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ADDIS ABABA UNIVERSITY

SCHOOL OF LAW AND GOVERNANCE

**THE IMPLICATION OF ETHIO - DJIBOUTI BULK WATER TRANSFER
AGREEMENT IN THE ADVENT OF ETHIOPIAN ACCESSION TO WTO**

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**A Thesis Submitted in Partial Fulfillment of the Requirements of
LL.M. Degree in Public International Law**

2020

ADDIS ABABA UNIVERSITY
SCHOOL OF LAW AND GOVERNANCE
LL.M. DEGREE IN PUBLIC INTERNATIONAL LAW

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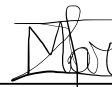
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Plagiarism declaration

I, the undersigned, do hereby declare that this thesis titled “The implication of cross boarder bulk water transfer agreement in the advent of Ethiopian accession to world trade organization, a case study of Ethio-Djibouti water supply agreement”, is my original work and that it has not been submitted for any degree or examination in any other university. Any sources used or quoted have been duly acknowledged.

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Acknowledgment

First of all, I would like to thank the Almighty God for giving me the strength and motivation through the entire period of this study to accomplish this work.

Among the many that deserve thanks for their help my special thanks go to my Advisor, Jetu Edosa for his willingness and constructive comment.

Thanks also due to institution which contributed for undertaking and completing my research by providing me the necessary materials. I am indebted to authorities in Ministry of Foreign Affairs for their cooperation, ministry of finance and documentation and library head of FDRE house of people representative to allow me to access official documents in the archive department which have important contributions for this study.

I would like to express my profound gratitude for my families. My deep love, respect and appreciation goes to them for their continuous encouragement and shouldering many responsibilities. I feel honored when I dedicate this work to them all

Last but by no means the least, I'm very much grateful to and proud of my friends, especially Kidus Merkoriyos, Nuredin jemal, Derej zelege and Habtamu dagne for their unreserved material supports during my studies.

Acronyms

CRC= Convention on the right of the child

CEDAW = Convention on elimination of discrimination against woman

CTE = Committee on trade and environment

DSB = Dispute settlement body

EIA = Environment Impact Assessment

FDI = Foreign direct investment

FDRE = Federal Democratic Republic of Ethiopia

GATT = General Agreement On trade in Good

HRW =Human right to water

HS= Harmonized Commodity Description and Coding System

ICCPR = International covenant on civil and political right

ICESCR = International covenant on economic, social and cultural right

IEL = International Economic Law

IWL= International water law

IFIs = International financial institutions

IMF = International monetary fund

WWF =World Water Forum

MFN = Most Favor nation treatment

NT = National treatment

NAFTA = North American free trade agreement

MEAs = Multilateral environmental agreements

TBT= Agreement on technical barrier of trade

TRIPs = Agreement on trade related aspects of intellectual property

PSNR = Permanent sovereignty over natural resource

UNWCC = Convention on the Law of the Non-navigational Uses of International water course

WB = World Bank

WTO = World Trade Organization

WWF= World water forum

WWV= World water vision

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CHAPTER ONE

GENERAL INTRODUCTION

1.1. Background

Global water scarcity is growing at alarming rate. Water is available in limited amount but the demand is increasing. Due to Climate change and population growth states failed to satisfy even the minimum needs of the people. Beside water is unevenly distributed across the world, e.g. Middle East and North Africa countries are the least water resource area.¹

Hydrologists have predicted that by the year 2025, as many as 3.5 billion people will be living in water stressed countries².

Many States have resorted to bulk water transfers to meet this scarcity. It is a large-scale transfer by human made diversion, using canals, tanker ships or pipeline. ³ It is all about transferring one country water resource out of its catchment area to any other place.⁴

Bulk water transfer creates new entitlements or reallocates the existing entitlement as it is the movement of water from the watershed of origin to a more distant location.⁵

In terms of arrangement the transfer occurs between different actors in different modes. It can be between governments in the form of treaties or contractual arrangement for sale or export. Sometimes government and private company can be actors in the transfer. Even it can be occurring between private parties⁶.

While bulk transfer of water can solve scarcity problem, it will have severe environmental, social and economic concerns for both water supplier and receiver states⁷. For instance withdrawal of ground water in excess of the rate at which the aquifers recharged leads to depletion of the aquifers or will entail permanent removal of the water from that location , socially transfer may

¹ Nora Hansen, "Human right to water and its status in international law", research in public international law, faculty of law of Stockholm University, 2018, p.1.

² McNiven, James, "Bulk Water Exports: Environmental Concerns and Business Realities", Paper (2005).

³ Edith Brown Weiss, "water transfers and international trade law" in Edith Brown Weiss, Laurence Boisson De Chazournes and Nathalie Bernasconi - Osterwalder (ed) *Freshwater and International Economic law* (2005) p.67

⁴ *ibid*

⁵ A.DanTarlock, "Water Transfers: A means to achieve sustainable water use" in Edith Brown Weiss, Laurence Boisson De Chazournes and Nathalie Bernasconi-Osterwalder(ed) *Freshwater and International Economic Law* (OUP 2005)37

⁶ Edith Supra note 3 at 74

⁷ McNiven Supra note 2.

create shortages in potable water supplies to nearby communities and economically transferring bulk water to other places require huge infrastructure⁸.

The World Water Forum recommends that any cross-border bulk water transfer arrangement should be performed in accordance with the principles of sustainability set out by world commission on dams.⁹ It also recommends exhausting other option such as, recycling or desalination prior to deciding to undertake bulk transfer.

If bulk transfer is the better option then, both supplier and receiver state should calculate the amount of water that could be transferred without causing of water drought and choose the proper way of transportation prior to transfer as preventive and precautionary measures¹⁰.

Until recent decade fresh water was considered as a public resource and was thought to be abundant. But this perception was begun to erode. Private sector and corporations understand the value of water and have begun laying the ground work for water to become a commodity to be traded and sold in open market like oil¹¹.

At UN conference held in doubling in January 1992, fresh water was declared for the first time as “Economic Good”. After that water has been promoted as a commodity by various international agencies such as the World Water Commission [it is an international water policy thin thanks that hold global water forum every three years], the world bank which promote water privatization in developing countries and big bottle water trading corporations¹².

Trade and investment agreements have been used as a tool by private companies and corporations to influence government policies and to challenge public control of fresh water resources. Those Investors who are involved in a massive land grabs through investor state dispute settlement (ISDS) claim ownership of water used in their operation¹³.

⁸ Ibid.

⁹ Jamie pittock , Jian-hua Meng, Ashok K.Chapagain , Inter basin water transfer and water scarcity in a changing world –a solution or pipedream ?discussion paper, Aug 2009, WWF Germany.

¹⁰ Mehmet Cagatay, bulk water transfer, Hacettepe University Faculty of Economics and Administrative Sciences Department of International Relations Ankara-Turkey, available at <https://www.researchgate.net/publication>

¹¹ Maude Barlow, “Water for Sale: How Free Trade and Investment Agreements Threaten Environmental Protection of Water and Promote the Commodification of the World’s Water” , (2017).

¹² The International Conference on Water and the Environment was held in Dublin, Ireland in 1992, forwarding four major principles concerning water and the fourth principle recognize water economic value in all its competing uses and recognized it as an economic good.

¹³ Maude Barlow , Supra note 11at 5

The idea of considering fresh water as a pure commodity is highly contested by Human right activists and NGOs. They argue, meeting the basic needs of human and safeguarding ecosystem should be given priority and it is beyond this requirement that water should be treated as an economic good. For them water is not just a mere commodity rather it is unique natural resource essential for all forms of life, having strong cultural and religious implications. For them, fresh water is a resource with higher social and community value¹⁴. They further argues that , the UN resolution recognizing water as a basic human right to be realized water in all its form should be removed from all such trade deal.

To understand the place of fresh water under Ethiopian law and policy the first instrument is the Constitution as it is supreme law of the land. Accordingly ownership of all natural resource including fresh water is exclusively vested in the state and public¹⁵.

Water is recognized not only as a limited natural resource and a public good but also as a human right under the constitution. The constitution incorporates ESCR and obligates the state to allocate resources to provide to the public health, education and *other social service*. [Emphasis added]. What are publicly funded social services? The lists in Article 41 (4) are not exhaustive. We can infer water as human right as it is one of publicly funded social services.

The water Resources Management Proclamation that regulates the management and utilization aspects of water resources in Ethiopia aims to achieve that water use allocation rights must be geared towards protecting and utilizing the water resources of the country to maximize *social benefits of the people of Ethiopia*¹⁶.

The Water Resource Policy has stipulated that water has to be considered both *as an economic and social good*. Water has to be priced in order to promote economic efficiency, social equity, and ecological sustainability¹⁷. Water tariff structures according to the Ethiopian Water policy are site-specific and determined according to local circumstances.

For water supply and sanitation services, the commanding principle is the “user pays principle”, especially for urban water supply and sanitation services¹⁸.The policy further states that the “user

¹⁴ Nora Hansen ,Supra note1, at 19

¹⁵ Constitution of The Federal Democratic Republic of Ethiopia(1995), Art 40(3)

¹⁶ Ethiopia Water Resources Management Proclamation 197/2000, Federal Negarit Gazeta, 61st Year No. 25 Addis Ababa, 9th March 2000 , preamble, paragraph 1 and Art 3

¹⁷ Ethiopia Water Policy (2000)Section 2.2.5 (b)

¹⁸ *ibid*

pays” principle should carefully be harmonized with the ability and willingness to pay principles¹⁹. The Policy strongly emphasizes that tariffs should neither be too low leading to the abuse of its use or should it be too high discouraging consumption²⁰. While rural tariff settings are based on the objectives of fully meeting the operation and maintenance costs, urban tariff structures are based on the basis of full cost recovery²¹.

The Policy seeks to harmonize the supply with consumer ability to pay. It exempts economically disadvantaged rural communities from paying water service tariffs and the cost must be borne by the government, as appropriate, and in so far as the communities are able and willing to cover the operation and maintenance costs on their own²².

Ethiopia has immense surface and groundwater resources potential. Since most of the rivers are Tran’s boundary, 97% of this estimated annual stream flow of the country flows out of Ethiopia into neighboring countries and only 3% of this amount remains within the country²³. The country has 12 major basins, 12 large lakes, and differently sized water bodies However, three of the major basins are dry basins, which do not have any stream flow in these basins²⁴.

Despite being water rich country, only 34% of the Ethiopian population has access to an improved water supply. More than 46% of the population of Ethiopia does not have access to the required quality and quantity of water for consumption. The situation is worst in rural area. The sources of water for people who live in rural area are river, lakes, springs, or unprotected well²⁵.

On the contrary, Djibouti has dry climate and high potable water demand²⁶.

Djibouti is strategically important in the horn region. Ethiopia access the Port of Djibouti. The people of Djibouti are largely dependent on Ethiopia for their subsistence since Ethiopia is the principal supplier of all types of food stuffs to Djibouti. ²⁷

¹⁹ ibid

²⁰ ibid

²¹ ibid

²² ibid

²³ Dessalegn Worku, “Theoretical and Empirical review of Ethiopian water resource potentials, challenges and future development opportunities,” International Journal of Waste Resource., Vol 8(2018), p.1

²⁴ Belete , Yilma and Assefa , Surface Water and Groundwater Resources of Ethiopia: Potentials and Challenges of Water Resources Development , Feb 2014 P.98

²⁵ Ibid

²⁶ [https://en.wikipedia.org/wiki/Djibouti_\(city\)](https://en.wikipedia.org/wiki/Djibouti_(city)) , Accessed 3 March 2020.

²⁷ https://en.wikipedia.org/wiki/Djibouti_Ethiopia_relation , Accessed 13 March 2019

Diplomatic relations between Ethiopia and Djibouti was established in 1984, following Djibouti independence from France, especially on economic areas.

Water is becoming additional element of bilateral integration between Ethiopia and Djibouti. To meet potable water demands in Djibouti, the government of Ethiopia and Djibouti signed a Memorandum of Understanding in September 2012 on the terms of bilateral cooperation in the field of drinking water. The deal is aimed at creating access to affordable and safe drinking water in Djibouti.²⁸

Ethiopia and Djibouti signed water supply agreement in Djibouti on 20th day of January 2013. The Ethiopian parliament has ratified this agreement on July 3, 2014²⁹.

The agreement, aims to provide 103,000 m³ water/ day, for a period of 30 years free of any charge.³⁰

This paper will analyze the implication of concluding bilateral water supply agreement Vis a Vis international trade law discipline and recommends alternatives which are important for ensuring sustainable water use in the context of Ethiopia's anticipated accession to WTO.

