China has begun to see the positive impacts of these strict measures, albeit with regional differences.

<sup>18</sup>Y Feng and D He, 'Transboundary Water Vulnerability and Its Drivers in China' (2009) 19 *Journal of Geographical Sciences* 189.

<sup>19</sup>United Nations (UN) Secretary-General António Guterres refers to the 'climate crisis' as a 'direct existential threat'; see D Carrington, 'Why the Guardian is Changing the Language It Uses about the Environment' (The Guardian, 17 May 2019).

<sup>20</sup>Feng et al (n 4).

<sup>21</sup>M Kattelus et al, 'China's Southbound Transboundary River Basins: A Case of Asymmetry' in Wouters et al (n 1) 248.

<sup>22</sup>D He et al, 'China's Transboundary Waters: New Paradigms for Water and Ecological Security through Applied Ecology' (2014) 51 *Journal of Applied Ecology* 1159, at 1161 (discussing China's considerable dam building).

<sup>23</sup>Kattelus et al (n 21) 248 (noting that six major transboundary river basins that drain south from China – the Red River, Mekong, Salween, Irrawaddy, Ganges-Brahmaputra-Meghna and Indus – serve more than one billion people across Asia in areas with exceptional biodiversity).

<sup>24</sup>DJ Devlaeminck, P Wouters and Y Liu, 'List of China's Transboundary Water Agreements and Related Documents' (20 January 2020) <<https://davidjdevlaeminck.com/research-resources/>>.

<sup>25</sup>On international water law generally, see S McCaffrey, *The Law of International Watercourses* (3rd edn, Oxford University Press 2019); EB Weiss, *International Law for a Water-Scarce World* (Martinus Nijhoff 2013); A Rieu-Clarke, A Allan and S Hendry, *Handbook on Water Law and Policy* (Routledge 2016); CB Bourne, 'The International Law Association's Contribution to International Water Resources Law' in P Wouters (ed), *International Water Law, Selected Writings of Professor Charles B. Bourne* (Kluwer Law International 1997) 233.

ing China's State practice in this field.<sup>26</sup> Having established gaps in this practice, the article then moves to exploring China's approach to international law considered more broadly. This reveals the continued importance of the Five Principles of Peaceful Coexistence<sup>27</sup> as the bedrock of China's foreign policy and international relations. The final sections draw together the main themes and propose a reconceptualized approach to understanding and implementing transboundary water cooperation, based on the China case study. International law concepts such as an 'instrumentalist approach', 'outcome cooperation', 'relational contracts' and even 'particular custom' combine to provide the basis for a reframing of the legal discourse in this field. The multi-level analytical approach used here offers new opportunities to explore more closely some of the important factors that influence the type and quality of transboundary water cooperation. A more informed understanding of the 'why' of international cooperation through a riparian nation's perception of international law could help to inform the 'how' of effective transboundary water cooperation. Reframing the legal discourse in this way could assist also with designing pragmatic steps towards addressing shared 'hard' transboundary water challenges.<sup>28</sup>

## 2 | INTERNATIONAL WATER LAW AND CHINA'S PRACTICE

The rules of international law that govern the uses of transboundary water resources have been codified and progressively developed in two global instruments – the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses (Watercourses Convention),<sup>29</sup> and the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Water

Convention).<sup>30</sup> These two multilateral agreements have emerged as a result of major in-depth studies and extensive examination of State practice in this field by the relevant United Nations (UN) bodies and experts, riparian nations' feedback and academic debate, dating back to the 1800s.<sup>31</sup> The two UN water conventions provide complementary frameworks for guiding States' actions related to transboundary water utilization and management.<sup>32</sup> The Water Convention, concluded decades ago within a European context (primarily to address pollution issues and to limit adverse transboundary impact) provides a rather regulated regime, perhaps making it somewhat less easily transferable to an Asian context.<sup>33</sup> However, China's transboundary water practice, examined primarily in the context of the Watercourses Convention, reveals broad alignment with the key principles of both instruments. Despite this, there are differences, briefly summarized here.

China, in the preponderance of its water treaties, expressly recognizes the overarching customary rule of 'equitable and reasonable use' of transboundary waters.<sup>34</sup> China's statements and voting records in the course of the negotiation of the Watercourses Convention highlight its support for this fundamental norm.<sup>35</sup> The open-ended nature of the rule of equitable and reasonable use (deliberately drafted in this non-prescriptive way, after much debate) is considered a particular strength. Its final formulation in the Watercourses Convention provides a malleable standard, devised for, and capable of, dealing with the (inevitable) changing circumstances of transboundary water resources.<sup>36</sup> By way of comparison, agreements setting forth fixed parameters for water-sharing may lead to problems with compliance, unless flexibility is built in, through procedural rules and institutional mechanisms capable of

<sup>26</sup>On China's transboundary waters and international law, see P Wouters, 'International Law of Watercourses: New Dimensions' in *Collected Courses of the Xiamen Academy of International Law, Volume 3* (Martinus Nijhoff 2011) 347. For an overview of the historical context on this topic in Asia, see E Benvenisti, 'Asian Traditions and Contemporary International Law on the Management of Natural Resources' (2008) 7 *Chinese Journal of International Law* 273.

<sup>27</sup>See generally: H Xue, 'Chinese Perspectives on International Law: History, Culture and International Law' (2011) 355 *Collected Courses of the Hague Academy of International Law* 41; also B Saul, 'China, Natural Resources, Sovereignty and International Law' (2013) 37 *Asian Studies Review* 196.

<sup>28</sup>'Hard' challenges in this context refer to the increased competition for shared uses of diminishing quantities and qualities of transboundary freshwater in the wake of climate change, growing populations and degraded ecosystems. See AD Tarlock, 'Four Challenges for International Water Law' (2010) 23 *Tulane Environmental Law Journal* 369 (Tarlock, 'Four Challenges'); Tarlock identifies shortcomings in this field – scarcity, unilateral action, climate change, environmental degradation, and social inequity – and suggests that a combined approach of benefit-sharing and integrated management could contribute to 'fairer, open, environmentally sustainable, cooperative, and adaptive management regimes among riparian states' (ibid 371). See also his recent views in AD Tarlock, 'Toward a More Robust International Water Law of Cooperation to Address Droughts and Ecosystem Conservation' (2016) 28 *Georgetown Environmental Law Review* 261, 262 (Tarlock, 'Toward a More Robust International Water Law').

<sup>29</sup>Convention on the Law of the Non-navigational Uses of International Watercourses (adopted 21 May 1997, entered into force 17 August 2014) 1997 36 ILM 700 (Watercourses Convention).

<sup>30</sup>Convention on the Protection and Use of Transboundary Rivers and Lakes (adopted 17 March 1992, entered into force 6 October 1996) 1936 UNTS 269 (Water Convention).

