

**PROSPECTS AND CHALLENGES OF THE NILE BASIN INITIATIVE (NBI)
FOR A PERMANENT BASIN WIDE COOPERATION**

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Declaration

I, the undersigned, declare that this Thesis is my original work, has not been presented for a degree in any other university and that all source materials used for the thesis have been duly acknowledged.

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Abstract

Nile is distinct International River not only because it is the longest river in the world, but further because it is one of the few international rivers shared by greater number of riparian states, yet not have all inclusive permanent basin wide cooperation on the uses and managements of its water resources so that still facing multifaceted challenges. It is also distinct because out of the ten riparian states sharing its waters, the most contributors to the river are use little or nothing while the most users contribute nothing or little to the river.

Although, attempt to cooperate on the Nile waters was started, at least in the form of bilateral agreements, since colonial era and later in 1959 between Egypt and Sudan, multilateral attempts started in 1967 with the establishment of Hydro- met between six riparian states that was also not inclusive until the NBI which was created in 1999 involving all Nile basin countries except Eritrea.

The NBI is a transitional arrangement established to advance NRBSAP to foster permanent cooperation and pursue sustainable development and management of Nile water resources for the benefit of all inhabitants in the region. Despite its encouraging shared vision, objectives, programs and projects, the NBI is however, said to be facing multifaceted challenges to that its success fall under question. Among other things, divergent interests of the riparian states; instability in the region; interference by one riparian in the affairs of the riparian states; instability in the region; interference by one riparian in the affairs of another; lack of transparency from part of supporting partnerships and unanswered legal issues are considered to be serious threats to the success of the NBI.

In sum, the paper briefly explores the prospects for the NBI, its progress and challenges facing its moves towards permanent basin wide cooperation. It tries to analyze these issues from perspective of modern international trends, and ends up with conclusion and recommending plausible solutions.

Acronyms

BFCM: Bureau of Flood Control and Management
CEO: Chief Executive Officer
CIDA: Canadian international Development Agency
DIIS: Danish Institute for International Studies
DRC: Democratic Republic of Congo
D-3 Project: Nile River Basin Cooperative Framework
ECAFE: Economic Commission for Asia and Far East
EIA: Environmental Impact Assessment
ENSAP: Eastern Nile Subsidiary Action Program
ENSAPT: Eastern Nile Subsidiary Action Program Technical Team
ENTRO: Eastern Nile Technical Regional Office
FAO: Food and Agriculture Organization
GEF: Global Environmental Fund
HYDROMET: Hydro-meteorological Survey of the Equatorial Lakes
IAG: Inter African Group
ICCON: International Consortium for Cooperation on the Nile River
ICJ: International Court of Justice
IDEN: Integrated Development of the Eastern Nile
IMF: International Monetary Fund
IRN: International Rivers Network
IUCN: The World Conservation Union
KBO: Kagera Basin Organization
LVEMP: Lake Victoria Environmental Management Program
NBC: Nile Basin Commission for Nile Waters
NBD: Nile Basin Discourse
NBI: Nile Basin Initiative
NBTF: Nile Basin Trust Fund
NC: Negotiating Committee of the Nile River Basin cooperative Framework
NEAP: National Environmental Action Plan
NEL-COM: Nile Equatorial Lakes Council of Ministers of Water Affairs

NBI Prospects and Challenges

NEL- TAC: Nile Equatorial Lakes Technical Advisory Committee

NGOs: None Governmental Organizations

NEL-SAP: Nile Equatorial Lakes Subsidiary Action Program

NEPAD: New Partnership for Africa Development

Nile-COM: Nile Basin Council of Ministers of Water Affairs

Nile-SEC: Nile Basin Imitative Secretariat

Nile-TAC: Nile Technical Advisory Committee

NRBA: Nile River Basin Agreement

NRBAP: Nile River Basin Action Plan

NRBC: Nile River Basin Commission

NRBC: Nile River basin Commission

OAU: Organization of African unity

PJTC: Permanent Joint Technical Commission for Nile Waters

POE: Panel of Experts

SAPs: Subsidiary Action Programs

SIDA: Sweden International Development Agency

SVP: Shared Vision program

TC: Transitional Committee

TECCO-NILE: Technical Cooperation Commission for the Promotion and Development of the Nile.

UK: United Kingdom (Great Britain)

UN: United Nations

UNDP: United Nations Development Program

UNEP: United Nations Environmental Program

UNESCO: United Nations Economic, Social and Cultural Organization

USALD: United States Agency for International Development

WB: The World Bank

WCD: The World Commission on Dams

WMO: World Meteorological Organization

WWF: World Wide Fund for Nature

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CHAPTER ONE

INTRODUCTION TO THE STUDY

1.1 Background to the Problems

Although Nile is the longest river in the world, it is also one of the few international river basins, which have no basin wide cooperation involving all riparian states on the uses of its water.¹ This means, it has no basin wide legal and institutional cooperative framework that governs the manners of utilizing and managing its water resources; if any, might be only the early bilateral accords that the upper riparian countries have been contesting until now, and the institutional cooperative attempts only between two and six riparian states until the recently established transitional arrangement NBI that also has not involving Eritrea.²

Nile is shared among 10 central and north east African states such as: Burundi, Democratic Republic of Congo, Egypt, Eritrea, Ethiopia, Kenya, Rwanda, the Sudan, Tanzania and Uganda.³ Based on geographical set up, amount of water they contribute to and their divergent interests on the Nile waters, these countries can be classified in to three groups: six equatorial Lakes countries, two eastern upstream, Nile states-Ethiopia and Eritrea, and two down stream states Egypt and Sudan. Out of these 10 countries, the former six in a group contribute about 14% and utilize only around 0.05%; Ethiopia contributes 85% and uses 0.65% while the lower riparian contribute almost nothing but utilizing about 95% of the River's water.⁴ Here, it is not difficult to infer that all the three

¹DIIS (2003), Overview of Water Use and Water Conflict in the lower Nile Basin, DIIS Working Paper 2004/6 presented at conference on From Water Wars to Water Riots Copenhagen.

² Mohammed Abdo (2004), The Nile Question: The Accords on the Water of the Nile and Their Implications on Cooperative in the Basin", *Perceptions Journal of International Affairs*, Vol.15, No2, Summer ed, Center for strategic Research, Turkey, P53.

³See Meraji O.Y. Musya (2002), The Nile Basin and the Nile Basin Initiative, available at: <<http://www.nilebasin.org/nilesec/htm>>, Accessed on 19/12/2005

⁴See Yaocb Arsano (1996). "Sharing Water Resources for Economic Cooperation in the Horn of Africa", in *Trading Places: Alternative Models of Economic Cooperation in the Horn of Africa*; Uppsala, Life and Peace Institute, p46.

groups have different concerns for and divergent interests on the utilization, management and development of the Nile water resources.

Although different cooperative attempts had been made on the Nile waters since colonial era until now between colonial powers, a colonial power with Nile riparian state(s), and later between and among independent Nile riparian states, none of such attempts were inclusive but bilateral or multilateral between two and six states one of which was always Britain or Egypt.⁵ Since such cooperative attempts were either in favor of Great Britain or Egypt, and also because they were bilateral and/or created by the colonial powers, all the none-party riparian states and on behalf of whom the colonial powers signed the treaties denied validly of such accords claiming that they affect their national interests.⁶ And all the institutional cooperative attempts were disbanded before achieving their goals, and the grounds for the failure of such cooperative attempts involve, among other things, growing divergent socio economic interests and hydrological intricacies, political instabilities in the region and interferences of one riparian state in the affairs of other states, and legal issues wrangling over the Nile waters between the upper and lower riparian states jointly with other Problems.⁷ These problems forced the Nile basin countries to pursue all inclusive cooperation so that in 1998 recognizing the cooperative development that holds greatest prospects of bringing mutual benefits to the region, they agreed to create a regional partnership to facilitate common pursuit of sustainable development and management of the Nile river resources.⁸ Accordingly, in 1999 all the

⁵See for example, Dahilon Yassin Mohammoda (2003), Nile Basin Cooperation: A Review of Literature, Current African Issues No 26, ISSN 0280-2171, Nordiska Africainstitutet. See also the 1999 PJTC, the 1976 Hydromet, the 1983 Undugu and the 1993 TECCO-NILE.

