

WATER RIGHTS

INTRODUCTION

This chapter identifies the core elements of water rights agreements. This chapter also outlines the Darfur Peace Agreement provisions relevant to water rights and presents sample language parties may wish to consider when drafting water rights provisions in a peace agreement.

The guarantee of sufficient, safe water for all people is a fundamental component to establishing peace in post-conflict provinces and can prevent future disputes over scarce resources. International law increasingly recognizes that the right to water either is a human right for all people or recognizes human rights that inherently require access to water such as a right to highest attainable standard of physical health.¹ Accordingly, the parties to the Darfur negotiations may wish to include the guarantee of water rights in a peace agreement.

State practice illustrates that water rights agreements generally include provisions that: (1) establish and define the right to water; (2) incorporate the right to water into domestic legislation; and (3) establish enforcement mechanisms for the right to water. Anticipating water scarcity and taking early action to avoid potential water scarcity can help prevent future conflict and help ensure a sustainable agreement. The 2006 Darfur Peace Agreement (DPA) affirms that all persons in Sudan have an affirmative right to water and requires the parties to provide access to water for all.²

CORE ELEMENTS

Defining the Right to Water

Some states have adopted provisions declaring that all people in the state own the state's water resources. South Africa's National Water Act provides that

¹ International Covenant on Economic, Social and Cultural Rights, art. 11, 12, *available at* http://www.unhchr.ch/html/menu3/b/a_cescr.htm (last accessed Sept. 12, 2007).

² Darfur Peace Agreement, May 5, 2006, *available at* http://www.unmis.org/english/2006Docs/DPA_ABUJA-5-05-06-withSignatures.pdf (last accessed Sept 18, 2007).

all water generated in the water cycle is a resource “common to all.”³ In other states, the state government may own all water rights. The Namibian constitution vests ownership of all natural resources in the state, which has a corresponding duty to ensure equal access to water and sufficient and adequate water for all.⁴

Incorporation of the Right to Water into Domestic Frameworks

States incorporate the right to water in their domestic frameworks in a variety of ways. Some states include the right to water in their constitution, while other states pass water allocation laws that mandate equitable distribution.

The Ethiopian constitution requires the state to provide access to clean water to the extent that the state’s resources allow.⁵ Similarly, the Gambian constitution requires the government to make an effort to provide equal access to clean and safe water.⁶ The Zambian constitution, like the Ethiopian and Gambian constitutions, also requires the government to provide clean and safe water.⁷

In 2001, Namibia passed the Namibian Water Resources Management Bill. This bill recognizes that water distribution has historically neglected some segments of Namibian society. The bill requires the government to ensure the equitable allocation of water to ensure the right of all citizens to sufficient safe water for a healthy and productive life and the redistribution of water.”⁸ In South

³ ROBYN STEIN, WATER SECTOR REFORMS IN SOUTHERN AFRICA: SOME CASE STUDIES, 118 (Hydropolitics in the Developing World, African Water Issues Research Unit, (2002), 115, *available at* http://www.internationalwaterlaw.org/Articles/hydropolitics_book.pdf (last accessed Sept. 6, 2007).

⁴ NAMIBIA CONST. art.100 (amendment 1998), *available at* http://www.parliament.go.th/parcy/sapa_db/cons_doc/constitutions/data/Namibia/Namibia_constitution.pdf (last accessed Sept. 7, 2007).

⁵ ETHIOPIA CONST. art. 90 (1994) *available at* [www.electionsethiopia.org/PDF/Constitution\(LF1\).pdf](http://www.electionsethiopia.org/PDF/Constitution(LF1).pdf) (last accessed Sept. 6, 2007).

⁶ GAMBIA CONST. art. 216(4) (amendment of 2001), *available at* [www.chr.up.ac.za/hr_docs/constitutions/docs/The%20GambiaC\(english%20summary\)\(rev\).doc](http://www.chr.up.ac.za/hr_docs/constitutions/docs/The%20GambiaC(english%20summary)(rev).doc) (last accessed Sept. 6, 2007).

⁷ ZAMBIA CONST. art 112 (amendment 1996), *available at* www.southernafricalitigationcentre.org/files/tbl_s5107SAPublications%5CFileUpload5913%5C18%5CZambia.pdf (last accessed Sept. 6, 2007).