<sup>31</sup>See McCaffrey et al (n 6) xxiii–xli.

<sup>32</sup>S McCaffrey, 'The 1997 UN Convention: Compatibility and Complementarity' in A Tanzi et al (eds), *The UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes* (Brill 2015) 49; A Tanzi, 'The Economic Commission for Europe Water Convention and the United Nations Watercourses Convention: An Analysis of their Harmonized Contribution to International Water Law' UN Doc ECE/MP.WAT/42 (2015).

<sup>33</sup>P Wouters and H Chen, 'China's "Soft-Path" to Transboundary Water Cooperation Examined in the Light of Two Global UN Water Conventions – Exploring the 'Chinese Way' (2013) 22 *Journal of Water Law* 232; Y Su, 'Contemporary Legal Analysis of China's Transboundary Water Regimes: International Law in Practice' (2013) 39 *Water International* 705.

<sup>34</sup>P Wouters, 'The Yin and Yang of International Water Law: China's Transboundary Water Practice and the Changing Contours of Sovereignty' (2014) 23 *Review of European, Comparative and International Environmental Law* 67.

<sup>35</sup>UNGA '99th Plenary Meeting, Fifty-First Session' UN Doc A/51/PV.99 (21 May 1997); see Chen et al (n 7); Su (n 33); Wouters (n 26); P Wouters, 'Enhancing China's Transboundary Water Cooperation – What Role for the UNECE Water Convention?' in Tanzi et al (n 32) 451.

<sup>36</sup>E Benvenisti, 'Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law' (1996) 90 *American Journal of International Law* 384, 402–404. Benvenisti highlights the important role of 'vague' rules in difficult negotiations, including with future-proofing the legal regime.

adjusting established regimes in the event of changing circumstances.<sup>37</sup>

Considered within the context of the core substantive rules in this field reflected in the UN water conventions and in customary law – the duties to cooperate, to use transboundary waters in an equitable and reasonable manner, to take due diligence to not cause significant harm, to protect the environment of the watercourse<sup>38</sup> – China's treaty practice reveals rather patchy and imprecise adherence to these specific obligations.<sup>39</sup> Most of China's transboundary water agreements (concluded primarily with its northern and western neighbours) are quite general, with cooperation effected in large part by joint bodies. With regard to procedural duties, the detailed provisions of the two UN water conventions are not reflected in China's diverse transboundary water treaty practice, which ranges from limited agreements on data exchange to more comprehensive arrangements establishing joint institutions.<sup>40</sup> The most functional arrangements appear to be between China and its northern neighbours Russia, Mongolia and Kazakhstan.<sup>41</sup> Transboundary water cooperation with China's southern neighbours, mostly limited to data exchange arrangements, appears to be evolving incrementally under the newly established basin-wide Lancang-Mekong Cooperation Mechanism.<sup>42</sup> In all other basins, China deals on a bilateral country-to-country basis.<sup>43</sup>

China's approach to dispute settlement in its water-related agreements is significantly more restrained when compared with the provisions set forth in the two UN water conventions.<sup>44</sup> China's view, aligned with its firm embrace of the fundamental tenet of State sovereignty, rejects the notion that a framework convention should

contain compulsory dispute settlement provisions;<sup>45</sup> instead, it is for each nation to consent to dispute settlement procedures on a case-by-case basis.<sup>46</sup> It is a view shared by most countries, including the United States, and all Permanent Members of the UN Security Council, apart from the United Kingdom, the only member to accept the compulsory jurisdiction of the International Court of Justice.<sup>47</sup> China has traditionally relied on consultations and negotiations to address any inter-State disagreements, including with respect to its shared uses of transboundary waters.<sup>48</sup> This approach is consistent across its treaty practice,<sup>49</sup> and continues in China's ongoing transboundary water relations.<sup>50</sup>

In summary, while China's treaty practice relating to transboundary waters aligns broadly with the overarching rules of the Watercourses Convention, there are differences and notable trends.<sup>51</sup> As China's 'upstream dilemma' persists, and its continuing hydropower development in the upper reaches of transboundary watercourses remains controversial,<sup>52</sup> how might international law offer new insights into China's evolving transboundary water practice?

<sup>37</sup>P Wouters, 'Universal and Regional Approaches to Resolving International Water Disputes: What Lessons Learned from State Practice?' in International Bureau of the Permanent Court of Arbitration (ed), *Resolution of International Water Disputes: Papers Emanating from the Sixth PCA International Law Seminar, November 8, 2002* (Kluwer Law 2003) 111.

<sup>38</sup>P Wouters et al, 'Sharing Transboundary Waters – An Integrated Assessment of Equitable Entitlement: The Legal Assessment Model' (UNESCO IHP 2006) <<https://unesdoc.unesco.org/ark:/48223/pf0000139794>>.

<sup>39</sup>Su (n 33).

<sup>40</sup>Chen et al (n 7).

<sup>41</sup>S Vinogradov and P Wouters, 'Transboundary Water Cooperation between the Russian Federation and the Neighbouring States: Legal and Institutional Frameworks' in McCaffrey et al (n 6) 463.

<sup>42</sup>'Lancang-Mekong Cooperation' (LMC) <<http://www.lmcchina.org/eng/>>. The LMC, launched in March 2016, comprises six countries: China, Cambodia, Laos, Myanmar, Thailand and Vietnam. The Fifth Mekong-Lancang Cooperation Foreign Ministers' Meeting was held in Vientiane, Laos on 20 February 2020. See also S Biba, *China's Hydro-politics in the Mekong: Conflict and Cooperation in Light of Securitization Theory* (Routledge 2018).

<sup>43</sup>Chen et al (n 7).

<sup>44</sup>Wouters (n 37). Each of the UN water conventions provides for compulsory dispute settlement, although through different processes. The Watercourses Convention (n 29) sets forth a menu of settlement procedures (Article 33, with 10 sub-provisions and an annex), which include among other means an innovative mechanism – compulsory fact-finding (resorted to where other traditional procedures have been unsuccessful). The Water Convention (n 30) takes a similar but less elaborate approach to dispute settlement: the parties must seek a solution by negotiation or by any other means of dispute settlement acceptable to them (Article 22 and Annex). Where a dispute is not resolved under this provision the dispute may be settled by arbitration or submitted to the International Court of Justice.

