



International and domestic water law in Central Asia - implementing international law obligations regarding transboundary waters: the role of domestic water legislation

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Abstract

Domestic water laws are instrumental to the implementation of transboundary waters treaty obligations, notably those regarding the allocation of transboundary water resources for use by the States that are a party to the treaty or agreement, and those regarding the protection of transboundary water resources from pollution. The analysis of relevant obligations featured in select transboundary waters agreements among Central Asia countries suggests that these countries must have in place, and implement, domestic water laws that regulate the abstraction and use of water resources from rivers and lakes, and the discharge of wastes in them, for relevant treaty obligations to be met effectively. Comparable conclusions can be drawn from the analysis of comparable obligations stemming from the Revised Protocol on Shared Water Resources in the Southern African Development Community (2000), and from the Tripartite Interim Agreement for Co-operation in the Protection and Sustainable Utilization of the Water Resources of the Incomati and Maputo Watercourses (Mozambique, South Africa, Swaziland, 2002).

Keywords: transboundary waters treaties and agreements; domestic water laws; regulation of transboundary waters abstraction and pollution; water abstraction concessions/licences; wastewater discharge permits

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1. Introduction

As has been illustrated in the article “International Watercourses, International Water Law and Central Asia”, featured in this Issue, international water law provides a framework of rules for state conduct in the regulation, allocation, management, and protection from pollution of transboundary freshwater bodies, i.e., rivers, lakes, wetlands, and aquifers which form or are bi-sected by an international boundary line. This is contrasted to domestic water law, which provides rules governing relations among people, private and public corporations, and the government in a given nation over that nation’s freshwater resources, up to the international

border with neighbouring nations. Beyond such border, the nation's domestic water laws cease to have effect, and those of the neighbouring nation(s) step in and control, inside the respective borders.

International and domestic water law have, as a result, clearly separate ambits of application, and obey separate norms, setting one apart from the other. Yet, freshwater bodies that form or are traversed by the international boundary lines between or among nations attract both sets of norms, the international - as two or more nations are involved -, but also the domestic as the domestic water law of each nation involved applies, up to the border with fellow nations partaking of the same freshwater body.

The resulting overlap, where transboundary freshwater bodies are governed, at one and the same time, by international water law and by the domestic water law of the concerned nations, suggests the existence of a grey area where the two sets of norms meet and interact, whose contours and modes of interaction deserve mapping out. For one thing, the transboundary character of freshwater bodies tends increasingly to reverberate in the domestic water laws of the nations where such freshwater bodies represent a significant share in the makeup of the water resources of those nations. In addition and perhaps more importantly, the norms posited by international water law must be implemented by the concerned nations inside their respective borders. This is achieved principally through the domestic water laws of each concerned country, that must be aligned with the norms – obligations, rights, standards – deriving from international water law.

This chapter is given over to the illustration of the second – and more important – mode of interaction and interface of the two water law domains, briefly sketched out above. In particular, the enabling/facilitating role of domestic water laws in the implementation of a transboundary water treaty obligations will be teased out, by reference to selected water treaty obligations regarding:

- the allocation and use of transboundary water resources to competing uses and users, and
- the protection of transboundary water resources from pollution.

2. Domestic water laws as instruments for the implementation of treaty obligations regarding the allocation and use of transboundary water resources

When a treaty or agreement over a transboundary freshwater body provides, explicitly or also by implication, for the allocation of water resources among the nations that are a Party to such treaty or agreement, the domestic water laws of the Parties must respond by putting in place a domestic allocation mechanism capable of ensuring respect domestically for the allocations agreed by the Parties to the agreement. For if such a mechanism is not in place domestically and if, as a result, the nationals of any Party are at complete freedom to abstract as much water as they please from the transboundary waterbody covered by an agreement, how will a Party

to the agreement be able to ensure that the agreed volumes or flows to be delivered to the other Party or Parties across the border are actually available, and to honor its obligations?

The point will be illustrated by reference to selected transboundary freshwater treaties and agreements, from the Central Asia region and elsewhere.

