



Report of the Third Sio-Malaba-Malakisi Basin Stakeholders Consultative Workshop

Workshop Report



September 25th – 26th 2018, Kisumu, Kenya

Contents

| | |
|--|--------|
| Background..... | - 3 - |
| Session 1: Welcoming Remarks | - 3 - |
| Session 2: The SMM Basin Investment Planning Process | - 4 - |
| Session 3: Facilitated dialogue on the design of the MoU for the SMM..... | - 6 - |
| Session 4: Review and finalize the agenda for the strategic meeting with the development partners..... | - 10 - |
| Closure | - 10 - |
| Annex 1: List of participants..... | - 11 - |
| Annex 2: Agenda for the meeting..... | - 12 - |
| Annex 3: Revised draft SMM MoU..... | - 14 - |

Background

IUCN has been working with the IGAD Secretariat in implementing the BRIDGE project (funded by SDC) since 2014 focusing on strengthening transboundary water governance in the IGAD region, with activities both at regional and basin level. In 2016, IUCN secured a co-financing project funded by OES US State Department, implemented together with UNECE synergizing approaches on transboundary water governance, mainly in the SMM basin, building on the previous NELSAP work and focusing on the promotion of Benefit Opportunity Assessment Dialogue, that is, ensuring multi-stakeholders engagement in agreeing on the SMM basin vision, updating the SMM 2008 strategy, developing the SMM investment framework and identifying and prioritizing SMM transboundary investment projects and defining an institutional framework for sustainable cooperation in the basin.

The 3rd SMM basin stakeholders' workshop took place on September 25th-26th 2018 in Kisumu, Kenya and was attended by members of the SMM Joint Working Group from Kenya and Uganda and representatives from the Nile Basin Discourse, NELSAP Coordination Unit, GIZ Uganda etc. The full list of the participants is herein attached as annex 1. The workshop objectives were to: 1] discuss the revised MoU for the joint management and development of the SMM basin, including steps towards its finalization and sign off, 2] provide inputs to finalize the SMM 4 preferred investment project clusters for discussion with the development partners on their implementation opportunities, 3] agree on the modalities for implementation of the Roadmap for the development of the full-fledged SMM investment plan and, 4] finalize the agenda for the meeting with development partners to discuss the SMM 4 preferred investment projects. The workshop agenda is herein attached as annex 2 and the detailed workshop presentations are herein:

<https://www.iucn.org/news/environmental-law/201810/third-smm-stakeholders-workshop-september-25-26-2018-kisumu-kenya>

Session 1: Welcoming Remarks

Mr. Fred Mwangi, Regional Water Expert at IGAD Water Unit in his opening remarks thanked the International Union for the Conservation of Nature (IUCN) and the United Nation Economic Commission for Europe (UNECE) for the implementation of the project activities and the SDC and OES US State Department for their funding support in strengthening the transboundary water cooperation and governance project in the IGAD region. He welcomed the German development agency GIZ to the partnership. He said that IGAD was ensuring that the issues related to transboundary waters were well understood and noted that “the Kenya-Uganda transboundary water cooperation is exemplary”.

Mr. John Owino, Nairobi-based Programme Officer, IUCN ESARO, in his welcoming remark said that the meeting was mainly to finalize some of the pending actions and agree on the way forward. He mentioned that the project still has an opportunity to organize one or two meetings at the regional level for the Protocol negotiation committee (most of whom are TAC members) and noted that if those meetings happens then it will create an opportunity to share the SMM work with this group at the regional level.

Ms. Chantal Demilecamps, Environmental Affairs Officer-United Nations Economic Commission for Europe (UNECE), noted that the process had progressed a lot and thanked partners for their commitments. She stated that continuity should be ensured for the process to bear fruits and mentioned that the next step should focus on the formal approval of the SMM investment framework and the definition of a sustainable institutional framework as was requested during the 1st SMM stakeholder's consultative workshop.

Dr. Callist Tindimugaya, the Commissioner Water Resources Planning and Regulation, Ministry of Water and Environment for Uganda and also TAC Uganda member as well as the OES/IGAD project focal person, welcomed all the participants and noted that SMM stakeholders are satisfied with the work made so far by the project on transboundary water governance and more so the identification and prioritization of the investment projects. He mentioned that the prioritized 4 SMM clusters of investment projects is not an end in itself and that implementing them should now be the priority as the way forward. He noted that Kenya and Uganda will continue working together and as focal persons together with her Kenyan colleague (Ms. Gladys Wekesa) will continue providing the leadership required going forward.

Dr Isaac Alukwe, Busia County Executive Committee Member, Water, Environment and Natural Resources, (Kenya), who officially opened the meeting, welcomed all the participants and wished them fruitful deliberations.

Session 2: The SMM Basin Investment Planning Process

Presentation of the summary descriptions of the preferred 4 bundles of SMM basin cluster of investment projects

A presentation on the summary narrative descriptions of the preferred 4 bundles of SMM basin cluster of investment projects was made by John Owino to the stakeholders, their inputs and comments were consequently incorporated into the draft description.