<sup>45</sup>The Chinese position: 'Article 33 of the United Nations Charter lays down that States may seek a peaceful solution to a dispute by means of their own choice. The compulsory fact-finding dictated by the draft Convention goes against the provisions of the Charter. The Chinese Government favours the settlement of all disputes by peaceful means, through consultations. We are not against fact-finding as an optional means of settlement, but we cannot agree to any mandatory means or procedures for the settlement of a dispute without the consent of the countries parties to the dispute'. See UNGA (n 35) 7. Other States challenged the compulsory dispute settlement provisions revealed during the voting in the UN Working Group of the Whole on the draft provision Article 33. China, Colombia, France, India and Turkey voted against the provision; see UN Working Group of the Whole Record, UN Doc A/C.6/51/NUW/L.4/Add1 (4 April 1997); see also remarks by France, India, Israel and Rwanda during the final voting on the UN Convention, UNGA (n 35) 8–11.

<sup>46</sup>China continues to be a strong supporter of the UN Charter, including its provision on dispute settlement, Article 2(3), which provides: 'All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered'. Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

<sup>47</sup>PC Chan, *China, State Sovereignty and International Legal Order* (Brill Nijhoff 2015) 100. It is also notable that only 8% of Asian States have accepted the compulsory jurisdiction of the International Court of Justice, compared with 30% of European States, 39% of Latin American States and 41% of African States; see AR Darmawan, 'International Law Takes a Step towards Asia' (The Interpreter, 30 June 2020) <<https://www.lowyinstitute.org/the-interpreter/international-law-takes-step-towards-asia>>.

<sup>48</sup>J Pan, *Towards a New Framework for Peaceful Settlement of China's Territorial and Boundary Disputes* (Martinus Nijhoff 2009) 80.

<sup>49</sup>Wouters and Chen (n 33).

<sup>50</sup>China's President Xi had proposed a five-point formula under which both countries would accommodate each other's concerns in matters of 'core interests'. See 'PM Wants India-China Body on Brahmaputra Dams' (Hindustan Times, 29 March 2013).

<sup>51</sup>Wouters et al (n 1) 353 conclude that China's transboundary water practice shows signs of incremental cooperation.

<sup>52</sup>See generally B Chellaney, *Water: Asia's New Battleground* (Georgetown University Press 2011); S Ho, 'China's Transboundary River Policies Towards Kazakhstan: Issue-Linkages and Incentives for Cooperation' (2017) 42 *Water International* 148; L Phan, 'The Sambor Dam: How China's Breach of Customary International Law Will Affect the Future of the Mekong River Basin' (2019) 32 *Georgetown International Environmental Law Review* 105.



### 3 | INTERNATIONAL LAW, CHINA AND THE FIVE PRINCIPLES

Scholarship on the topic of international law – what it is and how it works – continues to flourish, manifested by the growing body of literature in this field.<sup>53</sup> Diverse views and concepts, attempting to grasp the changing nature of international law, constantly emerge – from a ‘relative normativity’<sup>54</sup> to the ‘decay of international law’,<sup>55</sup> utopia,<sup>56</sup> fairness,<sup>57</sup> and the coexistence/cooperation didactic.<sup>58</sup> There is a growing literature examining the transformation of international law – the Eastphalian/Westphalian discourse,<sup>59</sup> the experience from different regions and countries, such as China,<sup>60</sup> and whether ‘authoritarian’ international law explains divergent State practice.<sup>61</sup> Some commentators question whether international law is ‘international’ or even ‘law’.<sup>62</sup> While it is impossible to examine here each of these various theories and conceptual approaches, this brief scan of the theoretical horizon reveals something fundamental: international law continues to evolve and is prolific with ongoing debate. It is an important context within which to explore transboundary water cooperation and its applicable regulatory frameworks.

In this light, one legal scholar suggests that ‘[i]nternational law can be understood from an *instrumentalist* perspective’.<sup>63</sup> Lowe identifies three limits of international law and asserts that ‘law cannot provide an all-encompassing normative code for international

society. It provides a language for international dealings, a conceptual and institutional framework ... [it] is an *instrument*, a way of doing things, not a comprehensive code to govern international life’.<sup>64</sup> This conceptual approach will be used to explore China’s ‘way of doing things’ through a brief survey of its attitude to international law, in the first instance, and then to examine how that might influence its transboundary water relations and practice.

There is a growing literature on China’s views towards international law.<sup>65</sup> A prominent Chinese legal authority observes that ‘it is always important and necessary to study international law from the perspectives of individual States in order to better appreciate how international law operates in each specific political, economic and social context. ... history and culture become pertinent elements to international law’.<sup>66</sup> Clearly, China’s attitude towards international law (and international water law and practice)<sup>67</sup> has been influenced by its history, geography and culture.<sup>68</sup> This continues to shape the evolving nature of China’s international practice, described recently as ‘Chinese exceptionalism’.<sup>69</sup>

Only some 70 years ago, China as a ‘new nation’ was the first country to sign the UN Charter.<sup>70</sup> Since then, as the People’s Republic of China (PRC), it has embraced the broad principles set forth in the Charter and anchored its foreign policy on three basic pillars: equality, mutual benefit and respect for the sovereignty and territorial integrity of other nations.<sup>71</sup> One of the most formidable challenges that faced the ‘new China’ was the demarcation of its more than 22,000 kilometres long land boundary with 14 States. When the PRC emerged, no single boundary was clearly demarcated, nor were they free of disputes with neighbouring countries. Some decades later, most (but not all) of these issues have been resolved through a series of bilateral agreements with the majority of its neighbours.<sup>72</sup> Underpinning these actions, and as the continuing cornerstone of China’s foreign policy, the Five

<sup>53</sup>See, e.g., E Roucouas, *A Landscape of Contemporary Theories of International Law* (Brill 2019).

<sup>54</sup>P Weil, ‘Towards Relative Normativity in International Law?’ (1983) 77 *American Journal of International Law* 413.

<sup>55</sup>A Carty, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs* (Manchester University Press 1986); see also DW Kennedy, ‘The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs (Book Review)’ (1987) 81 *American Journal of International Law* 451.

<sup>56</sup>M Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2006).

<sup>57</sup>TM Franck, *Fairness in International Law and Institutions* (Oxford University Press 1998).

<sup>58</sup>PM Dupuy, ‘International Law: Torn between Coexistence, Cooperation and Globalization: General Conclusion’ (1998) 9 *European Journal of International Law* 278.

<sup>59</sup>A Coleman and JN Maogoto, ‘“Westphalian” Meets “Eastphalian” Sovereignty: China in a Globalized World’, (2013) 3 *Asian Journal of International Law* 237; see also A Carty and F Nazir Lone, ‘Some New Haven International Law Reflections on China, India and their Various Territorial Disputes’ (2011) 19 *Asia Pacific Law Review* 93.

<sup>60</sup>C Cai, *The Rise of China and International Law Taking Chinese Exceptionalism Seriously*, (Oxford University Press 2019) (Cai suggests that China’s approach to international law is more principle-based rather than rule-based); see also Chan (n 47) 100.

