IELRC-SOAS
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INTERNATIONAL WATER LAW AND GROUNDWATER

Stefano Burchi, chairman of the Executive Council
International Association for Water Law (AIDA)
Rome, Italy

KEY ISSUES & CHALLENGES

in international/shared water resources development and management:

- reconciling the competing interests of states
- preventing inter-State conflict and defusing the potential for it

THE LAW RESPONDS WITH

- abstract and general standards and norms of interstate behaviour (customary law) restated in global **conventions** and in the **statements** of authoritative NGOs and IGOs
- more precise standards and norms of interstate behaviour, laid down in river- or lake- or aquifer-specific **treaties** and **agreements** and in regional agreements

RELEVANT GLOBAL CONVENTIONS AND OTHER GLOBAL INSTRUMENTS

- The United Nations General Assembly Convention on the Law of the Non-navigational Uses of International Watercourses (1997) – not binding yet
- The United Nations General Assembly Resolution 63/124 carrying “The Law of Transboundary Aquifers (2008) – not binding
- the International Law Association (ILA) -
  - Helsinki and subsequent complementary rules on international waters (1966-1999) (not binding) and
  - Berlin rules on water resources (2004) (not binding)

GENERAL STANDARDS AND NORMS OF INTERSTATE BEHAVIOUR (CUSTOMARY INTERNATIONAL WATER LAW) RELEVANT TO GW

- Each State has the right to utilize an international watercourse/aquifer in an equitable and reasonable manner
- Each State has the duty to take all appropriate measures to prevent the causing of significant harm to other watercourse/aquifer states
- Each State has a duty to exchange data & information, to give prior notification of planned measures and to consult and negotiate on them in good faith (= duty of cooperation)

IN PARTICULAR: INTERNATIONAL GROUNDWATER LAW

International groundwater law not well developed until now – this is due to

- complex nature of aquifers
- intense perception of State sovereignty over overlying territory
- invisibility of the resource.

GROUNDWATER IN GLOBAL INSTRUMENTS (CUSTOMARY LAW)

ILA Helsinki Rules (1966): drainage basin concept includes *surface and underground waters, flowing into a common terminus*.

ILA Seoul Rules (1986) made the Helsinki Rules applicable to *all groundwaters* and extends consultation and information exchange obligations instrumental to GW protection to

- "hydraulic structure of aquifers" and to
- recharge areas of aquifers

GROUNDWATER IN GLOBAL INSTRUMENTS (CUSTOMARY LAW)

UN Watercourses Convention (1997) – only applies to groundwater that is part of "*a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus*"

It does not apply to groundwater which is not linked to a body of surface water – i.e., aquifers receiving no or negligible recharge

UNGA RESOLUTION 63/124 of 2008 on "The Law of Transboundary Aquifers"

SCOPE

- "uses" – extraction of groundwater, heat and minerals + storage and disposal in rock matrix
- activities above or close to aquifer (adversely affecting it)
- aquifer + recharge and discharge zones

UNGA RESOLUTION 63/124 of 2008 on "The Law of Transboundary Aquifers"

GENERAL PRINCIPLES

- Sovereignty of States - qualified
- Equitable and reasonable utilization – qualified
- Obligation not to cause significant transboundary harm – extends to discharge zone
- Obligation to exchange information and data, and to provide timely notification of planned measures

UNGA RESOLUTION 63/124 of 2008 on "The Law of Transboundary Aquifers"

COMPLEMENTARY RULES

- Obligation to protect and preserve aquifer-dependent ecosystems (oases, wetlands)
- Obligation to prevent and minimize detriment to *recharge* and *discharge zones (*not included in definition of "aquifer") and to relevant *processes*
- Duty to prevent, control and abate pollution - precautionary principle applies

UNGA RESOLUTION 63/124 of 2008 on "The Law of Transboundary Aquifers"

COMPLEMENTARY RULES

- Obligation to undertake regular monitoring
- Duty to aim at maximizing long-term benefits from GW through individual or joint planning of "comprehensive utilization" of GW (complements Equitable Utilization rule)
- Duty to refrain from utilizing a recharging aquifer so as to prevent its functioning (complements Equitable Utilization rule)

