Southern African Development Community

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Case of the Orange – Senqu River in Botswana

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Legal Opportunities and Constraints for ORASECOM

Report No. ORASECOM 007/2009

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INTRODUCTION

ORASECOM's legal mandate derives from the November 2000 Agreement. However, as the Member States have also ratified the Revised SADC Protocol on Shared Watercourses, and are bound by international customary law, these instruments also establish a legal framework for the organisation. A previous study on the legal basis for a Basin Wide Plan has recommended that the ORASECOM Agreement needs to be revised to bring it in line with the Revised SADC Protocol.

This report addresses;

1. The general principles of International Water Law, including the Helsinki Rules, the UN Convention on the Law of the Non-Navigational Uses of International Watercourses , and the Berlin Rules.
2. The Revised SADC Protocol on Shared Watercourses, and how this protocol binds the ORASECOM Member States.
3. The ORASECOM Agreement, and the mandate this provides to the organisation.
4. The bilateral agreements in force in the Orange-Senqu River System, and how this may influence the formulation of a Basin Wide Plan for ORASECOM.

GENERAL PRINCIPLES OF INTERNATIONAL WATER LAW

While international water law has developed gradually over many years, it has evolved rapidly over the last 40 years from a series of normative and customary rules applicable to transboundary waters (the Helsinki Rules) to the UN Watercourses Convention. These are based on the following core concepts;

- Reasonable and equitable use,
- Avoidance of significant harm,
- Data and information sharing,
- Prior notification of activities on the shared watercourse,
- The establishment of shared watercourse institutions, and
- Maintenance of sovereignty with respect to the implementation in domestic law.

More recently the Berlin rules have added stakeholder participatory and integrated approaches to this list.

These principles have been codified in the 1997 UN International Watercourses Convention, but this has yet to be ratified by sufficient countries to come into force. Most of these general principles nevertheless remain applicable as customary international law.

THE REVISED SADC PROTOCOL ON SHARED WATERCOURSES

The Revised SADC Protocol was signed in August 2000, and came into force in September 2003. While not all the SADC Member States have ratified the Protocol, all of the ORASECOM Member States have. The Parties have thereby committed themselves to both the substantive and procedural provisions of the Protocol. The Protocol also includes detailed procedures and approaches for participation in shared watercourse institutions, determining reasonable and equitable use and the prevention of significant harm.

The Revised SADC Protocol follows the UN Convention wording in most respects with the following notable exceptions. Both the UN Convention and the SADC Protocol provide for the development of agreements that apply the provisions of the framework agreement (i.e. the Convention/ Protocol) to a specific watercourse. However, the UN Convention allows for the application and adjustment of the provisions according to the characteristics of the watercourse in question – potentially allowing for flexible approaches. The 'adjustment' provision is not found in the SADC Protocol, leaving some uncertainty regarding the degree of flexibility in applying the Protocol's provisions to a specific watercourse. Secondly, the relationship between the 'significant harm' and 'reasonable and equitable utilisation" provisions have, as far as the wording is concerned, changed in the Revised SADC Protocol.

Since the preamble of Protocol makes it clear that the Protocol aims to align the SADC legal framework with the UN Convention, it is unclear if a reversal of the relationship between the two principles indeed reflects the intention of the Parties. Whereas it is possible that the wording in the SADC Protocol gives downstream states a better negotiation provision, baring a (international) court decision on the matter, a definitive answer to this question is not possible.

Importantly for ORASECOM, Art. 5.3 SADC Protocol makes provision for the establishment of Shared Watercourse Institutions, whose responsibilities will be determined by the nature of their objectives which must be in conformity with the principles of the Protocol. Art 6.3 also indicates that Agreements concluded between that Parties should apply the provisions of the Protocol to a particular shared watercourse. Art 6.1 indicates that the Protocol does not affect the rights or obligations of Agreements in force.

THE BILATERAL ARRANGEMENTS

Examination of the ORASECOM Agreement suggests that the Parties intended to leave the institutional arrangements, mandates and water sharing agreements of the existing bilateral arrangements intact. However, new bilateral or trilateral arrangements would have to resort under ORASECOM. The exact mechanisms for reporting and oversight roles for ORASECOM and new and existing bilateral or trilateral arrangements are not clear.

Existing bilateral arrangements fall into two types, those which establish institutional arrangements, and those that relate to project specific arrangements – like the LHWP. These latter arrangements may include volumetric allocations between the Parties to the bilateral arrangement. Conflicts between the ORASECOM Agreement and the Bilateral Arrangements will only occur in cases where these volumetric allocations are inconsistent with a basin wide perspective of reasonable and equitable use. In these cases ORASECOM may recommend that the relevant Parties alter the volumetric allocations to be in line with a basin wide perspective.

THE ORASECOM AGREEMENT

The ORASECOM Agreement establishes the Commission, and gives it the objective to serve as a technical advisor to these Parties. Parties, through the Agreement also give the Council functions and broad powers to enable it to undertake studies in order to make recommendations and give advice. The scope of these functions and powers must be interpreted in view of the intention of the Parties to restrict the organisation to an advisory role, and the fact that implementation of the recommendations is a responsibility of the Party(ies).

The ORASECOM Agreement therefore contains all the provisions necessary for the organisation to function as a technical advisory body. Furthermore, like all international water law instruments it allows for a degree of flexibility in its interpretation. While the ORASECOM Agreement does not include the detailed procedures outlined in the Revised SADC Protocol a reconciliatory application of the two instruments in line with the SADC Protocol's nature as a framework agreement, would arguably obviate the need to amend the ORASECOM Agreement. Nevertheless, as ORASECOM's role evolves with the finalisation of the Basin Wide Plan, further clarity on some of the provisions will be necessary. This may be done through principles, or the amendment of the Agreement. Similarly, as new bilateral or trilateral arrangements are negotiated, the basin wide oversight role of ORASECOM vis-à-vis the bilateral arrangements may need to be clarified.

RECOMMENDATIONS

This assignment suggests that it is not necessary for the ORASECOM Agreement to be amended in order for the organisation to give effect to its role as a technical advisor to the Parties – particularly if the Revised SADC Protocol and the ORASECOM Agreement are interpreted conjunctively. However, as the organisation starts finalising the Basin Wide Plan, and as new bilateral and trilateral arrangements are negotiated further clarity on the intention

of the Parties may be needed. This could be done either through the amendment of the Agreement, or through the adoption of Principles.