<sup>61</sup>T Ginsburg, ‘Authoritarian International Law?’ (2020) 114 *American Journal of International Law* 221. Ginsburg introduces ‘authoritarian international law’ – ‘defined as legal rhetoric, practices, and rules specifically designed to extend the survival and reach of authoritarian rule across space and/or time’ (ibid 228) – which is characterised by less use of formal third-party adjudication in favour of State-to-State negotiations, leading to ‘the development of new norms and practices’ (ibid 225). See also S Chesterman, ‘Can International Law Survive a Rising China?’ (National University of Singapore 2020) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3630876](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3630876)>.

<sup>62</sup>A Roberts, *Is International Law International?* (Oxford University Press 2017).

<sup>63</sup>V Lowe, ‘The Limits of the Law, Inaugural Lecture’ (2015) 379 *Collected Courses of the Hague Academy of International Law* 1, 26 (emphasis added in main text). Lowe identifies three limitations of international law – its inability to address ‘intractable’ problems; its lack of specificity in dealing with particular issues; and the limits of its conceptual framework to cover certain issues.

<sup>64</sup>ibid (emphasis added).

<sup>65</sup>Early seminal works include T Wang, ‘International Law in China: Historical and Contemporary Perspectives’ (1990) 221 *Collected Courses of the Hague Academy of International Law* 195; more recent scholarship includes, *inter alia*, Xue (n 27) and Cai (n 60); see also A Zuo, ‘China’s Approaches to the Western-dominated International Law: A Historical Perspective from the Opium War to the South China Sea Arbitration Case’, (2018) 6 *University of Baltimore Journal of International Law* 21.

<sup>66</sup>Xue (n 27) 53–54. See also M Jorgensen, ‘Equilibrium & Fragmentation in the International Rule of Law: The Rising Chinese Geolegal Order’ (2018) <[https://publishup.uni-potsdam.de/files/42282/kfg\\_wps21.pdf](https://publishup.uni-potsdam.de/files/42282/kfg_wps21.pdf)>.

<sup>67</sup>Benvenisti (n 26) 274 (suggesting that ‘ancient Asian traditions can inform decision-makers as to the management of specific treaty regimes as well as the evolution of international law in general’).

<sup>68</sup>See generally MA Carrai, *Sovereignty in China, A Genealogy of a Concept since 1840* (Cambridge University Press 2019); J Pan, ‘Chinese Philosophy and International Law’ (2011) 1 *Asian Journal of International Law* 233.

<sup>69</sup>Cai (n 60); Jorgensen (n 66) introduces the notion of ‘geolegal power’ to explain China’s approach to international law; see also Saul (n 27) 197–201.

<sup>70</sup>UN, *Yearbook of the United Nations, 1946–1947* (UN 1947) 33, para 15.

<sup>71</sup>Xue (n 27) 63: ‘In its provisional constitutional document, the Common Program, it was provided that the People’s Republic of China should establish its diplomatic relations with foreign countries on the basis of equality, mutual benefit and mutual respect for territorial sovereignty, which was subsequently incorporated into the first Constitution of the country’ (footnote references omitted). Chan (n 47) 70 claims that China has followed these 3 principles since the Qing dynasty.

<sup>72</sup>Xue (n 27) 82. See also Saul (n 27) 203.

Principles of Peaceful Coexistence<sup>73</sup> provide a blueprint for China's actions: State sovereignty,<sup>74</sup> within the paradigm of 'peaceful co-existence'.<sup>75</sup> According to Xue Hanqin (now a Judge at the International Court of Justice), 'the ultimate goal China pursues is to achieve equitable and reasonable solutions; it is fully aware that only by so doing could the settlement last in the interest of peace and good neighbourliness'.<sup>76</sup>

The 'Five Principles' originated in separate statements endorsed by China with Myanmar and India, close to seven decades ago. Starting with the 1954 Agreement between China and India – the first treaty that formulated the Five Principles of Peaceful Coexistence<sup>77</sup> – these principles have become integral to China's approach to international law.<sup>78</sup> The preamble of this Agreement specifically elaborates on these Five Principles, including: (i) mutual respect for each other's territorial integrity and sovereignty; (ii) mutual non-aggression; (iii) mutual non-interference in the internal affairs of the other party; (iv) equality and mutual benefit; and (v) peaceful coexistence.<sup>79</sup> These elements, reiterated on numerous occasions in various UN fora and in China's continued support for the UN, remain the principal underpinnings of China's diplomacy.<sup>80</sup> This has been reinforced most recently by President Xi Jinping

during his historic visit to Myanmar, referring to them as 'a basic norm in international relations'.<sup>81</sup>

In China's view, the Five Principles find broad expression in the UN Charter,<sup>82</sup> evidenced also in China's support for the UN.<sup>83</sup> In the transboundary water context, the formulation of Article 8 of the Watercourses Convention echoes the constituent elements of the Five Principles, calling on watercourse States to 'cooperate on the basis of sovereign equality, territorial integrity and mutual benefit in order to attain optimal utilization and adequate protection of an international watercourse'.<sup>84</sup> While this approach is reflected broadly in China's transboundary water treaty practice, downstream riparian neighbours seek evidence of 'mutual benefit' across the basin.

Many of China's international initiatives, such as its Belt and Road Initiative,<sup>85</sup> appear to be in line with its adherence to the Five Principles.<sup>86</sup> This is reflected also in China's growing engagement in numerous multilateral,<sup>87</sup> regional and bilateral regimes, and global and regional institutions, suggesting a more nuanced and evolving contemporary approach to State sovereignty in its practice.<sup>88</sup> In the water-related context, China's role in international environmental negotiations appears to be influenced by two key factors: its enormous population, and its massive developing economy, highlighting thus its focus on national imperatives.<sup>89</sup>

<sup>73</sup>According to Xue (n 27) 107: 'In its foreign policy statements it reiterates that in the twenty-first century, it will continue to maintain its foreign relations with all States on the basis of the Five Principles of Peaceful Coexistence' (footnote references omitted).

<sup>74</sup>Carrai (n 68) 308 (noting the importance of sovereignty, enshrined in the Five Principles, which was considered by one of China's leading legal scholars, Wang Tiewa, and other scholars to comprise 'the PRC's greatest contribution to international law').

<sup>75</sup>Xue (n 27) 90: 'China's persistent stand on the primacy of State sovereignty has its deep roots embedded in the miserable experience in its modern history [footnote references omitted]'. Her discussion on sovereignty concludes by stating: 'China reserves its position on the principles of sovereignty and non-interference, because it believes that sovereignty, in the final analysis, is not so much about the concept itself, relevant or obsolete; it is a claim about the way in which how different political and social systems, different forms of civilization and culture should correlate and treat each other in international relations' (ibid 88–107).

