

# Chinese Journal of Environmental Law

## Biodiversity Conservation of the Third Pole: Global Experience and Lessons from the Mekong --Manuscript Draft--

<b>Manuscript Number:</b>	CJEL-1002R2
<b>Full Title:</b>	Biodiversity Conservation of the Third Pole: Global Experience and Lessons from the Mekong
<b>Short Title:</b>	Biodiversity Conservation of the Third Pole
<b>Article Type:</b>	Research Article
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<b>Abstract:</b>	<p>This article evaluates the potential for a biodiversity conservation regime for the 'Third Pole' - the Himalayas / Tibetan Plateau - focused upon transboundary governance. After providing an overview of regional precedents from the other polar regions and Europe, it reviews the measures taken in relation to mountain biodiversity under the Convention for Biological Diversity and other multilateral regimes, in particular the World Heritage Convention and the Wetlands Convention in an Asian context. Sub-regional precedents in Asia are then analysed - with a focus on the Mekong River Basin - to provide specific context for the recommendation for a regime to be developed for the Third Pole. It is concluded that such a regime must be mindful of the context in which precedents operate, and in particular the practical experience of other regimes, if it is to be effective.</p>
<b>Keywords:</b>	Third Pole; Asia; environmental regimes; Mekong; biodiversity conservation; precedents; effectiveness
<b>Funding Information:</b>	

**Response to the reviews**

I have taken on board all of the comments – thank you – in the new manuscript

## **Asian Precedents for Effective Biodiversity Conservation in the Third Pole**

Simon Marsden

Professor and Chair in Energy Law

N.B.

Please note I commence a new job on 2 January 2017 at the University of Stirling, which will be my affiliation if the article is published in the journal. I have therefore included address details there. I have used my current email address at Flinders University where I can be contacted until 20 January 2017. I will be able to provide a new email address at Stirling soon after 2 January 2017 when I begin my new job.

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(this is accessible until January 20, 2017)

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## Biodiversity Conservation of the Third Pole: Global Experience and Lessons from the Mekong

### I. Introduction: context and environmental regimes

This article analyses biodiversity conservation of the Third Pole, especially in relation to the Mekong River Basin, which both connects to it geographically, and has a transboundary regime that is of precedent value to the establishment of a Third Pole regime. The Third Pole ~~is~~ refers to the Himalayas ~~and~~ Tibetan Plateau, which includes the Hindu Kush Mountains ranging from central Asia to Kashmir at the Pakistani ~~and~~ Indian border. ~~However, this~~ mountainous sub-region also extends further to the northwest to include the Tien Shan of Kyrgyzstan, Kazakhstan, Uzbekistan and Xinjiang Kyrgyzstan (China), and the Pamir of Tajikistan ~~illustrative of the challenges of sustainable development across the sub-region.~~<sup>1</sup> It ~~furthermore~~ also includes the Karakoram of Afghanistan and Pakistan, and the Kunlun Mountains which border the Tibetan Plateau. It is called the Third Pole because it is largely frozen, containing 'more snow and ice than anywhere in the world outside the [north and south] polar regions'<sup>2</sup> with its icefields

<sup>1</sup> Thomas BREU, Hans HUMI, Andrea WURTH STUCKI, *The Tajik Pamirs: Challenges of Sustainable Development in an Isolated Mountain Region* (Centre for Development and Environment, University of Berne, Berne, 2003); Michelle LIM, 'Laws, Institutions and Transboundary Pasture Management in the High Pamir and Pamir-Alai Mountain Ecosystem of Central Asia' (2012) 8(3) *Law, Environment and Development Journal* 43.

<sup>2</sup> See: <<http://www.icimod.org/?q=3487>> accessed 16 February 2017.

**Commented [Review11]:** In your intro, can you please emphasize your focus on the Mekong, given that it is part of the title?

**Commented [Review12]:** If the Third Pole covers this region as well, there is no need for 'However'?

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'contain[ing] the largest reserve of freshwater outside the polar regions';<sup>3</sup> glacial water is the basis of the creation of life and biodiversity all the way to the sea. As well as comprising a significant part of the terrestrial cryosphere, it is also 'high altitude', compared with -as the 'First' and 'Second' Poles (the Arctic and Antarctic) which are-are 'high latitude',-and comprises a significant part of the terrestrial cryosphere. It is therefore The region is largely frozen, with the glacial water being the basis of creating creation of life (and biodiversity) all the way to the sea. It consists-is comprised either wholly or partly of the territory of individual states (Kyrgyzstan, Tajikistan, Afghanistan, Pakistan, India, Nepal, Bhutan and China), ~~or~~and is of major significance to the bordering states (Kazakhstan, Uzbekistan, Bangladesh, Myanmar, Laos, Thailand, Cambodia and Vietnam). For example the depletion of the Aral Sea impacts upon Kazakhstan and Uzbekistan who utilize the waters flowing into it from the Syr Darya and Amu Darya for irrigation. Map 1 highlights the nature of the glaciated and snow-covered terrain and location of each of these states, with geographical location of the Mekong River in SE Asia indicated.

<sup>3</sup> See: 'Understanding Asia's Water Crisis', *the third pole.net*  
<https://www.thethirdpole.net/about/> accessed 14 February 2017.

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Commented [Review16]: I wonder if your rationale for the name is appropriate; for example the ICIMOD website states 'The region stores more snow and ice than anywhere else in the world outside the polar regions, giving its name: 'The Third Pole'. <http://www.icimod.org/?a=3487>

Commented [Review17]: I am very much in favour of maps, but we need to be careful about how they reproduce in back and white Perhaps consider this map instead, or in addition, as it includes watersheds of the Mekong: <https://www.thethirdpole.net/about/> WE HAVE SINCE CORRESPONDED ABOUT THIS AND YOU HAVE AN ACCEPTABLE RESOLUTION VERSION OF THE ORIGINAL MAP NOW AVAILABLE I UNDERSTAND

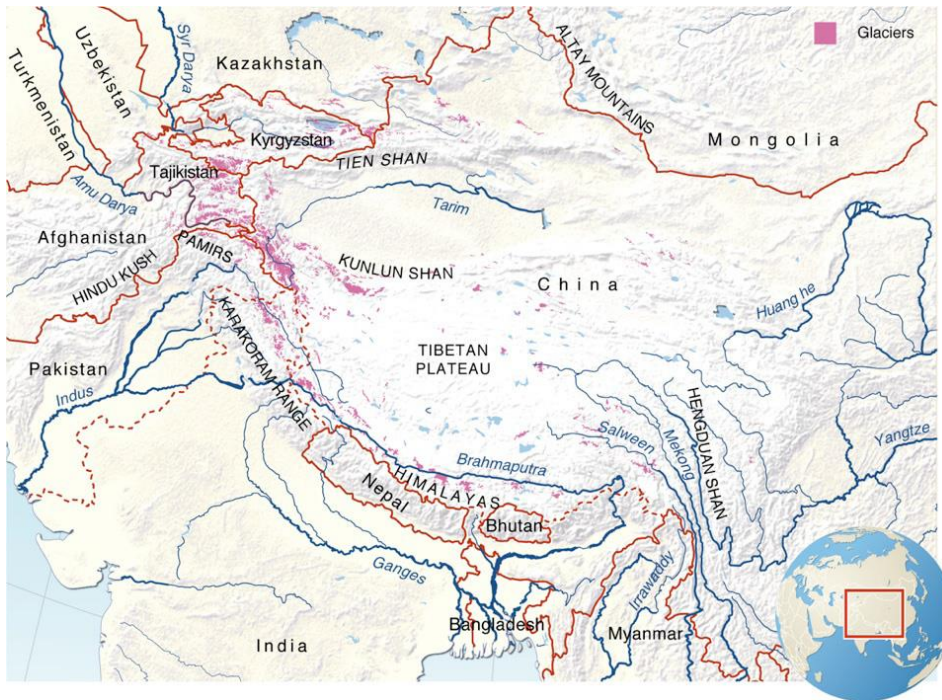
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Map 1: Water towers of Asia - glaciers, water and population in the greater Himalayas-

Hindu Kush-Tien Shan-Tibet region. Source: Hugo Ahlenius, UNEP/GRID-Arendal

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Third Pole

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The same is ~~also~~ true for Bangladesh. Qand, of particular relevance to this article however are,

the states of the Mekong Basin: they are all downstream in relation to the source of the

transboundary rivers which have their origin in the high country upstream, ~~and m.~~ Based on

existing experience of biodiversity conservation of the Third Pole, and particularly in connection

with the Mekong Basin, the article identifies lessons for this Asian subregion. Most of the rivers

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are utilized for hydroelectricity by the states upstream, which include China;<sup>4</sup> the upstream central Asian comparison are the states of Kyrgyzstan and Tajikistan, which also depend on the river as a source of power generation. There is therefore a need to improve the collaborative governance and planning frameworks to contend with the challenges of climate change, water management, resource extraction, infrastructure development and Indigenous / minority rights. Yet this has attracted the attention of only a few scholars to date, in an area with a significant population density of towns and cities.<sup>5</sup> Examples of the future pressures that the Third Pole is likely to be subject to, are the further development of the transboundary rivers originating in the Tibetan Plateau for hydroelectricity,<sup>6</sup> and the extraction of oil and gas reserves.<sup>7</sup> There is little or

<sup>4</sup> QIU Jane, 'China: The Third Pole' (2008) 454 *Nature* 393-396.

<sup>5</sup> Nakul CHETTRI, Arun B SHRESTHA, YAN Zhaoli, Birendra BAJRACHARYA, Eklabya SHARMA, and HUA Ouyang, "'Real World" Protection for the Third Pole and its People' in Falk HUETTMANN (ed), *Protection of the Three Poles* (Springer 2012) 113-133.

<sup>6</sup> John VIDAL and Kumkum DASGUPTA, 'Himalayas at Risk in Hydro Dam Water Grab', *New Zealand Herald News* 13 August 2013

<[http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10911594](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10911594)> accessed 21 September 2016, (India, Pakistan, Nepal and Bhutan plan 400 dams, China 100); and Kieran COOKE, 'The Dams of India: Boon or Bane?', *The Guardian* 17 March 2014

<<http://www.theguardian.com/environment/2014/mar/17/india-dams-rivers-himalaya-wildlife>> accessed 21 September 2016, (160 dams proposed for Assam specifically).

<sup>7</sup> Shishir PRASHANT, 'Jammu-Pak Border Might Have Oil and Gas, Says ONGC', *Business Standard* 7 February 2014

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no published work on this area by legal scholars, and attention has been mainly by scientists<sup>8</sup> and non-governmental organizations.<sup>9</sup> While interest in the sub-regional governance of other parts of Asia has grown and consolidated in recent years, the governance of the Third Pole is hence yet to be conceived, proposed or evaluated.

As a part of these efforts, regional and sub-regional approaches to biodiversity conservation are urgently needed to address the negative environmental effects upon transboundary and other protected areas and migratory species in Asia. There is significant biodiversity here, and a response to the challenges of planetary boundaries in the Anthropocene is required.<sup>10</sup> In support, the United Nations has emphasized the importance of regions and sub-

<http://smartinvestor.business-standard.com/market/CResults-225449-CResultsdet->

Jammu\_Pak\_border\_might\_have\_oil\_amp\_gas\_says\_ONGC.htm#.VQ-iVfmFlqM> accessed 21 September 2016.