1.2. Literature review

Considering bulk water as a commodity that can be traded is a new phenomenon. This is mainly because in the past fresh water was considered as a public good which could not be commodified. But now trade in bulk water has been seen as an answer to the scarcity.

Applicability of WTO/GATT rules on bulk water trade rests on the determination of whether bulk water is "Good" or "product". This is the area that there has not been any consensus on it.

In the absence of formal exclusion of water from the scope of GATT, one could argue that water should be considered as tradable good subject to GATT.

GATT has no definition of "Good" or "product". However, the world customs union's harmonizing commodity description and coding system /HS/ cover water in various forms³¹. Such inclusion has been interpreted by some scholars as evidence of GATT applicability to all forms of water if traded between states. While others say this is a mistaken understanding of the

²⁸ Agreement between the government of the federal democratic republic of Ethiopia and the government of the republic of Djibouti for the supply of water, Jan 2013.

²⁹ Procl. No.856, 2014. Fed. Neg.Gaz, year 20, No.57

³⁰ Ethio- Djibouti agreement Supra note 28.

³¹ HS is description and coding system developed by world custom organization to identify product for tariff purpose. Tariff heading 2201.90.0000 and Heading 20.09.

purpose of tariff schedule. They argue HS should not be taken as a reference to provide a definition of good falling under GATT rule. Rather HS is there to determine particular tariff heading of product.

Going through some sort of process or transformation has also been applied to determine bulk water as good or product. In this regard Smith says “Something must be done to water to make it a product, and that mere diversion, pumping, or transfer does not suffice”. According to Smith, as long as in its natural state water could not be considered as a ‘product’³².

Edith shares Smith idea. He said the fact that water is removed in bulk and lifted out of its natural state should not make bulk fresh water a tradable good subject to GATT rules. At least one additional step should be taken to transform bulk water into products³³.

However, the claim of something must be done to water to make it a product is not always true. Crude Oil is a subject of trade even it is selling in a form that it is extracted from soil. Therefore, GATT could be applied on bulk water in the same manner it does apply to crude oil³⁴.

Given the uniqueness of fresh water as a resource essential to all life, Edith , further, argues to completely exclude bulk fresh water from the scope of the GATT, as a matter of ‘anticipatory caution’.

“Anticipatory caution” as applied to fresh water resources implicate that in the face of uncertainty about the future, a country should be able to exercise its sovereign authority to maintain its fresh water resources without having to convince the trade community on the legitimacy of its actions³⁵.

Other warns of over exploitation of fresh water resource, if bulk water considered as tradable good subject to GATT. Water in its natural state is being over exploited, polluted and abused to the extent of endangering its sustainability. As a result, pricing and commoditization is becoming the mainstream philosophy so as to bring efficient utilization³⁶.

³² Bryant Walker Smith, “Water as a public good: the status of water under the general agreement on tariffs and trade.” *Cardozo Journal of International and Comparative Law*, Volume 17;291, p.293

³³ Fitzgerald Temmerman, "Bulk fresh water resource and the GATT", *Trade in water under international law, Bulk fresh water, irrigation subsidies and virtual water* (2017) P.28-50

³⁴ Mehmet, *supra* note 10 at

³⁵ Edith . *Supra* note 3 at 83

³⁶ Katsumi Matsuoka, *Tradable Water in GATT/WTO Law*, Paper presented at the AWRA/IWLRI-University of Dundee International Specialty Conference, August 6–8 2001, available at <http://www.awra.org/> (last accessed on December, 2016).

Alxi Gowlland argues for excluding water from the scope of the GATT and warns of irreversible over exploitation causing severe environmental damage. He concludes that, national states should therefore remain in possession of full sovereignty over bulk fresh water resources³⁷.

Therefore, the issue whether fresh water in its bulk state should be subject to international trade rule or should it receive different treatment is far from settled.

1.3. Research problems

The application of international trade law rules to cross boundary bulk water transfer is the most controversial issue because it contains environmental and social concern against trade concern.

On January 2013 Ethiopia and Djibouti signed water supply agreement in Djibouti which gives Djibouti 103,000 m³ water daily.

Ethiopia has been in the process of accession WTO since 2003. One of the guiding principles of the trading system is trade without discrimination. Member state should not discriminate between its trading partners and between its own and foreigner products, service or nationals. If a member state is willing to give any advantage to any other country this same advantage must also apply automatically to all other WTO members as well. Being WTO member means subjecting oneself to compulsory jurisdiction of WTO dispute settlement procedure.

Taking in to account these facts, the researcher will try to raise and address the following issues,

- How fresh water should be treated?
- How international trade law commitments in the one hand and contractual obligation to supply bulk water on the other hand will go simultaneously?
- What will be the possible negative outcomes that arise from the application of trade law dispute settlement procedure for dispute that may arise from bulk water transfer?

1.4. Research Objectives

- Critically examine the contents of Ethio - Djibouti water supply agreement and analyze its implication on Ethiopian commitment under world trade organization.
- Recommending the best approaches to negotiate trade agreements concerning fresh water.
- Analyze to what extent environmental, social and economic costs were dealt prior to signing the agreement.
- Recommending the best ways to resolve dispute that may arise in bulk transfer.

³⁷Alix Gowlland, Water governance in motion, "towards socially and environmentally sustainable water law", (2010), p.64

1.5. Research Questions

The research tries to focus on the following questions

- Assuming successful completion of accession process how could Ethiopia strike the balance between WTO commitments in one hand and bulk water transfer agreement on the other hand?
- Is bulk water an economic good? What is the status of bulk water under GATT 1994? Should we treat bulk water just like other natural resources or should we give it differential treatment owing to its unique features?
- What are the necessary and precautionary measures that should be taken prior to undertaking bulk transfer? What are the Drawbacks of the agreement?
- How dispute that may arise in bulk water transfer should be settled?

1.6. Methodology

The research involves qualitative methods in that it has devoted on theories and logical arguments on the existing legal instrument dealing with international trade law in bulk water. Significant attention was also given to the evaluation of the substance of the agreement to substantiate the study; relevant data from concerned bodies have been collected. Reviews of various literatures and analysis of law related with the subject matter under consideration has been employed. Source of information have been both primary and secondary sources. The primary data was collected from government organs such as ministry of foreign affairs and the house of people representatives.

Secondary data employed were policies, national legislations, domestic and foreign literature related with the study. International policy documents and agreements such as WTO, Agenda 21 and doubling declaration constituted as secondary data which were considered in the study. Internet sources were also consulted to get up to date in formations.

1.7. Limitation of the study

Since the practice of bulk water transfer is recent phenomena the researcher believes that lack of relevant material on the subject matter will be an obstacle and this may minimize the quality of the research. However the researcher will endeavor to make all possible efforts to minimize such constraint through consulting the materials written in other legal systems.

Time constraint to collect data and information will also be another limitation. However, the researcher will try to work diligently to come up with fruitful paper as much as possible.

1.8. Thesis organizations

The research is organized in four chapters each of which is further divided into sections and subsections. The first introductory chapter deals with background, literature review, objective of the study, research questions, methodology, limitations and organization of the paper.

Chapter two describes conceptual, theoretical and normative frameworks of cross boarder bulk water transfer. The conflicting trend with in international community about how bulk water transfer should be viewed will be discussed under this chapter. Dispute settlement mechanism which at the same time enhances sustainable water use, for dispute that may arise from bulk transport will be also the focus of this chapter.

Chapter three addresses the main focus of the study, the implication of Ethio - Djibouti water supply agreement in the advent of Ethiopian accession to WTO. Here the substance of the agreement will be thoroughly scrutinized in light of GATT 1994 rules. The last chapter tries to summarize the study and forward recommendations.

CHAPTER TWO

2.1. CONCEPTUAL, THEORETICAL AND LEGAL FRAMEWORK OF CROSS BOUNDARY BULK TRANSFER OF FRESH WATER

Introduction

Water scarcity is a major problem all over the world. By 2025, half of the world's population will be living in water-stressed areas³⁸. Billions of population of the world is living without safe drinking water. The scarcity is worsening due to exhaustive depletion of water resources and inadequate legal framework for water management. Water has become the key economic, social, political as well as environmental agenda both globally and locally³⁹.

In the past water has been considered as resource exclusively fallen under public ownership and water trading was taken as an immoral activity. But this thinking was changed and water came to be considered as scarce economic good which should have a price. The idea of considering water as tradable good has begun to emerge Since 1980s⁴⁰.

Until 1980s bulk water transfer remains only theoretical possibility. However, since 1990 increasing number of bulk transfer arrangement has been concluded. E.g. Israel and turkey water supply agreement⁴¹.

In 2002 the United Nations Committee on Economic, Cultural and Social Rights issued a General Comment, which openly expressed that “the concept of water management is not to be limited to its economic dimension only, and that access to water should be considered as a human right”. The Comment clearly states that everyone is entitled to sufficient, affordable, accessible, safe and acceptable water for the purpose of personal and domestic usage.⁴² On the other hand by 1992, Agenda 21's make it clear that economic value of water was part of the mainstream knowledge in water policy, this can be gleamed from the language of its Chapter 18 which says “Water should be regarded as a finite resource having an economic value with

³⁸ World health organization , 'Drinking-water' <https://www.who.int/news-room/fact-sheets/detail/drinking-water> , accessed 5 March 2020

³⁹ Ibid

⁴⁰ Rene Uruena, “international trade law and fragmentation in “water regulation”, societies of International Economic Law, (2008), p.5

⁴¹ Ibid.

⁴² General Comment No. 15 (2002) of the Economic and Social Council, "The Right to Water", UN Doc E/C.12/2002/11 of 20 January 2010.[Here in after called GC 15], Para 2.

significant social and economic implications regarding the importance of meeting basic needs”.⁴³ In addition, Dublin Principle under its principle no. 4 states that, ‘Water has an economic value in all its competing uses and should be recognized as an economic good’.⁴⁴

The move towards commoditization of water and subjecting it under international trade law discipline is not an easy task because international trade rules may be incompatible with domestic regulation that linked with protection/ preservation of water and ecosystem. There is inherently different approach between water and ecosystem policies which needs flexibility on the one hand and trade policy which require secured and predictable legal framework on the other hand⁴⁵.

Since, trade in bulk water is a new phenomenon it has a legal lacuna regarding how the issue is to be governed under public international law. Whether the relevant rules of WTO/GATT should apply to trade in bulk water is debatable.

This part of the paper expounds the concepts of bulk water trade and examines the legal status of bulk water under WTO rules and disciplines.

2.1.1. General remarks on cross boundary bulk water transfer

Bulk transfer of water is defined as large scale transfer of water by human made diversions, including canals, tanker ships or pipeline⁴⁶.

Bulk water trade is a new phenomenon as compared to bottled water trade. This is mainly because of two reasons. First, Countries were reluctant to engage in the export of this natural resource particularly because water was for a long time considered a public good which could not be commoditized. Second, technical limitations in transporting water along long distances and in determining accurately the amounts transported have also constituted an obstacle to trade in bulk water⁴⁷. New bulk storage and transfer technologies have now been developed to make it

⁴³ United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992 Agenda 21 available at <https://sustainabledevelopment.un.org/content/documents/Agenda21> accessed on February 28, 2020.

⁴⁴ Dublin Statement on Water and Sustainable Development, available at <http://www.wmo.int/pages/prog/hwrp/documents/english/icwedece.htm>, accessed on March 06, 2020.

⁴⁵ Arjen Y. Hoekstra, World Trade Organization Economic Research and Statistics Division, Working Paper for the World Trade Report 2010 on "Trade in Natural Resources: Challenges in Global Governance", January 2010, p.2.

⁴⁶ Edith Supra note 3 at 74

⁴⁷ Alix G. Gualtieri, “Legal Implications of Trade In ‘Real’ And ‘Virtual’ Water Resources”, IELRC Working Paper 2002, P.3

possible to move large volumes of water across long distances for commercial purposes, including through massive pipelines or supertankers⁴⁸.

Opening up the international market to water has been seen as an answer to the inequitable distribution of water across the world⁴⁹. Despite the high cost of transferring water over long distances as well as growing public pressure against water trade in exporting countries, there is increasing momentum for the establishment of an international water market by multinational and domestic corporations⁵⁰.

Bulk transfer of water can be conducted between different actors in different modes. It can be conducted between governments through contract or treaty, between private parties or between government and private parties⁵¹. In 2002, Israel agreed to buy 1.75 billion cubic feet of water from Turkey every year for a period of 20 years. This is typical case of large scale bulk water trade on contractual basis⁵².