⁶ See for example Tesfaye Tafesse (2001).The Nile Question: Hydro-polities, Legal Wrangling, Modus Vivendi and Perspectives, UK, Transaction Publishers, pp.101-108

⁷ See supra at 1.pp.45-55; see also Knife Abraham (2004). The Nile Opportunities: Avenues towards a Win-Win deal; see further Ayenew Tessera (2004). The Imperative Need for Water shed Management in the Eastern Nile Basin, Proceedings of the Conference on Managements of Water Resources in Ethiopia, Addis Ababa University, Institute of Development Research, p138

⁸ Ibid, pp 106-115

Nile basin countries, except Eritrea, jointly established the NBI as a transitional mechanism for cooperation until a permanent basin wide cooperative framework is established.⁹

The primary objectives of the NBI are: to develop the water resources of the Nile basin in sustainable and equitable way to ensure prosperity, security and peace for its entire people; to ensure efficient water management and the optimal use of the resources; to ensure cooperation and joint action between the riparian countries; seeking Win-Win gains; to target poverty eradication and promote economic integration; and to ensure that the program results in a move from planning to action on the ground.¹⁰

The NIB comprises two complementary programs: the basin-wide shared vision program (SVP) and subsidiary action programs (SAPs). The former is to create an 'enabling environment' for cooperative action through building confidence and skill focusing on seven projects: Nile trans-boundary environmental action; water resources planning and management; confidence building and stakeholders' involvement; applied training; and socio-economic development and benefit sharing.¹¹ The SAPs is to plan and implement investments and activities in the ground at the lowest appropriate level; and its objective is to translate the SVP in to action, realizing trans-boundary development opportunities.¹²

According to some sources, the planning phase of the projects is already completed and now has reached the implementation phase, the arrangement comprises institutional framework agreement on the sharing of the resources, a comprehensive development program of the Nile water resources and a clear mechanism on funding and partnership.¹³ In fact, none of them has been implemented so far. This is witnessed from the fact that its projects are yet not translated in to actual action on the ground; and the NBI is yet not

⁹ Ibid, pp

¹⁰ Ibid

¹¹ Ibid

¹² Kimberly E. Founds (2002), *The Nile Basin Initiative: Challenges to implementation*, paper presented at the *Managing Shared Water Conference*, Hamilton, Ontario, Available at: <http://Niebasin.com/documents/kiml.htm>

¹³ Abel Fattah Metawie, *Lessons Learnt from Cooperation in the Nile Basin*, Available at: <http://www.kosenberg.ucanr.org/document/lessonlearntfromcooperationinthenilebasin.doc>, Accessed on 25/09/2006.

replaced by the said permanent cooperative institution (NRBC) as the Nile River Basin Agreement that will establish it is yet not adopted and mechanisms of getting fund from supporting partners, particularly from international funding partnerships, is also yet not secured and they require the establishment of permanent cooperative institution and adoption of the basin wide agreement as a prerequisite to support development projects on the Nile water resources.¹⁴ Further, although NBI was thought to be replaced by the permanent institution within three to five years, it is yet not established even after nine years (in 2008), and it will not be established until the cooperative legal framework is adopted as its issue is suspended in the Draft Nile River Basin Agreement together with the issues relating to the governing principle on which agreement has not reached so far.¹⁵ Regarding the implementation of the NBI projects, some writers say that it would take some additional 10-15 years to enter in to implementation phase provided that the cooperative framework is adopted, if not may fail before achieving its objectives like the prior cooperative initiatives on the Nile waters.¹⁶

In sum, these situations are signs of the fact that the NBI is not moving forward in an expected pace and time towards its goal due to different and interrelated factors. Hence, despite its encouraging and some progresses so far, the NBI would not be successful due different multilateral inter connected challenges that are also associated with existing unresolved problems.

1.2 Statements of the Problems

The key issues here are as to whether the NBI can translate the Shared Vision in to action on the ground and achieve its objectives regardless of these challenges; and whether the Nile Basin countries can tolerate these challenges and the political games in the process to realize their Shared Vision in general. Despite the encouraging Shared Vision and policy guidelines on which the NBI is based on, its objectives and strategic action

¹⁴ See for example, *supra* notes at 1, 2, 4, 5, 12.

¹⁵ See for example, Art. 15(1) of the Draft Ministerial Accord on the NBI (2001); and Version 2 of the 2006 text of the Draft Agreement prepared for discussion.

¹⁶ *Supra* note at 14

program (SVP and SAPs), none of these projects has implemented so far away from beautiful plans on the paper. A number of legal and non-legal multidimensional and inter related problems are identified by different authors as the challenges that would affect the success of the NBI. Among other things, the following appear painstaking challenges that would affect the success of the NBI:

- 1) Divergent interests of riparian states on the Nile waters and there by in NBI;
- 2) Instability in the region and interferences by one riparian state in the affairs of others;
- 3) Unanswered legal issues on the uses, management and development of the Nile waters:
 - a) Absence of all-inclusive basin wide legal and institutional cooperative framework,
 - b) Traits from existing bilateral accords,
 - c) Divergent views regarding the role of international watercourses laws and states practices as customary international law for the issues on the Nile waters,
 - d) Disagreements on some fundamental governing principles of provisions of the Draft Nile River Basin Agreement; and
- 4) Problems relating to the roles of external supporting partners in the NBI: mainly the role of World Bank (including its fund supporting Policy for development projects on international water courses) together with interests of supper power nations, and inadequate involvement of NGOs and civil societies in the NBI. Processes.

There fore, it is these multidimensional problems and divergent views that initiated me to assess whether or not the NBI process can be successful at any rate regardless of these challenges.

1.3 Literature Review

Nile river is one whose watercourse or whose catchments basin lies in the territories of ten sovereign African states; and as the basin is inter connected through the flow of the river's waters, the use of waters in one part of the basin may affect the uses in another part.¹⁷ The Nile river basin is thus a basin shared among ten central and north east African countries that have been suffering from multifaceted challenges, which are interrelated and intermingled in to one another. In the first place, they have no comprehensive basin wide legal and institutional cooperative framework on the uses and management of their

¹⁷ See Supra notes at 14.

common water resources.¹⁸ Secondly, the utilization level of Nile waters by the co-basin states varies with their respective socio-economic development. Accordingly, among the ten riparian countries of the Nile river basin, the two down stream states, Egypt and Sudan, are the most users with out contributing any thing to it while the rest eight states, which collectively contribute about 100% to the river, are almost none users and thus have been strongly claiming to equitably use it.¹⁹ One of the main problems in this regard is that though Nile is their common property and wealth for all, there is no common law that governs as to how these countries equitably utilize and jointly manage their common property.²⁰ To this end, some writers argue that utilization of the Nile waters is governed neither by law nor by common sense.²¹

Others identify instability in the region, interferences by one riparian states in the affairs if others, various hydro political intricacies, set of socio-economic problems, population growth and climate changes, etc as reasons for the conflicts between down and upstream states.²² In deed, some stress that cooperation is not only means to overcome problems but also for survival. For instance, Foulds has put it saying that cooperation and shared concept of common Nile discourse amongst Nile co-basin countries is not only an imperative but also road to survival.²³

Although cooperative attempts on the Nile waters appear started during the colonial era by Great Britain, forgoing cooperation between and among independent Nile basin states has started since 1959. For example, the 1959 PJTC, 1967 Hydro-met, 1969 KBO, 1983

¹⁸ Julie M. Smith (1996). *Nine Nations, One Nile*, Seminar on Population-Environment Dynamics: Transitional Theory, The University of Michigan School of Natural Resources and Environment, available at: <<http://www.person.umich.edu/~wdrake/Smith.htm>>

¹⁹ See *Supra* notes at 14

²⁰ See *Supra* note at 4, pp.38-48

²¹ Yosef Yacob (2003). *Equitable Utilization of the Blue Nile River Sub basin: Context, Problems and Prospects*; Introduction to Doctoral Dissertation, available at :<<http://www.ethio.nt/ethio-waters/wquitableuse-of-nile.htm>>, accessed on 19/12/2005.

²² See *Supra* note at 1 and 7.

²³ *Supra* note at 14

Undugu, 1994 LVEMP, and 1993 TECCO-Nile are some among others.²⁴ However, all these attempts were not inclusive and except the former others were not tied by binding laws; but between two and six states, and failed before achieving their objectives.²⁵

Consequently, in 1997 Nile-Com established a forum for a process of legal and institutional dialogue, and in 1998 recognizing that cooperative development holds greatest prospects of bringing mutual benefits to the region, the Nile basin countries, joined and created a regional partnership to facilitate common pursuit of sustainable development of Nile resources.²⁶ It was as result of these efforts that all the Nile basin countries, but Eritrea, jointly established NBI as transitional mechanism for cooperation in 1999.²⁷

The contents of prospects of NBI involve different programs and projects. It comprises two major complementary programs that involve basin wide projects and sub-basin joint investment projects. One of them is the shared vision program (SVP), and it is to create an enabling environment while the other is subsidiary action program, and it is translate the SVP in to action and realizing trans-boundary development opportunities within the agreed basin wide framework.²⁸

The primary objective of the NBI involve the following: to develop the water resources of the Nile basin in a sustainable and equitable way and to ensure prosperity and peace for all its people; to ensure efficient water management and the optimal use of the resources; to ensure cooperation and a joint action between the riparian countries, seeking 'win-win gains; to target poverty eradication and promote economic integration; to ensure that the program results in a move from planning to action.²⁹

Despite these attractive and encouraging programs of the NBI, it would not be successful, because many of the problems that affected its predecessor cooperative attempts are yet

²⁴ See *Supra* notes 14 and 20

²⁵ See for example *supra* notes at 7, pp.104-106; and at 16

²⁶ See for example *supra* notes at 7, pp.104-106; and at 16.

²⁷ See *supra* note at 3.