Example 1 - Agreement between the Republic of Kazakhstan, the Kyrgyz Republic, the Republic of Tajikistan, Turkmenistan and the Republic of Uzbekistan on Cooperation in the Field of Joint Management on Utilization and Protection of Water Resources from Interstate Sources (Almaty Agreement), 1992.

Article 3

Each Party to the Agreement shall refrain from actions on their respective territories that might affect interests of other contracting Parties and cause them harm, lead to deviation from agreed volumes of water discharges and pollution of water sources.

The Almaty Agreement among the five Central Asia States incorporates the Soviet Schemes (Master Plans) for Integrated Water Resources Use and Protection for the Amudarya and Syrdarya basins, which had been endorsed by the central management of the Ministry of Reclamation and Water Management of the USSR. The Agreement covers, in particular, the main stem of the Pyanj, Vakhsh, Kafirnigan and Amudarya rivers in the Amudarya basin, and the main stem of the Syrdarya and Chirchik rivers in the Syrdarya basin. By Article 3 of the Agreement, the Parties are directed to, in particular, “refrain from actions on their respective territories that might...lead to deviation from agreed volumes of water discharges...”. The uncontrolled abstraction of water from the rivers in question, or damming, inside the territory of Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, or Uzbekistan, by nationals, institutions, or entities of those countries, could easily eat into, and upset, “agreed volumes” of across-the-border water releases, and result in the kind of “deviation” contemplated in Article 3. A strong argument therefore can be made that domestic regulation of water abstractions in all five countries that are a Party to the Almaty Agreement, and, in the specifics, an effective and operational system of administrative licences and concessions for the abstraction and use of the water resources of rivers and lakes in all five countries, and for river damming, must be in place in all five countries for the obligation stemming from Article 3 of the Agreement to be implemented and satisfied.

Example 2 - Agreement Between the Governments of the Republic of Kazakhstan, the Kyrgyz Republic, and the Republic of Uzbekistan on the Use of Water and Energy Resources of the Syr Darya Basin, 1998 (Tajikistan is also a Party, having joined in 1999).

Article III

The Parties will take no actions which will violate the agreed-upon water use regimes and energy deliveries, or infringe on the rights of the other Parties to obtain water and energy

deliveries in the mutually-agreed amounts or to transport resources through their own territories.

In similar fashion to the framework Almaty Agreement, also this more specific agreement for the Syrdarya basin lays down “negative” obligations (“The Parties will take no actions...”) that require however, in order to be implemented, pro-active action domestically, of the kind illustrated earlier regarding the Almaty Agreement. For it is readily apparent that the indiscriminate and uncontrolled abstraction of water from the river in question (or its tributaries in the basin), or its damming, in the territories of the four States Party will interfere eventually with, and upset, the “agreed-upon water use regimes” and, more specifically, “water...deliveries in the mutually-agreed amounts” contemplated in Article III, and will be a serious impediment to the implementation of the obligation crystallized in that article. As with the Almaty Agreement, a compelling argument therefore can be made that domestic regulation of water abstractions in the three countries that are a Party to the Syrdarya Agreement, and, in the specifics, an effective and operational system of administrative licences and concessions for the abstraction and use of the water resources of rivers and lakes in the three countries, and for river damming, must be in place for the obligation stemming from Article III of the Agreement to be implemented and satisfied.

Example 3 – Revised Protocol on Shared Water Resources in the Southern African Development Community (SADC), 2000.

Article 4

Specific Provisions

4. Prevention and Mitigation of Harmful Conditions

(b) State Parties shall require any person intending to use the waters of a shared watercourse within their respective territories for purposes other than domestic or environmental use or who intends to discharge any type of waste into such waters, to first obtain a permit, licence or other similar authorisation from the relevant authority within the State concerned. The permit or other similar authorisation shall be granted only after such State has determined that the intended use or discharge will not cause significant harm on the regime of the watercourse. [emphasis added]

As can be readily seen, Article 4.4(b) of the SADC Protocol is very explicit when it requires the domestic water laws of the twelve continental nations that are a Party to the Protocol to subordinate water abstractions in general, and abstractions from shared water resources in particular, to a “permit, licence or other similar authorization” from a competent authority of the nations concerned. Unless a system of water abstraction “permits, licences” or the likes is

in place in the domestic legal system of the States Party to the Protocol, there is no way they can implement the Protocol's provision, and the obligation stemming from it.