2.1.2. Impacts of cross boundary water transfer

While cross boarder water transfer can solve water scarcity problem, it will also entail the following significant economic, social and environmental cost for both water supply and receiver country⁵³,

Environmental costs

- Fish species and organisms which are beneficial for both water and soil of the environment can be harmed when they are transferred from one basin to another one.
- It can cause a quality decrease if the water transferred has lesser quality than their actual water that is already existed
- It can cause water drought
- Transfer of invasive alien species between river basin

Social costs

⁴⁸ Ibid.

⁴⁹ M. Clayton, "Forget OPEC The next cartel may export drinking water," Christian Science Monitor, (2004), available at <http://www.csmonitor.com/2004/1230/p13s01-sten.html>, accessed on February, 22, 2020

⁵⁰ David Johansen, "Bulk Water Removals, Water Exports and the NAFTA, (2002), available at <http://publications.gc.ca/Collection-R/LoPBdP/BP/prb0041-e.htm>, accessed on , January 09,2020

⁵¹ Edith Supra note 3, at 74

⁵² Mike Muller and Christophe Bellman "Trade and Water: How Might Trade Policy Contribute to Sustainable Water Management?" (ICTSD) International Environment House (Geneva, Switzerland) p.14

⁵³ Mc Niven Supra note 2 at 3.

- All the communities living close to the watersheds from which the water is removing will be displaced.
- Removing water from watersheds could result in shortages in drinking water supplies to nearby communities
- Low or almost non-existent consultation with those people who are affected by the transfer.

Economical cost

- Transferring water to other places require huge infrastructure
- people who live near the basin will be permanently lose farm lands due to the construction of infrastructures necessary for transferring the water
- During dry season, the area will also be affected by drought.

Therefore, stated should consider these social, economic and ecological costs first prior to the transfer.

2.1.3. bulk transfer as the real solution for scarcity

We have seen that bulk water transfer have huge ecological, economic and social costs. Therefore we should ask whether bulk transfer is the real solution for water scarcity.

The World Water Forum recommends that any cross-border bulk water transfer arrangement should be performed in accordance with the principles of sustainability set out by world commission on dams. Accordingly, prior to transfer, comprehensive “needs and option assessment” should be conducted⁵⁴. WWF recommends exhausting other option prior to deciding to undertake bulk water transfer. These alternatives are⁵⁵,

- I. Examine whether the water demand can be satisfied through other alternatives such as water recycling, virtual water trading or desalination to supplement local water supplies.
- II. Undertake cost benefit analysis of likely negative impacts of bulk transfer on both supplier and receiver state. Critically examine the economic, environmental and social implications.
- III. Devise mechanisms to mitigate the possible environmental, social and economic cost associated with cross boarder water transfer.

⁵⁴ Jamie Pittock Supra note 9 at 5

⁵⁵ Ibid at 7

- IV. Consult with people who can be directly/ indirectly affected by transfer prior to deciding to undertake the transfer.

2.1.4. How to mitigate the impacts of bulk transfer

After exhausting all alternatives and if bulk transfer is the only option available to cope up the scarcity, states should take the following preventive and precautionary measures⁵⁶.

- i. Trading countries should measure the precipitation rate of the area so that the supplier country would be able to calculate how much water could be transferred without a cause of water drought and enable to know the maximum limit that they must not go beyond it ⁵⁷. Otherwise, they could damage the environment if they do not have any idea about the limits.
- ii. Supplier country should investigate the organisms that live in the water basin. Because those organisms can be beneficial for plants and soil, moreover can be in a role of balance in environment that could cause harm if it is disrupted. After the investigation, if they come up with a result of absence of a threat, then they can transfer it securely with no doubt. If there is a threat, they can transfer after taking precautions such as purifying organisms and putting back them in their first place⁵⁸.
- iii. There may be intermixing of fish species that cannot live together⁵⁹. If there is such threat then they can transfer the water by tanker ships without joining any water basins together but using any other place to unload them. Therefore, planning is important.
- iv. Countries should measure the quality of the water which is planning to transfer somewhere else and the water they already had if they are planning to mix them. Because if the quality of the water, to be transferred, is less than they already had then the quality of their original, water will decrease. To prevent this problem, measurement process has to be done⁶⁰.

2.1.5. Emerging Norms on IWL in general and bulk water transfer in particular

⁵⁶ ibid

⁵⁷ Mehmet supra note 10 at 4

⁵⁸ ibid

⁵⁹ ibid

⁶⁰ ibid

IWL has been undertaking significant changes to efficiently respond to the global water crisis. These changes are the result of cross fertilization of norms and principles of international economic law, international human right law and international environmental law⁶¹.

2.1.5.1. Economization

Increase in water demand has made the big trading companies of the world consider water as a profitable industry and beneficial trading good. Water is referred to as Blue Gold in the 21st Century⁶². Treating fresh water as an economic good is manifested in different international legal instruments.

Dublin Declaration

The view that efficient and sustainable use of water can only be achieved through its economic valuation has been dominant in international development and policy debates since the 1992 International Conference on Water and the Environment held in Dublin, Ireland, which led to the adoption of the Dublin Statement⁶³. The conference was a compromise between those, mainly economists, who wanted to treat water in the same way as other private goods, subject to allocation through competitive market pricing, and those who wanted to treat water as a basic human need that should be largely exempted from competitive market pricing and allocation⁶⁴. The question is whether water is a purely private good that can reasonably be left to free market forces, or a public good that requires some amount of extra-market management to effectively and efficiently serve social objectives⁶⁵.

The proponents of water as a private good contend that water is just like any other good, that its production allocation should be determined by the amount that people are “ready, willing, and able to pay” for it. If the poor cannot pay as much for a unit of water as the rich they should get less water. This is what the proponents of water as a public good object to. They contend that safe water is a basic need that should be available at reasonable levels to everyone⁶⁶.

⁶¹ Paulo Canelas de Castro, “Trends of development of international water law”, 6 Beijing L.Rev 285 (2015) p.285

⁶²Reza Ardakanian, The fair distribution of water, Water and the Environment Pontifical Academy of Sciences,2007 ,p.10

⁶³ Dublin Statement, supra note 41

⁶⁴ C. J. Perry, Michael Rock, and D. Seckler , Water as an Economic Good: A Solution, or a Problem?

⁶⁵ ibid

⁶⁶ ibid

The Conference was finalized by forwarding four major principles concerning water. The fourth principle states that,

“Water has an economic value in all its competing uses and should be recognized as an economic good”.

Agenda 21

In 1992 the United Nations Conference on Environment and Development, [Earth Summit], was held in Rio de Janeiro Adopted Agenda for the 21st Century⁶⁷. Chapter 18.8 of Agenda 21 clearly acknowledges that water should be managed as both an economic and social good. It states that,

“Water should be regarded as finite resource having an economic value with significant social and economic implication regarding the importance of meeting basic needs”.

The WWV, adopted in 2000 by the World Water Council, stated that water must be treated as an economic good and introduced the idea of full-cost pricing of water services for all human uses. All this shows, international community has accepted that water should be treated as an economic good in order to solve problems of scarcity, inefficiency and unsustainability⁶⁸.

Water Commodification / pricing

Water undergoes through a complicated industrial process starting from extraction to constructing pipes and dams. The process involves the use of labor and capital, which in effect shifts the notion of considering water as a common resource into a value-based product. Therefore water starts to acquire a price. It is argued that through market mechanisms water will be allocated more efficiently⁶⁹.

The commodification of water refers to the process of transforming fresh water, from a public good into economic good. Once commoditized an economic good can be bought or sold at a price determined by market. I.e. market values replace social values previously attached to the good⁷⁰.

Commodification has its theoretical roots in neoclassical discourse whereby a good or service is assigned an economic value which prevents misuse. This market-based approach proposed by

⁶⁷ Agenda 21, supra note 45

⁶⁸ Alix G. Gualtieri supra note 47 at 2

⁶⁹ Reza Ardakanian supra note 59 at 11

⁷⁰ https://en.wikipedia.org/w/index.php?title=Commodification_of_water&oldid=918901086, Accessed on March 2020.

neoliberals as "market environmentalism": is described as a method of resource regulation that promises economic and environmental objectives can be met in tandem⁷¹.

Those who support for commodification of water argue that

- Fresh water is a commodity which should have a price. The price should be high to enhance efficient utilization of it. Transformation of water from a public good to an economic good claimed as better management and allocation of a resource, such as water⁷².
- Commodification can be an important way to better value water. A market that facilitates internalizing the costs of water consumption is an important tool toward advancing sustainable water management. When consumers do not internalize the costs of water consumption, water is often wasted⁷³.

Those who are against commodification forward the following arguments

- Commodification is not proper because water is essential public good that is necessary to all forms of life and to preserve sustainability of the ecosystem as well. Emphasize on the role of bulk water in fulfilling the basic human right to water⁷⁴.
- Fresh water has unique characteristics which makes it different from other natural resource⁷⁵. Therefore, Countries should be able to protect such a precious, unique and strategically significant national resource from short-sighted incentives leading to overexploitation.

2.1.5.2. Humanization

Development Human Right To Water

Today water is also became the concern of human right law. Every one entitled to have access to water of sufficient quality and quantity to sustain life. Water plays very significant role for implementing human rights and freedoms that have been enshrined in the charter. Other human rights cannot be executed without water.

International Human Rights instruments

⁷¹ Ibid

⁷² A. Dan Tar lock, Supra note 5

⁷³ Rhett Larson, the Case of Canadian Bulk Water Exports August, 2015, p.5

⁷⁴ Stefen Mc Caffrey , “The Human Right to Water, Domestic and International Implications”, (1992).

⁷⁵ Fresh water has no substitute and has vital role to conserve the ecosystem.

United-Nation is the leading international organizations in the area of human rights⁷⁶. The UN's Economic and Social Council drafted the Universal Declaration of Human Rights which finally gave rise to International Covenants on Civil and Political Right (ICCPR) and International Covenant on Economic Social and Cultural Right (ICESCR).

Human Right to Water (HRW) is not explicitly recognized under these two instruments. But this does not mean that humans do not have the right to water.

We may infer the right from the right to life, which is contained on ICCPR, and the rights to health, food, housing and adequate standards of living, which are included in the ICESCR⁷⁷.

The UN committee on civil and political right in 1989 comes up with broader interpretation of right to life⁷⁸. Accordingly, it is not only guaranteed against arbitrary deprivation, but also indicates the right of human being to have appropriate means of subsistence and conducive standard of living.

Convention on Elimination of Discrimination Against Water⁷⁹ and Convention on Rights of Child⁸⁰ explicitly recognized water as an individual human right. However these instruments only targets specific groups of the society [woman and children].

The 1997 UN Convention on the Law of the Non-navigational Uses of International Watercourses⁸¹ under Article 10 paragraph 1, states that

“No use of an international watercourse enjoys inherent priority over other uses.”

Under paragraph, 10.2, it is stated that

“In the event of a conflict, it shall be resolved “with special regard being given to the requirements of vital human needs”

The UNGA stated that in determining “vital human needs”, special attention is to be paid to providing sufficient water to sustain human rights, including both drinking water and water required for the production of food in order to prevent starvation’. Thus, drinking water is the

⁷⁶ The Charter of the United Nation San Francisco, 1945, preamble.

⁷⁷ Article 6 ICCPR “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrary deprived of his life.”, Article 11 and 12 of ICESCR

⁷⁸ General comment No 36 of civil and political council, “Right to life”, UN Doc [Herein after called GC No 36].

⁷⁹ Ethiopia has signed the agreement on Jul 8, 1980. Available at <http://www.un.org/womenwatch/daw/cedaw/states.htm>, article 14 (2) (h), Accessed on April 2, 2020.

⁸⁰ Ethiopia has ratified the agreement on 14 may 1991, available at <https://treaties.un.org/Pages/ViewDetails.aspx?src>, article 24 (1) (2)(c) Accessed on April 2, 2020.

⁸¹ The United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, May 21, 1997, UNGA Resolution A/RES/51/229, 36 ILM 700

most vital human need. It almost certainly implies that water for cooking and washing to maintain public health standards also falls within the scope of vital human needs⁸².