In this respect it is recommended that Council debates the following inter-related concepts – with the intention of securing clarity from the Parties. Clarity on these aspects will not only guide the development of the Basin Wide Plan and recommendations, but may also support a possible amendment of the Agreement should this prove necessary in the future.

1) **What was the intention of the Parties with the establishment of ORASECOM?**
   It is not clear if the Parties now (or in the future) intend ORASECOM to provide the forum whereby they could not only develop a joint technical understanding of the Orange-Senqu River System, but also where they could start to negotiate certain provisions under the Revised SADC Protocol OR whether ORASECOM should remain a technical advisory body.

2) **To what extent will the organisation only address transboundary issues?**
   International Water Law generally limits transboundary organisations to addressing problems that may cause significant harm to other watercourse States. Conversely, the ORASECOM Agreement allows the organisation to undertake studies and develop recommendations for non-transboundary water resources problems. However, ORASECOM may deal with recommendations for non-transboundary issues differently – only drawing the Party's attention to the potential problem.

3) **What limitations do Parties foresee to the 'all measures' provision in Article 5.2 of the ORASECOM Agreement?**
   It is clear that the Parties intended to give ORASECOM far-reaching powers to undertake studies and to make recommendations. Nevertheless, Parties did intend to maintain sovereignty by limiting the organisation to an advisory role. Clarity on this aspect becomes particularly important when involving stakeholders in the formulation of recommendations. It is recommended that Council seeks clarity from the Parties in this respect.

4) **Can ORASECOM provide a recommendation that does not outline the cost to the Parties?**
   The ORASECOM Agreement indicates that all recommendations made to Parties must include estimates of costs, and can include recommendations on the apportionment of those costs between the Parties. While it is feasible to determine the costs of implementing the recommendations in many cases, in some cases process of determining the costs may compromise the discretion of the Party to implement, or may be difficult to calculate or may be associated with indirect costs to the Party.

   In these cases it may not be feasible to determine the costs, and ORASECOM may wish to approach the Parties to recommend an amendment to this Article.

1. INTRODUCTION

1.1 Background to the overarching project

The European Union (EU) funded support to the Orange-Senqu River Commission (ORASECOM) forms part of the EU's wider African Transboundary Rivers support programme. The project was put out to tender in mid 2007, and the tender was awarded in early 2008. The project resources are secured by a Financing Agreement between the EU and SADC, and are managed by the Delegation of the European Commission (DEC) in Gaborone, Botswana. SADC is consequently the *de jure* client for the project.

The project will, however, be delivered through the ORASECOM Secretariat, who is therefore the *de facto* client for the work. The project includes 42 months of input from a Consultant Team Leader, and 21 months of input from an Information, Communication and Training Specialist. The ICTS is primarily responsible for the awareness raising and capacity building components of the project.

In addition to this, the project makes provision for 25 months of input from Category I experts (greater than 15 years experience), and 10 months of Category II experts (greater than 10 years experience). These inputs will be used to deliver targeted assignments in the following six Result Areas.

- **Result area 1:** Basin management institutions and organisations strengthened;
- **Result area 2**: Capacity for Shared Water Courses Management in all riparian states enhanced;
- **Result area 3:** Contributions to a shared information system that promotes the development of a common understanding for decision-making;
- **Result area 4**: ORASECOM communication and awareness building processes enhanced;
- **Result area 5:** Contributions to the development of the Orange-Senqu River Basin Water Resources Master Plan;
- **Result area 6**: Water conservation and environmental strategies developed.

The assignment dealt with in this report contributes to Result Area 1, and forms part of:

Activity 1.2 Identify potential legal constraints and opportunities to implementing recommendations.

This Assignment used 1 month of Category I input. The Terms of Reference for this Assignment are available from the Team Leader at quibellg@dwaf.gov.za.

1.2 Background to this Assignment

ORASECOM was established under an agreement signed on 3 November 2000 by the Governments of The Republic of Botswana, The Kingdom of Lesotho, The Republic of Namibia, and the Republic of South Africa. This 'ORASECOM Agreement' establishes the organisation as a technical advisor to the Parties (Art 4). Technical advice is provided through recommendations to the Parties. ORASECOM intends to develop a Basin Wide Plan which builds a common understanding of the water resources issues in the basin, and which proposes recommendations to address these issues.

A strong and effective ORASECOM would produce 'implementable' recommendations to the Parties. Recommendations that the Parties are unwilling or unable to implement will weaken the organisation, potentially raising conflicts within Council. 'Implementable' recommendations will, *inter alia,* be consistent with the National Development Goals of the Parties, should give consideration to strategically important water uses, will be seen as equitable and reasonable by all the Parties, will find an appropriate balance between protection of the environment and water use, and must be "implementable" within the

national law of each of the Member States[1]. The Basin Wide Plan will form the basis for developing many of these recommendations. Ultimately, therefore, the formulation of this Plan will require some negotiation between the Parties. This negotiation must take place within the framework provided by the various international legal instruments already in place between the Parties.

All the Parties to the ORASECOM Agreement have also ratified the Revised SADC Protocol on Shared Watercourses. The manner in which ORASECOM engages the provisions of the Protocol is therefore also important to providing implementable recommendations to Parties. It is important that these implications are commonly understood if the organisation is to give effect to its mandate. Moreover, as a 'public body' ORASECOM's actions are also limited to the provisions of the Agreement. These provisions are not only intended to provide the mandate for ORASECOM, but also to protect the interests of the Parties. However, it is equally important that the ORASECOM Agreement and the Revised SADC Protocol provide an enabling environment for the organisation to 'do its job'.
This Assignment seeks to better understand the provisions of the ORASECOM Agreement and the Revised SADC Protocol, and how they may affect the functioning of the organisation. This is done within the broader context of International Water Law. This analysis is then used to make recommendations for Council.

1.3 Scope and Objectives of this Assignment

The overall objective of this assignment is described as:

> *Identify potential legal constraints and opportunities to implementing recommendations.*

The following areas of work have been addressed;

1. Provide an outline of the general principles of International Water Law, including the Helsinki Rules, the UN Convention on the Non-Navigational Uses of International Watercourses, and the Berlin Rules.
2. Provide an overview of the Revised SADC Protocol on Shared Watercourses, and how this protocol binds the ORASECOM Member States.
3. Outline the provisions of the ORASECOM Agreement, and the mandate this provides to the organisation.
4. Outline the bilateral agreements in force in the Orange-Senqu River System, and how this may influence the formulation of a Basin Wide Plan for ORASECOM.

