AD HOC LEGAL MECHANISMS GOVERNING TRANSBOUNDARY AQUIFERS: CURRENT STATUS AND AND FUTURE PROSPECTS

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INTRODUCTION

• 592 transboundary aquifers and groundwater bodies

• Very few existing *ad hoc* legal mechanisms on TBAs

• The goal of this paper was threefold:
  • (1) to analyze existing legal mechanisms on TBAs
  • (2) to identify why there are so few agreements on this resource
  • (3) to reflect on the prospects for future legal mechanisms in this field
THE INTERNATIONAL CALL FOR STATES TO CONCLUDE AGREEMENTS ON SPECIFIC TBAS

• There have been several calls in the last years from different international fora encouraging states to conclude agreements and arrangements for this resource

• UN System:
  • 1997 UN Watercourses Convention (Art. 3.3)
  • 1994 UNILC Resolution on Confined Transboundary Groundwater (par. 2)
  • 2008 UNILC Draft Articles on the Law of Transboundary Aquifers (Art. 9)
  • 1992 UNECE Water Convention (Art. 9.1)
  • 2012 UNECE Model Provisions on Transboundary Groundwaters (Provision 6)
EXISTING AD HOC LEGAL MECHANISMS ON TBAs

• References to groundwater have increased over time. However, in the majority of cases, surface water is still the main subject of regulation.

• More recently: very few examples of ad hoc bilateral and multilateral agreements and arrangements on specific TBAs concluded between:

  a) aquifer States
  b) or subnational units of States

  (less than 1% of the TBAs already identified)
AD HOC LEGAL MECHANISMS BETWEEN STATES
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-1992: Agreement creating a joint authority for the study and development of the aquifer

-2002:
  - Agreement No 1 - Terms of Reference for the Monitoring and Exchange of Groundwater Information of the Nubian Sandstone Aquifer System
  - Agreement No 2 - Terms of Reference for Monitoring and Data Sharing

Source: https://www.libyaherald.com
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2000: Establishment of a Consultation Mechanism for the Northwestern Sahara Aquifer System

http://www.oss-online.org

NORTHWESTERN SAHARA AQUIFER SYSTEM
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2009: MoU to the setting up of a consultative mechanism for the management of the Iullemeden Aquifer System


http://www.oss-online.org
2010: Treaty on the Guarani Aquifer (Not in force)
AD HOC LEGAL MECHANISMS BETWEEN STATES


Source: http://www.scinexx.de
Ad hoc legal mechanisms on TBAs at local and federal levels
Ad hoc legal mechanisms on TBAS at local and federal levels

1977 - Arrangement on the Protection, Utilization, and Recharge of the Franco-Swiss Genevese Aquifer


Source: G. de los Cobos
AD HOC LEGAL MECHANISMS

1996: MoU Related to Referral of Water Right Applications Related to the Transboundary Abbotsford-Sumas Aquifer between the State of Washington as Represented by the Department of Ecology and the Province of British Columbia as Represented by the Minister of Environment, Lands and Parks

1999: MoU between City of Juárez, Mexico Utilities and the El Paso Water Utilities Public Services Board of the City of El Paso, Texas
A geographical pattern is hard to determine

In most cases these agreements resulted from projects with funding and assistance from international organizations

The legal nature and status of the *ad hoc* legal mechanisms varies. Some are proper binding treaties while others are informal agreements or MoUs

The scope and content of these agreements vary considerably. Some of them are mostly technical, some are fairly simple and others contain very detailed provisions.
WHY ARE STATES RELUCTANT TO GOVERN TBAs THROUGH AD HOC AGREEMENTS?

Cooperation on TBAs is affected by the same difficulties that arise for surface transboundary water resources + additional challenges arising from the particular features of a hidden resource such as groundwater:

• remaining knowledge deficit on TBAs.

• sometimes TBAs are simply not a priority for the states because there are no urgent problems relating to their exploitation or there is plenty of surface water.

• the special connection of this resource with the principle of state sovereignty may favour unilateral actions.

• still unclear global legal framework to take as a reference in groundwater governance.
TOWARDS A MORE COOPERATIVE APPROACH: SOME REFLECTIONS ON THE WAY FORWARD (I)

• In an ideal scenario, a step-by step approach should be adopted, whereby knowledge is first acquired, followed by a focus on regulation.

• TBAs seem particularly prone to one-off solutions, because of the different composition and structure that respective subsoils may have and the variety of possible transboundary implications.

• The effectiveness of cooperation will depend ultimately on the will of the parties to fulfil and implement the agreement.
  
  • Bilateral or multilateral treaties: enhance cooperation; promote and reflect awareness of the particular circumstances of a TBA; provide certainty; they may provide an institutional structure, as well as dispute-settlement mechanisms.
  
  • Informal agreements: simple, flexible, rapid and have a low public profile.

• Local transboundary arrangements may be useful, especially if the communities involved are mainly local.
Towards a more cooperative approach: some reflections on the way forward (II)

• A wider cooperative approach to the management of TBA should be encouraged by the international community.

• The precautionary principle in particular is called to play an important role in the specific regulation of TBAs as a result of the uncertainty in many cases on the features of this resource and the consequences of its ongoing exploitation or related activities.

• Finally, this strategy will necessarily require enhanced knowledge about the resource, an increase in public awareness of the benefits of cooperation, an understanding of the consequences of not taking preventive and precautionary actions, exchange of good practices and international funding.
THANK YOU!

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