General-Comment No. 15 is the most comprehensive recommendation, elaborating the right to water in the ICESCR. CESCR infer the right to water and sanitation from Article 11 and 12 of the ICESCR. Article 11, paragraph 1, of the Covenant specifies a number of rights emanating from, and indispensable for, the realization of the right to an adequate standard of living ‘including adequate food, clothing and housing’. The committee states that use of the word ‘including’ indicates that this catalog of rights was not intended to be exhaustive⁸³. The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival. The right to water is also highly related to the right to the highest attainable standard of health under article 12, paragraph 1 and the rights to adequate housing and adequate food under article 11, paragraph 1 of ICESCR⁸⁴.

The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses⁸⁵. In addition, GC 15 paragraph 6 states that priority in the allocation of water must be given to the right to water for personal and domestic uses. This means that the GC 15 has given the human right to water the highest priority among potential water use rights. Though the GC has only an authoritative interpretation that does not have a binding effect, the general practice indicates shows it is accepted by states.

Therefore, trade agreements must give space for government to preserve and maintain public management of water as well as promote the human right to water

2.1.5.3. Environmentalization

As water scarcity intensified, water abundant countries will face increasing economic and political pressures to commoditize its abundant freshwater supplies and this may cause over-exploitation.⁸⁶ The environment has been at the center of much of the debate over water trading. Water trade was perceived as environmentally irresponsible, culturally insensitive acts and

⁸² Salman M.A Salman, *The human Right to Water and Sanitation: is the Obligation Deliverable?*, Water International (2014). P. 969-982

⁸³ See GC 15, at Para. 3.

⁸⁴ Ibid, Para. 3.

⁸⁵ Ibid, Para. 12 (b).

⁸⁶ Rhett Larson supra note 70 at 10

controversial in ways that trade of other natural resource such as oil is not. The controversy over bulk water trade compared to trades of other natural resources may not arise solely from water's unique sociocultural and ecological significance. It also arises from a narrow conception of water's role in the global market⁸⁷.

Among the human activities that negatively impact the environment, trade takes the lion's share. Trade limits the ability of governments to maintain environmental laws and regulations to protect their water. Trade exceptions for environmental or conservation reasons are extremely limited.

The relationship between trade and environment is very controversial. There is a fear that environmental concern could be taken by states as a disguise for protectionism. Though there is no specific agreement dealing with environment, environmental issues were included in different WTO agreement. These provisions are named "green provisions"⁸⁸. Furthermore, the Marrakesh agreement clearly state that

*"...while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development..."*⁸⁹

Nowadays the scope of state obligation under IWL extended from mitigation of harm to taking preventive and precautionary measure. There are also procedural duties of undertaking environmental impact assessment⁹⁰. All these wider commitment resulted from acknowledging the significance of water in the ongoing climate changes.

2.2. Theoretical Frameworks of Bulk Water Trade

2.2.1. Water as "Good" or "Product"

There is an ongoing debate on whether bulk water transfer should be treated as a "good" or "product". Some argues that, the applying trade law rules bulk water is only theoretical and conceptual. Rather terms negotiated between parties or those remedies available under public

⁸⁷ ibid

⁸⁸ General Agreement on Tariffs and Trade 1994, Annex 1A,[Hereinafter called GATT] aarticle XX, and Agreement on Trade-Related Aspects of intellectual Property Rights, Annex 1C,[Hereinafter called TRIPs],article 27(2).

⁸⁹ Marrakesh Agreement Establishing the World Trade Organization (15 April 1994), the legal texts, preamble, available at www.wto.org/english/doc/e/legal-e/04-wto-e.htm ,visited Dec 08, 2019 preamble

⁹⁰ Water course convention Supra note 78, Articles 12.

international law should be the applicable rules to bulk water⁹¹. Even the general practice shows that trade law rules are applied only after water in its natural state transform in to products such as bottled water and on product containing water such as agricultural product. When water is extracted from its origin, purified, bottled and brought to market, it is considered as “product”⁹². The trade in bottled water has become of increasing concern to environmentalists but the cause for concern is the plastic packaging rather than the water itself. Bottled water is treated like any other goods and subject to GATT rules due to the notification on technical or sanitary regulations and standards of bottled water under the Agreement on Technical Barriers to Trade⁹³.

The North American free trade area (NAFTA) is another indication that bottled water is subject to international trade rules. Bottled water is clearly provided as tradable commodity under NAFTA⁹⁴. This view is criticized by others, why should bottled or virtual water be treated differently than water sold in bulk? This could be seen as drawing an irrational and poorly-drawn distinction between fresh water and other commodities that require water for their production. What is the difference between the water embedded in industrial and agricultural exports and raw water exported in bulk in tankers or pipelines? Either way, enormous quantities of water are being exported⁹⁵.

Countries with abundant freshwater resources can benefit from international trade in water. However there is no unanimity on the issue that market forces are best capable of solving water scarcity. NGO’s, human rights organizations, and various stakeholders oppose viewing water in economic terms⁹⁶. These individuals accuse international trade agreements and economic institutions such as WB and IMF of attempting to privatize a resource that they consider a basic human right.

There seems a clash between human right and environmental law in one hand and trade law disciplines on the other hand regarding how fresh water should be viewed. Rene Uruena argues that “international economic law has become the default language of fragmented global water

⁹¹ Edith Supra note 3 at 62.

⁹² Alexi Gowlland , supra note 44, at 5.

⁹³ Ibid.

⁹⁴ North American Free Trade Agreement, 17 December 1992, , available at http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID , accessed on January 6, 2020.

⁹⁵ Rhett supra note 70 at 3

⁹⁶ Paulo Canelas supra note 58 at 288

governance. Human right and environmental law are merely competing legal regime which will go against International Economic Law⁹⁷. The lack of a common understanding of whether or not water should be viewed as a commodity or a basic human right has resulted in heated debates among legal professionals and leading members of the academia⁹⁸. To strike the balance, water as an economic good must be reconciled with the idea of water as a fundamental human right and a critical ecological resource⁹⁹. Water can be both a valuable commodity and a human right when it is appropriately valued, and when that value is reflected in affordable rates for basic human consumption and adequately accounts for the value of in-stream water to the environment¹⁰⁰. General Comment of UN committee on ESCR openly expressed that “the concept of water management is not to be limited to its economic dimension only, and that access to water should be considered as a human right”.

2.2.2. Debate over Privatization of water service

The main focus of WTO is to liberalize multilateral trade¹⁰¹. The experiences of recently acceded countries show that liberalizing virtually all service sectors becomes a precondition to be a WTO member¹⁰². Liberalization of trade in water means opening up water services to the private sector. Privatization of water sector provokes both support and opposition.

2.2.2.1. Arguments for liberalizing/privatization of water sector

Those who support privatizing water sector forward the following arguments

- * Liberalizing of water services is expected to enhance global welfare through increased efficiency and competition, lower prices and greater choice for consumers
- * Privatization highly focuses on customer satisfaction. Therefore, more care will be taken on providing “clean” water.
- * International Financial institutions such as IMF/ WB have argued that the challenge of addressing the basic water needs of people and environment, without compromising the demands of modern developments, could be met by increased private sector participation in

⁹⁷ Urena Supra note 37 at 14.

⁹⁸ ibid

⁹⁹ Rhett Larson ,Supra note 70 at 6

¹⁰⁰ ibid

¹⁰¹ Marrakesh agreement, supra note 86.

¹⁰² See the experience of Nepal and Cambodia. E.g. Nepal was asked to open all services sectors in which it has made commitment for 100% equity participation by foreigners within a period of five years.

water resource management.¹⁰³ These institutions claim that privatization will ensure better water availability to the poor and address the global water crisis better. They usually cite three major reasons in support of the latter argument. First, they point out that as much as 40-50 percent of water is wasted under Public sector management. Taking privatization to be synonymous with efficiency, they argue this can be reduced by privatization. Second, they point out that “governments throughout the world frequently face budgetary constraints” and thus the public sector cannot adequately finance water projects, and therefore private investments are needed to raise the necessary finances. Third, they argue that the public sector “often lack the technical and operational skills of private sector participants to address these issues efficiently. Private sector can avoid bureaucratic hurdles and corruptions associated with the public sector and ensure efficient and timely delivery of water services to customers¹⁰⁴.

A review of IMF policies in 40 countries found that during 2000, IMF loan agreements in 12 countries included conditions imposing water privatization or full cost recovery¹⁰⁵. When the IMF presses for privatization of water it is difficult for developing countries to refuse.

2.2.2.2. Arguments against privatization/liberalization of water sector

- * Water is a public good and it should remain under public sector responsibility. The unique future of water makes it unnatural to be commercialized/privatized
- * The promises of privatization/liberalization are proved to be wrong. Rather multinational corporations with the only intention of making profit deprive the poor from accessing water. This ignites protest by those who are deprived of the access. E.g. Cochabamba protests.

Summary of case, Bolivia vs. Bechtel

In 1990s the WB and IMF pressured the Bolivian government into liberalizing its public enterprises including water service. The target for privatization was the public water system of Bolivia’s city, Cochabamba¹⁰⁶. In 1999, Bolivian officials leased off Cochabamba’s water until

¹⁰³ Shinye Vargheese, water service under WTO, institute for agriculture and trade policy paper, No 6, p.7.

¹⁰⁴ ibid

¹⁰⁵ https://en.wikipedia.org/w/index.php?title=International_trade_and_water&oldid=821051366 , Accessed on Jan, 2020.

¹⁰⁶ Jim Shultz, Bolivia’s War over Water, Democracy Center, Cochabamba, Bolivia.
http://www.democracyctr.org/bechtel/the_water_war , accessed on Jan 25, 2020.

the year 2039 to company, American construction firm, Bechtel. Just weeks after taking over the water, Bechtel's company hit local families with rate increases of up to 200 percent and higher. The rural and urban water users formed an alliance formed the coordinating body of large scale protests against privatization of water services .Through a bloody and weeklong popular protest the people of Bolivia ensure that the contract was nullified. The case shows this institution put privatization as a condition for loan. A cheaper tariff for users due to the competition is wrong rather water rates have skyrocketed due to privatization¹⁰⁷.

2.2.3. Argument against application of GATT rule to bulk water trade

- If bulk water is subjected to trade rule it will constrain state ability of taking action to preserve its ecosystem¹⁰⁸. As WTO is an exclusively trade organization, Environment issues are considered only in very limited conditions. The basic feature of these provisions is that they are deviation from the general principles of trade law such as MFN, NT. As they are exception to general rule they should be interpreted narrowly.

Fresh water is vital for all forms of life and to preserve the ecosystem. Government has the responsibility to satisfy the water demands of the people and to preserve and protect the environment. To discharge this function properly, government is expected to make sure that sufficient water is available and should be able to impose restrictions to meet basic needs of the societies.

If we subject bulk water to trade discipline, it will be very difficult for the government to take measures to fulfill the water demand of the societies and to preserve the ecosystem. We may say that government can invoke exception under GATT XI (2) (a), but it is up to the trade community to determine whether the measure taken is qualified for the exception.

- Subjecting bulk water transfer to trade law discipline may create difficulties for long term management of water resource because any action taken is subjected to scrutiny of whether it is violation of GATT rule or not¹⁰⁹. This in effect may result in the potentially serious domestic consequence of limiting a state's ability to regulate its water resource. It could also

¹⁰⁷ ibid

¹⁰⁸ Edith Supra note 3at 80

¹⁰⁹ Policy research initiative, sustainable development briefing note: exporting Canada's water: outside of NAFTA, at3 (2005), available at <http://www.horizons.gc.ca/doclib/SD-BN-ExportingWater-E.pdf> (describing the potential environmental risks associated with bulk water shipment). , Accessed on Feb23, 2020.

discourage investment by domestic companies, and infringing upon the availability to the public of its most valuable resource

Predicting the long term demand and supply of water resource is very difficult task. Availability of water varies from time to time. Therefore countries should be able to limit the sale of fresh water to other countries at time of difficulties.

Subjecting bulk fresh water to trade discipline have the effect of giving trade consideration prior places over conflicting uses of water and this have a negative consequences . In time of emergency it would be very difficult for countries to take action. Taking precautionary measure during scientific uncertainty would be very challenging. Trade consideration could delay decision making and this may cause irreparable damage to the environment.

➤ If bulk water is subject to trade law discipline, trade dispute settlement mechanism will be the primary authority to resolve water disputes.

Dispute that arises from international water agreement would be subject to dispute resolution mechanisms provided in treaty or under public international law or in one of contracting party domestic law or domestic law of third country. Moreover dispute involving water transfer could go before trade dispute settlement bodies. This will encourage forum shopping and result in different decisions for similar dispute¹¹⁰.

