

Draft annotated outline for the Checklist on the Development of Legal Frameworks for Transboundary Water Cooperation

Draft version as of 17 July 2020

The present document contains the first draft of the annotated outline for the Checklist on the Development of Legal Frameworks for Transboundary Water Cooperation, as included in the Programme of work for the period 2019-2021 (ECE/MP.WAT/54/Add.1) adopted by the Meeting of the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes ('Water Convention') at its eighth session (Nur-Sultan, 10-12 October 2018). It was prepared by the Secretariat in cooperation with several partners, to support the preparation of the Virtual Workshop on designing legal frameworks for transboundary water cooperation (28-29 July 2020).

Following the virtual workshop, the checklist will be further developed, also by integrating inputs received during the workshop, for consideration by the Working Group on Integrated Water Resources Management and the ninth Meeting of the Parties to the Water Convention in 2021.

I. Introduction: About the checklist

- Objective and scope of the tool:
 - Aimed at supporting countries in the design and drafting of agreements or other arrangements for transboundary waters, including both surface and groundwaters;
 - Focus on content and drafting options rather than on the process;
 - Evolvement over time only addressed with reference to design options related to amendment, protocols, annexes and other legal or technical procedures.
- Target audience
 - Country representatives involved in the negotiation and drafting of legal frameworks for transboundary waters;
 - Other stakeholders working on transboundary water cooperation.
- Rationale and analytical framework:
 - The structure of the tool is based on the fact that there is wide variety in international water law practice when it comes to design and drafting. Therefore, the checklist does not aim to be prescriptive, but rather to serve as an "agreement/arrangement builder", enabling countries to develop a legal framework that is tailored to their basin and other relevant national/regional circumstances while highlighting elements that are recommended for the effectiveness and sustainability of the agreement/arrangement.
 - In order to do so, the checklist is built around the following components:
 - (i) 6 main areas, grouping different provisions/issues typically included in agreements or other arrangements into "thematic modules" that can help structure legal frameworks for transboundary waters;
 - (ii) Building blocks, which correspond to provisions/issues that countries may consider including within each module;
 - (iii) Key aspects of each building block, which help define the content of the above-mentioned provisions/issues;
 - (iv) Supporting resources, which may assist countries in further developing the content of the building blocks (e.g. specific guidance documents developed within UNECE and by other relevant institutions)
- How to use the checklist
 - Process to use the tool follows its structure:



- Considering building blocks:
 - For each building block, country representatives and/or other stakeholders using the tool during their negotiation process would assess or negotiate whether the issue/provision is relevant to their context. In this respect, it is helpful for negotiating states to have a common understanding about management issues in the basin/aquifer, to reach informed decisions.
 - Some of the building blocks would be especially advantageous to include within an agreement or arrangement, as they help ensure that the legal framework can be effectively implemented. These building blocks are reflective of international practice, as they are typically included within legal frameworks for transboundary waters, as well as being strongly aligned with the 1992 Water Convention, the 1997 Convention on the Law of Non-navigational Uses of International Watercourses ('Watercourses Convention') and customary international law.
 - Moreover, there are building blocks that, if included within a legal framework for transboundary waters, would help fulfill SDG target 6.5, particularly by ensuring that the agreement/arrangement for water cooperation is "operational" within the definition used by the United Nations for the purposes of monitoring SDG indicator 6.5.2.

SDG target 6.5

By 2030, implement integrated water resources management at all levels, including through transboundary cooperation as appropriate

SDG indicator 6.5.2

Proportion of transboundary basin area with an operational arrangement for water cooperation

Definition of an "operational" arrangement within the meaning of SDG indicator 6.5.2

For an arrangement to be considered "operational", all the following criteria need to be fulfilled:

- There is a joint body or mechanism (e.g. a river basin organization) for transboundary cooperation;
- There are regular (at least once per year) formal communications between riparian States in form of meetings (either at the political and/or technical level);
- There is a joint or coordinated water management plan(s), or similar instrument, such as an action plan, common strategy, or joint objectives regarding the status or conditions of the transboundary waters (such as water quality objectives) in place;
- There is a regular exchange (at least once per year) of data and information.