The Roadmap for the development of a full-fledged SMM investment plan: timeline and milestones for operation

Ms. Chantal Demilecamps presented the SMM Basin Investment Framework Planning process. She noted that the objectives of the participative SMM Basin investment planning process carried out was to: 1] promote and guide investment of transboundary significance in the SMM Basin; 2] update the 2008 SMM Basin Investment and Development Strategy. The updated SMM Investment Strategy would include the SMM Basin Investment Framework (1st phase – mostly done) and an SMM Basin Investment Plan (2nd phase – still remains to be done, see the 5 steps still remaining and described below).

Since the meeting was being attended by some new people, it was important that they were updated on the process for the development of the SMM Basin Investment and Development Strategy so far, as follows:

The 1st SMM Basin multi-stakeholders' workshop held in Kisumu, Kenya in May 2017 mainly discussed the joint identification of past and prospective benefits of cooperation, requested for facilitation of a process for prioritization of investment projects in SMM basin through open and transparent process, using BOAD.

The Stakeholders Consultative meeting held in Entebbe, Uganda in January 2018 discussed the core elements of a Draft Basin Investment Framework and mapping of projects, that is, Note on rating investment projects of transboundary relevance in the SMM basin as well as the 1st draft of SMM Basin Investment Framework and the mapping of 67 SMM relevant projects, which were prioritized into a shortlist of 12 through a multi-criteria analysis that were agreed upon by the stakeholders and discussed the process for the nomination of a Joint Working Group on SMM investment framework.

The 2nd SMM multi-stakeholders' workshop held in Mbale, Uganda in May 2018 and analyzed further the 12 shortlisted investment projects through Benefit Opportunity Assessment Tool (BOAT), which culminated into the 4 bundles of prioritized projects. The workshop also discussed the 3rd draft of the SMM Basin Investment Framework as well as the possible institutional structure for the management and development of the SMM basin.

Concerning the Roadmap for the development of a full-fledged SMM Investment Plan, which is the 2nd phase (that still remains to be done) of the SMM investment and development strategy, the meeting was informed that it will have the following steps:

Step 1: Operationalization of the *Joint Working Group on SMM Investment Strategy and Institutional Framework*, responsible for engaging consultants for the development of the draft SMM Basin Investment Plan and acting as the Steering Committee for the development of the investment plan.

Step 2: Development of a portfolio of projects. Initially populate it with the projects discussed at the 2nd SMM Workshop; ensure that all current or planned projects that rely on or have an impact on the SMM basin's resources are identified, and that the necessary documentations are obtained and analyzed; and organize meetings with relevant public administrations and other project promoters and funders, in order to raise awareness about the SMM Basin Investment and Development Strategy (Investment Framework and Plan).

Step 3: Include a Resource Mobilization Strategy. Gather information about (i) historic levels of expenditure in capital as well as operation and maintenance expenses, (ii) sources of funding, and (iii) cost of projects included in the SMM Basin Portfolio. Carry out analysis to estimate the potential financing flows from the different sources of funding under a business-as-usual scenario and a proactive-fundraising scenario. Develop recommendations on how to realize the proactive-fundraising scenario.

Step 4: Present the draft Basin Investment Plan. Once developed by the consultants, under the leadership and guidance of the *Joint Working Group on SMM Investment Strategy and Institutional Framework* to: the basin's stakeholders, through existing structures, for consultation; to the *Joint Working Group on SMM Investment Strategy and Institutional Framework*, for endorsement of a revised draft; and to the relevant Ministers in both countries, for formal approval.

Step 5: Regularly update the Basin Investment Plan to include new project proposals in the portfolio of projects.

Main comments by the participants included:

1. The representative of NELSAP-CU informed the audience that Nile Basin countries were developing a Nile Equatorial Lakes Investment Programme (NELIP), which was discussed

in Nairobi in August 2018 and included some prioritized projects in SMM basins. The SMM Basin Investment Strategy should therefore take these developments into account.

2. TAC members from Kenya and Uganda highlighted the need for more coordination and harmonization between the 2 processes, to avoid approaching the same donors with same requests generated by different processes. However, as focal points are nominated in each ministry to discuss such issues, it should minimize the issue of duplication.
3. Representatives from IGAD and Kenya pointed out that the added value of the on-going process in SMM Basin was that it built on a consultation from the grassroots on priorities for the development of the SMM basin, and was complementary to the NELSAP process, as it provided an opportunity to be more focused on real needs. The representative of Uganda noted that the discussion on the SMM investment strategy should particularly help advancing with shared projects, such as the Angololo Dam: the SMM investment framework should look at how to guide progress together (projects design, ownership, benefit sharing, and exploitation of joint projects).

Session 3: Facilitated dialogue on the design of the MoU for the SMM

Mr. Diego Jara, lawyer from the IUCN Environmental Law Centre, facilitated a dialogue on the design of the MoU for the SMM. The meeting noted that the MoU would be important to promote institutional arrangements for the mobilization of resources including financial as well as for the implementation of the investment projects. It was indicated that an MoU could be considered as a tool to promote regional cooperation; ensure the integrity of the ecosystem in the basin; roles and provides guidelines and the responsibilities for the institutions to be involved in the implementation of the joint projects in the SMM basin.