1.4 Existing work on the legal framework for ORASECOM

ORASECOM has already, through support from GTZ, undertaken a legal analysis of the raft of legislation applicable to the formulation of the Basin Wide Plan. This work indicates that while the ORASECOM Agreement is a good starting point for this Plan, it does not form an adequate legal basis to develop such a Basin Wide Plan. To this end the report recommends that there should be prior agreement on how the Plan could be developed and implemented on both an inter-State (agreement between the Parties), as well as intra-State (how the Parties will give effect to recommendations) levels.

The report also indicates that the ORASECOM Agreement is not fully in line with the Revised SADC Protocol, and recommends that these differences be addressed, potentially through the revision of the ORASECOM Agreement.

[1] ORASECOM may recommend that the domestic law of the Member States be amended to allow for certain key recommendations to be implemented.

2. INTERNATIONAL WATER LAW

2.1 General

International law regulates relations between sovereign States, and the fundamental premise of international law is that States are independent, sovereign, and not subject to the will of other States or international organisations.

Unlike with domestic law however, there is no "international government" or enforcement body. Unlike domestic law, international agreements must be ratified[2] by participating States, and are only binding on these States. International law is not directly binding on individuals in these States. Rights and obligations for individuals within a national jurisdiction originate only from domestic law, hence it is required that international law is 'domesticated', i.e. made part of national law. In some countries, for example in Namibia, this is done through the Constitution, which indicates that all International Law binding on Namibia becomes domestic law provided that it is Constitutional. In the other Member States specific provisions must be included in the domestic law to make these binding on individuals.

Whereas there is no universal standard for national water resources legislation, national legislation must nonetheless reflect the international agreements to which States have committed to in relation to transboundary waters (both surface and groundwater). For scientific, hydrological and environmental issues, international treaties often set particular standards to be followed such as the use of 'best available technology' for the process or method of operation of pollution control undertakings. Treaty obligations are also often cast in generic language or include latitude leaving to the State or specific regional agreements to choose how to address the problem through treaty instruments or through national legislation. Often this ambiguity is vital to the process of getting Treaties ratified. These international treaties and agreements may also require the establishment of bi- or multi-lateral river system institutions, such as basin commissions, which national legislation must recognise.

2.2 The Helsinki Rules

The *Helsinki Rules* are a committed effort to identify, in a comprehensive manner, the rights and obligations of States with regard to international waters. The International Law Association approved the *Helsinki Rules on the Uses of International River*s in1966 (ILA 1966), and the *Helsinki Rules* are regarded as an authoritative summary of the customary international law on transboundary or internationally shared waters. The *Helsinki Rules* were not adopted by the UN General Assembly, but the Assembly did request that these rules be included in the 1997 UN Convention (see the following section). The *Helsinki Rules* have nevertheless heavily influenced state practice as well as the efforts of other international associations examining the law of internationally shared fresh waters.

In summary, the *Helsinki Rules;*

- treat international drainage basins (watersheds extending over two or more States) as indivisible hydrologic units to be managed as a single unit to assure the

[2] 'Ratification' in this context refers to the formal act whereby a country (through the appropriate diplomatic channels) submits an instrument expressing its consent to be bound by the international agreement. This is not to be confused with the internal process of verifying that the agreement meets constitutional requirements, which is sometimes colloquially referred to as (domestic ratification).

"maximum utilization and development of any portion of its waters". This rule explicitly includes all tributaries (including tributary groundwater) as well as the land area of the basin within the concept of "drainage basin" and thus extends the reach of the rules beyond the international watercourse itself[3]

- formulate the phrase "equitable utilization" to express the rule of limited territorial sovereignty as applied to fresh waters: "Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin" for current and future uses; and
- include chapters on pollution, navigation, timber floating, and procedures for preventing and settling disputes.

The International Law Association thereafter drafted rules relating to water-centred activities not addressed directly or adequately by the Helsinki rules, including flood control (1972), pollution (1972, 1982), navigability (1974), the protection of water installations during armed conflicts (1976), joint administration (1976, 1986), flowage regulation (1980), general environmental management concerns (1980), groundwater (1986), cross-media pollution (1996), and remedies (1996). Some of these supplemental rules developed a second basic principle governing the management of internationally shared water resources, that States should not cause "substantial damage" to the environment or to the natural condition of the waters beyond the limits of the nation's jurisdiction.

2.3 The 1997 UN International Watercourses Convention

The most significant international agreement to be negotiated in the sphere of management and utilisation of transboundary waters is the UN Convention on the Law of Non-Navigational Uses of International Watercourses adopted by the General Assembly in May 1997 (the "1997 International Watercourses Convention"). This did not depart from the principles of customary international law applicable to transboundary watercourses that have developed from case law, State Practice and non-binding international rules over the years. Rather it sought to codify them and to set out procedural requirements for notification and consultation amongst watercourse states regarding use and development of international watercourses.

Although the 1997 International Watercourses Convention does not introduce fundamental changes to the law applicable to international watercourses the clarity which it brought was an important development in an area that is marked by uncertainty and disagreement. Following a failed attempt to have the *Helsinki Rules* adopted as guidelines governing international water law, work on the 1997 International Watercourses Convention began in the 1960's. A number of drafts were negotiated and after three decades of discussion the Sixth Committee of the UN General Assembly was convened with a view to finalize a Convention on the non-navigational uses of watercourses. It was at these meetings that a number of core disagreements arose. They were essentially caused by a difference of approach by upstream and downstream states. Each favoured different utilization and control principles based on their position on the watercourse. States party to the discussions recognized the irreconcilable nature of disputes over approaches that favour upstream states verses approaches that favour downstream states and in the final text, they adopted rules that reflect the concomitant rights and obligations of all watercourse States.

[3] The UN Convention and the Revised SADC Protocol use the term "Watercourse", which is limited to the physically connected system of surface and groundwaters and does not include the land area of the basin.

A number of states abstained from or voted against the treaty in the UN General Assembly. These states expressed misgivings at the final version of the treaty which had been forty years in the making. States that abstained or voted against the text drew the General Assembly's attention to the perceived lack of consensus on several key provisions such as that governing dispute settlement. In addition a number of States felt there was a lack of balance in its provisions between rights and obligations of the upstream and downstream riparian states and were concerned about the perceived deviation of the 1997 International Watercourses Convention from a framework agreement.