²⁸ *Supra* note at 3

²⁹ *Ibid*

not solved so that would undoubtedly confront the NBI process. For example, divergent interests of all the Nile riparian states, political instability in the region, interference of one state in the affairs of other states, problems relating to participation of international supporting partners, alarming population growth rate, climate change, absence of basin wide legal and institutional cooperative framework and conflicts regarding validity of existing bilateral accords are existing problems.³⁰ In addition to these existing problems, none implementation and slow progresses of the NBI projects and delay of the legal and institutional cooperative framework due to disagreements on certain governing provisions of the Draft Cooperative Agreement are identified as new challenges threatening the success of the NBI.³¹

The link between existing and new challenges is seen from perspective of Egypt's powerfulness and her strong relation with international funding agencies and super power states; and it also lifts up the suspicion that the NBI would not be successful. To this end, it is said that Egypt is the country with greater power, has stronger international alliance and whose interests predominate.³² Further, some financial policies of the World Bank seem favor Egypt than other Nile riparian states. This also increases the suspicion that it would bring down her motivation to easily enter in to not only implementation of the NBI projects but also reach agreement on the adoption of the cooperative framework whose fate seems depending particularly on the World Bank. This means, on the one hand, the Bank is not only supporting partner of the NBI but also it is coordinating other supporting partners and managing finance they contributed and facilitating dialogues between Nile riparian countries.³³ On the other hand, its financial policies prevent its support for

³⁰ See supra note at 1, pp. 45-55; see also Kinfe Abraham (2004). *The Nile Opportunities: Avenues towards a Win-Win deal*; see further Ayenew Tessera (2004). *The Imperative Need for Water shed Management in the Eastern Nile Basin*, Proceedings of the conference on Managements of Water Resources in Ethiopia, Addis Ababa University, Institute of Development Research, p.138

³¹ Tesfaye.T and Wondwosen Michaigo (2006), *The Role of NBI in alleviating Food Security Environmental Degradation in Ethiopia*, Paper for the Nile Development Conference; see also Version 2 of the 2006 New proposed text of the Drat Agreement proposed for discussion

³² Dahilon Yassin Mohamoda (2003). *Nile Basin Cooperation: A Review of Literature*, Current African Issues No.26, ISSN 0280-2171, Nordiska Africainstitutet,

³³ DIIS (2003), *Overview of Water Use and Water Conflict in the lower Nile Basin*, DIIS Working paper 2004/6 presented at conference on From Water Wars to Water Riots, Copenhagen.

development projects on trans-boundary rivers where there is no cooperative legal framework among the riparian states and require the consent of Egypt to support development projects on the Nile waters for upper riparian states.³⁴ Hence, subject to its significant roles, the Bank is also suspected of playing game to set back the establishment of permanent cooperation; and it means indirectly supporting Egypt.³⁵ Apart from their pledge at ICCON1, NGOs and civil societies were restrained to involve in the decision making processes of the NBI, particularly at the planning stage; and this is also identified as new challenge threatening the success of the NBI.³⁶

Some writers went to the extent of saying that the NBI would take some additional 10-15 years to enter in to implementation phase, and the adoption of the Nile River Basin Agreement may take long years like the 1997 UN Convention on the Law of the Uses of Non-navigational International Watercourses that took some 25 years to be adopted, so that the implementation of NBI may take these much years, or would fail with out success like its predecessor initiatives.³⁷ In a nutshell, the summation of such existing and new challenges, particularly diverse interests of the riparian states; instability in the region and interferences of one in the affairs of others; unanswered legal issues; and problems relating to the roles of international supporting partnerships including lack of genuine participation of NGOs and civil societies are identified as forefront challenges threatening the success of the NBI.

1.4 Objective of the Study

So far, there is no established basin wide permanent legal and institutional cooperative frame work involving all riparian states on the utilization, management and development of the Nile water resource. Further, as some scholars argue, there is no international law

³⁴ See Supra notes at 14, 21 and 3.

³⁵ See supra notes at 1,4,20.

³⁶ See Supra notes at 7, p 117 and at 14.

³⁷ Ibid

or bilateral accord or common sense that can regulate patterns of the Nile waters utilization and management.

The NBI is a transitional mechanism for cooperation and sustainable development of the Nile river basin resources for the benefit of all inhabitants in the region. And, it is seen as a new road map for permanent cooperation on the Nile waters. Its move towards the desired goals would however be difficult because of multifaceted challenges facing it. The main objective of this study is, therefore to explore as to whether or not the NBI can achieve its objectives regardless of these multifaceted challenges in general, and in particular is:

- 1) To briefly highlight international trends of cooperation on trans-boundary waters and challenges where there is no or loose cooperation;
- 2) To look at prior NBI cooperative attempts on the Nile waters, challenges confronted them and their effect;
- 3) To discuss the NBI's prospects, objectives and projects, and its progresses toward permanent cooperation on the Nile waters;
- 4) To identify challenges confronting the NBI progresses; and finally
- 5) To evaluate the progresses of the prospects of the NBI versus the challenges confronting its move towards permanent cooperation on the Nile waters from perspective of modern international practices, and then after drawing conclusion to recommend plausible solutions.

1.5 Significance of the Study

An important consideration may be acquired from the analysis made by this study for the forward movements through the NBI for permanent all-inclusive cooperation on the Nile water recourses. This study would help not only for the principal stakeholders and institutions organizing and supporting the NBI programs and projects, but also for others. In general, it would help for the principal stakeholders (the Nile basin governments), supporting partnerships such as international funding institutions and other donors, NGOs, and civil societies that have been participating and need to participate in the NBI process as well as concerning cooperation and challenges on the Nile water issues. The thesis would also make academic contributions for research institutions and researchers that

need to make study on the Nile waters. Particularly, the writer thinks that it is very helpful for international funding institutions that also coordinating and facilitating the NBI process, and the Negotiating committee revising the Draft Cooperative Framework and Nile basin governments and their citizens.

In sum, the author believes that it gives highlight to all the overall picture of hydro political and legal issues threatening smooth relations between the Nile countries in general and the success of the NBI in particular. And it should not only be seen from perspective of diplomatic approaches, but further from perspective of legal impacts on both the existing and future generation in order to predict the consequences.

1.6 Delimitation of the Study

NBI is an intergovernmental transitional arrangement for permanent cooperation among the Nile riparian countries, particularly to advance broad based Nile river basin strategic action programs. However, the progresses of its programs and implementation of its projects appear slow so that it would not be successful due to multidimensional and interrelated challenges confronting its moves.

This thesis is however, limited to highlight overview of international experiences of some river basins and early cooperative attempts on the Nile waters and the challenges therein as a back ground; identify and discuss the contents of NBI prospects, the links between and progresses of the NBI and D-3 projects, roles of supporting partnerships; and the challenges confronting them. It has not assessed each and every objective, program, project, and challenges, but focusing on those the writer thinks critical. In short, the study tries to examine the prospects of and challenges in the NBI process from perspective of international trends and effects of early cooperative attempts on the Nile waters. Although there may be some progresses recently in the process, this study covers only the situations before the mid of 2007.

1.7 The Research Methodology

The main purpose of this thesis is to describe the contents of NBI prospects, their progresses and the challenges facing it and there by to see as to whether it can achieve its objectives irrespective of these challenges. As the NBI is an ongoing process and involves many partners, including the governments of the ten countries, international funding donors, NGOs and civil societies, collecting primary information from them would make the study more reliable. However, despite my strong efforts to get information from primary sources, the greater part is kept confidential between few concerned officials and the Negotiating Committee. Hence, the writer could not able to get primary sources and thus forced to use only secondary sources. Indeed, as legal research often depends up on broad legal views and arguments based on logical reasoning, the writer has followed descriptive method using secondary sources such as different international conventions on the uses and management of international watercourses, bilateral accords signed since the colonial era and later between Egypt and other riparian countries, other bilateral and multilateral agreements between and among riparian states of some international watercourses, etc. Further books, Articles /Journals/ and newspapers as well as electronic sources/internet/ were utilized for this study.

CHAPTER TWO

COOPERATION AND CHALLENGES ON INTERNATIONAL RIVERS: AN OVERVIEW OF INTERNATIONAL TRENDS

2.1. International River Basins

An international river is one whose watercourse traverses or whose catchments basin lies in the territories of two or more sovereign countries.¹ This traverse of catchments in effect entitles the riparian countries, that it passes through, equal rights of using and managing the resources of the river, as a matter of principle of international law, which says that international river is a common property and wealth of all co-basin countries sharing the basin.² According to this principle, the riparian countries not only have equal rights to utilize, manage and develop their common waters, but also obligation to respect the rights of other riparian states sharing the basin.³

There were 215 international river basins in 1978 while this number has increased to 261 in the year 1999.⁴ Currently, this figure may increase due to different socio-economic and political factors. Out of the 261 international river basins, respectively 60, 53 and 38 are found in Africa, Asia and Latin America while among the remaining, 39 are in North America and 71 in Europe.⁵ Again among these 261 river basins, 19 are shared by five or more riparian countries: one basin, the Danube between 17 riparian nations; five basins: Congo, Niger, Nile, Rhine and Zambezi between 9 and 13 countries while the remaining thirteen basins are shared among five and eight countries.⁶ By implication, the rest 242

¹Julies M.Smith (1996). Nine Nations, One Nile, in Transition Theory, Seminar on Population-Environment Dynamics, Michigan, The University of Michigan, Chapter 9. Available at: < <http://www.personale.umich.edu/wddrake\smith.html>.>

² TesfayeTafesse (2001).The Nile Question: Hydro politics, Legal Wrangling, Modus Vivendi and Perspective, London (UK.), Transaction publishers, P.101.