<sup>8</sup> See for example, Kenneth HEWITT, *Glaciers of the Karakoram Himalaya: Glacial Environments, Processes* (Springer 2014) 291.

<sup>9</sup> Note the work in particular of the [ICIMOD, the International Centre for Integrated Mountain Development](#), based in Kathmandu; Third Pole Environment (TPE), [based in Beijing](#); and The [thirdpole.net](#), based in London. Also the specific focus of International Rivers, which includes the Himalayas, see <https://www.internationalrivers.org/campaigns/the-himalayas> accessed 7 December 2016.

<sup>10</sup> See Jonas EBBESSON, 'Planetary Boundaries and the Matching of International Treaty Regimes' (2014) 59 *Scandinavian Studies in Law* 260; biodiversity loss and the relevant treaty regimes are considered at 274-277.

**Commented [Review111]:** Can you say definitively that there is no work by legal scholars, apart from yourself? For eg, Bjørn-Oliver Magsig International Water Law and the Quest for Common Security mentions the Third Pole a couple of times in the context of international water law:  
[https://books.google.com.au/books?id=rPqTBwAAQBAJ&pg=PA11&lpg=PA11&dq=third+pole+legal+law&source=bl&ots=J\\_L4ouPn&sig=9K6EGUiv8s0W6NsFGxdUP\\_YiEUw&hl=en&sa=X&ved=0ahUKEwjf4IvUtY7SAhUJmZQKhc7-DCU4ChDoAQgvMAG#v=onepage&q=third%20pole%20&f=false](https://books.google.com.au/books?id=rPqTBwAAQBAJ&pg=PA11&lpg=PA11&dq=third+pole+legal+law&source=bl&ots=J_L4ouPn&sig=9K6EGUiv8s0W6NsFGxdUP_YiEUw&hl=en&sa=X&ved=0ahUKEwjf4IvUtY7SAhUJmZQKhc7-DCU4ChDoAQgvMAG#v=onepage&q=third%20pole%20&f=false)  
 I HAVEN'T SAID THERE IS NO WORK APART FROM MY OWN. MAGSIG'S WORK CAN BE FOUND REFERENCED AT NOTE 52.

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regions in the work of its Statistics Division,<sup>11</sup> Environment Programme (UNEP),<sup>12</sup> and via its regional commissions.<sup>13</sup> In Asia, as elsewhere, significant negative effects from infrastructure

<sup>11</sup> In 1999 the Statistics Division **[what does 'this' refer to here?]** developed a system of macro-geographical (continental) regions, sub-regions and other selected economic groups to report advances towards achieving the Millennial Development Goals globally. The UN Geo-scheme distinguishes these regions and sub-regions.

<http://millenniumindicators.un.org/unsd/methods/m49/m49regin.htm#asia> accessed 21 September 2016.

<sup>12</sup> The Asia Pacific region of UNEP held its first Sub-regional Environmental Policy Dialogue meeting in Beijing in 2003; these have been held annually since. There are five sub-regions of the ~~UNEP Asia Pacific region~~: Central Asia, South Asia, Southeast Asia, Northeast Asia and the ~~south~~ Pacific. **[Normally, 'South Pacific is no longer used; see**

**<http://web.unep.org/gpa/gpa/unep-opens-new-sub-regional-office-pacific-based-samoa>**

<sup>13</sup> There are five UN regional commissions, of which three are active in Asia (the other two are in Africa, and Latin America and the Caribbean): the Economic and Social Commission for the Asia Pacific (ESCAP), the Economic and Social Commission for Western Asia (ESCWA), and the Economic Commission for Europe (ECE). The ECE is relevant because, in addition to the EU member countries, it has eleven Asian members: Turkey, Israel, Russia, Georgia, Armenia, Azerbaijan, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan.

<http://www.regionalcommissions.org/> accessed 21 September 2016.

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development ~~for example~~ include, for example: deforestation, introduction of invasive species and pollution, each of which in turn may lead to habitat and native species loss or damage.

Regimes are typically the means of addressing issues of governance, combining law, politics and institutions. In the context of international law - and particularly modern environmental treaties - institutions will typically comprise Meetings of the Parties (MOPs), an administering secretariat, working groups, and possibly a compliance procedure. Stakeholders will be both government and non-government organizations in the states concerned. A common dictionary definition for a regime is a 'particular government or a system or method of government.' ~~set of rules, cultural or social norms that regulate the operation of a government or institution and its interactions with society.~~<sup>14</sup> Litta highlights how regimes 'can take the form of established organizations ... or of rules and regulations without an existing organizing body',<sup>15</sup> and how 'environmental regime analysis evolved as a response to mounting international

<sup>14</sup> See: <

<http://dictionary.cambridge.org/dictionary/english/regime><http://en.m.wikipedia.org/wiki/Regime>

> accessed ~~15 February~~~~21 September~~ 2017. **[Since the issue of regimes are**

**central to your argument, can you insert a more authoritative**

**source for its definition? Wikipedia references should be avoided**

**wherever possible]**

<sup>15</sup> H LITTA, 'Regime Theory' in H LITTA, *Regimes in Southeast Asia: An Analysis of Environmental Cooperation* (Verlag Springer 2012) 45.

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concern about threats to environmental quality since the 1970s'.<sup>16</sup> Although many dictionary definitions emphasize an authoritarian aspect, this is not necessarily seen in practice, although the east Asian region - and southeast Asia in particular - have in fact experienced this over many years as a means of addressing environmental issues with limited resources.<sup>17</sup> The word 'regime' is significantly also commonly used in international relations, politics and law to refer to specialized arrangements, and often involves questions of sovereignty or jurisdiction.

Environmental regimes have been studied by international relations scholars in particular for the last 15 years or more. Research has distinguished between comprehensive environmental regimes - which include all aspects of environmental control - and specific sub-environmental regimes - which focus on a particular aspect, such as biodiversity conservation. In an international law context, framework agreements often provide for a comprehensive regime, which is then elaborated in more detail in protocols relevant to specific areas. Any regime for the Third Pole would likely need to be constituted by a framework agreement and detailed protocols. An example is the linked detailed arrangements under the *Alpine Convention*.<sup>18</sup> ~~Similarly, the~~ Association of Southeast Asian Nations (ASEAN) has prepared a framework *Agreement on*

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<sup>16</sup> ~~I~~<sup>i</sup>bid, 48.

<sup>17</sup> Mark BEESON, 'The Coming of Environmental Authoritarianism' (2010) 19(2) *Environmental Politics* 276.

<sup>18</sup> Convention on Protection of the Alps (Salzburg, 7 November 1991), OJ L 61, 12.3.1996, p. 32-36, in force 6 March 1995, see further below, n 5348:-

Commented [Review112]: Citation to a relevant dictionary?  
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*Nature and Natural Resources*,<sup>19</sup> and the ~~C~~entral Asian states have a similar agreement,<sup>20</sup>  
however neither contains linked protocols of a comparable nature.

**Commented [Review113]:** It is true that there is a range of declarations and charters under ASEAN but I do not think they can be characterized as subsets of the ASEAN Agreement itself

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Many studies have focused on the effectiveness of environmental regimes, pointing to common features<sup>21</sup> which, in relation to issue specific regimes, ‘sometimes play a decisive role in ameliorating environmental problems.’ As Kotzé concludes: ‘In sum then, the broader environmental regime and its sub-regimes provide the opportunity and means for collective global action and a concerted regulatory response to environmental issues through various state and non-state actors, and by means of a multitude of normative arrangements including many

<sup>19</sup> Agreement on Nature and Natural Resources (Kuala Lumpur, 9 July 1985), ~~unreported~~ [no need for this?], not in force, available at: <<http://environment.asean.org/agreement-on-the-conservation-of-nature-and-natural-resources/>> accessed 7 December 2016

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<sup>20</sup> Framework Convention on Environmental Protection for Sustainable Development in Central Asia (Ashgabat, 22 November 2006) TRE-143806, not in force. <<http://www.ecolex.org/server2.php/libcat/docs/TRE/Full/En/TRE-143806.pdf>> accessed 8 December 2016.

<sup>21</sup> See for example, LITTA, n 153, 50-55; ~~Oran R YOUNG (ed), *The Effectiveness of International Environmental Regimes* (MIT Press 1999); Edward L MILEV, A UNDERDAL, S ANDRESEN, J WETTERSTAD, JB SKJAERSETH and EM CARLIN, *Environmental Regime Effectiveness: Confronting Theory with Evidence* (MIT Press 2002); and Helmut BREITMEIER Oran R YOUNG and M ZUM, *Analysing International Environmental Regimes: From Case Study to Database* (MIT Press 2006).~~

laws.<sup>22</sup> Regimes are often contextualized in the regions and sub-regions in which they are located, with an expansive scholarship developing around notions of regionalism.<sup>23</sup> Gochhayat, in a recent study with special reference to India, provides a comprehensive introduction to notions of regionalism and sub-regionalism. The author begins with a definition:

At the international level, regionalism refers to transnational cooperation to achieve a common goal or resolve a shared problem or it refers to a group of countries, such as Western Europe, the Western Balkans, or Southeast Asia, that are linked by geography,

<sup>22</sup> Louis J KOTZÉ, *Global Environmental Governance: Law and Regulation for the 21<sup>st</sup> Century* (Edward Elgar 2012), 134.

<sup>23</sup> The work of the United Nations University Institute on Comparative Regional Integration Studies (UNU-CRIS) is instructive. See for example: Louise FAWCETT, ‘The History and Concept of Regionalism’ UNU-CRIS Working Papers W-2013/5 (United Nations University 2013) 1-19; and Rodrigo TAVARES, ‘The State of the Art of Regionalism: The Past, Present and Future of a Discipline’ UNU-CRIS Working Papers W-2004/10 (United Nations University 2004) 1-29. See also Werner SCHOLTZ and Jonathan VERSCHUUREN, (eds), *Regional Environmental Law: Transregional Comparative Lessons in Pursuit of Sustainable Development* (Edward Elgar 2016).

**Commented [Review114]:** Refer also to **Regional Environmental Law** Transregional Comparative Lessons in Pursuit of Sustainable Development, Edited by Werner Scholtz, and Jonathan Verschuuren; Also,

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history or economic features. Used in this sense, regionalism refers to attempts to reinforce the links between these countries.<sup>24</sup>

Regional measures include the issue-focused treaties of the UN Economic Commission for Europe (UNECE), the only UN regional commission to have produced any environmental agreements,<sup>25</sup> one of which is focused upon transboundary water issues.<sup>26</sup> Sub-regional efforts include the agreement for the protection of the Mekong River Basin<sup>27</sup> and the measures taken by ASEAN,<sup>28</sup> together with the more limited arrangements of the South Asian Association for

<sup>24</sup> A GOCHAYAT, 'Regionalism and Sub-Regionalism: A Theoretical Framework with Special Reference to India' (2014) 8(1) *African Journal of Political Science and International Relations* 10.