The UN treaty requires thirty-five states to ratify it for it to enter into force. At this point it seems unlikely that the 1997 International Watercourses Convention will enter into force in the near future. There is however, already significant evidence that even though the the 1997 International Watercourses Convention is not yet in force (and possibly might not enter into force), its principles and procedures have and will continue to serve as a basis for departure for States entering into new bilateral or multilateral agreements and have persuasive effect in disputes over use and management of transboundary waters. This has certainly been the case with the development of the Revised SADC Protocol on Shared Watercourses.

Most of the SADC countries have ratified the Revised SADC Protocol on Shared Watercourses, which is based on the 1997 International Watercourses Convention. However, only South Africa and Namibia have also ratified the UN Convention.

2.4 The Berlin Rules

The *Berlin Rules,* adopted in 2004, build on the work in the Helsinki Rules and the 1997 International Watercourses Convention by taking into account the development of important bodies of international environmental law, international human rights law, and the humanitarian law relating to the war and armed conflict, as well as the adoption by the General Assembly of the *UN Convention.* The *Berlin Rules* include within their scope both national and international waters to the extent that customary international law speaks to those waters. Indeed, some of the rules go beyond speaking strictly about waters and address the surrounding environment that relates to waters (the “aquatic environment”) and the obligation to integrate the management of waters with the surrounding environment. The major changes in the *Berlin Rules* relate to the rules of customary international law applicable to all waters—national as well as international, although there are certain refinements in the rules relating strictly to international waters.

In summary the *Berlin Rules inter alia;*

- set out general principles applicable to all waters: the right of public participation, the obligation to use best efforts to achieve both conjunctive and integrated management of waters, and duties to achieve sustainability and the minimization of environmental harm;
- define the principles applicable solely to international waters and recognize the importance of environmental protection and public participation. The rule of equitable utilization and the rule requiring the avoidance of significant harm have been further developed.
- deal with the rights of persons and communities;
- deal with the protection of the environment, including the protection of ecological integrity of the aquatic environment, the obligation to apply the precautionary approach, and the duty to prevent, eliminate, reduce, or control pollution as appropriate (including a special rule on hazardous substances);
- address the obligation to undertake the assessment of environmental impacts of programs, projects, or activities relating to all waters—national and international;

- set forth obligations for cooperative and separate responses to extreme situations, including highly polluting accidents, floods, and droughts;
- deal with groundwater, including transboundary aquifers;

Most of these principles have gained acceptance in customary international water law over the last 30 years or so without being articulated in one specific set of rules before. This includes five general principles that apply to States in the management of all waters, wholly national or domestic waters as well as internationally shared waters:

1. Participatory water management;
2. Conjunctive management;
3. Integrated management;
4. Sustainability; and
5. Minimization of environmental harm.

Additionally, the *Berlin Rules* posit three further rules relating to water in a strictly international or transboundary context:

6. Cooperation;
7. Equitable utilization; and
8. Avoidance of transboundary harm.

The *Berlin Rules* are therefore applicable to both domestic and international water resources management, but build on the existing framework for transboundary water management by explicitly including participatory and integrated approaches to water resources management.

2.5 Summary

International water law has evolved over the last 40 years from a series of normative and customary rules applicable to transboundary waters. These normative principles include the following;

- Reasonable and equitable use, for current and potential future use,
- The minimisation of environmental harm,
- An obligation not to cause significant harm
- Data and information sharing,
- Obligation to share information
- Prior notification of activities on the shared watercourse, and
- The establishment of shared watercourse institutions,

These principles have been codified into the 1997 UN International Watercourses Convention, but this has yet to be ratified by sufficient countries to come into force, and there seems to be little chance that this may be done soon. The general principles nevertheless remain applicable as customary international law.

More recently the Berlin rules have added stakeholder participatory and integrated approaches to the list of normative principles. These principles have not however been included in the UN Convention of Revised SADC Protocol.

3 THE REVISED SADC PROTOCOL ON SHARED WATERCOURSES

3.1 Background

The Revised SADC Protocol on Shared Watercourses was signed in August 2000, and succeeded the 1995 Protocol on Shared Watercourse Systems in SADC, in an attempt to take account of key principles of international water law following the adoption of the 1997 UN Watercourses Convention. The Revised SADC Protocol is a framework agreement applicable to the management of 15 international watercourses across the SADC region. The Revised Protocol entered into force on the 22nd September 2003, and has been ratified by, **Botswana**, **Lesotho**, Malawi, Mauritius, Mozambique, **Namibia**, Seychelles, **South Africa**, Swaziland, Tanzania, and Zambia. Angola have acceded to the Revised Protocol, while Zimbabwe and Congo have never ratified it.

The Revised SADC Protocol has proved influential in shaping treaty practice across the SADC region. Examples of such influence include the Zambezi Agreement, the Inco-Maputo Interim Agreements and the recently revised OKACOM Agreement. The ORASECOM Agreement indicates, that 'reasonable and equitable' (Art, 7.2) and 'significant harm' (Art 7.3) are to be interpreted in line with the Revised SADC Protocol.

In addition to the direct influence of the Revised SADC Protocol on establishing and revising basin agreements, SADC also plays a supporting role in the implementation of watercourse agreements within the SADC region. Through the water sector programme, SADC has developed a regional strategic action plan for integrated water resources management for 2005-2010. The plan seeks to *inter alia*, "provide a framework for sustainable, effective and efficient planning and management of shared river basins."

The Revised SADC Protocol's overall objective is to foster closer cooperation for judicious, sustainable and coordinated management, protection and utilization of shared watercourse and to advance the SADC agenda of regional integration and poverty alleviation. While the 1995 Protocol laid emphasis on the principle of territorial sovereignty of a watercourse state, the Revised Protocol lays emphasis on the unity and coherence of each shared watercourse. This reflects the commitment of the ratifying States to certain procedural and substantive frameworks for managing the water resources of these shared watercourses.

3.2 General Principles

Article 3 of the Revised SADC Protocol outlines general substantive principles that should underpin the management of shared watercourses. These are;

1. The unity and coherence of shared watercourses, and to harmonise water uses to support sustainable development in all watercourse States.
2. The utilisation of shared watercourses is open to all watercourse States, and without prejudice to their sovereign rights.
3. Parties undertake to respect the rules of customary and general international law.
4. Parties will maintain a balance between resource development for a higher standard of living and conservation and enhancement of the environment to promote sustainable development[4].
5. Parties will pursue and establish close cooperation on studies and execution of projects.
6. Parties will exchange available information and data.

[4] This balance must be found through a negotiated and common decision by all the watercourse States. It therefore stands to reason that any basin wide plan must include some elements of negotiation between the Parties. This is important when interpreting ORASECOM's mandate as outlined in Section 5.