During this session the legal nature of an MoU was clarified by mentioning that a memorandum of understanding (MoU) is a non-legally binding arrangement based on a joint declaration of intent by the parties aimed to establish a framework of cooperation in a specific area and sets forth the respective undertakings of the interested parties in a bilateral, trilateral or multilateral treaty. Moreover, memorandums of understanding as other arrangements must be developed in the context of existing policies and legal frameworks. Also, it is important to ensure coherence with wider policies and laws is essential for the implementation of the MoU. In order to attain this coherence, it is critical that key stakeholders understand the implications of existing frameworks relating to the resources at issue before developing new arrangements.

It was also mentioned that MoUs relating to transboundary water cooperation should include, as a minimum, the following elements:

- **Preamble**
The preamble is a clause containing a brief introduction on the context in which an MoU is being adopted, as well as the reasons and objectives sought to be accomplished with its implementation.
- **Scope**
The scope defines the coverage of an international instrument. In the context of transboundary waters, the scope of an arrangement normally defines: Geographical and hydrological coverage; Types of water uses and activities; and Substantive measures guiding such water uses.

- **Objectives**
 The objectives describe the expected results to be achieved through the MoU's implementation. These objectives are based on a vision stated by the Parties to the MoU (e.g. achievement of pure and natural state of water; water cooperation as a catalyst for peace and security; improvement of livelihoods of local communities, etc.). The set of objectives may be followed by a core set of guiding principles that should be followed to achieve those objectives. These principles ideally will aim to drive progress towards environmentally and economically sound practices under a scheme promoting effective water governance.
- **Guiding principles**
 The principles are the basic rules that guide the development of the commitments of the parties, the MoU implementation mechanisms, as well as any other provisions covered by the MoU. These rules are fundamentally those deriving from international relations, and commonly accepted by States. In the area of transboundary waters, the main rules to be considered are the following:
- **Cooperation**
 This is a basic principle of international law. The duty to cooperate comes from the idea of the community of interests that exists between the States that are part of a shared basin. It is only through cooperation between all of these States that sustainable development can be achieved and ecological integrity maintained. The duty to cooperate only establishes a general obligation and does not specifically require that institutions be established in order to put this process into practice. This is an overall duty to negotiate in good faith as well as having the opportunity to participate in cooperative arrangements for a shared basin.
- **Equitable and reasonable utilization**
 Equitable utilization is the most fundamental principle relating to the uses of Transboundary Rivers and Lakes. This principle entitles each riparian state to a reasonable and equitable share of the waters and for the beneficial uses of those waters within its own territory. The concept of equitable and reasonable utilization is based on equity and not equal division, promoting the equality of rights between the riparian. This equality of rights will take into account a number of relevant factors including the geography, hydrology of the basin, population, economy, social needs and existing and potential utilization of the waters.
- **Prevention of harm**
 This principle implies that States have to establish the measures to control the sources that create negative transboundary impacts (to other States, its people and resources). It is commonly accepted that the harm to be prevented should be "significant", that is, not trivial. The most important aspect of this principle relates to the duty of the State to be diligent; in other words, introduce all the necessary measures to avoid causing the harm.
- **Protection of shared watercourses and their ecosystems**
 This principle intends to promote the protection and conservation of the ecosystems of the watercourse individually or jointly by the riparian and thus ensure the integrity of river/lake systems in order for them to continue providing ecosystems services for human and the environment.

- **Public participation**

This principle refers to the involvement of local communities, civil society and other relevant stakeholders in decision making on transboundary waters. This involvement is expected to promote more inclusive and effective actions, policies and laws; the empowerment of stakeholders and their legitimacy to manage waters and other resources associated to them.

It was also highlighted that other principles to be considered in an MoU include:

- Precaution
- Prevention
- Intergenerational equity
- Mainstreaming women and youth
- Sustainable development
- Subsidiarity

- **Commitments**

Guided by the objectives and based on the spirit of the guiding principles of the MoU, the commitments constitute the specific actions to be taken in order to materialize the cooperation arrangements. This section enunciates the duties to which the Parties are bound to act or not in a particular way in regards to the management of water resources.

- **Implementation mechanisms**

Implementation of the MoU depends on the clarity of its provisions and the design of the necessary mechanisms for the Parties to comply with them.

This process of operationalizing the MoU is fundamental to the success of a cooperative framework. It should be a well-structured process that seeks to identify and align the interests of the Parties.

First, it requires stipulating the roles and responsibilities of the Parties to the MoU, and the commitments they enter into when signing the MoU. This could be included in this section or in the previous one (Commitments).

Second, it requires the establishment of a body or platform for ensuring the continuum of the cooperation and its sustainability, as well as to guarantee the fulfilment of the Party commitments. The level of complexity of this institutional framework will depend entirely on the Parties. The suggested text below is the minimum that MoU should provide for in this respect

- **Other provisions**

- **Financing**

All arrangements require funding of some sort, even those not focused on action require funding for parties to continue to meet to monitor the implementation of their arrangement or to take it forward. Unclear funding arrangements can quickly sour constructive relationships. The arrangement should specify which parties will provide which resources (cash or in-kind) or how external finances will be sought. It should further specify how funds will be administered.

- **Dispute resolution**

Arrangements should specify actions to be taken by the Parties in case of differences resulting from the interpretation or implementation of the MoU. Ideally, the parties will be able to resolve their differences through negotiation. This reinforces the importance of regular meetings or fora to assess progress and negotiate. When the parties are unable to resolve their differences or conflicts amongst themselves, there are several mechanisms: using the legal system that governs the arrangement; applying public or peer pressure through diplomacy or campaigns; or seeking third-party mediation or arbitration.