<sup>76</sup>ibid 85.

<sup>77</sup>Agreement between the PRC and the Republic of India on the Trade and Intercourse between the Tibet Region of China and India (adopted 29 April 1954, entered into force 3 June 1954). Commemorating the recent anniversary of these engagements, China's President Xi reaffirmed China's commitment to these principles; 'Xi, Myanmar Leaders Celebrate 70th Anniversary of Diplomatic Ties' (Xinhuanet, 18 January 2020); and 'Carry forward the Five Principles of Peaceful Coexistence to Build a Better World through Win-win Cooperation' (People's Daily Online, 10 July 2014).

<sup>78</sup>Calling for a new international order based on the Five Principles of Peaceful Coexistence, Premier Zhou and his counterparts from India and Myanmar proposed to adopt the Five Principles of Peaceful Coexistence as the norms governing international relations. See China Ministry of Foreign Affairs, 'China's Initiation of the Five Principles of Peaceful Co-Existence' <[https://www.fmprc.gov.cn/mfa\\_eng/ziliao\\_665539/3602\\_665543/3604\\_665547/t18053.shtml](https://www.fmprc.gov.cn/mfa_eng/ziliao_665539/3602_665543/3604_665547/t18053.shtml)>.

<sup>79</sup>Chan (n 47) 92 provides more details, explaining that the Five Principles were expanded by the 1955 Bandung Conference to ten guiding principles; see also discussion in Carrai (n 68) 307–318.

<sup>80</sup>The Five Principles of Peaceful Coexistence were incorporated in the Preamble of China's Constitution (4 December 1982) preamble (English version available at <<http://www.unesco.org/education/edurights/media/docs/39f675948ad50e4af1f11188daea47d593e7f694.pdf>>). In a more recent iteration, see President Xi Jinping's first address to the United Nations General Assembly, 'Working Together to Forge a New Partnership of Win-win Cooperation and Create a Community of Shared Future for Mankind' (28 September 2015) <<http://issi.org.pk/wp-content/uploads/2015/04/Doc-19.pdf>>. The statement concludes urging 'a new partnership of win-win cooperation and a community of shared future for mankind' (ibid).

<sup>81</sup>Xi, Myanmar Leaders Celebrate 70th Anniversary of Diplomatic Ties' (n 77). See also D Roy, 'Xi Jinping Thought on Diplomacy' Fails to Impress – or Reassure (The Diplomat, 2 April 2020), emphasizing China's view that international relations should have 'Chinese characteristics', based on the core principles espoused in the Five Principles.

<sup>82</sup>UN Charter (n 46) art 2(1).

<sup>83</sup>Z Wang and B Hu, 'China's Reform and Opening-up and International Law' (2010) 9 Chinese Journal of International Law 196.

<sup>84</sup>Watercourses Convention (n 29) art 8. On the duty to cooperate, see generally C Leb, *Cooperation in the Law of Transboundary Water Resources* (Oxford University Press 2013); C Leb, 'One Step at a Time: International Law and the Duty to Cooperate in the Management of Shared Water Resources' (2014) 40 Water International 21.

<sup>85</sup>G Martinico and X Wu (eds), *A Legal Analysis of the Belt and Road Initiative. Towards a New Silk Road?* (Palgrave Macmillan 2020).

<sup>86</sup>China launched its Belt and Road Initiative in 2013, a cornerstone of its good neighbour policy, aimed 'to enhance regional connectivity and embrace a brighter future'. See Government of China, 'China Unveils Action Plan on Belt and Road Initiative' (28 March 2015) <[http://english.www.gov.cn/news/top\\_news/2015/03/28/content\\_281475079055789.htm](http://english.www.gov.cn/news/top_news/2015/03/28/content_281475079055789.htm)>.

<sup>87</sup>Wang and Hu (n 83) 193. China is party to a number of water-related multilateral environmental agreements, such as the Convention on Wetlands of International Importance (Ramsar Convention), the UN Convention on Biological Diversity, the 1992 UN Framework Convention on Climate Change and the UN Convention to Combat Desertification, to name a few; see J Lee, 'The Governance of Wetland Ecosystems and the Promotion of Transboundary Water Cooperation – Opportunities Presented by the Ramsar Convention' in Wouters et al (n 1) 70.

<sup>88</sup>Chesterman (n 61) calls it a 'kinder, gentler Westphalia' referring to Ginsburg (footnote reference omitted). Saul (n 27) 211 finds that, '[o]n the whole, China takes international law seriously and views sovereign equality and multilateralism – including the protection of the weak from the strong – as positive social values'.

<sup>89</sup>Xue (n 27) 152: 'As the largest developing country, China has only about 7 per cent of the world's arable land, but it has to feed 20 per cent of the world population. Its per capita share of water resources is far below the world average. The natural conditions of a significant part of the country are unsuitable for agricultural and industrial development'.

#### 4 | REFRAMING THE LEGAL DISCOURSE OF TRANSBOUNDARY WATER COOPERATION: AN INSTRUMENTALIST APPROACH

International law, by its very nature, is diverse, evolutionary and even reconciliatory.<sup>90</sup> Normative paradigms can (and are) devised, interpreted and understood in dynamic ways, taking into account 'the perspectives and principles of traditional systems, not merely in a general way, but with reference to specific principles, concepts and aspirational standards'.<sup>91</sup> In this context, normative principles emerge from a broad range of sources, including the society being governed.<sup>92</sup> This contextualized approach to international law helps to explain varied national and regional approaches. China's adherence to the Five Principles influences its attitude to international law; this principles-based *modus operandi*, in turn, affects its transboundary water practice. Taking this into account, and drawing on Lowe's 'instrumentalist' approach,<sup>93</sup> two observations regarding China's transboundary water practice can be made. Firstly, China's approach to international law is largely principles-based, embedded within, and influenced by, a specific history, geography and culture.<sup>94</sup> Secondly, from this perspective, the two UN water conventions can be viewed as 'optional' legal frameworks, to be considered and applied within the particular regional context.<sup>95</sup> Thus, the legal discourse on transboundary water cooperation can be reframed such that a riparian nation's 'way of doing things' provides an intrinsic context for understanding its transboundary water practice. This reframing exercise offers new insights and opportunities for devising more meaningful cooperation, especially with respect to China's upstream dilemma. How might China's approach to international law be translated into enhanced transboundary water relations?