7. Parties will utilise the shared watercourse in an equitable and reasonable manner.
8. Parties will participate in the use, development and protection of a shared watercourse in a reasonable and equitable manner.
9. Parties will take all appropriate measures to prevent causing significant harm.
10. Share information on planned measures.

The Revised SADC Protocol also provides further rules guiding the determination of 'reasonable and equitable' – indicating that this requires taking into account and weighting of all relevant factors including;

- Natural characteristics of the watercourse.
- Social, economic and environmental needs of the States.
- The population dependent on the shared watercourse.
- Effects of use by one State on other States.
- Existing and potential uses,
- Conservation, protection, development and economy of the use of water, and the costs of measures to achieve this.
- Availability of alternatives of comparable value.

The Protocol also provides rules for action to eliminate or mitigate significant harm.

3.3 Specific Provisions

Article 4.1 of the Revised SADC Protocol outlines procedural rules regarding the exchange of information on planned measures. These place obligations on both the notifying State to provide information, as well as the notified State to respond in good faith, clearly and timeously. These provisions allow for the extension of the period, as well as actions in the absence of a reply to notification. Importantly, these procedural provisions are much more detailed than the rules on notification requirements in the ORASECOM Agreement (see Section 5).

Article 4.2 of the Protocol makes provision for environmental protection and preservation. These firstly place an obligation on Parties to individually and jointly protect and preserve the ecosystems of a shared watercourse. Art 4.2(b) makes provision for Parties to individually and jointly prevent, reduce and control the pollution and environmental degradation of shared watercourses 'that may cause significant harm'. Significant harm is expanded on in this provision to include harm to the environment, human health or safety, or the use of water for any beneficial purpose. Procedural provisions include consultation with a view to arriving at mutually agreeable measures, such as setting joint water quality objectives, techniques and practices to address pollution, and establishing lists of substances to be prohibited, limited, investigated or monitored.

Additional provisions include prevention of the introduction of alien or new species, and all measures required to protect and preserve the aquatic environment including the estuary, according to accepted international rules and standards.

Article 4.3 includes provisions to enter into consultations concerning the management of a shared watercourse, which may include the establishment of a joint management mechanism. This includes the regulation of flow, and participation on an equitable and reasonable basis in the construction and maintenance of regulation works. Substantive provisions include an obligation to maintain and protect installations, and to enter into consultations in this regard.

Article 4.4 re-emphasises the need to prevent or mitigate conditions that may be harmful to other watercourse States, and to place an obligation on Parties to require any person who may abstract water, or discharge waste to the system to require a permit, licence or other authorisation to do so. Importantly, there is an obligation on the Party to ensure that such authorisation is only granted after it has determined that it will not cause significant harm on the regime of the watercourse.

3.4 The establishment and participation in shared watercourse institutions

Article 5 of the Revised SADC Protocol includes provisions for the establishment of a range of institutional structures within SADC, and Shared Watercourse Institutions. Article 5.3 indicates that parties undertake to establish appropriate institutions whose responsibilities shall be determined by the nature of their objectives – 'which must be in conformity with the principles of the Revised Protocol. There is also an obligation to report to SADC on progress.

Article 6 of the Protocol refers to Shared Watercourse Agreements – and hence to the relationship between the Revised SADC Protocol and the ORASECOM Agreement. However, as is highlighted in the following section, the ORASECOM Agreement does not clearly specify that the Commission is established under the Revised SADC Protocol, perhaps due to the fact that the negotiation, finalisation and ratification of the two instruments were in effect taking place together.

Importantly Article 6.5 indicates that, where some but not all Watercourse States to a particular shared watercourse are parties to an agreement, nothing in that agreement shall affect the rights or obligations under the Protocol of Watercourse States that are not Party to the watercourse-specific agreement[5]. Moreover, Article 6.7 gives all the Member States who are not Parties to any bilateral arrangement applicable to only part of the shared watercourse the right to participate in consultations and negotiation in good faith with a view to becoming a Party to that bilateral.

3.5 Summary

The Revised SADC Protocol was signed in August 2000, and came into force in September 2003. While not all the SADC Member States have ratified the Protocol, all of the ORASECOM Member States have. The Parties have committed themselves through this process to both the substantive and procedural provisions of the Protocol.

The Revised SADC Protocol follows the UN Convention wording in most respects with the following notable exceptions. Both the UN Convention and the SADC Protocol provide for the development of agreements that apply the provisions of the framework agreement (i.e. the Convention/ Protocol) to a specific watercourse. In this context the UN Convention allows for the application and adjustment of the provisions according to the characteristics of the watercourse in question – potentially allowing for flexible approaches. The 'adjustment' provision is not found in the SADC Protocol, leaving some ambiguity regarding the degree of flexibility in applying the Protocol's provisions to a specific watercourse. Secondly, the relationship between the 'significant harm' and 'reasonable and equitable utilisation" provisions have, as far as the wording is concerned, changed in the Revised SADC Protocol. Since the preamble of Protocol makes it clear that the Protocol aims to align the SADC legal framework with the UN Convention, it is unclear if a reversal of the relationship between the two principles indeed reflects the intention of the Parties. Whereas it is possible that the wording in the SADC Protocol gives downstream states a better negotiation provision, baring a (international) court decision on the matter, a definitive answer to this question is not possible.

The Revised SADC Protocol commits the Parties to the key Principles of International Water Law, and specifically includes detailed substantive and procedural provisions for how Parties can give effect to the 'reasonable and equitable', 'significant harm' and 'prior notification' provisions. It also binds Parties to include permitting or licensing provisions in their domestic legislation and that approval processes which ensure that the shared

[5] This would allow third Party participation in bilateral arrangements applicable to only a portion of the watercourse.

watercourse is protected. It allows for the joint establishment of water quality objectives and discharge limits or monitoring, but seems to limit this to situations where the problem may result in significant harm.

Importantly for ORASECOM Art 5.3 makes provision for the establishment of Shared Watercourse Institutions, whose responsibilities will be determined by the nature of their objectives which must be in conformity with the principles of the Protocol. Art 6.3 also indicates that Agreements concluded between that Parties should apply the provisions of the Protocol to a particular shared watercourse. Art 6.1 indicates that the Protocol does not affect the rights or obligations of Agreements in force.