<sup>25</sup> See Simon MARSDEN and Elizabeth BRANDON, *Transboundary Environmental Governance in Asia: Practice and Prospects with the UNECE Environmental Agreements* (Edward Elgar 2015) ch 2.

<sup>26</sup> Simon MARSDEN, 'The Helsinki Water Convention: Implementation and Compliance in Asia' (2015) 20(2) *Nordic Environmental Law Journal* 119-129. See: Convention on the Protection and Use of Transboundary Watercourses and Lakes (Helsinki, 17 March 1992), 31 ILM (1992) 1312, in force 6 October 1996.

<sup>27</sup> Agreement on Cooperation for the Sustainable Development of the Mekong River Basin (Chiang Rai, 5 April 1995) 2069 UNTS 3, in force 5 April 1995.

<sup>28</sup> See Agreement on the Conservation of Nature and Natural Resources, above n 17; and Association of South East Asian Nations, Agreement on Transboundary Haze Pollution (Kuala

**Commented [Review115]:** Suggest reference also to Koh and Karim, 'The role of ASEAN in Shaping regional environmental protection', in Hirsch, P. (ed.) *Routledge Handbook of the Environment in Southeast Asia*, Routledge, 2016, especially at 319.

Regional Cooperation (SAARC).<sup>29</sup> Importantly however, the SAARC *Convention on Cooperation on Environment*, ~~was however~~ signed during the Sixteenth Summit in 2010, has been ratified by all Member States, and entered into force with effect from 23 October 2013. It identifies 19 areas for cooperation in the field of environment and sustainable development, and ~~can~~ potentially can be a mechanism to drive initiatives forward for the Third Pole.<sup>30</sup> The

Lumpur, 10 June 2002), unreported, in force 25 November 2003; available at <  
<http://haze.asean.org/asean-agreement-on-transboundary-haze-pollution/>> accessed 7 December

2016. See: [KL KOH and MS KARIM](#), ‘[The role of ASEAN in Shaping Regional Environmental Protection](#)’, in P HIRSCH (ed), *Routledge Handbook of the Environment in Southeast Asia* (Routledge 2016), especially at 319, and [KL KOH and MS KARIM](#), ‘SE Asian Legal

Governance’ in S ALAM, HJH BHUIYAN, TMR CHOWDHURY, and EJ TECHERA, *Routledge Handbook of International Environmental Law* (Routledge 2013).

<sup>29</sup> ~~Geographically, this SAARC is well placed to develop measures with respect to the Third Pole and build on measures introduced to date.~~ See: Sukh Deo MUNI and Jetly RAJSHREE, ‘SAARC: The Changing Dimensions’ UNU-CRIS Working Papers W-2008/8 (United Nations University 2008) 1-26; and Simon MARSDEN, ‘From the High North to the Roof of the World: Arctic Precedents for Third Pole Governance’ (2016) 8 *Yearbook of Polar Law* 56, 65-69.

<sup>30</sup> See: <[http://saarc-sec.org/areaofcooperation/cat-detail.php?cat\\_id=54](http://saarc-sec.org/areaofcooperation/cat-detail.php?cat_id=54)> accessed 8 December 2016, and link to the Convention at <<http://www.saarc-sec.org/publications/>> accessed 15 February 2017. For discussion see [Lawrence SAEZ](#), *The South Asian Association for Regional Cooperation (SAARC): An Emerging Collaboration Architecture* (Routledge 2011) and [MARSDEN](#) (2016), *ibid*, 66.

**Commented [Review116]:** This Convention needs to be summarized and critiqued. There seems to be very little comment on it from my brief research on it. A stronger rationale needs to be given as to why that Convention be the basis for a Third Pole regime, if that is what you are suggesting.

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significance of SAARC as the administering organisation has been noted, given that it members include ‘two of the world’s most determined rivals’<sup>31</sup> India and Pakistan, and ‘add into the mix tensions between India and China’.<sup>32</sup> As to the Convention on Cooperation on Environment, this is referred to as a ‘Regional Environmental Treaty’ and contains 12 brief articles following the recitals. Recitals emphasise ‘the interest ... to promote sustainable management of environment and natural resources’, ‘the deep concerns ... on the unabated degradation of the environment and the adverse impacts of climate change ... and [a] shared interest in its conservation for the well being of present and future generations’, and ‘closer cooperation ... for the protection and preservation, management and enhancement of environment.’

The objective ‘is to promote cooperation among the Parties in the field of environment and sustainable development’ (Article I), with the scope of cooperation referenced with respect to 18 areas. Of particular relevance are biological diversity (Article IIc), global environmental issues (Article IIh), mountain eco-system glaciers and glacial lake[s] (Article IIj) and river eco system[s] (Article IIk). Other areas specified include climate change (Article II d), water management and conservation (Article IIp), environmental impact assessment (EIA) (Article IIq) and the role / impact of human activity (Article IIs). While forms of cooperation are indicated (Article III), including collaboration among Parties and their agencies (Article IIIa), the Convention is weak and substantive obligations are notably lacking. The remaining articles of the treaty therefore merely consist of institutional measures and related provisions. As an indication of the institutional weakness of the treaty, disputes are to be ‘settled through

<sup>31</sup> Thomas G WEISS and Rorden WILKINSON, Foreword, *ibid* (SAEZ), xvii.

<sup>32</sup> Thomas G WEISS and Rorden WILKINSON, Foreword, *ibid* (SAEZ), xviii.

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11 negotiations' (Article VII). Nonetheless, acknowledging the difficult international relations  
12 between the SAARC Parties, (notably India and Pakistan as noted), the Convention represents a  
13 starting point upon which to build, with 'the modalities for collaboration ... [to] be developed by  
14 the Governing Council' (Article III.2).

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18 With the acknowledged major challenges outlined above, The objective of this article is  
19 to ~~therefore~~ consider the viability of developing a biodiversity agreement for the Third Pole,  
20 which has been identified as in need of cross-nation governance for transboundary biodiversity  
21 conservation.<sup>33</sup> In a critical analysis of these regulatory frameworks by Kotzé and Marauhn,  
22 there is no absence of a specific discussion on this part of the world although the low profile of  
23 the subregion may explain this is notable.<sup>34</sup> To ~~(re-)address redress for simply 'address'?~~ this,  
24 this article ~~will make~~ will make general reference to polar, mountain and water agreements of relevance to  
25 the Third Pole; provide an overview of multilateral environmental agreements that are concerned  
26 with conservation; and review the arrangements for the Mekong River Basin and experiences  
27 with biodiversity conservation, which are relevant because of the dependence of the downstream  
28 states upon a healthy transboundary biodiverse river system. Transboundary environmental  
29 impact assessment (EIA) is an added focus, which is a specific recognized measure to address  
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**Commented [Review117]:** Perhaps put this more positively with regard to no reference to the Third Pole. The Third Pole idea is not necessarily widely known, as you already imply above with regard to lack of legal analysis. DONE

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42 <sup>33</sup> <<http://vivo.cornell.edu/display/AI-PRCR-0203DF692BA00002C44>> accessed 21 September  
43 2016.

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45 <sup>34</sup> Louis J KOTZE and Thilo MARAUHN (eds), *Transboundary Governance of Biodiversity*  
46 (Brill Nijhoff 2014); this is however explained by its focus on southern Africa.  
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biodiversity loss.<sup>35</sup> In the Mekong River Basin, transboundary EIA has been found wanting,<sup>36</sup> and this has implications for the development of Third Pole governance for biodiversity conservation as well as other areas.<sup>37</sup>

The structure of the article is as follows. Section II ~~will~~ considers relevant global and regional precedents for the Third Pole before considering the relevance of certain conservation conventions, in particular the *Convention on Biological Diversity* (CBD). In relation to the CBD, specific reference ~~will be is~~ made to the Mountain Biodiversity Programme, and its implementation and review, and to the general focus of the CBD upon ecosystem services. The

<sup>35</sup> <<http://www.cbd.int/doc/reviews/impact/EIA-guidelines.pdf>> accessed 21 September 2016.

Note Simon MARSDEN, 'Developing Agreements for Transboundary Environmental Impact Assessment and Strategic Environmental Assessment in Asia' in Robin WARNER and Simon MARSDEN (eds), *Transboundary Environmental Governance: Inland, Coastal and Marine Perspectives* (Ashgate 2012) 141-164.

<sup>36</sup> Ben BOER, Philip HIRSCH, Fleur JOHNS, Ben SAUL and Natalia SCURRAH, *The Mekong: A Socio-Legal Approach to River Basin Development* (Routledge 2016), esp. Ch 5. 'Assessing a river basin: the politics of the technical'.

<sup>37</sup> See Simon MARSDEN, 'Environmental Assessment of Cross-Border Development: China and the Third Pole' (2016) 18(1) *Journal of Environmental Assessment Policy and Management* 1650009-1-1650009-21

**Commented [Review118]:** Add a reference to Ben Boer, Philip Hirsch, Fleur Johns, Ben Saul and Natalia Scurrah, *The Mekong: A Socio-Legal Approach to River Basin Development*, Routledge, 2016, esp. Ch 5. 'Assessing a river basin: the politics of the technical'.

**Commented [Review119]:** It would be useful to explain the structure of the article earlier, rather than at page 12. MY APPROACH IS FAIRLY STANDARD: SETTING THE SCENE FIRST, OUTLINING THE OBJECTIVE / RESEARCH QUESTION SECOND, THEN OUTLINING STRUCTURE THIRD. THE LENGTH OF THE INTRODUCTION MAY BE THE ISSUE, BREAKING IT UP BY HAVING A BRIEF INTRODUCTION THEN A SEPARATE SECTION EXPLAINING THIRD POLE IF YOU PREFER – IT THINK IT IS OKAY AS IS.

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11 relevance of the *World Heritage Convention* (WHC)<sup>38</sup> and *Wetlands Convention* (Ramsar)<sup>39</sup> ~~will~~  
12 ~~is~~ also ~~be~~ canvassed. The following section III ~~will~~ analyses the governance arrangements for the  
13 Mekong River Basin; the Mekong ecosystem is rich in biodiversity, and recent studies have  
14 classified the river as the second most biodiverse in the world.<sup>40</sup> Good governance here is  
15 therefore particularly significant, but practice emphasises the conflict between upstream and  
16 downstream water uses, that must be addressed effectively in any governance arrangement for  
17 biodiversity conservation of the Third Pole. A concluding section IV ~~will~~ draws lessons of  
18 relevance for the Third Pole, in particular the scope of any instrument that should be developed  
19 in the light of the absence ~~of,~~ or inadequacy of, ~~the~~ current arrangements.

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29 <sup>38</sup> Convention Concerning the Protection of the World Cultural and Natural Heritage (Paris, 16  
30 November 1972), 1037 UNTS 151, in force 17 December 1975. The author is grateful for the  
31 feedback from Catherine Redgwell at an International Symposium in Cambridge in early 2015  
32 where an early version of this ~~paper~~ ~~research~~ was presented; ~~this~~ ~~is~~ ~~what~~ ~~does~~ ~~'this'~~ ~~refer~~ ~~to~~  
33 ~~here?~~ ~~Please~~ ~~clarify,~~ ~~feedback~~ highlighted the significance of this treaty in the Third Pole sub-  
34 region, as well as in connection with biodiversity, sustainability and the law generally.