³ Ibid

⁴Aaron.T.Wolf et.al (1999). International River Basins of the World, International Journal of Water Resources Development, Vol. 15, No.4, pp.387-428; available at:<<http://www.transboundarywaters.org.edu/publications/register/register-paper.html>

⁵ Ibid

⁶ Ibid

river basins are shared among two and four riparian countries. Out of the international river basins shared by more than nine co-basin countries, except the Danube and Rhine rivers that are found in Europe, all others are found in Africa.⁷

2.2 Co operations and Challenges: International Practice in general

Regarding cooperation on the uses and management among riparian countries, while the Danube and Rhine rivers have multilateral basin wide cooperative agreements, among the African international rivers shared among nine and above riparian countries, only the Niger River has multilateral basin wide legal and institutional cooperative framework among the riparian countries.⁸ Concerning other international rivers shared by between two and eight states, studies show that almost all the riparian countries of North America and Europe have basin wide bilateral or multilateral or both cooperative frameworks while those found in South America, Asia and Africa appears otherwise, if not very less or rather none inclusive bilateral cooperative.⁹ In this connection, some writers have stressed that in the areas where basin wide cooperative agreement is not reached on the patterns of utilization and manners of management of international waters if the riparian nations have divergent and competing needs, level of development or economic capacity, it would be ground for the next world war.¹⁰ On the other hand, there are studies that indicate that in the basins where international waters have been the driver of conflict, the record is however over whelmed by cooperation. To this end, one study has specified that in the last 50 years while only 37 acute conflicts have been recorded, 157 treaties have been negotiated and signed during the same period; and the total number of water related issues is weighted towards cooperation.¹¹ It also address that the majority of the

⁷ Ibid

⁸ Ibid

⁹ Ibid

¹⁰ Aaron T.Wolf (2002), "Conflict and Cooperation: Survey of the Past and Reflection for the Future", Paper presented for UNESCO/Green Cross International Program /, 3rd Preparatory Seminar on From Potential Conflict to Cooperation Potential (P.C.-C.P.): Water for Peace, Bakvat, Azerbaijan.

¹¹ See supra note at 4.

agreements/treaties/ on the uses of international rivers are bilateral and only a few are multilateral¹².

If international rivers are common properties of the co-basin countries on the one hand, and if such countries unilaterally use the water resources of the river within their territories for their national needs without the consent of others on the other hand, it is quite understandable that the use of waters in one part of the basin may affect the interests of others and arise conflict among the riparian states, unless they have common rules that regulate how to use, manage and develop the waters of their common river basin. Indeed, international practice reveals that the issue of conflicts and cooperation over shared waters, including on international rivers, has become increasingly the concern of almost all members of any society in the world community.¹³ To this end, conflict is seen mainly in third world due to different factors. This is not only because shared waters have distinct functions than other waters, but more importantly because of divergent interests of riparian states over their shared waters, lack/absence/of universally accepted and/or basin wide water course laws and institutions (in fact in some river basins) in addition to other social, economic, political and natural factors.¹⁴

The needs to cooperating on the uses, management and development of shared waters have been strongly emphasized technically and professionally from different perspectives by a number of scholars from multi disciplines.¹⁵ To this end, Imeru Tamrat has stressed that not only the roles and functions of the institutions but also the level and strength of cooperation is similarly diverse ranging from a loose form of cooperation such as the institutions having a coordinating role monitoring use to those that have broad supranational decision-making powers in the use and management of international river basins.¹⁶

¹² Ibid

¹³ Supra note at 10

¹⁴ See for example, supra notes at 1,2,4, and infra notes at 15; 96

¹⁵ Imeru Tamrat (2004), Bilateral and multilateral river basin institutions: Lessons for the Nile basin, paper Submitted at the National water Forum organized by ministry of water resources. A/A, Ethiopia.

¹⁶ Ibid

On the other hand, several studies undertaken by many scholars from different disciplines have enumerated some common problems in many international river basins.

For example, Tesfaye Taffesse has pointed out that the problems are attributed to the differences in the economic and political geographies of the basins as well as the extent of water availability in relation to demand.¹⁷ Consequently, he has described the most common challenges of many international rivers are involving: lack of comprehensive basin wide agreements, unilateral development activities regardless of their detrimental effects to other basin states, increasing population growth, climate change, and environmental degradation.¹⁸

Another scholar, Yosef Yacob has put the problems in relation to the utilization, management and development of the shared waters. Accordingly, he has elaborated the straitening circumstances such as feasibility of irrigations, domestic agricultural and industrial needs, unilateral development projects, environmental degradation, increasing competition over the uses of shared water resources and preemption of development options.¹⁹ Bunter Baechler also, by basing his study on environmental context, has mentioned multiplicity of parties, asymmetry of power between the contending parties and existence of other factors external to environmental issue, etc as some of the factors that may stress out challenges in international river basins.²⁰

Julie M. Smith has identified the problems in international rivers in relation to conflicting interest between downstream and upstream riparian countries over the uses of water resources of shared river basins. According to him, interalia, sentimental abuse, un even distribution of physical impacts stemming from differing demands for water resources, lack of cooperative action to manage and develop the river for mutual benefit, and absence of reciprocal power or agreements between upper and lower riparian countries

¹⁷ Supra note at 2, p.5.

¹⁸ Ibid, pp. 7-21

¹⁹ Yosef Yacob (2003), *Equitable Utilization of the Blue Nile River Sub-Basin: Context, Problems and Prospects*, Introduction to Doctoral Dissertation, available at: < <http://www.ethionile/ethiowaters/equitable-use-of-nile.html>.> accessed on 19/12/2005

²⁰ Yacob Arsano (2005). *Four Approaches to Cooperation in the Nile Basin*, in Gunter (2002) *Transformation of Resource Conflicts: Approach and Instruments*, of the Conference on Management of water Resources in Ethiopia IDR, Addis Ababa University, P. 186.

over the use and management of shared water resources are some of the common challenges in most international river basins of especially third world.²¹

Other scholars identify intra and inter state Political intricacies, in addition to the above-mentioned problems, as the exacerbating factors of challenges in international river basins.²² There are also writers who observe causes of challenges in international river basins from perspective of differences in ideology, religion and external interferences as the igniting factors in some basins, such as in the Mekong and Jordan basins as we will see later.²³

In sum, international practice reveals that many international river basins have been facing multifaceted challenges and similarly the riparian states sharing such basins have been thriving to cooperate to overcome such challenges although their approaches and extents vary from one to the other basin depending on several factors, which may be severe, peculiar or greater in some river basins. At this stage however, it would not be easy to draw lessons for the cases in the Nile basin from such general expressions so that before dealing with the cases in the Nile basin, it seems good to see cooperative trends and the predicaments in some selected international river basins. Thus having this general over view in mind, let's proceed to see the practices in some selected international river basins that have/not basin wide legal and institutional cooperative framework, and the challenges confronting cooperative attempts in the latter case.

2.3 The Trends in Some Selected International River Basins

In the preceding discussion, cooperation and challenges in international river basins are overviewed in a general way to have an over all picture. Here, we will see the cooperative trends, the challenges therein and their implication in some selected international river basins to compare with the cooperative trends in the Nile River basin,

²¹ Supra note at 1.

²² See for example Aaron T.Wolf (1998). Conflict and Cooperation along International Water Ways, in Water policy, available at:<<http://www.transboundarywaters.org/edu/documents/conflictcooperation/htm/>>

²³ Supra note at 2, pp. 8-17

mainly with the ongoing efforts by the Nile basin countries through the NBI process towards the permanent comprehensive basin wide cooperation.

Assessing the practices in these river basins, both their failures and success, would help to compare with the past and recent trends in the Nile basin through different cooperative initiatives, particularly to test whether or not the move through the ongoing NBI process towards permanent basin wide legal and institutional cooperative framework on the uses, management and development of the Nile River is in the right track from perspective of such international practices. To this end, the writer selects around ten river basins from all the continents with different socio-economic and political geographies, but with especial emphasis on the river basins of the third world. These involve the Okavango basin, the Jordan basin, the Mekong basin, the Euphrates Tigris basin, the Indus and the Ganges-Brahmaputra-Barak basins, the Amazon and Rio de Laplata basins, the Colombia and Colorado basin, and the Danube basin.