Example 4 – Tripartite Interim Agreement between the Republic of Mozambique and the Republic of South Africa and the Kingdom of Swaziland for Co-operation in the Protection and Sustainable Utilization of the Water Resources of the Incomati and Maputo Watercourses, 2002.

Article 9

Flow Regimes

(2) Any abstraction of waters from the Incomati or Maputo watercourses, regardless of the use or geographic destination of such waters, shall be in conformity with the flow regimes of Annex I and relevant provisions of this Agreement and its Annexes.

...

The Tripartite Interim Agreement (TIA) is not so explicit as the SADC Protocol as regards the domestic water law requirements stemming from Article 9(2). The implication, however, is very clear that, in order for “any abstraction” of water from the nominated transboundary rivers to be in conformity with the agreed “flow regimes” and, in particular, with the agreed allocations among the three nations Party to the TIA, there must be in place in each of the Parties legislation providing for the subordination of water abstraction in general, including abstractions from the Incomati and Maputo rivers, to government-administered licences, concessions, authorizations or the likes. As with the SADC Protocol, unless a system of water abstraction licences, concessions or the likes is in place in the domestic legal system of the States Party to the TIA, there is no way these can implement the agreement's water allocation provisions, and the obligations stemming from them.

3. Domestic water laws as instruments for the implementation of treaty obligations regarding protection of transboundary water resources from pollution

When a treaty or agreement over a transboundary freshwater body provides for the protection of water resources from pollution originating from within the nations that are a Party to such treaty or agreement, the domestic water laws of the Parties must have in place mechanisms – notably, a wastewater discharge permit or authorization system, and a complementary set of effluent quality standards and/or ambient water quality objectives - capable of ensuring respect domestically for the pollution abatement/control targets or other restrictions agreed by the Parties to the agreement. For if such a mechanism is not in place domestically, and if, as a result, the nationals of any Party are at freedom to pollute a transboundary freshwater body covered by an agreement, how will any Party to the agreement be able to ensure that the agreed water quality targets or other agreed restrictions (a) are achieved inside its borders, in

the domestic portion of the transboundary waterbody, (b) reverberating beneficially on the same waterbody's water quality across the border?

The point will be illustrated by reference to selected transboundary freshwater treaties and agreements.

Example 1 - Agreement between the Republic of Kazakhstan, the Kyrgyz Republic, the Republic of Tajikistan, Turkmenistan and the Republic of Uzbekistan on Cooperation in the Field of Joint Management on Utilization and Protection of Water Resources from Interstate Sources (Almaty Agreement), 1992.

Article 3

Each Party to the Agreement shall refrain from actions on their respective territories that might affect interests of other contracting Parties and cause them harm, lead to deviation from agreed volumes of water discharges and pollution of water sources.

By Article 3 of the Agreement, the Parties are directed to, in particular, “refrain from actions on their respective territories that might... lead to... pollution of water sources.”. The uncontrolled discharge of untreated waste and wastewater to the rivers in question inside the territory of Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, or Uzbekistan, by nationals, institutions, or entities of those countries, would inevitably pollute water across the State borders, which is something that Article 3 enjoins the five countries from doing. A strong case can therefore be made for domestic regulation of waste and wastewater discharges to rivers and lakes to be in place in all five countries that are a Party to the Almaty Agreement, and, in the specifics, for an effective and operational system of administrative waste and wastewater discharge permits, assorted with water quality and treatment standards, to be in place in all five countries, for the obligation stemming from Article 3 of the Agreement to be implemented and satisfied.