Once having provided these technical inputs, Mr. Diego Jara proceeded to contextualize and explain the practical exercises which consisted of:

A group analysis

To review the elements of an MoU applied to the SMM using the “SMM MoU working draft” developed by the Environmental Law Centre

A plenary session

To exchange the finding made in each of the analysis groups

A facilitated discussion

To provide comments and observations to the findings made in each group which are included in this report as annexes

Way forward

All the inputs obtained during this practical session will be incorporated to the SMM Draft MoU and will be circulated to the relevant stakeholders for comments. The draft MoU is herein attached as annex 3.

In regards to the roadmap for the investment framework, it needs to be officially adopted by the two countries i.e. the Joint Working Group should finalize it and present it to relevant institutions for endorsement; the IGAD Secretariat should continue moving forward the two processes – development of the MoU and finalization of the Investment Framework; the Joint Working Group should take forward the framework as well as the MoU including consulting the relevant stakeholders. Countries requested for additional financial support to enable them move the process forward.

Mr. Fred Mwangi, the Regional Water Expert, IGAD Secretariat, noted that they will continue supporting the process together with the focal points of the two countries to come up with an agreed SMM investment framework and to progress in the development of the MoU. He emphasized that IGAD Secretariat will continue working with the key partners (IUCN, UNECE, GIZ) to mobilize resources to continue with the finalization of this process.

During the meeting it was emphasized that the Joint Working Group was created, with the nomination of 5 working members for each of the 2 countries and they should agree on the dates for the JWG to meet and finalize the investment framework for adoption. Tentatively, the JWG will meet within October, during this time there will be exchanges of emails between the Joint Working Group and the Environmental Law Centre to follow up on the preparation of the SMM MoU. The participants agree that by December 2018 a solid text for the MoU should be done.

Session 4: Review and finalize the agenda for the strategic meeting with the development partners.

Mr. John Owino presented the draft agenda being proposed for the strategic meeting with the development partners to discuss the way forward on the implementation of the 4 SMM preferred clusters. The meeting approved the draft agenda and the meeting was informed that the planning for this meeting is ongoing.

Closure

Mr. Fred Mwangi on behalf of IGAD mentioned that the 3rd SMM dialogue was a good meeting and that he will follow up on the way forward to ensure that the process is finalized. IGAD Secretariat will continue exploring the possibility of having more partners joining the process. He welcomed Rose and Louis to share with the meeting their experiences in participating in the World Water Week held in Stockholm, August 2018. Both expressed thanks to IUCN for sponsoring them to the conference during which they made a presentation on the experience from the SMM which was shared during the meeting.

Mr. John Owino on behalf of IUCN noted that it has been a pleasure working with the partners and will continue supporting this process towards the SMM basin vision.

Ms. Chantal Demilecamps, Environmental Affairs Officer, United Nations Economic Commission for Europe (UNECE), Helsinki Water Convention Secretariat mentioned that there is still a lot to be done and that the development of the MoU would help turning the commitment of the countries to work on the framework for the development of the transboundary SMM basin into a sustainable cooperation process. She noted that the growing political importance of transboundary water cooperation, congratulated the basin stakeholders for the progress made. She referred to the upcoming Meeting of Parties of the Water Convention to take place Astana, Kazakhstan in October 2018, where progress on the SMM basin cooperation process would be reported.

Mr. John Musila, the Chairperson of the Mpologoma Catchment Management Committee, thanked the partners and stakeholders for effective participation in the meeting. He highlighted the importance of appreciating the tradition of our people since the people had culture and tradition of environmental conservation. With these words, the dialogue was officially closed.