2.3.1. The Okavango (Quito) Basin

This basin is found in Africa and shared among three sovereign states: Angola, Namibia, and Botswana.²⁴ Concerning the challenges in the basin, writers specify large mass of desert frequently hit by drought, water scarcity, lack of basin wide agreements, tensions and suspicions among the co-basin states, absence or little effort of forging basin wide cooperation, unilateral actions detrimental to other riparian countries and opting to change natural flow of water as the major challenges of this river basin.²⁵ In the Okavango river basin, Angola is the upper riparian state while Namibia is the middle and Botswana at the lower end of the river. Among these countries, Namibia moved to change the natural flow of the river's water to use it for her national interest, but this act has been followed by an uproar from Botswana as the latter was directly affected by the diversion.²⁶

²⁴ Supra note at 2, pp.10-11

²⁵ Ibid

²⁶ I'd,p.11

The conflicting issue was raised as a result of the Namibian unilateral action to tackle the recurrent drought facing her citizen versus the Botswana's claim; and it was not only because the river is their common property, but because the diversion of the river by Namibia may affect Botswana's national interest no matter how it may be necessary for the former and is more dependent on the river than the other co-basins. And, this problem has yet not been resolved as there is neither bilateral nor multilateral cooperative agreements between them, except the formation of a tri-national body known to be the Okavango Commission in the mid of 1990 that may be considered as step toward cooperation although unsuccessful in its work.²⁷

2.3.2 The Jordan Basin

It is found in the Middle East and shared among Israel, Jordan, Lebanon, Syria and the incipient Palestine.²⁸ This region is known not only because it is arid and semi-arid, but further because it is the area that still threatening international peace and security due to the repeated and continues conflicts between Israel, the lower riparian state, and the upper riparian states that are claiming not only for the uses of the Jordan water resources but more importantly fighting to re-back the territories taken away by Israel after 1967.²⁹ To this end, Golan Heights, West banks and Gaza strips are identified as the areas which impasse, interalia, the challenges in the Middle-East since Israel had annexed these areas by force from Syria and Palestine and still has denied Palestine's state-ship so that war continues over there.³⁰ Other reasons for the conflicts between Israel and upper riparian states over the Jordan waters include: firstly, the large amount of water, that recently Israel claims as indispensable necessity rather than as of right, is from these areas, which are strictly speaking, outside the territory of Israel before 1967 and during that time only uses 3% from the Jordan's river basin that was found in Israel's proper while currently she gets 30% from the Golan heights and utilizes approximately 82% from underground resources of the West Bank; secondly the hydro-political intricacies in

²⁷ Ibid

²⁸ Ibid

²⁹ Ibid

³⁰ Ibid

The basin is marred with suspicions, mistrust and finger pointing of other grounds for the conflicts in the middle east; mistrust and finger pointing of other grounds for the conflicts in the middle east; thirdly, absence of basin wide cooperative agreements; and fourthly, external interferences and religion differences between the Chirstian Israeli and the rest Muslim countries of the Jordan basin.³¹ Further, hydro-political positions of the basin countries on different traditional legal doctrines of using international watercourse instead of the accepted modern principles under international watercourses laws are also other point of differences between them.³² For example, the Israel's position before she annexed the Golan Heights, the West Banks and Gaza Strips in 1967 she claimed the 'principle of community property' but after has occupied these areas the principle of 'absolute territorial integrity' and 'sovereignty'.³³ The upper riparian states, Syria and Lebanon on their part, have been claiming principle of 'absolute territorial integrity' and 'sovereignty' while the middle riparian state advocates the principle of 'absolute integrity'.³⁴

Concerning cooperative endeavors on the Jordan waters, attempts begun since 1948; and different conferences took place in different cities until 1994 although no concrete change comes out of such conferences.³⁵ For example, the 1950 Johnston plan for basin-wide and integrated approach to construct small dams, and then bilateral negotiation between Jordan and Israel in which the two states agreed to undertake joint projects and exchanging hydrological data were not successful.³⁶

³¹ Ibid

³² See for example, Waterbury (199.7) and Kefiyalew (199.7.) v the 1997 UN Convention on the Laws for the Uses of None-navigational international watercourses.

³³ Ibid

³⁴ Ibid

³⁵ William Sharks, Patricia Wouters and Samantha Rochford (1999), Water Wars in the Near Future? Reconciling Competing Claims for the World's Diminishing Fresh Water Resources, in the Challenge of the Next Millennium, Journal of Center for Energy, Petroleum and Mineral: Law and Policy, Vol.3-2 Article; see also supra note at 2, pp.16-17.

³⁶ Ibid

Overall, from this finding it is possible to come to the conclusion that this river basin is surrounded by multifaceted challenges. There fore, even in the future may not able to establish all inclusive basin wide cooperation in the Jordan basin unless the over all problems in the region get solution; and then basin-wide legal and institutional cooperative framework is established on the use and management of the Jordan waters; there could not be peace in the basin without collective-solutions by way of establishing comprehensive basin wide agreements among all the basin countries concerning the use and management of the shared water resources of the Jordan River basin.³⁷ This could be a lesson to be taken in to account for the ongoing process in the Nile basin.

2.3.3 The Mekong Basin

It is shared among six Asian riparian countries: China, Burma, Cambodia, Laos, Thailand and Vietnam, among which the first two are the upstream while the other four are relatively the lower riparian states.³⁸ The hydro-politics in the basin include ideological, internal and external factors such as interalia, the American intervention during cold war, the civil war in Cambodia, the exclusion of upstream China in any cooperation talks (probably because of her communist political ideology), and also her unilateral move to undertake hydraulic works regardless of its detrimental effects on the downstream riparian countries, lack of all inclusive basin wide cooperation.³⁹

Concerning the cooperative institution in the Mekong river basin, many efforts have been made (by the help of supporting international organizations) to establish basin wide cooperation since 1949 up till the 1995 among the four lower riparian countries.⁴⁰ These include the establishment of the 1949 Bureau of Flood Control in the Mekong Basin (BFCMB) by the support of the UN body, viz. Economic Commission for Asia and the Far East (ECAFE) with the view to controlling floods and propelling water resources development; the 1957 Mekong Committee again among the lower riparian countries

³⁷ Ibid

³⁸ Supra note at 2, pp.8-10.

³⁹ Ibid

⁴⁰ Ibid

(Cambodia, Laos, South Vietnam and Thailand) with the help of UN; and then in 1965 the committee changed its name in to Committee for Coordination of Compressive Development of the Lower Mekong Basin, which indeed did not able to perform its function so that UNDP took over the chairmanship of the Committee and temporarily assigned an expert called Redozowics to discuss the matter with the Mekong riparian states and come up with a working formula to save the fledging organization.⁴¹ For example, in 1975 the member countries signed a ‘Joint Declaration of principles for the Utilization of the water of the Lower Mekong Basin, but because Cambodia withdrew from the committee in the same period, the activities of the Mekong Committee were staked until the reestablishment of the Interim Mekong Committee in 1978 by the three Lower Mekong countries with the exclusion of Cambodia; and even after the establishment of the Interim Committee, not much was done until a new phase was entered in the 1995 Mekong River Agreement.⁴²

The 1995 Mekong River Agreement that is termed as “Agreement on Cooperation for the Sustainable Development of the Mekong River Basin” was made again among the four riparian countries; and the Mekong River Basin Commission established under this Agreement is only to administering, interalia, information exchange and continuous contacts between the riparian countries.⁴³ Unlike the previous cooperative attempts, the 1995 Agreement has also addressed issues of social and environmental assessments prior to the implementation of large-scale development projects, and the Mekong River Basin commission has introduced overall framework and direction of its activities centered on three components such as: the basin-wide development plan, the Water Utilization Program and the Environmental Program.⁴⁴

As far as the legal principle and rules governing the uses of the Mekong River are concerned, article 4 of the 1995 Agreement provides the principle of ‘sovereignty and

⁴¹ Supra note at 24(a); See also supra note at 26.

⁴² Ibid

⁴³ Supra note 15

⁴⁴ Mekong River Commission, 2002

territorial integrity' on the utilization and protection of the water resources of the Mekong river basin.⁴⁵ This principle tends to underline the equality of rights of the four riparian countries to the use of the Mekong waters within their respective territories although subsequent provisions of the agreement put more emphasis on the principle of 'restricted sovereignty' so that seems qualified by the latter.⁴⁶ The 1995 Mekong River Basin Agreement also provides rules concerning notification and prior consultation procedures both of which have different requirements. For example, it says that any proposed inter-basin diversion project on the mainstream of the Mekong is subject to specific agreement by the Joint Committee while for intra basin use of water on the mainstream or for the use of the Mekong water from the tributaries requires the consent of the riparian countries.⁴⁷ Prior consultation involves more than timely notification in that it requires agreement by all the other riparian countries on the proposed use based on the submission of all data and information by the concerned riparian country.⁴⁸ The challenges in the 1995 Mekong River Agreement include harmonizing and balancing various and competing water resources development interests of the basin states; and as the parties to the Agreement are still only the four lower riparian countries (without involving the two upstream countries: China and Myanmar), so that it would be difficult to realize an interrelated basin-water resources management.

Overall, although the cooperation among these countries have been supported by international institutions, and the 1995 Mekong River Basin Agreement has incorporated some important substantive and procedural principles and rules governing the uses and management of international watercourses, it would not be successful since all the attempts were not inclusive but only among the four lower riparian states; the influence of incorporating the already dying doctrines such as sovereign equality and a territorial integrity in the 1995 Agreement, the China's plan to proceed constructing a series of dams, financial restrictions from the donor institutions or funding agencies, etc. The

⁴⁵ Ibid

⁴⁶ Ibid

⁴⁷ Supra note at 15

⁴⁸ Ibid

problems and cooperative attempts as well as the problems relating to role of financially supporting institutions could be lessons for the cases in the Nile basin mainly for the ongoing NBI process.