⁸ ROBYN STEIN, WATER SECTOR REFORMS IN SOUTHERN AFRICA: SOME CASE STUDIES, 118 (Hydropolitics in the Developing World, African Water Issues Research Unit, 2002).

Africa, the National Water Act established a basic human needs water reserve⁹ to ensure that all citizens' "basic domestic water needs" are met.¹⁰ Part 8 of the National Water Act also creates a compulsory licensing procedure that allows the government to allocate water to poor communities through an application process.¹¹

Bilateral and Regional Protection Mechanisms

Some states use multi-lateral or bilateral treaties to guarantee the right to water for all individuals. The governments of Cambodia, Laos, Thailand, and Vietnam all signed the Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin (the Agreement), which calls for the "the sustainable development, utilization, conservation and management of the Mekong River Basin water." Additionally, the Agreement requires that the parties "protect the environment, natural resources, aquatic life and conditions, and ecological balance of the Mekong River Basin from pollution or other harmful effects resulting from any development plans and uses of water and related resources in the [Mekong] Basin."¹²

The governments of Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru, Suriname, and Venezuela are all signatories to the Treaty of Amazonian Cooperation.¹³ Under the treaty, the parties are obligated to cooperate in harnessing the natural resources of the Amazon Basin. The treaty also requires that all parties to ensure an equitable distribution of resources and to conserve the environment.¹⁴

⁹ South Africa National Water Act 36 of 1998, part 3, *available at* <http://www.elaw.org/resources/text.asp?id=1153> (last accessed Sept. 6, 2007).

¹⁰ Barbara Schreiner et al., AFRICAN WATER ISSUES RESEARCH UNIT, FROM BUCKET TO BASIN: A NEW WATER MANAGEMENT PARADIGM FOR POVERTY ERADICATION AND GENDER EQUALITY (2002), p. 128, *available at* http://www.internationalwaterlaw.org/articles/hydropolitics_book.pdf (last accessed Sept. 6, 2007).

¹¹ South Africa National Water Act 36 of 1998, part 8.

¹² Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, April 5, 1995, *available at* <http://www.waterlaw.org/regionaldocs/mekong.html> (last accessed Sept. 6, 2007).

¹³ Treaty of Amazonian Cooperation (1978), *available at* http://www.internationalwaterlaw.org/regionaldocs/amazonian_cooperation.html (last accessed Sept. 6, 2007).

¹⁴ Treaty of Amazonian Cooperation (1978), art. 1.

Water Rights Enforcement Mechanisms

States employ a variety of water rights enforcement mechanisms. Some states have water commissions or other government agencies that regulate the distribution of water. Other states employ provincial mechanisms to ensure access to water.

Mexico has a National Water Commission¹⁵ that monitors water policies and enforces the state's water laws.¹⁶ The National Water Commission, in conjunction with provincial councils, sets water use levels, promotes conservation, and advocates on behalf of user groups.¹⁷

In South Africa, the National Water Act established a Water Tribunal.¹⁸ This tribunal has national jurisdiction and serves as a forum to settle water disputes. The South African Department of Water Affairs notes that the tribunal has jurisdiction over "water allocation, licen[s]e applications, declarations of existing lawful water use or compensation."¹⁹

On a regional level, the Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin established the Mekong River Commission.²⁰ The Mekong River Commission has implemented a variety of

¹⁵ COMISION NACIONAL DEL AQUA, *available at* <http://www.cna.gob.mx/eCNA/Espaniol/Directorio/Default.aspx> (last accessed Sept. 13, 2007) (in Spanish).

¹⁶ AUSTRALIAN GOVERNMENT, WATER RIGHTS ARRANGEMENTS IN AUSTRALIA AND OVERSEAS COMMISSION RESEARCH PAPER (2003), p. 296, 303, *available at* <http://www.pc.gov.au/research/crp/waterrights/waterrightspdf.zip> (last accessed Sept. 13, 2007).

¹⁷ NATIONAL RESEARCH COUNCIL, *MEXICO CITY'S WATER SUPPLY: IMPROVING THE OUTLOOK FOR SUSTAINABILITY*, National Academy Press, 1995, ch. 7, *available at* <http://lanic.utexas.edu/la/Mexico/water/ch7.html> (last accessed Sept. 14, 2007).