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39 <sup>39</sup> Convention on Wetlands of International Importance especially as Waterfowl Habitat  
40 (Ramsar, 2 February 1971), 996 UNTS 245, in force 21 December 1975.

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43 <sup>40</sup> See Guy ZIV et al, 'Trading-off Fish Biodiversity, Food Security, and Hydropower in the  
44 Mekong River Basin' (2012) 109 *Proceedings of the National Academy of Sciences of the United*  
45 *States of America* 5609; and Frances SEYMOUR, and Peter KANOWSKI, 'Forests and  
46 biodiversity' in Philip HIRSCH (ed) *Routledge Handbook of the Environment in Southeast Asia*,  
47 *Routledge*, 2016 at 160-162.  
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**Commented [Review121]:** Refer also to Seymor and Kanowski, 'Forests and biodiversity' in Philip Hirsch (Ed) *Routledge Handbook of the Environment in Southeast Asia*, Routledge, 2016 at 160162.

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## II. Global and regional precedents for biodiversity conservation

There are numerous global precedents of potential relevance for the regional governance of the Third Pole. Polar examples include measures developed by the Arctic Council (with programmes on environment and climate, and biodiversity),<sup>41</sup> the *Svalbard Treaty* (with specific attention given to environmental protection under implementing law),<sup>42</sup> and the *Environment Protocol* to the *Antarctic Treaty* (with annexes on protected areas, fauna and flora and EIA).<sup>43</sup> It is important to note however that under the Antarctic Treaty System (ATS)<sup>44</sup> - of which the Protocol is part - there is a limited place for ~~sustainable~~ development, with tourism the main activity. This is because the ATS is focused on peace and science. Although scientific activity has produced

<sup>41</sup> <http://www.arctic-council.org/index.php/en/> accessed 21 September 2016. Note that China and India were granted Observer status in 2013. See Timo KOIVUROVA, Paula KANKAANPAA and Adam STEPIEN, 'Innovative Environmental Protection: Lessons from the Arctic' (2015) 27 *Journal of Environmental Law* 285.

<sup>42</sup> The Svalbard Treaty (9 February 1920, Paris), in force 14 August 1925; Svalbard Environmental Protection Act; Act of 15 June 2001 No.79 Relating to the Protection of the Environment in Svalbard. See Christopher R ROSSI, 'A Unique International Problem': The Svalbard Treaty, Equal Enjoyment, and Terra Nullius: Lessons of Territorial Temptation from History' (2016) 15 *Washington University Global Studies Law Review* 93-136.

<sup>43</sup> Protocol on Environmental Protection to the Antarctic Treaty (Madrid, 4 October 1991), 30 ILM 1455 (1991), in force 14 January 1998. See Annexes I, II and V.

<sup>44</sup> <http://www.scar.org/antarctic-treaty-system> accessed 21 September 2016.

**Commented [Review122]:** I guess there is a limited place for any kind of development, sustainable or otherwise (I see you this formulation below)

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evidence of resources which are potentially exploitable given advances in technology,<sup>45</sup> until 2048 when the 50 year mining moratorium potentially ends,<sup>46</sup> there is – other than in support of scientific activity - ~~therefore~~ no infrastructure development on Antarctica, sustainable or otherwise. Tourism development is carefully managed and limited largely to offshore settings.<sup>47</sup>

<sup>45</sup> Note in particular China's 'scientific research' efforts, which have been ~~exposed~~ shown to contemplate mining activity in the future: <<http://www.abc.net.au/news/2015-01-20/chinas-desire-for-antarctic-mining-despite-international-ban/6029414>>, accessed 21 September 2016. See also Anne-Marie BRADY, *China the Great Polar Power* (Cambridge 2017). ~~This mirrors Japan's 'scientific research' activity in Antarctic waters, that were was roundly condemned by the ICJ in 2014; see Whaling in the Antarctic (Australia v Japan), Judgment 31 March 2014, paras 73-86 <<http://www.icj-cij.org/docket/files/148/18136.pdf>> accessed 21 September 2016.~~

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<sup>46</sup> Article 5(a) provides the following: 'With respect to Article 7, the prohibition on Antarctic mineral resource activities contained therein shall continue unless there is in force a binding legal regime on Antarctic mineral resource activities that includes an agreed means for determining whether, and, if so, under which conditions, any such activities would be acceptable.'

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<sup>47</sup> Kees BASTMEIJER, 'The Antarctic Treaty System and the Regulation of Antarctic Tourism', in Natalia Louchacheva (ed), *Polar Text Book II* (Nordic Council of Ministers 2013) 131-154; ~~and LK KRIWOKEN and D ROOTS, 'Tourism on Ice: Environmental Impact Assessment of Antarctic Tourism' (2000) 18 *Impact Assessment and Project Appraisal*, 138-150.~~

Fishing in the Southern Ocean is the primary concern, impacting upon marine biodiversity.<sup>48</sup>

There is however a need to ensure that assessment frameworks are updated to manage this as appropriate, particularly current 'scientific' activities, as noted above.<sup>49</sup>

These governance mechanisms have served to manage ~~reasonably well~~ the diverse interests of participating states in the other poles reasonably well.<sup>50</sup> This is crucial, because any regime for the Third Pole – including any sub-regime for biodiversity conservation - must contend with the interests of states ~~traditionally-historically~~ in conflict for land and resources, particularly India and Pakistan, and India and China, where boundary disputes continue to cloud relations.<sup>51</sup> The need to manage and protect shared watercourses also raises the prospect of other

**Commented [Review123]:** 'Traditionally' seems less appropriate here; 'historically' might more readily refer to the period after partition, from 1947.

<sup>48</sup> L CORDONNERY, AD HEMMINGS and L KRIWOKEN, 'Nexus and Imbroglia: CCAMLR, the Madrid Protocol and Designating Antarctic Marine Protected Areas in the Southern Ocean', (2015) 30(4) *International Journal of Marine and Coastal Law*, 727-764.

<sup>49</sup> Simon MARSDEN, 'Introducing Strategic Environmental Assessment to the Madrid Protocol: Lessons from International Experience' (2011) 1(1) *The Polar Journal* 33-47.

<sup>50</sup> See generally, Falk HUETTMANN, 'Introduction: Why Three Poles and Why Protect Them' in Falk HUETTMANN (ed), *Protection of the Three Poles* (Springer 2012) 3-32.

<sup>51</sup> Tsering TOPGYAL, 'China and India's Border Dispute Rises to Dangerous New Heights', *The Conversation*, 26 September 2014

<<http://theconversation.com/china-and-indias-border-dispute-rises-to-dangerous-new-heights-32125>> accessed 21 September 2016.

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precedents, such as the largely European based *Helsinki Water Convention*,<sup>52</sup> and in a mountain context, the *Alpine*<sup>53</sup> and *Carpathian Conventions*.<sup>54</sup> The *Alpine Convention* has a large number of protocols, including for the conservation of nature and countryside and mountain forests;<sup>55</sup> the *Carpathian Convention* also has a number of linked agreements including a biodiversity

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<sup>52</sup> Above n 264. See Ruby MOYNIHAN and Bjørn-Oliver MAGSIG, ‘The Rising Role of Regional Approaches in International Water Law: Lessons from the UNECE Water Regime and Himalayan Asia for Strengthening Transboundary Water Cooperation’ (2014) 23(1) *Review of European, Comparative and International Environmental Law* 43.

<sup>53</sup> Above n 186. See Volker MAUERHOFER, Edwald GALLE and Marco ONIDA, ‘The Alpine Convention’ in CJ BASTMEIJER (ed), *Wilderness Protection in Europe: The Role of International, European and National Law* (Cambridge University Press 2016) 199.

<sup>54</sup> Framework Convention on the Protection and Sustainable Development of the Carpathians (Kiev, May 2003), in force January 2006. See Simon GABERELL, ‘Framing Mountains for Regional Environmental Cooperation: The Case of the Carpathians’ in Jörg BALSIGER and Aysun UYAR (eds), *Comparing Regional Environmental Governance in East Asia and Europe: Proceedings* (Research Institute for Humanity and Nature 2013) 35-42.

<sup>55</sup> See for example, Protocol on Nature Protection and Landscape Preservation in Implementation of the Alpine Convention of 1991 (20 December 1994), LEX-FAOC034033, not in force; [for other protocols see - http://www.alpconv.org/en/convention/protocols/pages/default.aspx?AspxAutoDetectCookieSupport=1, accessed 14 February 2017.](#)

protocol.<sup>56</sup> As with precedents under Asian sub-regional agreements,<sup>57</sup> and in the Arctic context,<sup>58</sup> these are a helpful pointer to measures that can be taken to better protect the Third Pole, despite the challenges of context, climate change and security.<sup>59</sup>

At an international level, governance for biodiversity conservation specifically ~~many can~~ be multilateral, regional or sub-regional. Within a state, national, regional and local efforts may mirror global governance frameworks. Transboundary initiatives of MEAs in the Asian context are also a valuable precedent. Of the conservation conventions, ~~in addition to~~ the WHC<sup>60</sup> and

**Commented [Review124]:** 'In addition ' in note 55 replaced to avoid repetition.

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<sup>56</sup> Protocol on Conservation and Sustainable Use of Biological and Landscape Diversity to the Framework Convention on the Protection and Sustainable Development of the Carpathians (Bucharest, 19 June 2008) unreported, in force 28 April 2010; available at: <  
<http://www.carpathianconvention.org/protocols-to-the-convention.html>> accessed 7 December 2016.

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<sup>57</sup> Simon MARSDEN, *Environmental Regimes in Asian Subregions: China and the Third Pole* (Edward Elgar 2017).

<sup>58</sup> MARSDEN, above n 297.

<sup>59</sup> Karen MORTON, 'Climate Change and Security at the Third Pole' (2011) 53(1) *Survival: Global Politics and Strategy* 121-132.

<sup>60</sup> ~~In addition~~Further to the transboundary protected areas and initiatives highlighted in the text, there are of course national properties on the List of World Heritage. These include the following natural inscriptions: Nanda Devi and Valley of Flowers National Parks (India), Great Himalayan National Park Conservation Area (India), Sagarmatha National Park (Nepal), Chitwan National Park (Nepal), and Tajik National Park (Mountains of the Pamirs) (Tajikistan). The following



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11 *Wetlands Convention*, the *Convention on International Trade in Endangered Species (CITES)*<sup>61</sup>  
12 and *Convention on Migratory Species (CMS)*<sup>62</sup> can all be looked to.<sup>63</sup> Another significant MEA  
13 is the *Climate Change Convention*,<sup>64</sup> which is ~~highly~~-relevant to both biodiversity conservation  
14 and sustainable development, and also the *UN Watercourses Convention*,<sup>65</sup> although ~~other than~~  
15 ~~noted due to space constraints~~, these are not considered here due to space constraints.  
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20 The WHC is included in the list of the seven ‘biodiversity-related conventions’ of the  
21 CBD, and has an important role to play in the protection~~ioned~~ of areas and species.<sup>66</sup> ~~Illustrative of~~

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25 Tibetan cultural property is also inscribed under the WHC: Historic Ensemble of the Potala  
26 Palace, Lhasa; with a number of other sites on the eastern side of the Tibetan Plateau  
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28 <http://whc.unesco.org/en/list/> accessed 21 September 2016.