2.3.4 Euphrates- Tigris Basin

This basin is shared by between four Asian co-basin states namely: Turkey, Iran, Syria and Iraq among which respectively the first two are upstream riparian while the other two are midstream and downstream, but almost all are highly dependent on the water resources of the rivers.⁴⁹

The hydro-political problems in the basin involve, inter alia, limitation of Iran's interest towards navigational use of the river, unilateral and adhoc hydraulic plans rather than with cooperative spirit by all; Turkey's hydro political position to maintain "Harmon doctrine" because the waters of these rivers originate there so that she claimed the water resource of the rivers as her own exclusive property and not as common property; drought and construction of dams for irrigation and hydroelectric supply; and absence of basin wide cooperative agreement with regards to the river's water resources.⁵⁰

Given the divergent interests among and between the co-basin countries, various attempts had been made to negotiate the conflicting issues over the shared waters of the Euphrates-Tigris Rivers since 1946 up until 1990. For instance, the 1946 Treaty of Friendship between Turkey and Iraq although failed because of the non-inclusion of Syria in the treaty.⁵¹ Subsequently series of meetings and talks were held but resulted in only signing bilateral agreements between Syria and Turkey in 1987 and between Iraq and Syria in 1990.⁵² In this connection, although some of the tributaries of the Tigris River originate in Iran, any talk over the use of the water resources of the basin did not involve her.⁵³

⁴⁹ Supra note at 24; see also supra note at 2, pp.12-15.

⁵⁰ See supra note at 2, pp.12-15

⁵¹ Ibid

⁵² Ibid

⁵³ Ibid

Hence, despite a number of discussions, so far no multilateral agreement has been signed among the riparian countries of the basins.⁵⁴

In sum, it is possible to observe here that the main challenges dominating this river basin is referred to divergent unilateral interests of the riparian states on the uses of the rivers' waters, their divergent positions relating to traditional legal doctrines on the uses of shared waters, and absence of all inclusive basin wide legal and institutional cooperative framework beyond bilateral agreements.

2.3.5 The Indus and the Ganges-Barhmaputra- Barak Basins

These are two different river basins found in Asia; and the former is shared between India and Pakistan while the latter is among four riparian states: India, Bangladesh, Bhutan and Nepal.⁵⁵ In the Indus river basin case, problem was raised in 1947 between India and Pakistan because of the Indo-Pakistan partition line that led to conflict when India withheld water flows to canals in Pakistan.⁵⁶ However, by the initiation of the World Bank and its financial support, comprehensive basin wide solution had been reached in 1960 by signing Indus Water Treaty that also established Indus Commission empowering the latter with a task of handling hydraulic data, including the monitoring of flow of discharges.⁵⁷ In relation to the success of basin wide cooperation in the Indus river basin, some writers say that it was because of not only the effort and commitment of the World Bank, but more importantly because of the physical geography of the basin itself and the number of riparian state sharing the river (i.e., lesser number).⁵⁸

Concerning the situation in the Ganges Brahma-Putra-Barak basin, the problem frustrated the basin involve unilateral diversion of water for development projects, unilateral development of small scale irrigations and power generations, lack of a comprehensive

⁵⁴ Ibid

⁵⁵ Supra note at 2, pp.17 and 19

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸ Ibid

basin wide agreement that comprises all the riparian states.⁵⁹ As far as attempts towards cooperation is concerned, efforts have been made since 1977 until 1996 but resulted in only bilateral Ganges Water Treaty between India and Bangladesh but not with others, and still there is no comprehensive basin wide agreement on the utilization or allocation or management of the shared water resources of the basin among all the riparian states.⁶⁰ Hence, as there is no multilateral agreement among the riparian states, some riparian countries especially India and Nepal, have been frustrating each other and attempts to develop water project with the support of international funding organizations.⁶¹

In general, two different points are inferred here: in the basin where the number of riparian countries sharing the river basin is less and effort of international funding organization is high, cooperative endeavors have been successful while in the other wise case it is yet not, although it may not always be true.

2.3.6 The Amazon and Rio de Laplata

These are also two independent river basins in South America; and each of them is shared among eight and five riparian countries respectively.⁶² The Amazon river basin is shared among Bolivia, Guyana, Surinam, Venezuela, Peru, Ecuador, Colombia and Brazil while the Rio Laplata basin which comprises four rivers: Panama, Paraguay, Uruguay and Laplata, is shared among Brazil, Argentina, Paraguay, Uruguay and Bolivia.⁶³ Some of the problems in these river basins were unilateral plans for development, riparian states wish to cooperate for particular works rather than combined and integrated cooperative development works, and less respect for basin wide agreements.⁶⁴

Basin wide cooperative attempts on the joint development of water resources of the Amazon came in to effect since 1978 when the 'Treaty for Amazon Cooperation was

⁵⁹ *I'd*, pp.19-20

⁶⁰ *Ibid*

⁶¹ *Ibid*

⁶² *Ibid*

⁶³ *Ibid*

⁶⁴ *Ibid*

signed by all the eight riparian states.⁶⁵ In case of the Rio de Laplata basin, a cooperative basin wide agreement called the 'Treaty on the River Plate Basin' was concluded in 1970 among the entire basin's riparian states for development and physical integration of the entire basin.⁶⁶ Besides the 1970 multilateral basin wide cooperative treaty, there have been subsequent bilateral and tripartite agreements between and among the riparian countries (on each river) for particular works: for example, in 1973 between Brazil and Paraguay, in 1974 between Argentina and Uruguay; and in 1979 tripartite agreement among them; etc.⁶⁷

The distinctive feature of the problems in these river basins is that the basin wide multilateral cooperative agreements do not able to control the unilateral activities of some states or bilateral cooperative agreements for particular works between some of them regardless of requiring consent of others.⁶⁸ It is obvious that this would harness trusts on basin wide cooperative agreements as it affects the interests of non-party co-basin sates or non consented states of the basins. This may lead to quest whether basin wide cooperative agreement would bring lasting peace among the riparian countries conflicting interest on trans-boundary rivers.

Except for the above mentioned shortcomings, the trends in these river basins can be seen as good lesson for basin wide cooperative framework in the Nile basin; and also it would help one to think ahead, how to control the unilateral activities in the Nile basin, through the NBI processes and further to reconsider the impacts of many bilateral accords that Egypt concluded with other Nile riparian countries turn by turn.

2.3.7 The Colombia and Colorado Basins

These are two independent river basins in North America; and the former is shared by between U.S.A. and Canada while the latter is between U.S.A. and Mexico.⁶⁹ The acrimonious boundary water conflicts between the riparian countries in these basins were

⁶⁵ Ibid

⁶⁶ Ibid

⁶⁷ Ibid

⁶⁸ Ibid

⁶⁹ I'd, pp.xiv-xv

related to different doctrines of riparian states on the uses of shared waters in the early days. These doctrines have been cited as state practice in many riparian countries of other regions even recently, including the Nile riparian states.⁷⁰ These doctrines include the principle of ‘equitable apportionment’, ‘prior appropriation’, reasonable use, etc.⁷¹

However, it is not an issue in North America this day as the riparian states have already solved it by concluding different treaties and establishing institutions governing such issues. For example, they established Boundary Water Treaty and International Joint Commission since 1909 on the Colombia River; and subsequently several agreements, including the 1961 Treaty on Cooperative Development of the water resources of Colombia river basin and the 1964 Protocol for the Colombia River Treaty between the two countries on the uses and management of the river.⁷²

These countries were motivated to enter into agreement for the mutual benefit from cooperation than unilateral water resources development, because they have a history of good political and socio economic relationship so that have been resolving conflicts through their established institutions smoothly.⁷³ The IJC established under the 1909 treaty is seen as an umbrella treaty for a cooperative framework governing the relations between riparian states with respect to the uses, management and development of trans-boundary water resource.⁷⁴

Concerning legal principles and rules governing their shared waters, Article II of the 1909 Boundary Waters Treaty provides that each riparian state reserves the exclusive jurisdiction and control over the use of the waters within its territory and maintaining boundary waters as subject to equal and similar rights.⁷⁵ However, departing from the 1909 umbrella treaty, the Columbia River Treaty advocates the principle of ‘equitable sharing of downstream benefits’ though still different from the principle of equitable

⁷⁰ Ibid

⁷¹ Ibid

⁷² Ibid

⁷³ Ibid

⁷⁴ Supra note at 43

⁷⁵ Ibid (Paisley, 2002).

sharing of water resources'.⁷⁶ Equitable sharing of water resources is concerned with the division of waters among the concerned riparian state based on agree up on criteria while equitable sharing of downstream benefits focuses on the division of benefits gained from the water works usually built in upstream but for the benefit of downstream countries.⁷⁷ This principle encourages and motivates agreement among riparian countries particularly when the benefits available to them are greater than opting for a unilateral approach.⁷⁸ The spirit of this principle may not only have laid basis for the introduction of principle of equitable utilization but also for existing differences between Ethiopia and Egypt on this fundamental principle.

Concerning the Colorado River basin, an agreement has been interred in 1944 and an International Boundary Waters Commission was established between Mexico and U.S.A.⁷⁹ Thus there is no problem of cooperation between them on the uses of the river's water. USA has introduced different riparian doctrines on the utilization of shared water resources as state practices although recently not applicable and replaced by different treaties in North America. Nonetheless, these doctrines are still claimed as customary international law by some riparian states of the third world, and become point of differences in cooperative negotiations between lower and upper riparian states in many international water use disputes.⁸⁰ Therefore, in the basins where there are no basin wide inclusive agreements, different riparian countries have been claming such state practices as customary international law that in effect challenges cooperative efforts because of the competing claims between upper and lower riparian states.