The competence of trade law dispute settlement body to entertain the legitimacy of measure taken to protect the ecosystem is also questionable because they lack the requisite expertise.

2.2.4. Argument in favor of applying trade rules for bulk water trade

➤ If we subject bulk water under GATT discipline, we are recognizing the water as a commodity and this will bring sustainable and efficient use of water.

➤ If we apply GATT to bulk water transfer, basic trade law principles such as MFN, NT will be applied. i.e. Exporter in one country cannot favor on importing country over another. Importer also cannot discriminate water from one country from another by imposing different tariff or quota.

If bulk water is subjected under GATT, then the water trade will also be protected from unnecessary trade barriers.

¹¹⁰ Edith Supra note 3 at 83

To strike balance between the need to preserve the ecosystem in one hand and respecting trade rules/principles to maintain a level playing field in trading relationships on the other hand we should take in to account the unique feature of water and adopt a different approach¹¹¹.

In time of uncertainty about the future, countries should be allowed to take precautionary measure without having to convince the trading community on the legitimacy of its action.

23. Legal frameworks of bulk water transfer

categorizing water as a “Good” or “product” and subjecting it to WTO rule may cause serious domestic consequence of limiting a state’s ability to regulate its water resources over which it traditionally had full control. It’s also infringing upon the availability to the public of its most valuable resource¹¹².

2.3.1. WTO/GATT and WATER

One of the purposes of GATT is to set rules for trade of goods¹¹³. Applying GATT to bulk water depend on the status given for water. If bulk water is treated as a good or product, then it will be subject to the rules of WTO rules.

The two fundamental legal questions associated with bulk water trade are

- i. Is water a “good” or “product” for purposes of international trade law?

The harmonized tariff schedule used to classify goods includes a listing for water. GATT tariff item 22.01 lists: “waters, including natural or artificial mineral waters and aerated waters, not containing added sugar or other sweetening matter nor flavoring; ice and snow” as tradable goods subject to the rules of the WTO. Some scholar argues the term “natural water” indicates water in any form must be considered as good. Therefore, at least in theory, GATT already has a structure to support trade in bulk water¹¹⁴.

Others say the fact that water is mentioned under a tariff heading of the HS does not necessarily mean water is to be considered as subject to the GATT. They further states that, this is mistaken understanding of the purpose of tariff schedule. HS does not tell us if and water is a good, rather it only tells us when water is classified as good, it fall under a particular tariff heading. Broad

¹¹¹ Ibid at 81

¹¹² Edith supra note supra note 3 at 80

¹¹³ Douglas A. Irwin, the GATT in Historical Perspective, American Economic Association, VOL 85, No.2 (May 1995), p 323-328.

¹¹⁴ Elise L. Larson, In Deep Water: A Common Law Solution to the Bulk Water Export Problem., 2009 ,P.9

interpretation of good/product to cover water in its bulk/fresh state is inconsistent with the purpose of tariff headings. Even there is no tariff binding yet on water.

In the absence of formal exclusion of water from the scope of GATT, one could argue that water should be considered as tradable good subject to GATT¹¹⁵.

Transformation is another criterion to characterize bulk water as “good”. As soon as water has been transported from place to place it should be treated like good. Such kind of bulk transfer is not that different from bottling water except the quantities¹¹⁶.

NAFTA define good with reference to how the term is understood under the WTO. GATT, however, does not define a “good,” though it does provide that a good must also be a “product”. GATT 1994 provides no definition of “good” or “product”. The status of fresh water is undefined under the GATT. Undefined meaning of product causes non-existence of a law that regulates water trade in its bulk state [not bottled water] and prevents establishment of an international organization that recognizes bulk water transfer¹¹⁷.

The issue mooted is what is “product”? The Dictionary meaning of product is “*An article or substance that is manufactured or refined for sale or a substance produced during a natural, chemical, or manufacturing process*”¹¹⁸. i.e. something must be done to water to make it a product and mere transfer, diversion of fresh water is not suffice to consider fresh water a product.

Smith says “*Something must be done to water to make it a product, and that mere diversion, pumping, or transfer does not suffice*”¹¹⁹. According to smith, as long as in its natural state water could not be considered as a ‘product’.

Some argues it is unnecessary and pointless to try to define water whether a product or a natural resource because it is both¹²⁰. The mere fact that water is a natural resource does not preclude it from being considered as a “product”. E.g. oil is a natural resource but, it is subject of trade.

¹¹⁵ Fitzgerald Supra note 30 at 28.

¹¹⁶ Alix G. Gualtieri Supra note 44 at 6

¹¹⁷ Mehmet Supra note 10 at 8

¹¹⁸ Oxford Compact English Dictionary (2003), available at <http://www.askoxfoed.com/dictionaries/compact - oed/>
Accessed on Dec 12, 2019

¹¹⁹ Smith Supra note 29 at 293

¹²⁰ Mehmet Supra note 10 at 8

One reason given to exclude bulk water from trade law discipline is it can cause harm to the natural environment. However this is a paradox because trade in animals/their product can also cause damage to the environment but such traded is not controversial as bulk water trade.

In 1993, Canada, united states and Mexico clarifies the status of fresh bulk water in relation to NAFTA.

“Unless water in any form has entered in to commerce and become a good or product, it is not covered by the provision of any trade agreement including the NAFTA. And nothing in the NAFTA would oblige any party to NAFTA to either to exploits its water for commercial use, or to begin exporting water in any form. Water in its natural state in lakes, rivers, reservoirs, aquifer, water basin and the lakes is not good or product, is not traded, and therefor is not and never has been subject to the terms of any trade agreement”¹²¹.

Accordingly, “water in its natural state . . . is not a good or product, is not traded, and therefore is not and never has been subject to the terms of any trade agreement.

The issue here is, why shouldn’t GATT apply to water if it applies to other natural resources? GATT applies to most if not for all natural resources, e.g. GATT has not been applied to gas. Many countries have asserted “permanent sovereignty” over those resources and, the United Nations General Assembly has provided for the “inalienable right of all states freely to dispose of their natural wealth and resources in accordance with their national interests¹²².

Therefore, legal treatment of bulk water trade has enormous implications for global water management. If bulk water is a good, then nations will generally not be able to ban its export unless it avails itself of one of these narrow exceptions.

- ii. Second, if water is a “good,” is there anything specific to fresh water justifying derogation of principles of international trade law?

Edith brown suggests four kinds’ approaches. These are ignore except, avoid and adjust approach.¹²³

¹²¹ Statement of Representatives from Canada, the United-States, and Mexico Concerning NAFTA and Water Available at <http://www.scics.gc.ca/cinfo99/83067000-e.html#statments> , Accessed on 23 March 2020.

¹²² UN GA. Res.1803 (XVII), 14 Dec, 1962. “Permanent Sovereignty over Natural Resource”

¹²³ Smith Supra note 29

“Ignore” approach is when members informally decline to subject water to GATT provisions just like what is done for crude oil. Many oil-exporting countries were not parties to the 1947 GATT and some are still not members of the WTO, oil has been de facto exempt from GATT’s rules even though it is considered a product in the market place. This provides strong precedent for not subjecting bulk transfers of water to trade law disciplines.¹²⁴”

“Except” approach, a state might defend and justify a measure that would otherwise violate GATT by appealing to one of the regime’s exceptions. E.g. Article XI (2) (a)

“Avoid” approach; a state could impose an export duty on water high enough to make export economically impractical, because bulk water is not yet subject to a tariff binding under GATT¹²⁵.

“Adjust” approach; states could “clarify” GATT’s application in one of four ways.

1. Amending GATT to explicitly exclude bulk water trade or broaden the application of General exception clause [article XX] to include measure for conservation of water resource. Procedure of amendment is provided under Article X of Marrakesh agreement.
2. Waiver the application of particular obligations of GATT to bulk transfers of water. [Article IX: 3] of Marrakesh agreement]. But waiver is intended for shorter use; it should have termination date and must indicate exceptional circumstance justifying the waiver.
3. Interpretation, through procedure provided under Article IX: 2 of Marrakesh Agreement. This seems like what Canada, Mexico and USA done regarding the application of NAFTA to bulk water. That excludes bulk water provided that such an interpretation does not “undermine” GATT’s amendment procedures¹²⁶.
4. Decision, procedure of decision making as provided under article IX: 1 of the Marrakesh Agreement.

2.3.2. WTO/GATS and water service

GATS cover trade in services. [Article I: 1]. GATS aims to achieve predictable trade rules and progressive liberalization of service i .e. service markets must be opened up further to Foreign Service operators [Article XIX].

¹²⁴ Edith Supra note 3 at 84

¹²⁵ Smith Supra note 29

¹²⁶ Edith Supra note 3 at 85-88

Trade is liberalized through a series of market access and national treatment commitments specified in schedules that describe their terms, limitations and conditions. When a government undertakes such commitments, it cannot impose new measures on foreign services providers that would limit their market entry or their operations below the level specified. These commitments are legal bindings analogous to bound tariffs in the case of trade in goods. They guarantee to services providers from other countries that barriers to trade in services will not go beyond what is scheduled.

In 2001 WTO ministerial conference in Doha, members of European Union and USA make a proposal for inclusion of “Water service” under GATS as an “environmental service”¹²⁷. The proponent of the effort to include water in GATS argues that it would help to meet the millennium development goal on water.

Even though GATS is entered by government, its prime consideration is not the relation between governments. Rather it is an instrument for the benefit of business because allowing GATS to regulate their service sector means creating favorable investment environment .That is why many including the European Commission argued that GATT is a backdoor attempt to revive the multilateral investment agreement¹²⁸.

Whether or not water as a service sector is included GATS is debatable .Water services are not explicitly included in the WTO Document MTN.GNS/W/120 services sector classification.

If “water service” come under the preview of GATS, it will cover major ways of water resource are used. According to GATS “supply of service” includes the production, distribution, marketing, sale and delivery of service¹²⁹.Thus “water service” under GATS can include operation of water pipeline, supply of bulk water, sewerage service...etc. Furthermore, there would have to be a systemic reduction or elimination of tariff/ non-tariff barriers.

“Service” is defined as “includes any service in any sector except service supplied in the exercise of governmental authority¹³⁰. “Service supplied in the exercise of governmental

¹²⁷ WTO service negotiating proposal , October 24,2001, available at WTO website

¹²⁸ See <http://gats-info.eu.int/gats-info/2000/NEWS=bb>

¹²⁹ *ibid* , article XXVIII(b)

¹³⁰ GATS, article I (3) (b)

authority" means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers¹³¹.

In Ethiopia, water supply service is provided in the exercise of governmental authority through centralized system. The responsibility is vested on Ministry of Water, Irrigation and Energy¹³². It is not for commercial purpose or to make profit.

Applying GATS rules on water service sector have huge implication on domestic environmental and social is regulatory policy of member country. Internal government regulations such as forms of public ownership could be considered barriers of service delivery. Members must ensure that any domestic measures that affect trade in services are consistent with the rules general as well as specific obligations.

GATS contain only a very narrow environmental exception to the rules if it is “necessary to protect human, animal or plant life or health¹³³.” This exception has been interpreted narrowly by WTO bodies. For instance, laws and measures introduced for the purpose of environmental protection and water conservation could be classified as barriers to trade and could be overruled. Market access commitments which prohibit quantitative restrictions, could limit the right of governments to restrict the quantities of water that companies are allowed to collect from rivers and groundwater sources. The resulting increased pressure on water sources could lead to sustained environmental damage.

GATS also have implication on domestic regulation of human right to water. Decisions about how water is distributed and used should be based on human rights and environmental needs rather than on pure economics. However, the “Full cost-recovery” a principle promoted by the IMF and WB that people should pay the full cost of water, or go without would effectively be enshrined in law by GATS is also not compatible with the basic human right of access to clean, safe drinking water. It is often ordinary people who end up paying the increased financial cost resulting from water privatization as companies try to recoup their investment.

2.3.3. General Remarks on Dispute Settlement

¹³¹ Ibid, article i(3)(c)

¹³² Procl. No.1097, 2018. Fed. Neg.Gaz, year 25, No.8, art 23.

¹³³ GATS , article XIV(b)

A dispute may be defined as a specific disagreement concerning a matter of fact, law or policy in which a claim or assertion of one party is met with refusal, counter-claim or denial by another¹³⁴. Disputes are inevitable part of international relation the issue is how to resolve it.

Article 2(3) of UN charter requires states “to settle their international dispute by peaceful means”. Methods of peaceful settlement are enumerated under article 33(2) of the UN charter.