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30 <sup>61</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora  
31 (Washington DC, 3 March 1973), 993 UNTS 243, in force 1 July 1975.

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33 <sup>62</sup> Convention on the Conservation of Migratory Species of Wild Animals (Bonn, 23 June 1979),  
34 19 ILM 15, in force 1 November 1983.

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37 <sup>63</sup> See MARSDEN AND BRANDON above n 253.

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40 <sup>64</sup> United Nations Framework Convention on Climate Change (Rio de Janeiro, 9 May 1992),  
41 1771 UNTS 107, in force 21 March 1994.

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43 <sup>65</sup> Convention on the Law of Non-Navigable Uses of International Watercourses (New York, 21  
44 May 1997), 36 ILM 700, in force 17 August 2014.

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47 <sup>66</sup> <https://www.cbd.int/brc/> In addition to the CBD, ~~the others are~~, Ramsar, CMS and CITES,  
48 the *International Treaty on Plant Genetic Resources for Food and Agriculture*, and the  
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To illustrate the three pole synergies as well as the differences, the relevance of the WHC in the Arctic and sub-Antarctic – including in transboundary contexts - has ~~recently~~ been considered ~~by the current author~~.<sup>67</sup> There are currently two transboundary Asian properties on the List of World Heritage. The first is the Uvs Nuur Basin,<sup>68</sup> which is shared between Russia and Mongolia and comprises 12 protected areas representing the major biomes of eastern Eurasia. This ~~is~~ ~~illustrative of~~ ~~demonstrates~~ the potential for this agreement to be utilised further in the context of the Third Pole. The second is the Western Tien-Shan,<sup>69</sup> which includes protected nature areas in the mountainous country of Kazakhstan, Kyrgyzstan and Uzbekistan, and demonstrates this further. In addition, the significance of the cultural heritage of the Altai Mountains of China,

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~~International Plant Protection Convention~~ ~~are also included in addition to the WHC, details of which are included in this website.~~

<sup>67</sup> Simon MARSDEN, ‘The World Heritage Convention in the Arctic and Indigenous People: Time to Reform?’ (2015) 6 *Yearbook of Polar Law* 226-249; and Simon MARSDEN, ‘Protecting Sub-Antarctica via the World Heritage Convention: Recommendations for Improved Domestic and Transboundary Governance in Australasia’ (2013) 9(1) *Macquarie Journal of International and Comparative Environmental Law* 1-17. Also in an Arctic context in relation to properties and potential properties in Iceland and Svalbard, see Simon MARSDEN, ‘Wilderness Protection in Europe and the Relevance of the World Heritage Convention’ in CJ ~~Bastmeijer~~ BASTMEIJER (ed), *Wilderness Protection in Europe: The Role of International, European and National Law* (Cambridge University Press 2016) 137.

<sup>68</sup> <<http://whc.unesco.org/en/list/769>> accessed 21 September 2016.

<sup>69</sup> <<http://whc.unesco.org/en/list/1490>> accessed 21 September 2016.

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Kazakhstan, Mongolia and Russia has been highlighted, and the need for transboundary cooperation for conservation.<sup>70</sup> A Subregional World Heritage Consultative Workshop for Promotion of Transboundary cooperation was held involving these four States Parties in discussing cultural value and management arrangements for a possible transboundary nomination.<sup>71</sup>

A final very significant example under the WHC was formalised by the Ashgabat Agreement.<sup>72</sup> ~~Under this, under which~~ representatives of 12 Asian countries outlined the Silk Roads Heritage Corridors approach for a future serial and transboundary World Heritage nomination. Fifty potential Silk Roads Heritage Corridors have been identified, with three corridors within the central Asian countries and China recommended as a top priority for the first phase of the nomination of the Silk Roads at the second meeting of the Coordinating Committee of the Serial World Heritage Nomination of the Silk Roads in 2011. In 2014 at the 38th Session of the World Heritage Committee in Doha, the Routes Network of Chang'an-Tianshan Corridor (a China, Kazakhstan and Kyrgyzstan joint nomination) was inscribed on the List of World Heritage as part of this process.<sup>73</sup>

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<sup>70</sup> The World Heritage Centre (~~the key administrative body~~) of UNESCO initiated a similar exercise for the Golden Mountains of Altai, ~~whose the~~ Russian part ~~of which~~ was inscribed on the World Heritage List in 1998.

<sup>71</sup> <<http://whc.unesco.org/en/events/513>> accessed 21 September 2016.

<sup>72</sup> <<http://whc.unesco.org/en/news/751>> accessed 21 September 2016.

<sup>73</sup> <<http://whc.unesco.org/en/list/1442>> accessed 21 September 2016.

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In relation to the Wetlands Convention, ~~this is also part one~~ of the conservation conventions noted above.<sup>74</sup> ~~The the~~ focus is – like the WHC – again upon inscription of significant sites, here the List of Wetlands of International Importance and appropriate ‘wise use’ management to ensure the maintenance of their conservation status.<sup>75</sup> In 1987 and 1990 the Ramsar COP revised the criteria for inscribing wetlands on the List, and at COP6 in 1996 new criteria, (fish and fisheries), were added.<sup>76</sup> This demonstrates the breadth of the convention and its relevance to the non-avian species that are found in international rivers, including those that originate in the Tibetan Plateau. The Wetlands Convention also has clear application in the Arctic, ~~emphasising which serves to underline~~ parallels with the Third Pole.<sup>77</sup> Furthermore,

<sup>74</sup> Note 3955. ~~[Wrong note citation: you cite Ramsar at n 34, and do not refer to it in n 55: I think you mean to refer here to n 61.]~~

<sup>75</sup> See Michael BOWMAN, ‘The Ramsar Convention on Wetlands: Has it Made a Difference?’ (2002/2003) *Yearbook of International Cooperation on Environment and Development* 61

<sup>76</sup> Ramsar Convention, *The Criteria for Identifying Wetlands of International Importance*, Ramsar Information Paper No 5.

<sup>77</sup> See: ‘Ramsar Focuses on Arctic Wetlands’ (11 December 2014),

<<http://www.ramsar.org/news/ramsar-focuses-on-arctic-wetlands>> accessed 8 December 2016.

See also o T MINAYEVA and A SIRIN, ‘Arctic Peatlands’, *Arctic Biodiversity Trends 2010*; and Hans JOOSTEN, ‘Peatlands, Climate Change Mitigation and Biodiversity Conservation’, policy brief, (Nordic Council of Ministers 2015).

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11 ~~There~~ ~~there~~ are ~~furthermore~~ a number of relevant wetland sites in ~~the~~ Third Pole region.<sup>78</sup>  
12  
13 although none are transboundary.<sup>79</sup> Regional initiatives under this treaty have however assisted  
14 in providing context for its application, and are stated to ‘improve the visibility of the  
15 Convention through international cooperation at regional level on wetland-related issues of  
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18  
19 <sup>78</sup> As examples of states with Third Pole territory, Bhutan has 3, China 52 (with 12 located in the  
20 Tibetan Plateau), India has 28 (with at least 6 in the Himalayas), Pakistan 19 (with about 10  
21 along the Indus River) and Nepal has 10. [See <https://www.thethirdpole.net/about>](https://www.thethirdpole.net/about) accessed 15  
22  
23 [February 2017](#).  
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26  
27 <sup>79</sup> The only eight transboundary wetlands sites are all located in Europe, see:  
28 [http://www.ramsar.org/search?search\\_api\\_views\\_fulltext=transboundary%20wetlands&f\[0\]=fi](http://www.ramsar.org/search?search_api_views_fulltext=transboundary%20wetlands&f[0]=field_document_type%3A497)  
29 [eld\\_document\\_type%3A497](http://www.ramsar.org/search?search_api_views_fulltext=transboundary%20wetlands&f[0]=field_document_type%3A497)> accessed 7 December 2016.  
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**Commented [Review125]:** Perhaps refer to this map (also noted above), as it specifically includes wetlands  
<https://www.thethirdpole.net/about>

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common concern,<sup>80</sup> ~~in each case~~ involving ~~in each case~~ all relevant national and regional stakeholders.<sup>81</sup>

~~While there is no regional initiative of relevance to the Third Pole, an example of a similar ecosystem (combining high altitude mountains and associated wetlands), can be found in Latin America, specifically the Regional Initiative for the Conservation and Wise Use of High Andean Wetlands, which aims to promote conservation and sustainable use of High Andean wetlands through long term regional cooperation.~~<sup>82</sup> Finally, the Convention has been subject to a ~~few cases of litigation in~~ international courts and tribunals, in particular in Europe and Latin

<sup>80</sup> ~~While there is no regional initiative of relevance to the Third Pole, an example of a similar ecosystem (combining high altitude mountains and associated wetlands), can be found in Latin America, specifically the Regional Initiative for the Conservation and Wise Use of High Andean Wetlands, which aims to promote conservation and sustainable use of High Andean wetlands through long term regional cooperation. See: <<http://www.ramsar.org/document/regional-initiative-for-the-conservation-and-wise-use-of-high-andean-wetlands-haw>> accessed 7 December 2016.~~

<sup>81</sup> Convention on Wetlands, 52nd Meeting of the Standing Committee, Gland, Switzerland, 13-17 June 2016, *Operational Guidelines for Ramsar Regional Initiatives to support the implementation of the Convention*, Document No SC52-22.

<sup>82</sup> ~~<<http://www.ramsar.org/document/regional-initiative-for-the-conservation-and-wise-use-of-high-andean-wetlands-haw>> accessed 7 December 2016.~~

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America.<sup>83</sup> Most recently the ICJ has ~~recently~~ examined the transboundary implications for a wetlands site in central America, which emphasizes the significance of cross-border cooperation even in the absence of the inscription of a transboundary protected area.<sup>84</sup> Of more general significance is the fact that the principle of transboundary EIA – if not its content requirements – is now a recognized obligation under customary international law.<sup>85</sup>

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<sup>83</sup> The Danube Delta case was perhaps the most significant in relation to Europe as it concerned the application of other regimes. See Mari KOYANO, 'The Significance of the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) in International Environmental Law: Examining the Implications of the Danube Delta Case' (2008) 26:1 *Impact Assessment and Project Appraisal* 299.

<sup>84</sup> This also examined the application of EIA to the activities concerned. See ICJ, *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica) / Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* – Joint Proceedings – Judgment 16 December 2015. Available at: < <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=7f&case=150> > accessed 7 December 2016.