China's international cooperation 'carries forward' the Five Principles in global policy forums,<sup>96</sup> evidenced in a steadfast re-

peated mantra of idealistic aspirations – being the 'good neighbour', contributing to a 'harmonious society',<sup>97</sup> and support for a 'community of interests' with 'win-win' outcomes.<sup>98</sup> The China-Russian Declaration on the Promotion of International Law, as one example, articulates this approach as follows:

*The principles of international law are the cornerstone for just and equitable international relations featuring win-win cooperation, creating a community of shared future for mankind, and establishing common space of equal and indivisible security and economic cooperation.*<sup>99</sup>

Each of these high-level objectives provides ample opportunities for their more pragmatic implementation within the transboundary water context, in line with China's adherence to the Five Principles. Translating broad policy aims into effective transboundary water cooperation requires innovative methods, albeit within regional settings. China's practical actions under the 'Red Lines' water-related monitoring requirements set forth in its FYPs demonstrate concrete steps to address water quality and quantity issues, affecting its transboundary water resources as well.<sup>100</sup> At the international level, evaluating the effectiveness of China's transboundary cooperation is rather more difficult. McCracken's recent study identifies various typologies of transboundary water cooperation and methods for assessing them; one of these is 'outcome cooperation'.<sup>101</sup> Tarlock applies this notion in a legal context, suggesting

<sup>90</sup>Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Judgment) [1997] ICJ Rep 7, 90 (Separate Opinion by Judge Weeramantry): 'The law necessarily contains within itself the principle of reconciliation', in referring to the "congruence of fit" between development and environmental imperatives'.

<sup>91</sup>Ibid 110.

<sup>92</sup>Weil (n 54) 414, discussing the structural weaknesses of international law observes, 'the international normative system, given the specific structure of the society it is called on to govern, is less elaborate and more rudimentary than domestic legal orders' (emphasis added). In the Chinese context, Chan (n 47) 61 asserts: 'It is imperative for the legitimacy of international law to understand China's relationship with international legal order in a normative framework that takes into account China's national characteristics ...'.

<sup>93</sup>Lowe (n 63) 20: 'international law should be understood from an instrumentalist perspective. ... The Law is one way of doing things; and it has its own merits and its own limitations'.

<sup>94</sup>Benvenisti (n 26) 273 (suggesting that 'shared Asian traditions ... can and should serve as guidance in the management of the region's many shared resources'). See also Chan (n 47) 290, who following his extensive study asserts that the 'context of the historical, political, economic, social and cultural peculiarities and circumstances of a State' must be considered as integral to China's approach to international law.

<sup>95</sup>Lowe (n 63) 22 (asserting 'the Law is always an optional framework within which to operate' (emphasis added)).

<sup>96</sup>Only recently (January 2020), China's President Xi reaffirmed China's commitment to these principles, agreeing to carry forward' this approach (n 77). See also L Wang, 'Xi Jinping's Thought on Diplomacy and China's Position in the New Era' (China Today, 27 June 2018) <[http://www.chinatoday.com.cn/ctenglish/2018/commentaries/201806/t20180627\\_800133707.html](http://www.chinatoday.com.cn/ctenglish/2018/commentaries/201806/t20180627_800133707.html)>.

<sup>97</sup>See Xi Jinping, first address to UNGA (n 80) where he shares a 'new vision of seeking win-win outcomes for all'; see also Biba (n 42) 4–5 who summarizes as follows: 'China's foreign policy has also put a premium on its so-called "good-neighbourly policy" (*mulin zhengce*) as a part of the country's peaceful rise (*heping jueqi*), later renamed peaceful development (*heping fazhan*), strategy that has itself been further supplemented by lofty slogans such building a "harmonious world" (*hexie shijie*) and a "community of common destiny" (*mingyun gongtongti*). ... The key principle of China's neighbourhood diplomacy is "becoming friends and partners with your neighbours" (*yulin weishan, yilin weiban*), which is itself aimed at "building an amicable, tranquil and prosperous neighborhood" (*mulin, anlin, fulin*)'.

<sup>98</sup>E Benvenisti and G Nolte (eds), *Community Interests Across International Law* (Oxford University Press 2018).

<sup>99</sup>The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law' (25 June 2016), cited in Benvenisti and Nolte, *ibid*, 6. Following a brief introductory survey on this topic, the authors conclude: 'What is clear is that global challenges will continue to demand the attention of national communities and resolving them will continue to require a cooperative approach' (*ibid* 7).

<sup>100</sup>China's 12th FYP (n 15) requires reporting across three 'red lines' related to water use, water use efficiency, and pollution, with limits on each of these set for 2015, 2020 and 2030; for more details, see Global Water Partnership, 'China's Water Resources Management Challenge: The "Three Red Lines"' (2015) (n 15); China's 13th FYP (n 16) includes 25 targets, building on the water-related reporting, especially targeting pollution. For more details see China Water Risk, 'China's 13th Five-Year Plan for Ecological & Environmental Protection (2016-2020)' <<http://www.chinawaterisk.org/notices/chinas-13th-five-year-plan-2016-2020/>>, which summarizes the 13th FYP's six general aims for improving China's water resources quality, and sets forth some of the more defined water-related targets in the plan, including the objective that more than 70 percent of China's surface water must reach Grade III or equivalent by 2020.

<sup>101</sup>M McCracken, *It Depends: Defining Cooperation and Evaluating Effectiveness in Transboundary Waters* (PhD Dissertation, Oregon State University 2019). McCracken devises 'the Four Frames of Cooperation and the Weighted Model of Effective Cooperation ... to improve the understanding of cooperation and encourage a detailed evaluation of the quality, success, and effectiveness of cooperative processes' (*ibid* 2). The 'Four Frames of Cooperation' comprise legal, institutional, relational and outcome (*ibid* 106). McCracken advocates that 'effective cooperation is equitable and sustainable' (*ibid* 184).



that transboundary water cooperation could be improved by focusing on measurable cooperation *outputs*.<sup>102</sup> Identifying, agreeing and acting on shared 'win-win' outcomes could help to transform the quality of the cooperation.<sup>103</sup> Tarlock elaborates:

*Some benefits, such as shared hydropower revenues or firm water allocations, may be immediately measurable, but others, such as comprehensive ecosystem restoration plans, can only be measured over longer time frames. Ultimately, cooperation for cooperation's sake does not advance water security and often perpetuates unilateral action.*<sup>104</sup>

Translating China's 'community of interest' and 'win-win' objectives into actual shared-benefits practice across their international basins<sup>105</sup> could improve its transboundary cooperation;<sup>106</sup> this would align with an approach already broadly endorsed in this field.<sup>107</sup> A recent policy statement issued by China's Ministry of Foreign Affairs reveals some positive movement in this direction: 'new projects in transboundary rivers must go through scientific planning and study, with the consideration of the interests of both downstream and upstream riparian countries'.<sup>108</sup> This Chinese 'way of doing things' can be traced in the evolving Lancang-Mekong Cooperation in two important respects.<sup>109</sup> In the first instance, the arrangement is based on soft law instruments, arising out of inter-state declarations (compared with the more formal international agreement on the Mekong signed up by the four lower riparians under the Mekong Agreement). Secondly, the LMC aims are based on broad aspirational principles. The LMC recently agreed a package of cooperative actions, with a priority given to improving people's livelihoods across the region.<sup>110</sup> Measurable

outcome cooperation objectives aimed at addressing regional issues, such as poverty alleviation, more reliable access to energy resources and environmental protection, could help to catalyse improved transboundary water cooperation.<sup>111</sup> The LMC example of incremental regional cooperation could assist with implementing a shared-benefits strategy more broadly, albeit within a soft principles-based approach.<sup>112</sup>