Example 2 - Agreement between Government of the Republic of Belarus, the Government of the Russian Federation, the Government of the Republic of Kazakhstan and the Government of the Republic of Tajikistan on the Main Principles of Interaction in the Field of Rational Use and Protection of the Transboundary Water Bodies (CIS Agreement), 1998.

Article 2

The Parties shall... take measures in order to prevent and eliminate surface and ground water pollution... [omissis].

By analogy with the previous example, a compelling case can be made for water pollution prevention and control legislation, domestically in all four States Party, to constitute the prime “measure” invoked by the article in question, and the instrument for the implementation of the obligations that stem from it. For if no such legislation is in place in the States Party, including

in particular an effective and operational system of administrative waste and wastewater discharge permits, assorted with water quality and treatment standards, the resulting unregulated and un-controlled pollution of transboundary waters inside the territory of any State Party will inevitably defeat the spirit, the letter, and the purpose of the article in question, and result in a failure to implement it.

Example 3 – Revised Protocol on Shared Water Resources in the Southern African Development Community (SADC), 2000.

Article 4

Specific Provisions

2. Environmental Protection and Preservation

b) Prevention, reduction and control of pollution

iii) State Parties shall, at the request of any one or more of them, consult with a view to arriving at mutually agreeable measures and methods to prevent, reduce and control pollution of a shared watercourse, such as:

- setting joint water quality objectives and criteria;*
- establishing techniques and practices to address pollution from point and non-point sources;*

cc) establishing lists of substances the introduction of which, into the waters of a shared watercourse, is to be prohibited, limited, investigated or monitored.

4. Prevention and Mitigation of Harmful Conditions

(b) State Parties shall require any person intending to use the waters of a shared watercourse within their respective territories for purposes other than domestic or environmental use or who intends to discharge any type of waste into such waters, to first obtain a permit, licence or other similar authorisation from the relevant authority within the State concerned. The permit or other similar authorisation shall be granted only after such State has determined that the intended use or discharge will not cause significant harm on the regime of the watercourse. [emphasis added]

It is readily apparent that Article 4.4(b) of the SADC Protocol is very explicit when it requires the domestic water laws of the twelve continental nations that are a Party to the Protocol to subordinate waste discharges in general, and waste discharges to shared water resources in particular, to a “permit, or other similar authorization” from a competent authority of the nations concerned. Moreover, Article 4.2(b)(iii) is equally explicit when it directs the Parties to craft complementary, pollution-specific measures like “water quality objectives and criteria”, “lists of substances” to be prohibited or restricted, or also less precise measures like

generic “techniques and practices” for the control of pollution from both point- and non-point sources.

The difference is that, whereas Article 4.4(b) is prescriptive of a precise obligation, and is therefore immediately operational, Article 4.2(b)(iii) is not, as it requires a determination or determinations by the Protocol Parties in order for it to become operational, and to begin displaying its full effects.

With this caveat, unless a system of waste discharge permits or authorizations is in place in the domestic legal system of the States Party to the Protocol, ideally tied to the achievement of “water quality objectives and criteria” for the Parties’ freshwater bodies in general, and for the Parties’ transboundary freshwater bodies in particular, there is no way the Parties can implement the Protocol’s above-mentioned provisions. In particular, a domestic waste discharge permit/authorization system is also directly instrumental to limiting the disposal of “restricted” substances into the transboundary freshwater bodies of the Parties to the Protocol, under Article 4.2(b)(iii)(cc). Such system is therefore directly instrumental to implementing that provision of the Protocol, if and when it is acted upon by the Parties by the adoption of the required determination(s).

Example 4 – Tripartite Interim Agreement between the Republic of Mozambique and the Republic of South Africa and the Kingdom of Swaziland for Co-operation in the Protection and Sustainable Utilization of the Water Resources of the Incomati and Maputo Watercourses, 2002.