4 BILATERAL AGREEMENTS IN THE ORANGE-SENQU RIVER SYSTEM

4.1 Background

In addition to the ORASECOM Agreement, a number of bilateral agreements between the Parties also affect the management of the water resources of the Orange-Senqu River System. All these bilateral agreements have entered into force prior to the entering into force of the ORASECOM Agreement. The relationship between the ORASECOM Agreement and the bilateral agreements as well as between ORASECOM and the bilateral Commissions established by the bilateral agreements is regulated in Articles 1.3 and 1.4 of the ORASECOM Agreement respectively.

Article 1.3 ORASECOM Agreement provides that "in the absence of an agreement to contrary, nothing in this Agreement shall affect the rights and obligations of a Party arising from other agreements in force prior to the date this Agreement comes into force for such a Party". In this respect, it is important to analyse;

- Whether the rights and obligations of the Parties resulting from bilateral agreements contradict those rights and obligations under the ORASECOM Agreement
- Whether (and to what extent) the rights and obligations resulting from the bilateral agreements pre-determine the interpretation of rights and obligations from the ORASECOM Agreement and its implementation.

Article 1.4 ORASECOM Agreement permits "…any number of the Parties" to establish among themselves river commissions with regard to any part of the River System" and defines – in broad terms – the relationship between ORASECOM and the bilateral commissions. It provides that new (i.e. established after the entry into force of the ORASECOM Agreement) bilateral commissions "will be subordinate" to ORASECOM, whereas existing Commissions "will liaise" with ORASECOM in terms of the ORASECOM Agreement.

4.2 Rights and obligations from the bilateral agreements

Broadly, the bilateral agreements can be split into two categories:

a) those that have the establishment of a bilateral institutional mechanism as their main objective, and
b) those that deal with specific (infrastructure) projects. The latter ones regularly also create a project specific institutional mechanism.

The obligations of Parties from bilateral agreements under a), are purely to establish the agreed on institutional mechanism and meet certain procedural requirements. These agreements do not contain substantive rights and obligations with respect to the management of the water resources as such. These instruments therefore have little effect on ORASECOM's functioning.

Of more relevance in the context of Article 1.3 ORASECOM Agreement are the project specific bilateral agreements (e.g. LHWP-Treaty with Protocols; Agreement on the Vioolsdrift and Noordoewer Joint Irrigation Scheme). In addition to setting up project specific institutional mechanism and regulating issues concerning project construction, cost sharing etc., these projects also directly impact the management of the Orange-Senqu River's water resources, more specifically by specifying the sharing of water between countries on the basis of agreed on volumetric allocations.

In this respect, the Parties have agreed, in the Revised SADC Protocol and the ORASECOM Agreement, that the water resources of the Orange-Senqu River need to be shared equitably and reasonably, while not defining this in volumetric terms. The volumetric allocations to countries made in the bilateral agreements form part of the overall water resources of the system. ORASECOM is in the process of determining the total water available in the Basin, and should as part of the development of the Basin Wide Plan address the reasonable and equitable sharing of this water. Until this is done, it is unclear whether the allocations made in the bilateral arrangements are in conflict with the Parties obligations under the ORASECOM Agreement.

ORASECOM must, when making a determination of reasonable and equitable sharing across the basin as part of the Basin Wide Plan, apply the provisions of Article 3.8 of the Revised SADC Protocol. Once this determination has been done ORASECOM should set this off against the existing volumetric obligations under the bilateral agreements. If conflicts are found, ORASECOM may indicate this to the Parties concerned, and may recommend that the provisions of the bilateral arrangement be revised.

4.3 Interpretation of Article 1.4 ORASECOM Agreement

Article 1.4 ORASECOM Agreement requires the existing bilateral commissions to "liaise" with ORASECOM, while not providing any definition of the term "liaise" in this context. The term thus needs to be interpreted in the light of the general duty to cooperate as well as the specific information and data exchange provisions of the ORASECOM Agreement and the Revised SADC Protocol.

The fact that the ORASECOM Agreement (in Article 1.3) stipulates that the rights and obligations from existing agreements shall remain unaffected and in Article 1.4 uses the term "liaise" (with ORASECOM) rather than – as it does for new commissions - "subordinate" (to ORASECOM) suggests that the Parties intended to leave the institutional machinery of the bilateral agreements unaffected. That would mean that bilateral commissions maintain a high degree of independence in their operations and suggests that decisions taken are not subject to approval or endorsement by ORASECOM.

That does, however, not mean that the bilateral commissions can take decisions that contravene the obligations the Parties to the ORASECOM Agreement have committed to. Decisions taken by any of the bilateral Commissions thus need to be taken against the background of the obligations of the Parties from the respective bilateral agreement as well as the ORASECOM Agreement (see above section on rights and obligations from the bilateral agreements).

International water law in both treaty (e.g. SADC Protocol, ORASECOM Agreement Article 7.1) and customary international law provides for a general duty to cooperate. This duty has been substantiated in numerous agreements and decisions of international tribunals, in particular requiring Parties to water agreements to share data and exchange information. More so, the ORASECOM Agreement concerns specific obligations of the Parties for data and information exchange (e.g. Article 7.4; 7.5; 7.10; 7.11). These obligations are met through institutional mechanisms such as the bilateral commissions as well as ORASECOM.

In the context of the specific data and information sharing obligations under the ORASECOM Agreement as well as the general duty to cooperate the term "liaise" in Article 1.4 ORASECOM Agreement needs to be interpreted as an obligation of the bilateral commissions for full and prompt disclosure of all relevant information to ORASECOM concerning the substantive areas ORASECOM is tasked to advise the Parties on.

In other words, the information that the bilateral commissions need to make available to ORASECOM promptly and comprehensively includes all information of relevance for any of the technical areas ORASECOM needs to formulate recommendations to the Parties. As such, all matters relevant for the development of a basin wide plan - fall under the umbrella of ORASECOM and consequently the bilateral commissions must provide this information to ORASECOM.

The interpretation of the provision that new bilateral and trilateral arrangements should be subservient to ORASECOM is somewhat more complex. Here too no clear definition of 'subservient' is provided, and this provision would therefore suggest that the Parties intended such new commissions to be constituted under ORASECOM, perhaps as a sub-committee dealing specifically with issues only relevant to some of the Parties.

4.4 Summary

Bilateral Agreements which only deal with the establishment of bilateral institutional mechanisms have very little bearing on the functioning of ORASECOM. However, those which specify volumetric allocations may, when set against the requirement of reasonable and equitable sharing across the whole of the Orange-Senqu system, create conflicts between the various instruments.