<sup>85</sup> ICJ, *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (20 April 2010, Judgment), para. 204. For discussion, see Alan BOYLE, 'Developments in the International Law of Environmental Impact Assessments and their Relation to the Espoo Convention' (2011) 20 *Review of European Community and International Environmental Law* 227. See also Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991), 30 ILM (1991) 802, in force 27 June 1997.

However, of the conservation MEAs, ~~t~~The CBD ~~is however the~~remains the MEA-most relevant to ~~the~~ development of a biodiversity conservation sub-regime in the Third Pole, and has identified the importance of mountain biodiversity in a ~~cross-~~sectoral programme.<sup>86</sup> This notes that mountain ecosystems are significant for biodiversity conservation and sustainable use, and that they include other ecosystem types such as forests and inland waters. Mountain biodiversity is therefore cross-cutting under the CBD, and ~~other than in addition to~~ the specific mention ~~it~~ in Article 20(7),<sup>87</sup> ~~all~~ the other articles and many decisions ~~apply~~ to mountain biological diversity. ~~As noted above,~~ COP-7 Decision VII/27 on mountain biological diversity provided the framework for action in this area,<sup>88</sup> with the purpose being the significant reduction of mountain biological diversity loss by 2010 at global, regional and national levels. Of relevance, this emphasizes the need to:

~~2.3.1. 'Promote integrated transboundary cooperation, strategies for sustainable activities on mountain ranges through mutually agreed-upon arrangements by countries concerned' (2.3.1);~~  
~~Cooperative arrangements should cover specific thematic issues such as landscape, soil, wetland, watershed, rangeland, mining, protected areas and wildlife management, agriculture, pastoralism, forestry, transportation, energy and tourism.~~

<sup>86</sup> See: <<https://www.cbd.int/mountain/>>, accessed 16 February 2017,

<sup>87</sup> This states: 'Consideration shall also be given to the special situation of developing countries, including those that are most environmentally vulnerable, such as those with arid and semi- arid zones, coastal and mountainous areas.'

<sup>88</sup> See: <<https://www.cbd.int/decision/cop/default.shtml?id=7764>> accessed 16 February 2017,

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~~2.3.2. Promote and strengthen regional and transboundary cooperation for research, adaptive management, fair and appropriate allocation of water to ecosystems, and exchange of expertise (2.3.2); to improve the conservation and management of mountain biodiversity (e.g., Global Mountain Biodiversity Assessment (GMBA) and International Centre for Integrated Mountain Development (ICIMOD)).~~

~~2.3.3. Promote the appreciation and conservation of mountain biological diversity as a means of reducing human conflict (2.3.3); and, i.e., through peace parks.~~

~~2.3.4. Strengthen collaboration and synergies between the work programmes of the Convention on Biological Diversity and other global conventions and agreements ... on climate change, desertification, transboundary pollution, invasive alien species, wetlands and endangered species, with a special focus on mountain systems and their biological diversity, including through joint programmes of work. Also strengthen collaboration with the International Partnership for Sustainable Development in Mountain Regions and regional conventions on mountains.~~

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The work programme furthermore identified EIA in Goal 1.1: ‘To prevent and mitigate the negative impacts of key threats to mountain biological diversity’, specifically Action 1.1.3 to ‘Prevent or mitigate the negative impacts of economic development, infrastructure projects and other human-induced disturbances on mountain biological diversity at all levels, where applicable, taking into consideration the results of environmental and social impact assessment, paying particular attention to cumulative impacts.’ Programme element 2: ‘Means of implementation for conservation, sustainable use and benefit-sharing’, furthermore contained Goal 2.1 ‘To enhance the legal, policy, institutional, and economic framework’, with the specific action, 2.1.9 [to] ‘Encourage the implementation of environmental and social impact assessments

at sectoral, programme and project levels. Promote sustainable development and the eradication of poverty and prevent the negative impacts of economic development on mountain biological diversity including cumulative impacts.’

In addition, and of clear relevance to the Third Pole, with synergies to the governance of the ‘First Pole’ (the Arctic), the work programme also emphasised the need to ‘take into account specificities of indigenous and local communities depending upon mountain ecosystems, by observing section F of decision VII/16 of the Conference of the Parties on the Akwé: Kon voluntary guidelines,<sup>89</sup> for the conduct of cultural, environmental and social impact assessment regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities.’<sup>90</sup> Furthermore, and in relation to strategic environmental assessment (SEA), 2.1.10 emphasized the need to ‘Integrate aspects of mountain biological diversity into plans, policies and programmes related to mountain areas.’<sup>91</sup>

<sup>89</sup> See: < <https://www.cbd.int/doc/publications/akwe-brochure-en.pdf> > accessed 16 February 2017.

<sup>90</sup> Leena HEINÄMÄKI, Thora Martina HERRMANN and Antje NEUMANN, ‘The Protection of the Culturally and Spiritually Important Landscapes of Arctic Indigenous Peoples under the Convention on Biological Diversity and First Experiences from the Application of the Akwé Kon Guidelines in Finland’ (2014) 6 *The Yearbook of Polar Law* 189.

<sup>91</sup> In relation to SEA and the conservation conventions generally, see chapter 6, Simon MARSDEN, *Strategic Environmental Assessment in International and European Law: A Practitioner’s Guide* (Earthscan / Routledge, 2008) 115-134.

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11 In relation to progress, the CBD advocates the use of landscape and ecosystem  
12 approaches for managing regional biodiversity,<sup>94</sup> in recognition of the need for increased  
13 regional cooperation. In connection with the ecosystem approach, case studies have been  
14 developed further to ~~the~~ Decision V/6 of the COP, which requested that the Executive Secretary  
15 collect, analyse, compare and disseminate identified case-studies and lessons learned. One of  
16 particular relevance to the Third Pole – and the Mekong River Basin – concerned eco-region  
17 conservation in Cambodia, Lao PDR and Vietnam. Overall, the general study concluded that  
18 what was distinctive about the ecosystem approach (EA) as demonstrated by each of the case  
19 studies was the following:  
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29 The EA provides a framework whereby an acceptable balance can be obtained of the  
30 three key objectives of the CBD.  
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- 32 · People are placed at the heart of biodiversity management.
  - 33 · Emphasis is on capturing and optimising the functional benefits of ecosystems.
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38 <sup>94</sup> In relation to ecosystem approaches, see < <https://www.cbd.int/ecosystem/default.shtml> >  
39 accessed 7 December 2016. Note that the Wetlands Convention has also encouraged the use of  
40 these approaches, see Resolution IX.1 Annex A, COP9 (Kampala, Uganda, 8-15 November  
41 2005), *Conceptual Framework for the Wise Use of Wetlands and the Maintenance of their*  
42 *Ecological Character*, 6. For analysis, CM FINLAYSON et al, ‘The Ramsar Convention and  
43 Ecosystem-Based Approaches to the Wise Use and Sustainable Development of Wetlands’  
44 (2011) 14:3-4 *Journal of International Wildlife Law and Policy* 176.  
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· The importance of biodiversity management beyond the limits of protected areas is emphasised whilst protected areas are recognised as still being vitally important for conservation.

· The flexibility of the approach with respect to scale and purpose provides a versatile framework for operationalisation.<sup>95</sup>

In support of the mountain programme, ICIMOD and its partners have identified seven transboundary landscapes for programmatic cooperation. From west to east, these are: Wakhan, Karakoram-Pamir, Kailash, Everest, Kangchenjunga, Brahmaputra-Salween, and Cherrapunjee-Chittagong. From north to south, trans-Himalayan transects cover most of the eco-regions in the region.<sup>96</sup> The Kangchenjunga landscape was identified above. Cooperation is demonstrated furthermore by an event in 2012 organised by the ICIMOD in collaboration with GB Pant Institute of Himalayan Environment and Development and other partners, entitled ‘Managing Biodiversity in Transboundary Landscape in the Hindu Kush-Himalaya Region’.<sup>97</sup> A side event to the 11th Conference of the Parties (COP11), the purpose was to share experiences and lessons learnt on managing biodiversity with an ‘ecosystem approach’ in the transboundary landscapes

<sup>95</sup> R D SMITH and E MALTBY, *Using the Ecosystem Approach to implement the CBD: A Global Synthesis Report Drawing Lessons from Three Regional Pathfinder Workshops* 32. <[http://www.cbd.int/programmes/cross-cutting/ecosystem/cs.aspx](https://www.cbd.int/programmes/cross-cutting/ecosystem/cs.aspx)> accessed 7 December 2016.

<sup>96</sup> See ‘Transboundary Landscapes’ <<http://icimod.org/?q=9121>> accessed 21 September 2016.

<sup>97</sup> <<http://www.cbd.int/kb/record/sideEvent/2541?RecordType=sideEvent>> accessed 21 September 2016.

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in the region, raise awareness among communities about the prospect of regional cooperation, and highlight transboundary initiatives and lessons learnt.

Another side event to COP11 was organised by the Wildlife Enforcement Network, entitled ‘Managing Biodiversity Conservation and Wildlife Protection at Landscape and Transboundary Scales in South Asia’.<sup>98</sup> Since several biodiversity rich protected areas are located over international boundaries between countries in South Asia, applying a landscape approach is the best way of achieving long-term conservation outcomes and human well-being. Poaching and illegal trade in wildlife is an imminent threat to a number of species in south Asia, so cooperation and collaboration amongst countries with shared borders is essential and this event showcased two ongoing externally funded World Bank projects, one in India, and the other a regional project (Bangladesh, Bhutan, India and Nepal), that provide the scale and opportunity to influence conservation for positive outcomes.

### III. Governance of the Mekong river basin in Southeast Asia

The Mekong River Basin is a place of international significance, in particular a hotspot of aquatic and terrestrial biodiversity.<sup>99</sup> Only the Amazon River Basin has a greater diversity of flora and fauna. There are more than 1200 species of fish, although a few have been

<sup>98</sup> <<http://www.cbd.int/kb/record/sideEvent/2948?RecordType=sideEvent>> accessed 21 September 2016.

<sup>99</sup> See: <<http://www.independent.co.uk/environment/mekong-river-region-named-global-biodiversity-hotspot-by-wwf-after-367-new-species-are-discovered-in-9486539.html>> accessed 16 February 2017.

**Commented [Review133]:** Both aquatic and terrestrial hotspots are important in the Mekong; see for eg <http://www.independent.co.uk/environment/mekong-river-region-named-global-biodiversity-hotspot-by-wwf-after-367-new-species-are-discovered-in-9486539.html>

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commercialized.<sup>100</sup> Aquaculture is second only to rice as the Vietnamese delta's export income; specific fish species have therefore been subject to a good deal of commercialisation.<sup>101</sup> This is increasingly recognised by the relevant states, who are making efforts to support sustainable fisheries.<sup>102</sup> The diversity of plants includes forests, grasslands, flooded forests, mangroves and other wetlands. Tonle Sap Lake, which became a UNESCO biosphere in 1997,<sup>103</sup> is the biggest freshwater reserve in Southeast Asia, and is directly connected to the Mekong. However, increasing use of the resources of the Mekong is however putting the river system under significant pressure, notably deforestation and conversion of wetlands into agricultural land, and developing hydropower and other infrastructure works.<sup>104</sup> Resulting impacts upon biodiversity

<sup>100</sup> See Simon BENEDIKTER, *The Vietnamese Hydrocracy and the Mekong Delta: Water Resources Development from State Socialism to Bureaucratic Capitalism* (Lit Verlag 2014), 105.