Source: Step-by-step monitoring methodology for SDG indicator 6.5.2 (revised version "2020") available [here](#)

- Other building blocks have more of an "optional" character; during the negotiation process it needs to be decided whether to include them or not in the legal framework, as well as the level of detail for defining their content. In this respect, relevant diagnostic studies can be useful to understand management issues of relevance as well as their occurrence in a given basin (in space and time).
- To facilitate the process of selecting building blocks and defining their content, the checklist will:

- a) Provide guidance on the advantages of including building blocks and key aspects within an agreement or arrangement. These can relate to both effective implementation of the legal framework as well as specific basin conditions.
 - b) Provide some examples from existing instruments, including the 1992 Water Convention and the 1997 Watercourses Convention, as appropriate.
- Overall, it is also important to consider that, while countries have discretion in shaping their agreements/arrangements, there is a value in preserving the integrity of the building blocks as a whole, as many of them are interdependent and mutually supportive. By way of illustration, some procedural features such as the exchange of data and information are key to the effective implementation of general principles. These aspects will also be flagged in the checklist as part of the guidance provided.

= = =

II. Preparing the ground

- Chapter II is aimed at facilitating the use of the checklist by setting it within the wider context of cooperation over transboundary waters and by providing some supporting notions which are helpful to prepare the ground for negotiations and for developing legal frameworks.

Section 1 - Benefits of developing agreements or arrangements for transboundary water cooperation

Section 2 - Key messages:

1. The development of a legal framework is a process

- Initiating cooperation
- Developing a shared understanding about the basin/aquifer, its status and the management issues of relevance to address (through e.g. exchange of information, assessment and studies)
- Negotiating a legal framework
 - Prerequisites
 - Existing challenges and lessons learned
- Evolvement over time
 - Ensuring flexibility
 - Evolvement of a cooperation regime
 - Options to further develop agreements (e.g. action plans, decisions by the Meeting of the Parties, minutes, operational rules)
- Implementation, the importance of bringing concrete benefits for river basin/aquifer populations

2. There is wide diversity in international water law practice

- The question of form
- Diversity with respect to geographical and material scope
- Adapting legal frameworks to the specific characteristics of each basin

3. Consider relevant international law

- Effects of becoming a Party to a treaty under international law
- Harmonizing elements in international water law: Relationship between a new legal framework, the Global Conventions and regional directives, including how to ensure consistency in a new agreement or arrangement
- Links with international environmental law, including other Multilateral Environmental Agreements
- Links with international human rights law, including the human rights to safe drinking water and sanitation

Draft annotated Checklist outline

Thematic modules	Building Blocks	Key aspects (Draft in progress)	Advantages of the building blocks/key aspects (to be filled)
1. Preamble	Context	<ul style="list-style-type: none"> - Explain the reasons that led to the development of the agreement/arrangement (e.g. cooperative efforts that led to the adoption of the legal framework). - Put the agreement/arrangement into context by explaining its relationship with other instruments and institutions that operate at a global, regional and/or sub-regional level - Refer to basin-specific conditions, if relevant 	
	Vision, purpose	<ul style="list-style-type: none"> - Explain the vision and purpose, including by referring to principles, approaches and values as relevant/appropriate 	
2. General provisions	Definitions/Use of Terms	Identify and define (accurately) key terms and concepts	✓ Helps ensure that the legal framework can be effectively implemented and avoid ambiguity in its interpretation
	Objective	Clearly define general and specific objectives of the cooperative framework	✓ Helps ensure that the legal framework can be effectively implemented
	Scope	Clearly define the waters (geographical scope, including whether the agreement/arrangement applies to	✓ Helps ensure that the legal framework can be effectively implemented

		groundwater) and measures, activities or uses to which the agreement/arrangement applies (material scope)	
	States and/or entities that can become Parties to the agreement	Define who can become Party to the agreement: - Riparian states - Basin states - Other states or entities (e.g. local/provincial government)	✓ Helps ensure that the legal framework can be effectively implemented
	Relationship with other agreements, rights and/or obligations	- Relationship with existing agreements - Relationship with other existing rights and obligations - Possibility to enter into further bilateral or multilateral agreements - Possibility to adopt more stringent measures	
3. Substantive content of the agreement or other arrangement	General obligations and rights	Equitable and reasonable utilization	✓ Part of customary international water law
		Obligation not to cause significant harm	✓ Part of customary international water law
		General obligation to cooperate	✓ Part of customary international water law
		General obligation to protect ecosystems	✓ Part of customary international water law
	Principles and other rights and obligations	Prevention	
	Precautionary principle		