Annex 1: List of participants

| Kenya | Uganda |
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| 1. Gladys Wekesa, Ag. Director of Transboundary Water Resources Ministry of Water & Irrigation; email: gnwekesa@yahoo.com ; | 13. Callist Tindimugaya, Commissioner of Water Resources planning and Regulations, email: callist_tindimugaya@yahoo.co.uk ; |
| 2. Silas Mutia, Ministry of Water and Irrigation, Nairobi Email: silasmutia@gmail.com ; | 14. Mr Louis Mugisha, Team Leader, Kyoga Water Management Zone, email: mugishalouis@yahoo.com ; |
| 3. Ms. Rose Ogara, Regional Manager, Water Resources Management Authority, Lake Victoria North Catchment Area Email: rosefokwo@yahoo.com ; | 15. Eng. Patrick Okotel, Manager, WFP Eastern Center, Water for Production Department, email: okotelpatrick@gmail.com ; |
| 4. Dr. Isaac A. Alukwe, Busia County CEC, for Environment, Water and Natural Resources Email: jaalukwe@gmail.com ; | 16. Mr. Musila John, Vice-Chairman/LC V Chairperson Manafwa, Mpologoma Catchment Management Committee, email: African_missionaries@yahoo.com ; |
| 5. Irene Kiti, Foreign Service Officer, 2nd Counselor/Ministry of Foreign Affairs Email: irenekitiwakesho@gmail.com ; | 17. Ms. Were Lamura, Natural Resources Officer, Butaleja District, Mpologoma Catchment Management Committee, email: lamulaw@yahoo.com ; |
| 6. Rastus Shikuku, Principal Budget Officer, The National Treasury Kenya Email: shikukurastus@gmail.com ; | 18. Mr. Moses Ssonko, Senior Economist, Ministry of Finance, Uganda Email: Moses.Ssonko@finance.go.ug ; |
| SMM PMU | 19. Mr. Medard Ainomuhisha International Legal & Social Affairs Ministry of Foreign Affairs Email: medard.ainomuhisha@mofa.go.ug ; |
| 7. Mr. Martin Okirya, Junior SMM, Project Officer email: mokirya@nilebasin.org ; | 20. Mr. Sowed Sewaggude, Principal Water Officer, - International and Transboundary WR management, Ministry of Water and Environment, email: sewaguddes@yahoo.co.uk ; |
| IUCN | IGAD Secretariat |
| 8. John Owino, Programme Officer, ESARO, email: John.Owino@iucn.org | 21. Fred Mwango, Regional Water Expert, email: Fred.Mwango@igad.int ; |
| 9. Mr. Diego Jara, IUCN Environmental Law Centre | 22. Khadija Mohamed, Program Officer, IGAD |
| 10. Celestine Chemorkok, Celestine.chemorkok@iucn.org | 23. Mr. Mahemed Abdillahi, Communication Officer, IGAD |
| NILE BASIN DISCOURSE | UNECE |
| 11. Mr. Joseph Ngome, Kisumu, Kenya, Email: ngomejp@yahoo.co.uk ; | 24. Chantal Demilecamps, UNECE, Email: Chantal.Demilecamps@unece.org ; |
| GIZ, Uganda | NELSAP-CU |
| 12. Mr. Juan Carlos Email: juan.sanchez@giz.de ; | 25. Mr. Tola Maro Andy, Email: matola@nilebasin.org ; |
| | 26. Mr. Sadiki L. Laisser, Project Officer, NELSAP; Email: slaiser@nilebasin.org |

Annex 2: Agenda for the meeting

The 3rd Sio-Malaba-Malakisi basin stakeholders' consultative workshop, September 25th 2018, Kisumu, Kenya

Objectives:

1. Discuss the revised MoU for the joint management and development of the SMM basin;
2. Discuss future steps for a sustainable legal and institutional framework for the management of the transboundary SMM basin;
3. Finalize the 4 preferred Project Clusters for presentation to Donors
4. Agree on the modalities for implementation of the Roadmap for the development of the full-fledged SMM investment plan;
5. Finalize the agenda for the meeting with donors and preparation of slides for that meeting;

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| Monday September 24th 2018 | |
| | Participants travel and check in at the hotels in Kisumu, Kenya in the evening |
| Day 1 – Tuesday September 25th 2018 (Technical meeting for the Sio-Malaba-Malakisi basin stakeholders) | |
| 8.00-9.00 | Participants' arrival to the workshop venue and registration |
| 9.00-9.45 | <p>Session 1: Workshop opening <i>Chair: IGAD Secretariat</i></p> <p>Welcoming remarks by:</p> <ul style="list-style-type: none"> • Mr. Fred Mwango, Regional Water Expert, IGAD Secretariat; • Mr. John Owino, Programme Officer, IUCN ESARO; • Ms. Chantal Demilecamps, Environmental Affairs Officer, United Nations Economic Commission for Europe (UNECE); • Dr. Callist Tindimugaya, Commissioner of Water Resources Planning and Regulation, Uganda; Member of IGAD TAC on water; • Ms. Gladys Weseka, Director Transboundary Water Resources, Kenya; Member of IGAD TAC on Water. <p>Round of introductions Workshop objectives/agenda and an overview of the work completed so far – Mr. Fred Mwango, Regional Water Expert, IGAD Secretariat</p> |
| 9.45-10.45 | <p>Session 2: The SMM Basin Investment Planning Process <i>Chair: SMM stakeholder representative</i></p> <ul style="list-style-type: none"> • Presentation of the summary descriptions of the preferred 4 bundles of SMM basin cluster of investment projects – IUCN ESARO <ul style="list-style-type: none"> ○ Sio sub-basin, ○ Malaba-Malakisi sub-basin ○ The Roadmap for the development of a full-fledged SMM investment plan: timeline and milestones for operation – Gladys Wekesa, TAC, Kenya <p>Q&A and discussion</p> |
| 10.45-11.15 | Tea/Coffee break |
| 11.15-1.00 | <p>Session 3: Facilitated dialogue for the design of an MoU between Kenya and Uganda for the joint management and development of the Sio-Malaba-Malakisi <i>Chair: TAC Kenya</i> <i>Facilitator: Mr. Diego Jara, IUCN Environment Law Centre, Bonn</i></p> <ul style="list-style-type: none"> • Main elements of an MoU <ul style="list-style-type: none"> ○ Preamble ○ Scope ○ Objectives ○ Guiding principles ○ Commitments ○ Implementation mechanisms |
| 1.00-2.00 | Lunch Break |
| 2.00-5.00 | <p>Session 3 (Continuation): Facilitated dialogue for the design of an MoU between Kenya and Uganda for the joint management and development of the Sio-Malaba-Malakisi <i>Chair: TAC Kenya</i> <i>Facilitator: Mr. Diego Jara, IUCN Environment Law Centre, Bonn</i></p> |

