

IV INTERNATIONAL SYMPOSIUM ON
TRANSBOUNDARY WATERS MANAGEMENT
Thessaloniki, 15-17 October 2008

REFLECTIONS OF INTERNATIONAL WATER AGREEMENTS IN NATIONAL WATER LEGISLATION

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INTRODUCTION

Compliance with international/regional norms generally implies adjustment of the national water resources legislation, producing an interface between the domestic and the international law planes

Interface may play itself out along a pattern of conscious and deliberate reception of prior international/regional norms in the domestic legislation of countries, or of coincidental responsiveness of prior domestic legislation to international/regional norms junior in time

PLAN OF RESEARCH

Recent significant water sector legislative reforms of RSA and Namibia examined against the backdrop of

- (a) SADC regional legal framework for shared waters, and
- (b) other bi- and multi-lateral river-specific agreements to which the two countries are a Party,

with a view to determining whether and to what extent international/regional agreements to which those countries are a Party are contextualized in their domestic legal framework

The Revised SADC Protocol (2000)

General principles (Article 3)

- equitable and reasonable utilisation, and relevant factors
- obligation not to cause significant harm.

Specific Provisions (Article 4):

- Planned Measures
(information exchange, notification & consultation)
- Environmental Protection and Preservation
(control of pollution)
- Management of Shared Watercourses
- Prevention and Mitigation of Harmful Conditions
- Emergency Situations

In particular: Preventing and mitigating harmful conditions (Art. 4.4(b))

- Non-domestic abstractions of water and
- Discharges of waste into freshwater bodies
 - must be subject to government permit or licence, and
 - permit or licence granted only if no “significant” harm caused on the regime of the waterbody.

Bilateral and trilateral agreement commitments of South Africa and Namibia

- **The Tripartite Interim Agreement Between the Republic of Mozambique and the Republic of South Africa and the Kingdom of Swaziland for Co-Operation on the Protection and Sustainable Utilisation of the Water Resources of the Incomati and Maputo Watercourses signed in 2002 (Tripartite Agreement)**
 - technical legal and administrative measures to “prevent, reduce and control pollution of surface and ground waters”,
 - enhance water quality,
 - control transboundary impact,
 - co-ordinate plans and information,
 - promote partnerships,
 - promote infrastructure security,
 - mitigate flood and drought effects.

- **The Treaty on the Development and Utilization of the Water Resources of the Komati River Basin between the Kingdom of Swaziland and the Government of the Republic of South Africa, March 1992 (the Komati River Treaty)**

- development of river basin plans
- establishment of KOBWA (the Komati River Basin Water Authority)
- design, construction, operation and maintenance of the Dam Project
- water allocations

South Africa

The National Water Act No. 36 of 1998

- “meeting international obligations” is listed as one of the Purposes of the Act (2(i))
- “international rights and obligations” must be provided for in the National Water Strategy (6(1)(b)(ii))
- Inaugurates generalized licensing requirements in respect of water abstractions and waste disposal into water bodies

South Africa

- Subjects all licensing to pre-grant scrutiny and to post-grant monitoring to protect the water body (27(1)(f), 29(1), 49(2)(a))
- international obligations” must be met in preparing water allocation schedules in connection with abstraction licensing (45(2)(a))

South Africa

- “international obligations” in regard to the quality of water resources must be considered in issuing authorizations and licences for abstraction, and for waste disposal purposes (27(1)(j))
- “international obligations” have priority call in times of shortage, and licences can be adjusted downwards as a result (49)2)(b))

Conclusions

- RSA Water Act provides a tight fit to the general abstraction licensing and waste discharge permitting requirements of the Revised SADC Protocol

Conclusions

- It is instrumental to honouring detailed water sharing schemes and water pollution control programmes agreed under a number of bi- and tri-lateral agreements made with RSA's neighbours
- Forces consideration of regional and other bi- and tri-lateral obligations on the daily administration of the Act

Namibia

Water Management Act No. 24 of 2004

- Carries explicit endorsement of principles and customary rules reflected in UN Convention and in SADC Protocol (53)
- Meeting Namibia's international obligations and promoting respect for Namibia's international rights in regard to abstracting water and discharging polluting effluents feature as one of the Fundamental Principles (3 (m))

Namibia

- Inaugurates generalized licensing requirements in respect of water abstractions and waste disposal into water bodies
- Subjects all licensing to pre-grant scrutiny and to post-grant monitoring to protect the water body

Namibia

- International obligations must enter the decision-making leading up to abstraction licences (35(1)(f)(ii) and to waste discharge permits (61(g))
- Specific criteria are given regarding licensing of abstractions from shared water bodies (35(2))

Conclusions

- Namibia Water Act provides a tight fit to the general abstraction licensing and waste discharge permitting requirements of the Revised SADC Protocol
- unilaterally fleshes out relevant factors and circumstances leading up to equitable utilization determinations under the Revised SADC Protocol

Conclusions

- is instrumental to honouring detailed water sharing schemes and water pollution control programmes agreed under a number of bi- and tri-lateral agreements made with Namibia's neighbours
- forces consideration of regional and other bi- and tri-lateral obligations on the daily administration of the Act

GENERAL CONCLUSIONS

- The foregoing analysis demonstrates how prior international/regional obligations have influenced the drafting of national laws (Namibia), or how prior national laws have been capable of responding to international/regional obligations junior in time (RSA)
- Examination of the domestic legislation of RSA and Namibia bears out an interface pattern of the domestic with the international/regional law plane ranging from a close approximation of substantive international obligations to domestic legislation being directly instrumental to meeting substantive international obligations

GENERAL CONCLUSIONS

- In particular, the national laws examined articulate in detail how the commitments of the two countries at regional, bi- and tri-lateral level are to be considered in the application of the law, especially in connection with allocation of water for abstraction and use, and with water pollution control
- By forcing consideration of regional and other bi- and tri-lateral obligations on the daily administration of the Act by the respective government the laws examined seem to have pushed to the furthest the interplay of domestic and international/regional law

THANK YOU

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