<sup>101</sup> See Leng Sy VANN, Eric BARAN, Cheng PHEN and Touch Bun THANG, *Biological Reviews of Important Cambodian Fish Species, Volume 2* (World Fish 2006).

<sup>102</sup> See Mekong River Commission Events, 'Cambodia, Lao PDR Reaffirm Cross-Border Dialogue for Sustainable Fisheries', 23 December 2016. See: <  
<http://www.mrcmekong.org/news-and-events/events/cambodia-lao-pdr-reaffirm-cross-border-dialogue-for-sustainable-fisheries/>> accessed 17 February 2017.

<sup>103</sup> <<http://www.unesco.org/new/en/phnompenh/natural-sciences/biosphere-reserves/tonle-sap-biosphere-reserve/>> accessed 8 December 2016.

<sup>104</sup> See Jeremy CAREW-REID, 'The Mekong: Strategic Environmental Assessment of Mainstream Hydropower Development in an International River Basin' in HIRSCH (ed), above n 40, 334-355, especially at 336-338.

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are considerable, and derive from the different interests of the states concerned. Litta comments:  
‘While Viet Nam and Cambodia need a constantly high water discharge to provide water for rice  
paddies and to support the fish, Thailand, Laos and Yunnan aim to remove water from the  
Mekong in order to realize hydropower projects and to use the water for irrigation of dry  
agricultural regions.’<sup>105</sup>

The *Mekong Agreement* applies to four states: Cambodia, Laos, Thailand and Vietnam.<sup>106</sup>

Two dialogue partners are however also involved in the cooperative framework, China and  
Myanmar. As an example of subregional governance and the implications that come from a  
focus upon national interests for a major transboundary watercourse originating in the Tibetan  
Plateau, the *Mekong Agreement* is instructive in the Third Pole context. The main institutions are  
the Mekong River Commission (MRC) and its Joint Committee. The key activities carried out  
are Basin planning, EIA, ensuring protection of the environment and ecosystems, and the  
reasonable and equitable use and protection of water. *Procedures for Notification, Prior  
Consultation and Agreement* (PNPCA), and *Guidelines on Implementation* theoretically provide  
the means by which the activities are carried out in accordance with established practices.<sup>107</sup>

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<sup>105</sup> H LITTA, ‘Case Study Two: Common Use of the Mekong’ in H LITTA, *Regimes in  
Southeast Asia: An Analysis of Environmental Cooperation* (Verlag Springer 2012) 139, 144.

<sup>106</sup> Above n 275.

<sup>107</sup> Mekong River Commission for Sustainable Development, *Procedures for Notification, Prior  
Consultation and Agreement* Phnom Penh, 13 November 2003; and Mekong River Commission  
for Sustainable Development, *Guidelines for Implementation of the Procedures for Notification,*



There is no separate biodiversity agreement to the *Mekong Agreement* and the effectiveness or otherwise of the governance arrangements therefore relate to the *Agreement*, PNPCA and associated *Guidelines*.<sup>108</sup>

As noted, many of the activities impacting the Mekong River are operations connected with dam building, the majority of which have been conducted outside the framework of the *Agreement*, meaning that dam building and related development has frequently failed to follow its provisions. Early specific examples include the Vietnamese Sesan Dam, the Thai water grid, the Laos Thuen Dam and Chinese development on the Upper Mekong. An early Danish sponsored study criticized the flexibility of the rules, lack of enforcement, adherence to the participation provisions, and motivation and / or political will by the MRC and its Parties, with

*Prior Consultation and Agreement* 21 August 2005 <<http://www.mrcmekong.org/>> accessed 21 September 2016.

<sup>108</sup> See: Philip HIRSCH and Kurt Mørck JENSEN, *National Interests and Transboundary Water Governance in the Mekong* (Australian Mekong Resource Centre, University of Sydney, Danish International Development Assistance, 2006), in particular ch 3 'Legal and Institutional Framework for Mekong Water Governance', available at: <[http://sydney.edu.au/mekong/documents/mekwatgov\\_mainreport.pdf](http://sydney.edu.au/mekong/documents/mekwatgov_mainreport.pdf)> accessed 16 February 2017.

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[national interests dominating outcomes.](#)<sup>109</sup> [These developments](#) have involved little or no transboundary EIA,<sup>110</sup> and inadequate public participation of those affected by the development. [Hirsch and Jensen identify furthermore the absence of legally-based standards for transboundary EIA, advocating their inclusion in the current rules or the development of a related protocol.](#)<sup>111</sup> [While draft technical guidance was released in 2012, it is not legally binding upon the MRC Parties.](#)<sup>112</sup> [Early examples include the Vietnamese Sesan Dam, the Thai water grid, the Laos Thuen-Dam and Chinese development on the Upper Mekong. An early Danish-sponsored study criticized the flexibility of the rules, lack of enforcement, adherence to the participation](#)

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<sup>109</sup> [HIRSCH and Jensen above note 107, 23-44; see also Ben BOER, Philip HIRSCH, Fleur JOHNS, Ben SAUL and Natalia SCURRAH, \*The Mekong: A Socio-legal Approach to River Basin Development\* \(Routledge 2015\).](#)

<sup>110</sup> [See Simon MARSDEN, ‘Developing Agreements for Transboundary Environmental Impact Assessment and Strategic Environmental Assessment in Asia’, in Robin WARNER and Simon MARSDEN \(eds\), \*Transboundary Environmental Governance – Inland, Coastal and Marine Perspectives\* \(Ashgate, 2012\) 152-156.](#)

<sup>111</sup> [Above note 107, 31.](#)

<sup>112</sup> [Mekong River Commission, \*Technical Guidance for Conducting and Considering Transboundary Environmental Impact Assessment Process for proposed development projects/activities in connection with the national EIA process\* \(Mekong River Commission, 2012\).](#)

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provisions, and motivation and / or political will by the MRC and its Parties, with national interests dominating outcomes.<sup>113</sup>

In April 2011, the MRC deferred a decision on the Xayaburi hydropower plant in Laos, the first dam on the mainstream of the Lower Mekong Basin; Vietnam had also recommended deferring all development for at least a decade while environmental concerns continued to be expressed.<sup>114</sup> In March 2011 the MRC Secretariat's *Prior Consultation Project Review Report* identified a number of 'areas of uncertainty on which further information is needed'.<sup>115</sup> These

<sup>113</sup> For analysis, see Philip Hirsch and Kurt Mørck Jensen *National Interests and Transboundary Water Governance in the Mekong—Ch 3 Governance 23-44*. [http://sydney.edu.au/mekong/documents/mekwatgov\\_mainreport.pdf](http://sydney.edu.au/mekong/documents/mekwatgov_mainreport.pdf). [maybe leave the following reference out, as the book covers a lot of this in more depth] see Fleur JOHNS, Ben SAUL, Philip HIRSCH, Tim STEPHENS and Ben BOER, 'Law and the Mekong River Basin: A Socio-Legal Research Agenda on the Role of Hard and Soft Law in Regulating Transboundary Water Resources' (2010) 11(1) *Melbourne Journal of International Law* 154-174; HIRSCH and Jensen above note 107, 23-44; see also Ben BOER, Philip HIRSCH, Fleur JOHNS, Ben SAUL and Natalia SCURRAH, *The Mekong: A Socio-legal Approach to River Basin Development* (Routledge 2015).

<sup>114</sup> See Alistair RIEU-CLARKE, 'Notification and Consultation Procedures under the Mekong Agreement: Insights from the Xayaburi Controversy' (2015) 5 *Asian Journal of International Law* 143.

<sup>115</sup> Mekong River Commission Secretariat, "Prior Consultation Project Review Report—Stakeholder Consultations Related to the Proposed Xayaburi Dam Project" (24 March 2011),

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included impacts from changing flow patterns, particularly on fish migration during construction and operation, an estimate of potential loss of fisheries due to the project, and further detail on the proposed measures to mitigate such losses. As such, the inadequacy of any analysis of the effects upon biodiversity was highlighted. The April 2011 deferral decision was informed by the MRC Final Report on *SEA of Hydropower on the Mekong Mainstream*.<sup>116</sup> This was a proactive effort to evaluate twelve hydropower schemes, eight of which were in Laos. Despite the deferral decision and SEA Report, construction work on the Xayaburi Dam commenced by Laos in the absence of a final decision by the MRC or adequate consultation. As Thailand is to be the consumer of the electricity produced, financing of the project was by six Thai banks, despite the likely environmental and social costs.<sup>117</sup>

In December 2011, the MRC Council Members concluded that there was a need for further study on the sustainable development and management of the Mekong River including impact from mainstream hydropower development projects.<sup>118</sup> Concerns continued to be

online: <<http://www.mrcmekong.org/assets/Consultations/2010-Xayaburi/2011-03-24-Report-on-Stakeholder-Consultation-on-Xayaburi.pdf>> at 58.

<sup>116</sup> International Center for Environmental Management, *MRC Strategic Environmental Assessment of Hydropower on the Mekong Mainstream: Final Report* (Mekong River Commission 2010).

<sup>117</sup> See: <https://www.internationalrivers.org/resources/thailand-defies-neighbors-on-contentious-xayaburi-dam-3686> accessed 17 February 2017.

<sup>118</sup> See: <<http://www.mrcmekong.org/news-and-events/news/further-study-on-impact-of-mekong-mainstream-development-to-be-conducted-say-lower-mekong-countries/>>

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emphasized by the Save the Mekong Coalition environmental NGO, whose request for clarification in relation to the decision making process was responded to in May 2012: that no decision had been reached, and that construction work was ‘only preparatory and exploratory’.<sup>119</sup> In July 2012, the Laos government invited relevant embassies, lenders, and development partners to the site to learn how the project had been modified to address concerns raised during the PNPCA process.

Despite this attempt at reassurance, at the 19th MRC Council meeting in January 2013, a joint development partner statement raised concern ‘about the social impacts and environmental risks associated with the construction.’<sup>120</sup> At an Informal Donor meeting in June 2013, Thailand noted that some MRC partners have different interpretations of the MRC Procedures and their application. It requested the MRC Secretariat to develop explanatory notes to complement the PNPCA to avoid confusion, and asked the MRC Secretariat to improve the MRC website on PNPCA. The United States agreed with Thailand about the lack of clarity, and the MRC Secretariat said an informal note would be prepared. Thailand also expressed concern to Laos

<sup>119</sup> See: <http://www.mrcmekong.org/assets/Publications/Consultations/SEA-Hydropower/Response-to-req-for-Clarifications-on-the-Prior-Consultation-for-the-Xayaburi-Dam-May142012.pdf>, accessed 17 February 2017.

<sup>120</sup> International Rivers, ‘Xayaburi Dam: Timeline of Events’, February 2013, see: [http://www.internationalrivers.org/files/attached-files/xayaburi\\_dam\\_timeline\\_of\\_events\\_feb.\\_2013\\_0.pdf](http://www.internationalrivers.org/files/attached-files/xayaburi_dam_timeline_of_events_feb._2013_0.pdf).