GROUNDWATER-SPECIFIC TREATIES AND AGREEMENTS

Very few treaties and agreements dealing exclusively with groundwater, notably:

- Nubian Sandstone Aquifer System (Chad, Egypt, Libya, Sudan - 2000) - data collection and exchange for aquifer modelling, joint institution
- Northwestern Sahara Aquifer System ((Algeria, Libya, Tunisia – 2002, 2007) - joint institution for data collection and exchange and for aquifer modelling

GROUNDWATER-SPECIFIC TREATIES AND AGREEMENTS

- Iullemeden Aquifer System (Mali, Niger, Nigeria – draft Agreement 2009) - joint institution + principles
- Genevese Aquifer agreement (France, Switzerland – 1978, replaced in 2007) - scope includes planned limitations on extractions, regulated aquifer recharging, pollution control, cost sharing, data collection and exchange

GROUNDWATER-SPECIFIC TREATIES AND AGREEMENTS

- Guarani Aquifer Agreement (Argentina, Brazil, Paraguay, Uruguay – 2010)

premised on sovereignty rights over national portions of Aquifer, qualified by substantive and procedural obligations (a) of reasonableness and sustainability of use, and (b) not to harm “significantly” other Aquifer States/the environment – Cooperation coordination commission formed under umbrella of River Plate Basin Treaty (1969)

GROUNDWATER IN RIVER/LAKE TREATIES & AGREEMENTS

Danube River Convention (1994)

lays down obligation to

- enumerate groundwaters subject to long-term protection
- enumerate protection zones of groundwaters which are the sources of drinking water supplies
- prevent groundwater pollution from, in particular, land-based activities

Sava River Basin Agreement (2003)

- lays down obligation of sustainable and integrated management of surface and groundwater resources

GROUNDWATER IN OTHER TREATIES

Rhine Protection Convention (1999)

- includes within its scope of application "groundwater interacting with the Rhine"

Revised Protocol on Shared Watercourses in the Southern African Development Community (SADC)(2000)

- attracts groundwater connected to surface water within its scope of application

GROUNDWATER IN OTHER TREATIES

The Lake Tanganyika Convention (2003) and the Lake Victoria Protocol (2003) attract "groundwaters that flow into the Lake" within their respective scope of application

GROUNDWATER IN OTHER TREATIES

UNECE Convention on the Protection and Use of Transboundary Watercourses and Lakes (1992)

- attracts all trans-boundary groundwaters within its scope of application
- provides detailed guidance in regard to GW (Model Provisions on trans-boundary groundwaters, adopted by Parties to the Convention (2012))

ISSUES OUTSTANDING (RE: GLOBAL INSTRUMENTS)

SOVEREIGNTY

RELATIONSHIP OF UNWCC TO UNILC DRAFT ARTICLES ON TRANSBOUNDARY AQUIFERS

- Areas of “physical” overlap (re: recharging aquifers)
- Eventual form/instrument of Draft Articles – consideration of this issue by UNGA remanded twice, in 2011 and again in 2013 (latest Resolution A/68/470 of December 2013 remanding consideration to 2016 session of UNGA)

CONCLUSIONS

Evidence that transboundary groundwater abstraction and pollution are attracting increasing attention in the practice of States – transboundary aquifers?

Practice is diverse, showing

- inclusion of recharging GW in the scope of mainly SW-oriented treaty-making
- timid *ouvertures* beyond adherence to general principles/commitments

CONCLUSIONS

The UNILC Draft Articles hold out best promise for the future of transboundary groundwaters and aquifers treaty negotiations – the sovereignty issue notwithstanding

In a regional context, so do the UNECE Model Provisions on Transboundary Groundwaters

THANK YOU…

Stefano Burchi
Chairman of the Executive Council
International Association for Water Law (AIDA)
Rome, Italy
stefano.burchi@gmail.com
www.aida-waterlaw.org