

# EMERGING LEGAL PRINCIPLES FOR TRANSBOUNDARY AQUIFERS AND THE SOUTH AMERICAN GUARANI AQUIFER

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## **International law for transboundary aquifers**

Although there is extensive doctrine on the development of international legal principles applicable to transboundary aquifers, the scope and character of the rules that should govern such an important natural resource are still blurred by the division in the opinion of States. Groundwaters have special requirements and they must be considered, especially regarding use planning, water quantity assessment, water quality control and protection, interrelation with recharge areas, effects on and from surface waters and lakes, the management of non-rechargeable aquifers, among others.

The legal status is particularly important, because the binding or non-binding nature is the essence of any provision aspiring to become a "legal" provision. Actually, it is inappropriate to consider a non-binding formulation "legal". When stating that a principle of behavior is a "legal" principle, its binding nature is implicit in that. In environmental and natural resources documents, the terminology used sometimes seems rather inconsistent. However, the content and legal status of "principles" applicable to natural resources in general and transboundary aquifers in particular are of the utmost relevance for their utilization and management.

Many efforts have been made to build international rules for the access and utilization of natural resources, a subject that traditionally has not been regulated by international law. Water is an exception, because local rules and inter-jurisdictional compacts have been adopted from very early times. Those rules have had a very concrete purpose, for water allocation, navigation, irrigation, hydropower generation, timber floating, among others. They were not building general rules, although they could generate trends in State practice and this practice would be able to turn into general principles.

Those agreements dealt with water uses rather than with water access, which refers to the entitlement to use the resource and which was drawn up at a more recent stage of legal evolution. Likely taking for granted that the permanent sovereignty over natural resources is a well-established legal principle, the right of access was not addressed by the Convention on the Law of the Non-navigational Uses of International Watercourses opened by the United Nations General Assembly in 1997 for the signature of governments, which refers exclusively to the non-navigational *uses* of international watercourses.

More recently, in the draft articles on "Shared Natural Resources: Transboundary Aquifers" approved by the United Nations International Law Commission (ILC), chaired on the matter by the Special Rapporteur Ambassador Chusei Yamada, the access to the resource is addressed. The sovereignty of aquifer States over the resources in their territories is reassured. National sovereignty, however, does not denote unregulated access, but access conditioned by the general rules of international law applicable to shared natural resources.

The set of rules formulated by the ILC merges codification and progressive development of international law. The draft articles are a joint effort of scholarly elaboration and governmental commentaries on the subject, roughly including accepted legal principles in their essential features.

## Rules of access

The entitlement to access must be shaped by the international legal framework, and the transcription of those principles into a set of rules is the present challenge. Is there a common cluster of legal principles for transboundary aquifers? Doctrine and legal instruments alike incorporate legal rules, but can those rules be transformed into legal principles of worldwide acceptance?

## Rules of utilization

The sovereignty over natural resources conforms to the international legal framework, which contains the legal principles for the utilization of shared natural resources. The enumeration of those principles, from the most general to the most specific, can be summarized as follows:

1) *The principle of co-operation between States*

It is the most widely stated principle, and one of the Purposes of the United Nations in order to solve 'international problems of an economic, social, cultural or humanitarian character'. The principle of co-operation implies a set of autonomous principles, which do not exclude but certainly include the

2) *Duty not to produce significant harm to other States*

3) *Equitable utilization of shared natural resources*

4) *Responsibility not to cause damage to the environment of other States, or beyond national jurisdictions*

5) *Notification and prior consultation to other States of new projects*

6) *Exchange of data and information*

7) *The principle of public participation and governance of decision-making mechanisms*

The establishment of working groups, permanent commissions, or conventions for the utilization of shared international resources.

8) *The principle of compliance with international commitments and peaceful settlement of disputes*

Joint commissions or other agencies for monitoring the implementation of agreed quantity and quality standards.

Access to national courts and to international adjudication bodies and tribunals.

Mechanisms for negotiation and dispute avoidance.

Peaceful settlement of disputes

The above listed principles are not the only ones and their classification is one of a number of possible systematizations. The extent to which the above enumerated principles can be applicable to transboundary aquifers is a matter of implementation in each particular case, but as legal principles, they are binding for every State. General principles are the common feature of State practice dispersed in space and time; they are an abstract formulation of a variety of conducts from different origins, *i.e.*, national statutes, international agreements, judgments and awards, resolutions of international organizations, contributions of academic bodies, among others.

Legal principles are mandatory when accepted as customary law, and they prevail over other rules because they cannot be derogated. Agreements are usually the application of general principles to specific situations, and for that reason, they are a significant contribution to their acceptance and consolidation. They are the general rule that supports an agreement.

## The South American Guarani Aquifer

The Guarani Aquifer system, which stretches over a surface of approximately 1,200,000 km<sup>2</sup> in the territories of Argentina, Brazil, Paraguay and Uruguay and comprises one or more aquifers, has been the object of studies through a GEF/UNEP/OAS project. A draft Declaration of Basic Principles and Action Guidelines has been approved under Resolution 9/2004 of the Guarani Aquifer System Steering Committee, dated June 2004. A specific agreement is at present under way which envisages the protection of the resource.

## **Conclusion**

The relevant conclusion is the existence of legal principles for the access and utilization of transboundary aquifers, which are not dependent but would benefit from a codification process. Much has to be done to reach the widely accepted implementation of the legal principles for natural resources and specifically for transboundary aquifers, building upon the awareness of national and international agencies, scholars, corporations and users.