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about the lack of information needed to respond to the NGOs in Thailand that had expressed concerns about Xayaburi.<sup>121</sup>

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Most recently, eConsultation on another major project, the Don Sahong Hydropower Project - again in Laos - commenced in July 2014. Given the inadequate consultation over the Xayaburi Dam, in September 2014 an environmental NGO - Save the Mekong Coalition - sent a letter to the prime ministers of the MRC Parties, urging them to halt the consultation over the Don Sahong project and reform the PNPCA process first.<sup>122</sup> This was because other than the MRC Parties, there is no formal means under the PNPCA procedures for gathering and inputting the concerns of other (non-government) stakeholders. There is hence an urgent need to incorporate provisions for access to information, public participation in decision making and access to justice in environmental matters to provide for this. The MRC agreed to hold a meeting in relation to this in December 2014, an additional opportunity for NGOs and other organisations to find out more about the project and to share their concerns. Most of them were concerned about the impact on fish migration and food security,<sup>123</sup> and the potential

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<sup>121</sup> Mekong River Commission. Report. Informal Donor Meeting, 27-28 June 2013, Phnom Phen, 9-10.

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<sup>122</sup> See: <<http://www.mrcmekong.org/assets/Other-Documents/stakeholder-submissions/Concern-on-Don-Sahong-dam-10sep2014eng.pdf>> accessed 17 February 2017; Mekong River Commission for Sustainable Development, *Public Participation in the Context of the MRC* undated; and H LITTA, above n 91.

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<sup>123</sup> Note that efforts to rebuild freshwater fish populations in the Mekong and Sekong River Basins are underway with plans in place to establish a joint fisheries management plan between Cambodia

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transboundary impacts of the project. It was suggested that more time be allowed for the MRC to conduct further studies and evaluate the information. Cambodia recommended that transboundary EIA and socio-economic impacts assessments be conducted in downstream areas, particularly those adjacent to the project site, the Cambodian Mekong River and the Tonle Sap Lake, prior to the project's implementation; Thailand expressed concerns that the data and information provided was insufficient to assess the potential transboundary impacts on the rivers flow regime, fisheries ecology, fish migration, tourism, and the livelihood of the Thai people; and Vietnam argued that the project should be considered in conjunction with other proposals impacting the Mekong mainstream together with the Mekong Delta. Following the response of Laos, which supported the project in its territory, the Joint Committee decided to refer the matter to the MRC Council, and on the 28 January 2015 the MRC held a Special Session of its Joint Committee on the Prior Consultation process for Don Sahong, and based on the outcomes, the Joint Committee agreed to report including discussion of<sup>124</sup> the need to reform the PNPCA process. <sup>124</sup> Despite this, consultation on a third project on the mainstream commenced in 2016, with the Pak Beng hydropower project also proposed on the Mekong mainstream in the northern

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and Laos following a meeting on 13 February 2017, <http://www.mrcmekong.org/news-and-events/events/cambodia-lao-pdr-discuss-a-joint-fisheries-management-plan/> accessed 22 February 2017.

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<sup>124</sup> <http://www.mrcmekong.org/news-and-events/news/mrc-holds-special-session-on-prior-consultation-of-don-sahong-hydropower-project/> accessed 21 September 2016. See also: <http://www.mrcmekong.org/assets/Publications/Consultations/SEA-Hydropower/Letter-DonSahong-consultation-11.11.14.pdf> accessed 17 February 2017.

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territory of Laos.<sup>125</sup> Pak Beng is located between the Jinghong hydropower project in China and the Xayaburi hydropower project in Laos, which highlights the issue of cooperation with China, the most significant of the two dialogue partners because it is building dams of its own which are impacting the Mekong.<sup>126</sup> the headwaters of which lie in the Tibetan Plateau.<sup>127</sup> Whether as a result of this there is a greater focus in the assessment process upon impacts upon biodiversity however, remains to be seen.

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**IV. Conclusions**

Effective biodiversity conservation depends on an environmental regime and / or sub-regime that imposes enforceable obligations on the Parties, and which is based on continuing political will. With its source in the Third Pole, the Mekong arrangements - which are designed to manage this major river basin - fail to provide for effective biodiversity conservation in either the *Agreement*, PNPCA or associated *Guidelines*. Practice has demonstrated instead the resulting conflict when the governance arrangements provide inadequately for environmental protection, or they are not

Commented [Review141]: The lessons for the Mekong need to be better spelled out in your conclusions. The links between the Third Pole, and especially the SAARC region and the Mekong region need to be more explicit from the point of view of adequacy of regional legal and policy frameworks.

<sup>125</sup> See: <http://www.mrcmekong.org/topics/pnpca-prior-consultation/pak-beng-hydropower-project/>, accessed 22 February 2017,

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<sup>126</sup> Aisha Down and Van Roenun, 'China Dam Construction Is Putting Pressure on Mekong River', *Cambodia Daily*, 17 January 2017. See: <  
<https://www.internationalrivers.org/resources/china-dam-construction-is-putting-pressure-on-mekong-river-cambodia-daily-11631>> accessed 22 February 2017,

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<sup>127</sup> Summary of Minutes of the Forty-First Meeting of the MRC Joint Committee, Mekong River Commission, 6-7 May 2015, Siem Reap, 3.

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11 adhered to. Development activity by members – or dialogue partner China – has been undertaken  
12 without due regard to either the established procedures, or to **the requirement for transboundary**  
13 **EIA** under general international law. With respect to public participation, the absence of either  
14 effective provisions - or their implementation - in the examples above is cause for considerable  
15 concern, as without this biodiversity conservation depends upon governments alone to ensure  
16 this is achieved. [While steps would appear to have been taken to take forward the concerns of the](#)  
17 [relevant NGOs, other members and various other stakeholders, it is extremely troubling that](#)  
18 [these efforts have not resulted in a moratorium on proposals for new dams, which is most clearly](#)  
19 [illustrated with reference to the initiation of the proposals for Don Sahong and Pak Beng.-](#)

**Commented [Review142]:** See the 2012 MRC draft guidelines (sent by email by Ben Boer)

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28 In the Third Pole sub-region itself, the protection of biodiversity is not subject to any  
29 designated transboundary regime or sub-regime. Instead, its conservation depends upon the  
30 application of certain MEAs, notably the CBD, WHC and the Wetlands Convention as discussed.  
31 This has both advantages and disadvantages. The main advantage is that there is scope to learn  
32 from what is working or not working elsewhere. As indicated, experience may be derived from  
33 the polar, mountain or water examples outside Asia (or which in the case of the UN and UNECE  
34 water treaties are currently not adopted or ratified by Third Pole states); and regimes and sub-  
35 regimes in Asian sub-regions, of which the Mekong arrangements are a **very** important  
36 example. [The failure of the Mekong regime to effectively deal with the assessment of](#)  
37 [transboundary environmental effects upon biodiversity, and to appropriately involve the public](#)  
38 [and NGOs in the process, must serve as a major lesson in the design of any Third Pole regime.](#)  
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40 Lessons can also be learnt from the **voluntary experiences carried out in the Himalayas / Tibetan**  
41 **Plateau under the landscape and development, and cooperation initiatives highlighted in the**  
42 **second section of this article.**

**Commented [Review143]:** Cross-references here to earlier in the article?

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11 ~~However,~~ if a sub-regime for the Third Pole is to be developed and implemented  
12 effectively for biodiversity conservation, lessons must [therefore](#) be learnt [very](#) well to avoid poor  
13 decision-making impacting negatively upon the places and species that need conservation and  
14 protection. Voluntary experiences provide a foundation for regulatory action, but regime  
15 building requires more than trust and goodwill to operate effectively. National interests must not  
16 dominate regional needs, and the public must have a voice in decision making if the places and  
17 species are to support the people whose livelihoods depend on them. At present the main  
18 disadvantage of the current situation is that without any regime for the Third Pole at all –  
19 effective or otherwise – national interests will continue to dominate and the environment  
20 generally - and biodiversity conservation specifically - will be marginalized in decision making.

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29 An appropriate biodiversity conservation instrument for the Third Pole could potentially  
30 take the form of a protocol relating to a framework convention; [both would need to be developed](#)  
31 [from the ground up, drawing on the recognized needs of the relevant stakeholders for both](#)  
32 [environmental protection and equitable utilization](#). Given the broad range of issues to be  
33 addressed [and the uniqueness of #](#) the region, it is suggested that ~~this~~ [such an arrangement](#) may  
34 be the most practical approach. The European examples of the *Alpine* and *Carpathian*  
35 *Conventions* follow this direction as noted,<sup>128</sup> with designated subsidiary instruments adopted in  
36 1994 and 2008, although only the latter is in force. In an Asian context, it is ~~however also~~  
37 significant that [general](#) framework agreements were [also](#) adopted but are not in force for both  
38 [Central](#) (2006) and [Southeast Asia](#) (1985),<sup>129</sup> [suggesting that new arrangements may be](#)  
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Commented [Review144]: Be more specific about which convention (s) here?

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49 <sup>128</sup> See notes 50 and 51.

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65 <sup>129</sup> See notes 17 and 18.

needed; the reasons why these other Asian agreements have not been ratified may also provide valuable information as to how best to proceed, which could be resurrected to provide the basis for any subsidiary instrument.

However the fact that the key Third Pole states which are either entirely or partly located in the area are for the most part not involved in these Asian agreements emphasizes however the need for a more targeted approach. One clear possibility, as discussed at length earlier in this article, is the SAARC Convention on Cooperation on Environment, which was adopted in 2010 and came into force in 2013.<sup>130</sup> This little recognised SAARC instrument is strengthened by its broad SAARC membership (Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka); large number of observer states, (including China); the status of SAARC as an intergovernmental organisation, (with legal personality); and its relationship with the South Asia Cooperative Environment Program (SACEP), which has specific experience of environmental issues.<sup>131</sup> Building on global experiences and lessons from the Mekong, SAARC is potentially well placed to improve the biodiversity conservation of the Third Pole, and the Convention on Cooperation on Environment may, as noted, provide a starting point upon which to build future efforts and ensuring that they are effective.

**Commented [Review145]:** While it would be desirable to revive the ASEAN Agreement, I do not see that happening any time soon. See Koh and Karim, in Hirsch (ed) cited above at 323-324; also Boer in Hirsch (ed) 'Environmental law in Southeast Asia' and Boer, B. (2015). Introduction to ASEAN regional environmental law. In Werner Scholtz, Jonathan Verschuuren (Eds.), *Regional Environmental Law: Transregional Comparative Lessons in Pursuit of Sustainable Development*

**Commented [Review146]:** It would be useful to more particularly summarize and offer a critique of the SAARC Convention earlier in the article. I can find very little literature on it; you may well have some on file. See my earlier comment at page 11.

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<sup>130</sup> Above n 3028.

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<sup>131</sup> This has the same Parties as SAARC, and is a formal arrangement to promote regional cooperation. See: <<http://www.sacep.org/>> accessed 8 December 2016.

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