The general assembly resolution of 1970 also proclaims that “*State shall accordingly seek early and just settlement of their international dispute by negotiation, inquiry, mediation, conciliation....or other peaceful means of their choice*”¹³⁵.

Ismail Serageldin, former vice president of the World Bank, warned that “*the wars of the next century will be about water*”¹³⁶.

Dispute settlement of IWL

In water related dispute too, state are under obligation to settle it peacefully. UNWCC provides states with a framework for dispute resolution. Some aspects of the Convention are widely regarded as reflecting rules of customary international law in the area.

However, due to the lack of consensus on the principles that should guide the development and management of an international watercourse, the international community has had to determine appropriate methods to resolve the disputes that arise in this context. In doing this the principle of peaceful settlement of disputes found in the UN Charter remains paramount¹³⁷.

UNWCC provides a three stage process for dispute resolution. It begins by Stating that in the event of a dispute parties should begin by trying to settle the matter peacefully by engaging in negotiations¹³⁸. If the parties cannot reach a settlement through negotiations they can jointly seek the use of good officers of, or request mediation or conciliation by, a third party¹³⁹. States can

¹³⁴ J.G. Merrills, international al dispute settlement, Cambridge University press, 5th Edition, 2011, p1.

¹³⁵ UNGA.Res.2625 (XXV), 24october 1970.

¹³⁶ Ayalew Getachew, Water law Teaching Material , *Prepared under the Sponsorship of the Justice and Legal System Research Institute*, (2009) PP.126

¹³⁷ Alice Chote, ‘the Resolution of International Watercourse Disputes: How Should States Approach the Matter?’ (2013), LLM Research Paper, University of Willington, PP. 10, available on, <https://researcharchive.vu.w.ac.nz/xmlui/bit stream/handle/10063/3208/thesis.pdf?sequence=2> , accessed on March 15, 2020.

¹³⁸ Water course convention , Article 33(1)

¹³⁹ Ibid, Article 33(2)

also make use of a previously established joint watercourse institution, or have recourse to arbitration or the ICJ in order to resolve the matter¹⁴⁰.

UN water course convention goes on to say that if parties are unable to settle the matter through recourse to the above means within six months, “the dispute shall be submitted, at the request of any of the parties to the dispute, to impartial fact finding” by a commission¹⁴¹. The commission should investigate the allegations made by each state, and make “such recommendations as it deems appropriate for an equitable solution of the dispute, which the parties concerned shall consider in good faith”¹⁴².

Nature of WTO dispute settlement procedure

Settlement is based on clearly defined rules, with timetables for completing a case¹⁴³. Settling disputes is the responsibility of the Dispute settlement body (DSB) which consists of all WTO members. DSB has the sole authority to establish “panels” of experts to consider the case, and to accept or reject the panels’ findings or the results of an appeal. It monitors the implementation of the rulings and recommendations, and has the power to authorize retaliation when a country does not comply with a ruling.

WTO dispute settlement system is compulsory [membership constitutes consent to, and acceptance of, the jurisdiction of the WTO dispute settlement system. There is no need for the parties to a dispute, arising under the covered agreements, to accept, in a separate declaration or separate agreement, the jurisdiction of the WTO dispute settlement system to adjudicate the dispute] ¹⁴⁴ and exclusive [Member is obliged to bring any dispute arising under the covered agreements to the WTO DSB] ¹⁴⁵.

First stage: consultation .Before taking any other actions the countries in dispute have to talk to each other to see if they can settle their differences by themselves. If consultations fail, the complaining country can ask for a panel to be appointed. Panels consist of three (possibly five) experts from different countries who examine the evidence and decide. The panel’s report is

¹⁴⁰ Ibid, Article 33(2)

¹⁴¹ Ibid, Article 33(3)

¹⁴² Ibid, Article 33(8)

¹⁴³ Understanding on Rules and Procedures Governing the Settlement of Disputes , Marrakesh Agreement, Annex 2.

¹⁴⁴ Peter. Van den Bossche, The Law and Policy of the World Trade Organization, text, cases and materials, Cambridge university press, 2nd ed. (2013), pp p.161

¹⁴⁵ ibid

passed to the DSB. The final stage is appeals. Either side can appeal a panel's ruling. Appeals have to be based on points of law such as legal interpretation; they cannot reexamine existing evidence or examine new issues.

The remedies for breach of WTO law are the withdrawal/ modification of the WTO inconsistent measure, compensation and retaliation¹⁴⁶.

Dispute settlement mechanisms in bulk water transfer

Growing international trend of trade in water will create new forms conflicts between the states and will limits the traditional authority of states to regulate their water resources if subject to international trade agreements.

B.R Chauhan observes that *“the development, management and settlement of disputes pertaining to water resources, such as rivers, lakes, springs, waterways, waterfalls and aqueducts, at international as well as inter-state level, create not only legal but also social, economic and political problems for the concerned states or countries as units of international community or provinces etc., as units of federal polity, as the case may be”*.¹⁴⁷

The issue is whether IWL dispute settlement procedure or adjudicatory mechanisms of WTO should be applied for bulk water transfer to ensure sustainable use in the future?

WTO regime governs the dispute related to goods and services. If the bulk water is considered as a product under GATT 1994, and the dispute arose as to interpretation of GATT rules. If bulk water is not considered as good, WTO DSB cannot be applicable. This issue is not settled yet because there is no dispute involving water brought before DSB.

If there is a particular agreement between the states, then resolution shall be according to such agreement. However, when the parties involved are not states only but private parties, then arbitration can be the only successful means as the convention provides the options for either ICJ or arbitration.

Hence as there is no unanimity on treating bulk water transfers as economic good or as only a natural commodity, a specific resolution method cannot be prescribed. However, arbitration under water course convention shall be the best optimal method to resolve the disputes .because dispute on bulk water transfers shall involve not only the quantity and quality issue or time of

¹⁴⁶ DSU Article 3.7

¹⁴⁷ B.R.Chauhan, Settlement of International and Inter-State Water Disputes in India (1992) p.7

delivery or cost issue, but the social and environmental issues are also involved¹⁴⁸. The impact on ecology and biodiversity needs to be addressed. Trade cannot be successful at the expense of environment. Hence environment should be sustained.

As the climate change escalated and as the world's population continues to increase, the global water crises are inevitably going to become more severe. Therefor the current dispute resolution mechanisms utilized by the international community will not suffice to handle the increasing severity of the water crises. The best method of resolving water disputes is simply allowing the disputing parties to negotiate a mutually beneficial terms and to create goodwill between and among each other¹⁴⁹.

¹⁴⁸ Gayathrid and Sanjay, Dispute settlement mechanism in trans-boundary freshwater allocation: an interference of international trade law and environmental law- a way forward to sustainable development? Research Paper, p.16

¹⁴⁹ ibid

CHAPTER THREE

THE IMPLICATION OF ETHI - DJIBOUTI BULK WATER TRANSFER AGREEMENT IN THE ADVANT OF ETHIOPIAN ACCESSION TO WTO

3.1. Brief overview of Ethiopian accession to WTO

WTO Is an international organization with 164 member states for liberalizing trade, a forum for governments to negotiate trade agreements and a place to settle trade disputes. WTO regulates trade in goods, services, intellectual property and other specialized agreements on trade measures.

WTO Objectives

- i. Raising the standard of living and Ensuring full employment;
- ii. Promoting the steady growth of real income and effective demand;
- iii. Expanding the production of trade in goods and services; and
- iv. Sustainable development and environmental protection.

The Basic rules and Principles

- i. Trade without Discrimination i.e. giving equal opportunities for product and service
- ii. Predictability of trade rules through binding commitments and transparency
- iii. Rule on market access

Apart from the basic rules and principles WTO rules also recognize non-economic societal values and interests such as protection of the environment, public health and morals.

Accession to the WTO signals Ethiopia's willingness to ensure that its domestic laws, regulations and administrative procedures, particularly those pertaining to international trade, conform to WTO Agreements. The benefit of WTO membership is dependent on Ethiopia's ability to take full advantage of the opportunities created by trade liberalization and to manage the changes induced by WTO membership. .

According to the statement made by the Ethiopian representative at the WTO General Council meeting of 10 February 2003, the key reasons that convinced Ethiopia to apply for WTO membership are¹⁵⁰

¹⁵⁰ Henok Birhanu , Ethiopia's Long Walk to WTO Membership: Exploring the Implications of the 2012 WTO Accession Guidelines for Least Developing Countries , Manchester Journal of International Economic Law, Volume 12, December 2015

- a. integrating into the multilateral trading system is the best way to accelerate economic growth
- b. being party to the rules based trading system will create confidence for investors and attract FDI
- c. It would secure predictable market access

In October 1997 Ethiopia applied for observer status¹⁵¹. Formal request for WTO membership was submitted in January 2003. Following Ethiopia's formal application, the General Council established a Working Party on the accession of Ethiopia in February 2003.

Current status of Ethiopian Accession

Ethiopia resumes the negotiation after 8 year pause¹⁵². Members express unanimous support for the resumption of Ethiopian WTO membership negotiation at the 4th meeting of the working party on the country's accession, held on 30 Jan 2020. Ethiopian delegate express their wish to conclude the accession process by the end of 2021¹⁵³.

3.2. The substance of the Ethio - Djibouti water supply agreement

Background

The formal diplomatic relation between the two countries was established in 1984¹⁵⁴. Even though their relationships have been good throughout the periods, the Ethio-Djibouti relationships have been transformed to higher level of cooperation and interdependence after the war between Eritrea and Ethiopia. Ethiopia's heavy dependence on Djibouti's port for its international business transactions, following the war, has motivated the two countries linkages in other areas. Currently, they are tied to each other's in various ways including; port, transport, communications, trade and investment¹⁵⁵.

As potable water is becoming one element of bilateral integration between Ethiopia and Djibouti, the two countries signed a Memorandum of Understanding on the terms of bilateral cooperation in the field of drinking water.

¹⁵¹ WTO document, Minutes of Meeting held on 22 October 1997, WTO doc. WT/GC/M/23, 28 November 1997.

¹⁵² Working party is the main body responsible for overseeing the accession process. The first working part was established on 10 Feb 2003 and after that working party meeting was conducted on 27 March 2012.

¹⁵³ [http:// www.wto.org/ english/news](http://www.wto.org/english/news), accessed on April 21, 2020.

¹⁵⁴ Mulubrhan Atsbaha , the roles of Djibouti port in strengthening the Ethio-Djibouti economic relations , ELK Asia pacific journal of social science, Volume 5, 2018, p.2

¹⁵⁵ FDRE Foreign affair and national security Policy and strategy, Nov 2002.

The Ethiopia-Djibouti water project is classified as one of the largest water projects in Africa. Completed in 2017, the project was financed by the Export-Import Bank of China and executed by the Chinese construction giant CGC-OC Group¹⁵⁶.

The aim of the agreement

- i. To strength the two countries economic, social and cultural cooperation and regional integration
- ii. To enable Djibouti to get sustainable, affordable and adequate drinking water¹⁵⁷.

From Ethiopian side, Ministry of finance and economic development was leading the project¹⁵⁸. The deal was to supply water to Djibouti for 30 years in the amount of 103,000 m³ per day for free from ground water resource.

According to the agreement, the Ethiopian Government grants 20 Hectares of land in Shinile area from which Djibouti shall supply water to its territory in addition to 4000 Hectares of land in the proposed ground water well field area¹⁵⁹. Shinile is located north of Somali national regional state in Ethiopia territory and 100 KM away from Djibouti boarder .The deal was presented to the HPR for discussion and promulgation.

Ethiopian Commitment

- Designation of land to Djibouti as a field area
- Finance the cost of consultancy fee to be paid for Ethiopian company
- Exempt from tax and duties goods and vehicles necessary for the execution of the project
- Take all necessary measure to avoid pollution and protect the environment in and around the project area

Djibouti Commitment

- payment of compensation for resident who may be affected by the project for Permanent loss of use of land
- allocate the budget for the project

3.3 Drawbacks of the agreement.

¹⁵⁶ D.MULU - OWWDSE, General overview of Ethiopia to Djibouti Trans boundary water supply project 2018.

¹⁵⁷ Ethio - Djibouti water supply agreement, preamble, Para 3.

¹⁵⁸ Proclamation 856/2014, article 3.

¹⁵⁹ Ethio - Djibouti water supply agreement, Article III(1)

1. The agreement gave Djibouti huge amount of water for free. Ethiopia gets no economic benefits from the agreement¹⁶⁰.

According to internationally accepted norms and practices any deal or business between two nations is expected to be based on mutual benefits.