In these cases ORASECOM would have to recommend amendments to the bilateral arrangements to bring these in line with the basin wide perspective.

5. THE ORASECOM AGREEMENT

5.1 Background

The ORASECOM Agreement was signed on 3 November 2000. The ORASECOM Agreement expresses the desire of the Contracting Parties to;

- Establish the Orange-Senqu River Commission and its institutions (i.e. Council),
- Provide it with an international legal personality, and
- Provide Council with objectives, functions and powers to act as a technical advisor to the Parties.

Beyond this, the Agreement includes the Articles outlining the obligations of Parties (derived from the Revised SADC Protocol), as well as to provide for the settlement of disputes, withdrawal of the Parties, Financial Arrangements, and General Provisions including a provision for the Agreement to enter into force by notification through the diplomatic channel of the compliance with the necessary Constitutional requirements (see Footnote 1 on page 3).

ORASECOM has however evolved rapidly since its establishment, perhaps most significantly with the establishment of the Secretariat, with its concomitant financial obligations on the Member States. The organisation has also progressed considerably towards the development of a common understanding of the basin on which a Basin Wide Plan could be founded. Ultimately, however, ORASECOM must investigate and negotiate a variety of options for the management of the Basin, before any Basin Wide Plan can be formulated. The ORASECOM Agreement should underpin the organisation's functioning in all of these roles.

This section explores the ORASECOM Agreement in the light of the intention of the Parties in providing the organisation with a mandate to formulate recommendations based on this Basin Wide Plan. The links with the Revised SADC Protocol on Shared Watercourses in this regard are also highlighted.

5.2 The relationship between the ORASECOM Agreement and the Revised SADC Protocol

The ORASECOM Agreement establishes the organisation as a 'Technical Advisor' to the Parties with respect to the development, utilisation and conservation of the water resources in the River System. Any advice needs to be given in the context of the procedural and substantive obligations of the Parties stemming from the ORASECOM Agreement. However, legally the ORASECOM Agreement is complemented by the Revised SADC Protocol as a regional framework agreement. The nature of a framework agreement is such that where a more specific agreement (*lex specialis*) leaves legal gaps or is less elaborate than the framework agreement, interpretational guidance can be drawn from the framework agreement. In the context of the ORASECOM Agreement this would for example mean that ORASECOM, when elaborating on the required procedures for notification, would seek guidance from the Revised SADC Protocol to interpret the less detailed provisions on the matter in the ORASECOM Agreement.

Hence, ORASECOM must – in order to formulate certain recommendations – interpret the provisions of both the ORASECOM Agreement, and the Revised SADC Protocol conjunctively. In this sense, conciliatory interpretation of the two instruments is required. As such, where the Revised SADC Protocol provides more clarity on interpretations (for example how reasonable and equitable should be interpreted), then ORASECOM should use the provisions of the Revised Protocol.

In these cases ORASECOM may be limited to interpreting the provisions of the Revised SADC Protocol only in so far as they enable the formulation of technical

recommendations. Similarly, in some cases ORASECOM may need to interpret the the Revised SADC Protocol specifically for the Orange-Senqu River System.

There are nevertheless some provisions in the Revised SADC Protocol that may not be consistent with a 'technical advisor' role. For example, negotiations around some of the provisions around significant harm, or third Party participation in the bilateral arrangements. It is not clear what the intention of the Parties was (is) in this respect, and it is recommended that the organisation seeks clarity from the Parties in this respect. However, adoption of some of these roles is likely to require adjustment of the organisations institutional arrangements (see below).

5.4 The establishment of the ORASECOM Institutions

In the ORASECOM Agreement, Parties formally establish and define the Council as a collective of 4 delegations made up of not more than 3 permanent members, supported by not more than 3 advisors (Art. 2). Article 3 of the Agreement provides for the regular meetings of Council.

Article 6.1 provides Council with the powers to establish *ad hoc* or standing working groups or committees comprising representatives of the Parties, while Article 3.10 allows Council to establish its own rules of procedure. Council has used these provisions to establish a number of Task Teams as well as the Secretariat through their regular meetings. However, the establishment of the permanent Secretariat represents a significant change to the institutional structures of ORASECOM. Moreover, it is clear that as ORASECOM moves from building a common understanding of water resources challenges in the basin, towards a Basin Wide Plan and recommendations to address these challenges, the negotiation role of the organisation will have to change. This may warrant a revision of the Agreement so that Parties can formally establish the relationships between Council, Secretariat and Task Teams and most importantly the Parties. Similarly, amendments could include processes to establish Terms of Reference for standing committees.

The Financial Arrangements in the ORASECOM Agreement (Article 10) indicate that all the costs of participation of the delegations in attending the meetings of Council shall be borne by the Party concerned, while the host of the meeting will cover venue costs. Article 10.3 indicates that all other costs or liabilities accepted shall be shared equally by the Parties, unless otherwise agreed by Council. This therefore makes provision for the equal contributions to the operation of the Secretariat, while also allowing for the costs of providing office space for the Secretariat to be borne by South Africa.

5.5 The objectives, functions and powers of Council

Articles 4, 5 and 6 of the Agreement provide the core of the mandate provided by the Parties. These firstly establish the Council as a 'Technical Advisor' to the Parties, outline the functions in this respect, and give the Council the powers to execute these functions through the establishment of *ad hoc* or standing working groups and the appointment of consultants or technical experts.

Importantly, Article 5.2 requires Council to take all measures required to make recommendations, or to advise Parties on a range on matters specified. There is also a 'catch all' clause which allows the Parties to determine 'other such matters' (Article 5.2.10). This signals the intention of the Parties to provide Council with the tools to 'do its job', recognising that in order to provide viable and "implementable" recommendations Council will have to conduct studies in the Member States. This includes collation of existing data, collection of new data, the dissemination of information (Art. 5.2.5) testing of scenarios both through modelling as well as with stakeholders, and potentially the

implementation of pilot studies. However, in the latter two cases the line between developing the recommendation and implementation may start to become blurred.

In this sense any limitations on 'all measures' intended by the Parties would have to be interpreted against two criteria; firstly is the action intended to develop a recommendation for implementation by Parties, and secondly does the action compromise the sovereignty of Parties by creating expectations or by creating the perception that ORASECOM rather than the Governments of the Member States are delivering on key water resources management problems. Often this line may be difficult to walk and it is recommended that Council seeks clarity from the Parties in this regard.