Despite this, hard questions remain on how 'outcome cooperation' might be achieved in China's transboundary water relations with its southern neighbours, where tough challenges remain.<sup>113</sup> Could China's adherence to the Five Principles – 'mutual respect for each other's territorial integrity and sovereignty', 'equality and mutual benefit' and 'peaceful coexistence' – provide the impetus for more meaningful transboundary water cooperation across the region? Given the origins of these principles, stemming from agreements with India and Myanmar, might this commonality provide a shared platform for improved transboundary water cooperation, and, perhaps catalyse a shared-benefits strategy on the Indus, or the Brahmaputra?<sup>114</sup> China may have little incentive to move forward without considerable pressure.<sup>115</sup> However, principles-based opportunities do exist across the region.<sup>116</sup> As just one example, regional dependence on hydropower raises a spectrum of prospects, which could be linked to shared economic and environmental benefits.<sup>117</sup> China's principles-based approach resonates with a shared-benefits paradigm. It also raises issues linked with the legal notion of 'shared

<sup>102</sup>Tarlock, 'Toward a More Robust International Water Law' (n 28) argues that shared approaches to beneficial outcomes could relieve water stress and enhance water across entire water basins.

<sup>103</sup>AD Tarlock, 'Promoting Effective Water Management Cooperation among Riparian Nations' (Global Water Partnership 2015).

<sup>104</sup>Tarlock, 'Toward a More Robust International Water Law' (n 28) 289.

<sup>105</sup>As one example of growing cooperation on the Mekong see S Lee, 'Benefit Sharing in The Mekong River Basin' in Wouters et al (n 1) 307.

<sup>106</sup>O McIntyre, 'Benefit-sharing and Upstream/Downstream Cooperation for Ecological Protection of Transboundary Waters: Opportunities for China as an Upstream State' (2015) 40 *Water International* 48. See also Tarlock, 'Four Challenges' (n 28) 403.

<sup>107</sup>See summary discussion of 'community of interests' in O McIntyre, 'Transboundary Water Resources' in A Nollkaemper and I Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (Cambridge University Press 2017) 905, 910–911.

<sup>108</sup>McIntyre (n 106) 67.

<sup>109</sup>The Lancang-Mekong Cooperation states that its key aims are to: bolster the economic and social development of the Sub-regional countries, enhance the wellbeing of their people, narrow the development gap among regional countries, support the ASEAN Community building, to promote the implementation of the UN 2030 Agenda for Sustainable Development, and, to advance South-South cooperation; see <[http://www.lmcchina.org/eng/gylmhx\\_1/jj/t1519110.htm](http://www.lmcchina.org/eng/gylmhx_1/jj/t1519110.htm)>.

<sup>110</sup>Following the most recent LMC meeting in February 2020 in Laos, China's foreign Minister Wang Yi outlined the following agreed areas of enhanced cooperation: connectivity in trade, combating the coronavirus epidemic, dealing with drought across the region, promote the upgrading of agricultural cooperation, enhancing people's sense of fulfilment, jointly maintaining peace and stability in the subregion. The six countries agreed to strengthen exchanges in governance, and to cooperate in dealing with security challenges across the region; 'Wang Yi Elaborates on Priorities of Future Lancang-Mekong Cooperation' <[https://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1748369.shtml](https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1748369.shtml)>.

<sup>111</sup>McIntyre (n 106) 67.

<sup>112</sup>AD Tarlock and P Wouters, 'Are Shared Benefits of International Waters an Equitable Apportionment?' (2007) 18 *Colorado Journal of International Environmental Law and Policy* 523.

<sup>113</sup>Y Feng, W Wang and J Liu, 'Dilemmas in and Pathways to Transboundary Water Cooperation between China and India on the Yaluzangbu-Brahmaputra River' (2019) 11 *Water* 2096; see also 'The Ministry of Foreign Affairs Holds a Briefing for Chinese and Foreign Media on President Xi Jinping's Attendance at the Second Informal Meeting between Leaders of China and India in India and His State Visit to Nepal' (Ministry of Foreign Affairs, 9 October 2019) <[https://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1707022.shtml](https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1707022.shtml)>.

<sup>114</sup>China continues to develop major dams on the Indus and Brahmaputra and has yet to conclude any transboundary water agreements with its downstream riparian neighbours on these shared freshwaters, apart from some data-sharing agreements with India. Can shared hydropower projects offer shared opportunities in this regard? See L Yang, 'Transboundary Water Cooperation on The Yarlung Zangbo/Brahmaputra – A Legal Analysis of Riparian State Practice' in Wouters et al (n 1) 286. Yang explores two models for possible enhanced cooperation, including an integrated hydropower approach, and through shared commitments under multilateral environmental agreements that Bangladesh, Bhutan, China and India are already party, such as the 1992 Convention on Biological Diversity.

<sup>115</sup>McIntyre (n 106) 67.

<sup>116</sup>BO Magsig, 'Water Security in Himalayan Asia: First Stirrings of Regional Cooperation?' in Wouters et al (n 1) 274.

<sup>117</sup>Tarlock, 'Four Challenges' (n 28) 397 cautions against the rush to dam and divert, arguing these should be developed cooperatively, with a view to sharing benefits across the basin 'to ensure that all riparian states receive a measure of water justice'.

responsibility' in international law, a topic particularly relevant to transboundary water regimes.<sup>118</sup>

China's 'outcome cooperation' on its transboundary waters could be devised through various means, such as 'relational contracts',<sup>119</sup> a communicative approach<sup>120</sup> and through technical joint institutions and regional organizations.<sup>121</sup> Each of these methods accord with China's principles-based approach to international law, where regional bilateral relationships continue to be central to transboundary water cooperation. This involves consultations to find flexible arrangements, avoiding specific allotments of water shares in favour of adaptive processes and institutional interactions, which aligns with best practice in this field.<sup>122</sup> Institutions 'can bridge the inherent gap between sovereigns, and lower the transaction costs involved in communication, the monitoring of performance and the enforcement of rules, by creating a suitable political environment for transactions between their members'.<sup>123</sup> Under this approach, national sovereignty is preserved and yet softened, falling within the hallmarks of the Five Principles and consistent with China's 'way of doing things'.<sup>124</sup> The LMC framework demonstrates how this could be achieved at the basin level. At the global level, transboundary water cooperation could find further support from China's engagement with the UN Sustainable Development Goals (SDGs).<sup>125</sup>