		Sustainability	
		Polluter/user pays principle	
		Human rights to safe drinking water and sanitation	
	Water management and protection issues	Water allocation and flow regulation - Quantity - Quality - Timing	
		Installations - Potentially joint infrastructure - Infrastructure safety	
		Water Quality	
		Protection and preservation of ecosystems, including ecosystem approach	
		Prevention, reduction and control of pollution	
		Emergency/critical situations, including floods and droughts	
		Groundwater management	
		Development of water/basin/aquifer management plan(s) (joint or coordinated plan(s) or objectives)	✓ Helps fulfil the “operationality” criteria of SDG indicator 6.5.2
		Protection of the marine environment	

	Sectoral and intersectoral issues	<ul style="list-style-type: none"> -Agriculture -Navigation -Energy - Water supply and sanitation - Other industrial uses -Fisheries -Tourism -Health, including prevention of water-related diseases -Climate change-related aspects, including water scarcity - Disaster risk reduction -Nature protection -Hazardous activities, including prevention of accidental water pollution 	
4. Procedural features	Regular exchange of data and information	<ul style="list-style-type: none"> - General exchange of information (hydrological meteorological, hydrogeological and ecological) - Information concerning planned measures - Grounds for not disclosing information 	<ul style="list-style-type: none"> ✓ Helps ensure that the legal framework can be effectively implemented ✓ Helps fulfil the “operationality” criteria of SDG indicator 6.5.2
	Notifications and consultations	<ul style="list-style-type: none"> - Notification for planned measures with possible adverse effects and related procedures - Consultations and negotiations concerning planned measures - Procedure/s in the absence of notification 	

		- Urgent implementation of planned measures	
	Public participation and stakeholder involvement	- Access to information for the public - Public participation in decision-making processes - Public participation in implementation - Non-discrimination in access to judicial and other remedies for individuals affected by transboundary harm	✓ Helps ensure that the legal framework can be effectively implemented
	Environmental Impact Assessment		✓ EIA in a transboundary context is part of customary international law
	Joint Monitoring and Assessment	- Coordinated/Harmonized data gathering and processing methods, joint databases, digitalization of data - Joint research and studies - Monitoring arrangements and related principles (e.g. related costs)	✓ Complements and is linked to provisions related to the exchange of data and information
5. Implementation, institutional framework and dispute settlement	Implementation at transboundary level, including establishment of joint bodies	- Status of the body and legal personality - Structure, tasks and functions, decision making process - Other supporting bodies (e.g. working groups, technical bodies) - Status of civil society organizations within the joint body (e.g. consultative, participation in the voting procedure..)	✓ Helps ensure that the legal framework can be effectively implemented ✓ Helps fulfil the “operationality” criteria of SDG indicator 6.5.2
	Implementation at national level	- Designation of relevant national authorities - Implementing measures	

		- Implementation of decisions/recommendations of joint bodies (if applicable)	
	Financing	- Financing of the institutional structure (meetings, secretariat) - Financing of joint activities	✓ Helps ensure that the legal framework can be effectively implemented (in case institutional structure is foreseen)
	Compliance monitoring and dispute settlement	- Monitoring implementation of the agreement (e.g. obligation of reporting...)	✓ Helps ensure that the legal framework can be effectively implemented
		- State responsibility - Compensation	
		- Dispute prevention (e.g. through joint body, recourse to the Water Convention Implementation Committee) - Avenues for dispute settlement (e.g. through joint bodies, negotiation, mediation, good offices, arbitration, impartial fact-finding, ICJ)	✓ Helps ensure that the legal framework can be effectively implemented ✓ Obligation to settle disputes in a peaceful manner is part of customary international law
6. Final provisions	Ensuring evolvement over time	-Amendment -Protocols -Annexes - Other legal and technical procedures (e.g. monitoring protocols, data policy)	✓ Helps achieve flexibility over time
	Entry into force	- Define procedures for entry into force: ❖ Signature ❖ Ratification, acceptance, approval, accession ❖ Permissibility of reservations - Depositary and registration	✓ Helps ensure that the legal framework can be effectively implemented

	Withdrawal/termination	- Specify right to withdraw or termination of the treaty and related procedures	
--	-------------------------------	---	--

DRAFT