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| | <ul style="list-style-type: none"> • Facilitated Discussion on: <ul style="list-style-type: none"> ○ The Joint Working Group for the SMM investment planning and other related bodies and functions ○ Roles and responsibilities of the Joint Working Group for specific tasks: <ul style="list-style-type: none"> ▪ Steer the development of the SMM investment plan, ▪ facilitate the development of a portfolio of projects and its regular updates, ▪ develop and implement the resource mobilization strategy ○ Financial sustainability of the new institutional arrangements: government commitments i.e. how Kenya and Ugandan government plan to ensure financial resources are allocated from national budgets to enable the functioning of the joint working group/steering committee • Roadmap for the finalization and adoption of the revised MoU |
| Day 2 Wednesday September 26th 2018 | |
| 9.00:11.00 | <p>Session 3 (Continuation): Facilitated dialogue for the design of an MoU between Kenya and Uganda for the joint management and development of the Sio-Malaba-Malakisi <i>Chair: TAC Kenya</i> Facilitator: Mr. Diego Jara, IUCN Environment Law Centre, Bonn</p> <ul style="list-style-type: none"> • Review of the MoU working draft • Plenary session • Way forward |
| 1.00-2.00 | Lunch |
| 2.00-4.00 | <p>Session 4: Review and finalize the agenda for the Strategic meeting with the donors Chairs/Facilitators: Fred Mwangi/Chantal Demilecamps Way forward, AoB and Closure,</p> |

DRAFT SUGGESTED WORKING TEXT FOR A MEMORANDUM OF UNDERSTANDING RELATING TO COOPERATION ON THE SIO-MALABA-MALAKISI BASIN

1. PREAMBLE

Taking into account that the Republic of Uganda and the Republic of Kenya (hereinafter “the Parties”) are riparian of the Sio-Malaba-Malakisi basin;

Considering that the Parties have since 2005 been engaged in discussions and activities in the Sio-Malaba-Malakisi basin (hereafter SMM), in the context of fostering transboundary water governance and development;

Aware of the importance of furthering regional cooperation regarding the utilisation and development of common water resources;

Mindful of existing cooperation efforts between the countries through agreements and other joint initiatives of conservation and development of shared waters;

Recognizing the contribution that such cooperation efforts could make towards peace and prosperity of the Eastern African region and towards fostering regional integration;

Recalling the existing Memorandum of Understanding (hereafter “MoU”) between the Republic of Kenya, the Republic of Uganda and the Nile Basin Initiative (NBI)/Nile Equatorial Lakes Subsidiary Action Program (NELSAP) for the integrated management and development of a transboundary water resource of the Sio-Malaba-Malakisi River Basin, signed 4 June 2015;

Recognizing the contributions and work of the existing institutions under the institutional framework of the previous MoU;

Appreciating the benefits achieved so far of such contributions;

Acknowledging the existing cooperation between the riparian communities;

Agree that it is in the mutual interest of the Republic of Uganda and the Republic of Kenya (individually referred to as a “Party” and collectively “the Parties”) to establish a framework operationalized by the following Memorandum of Understanding (hereafter “MoU”).

2. SCOPE

Art. 1 Scope of the Memorandum of Understanding

The MoU applies to the sustainable management and development of water resources of the Sio-Malaba-Malakisi basin (hereafter referred to as “SMM”), its waters and to measures of cooperation, protection, preservation and management related to the uses of its waters.

Art. 2 Use of Terms

Transboundary waters: any surface or ground waters which marks cross or are located between two or more States.

Riparian States: The Republic of Kenya and the Republic of Uganda.

Integrated Water Resources Management: an approach of integrated management of the different phases of water, according to which States should make efforts to achieve the unified management of surface, ground waters and any other waters considered relevant, as well as include the management of other natural resources.

3. OBJECTIVES

Art. 3 Objectives

1. The objectives of this MoU are:

- a) To foster cooperation among the Parties and ensure sustainable development and peace in the region.
- b) To establish the foundations and guiding principles for creating the joint mechanisms for the sustainable management of the SMM, its resources and its catchment.
- c) To ensure that the cooperative framework aims towards securing the investments for the development and management of the SMM by the Parties;
- d) To encourage the development of an effective regulatory and institutional framework that is stakeholder inclusive to foster cooperation and the sustainable development of the basin.

2. The Parties, subject to terms of this MoU, agree to strengthen, promote and develop long-term cooperation in the field of integrated water management on the basis of equality and mutual benefit.

Art. 4 Areas of cooperation

1. Specific areas of collaboration, activities and projects will be identified on the basis of programmatic and/or other relevant criteria and will be specified in one or more agreed annual work plans and budgets.
2. Potential areas of collaboration include:
 - a) Promoting the knowledge and practice of water governance at multiple levels and enhancing capacity to implement basin, sub-basin, national and subnational frameworks contributing to transboundary water governance in the SMM basin;
 - b) Harnessing & developing water resources for development within the ecosystem approach;
 - c) Undertaking joint investment programmes in the basin;

- d) Environment management in the basin;
- e) Resources development and management;
- f) Joint research, development and design project, including mutual exchange of research findings, scientific and technical documentation and information;
- g) Strengthening the institutional framework for transboundary cooperation among Basin states;
- h) Any other areas of cooperation in the field of shared water management to be mutually agreed by the Parties.