Some member of the house of people representative question what Ethiopia would gain from the deal during the time they deliberate and debate on the bill. The government representative responded that, the basis of the agreement is the spirit of cordiality and friendly cooperation between the two countries and national interest does not always means obtaining economic benefit because there are non-monetary benefits¹⁶¹.

Ethiopia's land-locked reality may dictate her to have special concern for Djibouti. But this doesn't mean that Djibouti should always get better offer from Ethiopia because, the Ethiopian constitution put mutual benefit and protection of national interest as a basis for external relation. As clearly stipulated under the FDRE constitution, one of the core principle of external relation is "*promotion of external relation which respect and accord with the sovereignty of Ethiopia and the interest of its people*"¹⁶².

The constitution also states that "*foreign relation policies of Ethiopia should be based on mutual interest and equality of states as well as international agreement that promote the interest of Ethiopia*"¹⁶³.

Furthermore, the FDRE Foreign affair and national security Policy and strategy states that the policy direction Ethiopia should follow toward Djibouti should be "*...to assume long standing and reliable port service with reasonable fee But this should not impose negative pressure on us rather to secure long standing interest.*"¹⁶⁴

Therefor the policy is clear meaning it centered on the basis of give-and-take principle in which both sides benefit. The port service Ethiopia gain from Djibouti is based on internationally accepted trade practices.

¹⁶⁰ See Ethio-Djiboti water supply agreement

¹⁶¹ የኢ.ፌ.ዲ.ሪ በ4ኛው የህዝብ ተወካዮች ምክር ቤት 4ኛ ዓመት የስራ ዘመን (2006) የጸደቁ አዋጆች የህዝብ ይፋ ውይይት እና የውሳኔ ሃሳቦች፣ ጥራዝ 2፣ የተፈጥሮ ሃብት ልማት እና አካባቢ ጥበቃ ጉዳዮች እና የበጀት እና ፋይናንስ ጉዳዮች ቋሚ ኮሚቴ ከአስረኞች ጋር ያደረጉት ውይይት፣ ሰኔ 11/2006 ዓ.ም.

¹⁶² FDRE constitution , Article 86/1

¹⁶³ ibid Article 86/3

¹⁶⁴ Foreign policy, supra note 150.

Therefore, we can say the water for free agreement is inconsistent with common /general practice and international norms, and with the foreign policy of Ethiopia.

2. International law today also addresses fresh water from a human rights perspective. Access to water supply and sanitation in Ethiopia is amongst the lowest in Sub-Saharan Africa and the entire world¹⁶⁵.

Local residents of the area depend on that very water resource that the Ethiopian Government is donating to a foreign nation. Somali Region in general and Shinile Zone in particular is where scarcity of water is a major problem¹⁶⁶. This is unfair because, government of Ethiopia gives priority to foreigners over citizens

3. Ethiopian Government gives thousands hectares of land to Djibouti to draw water with in the designated land for 30 years.

This is again incompatible with Ethiopian land policies. Land is an economic commodity which has special significance for Ethiopia. Land and other natural resource shall be held by the government on behalf of the people in order to deploy them for their common good and development¹⁶⁷. Furthermore the constitution state that, land is the common property of nation, nationalities and people of Ethiopia and shall not be subject to sale or to other means of transfer¹⁶⁸.

According to what is stated in the minutes of the house, some members of the house also raise this concern during their discussion but it was stated that there is no violation; the land and economic policies were carefully envisaged prior to designating the land¹⁶⁹.

4. Under Ethiopian law federal government shall determine and administer the utilization of water/river/Lake linking two or more state or crossing the boundaries of the national territory¹⁷⁰. The water resources which remain confined within the boundaries of respective states such as ground water, lake which do not “link” should be states power because power not given expressly to federal governments are reserved to states¹⁷¹. The issue to be mooted

¹⁶⁵ Water supply and sanitation in Ethiopia, <https://en.wikipedia.org/w/index.php> , accessed April 10, 2020

¹⁶⁶ <http://www.scribd.com/doc/118102413/Water-Stress-in-Shinile-Zone-Somali-Region>, accessed March 18, 2020

¹⁶⁷ FDRE constitution Article 89/5

¹⁶⁸ ibid Article 40/3

¹⁶⁹ የተፈጥሮ ሃብት ልማት እና አካባቢ ጥበቃ ጉዳዮች እና የበጀት እና ፋይናንስ ጉዳዮች ቋሚ ኮሚቴ ውይይት Supra note 156

¹⁷⁰ FDRE constitution Article 51(12) and 55(1)(v)

¹⁷¹ Ibid article 52(2)

here is whether official of Somali regional state and public were given the chance to express their views concerning the project?

The minute's shows public consultation was conducted and representatives of public officials of the region were also involved as committee member and take part actively.

5. There is no indication under the agreement whether or not EIA¹⁷² and other existing laws and regulations have been conducted.

The FDRE constitution dictates that no aspect of the process of economic development shall adversely affect the environment¹⁷³. Government is duty bound to make sure that strict rules and directives are in place to protect the environment in the process of economic development.

However in minutes of the house it was stated that EIA has been conducted and the EIA report was approved by the environmental protection authority prior to commencing the project.

6. Ethiopia Government is responsible for safeguarding the water resource from pollution and other activities that may harm the resource. This is cumbersome especially in the absence of provision which govern issues of force majeure. [Circumstances arising and completely outside of the control and beyond the contemplation of the parties]. What if drought happens in the area or what if flood or other natural disaster pollutes the water? Will Ethiopia be held responsible for failure to control the pollution in such unforeseen case? This is critical issue left unregulated and may be a source of conflict.

7. The agreement states that, any dispute shall be settled by means of bilateral consultation. But what if bilateral consultation fails? The agreement says nothing.

8. With regard to administration, the agreement states that, Djibouti may set up its own company to manage the operation of water supply system in Ethiopian territory. This will amount infringing territorial sovereignty of Ethiopia.

9. With regard to compensation scheme, the agreement states that "Djibouti shall pay compensation for residents who may be affected by the project for the permanent loss of use of the land as per the existing laws of the two countries. Here there arise of conflict of law issues especially if the amount of compensation is different.

¹⁷² Procl. No.299, 2002.fed .Neg. Gaz, year 9, No.11, Art 2(3) EIA means the methodology of identifying and evaluating in advance any effect, be it positive or negative, which results from the implementation of a proposed project or public instrument.

¹⁷³ FDRE constitution Art 92/2

3.4. Implication of bulk water supply agreement on WTO commitment

The WTO rules do affect the ability of governments to regulate its water resources. E.g. an outright ban on the export of water could be subject to a successful trade challenge. Trade in bulk water could lead to conflict between international trade liberalization rules in one hand and domestic water and environmental policies on the other hand. Therefore governments should highly negotiate to ensure that agreement concerning trade liberalization should not curtail its capacity to ensure full realization of right to water of their citizen¹⁷⁴.

3.5. Major WTO/ GATT commitment and their application on bulk water trade

The main purpose of the GATT is the liberalization of international trade through the elimination of trade restrictions¹⁷⁵. To meet these objectives core principles are couched in articles I, III and XI of the Agreement.

The pertinent provisions of GATT rules which require special emphasis are article I, III, XI and XX.

1. Article I.I of GATT 1994 embodies the principal MFN obligation which states that,

“Any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties”.

If WTO Member agrees in negotiations with another country, which need not be a WTO Member, to reduce the tariff on a product this same “tariff rate” must also apply to all other WTO Members as well. In other words, if a country gives favorable treatment to one country regarding a particular issue, it must treat all Members equally with respect to the same issue.. “Like” products from all WTO Members must be given the same treatment as the most advantageous treatment accorded the products of any state.

If a country import bulk water trade from more than one country or export such water to more than one country, then these countries are required to refrain from discriminating among importer/exporter. Any ‘favor’ concerning imports or exports of bulk fresh water which is granted to any bulk fresh water exporting or importing WTO Member would also have to be

¹⁷⁴ See GC , supra note 38.

¹⁷⁵ Marrakesh agreement , preamble

granted to any other bulk fresh water exporting or importing WTO Member immediately and unconditionally.

2. Article III of GATT 1994, about national treatment, under Para 4 provides that

“The products of the territory of any contracting party imported in to the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in the respects of all laws and regulations....”

NT principle deals with form of discrimination between domestic and foreign like Products. Once goods have entered a market, they must be treated no less favorably than similar, domestically produced goods.

Applying NT rules to bulk fresh water would have a consequence that domestic and foreign bulk fresh water trading companies would have to be taxed and regulated alike, without any discrimination.

To what extent WTO rules allow government to protect their water resource from over exploitation? To what extent WTO rules recognize social and environmental values?

WTO agreement recognizes the need of sustainable development and it reflects the importance of keeping and conserving the environment¹⁷⁶. The Committee on Trade and Environment was established in 1994 to address the issues at the interface of international trade and the environment. Exceptions under the GATT, GATS¹⁷⁷ and TRIP¹⁷⁸ exist to meet environmental objectives. In 2001 Doha ministerial conference environmental issue was put as a major discussion agenda. New agreement such as TBT¹⁷⁹ contained environmental provisions.

1. Article XI of GATT 1994 on general elimination of Quantitative restrictions under paragraph 1 provides that

“No restriction or prohibition other than duties, taxes or other charges whether made effective through quotas, import or export license or other measures, shall be maintained by any party on the importation/exportation of any product ...”

¹⁷⁶ *ibid*

¹⁷⁷ GATS contains similar provision with GATT Article XX under article XIV(b), that allows member state to take measure *“necessary to protect human, animal or plant life or health...”*

¹⁷⁸ See TRIPS Article 27(2) (3). permits the exclusion of inventions from patent, where such an exclusion is necessary to protect human, animal or plant life or health and avoid harm to the environment

¹⁷⁹ The TBT Agreement refers both to mandatory requirements or technical regulations that imported products need to comply with and non-mandatory standards including labeling schemes. Article 2.2 of the TBT Agreement allows measures for the protection of human, animal or plant life or health, and for the protection of the environment

Here it is important to strike balance between the intention of water exporting countries to limit or ban exportation of their water resources in one hand and the interest of water importing countries to bring a claim under the WTO DSB against restrictive trade measures.

Article XI (2) (a) of GATT 1994 provide an exception to the general prohibition .This exceptions permit the imposition of quantitative measures only on temporary basis to prevent shortage of food stuff and other products essential products. Article XI (2) (a) provides that

“Export prohibitions or restrictions temporary applied to prevent or relive critical shortages of food stuffs or other products essential to the exporting Party”.

To qualify the exception, the shortage needs to be critical and essential to the exporting country. The export restriction should only be for temporary period.

What does “other products essential to the exporting countries mean”? Does bulk transfer of fresh water could be considered as a product essential to exporting countries? If the answer is yes because water is essential in reliving shortage of food stuff, then ban on import/export of fresh water would not be a violation of article XI, But if the answer is no, Article XI do not apply unless it is justified under the exception provided under article XI (2) or other exception provided under article XX.

Sometimes countries want to impose restriction on export of fresh water to protect their environment and the ecosystem of the basin since there are wildlife and flora which are dependent on that fresh water. But Para 2(a) does not seem to be applying to ban water export for environmental ground.

2. Article XX of GATT

The Purpose of this provision is to allow WTO members to maintain measures that aim to promote important societal values and interests, even if the measures are inconsistent with other rules of the GATT.

The pertinent provision for our topic is Article XX (b) and (g) of GATT which states that

“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail ... measures

(b). Necessary to protect human, animal or plant life or health;

(g). Relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption

Applying this provision needs to satisfy two tier test

i. Provisional justification - Article XX (a) to (j)

- Determine whether the policy objective of the measure falls within the exception. For example, if the exception in Article XX (b) is being relied upon, the policy objective of the measure must be the protection of human, animal or plant life or health. In the case of Article XX (g), the policy objective of the restriction must be the purpose conservation of exhaustible natural resources.
- Determine whether the measure satisfies the qualifying language of exception. In the case of Article XX (b), the question is whether the restriction is “necessary” to achieve the policy objective. In the case of Article XX (g), the question is whether the restriction is “relating to” the conservation of exhaustible natural resources and is being made in conjunction with restrictions on domestic production and consumption.

ii. Requirement of the Chapeau

Restriction on water export could qualify under Article XX (b) exception if it is necessary to protect human, animal and plants life or health.