Article 8

Water Quality and Prevention of Pollution

1. *In order to protect and conserve the water resources of the Incomati and Maputo watercourses, the Parties shall, through resolutions adopted by the TPTC, and, when appropriate, through the co-ordination of management plans, programmes and measures, proceed to*

- a. *endeavour to develop an evolving classification system for the water resources of the Incomati and Maputo watercourses;*
- b. *classify and state the objectives and criteria in respect of water quality variables to be achieved through the agreed classification system for the water resources;*
- c. *adopt a list of substances the introduction of which, into the water resources of the Incomati and Maputo watercourses, is to be prohibited or limited, investigated or monitored;*
- d. *adopt techniques and practices to prevent, reduce and control the pollution and environmental degradation of the Incomati and Maputo watercourses that may cause significant harm to the other Parties or to their environment, including human health and*

safety, or to the use of the waters for any beneficial purpose, or to the living resources of the watercourses; and
e. *(omitted).*

Like in Example 1, the TIA provisions of Article 8(1) are quite explicit in directing the Parties to craft a number of pollution control-specific measures. In view of its precision relative to the other nominated measures, the adoption of a “list of substances” the discharge of which to the Incomati or Maputo rivers is to be prohibited or restricted, and the determination of “water quality objectives and criteria” tied to a “classification” system of the waters of the Incomati and Maputo rivers, stand out among the prescribed anti-pollution measures. Like the near-identical provision in Example 1, although the operational effectiveness of Article 8(1)(b) and (c) of TIA is subordinate to the adoption of a determination by the Parties to the agreement, it nonetheless requires that a government-administered system of waste discharge permits or authorizations be in place domestically in the TIA Parties, including for the control of pollution of the stretches of the Incomati and Maputo rivers that are inside the territory of each Party. As with Example 1, a domestic system of waste discharge permits or authorizations to freshwater bodies is necessary to operationalize the “list of substances” - to be agreed in future by the Parties - for “restricted” discharges to the Incomati and Maputo rivers, as well as the “water quality objectives and criteria” tied to a “classification” system of the waters of the Incomati and Maputo rivers. By contrast, the other anti-pollution measures listed in Article 8(1)(a) and (d) are too indeterminate for (a) precise obligations to stem for the Parties to the agreement, that would require (b) precise implementing provisions in the domestic water laws of the Parties.

4. Conclusions

Contrary to widespread practice, domestic water resources laws must not be seen in isolation from treaty obligations regarding transboundary rivers, lakes, or aquifers – and vice-versa. If laws and regulations governing the abstraction and use of water from rivers, lakes and aquifers, and the discharging of wastes and wastewater in them – in the prevailing Central Asia legal tradition and terminology, these laws are commonly known as Water Codes – are in place, and, in particular, if effective and operational systems of (a) administrative licences and concessions for the abstraction and use of water resources from the above-mentioned water sources, and (b) administrative waste and wastewater discharge permits, assorted with water quality and treatment standards, are also in place, then the prospects of implementation of transboundary waters treaty obligations regarding, respectively, the use of transboundary waters, and the prevention and control of their pollution, by the countries that have those transboundary waters in common, will no doubt look brighter. Domestic water law and transboundary water law appear therefore linked instrumentally, in the sense that (a) the former is the prime instrument for the implementation of the obligations that emanate from the latter, and (b) the latter cannot do without the former if the obligations that emanate from it

are to be fulfilled, and not remain dead letter. This paradigm is valid not just in Central Asia, but everywhere in the world where there are freshwater bodies that are transboundary in nature, and some agreement exists among the concerned countries regarding the allocation and use of the relevant water resources, and their protection from pollution.

5. Editorial note

This article is an adaptation from “Bridging perspective – Linking international water law and domestic water law”, by this same author, featured in UNESCO-IHP, Training Manual “Hydro-diplomacy, Legal and Institutional Aspects of Water Resources Governance – From the International to the Domestic Perspective” (see the References).

6. References

UNESCO-IHP, Hydro-diplomacy, Legal and Institutional Aspects of Water Resources Governance – From the International to the Domestic Perspective”, Training Manual, Paris, 2016 <http://unesdoc.unesco.org/images/0024/002452/245262e.pdf>.