4. GUIDING PRINCIPLES

Art. 5 Cooperation

1. The Parties agree to cooperate on joint development of the SMM basin resources and in the effective management of the SMM on the basis of sovereign equality, territorial integrity, mutual benefit and good faith, in order to ensure the optimal utilization and the adequate protection of the waters and its ecosystems.
2. In determining the manner of such cooperation, the Parties may consider the establishment of Joint Bodies to facilitate cooperation on relevant measures and procedures in the light of experience gained through existing cooperation mechanism in the region.
3. In order to achieve this purpose, exchange of information, consultations, notifications and other forms of cooperation are carried out on the basis of good faith.
4. The Parties will support each other in working towards the achievement of the objective and the fulfilment of their respective commitments.

Art. 6 Equitable and Reasonable Utilization

1. The Parties agree to utilize the waters of the SMM in an equitable and reasonable manner. In particular, the SMM and its waters will be used and developed by the Parties with a view to attaining optimal and sustainable utilization thereof and benefits therefrom, taking into account the interest of the Parties, consistent with adequate protection of the SMM.
2. The Parties agree to participate in the use, development and protection of the SMM in an equitable and reasonable manner. Such participation includes both the right to utilize the SMM and the duty to cooperate in its protection and development.

Art. 7 Avoidance of Harm

1. When utilizing the waters of the SMM, Parties agree to take all appropriate measures to prevent the causing of significant harm **as well as the risk of pollution of "no-mans land"**.
2. Where significant harm is caused to another Party, the Party whose use causes such harm agrees to take appropriate measures in consultation with the affected Party, to eliminate or mitigate such harm.

Art. 8 Ecosystem Approach

The Parties agree to cooperate in the management of the SMM, for the integrated management of land, water and living resources and promote their conservation and sustainable use in an equitable way.

Art. 9 Public Participation and Information

1. The Parties agree to ensure appropriate access to information and the opportunity to participate in the decision-making process of all stakeholders involved.
2. The Parties will make sure that information on the conditions of transboundary waters, measures taken or planned to be taken and the effectiveness of those measures, is made available to the public.

5.COMMITMENTS

Art. 10 Maintaining environmental flows

In the management of the water resources of the basin, environmental flows will be provided for the conservation of aquatic ecosystems.

Art. 11 Adoption of integrated strategies and efficient internal measures

The Parties will make all efforts to adopt integrated policies, strategies, and regulations in order to achieve a sustainable development, conservation and use of the shared water resources of the Basin.

Art. 12 Harmonisation of policies, strategies and legislative frameworks

The Parties will provide for the harmonisation of their policies, strategies and legislation in relevant areas of water management and development.

Art. 13 Promotion of good environmental practices

The Parties will encourage the use of good environmental and traditional practices and local know-how of the local beneficiary communities in all areas of the sustainable management of the water resources of the Basin.

Art. 14 Enhancing the cooperative framework

In the implementation of the MoU, the Parties will endeavour to work towards the adoption of a framework for cooperation to coordinate all initiatives pertaining to the Basin.

Art. 15 Policies and strategies of conservation and sustainable use

The Parties agree to, depending on the circumstances and means, jointly design and implement strategies, policies, plans, programmes, and development projects for the conservation and sustainable use of water resources in the Basin.

Art. 16 Collection and sharing of data and information

1. The Parties agree to, through their national institutions, facilitate joint campaigns for data collection on all the water resources of the basin.

- 2.They agree to harmonize data collection methods and techniques, processing and storage.
- 3.They agree to regularly communicate and share the totality of the information, appropriate scientific and technological data on the water resources of the Basin.
- 4.They agree to adopt common databases on the water resources of the Basin.

Art. 17 Joint studies and assessment

When a conflict arises in the use of the water resources of the Basin, the Parties agree to carry out joint surveys and assessments that will allow for appropriate and satisfactory solutions to these problems through mediation and arbitration.

Art. 18 Sensitization of the local communities

The Parties agree to provide for the sensitization of local communities to raise their awareness for improved protection and conservation of the water resources of the Basin.

Art. 19 Capacity building

The Parties agree to design and implement capacity building programmes for all stakeholders involved in the sustainable management of the shared water resources of the Basin.

Art. 20 Joint scientific research

The Parties will encourage research institutions to undertake joint and collaborative research programmes on the management and use of water resources while appreciating local knowledge.

Art. 21 Control and reduction of water pollution

The Parties agree to undertake actions to control and reduce water pollution, and if applicable, take measures for an ecologically sound management of wastes, which will ensure the protection of human health and of the environment.

The Parties will endeavour to ban the importation of foreign waste coming into the Basin for treatment, disposal or recycling.

Art 22. Emergency plans

The Parties agree to develop and implement joint emergency preparedness plans to address unforeseen situations which may be injurious to the people, environment and the water resources of the Basin.

Art. 23 Water resources audits and monitoring

The Parties will promote a better knowledge of the water resources by taking stock of the situation through assessments of the water resources of the Basin.