2.3.8. Danube Basin

It is found in Europe, and its unique feature, among all the 261 international river basins, is that it is shared among 17 riparian countries while all other international river basins are

⁷⁶ Supra note at 43

⁷⁷ Ibid, see also supra note at 15

⁷⁸ Ibid

⁷⁹ Ibid

⁸⁰ For example, in Tigris-Euphrates, Jordan, Nile river basins, etc.

shared by between not more than 13 riparian countries.⁸¹ The Danube River basin cooperation started more recently regardless of its greatest number of riparian states that have diversity of languages, ethnic and religious groups, history of population movements, and conflict and displacement of people, which are still root causes for the lack of environmentally sustainable management today.⁸²

Regarding the cooperative attempts in the Danube river basin, multilateral agreements were started to be made among the riparian countries on the uses of the Danube waters since the 1985 Regensburg trilateral agreement which also included the European Community as third signatory when the riparian countries recognized the need for regional cooperation and led to the establishment of multilateral agreement.⁸³ In 1975, Romania took initiative to start cooperation on water protection, quantitative water management and flood control; in 1977 Austria and Germany initiated bilateral agreement on water management in the Danube catchments and the process of contacts by the 1985 Bucharest Declaration.⁸⁴ Subsequently the 1985 Bucharest Declaration for the Management and protection of the Danube River (Bucharest, 1985); in 1991 Danube Conference in Budapest decided to develop a binding instrument on the protection and sustainable use of the Danube River (Danube river Protection Convention, (DRPC) and a separate instrument on nature conservation (Danube Basin Nature Conservation Convention, (DBNCC) in the same year (1991) involving Danube countries, donors, International Funding Institutions (IFIs), G24 countries, and NGOs established the Environmental program for the Danube River Basin; in 1992 first round of negotiations on DRPC held in Vienna, signed by eleven Danubian countries and EC in Sofia on June 29, 1994; in 1998 first meeting of the International Commission for the Protection of the Danube River (ICPDR) entered into force on October 22,1998; and in 1999 Organizational framework was established consisting of: Conference of the Parties,

⁸¹ See supra note at 22

⁸² (Bendow, 2002a; 2002b).

⁸³ Imeru Tamrat (2006), *Bilateral and Multilateral River Basin Institutions: Lessons for the Nile Basin* /supra note at 15/

⁸⁴ Ibid

ICPDR, Secretariat, PMTF, and 5 Expert Groups.⁸⁵ If closely looking in to the progresses of cooperative initiatives in the Danube river basin, one can observe that it was started recently in 1975 by the initiation of Romania and then in 1985 Austria and Germany developed bilateral accord; and with in short time, in 1994, basin wide cooperative framework was signed and entered in to force in 1998.

Alike in other international river basins, the conflicts between riparian countries of Danube involves utilization of the water resources of a section of Danube river for the development activities such as construction of dams for energy, agriculture, transport and other sectors of economy; competing claims of states for various rules of riparian states over shared waters such as equitable and reasonable sharing of the resources of international watercourse. etc.⁸⁶ The best example in this regard is the Gabčíkovo-Nagymaros case (19 97) between Hungary and Slovakia. The dispute between the two countries arose out of the bilateral treaty concluded in 1977 concerning the construction and operation of the Gabčíkovo-Nagymaros system of Locks when Hungary decided to abandon her agreement and Czechoslovakia decide to unilaterally divert the Danube River.⁸⁷ The dispute was resolved by international court of Justice in 1997. In its decision, the court identified flood protection measures, farming and forestry activities, industrial activities and population increase as the major problems that caused disputes on Danube River which, however has significant role in the commercial and economic development for all its riparian states.⁸⁸

Despite earlier bilateral agreement concerning the construction of a dam at Gbickovo-Nagymaros, dispute arose between the two states, and they submitted their case to I.C.J. because, Hungary refused to go ahead with the project on the ground that the work “would cause damage not foreseen at the time of the conclusion of the 1977 treaty” on the one hand, and Slovakia reacted by ‘diverting the Danube and implementing a

⁸⁵ Ibid

⁸⁶ ICJ (1997), Case Summary Gabeikovo-Nagymaros Project (Hungary/Slovakia), Summary of the Judgment of 25 September 1997.

⁸⁷ Ibid, see also supra note at 45,pp.xviii

⁸⁸ Ibid

provisional solution aimed providing for itself the benefits anticipated under the 'Nagyomros Works' on the other hand.⁸⁹ In this case, Hungary alleged that Slovakia had violated the customary rules of equitable utilization and nor arm by diverting the Danube and implementing the provisional solution.⁹⁰

The implication of these issues, that was raised both by the parties and the court's decision, could be lessons on legal rights and obligations of Nile riparian states with respect to development, use and management of the water resources of Nile for the intended basin wide cooperative agreement as well as regarding impacts of existing bilateral accords unless their fate is expressly mentioned in the designed basin wide agreement. The ICJ's decision as well as the allegation and response of the disputants may help the Nile basin countries to reconsider and clearly determine the effect of the earlier bilateral accords when adopting the cooperative basin wide framework; but still it could be an exemplary in holding together divergent interests of many riparian countries and establishing legal and institutional cooperative framework.

2.4. The Role of International Watercourses Laws

There were no accepted rules of international law applicable to all international river disputes before the adoption of the universal conventions on the uses of international waters; and the basin wide agreements established between certain riparian countries are considered to be law only for them, but not for riparian countries in other basins as universal conventions, except may be serving as customary international law (may be in the form of states practices/riparian doctrines) on trans-boundary waters.⁹¹ The accepted rules governing the utilization of trans-boundary fresh waters in the area of international water laws are those norms contained in the universal legal instruments that have started evolving since the 1966 Helsinki rules.⁹² The writer thus here tries to pinpoint the role of such universal conventions and legal principles acknowledged under them as the later

⁸⁹ Ibid

⁹⁰ Ibid

⁹¹ Branko Bošnjakoviæ(2003), *Negotiations in the Context of International Water related Agreements*, University of Rijeka, Croatia, and EST Consultancy–Environmentally Sustainable Transition, Tannay, Switzerland SC-2003/WS/45

⁹² Ibid

basin wide agreements appear influenced by the rules and principles of such international water laws in the uses, management and development of waters of international rivers.

The 1966 Helsinki rule has identified the basic rule of international water resources law such as, the Principle of reasonable and equitable utilization and sharing of the benefits of the waters of an international drainage basin.⁹³

The 1997 UN Convention on the law of the Non-navigational Uses of International Watercourses, which was adopted by a great majority of countries, also appears to promoting cooperation among riparian states in setting principles, norms and rules that give guidance for regulating conflicts on the uses; and it is identified as a general framework agreement that contains important substantive and procedural principles and addressed the subject of cooperation regarding the prevention or solution of conflicts, for example, in article 5 (Equitable and reasonable utilization and participation), 7 (Obligation not to cause significant harm), 9 (Regular exchange of data and information) and 33 (settlement of disputes).⁹⁴ One would not be wrong if says that the Convention contains the most critical principles and tries to balance the right of upstream and downstream states. Therefore, although the required number of ratifications by UN member states is still being awaited for the Convention to enter into force, the substantive and procedural principles contained in the Convention could be considered as 'a cogent summary of the relevant customary international law'.⁹⁵ In this connection, no matter how almost all substantive and procedural principles adopted in the Draft Nile river Basin Agreement seem derived from those in this Convention, majority of the Nile riparian states including Ethiopia and Egypt have not ratified the 1997 UN Convention on the Law of the Non navigational Uses of International Watercourses.⁹⁶ There for, except may be serving as

⁹³ Ibid

⁹⁴ Ibid

⁹⁵ Imeru Tamrat (2004), *Bilateral and Multilateral River Basin Institutions: Lessons for the Nile Basin*, in Dellapenna, 2001, *supra* note at 15

⁹⁶ Mohammed Abdo (2005). *The Nile Question: The Accords on the Water of the Nile and Their Implications on Cooperative in the Basin*, *Perceptions Journal of International Affairs*, Vol. IX, No. II, Center for Strategic Research, Turkey, summer ed., P. 53.

guidelines or customary international law, it could not be binding law upon the countries that yet not ratified it.

The UNECE Convention on the Protection and Use of Trans-boundary Watercourses and International Lakes, also known as the 1992 Helsinki I Convention, that was signed in 1992 at Helsinki by twenty five countries and ratified by thirty two countries in January 2002, has also explicitly recognized the need to apply a number of basic principles.⁹⁷ This convention is considered to be the first multilateral treaty to specify the procedural rights and duties of Parties with regard to trans-boundary impacts of proposed activities and to provide procedures in a trans-boundary context.⁹⁸ Further, the EIA Convention that stipulates the obligations of parties to assess the environmental impacts at an early stage of planning has prescribed the measures and procedures to prevent, control, or reduce any significant adverse effect of the environment, particularly trans-boundary effect, likely to be caused by a proposed activity or any major change to an existing activity.⁹⁹ According to this convention, the main and core obligation of the riparian parties is to enter on the basis of equality and reciprocity into arrangements in order to define their mutual relations and conduct regarding the prevention, control, and reduction of trans-boundary impacts; and such agreements stress the establishment of joint covering well-defined catchments areas with their tasks.¹⁰⁰

Concerning the tasks of the joint bodies, studies show that much of the works of developing conventions, norms, and standards rarely hits the headlines, but it provides considerable and direct benefits to member countries and facilitates the economic integration in the region.¹⁰¹ However, the larger significance of the technical work is that it helps to create a framework in which the habits of cooperation to overcome differences and seek common ground have become deeply entrenched over the course of nearly fifty years.¹⁰² In short, these international watercourse laws have some implications/reflections

⁹⁷ Supra note at 91

⁹⁸ Ibid

⁹⁹ Ibid

¹⁰⁰ Ibid

¹⁰¹ UNECE Regional Water-Related Conventions.