¹⁸ South Africa National Water Act 36 of 1998, ch. 15.

¹⁹ WATER TRIBUNAL RULES GAZETTE: MEDIA RELEASE BY THE DEPARTMENT OF WATER AFFAIRS AND FORESTRY (Nov. 1, 2005), *available at* <http://www.dwaf.gov.za/WaterTribunal/documents/doc/paiamanual.doc> (last accessed Sept. 13, 2007).

²⁰ Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, 5 April 1995.

policies including food and drought policies and water monitoring.²¹ In 2003, the Commission established a framework for monitoring river flow, water quality and other water use issues.²² The parties agreed to mechanisms to share information,²³ notification procedures,²⁴ water use monitoring procedures,²⁵ and water flow maintenance procedures.²⁶

DARFUR PEACE AGREEMENT

The 2006 Darfur Peace Agreement (DPA) affirms that all Sudanese have the right to safe drinking water.²⁷ The DPA requires that “[n]o person or group of persons shall be deprived of any traditional or historical right in respect . . . [to] . . . access to water without consultation and compensation on just terms.”²⁸ In formulating a national development policy, the agreement also calls on all sides to “give special priority to the most disadvantaged [provinces] including Darfur” so that marginalized groups receive equitable economic development.²⁹ The DPA further provides that the rehabilitation of basic social services, like water, in Darfur should be a “key strategic [objective]” in the national development policy.³⁰

²¹ For a full list of Mekong River Commission press releases see http://www.mrcmekong.org/MRC_news/press_releases.htm (last accessed Sept. 6, 2007).

²² Press Release, *Mekong River Commission Countries Sign off two Procedures on Water Use*, MRC No.16/03 Phnom Penh, 30 November 2003, *available at* http://www.mrcmekong.org/MRC_news/press03/30-nov-03.htm (last accessed Sept. 19, 2007).

²³ MEKONG RIVER COMMISSION, PROCEDURES FOR DATA AND INFORMATION EXCHANGE AND SHARING, Nov. 1, 2001, *available at* http://www.mrcmekong.org/download/programmes/wup_Procedures.pdf (last accessed Sept. 19, 2007).

²⁴ MEKONG RIVER COMMISSION, PROCEDURES FOR NOTIFICATION, PRIOR CONSULTATION, AND AGREEMENT, Nov. 30, 2003, *available at* http://www.mrcmekong.org/download/programmes/wup_PNPCA.zip (last accessed Sept. 19, 2007).

²⁵ MEKONG RIVER COMMISSION, PROCEDURES FOR WATER USE MONITORING, Nov. 30, 2003, *available at* http://www.mrcmekong.org/download/programmes/wup_PWUM.zip (last accessed Sept. 19, 2007).

²⁶ MEKONG RIVER COMMISSION, PROCEDURES FOR THE MAINTENANCE OF FLOWS ON THE MAINSTREAM, June 2, 2006, *available at* <http://www.mrcmekong.org/download/programmes/FlowsProcedure.pdf> (last accessed Sept. 19, 2007).

²⁷ Darfur Peace Agreement, art. 17, para. 97, sec. c.

²⁸ Darfur Peace Agreement, art. 19, para. 159.

²⁹ Darfur Peace Agreement, art. 19, para. 145.

³⁰ Darfur Peace Agreement, art. 19, para. 145 sec. b.

The DPA also recognizes that competition for water is a significant problem for nomadic herders and farmers.³¹ The DPA declares that traditional rights of access to water shall be recognized and protected.³² Accordingly, the DPA provides that the parties shall work on “developing a framework for equitable access by various users of land and water resources.”³³ The DPA also specifically requires the government of Sudan to restore water services.³⁴

SAMPLE LANGUAGE

Article XXX

Definition of the Right to Water

Water, below and above the surface of the land and in the Red Sea and within the territorial waters and the exclusive economic zone of the Republic of the Sudan shall belong to the State if it is not otherwise lawfully owned.³⁵

OR

Recognizing that while water is a natural resource that belongs to all people, the discriminatory laws and practices of the past have prevented equal access to water, and use of water resource the government should work to ensure the equitable allocation of water for beneficial use, and the redistribution of water.³⁶

Article XXX

Incorporation of the Right to Water into Domestic Frameworks

To the extent the state’s resources permit, policies shall aim to provide all Sudanese access to clean water [parties may want to consider guaranteeing the right to water to all individuals including refugees and non-citizens].³⁷

³¹ Darfur Peace Agreement, art. 19, para. 149.