The Parties agree to set up a mechanism to regularly monitor the quantity and quality of the water resources as well as climatic data of the Basin.

Art. 24 Protection of waters

The Parties, in close collaboration with the local communities, agree to implement programmes to control desertification and erosion within the basin as well as the protection of SMM waters and restoration of the rivers.

Art. 25 Control of water-related diseases

The Parties agree to develop and implement programmes and strategies to prevent and eradicate water-related diseases.

Art. 26 Conservation of aquatic biodiversity

For a sustainable use and better conservation, the Parties will identify, regularly carry out inventory and monitor aquatic biodiversity and take appropriate measures for their conservation, in particular through protected areas.

Art. 27 Control of invasive aquatic species

The Parties agree to adopt all relevant measures to control invasive aquatic flora and fauna that adversely affect the ecosystem of the basin.

Particular attention shall be paid to aquatic endangered species, and to those offering more potential for a sustainable use.

Art. 28 Soil conservation

The Parties agree to undertake measures for the protection, conservation and restoration of soils to ensure sustainable use of the land and water resources.

6. IMPLEMENTATION MECHANISMS

Art. 29 Implementation

In order to ensure the effective implementation of this MoU, the Parties agree to take the following steps:

- a. The Parties accept to exchange information to the fullest extent possible on matters of common interest as well as documentation relating to the projects, in order to attain better complementary action and effective coordination;
- b. The personnel of each Party, actively involved in specific collaboration activities, will seek to meet on a regular basis, and at a minimum once every calendar year, to develop joint work plans and monitor implementation with a view to achieving effective joint implementation;
- c. Each Party will nominate and notify to the other Party a focal point dedicated specifically to coordinating the collaboration and communication under this MoU, and the specific activities undertaken pursuant to the Annual Workplans agreed by the Parties;

- d. Each Party will ensure that any changes made to the list of its focal points will be communicated promptly to the other Party;
- e. The lead Ministry to be Ministry of Water, other relevant sectoral ministries will be involved if need be;
- f. Under the basin joint committee, a secretariat (focal points from each countries within the basin) will work closely with the committee ;
- g. Appoint from among existing staff members a senior Government official of the Ministry responsible for water resources management and development as a National Liaison Officer as part of the National Coordination Office ;
- h. Provide counterpart funds for preparation and implementation of investment projects as required under the project financing agreements. ;
- i. Meet operational costs of the National Coordination Office ;
- j. Permit all goods purchased for the activities under this MOU and financed out of funds provided under this MOU to be imported into the country and without the imposition of any customs duties and other taxes and levies other than levies representing value of services rendered;
- k. Provide staff to plan and carry out the necessary activities.

7. INSTITUTIONAL FRAMEWORK (BASED ON PREVIOUS SMM MEETINGS)

Art. 30 Joint Working Group

The Joint Working Group comprises senior officials (at head of department level) of the governments of the Member States of this MoU. It will facilitate cooperation among the Parties and will be responsible for:

- a. Approving and updating the SMM basin Investment Framework;
- b. Assessing project proposals and formally including those that meet the minimum criteria into the SMM Basin Portfolio;
- c. Prioritizing projects in the SMM Basin Portfolio according to the Benefit Opportunities Assessment framework;
- d. Maintaining a database of relevant project proposals, as well as of projects under implementation, and projects completed;
- e. Actively liaising with national authorities, development partners, and other potential funders to explore funding opportunities to implement the basin priority projects;
- f. Monitoring and evaluating the implementation of the SMM Basin Investment Framework.

8. IMPLEMENTATION MECHANISMS

Art. 31 Timeframe

The Parties agree to establish a set of collaboration activities in the framework of the Annual Workplans according to the availability of funds and resources to be approved by the appropriate administrative authorities of each Party; and undertaken in accordance with jointly established policies and procedures.

Art. 32 Financial Conditions

1. Financial, administrative and reporting provisions relating to any collaboration activities between the Parties should be expressly agreed in the relevant Annual Workplans and Budgets.
2. The Parties agree to develop modalities for joint resource mobilization and financial management.

Art. 33 Dispute Resolution

Any dispute arising out of or in connection with this MoU will be settled by amicable negotiation between the Parties.

Art. 34 Representation

Neither Party will have the authority to incur any liability or make any commitment on behalf of the other Party vis à vis any third party, contractually or otherwise, without the other Party's advance express written consent.

Art. 35 Duration, Amendment, Termination

1. The MoU will enter into force on the date of signature by both Parties and will remain in effect indefinitely until and unless terminated by either Party.
2. This MoU may be amended by mutual written arrangement of the Parties.

Art. 36 Non-enforceability

This MoU is a non-binding statement of the Parties' mutual understanding of their proposed collaboration framework. The MoU is not intended to create any legally enforceable rights or obligations in respect of either Party, including any obligation on their part to enter into any supplemental agreements.

Art. 37 Language

This MoU is signed in English, Luganda and Swahili in two (2) original copies of identical wording, legal value and date, each of which will be deemed an original, and which together will constitute one and the same instrument.

IN WITNESS WHEREOF the undersigned, being duly authorised, have on behalf of the Parties hereto signed this MoU at the place and on the day below written.

Republic of Kenya

Republic of Uganda