To apply Article XX (g), water must firstly constitute an “exhaustible natural resource”. There is no indication in GATT, that water could be considered as exhaustible natural resource.

For the first time the Appellate body in US- Shrimp case applied interpretation of the concept of “exhaustible natural resource”. Accordingly the term was interpreted broadly to include not only “mineral” or “non-living” resources but also living species which may be susceptible to depletion, such as sea turtles¹⁸⁰.

Similarly “exhaustible natural resources” are broadly understood, and include minerals, non-living natural resources {coal, oil, natural gas, etc.} as well as environmental resources such as “clean air” in US - Gasoline case¹⁸¹.

Meeting the requirements of sub-paragraph (g) requires that

- I. The policy objective of the measure of concern is to “conserve limited natural resources”,
- II. The measure is “relating” to the conservation of limited natural resources, and

¹⁸⁰ US - Shrimp (DS58), Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products.

¹⁸¹ US - Gasoline (DS2), United States – Standards for Reformulated and Conventional Gasoline

III. The measure is implemented alongside restrictions on domestic production or consumption

Therefore, freshwater resources water can be covered under the term “exhaustible natural resources” due to human intervention and uncontrolled exploitation of water resources, water resources are reaching to that stage. Fresh water can be exhausted if consumption exceeds the sources and the water cycle. Furthermore water is a resource that is “necessary to protect human, animal, or plant life or health”. Therefore, measures can be taken to protect water resources to preserve it for future. However, to limit exports in this manner, the national government must also restrict domestic consumption to show the policy is in defense of natural resources and not a matter of economic protectionism. Government cannot simply prohibit exports to protect so as to protect the environment; it must also restrict domestic consumption.

Therefore state wishing to ban water exports as part of its National water policy would have difficulty justifying it under the GATT exceptions. The restrictions can be justified under the GATT exceptions on environmental or human health grounds, provided the restrictions are implemented in a non-discriminatory manner and do not form a disguised restriction on trade

CHAPTER FOUR

CONCLUSION AND RECOMMENDATION

4.1. CONCLUSIONS

Today many peoples are living in water stressed situations. The water crisis could affect as many as 7 billion people by 2075¹⁸². The scarcity changed the perception of water from social good to an economic good.

Bulk transfer pursued as instruments to minimize the socioeconomic impact of water scarcity. Mostly the transfer is going to be trade relation between parties. Though Bulk transfer is attractive from a business point of view, it will have adverse economic, social and environmental consequences. This might raise sustainability concern and cause public opposition on national security and environmental grounds.

Trade agreement impedes government ability to maintain environmental policies, laws and regulations to protect water. They also pave the way for commodification and privatization of water service.

On the Doha development Round of negotiations it was declared that no sector is to be excluded from the negotiations to the new agreement. If water services negotiations succeed then once a member chooses to open their markets to their own private sector, then it should have to afford other members the same rights to invest in that sector.

WTO is an exclusively trade organization that is not necessarily competent to address water and environmental concerns except in a very limited exceptional cases. These are deviation from the basic principles whose scope, interpretation and application are inherently restricted. Furthermore, whenever trade disputes with reference to freshwater protection arise, it will be settled under WTO rules the outcome will be in favor of free trade and not freshwater protection. Strict adherence of international trade law discipline to bulk water transfer may leads to over exploitation of the resource which in return affects the ecosystem. The GATT/ GATS environmental exceptions are inadequate remedy for the challenges that the GATT/GATS poses on domestic environment/water management.

Therefore people and their government must retain the right to restrict trade in condition where the water resources have been affected. Trade agreement must be negotiated to give government

¹⁸² Water for a sustainable world, UN world water development report, 2016.

the right to protect water and environment. Government should also be given the right to maintain public management of water.

The privileges given for investor under ISDS should be interpreted narrowly so as to protect this precious natural resource from over exploitation leading to ecological disruptions.

Trade agreement should also recognize and promote the human right to water. Water is a special resource which has no substitute; its allocation is also a social issue that should not be left to market forces alone

The following recommendations are made accordingly to protect water in international trade dealing.

4.2. RECOMMENDATIONS

- As much as possible priority must be given to remove fresh water from any trade agreement. Given the threat to water it is urgent to remove all references to water as a good, service or investment in all present and future treaties.
- Trade negotiators should highly negotiate to the development of international trade rules that allow sufficient space to domestic regulators to adopt policies to protect and conserve water and ecosystem. Negotiation must be conducted in a way that ,
 - a. Give governments the right to protect water and the environment,
 - b. Give maintain public management of essential public service such as water,
 - c. Ensure realization of HRW
- Clarifying WTO rules through interpreting or amending existing general exception clause to include measures relating to conservation of natural resources specifically water.
- Water as a fundamental human right and a critical ecological resource should be recognized in the application of traded discipline. Therefore Ethiopia should be able to protect such unique resource from short-sighted incentives leading to over exploitation.
- We need to consider and integrate social and environmental values of water into negotiations, implementation and interpretation of trade agreements. Considering water as an economic good must be reconciled with the essential role of water in ecosystem, and human life. Attention should thus be given to the way GATT exceptions, especially Article XX, could be used to allow for states to adopt restrictive measures on trade in water for social and environmental reasons. Doing this will create coherence between trade rules in one hand and social and environmental commitment in the other hand.

- Any trade agreements concerning fresh water must clearly recognize the right of governments to have full control over its natural resource including water. One manifestation of exercising sovereignty could be adopting limits on extracting water like what has been done on extraction limit on OPEC and imposing export tax on fresh water. High export tax will discourage the transfer of bulk water. Therefore using export tax as “policy tool” is important to address the over exploitation and environmental concern. Highly negotiate to exclude bulk water transfer from GATT governance. To do so Ethiopia could rely on the status of oil under trade agreement as strong precedence.
- The Marrakesh Agreement specifically recognizes the concept of “sustainable use of natural resource”. One way of using fresh water in sustainable manner is to treat water different from other natural resource. Fresh water as distinct from other natural resource because it is precious and strategically significant national resource .it also has unique cultural, environmental and human health values. It is vital for all forms of life and it has no substitute. Owing to this unique nature it should receive different treatment under international trade law. Ethiopia should follow protectionist policy for trade in fresh water in ways that it cannot for other commodities. Other Countries should have very limited role to challenge domestic or international protections of water.
- Once trade in water is become the subject of international trade rules, it will put limit on government abilities in adopting measure which are necessary to protect and preserve water resource easily at domestic level. Therefore Ethiopia should highly negotiate on terms that ensure any agreement concerning trade liberalization of fresh water service should not curtail government ability to take immediate measure in time of emergency without convincing the trade community on the legality of its action.
- Liberalizing water sector creates a right for foreign investors to enter that service market. Those investors receive national treatment rights, i.e. the same legal rights as domestic investors receive. Domestic service provider may not compete with foreign investor and will be driven out from the market. The foreign investor may increase the price for the service. This is what is happening in practice in other countries. Therefore Ethiopia should not be hurry to open up the water service for liberalization.

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**AGREEMENT BETWEEN THE GOVERNMENT OF THE
FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA
AND THE GOVERNMENT OF THE REPUBLIC OF
DJIBOUTI FOR THE SUPPLY OF WATER**

WHEREAS, the Government of the Federal Democratic Republic of Ethiopia and the Government of the Republic of Djibouti animated by the sincere spirit of cordiality and friendly cooperation which happily governs the relationship of the two countries;

WHEREAS, Ethiopia and Djibouti have agreed to extend their bilateral relations by signing a cross border water supply agreement aimed at improving the living standards of the people of Djibouti;

WHEREAS, Ethiopia and Djibouti have signed a Memorandum of Understanding on 3rd September 2012 on Supply o Water to Djibouti;

WHEREAS, it is believed that this cooperation will further enhance and deepen the existing relations between the two Countries.

NOW THEREFORE, the parties hereto have agreed as follows:

ARTICLE I

GENERAL

1. The Government of the Federal Democratic Republic of Ethiopia (hereinafter referred to as "Ethiopia") and the Government of the Republic of Djibouti (hereinafter referred to as "Djibouti") have agreed to jointly develop the underground water in Shinile area to supply water to Djibouti.
2. The two parties agreed to jointly approve the feasibility study of the Project and specifications of the works to be carried out by the contractor.
3. The two parties agreed to assign one company from each country to serve as joint consultants to both countries throughout the project construction period.

ARTICLE II

COMMITMENTS AND CONTRIBUTIONS OF THE PARTIES

1. The Commitments of Djibouti

Djibouti shall:

- a) Hire a construction company for the execution of works within the framework of the Water – Supply Project and fulfill all necessary procedures;
- b) Finance the costs of the project based on the most advantageous offer;
- c) Assign a project coordinator within the framework of the Water Supply Project. Who will jointly work with the project coordinator assigned by Ethiopia;
- d) Provide full administrative support in giving the authorization necessary to the consulting enterprise to be successful in the construction supervision and contract administration work;
- g) Finance the costs of consultancy fee to be paid for ONEAD during the project construction time;
- h) Ensure the security of part of the Project within its territory during the construction and operation.

2. The Commitments of Ethiopia

Ethiopia shall

- a) Provide the authorization necessary to the Contractor hired by Djibouti, for the execution of the works specified in the Water Supply Project;
- b) Ensure appropriate working conditions for personnel assigned by Djibouti within the framework of the Project, as well as for the Contractor hired by Djibouti;

- c) Provide work and residence permits and visas, free of charge to personnel engaged in the project.
- d) Assign a project coordinator within the framework of the Water – Supply Project who will jointly work with the Project coordinator assigned by Djibouti and to bear related expenses;
- e) Make available electricity and telephone lines to the Project as per the rules and regulations of EEPCO and ETC that apply to similar water projects;
- f) Take measures to allow the use of land, which may be required for the realization of some components of the Projection the Ethiopian territory;
- g) Finance the costs of consultancy fee to be paid for Ethiopian compagny during the project construction time;
- h) Ensure the security of part of the Project within its territory during the construction and operation;
- i) Exempt from taxes and duties goods and vehicles imported into Ethiopia for the execution of the Project;
- J) Take all necessary measures that can make the project sustainable, to avoid pollution and protect the environment in and around the Project area as per the existing laws in Ethiopia;
- k) Consult the Government of Djibouti before taking any measure that affect the pipeline.

ARTICLE III

DESIGNATION OF LAND

1. Ethiopia shall designate 20 Hectares of land in Shinile area from which Djibouti shall supply water to its territory, in addition to the 4000 hectares of land in the proposed ground water well field area.

2. Djibouti shall have the full and exclusive right to draw water within the designated land up to a maximum of 103,000 cubic meters per day.

ARTICLE IV FEES AND CHARGES

Ethiopia agreed to supply to Djibouti the water under this Agreement free of any charge.

ARTICLE V COMPENSATION

Djibouti shall pay compensation for residents of Shinile area and for residents of Ali Sabih, Dikhil, Arta and Djibouti town who may be affected by the Project for the permanent loss of use of the land and its associated revenue as per existing laws of the two countries.

ARTICLE VI SPECIAL CONDITIONS

1. Ethiopia reserves the right to inspect the works to be executed within the framework of the Water Supply Project at every stage and to ensure conformity with the Project, specification and agreements executed in cooperation with Djibouti.
2. The parties shall take all the measures necessary for assuring the delivery of the facility to be constructed within the framework of the Project to a Company, which operates the Water Supply under full ownership of Djibouti



**ARTICLE VII
OWNERSHIP**

Djibouti shall own, possess and control the infrastructure developed in accordance with this Agreement.

**ARTICLE VIII
SCHEME ADMINISTRATION**

After the construction period Djibouti may set up its own company to manage the operation of the water supply system in the Ethiopian Territory or outsource the management to a third party.

**ARTICLE IX
DURATION OF SUPPLY**

The water supply to be made under this Agreement shall be valid for thirty years. However, the parties may by mutual agreement extend this period

**ARTICLE X
DISPUTE**

Any dispute arising from the application of provisions of this Agreement shall be settled by means of bilateral consultations.

**ARTICLE XI
ENTRY INTO FORCE**

This Agreement shall enter into force on the date of the last written notification, through diplomatic channels, that all internal procedures necessary for its entry into force have been fulfilled.

Done at Djibouti this 20th day of January 2013.

On behalf of the Government of the
Federal Democratic Republic of
Ethiopia

H.E Mr. Sufian Ahmed
Minister of Finance and
Economic Development



On behalf of the Republic of
Djibouti

H.E Mr. Ilyas Moussa Dawaleh
Minister of Economy and Finance
in charge of Industry