³² Darfur Peace Agreement, art. 20, para. 158.

³³ Darfur Peace Agreement, art. 19, para. 149.

³⁴ Darfur Peace Agreement, art. 27, para. 369.

³⁵ NAMIBIA CONST. art. 100 (amendment 1998).

³⁶ This is drawn from South Africa National Water Act 36 of 1998.

³⁷ This is drawn from ETHIOPIA CONST. art. 90(1) (1994).

OR

The Government of Sudan has overall responsibility for and authority over the state's water resources and their use, including the equitable allocation of water to ensure the right of all citizens to sufficient safe water for a healthy and productive life and the redistribution of water.³⁸

Article XXX

Water Rights Enforcement and Dispute Resolution Mechanisms

A water tribunal is hereby established. It shall have jurisdiction over water allocation, license applications, declarations of existing lawful water use or compensation.³⁹

Article XXX

Establishment of a National Water Commission

- (1) A National Water Commission (NWC) is established by this section. The NWC consists of:
 - (a) The Chair; and
 - (b) At least three, but no more than six [the parties may choose a different number of commissioners based upon provinces or other criteria], Commissioners nominated in accordance with subsection (2) or (3).
 - (c) The Commonwealth must nominate a person to be appointed as the Chair in consultation with the other parties to the NWI. The Commonwealth may nominate no more than three other persons to be appointed as Commissioners.
 - (d) The parties to the NWI (other than the Commonwealth) may nominate no more than three persons to be appointed as Commissioners.

- (2) The NWC has the following general functions:

³⁸ This is drawn from The preamble of the sixth draft of the Namibian Water Resources Management Bill in ROBYN STEIN, WATER SECTOR REFORMS IN SOUTHERN AFRICA: SOME CASE STUDIES, 118 (Hydropolitics in the Developing World, African Water Issues Research Unit, 2002), *available at* http://www.internationalwaterlaw.org/articles/hydropolitics_book.pdf (last accessed Sept. 6, 2007).

³⁹ Based on the Jurisdiction of the South Africa Water Tribunal Rules. From Media release by the Department of Water Affairs and Forestry (Nov. 1, 2005). *available at* <http://www.dwaf.gov.za/WaterTribunal/documents/doc/paiamannual.doc> (last accessed Sept. 13, 2007).

- (a) If requested to do so by the Minister, to advise and make recommendations to the Commonwealth on matters of national significance relating to water (including the sustainable management of water resources and access to, and use of, water);
- (b) If requested to do so by the Minister, to advise and make recommendations to the Minister on matters relating to water;
- (c) If requested to do so by the Minister, to advise and make recommendations to the Minister in relation to any other Commonwealth program that relates to the management and regulation of Australia's water resources; to advise the [Government or other body], where relevant, on whether a [province, region or city] is implementing its commitments under any agreement relating to water.⁴⁰

OR

- (1) Whenever any difference or dispute may arise between two or more parties to this Agreement regarding any matters covered by this Agreement and/or actions taken by the implementing organization through its various bodies, particularly as to the interpretations of the Agreement and the legal rights of the parties, a National Water Rights Commission shall first make every effort to resolve the issue.⁴¹
- (2) The National Water Rights Commission shall consist of at least two permanent bodies:
 - (a) A Council, which shall be composed of one member of [each province or other government body] who would be empowered to make policy decision on behalf of his/her [province]; and
 - (b) A Secretariat, which shall render technical and administrative services to the Council and Joint Committee, and be under the supervision of the Joint Committee.⁴²

⁴⁰ Australia National Water Commission Act 2004, part 2, 5 Sept. 2005, *available at* <http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/F0C90418C1B6AA9FCA2573520004D190?OpenDocument> (last accessed Sept. 17, 2007).

⁴¹ This is drawn from the Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, art. 34, 5 April 1995.

⁴² This is drawn from the Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, art. 11-33, April 5, 1995.