Finally and on a slightly different note, could this transboundary water practice be viewed as 'special custom'?<sup>126</sup> While not within the purview of this article, a closer examination of whether the Five Principles might comprise special or particular custom<sup>127</sup> could offer new insights into regional transboundary water practice. In his review of special custom, D'Amato calls for 'new methods in the social sciences' to permit a systematic analysis of diplomatic correspondence among nations, and other means to explore more completely the notion of regional custom. Barberis explored this topic within the Latin American context, developing a methodology for analysing the concepts of 'region', and 'regional legal standard'.<sup>128</sup> China continues to apply the Five Principles – a 'norm in international relations'<sup>129</sup> – in its relations with its neighbours and has done so for close to seven decades.<sup>130</sup> Given the regional origins of the principles, in legal agreements with India and Myanmar, and the consistency of China's application, the notion of special custom could be explored further.<sup>131</sup>

## 5 | CONCLUDING OBSERVATIONS

As international law and international relations continue to transform, traditional approaches to evaluating transboundary water cooperation must also be recalibrated. International diplomacy in a mutable world also needs to evolve to meet diverse challenges, new and old.<sup>132</sup> Finding pragmatic ways to coexist in uncertain and changing circumstances will continue to confront nation States around the globe.<sup>133</sup> Balancing regional and global commu-

<sup>118</sup>A Nollkaemper and I Plakokefalos, 'The Practice of Shared Responsibility: A Framework for Analysis' in Nollkaemper and Plakokefalos (n 107) 1. See also O McIntyre (n 107) 905 (discussing the notions of 'cooperative responsibility' and 'cumulative responsibility', both relevant in transboundary water situations).

<sup>119</sup>Benvenisti (n 36) 410 defines these as 'international agreements for the joint management of shared freshwater, especially those including the construction of specific water-related projects such as dams, hydroelectric facilities and irrigation works'. This joint management, project-focused approach aligns with Tarlock's outcome cooperation.

<sup>120</sup>Y Su, 'Evolving Normativity in Contemporary International Water Law: A Communicative Approach to the Growing Role of Non-State Actors' (on file with authors).

<sup>121</sup>Benvenisti (n 36) 412 identifies some of the benefits of joint institutions.

<sup>122</sup>Lowe (n 63) 27: 'The law can impose a duty to adopt identified, practical solutions that are already available to States; but the lawyers are well advised to walk a pace or two behind the scientists and technical experts who alone can make potential solutions into realizable practical aims, and appropriate subjects for legal obligations'. In the transboundary water context, see discussion on adaptive management in Tarlock, 'Four Challenges' (n 28) 384.

<sup>123</sup>Benvenisti (n 36) 412 suggests that international institutions could offset some of the factors that hinder cooperation. Chesterman reviews Asia's 'under-participation and under-representation' in international institutions; see S Chesterman, 'Asia's Ambivalence about International Law and Institutions: Past, Present and Futures' (2016) 27 *European Journal of International Law* 945.

<sup>124</sup>See more details in Carrai (n 68) 23–33.

<sup>125</sup>BM Kuhn, 'China's Commitment to the Sustainable Development Goals: An Analysis of Push and Pull Factors and Implementation Challenges' (2018) 3 *Chinese Political Science Review* 359. China has largely internalised the SDGs. The National Plan on Implementation of the 2030 Agenda for Sustainable Development is the key policy document for guiding China's commitment to SDG implementation; see also A Rieu-Clarke, 'Can Reporting Enhance Transboundary Water Cooperation? Early Insights from the Water Convention and the Sustainable Development Goals Reporting Exercise' (2020) 29 *Review of European, Comparative and International Environmental Law*; H Hussein et al, 'Monitoring Transboundary Water Cooperation in SDG 6.5.2: How a Critical Hydropolitics Approach Can Spot Inequitable Outcomes' (2018) 10 *Sustainability* 3640.

<sup>126</sup>A D'Amato, 'The Concept of Special Custom in International Law' (1969) 63 *American Journal of International Law* 211; see UN 'Report of the International Law Commission Seventieth Session' UN Doc A/73/10 (2018) 155, citing the cases of special custom, most of which involve water-related issues.

<sup>127</sup>UN 'Report of the International Law Commission Seventieth Session' (n 126) 122. This report explores the methodology for identifying rules of customary international law and seeks to 'offer practical guidance on how the existence of rules of customary international law, and their content, are to be determined'. It finds that (i) a rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States; and (ii) to determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (*opinio juris*) among themselves (ibid 154–156).

<sup>128</sup>JA Barberis, 'Les Règles Spécifiques du Droit International en Amérique Latine' (1992) 235 *Collected Courses of the Hague Academy of International Law* 81.

<sup>129</sup>Xi, Myanmar Leaders Celebrate 70th Anniversary of Diplomatic Ties' (n 77). See also discussion in Carrai (n 68 and n 74).

<sup>130</sup>Carrai (n 68) 435.

<sup>131</sup>In this light, Jorgensen (66) 31 characterizes China's regional approach to international law as a new 'geolegal power' with 'shifting foundations in the regional legal order'.

<sup>132</sup>How International Law Is Being Reshaped and the Challenges It Faces' (World Economic Forum, 25 July 2018). See also Ginsburg (n 61) who traces the emergence and practice of authoritarian international law.

<sup>133</sup>A Ward (ed), *Risks and Opportunities in International Affairs* (Chatham House 2018).

nity interests in a system that protects self-interest is a systemic issue posing complex problems across the horizon of international law.<sup>134</sup>

Reframing the approach to understanding transboundary water cooperation within the broader context of international law and in the light of regional practice can help to identify new pathways for improved riparian nations' engagement. In the case study undertaken here, reframing China's transboundary water practice means acknowledging the Five Principles as the *leitmotif* for its regional transboundary water cooperation; it is the immutable foundation for its 'way of doing things'.<sup>135</sup> Outcome cooperation, implemented through the more nuanced concept of contextualized international law, infused with the principle of 'peaceful co-existence', offers meaningful insights into China's transboundary water practice. Challenges remain in transforming high-level rhetoric into meaningful action on the ground. Reframing the transboundary water legal discourse offers new opportunities for better understanding regional freshwater cooperation – so essential for tackling ever-evolving environmental, economic and social challenges across the region and the globe.

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<sup>134</sup>Benvenisti and Nolte (n 98); see also E Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2013) 107 *American Journal of International Law* 297, 318–319.

<sup>135</sup>Lowe (n 63) 25.