More specifically Article 5.2 includes the following provisions which may need to be examined in the light of the organisation's evolving role in the management of the basin;

- **Article 5.2.2** – allows Council to make recommendations on equitable and reasonable utilisation of the water sources in the River System. Section 7.2 places an obligation on the Parties to utilise the resources of the River System in a reasonable and equitable manner, and that this must be interpreted in line with the Revised SADC Protocol. In this respect therefore Council should make recommendations in line with Articles 3.7 and 3.8 of the Revised Protocol. Studies to this effect should be included in the Basin Wide Plan.
- **Article 5.2.4** – allows Council to make recommendations on the extent to which the inhabitants of each basin State shall participate in the management of the River System, as well as the harmonisation of policies in this regard. The Ministers of water from the Parties have subsequently instructed ORASECOM to develop modalities for participation by stakeholders in IWRM, and for capacity building and awareness creation – but that this required careful consideration[6]. To this end ORASECOM has produced a Roadmap for Stakeholder Participation, and is in the process of developing a Communications Strategy. It is important that these studies and their subsequent processes do not compromise the intent of the Parties with respect to this clause (see the discussion on the limitations on all measures).
- **Article 5.2.5** – allows Council to make recommendations on a standardised form of collecting, processing and disseminating data. This goes beyond the obligations of Parties under the Revised SADC Protocol, which only require Parties to share data. As this may entail significant costs for the parties, the modalities of this process need to be discussed before recommendations are made.
- **Article 5.2.6** – allows Council to make recommendations on the prevention of pollution and the control of aquatic weeds. This goes beyond the requirement in the Revised SADC Protocol (Article 4.2(b)) which limits this to pollution that causes significant transboundary harm – but is more in line with Article 2 (a) (Revised SADC Protocol) which requires protection of the ecosystems of the shared watercourse. However, this may suggest that Council should address non-transboundary problems in a different way.

In Articles 6.3 and 6.4 of the ORASECOM Agreement, Parties require Council to ensure that advice is contained in a report, signed by the leader of each delegation and that this report must include estimates of the cost of implementation, as well as proposals for the apportionment of the costs between the Parties. This means that advice and recommendations should not only indicate 'what' must be done, but also 'how' it must be done.

Article 7 of the ORASECOM Agreement primarily re-iterates the obligations of the Parties which already resort under the Revised SADC Protocol. However, the ORASECOM

[6] This is included in the unsigned Minutes of a Meeting of the Ministers on 22 September 2005 at Mohale Dam.

Agreement does not include the detailed substantive or procedural provisions that are found in the Revised SADC Protocol. However, conciliatory interpretation of the ORASECOM Agreement to make it fully in line with the Protocol is required, given the nature of the Revised SADC Protocol as a regional framework agreement.

5.6 Conclusions

The Governments of Botswana, Lesotho, Namibia and South Africa have through the ORASECOM Agreement established the Commission, and given it the objective to serve as a technical advisor to these Parties. They have also given the Council, as the highest body of the Commission, far-reaching functions and powers to enable it to make recommendations and give advice. Limitations on these functions and powers must however be set against the intention of the Parties to limit the organisation to an advisory role, and that ultimately implementation of recommendations will be at the discretion of the Party(ies).

It is the opinion of the authors of this report that ORASECOM Agreement does not need to be amended in order for the organisation to funcyion as a technical advisor. However, as ORASECOM's role changes towards negotiation and implementation of basin wide scenarios, amendment may be required to clarify the intention of the Parties

6 CONCLUSIONS AND RECOMMENDATIONS

The previous Legal Analysis for ORASECOM recommended that while the ORASECOM Agreement is a good starting point for a Basin Wide Plan, it does not form an adequate legal basis for the Plan. To this end it was recommended that the Member States firstly agree on how the Plan would be developed and implemented. Furthermore, the work indicated that the ORASECOM Agreement is not fully in line with the Revised SADC Protocol, and recommended that these differences be addressed, potentially through the revision of the ORASECOM Agreement.

In this respect, the conclusions of this assignment are that the ORASECOM Agreement does not need to be revised in order for the organisation to serve its core mandate as a technical advisor to the Parties. In cases where the ORASECOM Agreement is not seen to be fully in line with the Revised SADC Protocol, or where the detailed procedural requirements in the Revised SADC Protocol would support the formulation of recommendations conciliatory interpretation of the two instruments should be encouraged.

However, as the organisation moves toward the discussion of scenarios and the formulation of a Basin Wide Plan, its role as a negotiation forum for Parties – leading to the Basin Wide Plan and 'implementable' recommendations - will increase. In addition the potential oversight role of the organisation with respect to the implementation of the Basin Wide Plan and the bilateral arrangements may change. This may require clarity as to intention of the Parties with respect to the functions of the organisation.

In this regard; the following inter-related concepts should be debated by Council in preparation for seeking further clarity from the Parties.

1) **What was the intention of the Parties with the establishment of ORASECOM?**
   It is not clear if the Parties now (or in the future) intend ORASECOM to provide the forum whereby they could not only develop a joint technical understanding of the Orange-Senqu River System, but also where they could start to negotiate certain provisions under the Revised SADC Protocol OR whether ORASECOM should remain a technical advisory body.

2) **To what extent will the organisation only address transboundary issues?**
   International Water Law generally limits transboundary organisations to addressing problems that may cause significant harm to other watercourse States. Conversely, the ORASECOM Agreement allows the organisation to undertake studies and develop recommendations for non-transboundary water resources problems. However, ORASECOM may deal with recommendations for non-transboundary issues differently – only drawing the Party's attention to the potential problem.

3) **What limitations do Parties foresee to the 'all measures' provision in Article 5.2 of the ORASECOM Agreement?**
   It is clear that the Parties intended to give ORASECOM far-reaching powers to undertake studies and to make recommendations. Nevertheless, Parties did intend to maintain sovereignty by limiting the organisation to an advisory role. Clarity on this aspect becomes particularly important when involving stakeholders in the formulation of recommendations. It is recommended that Council seeks clarity from the Parties in this respect.

4) **Can ORASECOM provide a recommendation that does not outline the cost to the Parties?**
   The ORASECOM Agreement indicates that all recommendations made to Parties must include estimates of costs, and can include recommendations on the

apportionment of those costs between the Parties. While it is feasible to determine the costs of implementing the recommendations in many cases, in some cases process of determining the costs may compromise the discretion of the Party to implement, or may be difficult to calculate or may be associated with indirect costs to the Party.

In these cases it may not be feasible to determine the costs, and ORASECOM may wish to approach the Parties to recommend an amendment to this Article.