¹⁰² Ibid

/and roles on/for the proposed NRBA and NRBC. And thus they may possibly serve not only as guidelines but also as customary international law at least until the NRBA is adopted.

To wrap up the chapter, by and large international practice shows that there have been conflicts in international river basins where there is no or loose cooperation among the riparian states: particularly, in many international river basins of Africa, Asia, and South America, whether shared between few or among countries, among other things, absence of basin wide agreements or weak/powerless/ cooperative institutions on the used and management of shared waters are still an issue of conflict between upper and lower riparian states. In the regions where international rivers were the driver of conflict, the likelihood of conflicts over the uses and management of such water rise, among other things, with institutional capacity when there is no treaty or other regional agreement or when relations between the riparian states are especially bad over other issues. Again, not only absence of basin wide agreement, but also establishing low capacity cooperative institutions could not able to cease conflicts on the uses of international rivers so that construction of any development project by one riparian on shared waters could be driving force for conflict and political intricate. In many international river basins of developing regions which have not basin wide legal cooperative framework so far, the involvement of influential international supporting donors or super power nations have yet not been resulted in creating inclusive basin wide agreements except in the Indus river basin case between India and Pakistan. International laws have reflections on and roles to play on basin wide agreements and also may serve as guidelines but may/may not as customary international law where there is no basin wide agreement among all the riparian states

CHAPTER THREE

CHALLENGES IN THE EARLY COOPERATIVE ATTEMPTS IN THE NILE BASIN

3.1. The Nile Basin and Challenges of the Basin in general

Nile is the world's longest international river that supplies ten central and north east African countries tied by it as a string threads together.¹ It is also a river whose basin covers an area of about 3 million Km², i.e., 1/10 of the Africa's land mass,² passes through the countries with variety of climates and natural formations, from mountainous highlands to barren deserts, that means it flows from eastern and central African high lands to the northern arid countries, i.e., the Sudan and Egypt.³ Technically speaking however, the main Nile begins at the point near Khartoum, the capital of Sudan, where the Blue Nile of Ethiopia and White Nile of the Equatorial Lakes of central African Countries join and then flowing through Sudan and Egypt, and finally culminating in a vast delta in the Mediterranean Sea.⁴

The Nile basin is a basin which contains outstanding environmental assets: land escarpments with high mountains, tropical forests, wet lands, lakes, savannas, wet lands, arid lands and deserts; and it serves as a home to several wild, domestic and water animals as well as more than 160 million people out of roughly 300 million living in the ten riparian countries that have rights to use their shared Nile waters.⁵ The Nile river has several sources, among which the principal streams involve the White Nile, which begins at the

¹ International Rivers Network (IRN) (2005), Linking Human Rights and the Environmental Protection: available at: http://www.irn.ca/the_nile_states_dam_their_way_to_cooperation/html/, accessed on 12/19/2005.

² Ibid

³ Tesfaye Tafesse (2001). The Nile Question: Hydro politics, Legal Wrangling, Modus Vivendi and perspectives, Transaction Publishers, London, P.23.

⁴ Yosef Yacob (2003). Equitable Utilization of the Blue Nile River Sub-basin: Context, Problems, and Prospects, Introduction to Doctoral Dissertation, available at: <http://www.ethionile/ethio-waters/equitable-use-of-nile.html>, accessed on 12/19/2005

⁵ Meraji O.Y. Msuya (2002). The Nile Basin and the Nile Basin Initiative, International Weiterbildung (inwent), available at: <http://www.inwentorg/inwentthe.nilebasins.nbi/html/>, accessed on 12/19/2005

Lake Victoria of Central Africa, Blue Nile, which consists Sobat, Atbara (Tekeze) and Abay rivers, all flowing from the Ethiopian high lands, and at the most distant the Kagera river that winds its way through Burundi, Rwanda, Tanzania and Uganda into Victoria.⁶

Regarding the water contribution of the riparian states to the main Nile, writers point out that Ethiopia has contributed 86% and the Lake plateau of central Africa 14% to the total annual discharge of the Nile water; but the most users, Egypt and Sudan, have contributed nothing to it.⁷ The Nile River is thus waters from areas with high precipitation in the high lands of Ethiopia and central African Plateau to the arid and desert countries, Egypt and the Sudan.⁸ As a matter of certain international principles on trans-boundary waters, Nile is the common property of all the countries sharing it so that upper riparian states have been claiming rights of using it equally while the lower riparian states have been claiming principles against the interests and rights of other; that means all have divergent interests on the Nile waters.⁹

The number of countries sharing the Nile is high and less than only the number of countries sharing the Danube and Niger rivers.¹⁰ But, among international river basins in the world, the Nile basin is distinct not only being shared by large number of riparian countries, but also because in no other basin is the strongest riparian country so totally dependent on the waters of a single river that flows in to it from sources outside its territory and to which its own territory adds no water to it, but utilizes more water than all the other riparian states combined.¹¹ Further, although Nile is an international river whose

⁶ Supra note at 4.

⁷ See for example. Yacob Arsano (2005), Four Approaches to Cooperation in the Nile Basin, Proceedings of the Conference on management of water Resources in Ethiopia, Institute of Development Research (IDR), Addis Ababa University, Addis Ababa, Ethiopia, P.181, see also supra note 3, P-44

⁸ Kinfé Abraham (2002). The Nile Basin Disequilibrium: Perceptions, Journal of International Affairs, Vol.1, No. 3

⁹ Dahilon Yassin Mahamoda (2003). Nile Basin Cooperation: A Review of the Literature on Current African Issues No. 26, ISSN 0280 -2171, Nordic Africa Institute, Uppsala, Sweden, p.7.

¹⁰ The countries sharing the Danube and Niger rivers are respectively 17 and 11 as described

¹¹ DIIS (2003), The Role of the Poor and Implications for Water Management Institutions in Future Water Related Conflicts, in Elihance (1999:80), Hydroplitics in the Third World: Conflict and Cooperation in Internationals River Basins, DIIS Working Paper 2004/6 presented at Conference on From Water Wars to Water Riots ? , Copenhagen, P. 114

water resources are considered to be the common property of all the riparian countries, like any other international rivers, up till now the riparian countries in the basin have no basin wide framework agreement on the uses, management and development of the river's waters.¹² Hence, the absence of basin wide legal framework and the prevailing anarchic approach to the uses and management of the Nile waters have given rise to the unregulated competition between the most users downstream states, Egypt and Sudan, and the whole contributors, but not user upstream states, Ethiopia and the Equatorial Lakes Region Countries.¹³

It is international practice that unilateral and competitive use of the water resources of an international river by one country with out considering the demand of other riparian countries would likely not only create unfair competition and uneconomic utilization but also may escalate the extent of existing political intricacies, legal skirmishes and other problems instead of basin wide cooperative efforts.¹⁴ In this regard, the Nile basin is a paradigm case that embodies various complex challenges relating to the use and management of the Nile waters.¹⁵

Despite the abundant natural endowments in the Nile basin, including the water resources of Nile, studies, by a number of scholars from different disciplines, show that the basin has increasingly been facing multifaceted and interrelated challenges such as: rapid population growth, environmental degradation, climate change and ecological consequences, frequent natural disaster, poverty, political and socio-economic conflict of interests, historical legal issues, unilateral development efforts, etc.¹⁶ For example, according to Dahilon Yassin Mohamoda, the challenges in the Nile basin include:

¹² Tsfaye Tefesse (200: 33), *The Nile Question: Hydro politics, Legal Wrangling, Modus Vevindi and Prospects*, in Yacob Arsano (1997), *Predicaments of cooperation in the Nile Basin Paper submitted for the 13th International conference of Ethiopian Studies, Kyoto, Japan*, P. 41.

¹³ Mohammed Abdo (2005). *The Nile Question: The Accords on the Water of the Nile and Their Implications on Cooperative in the Basin*, *Perceptions Journal of International Affairs*, Vol.IX, No.II, Center for Strategic Research, Turkey, summer ed. , P. 53.

¹⁴ *Supra* note at 7, P. 182 see also *supra* note at 4.

¹⁵ *Ibid*

¹⁶ *Supra* note at 1, 3, 4, 7, 9, 11.

poverty, wide spread conflict environmental degradation, frequent natural disasters, rapidly growing population combined with ecological consequences, increasing agricultural and industrial development which demand more water, mutual distrust, competition and confrontation, and absence of basin wide legal instrument on the utilization and management of the waters resources of the Nile river.¹⁷

Kimberly E. Foulds in his part has identified population growth whose pressures place stress on the political, economic, and social institutions, the threats of waters scarcity; and recurrent drought and rapid desertification compounded by abject poverty as some of several challenges, which almost all the Nile basin countries have in common.¹⁸

Meraji O.Y Musya, the executive director of Nile Basin Initiative Secretariat in 2001, has also mentioned that the people of Nile basin has been facing considerable challenges as the basin is characterized by poverty, political instability, rapid population and environmental degradation.¹⁹

The International Rivers Network (IRN) has addressed water scarcity, competing project for various irrigation and hydropower dams and coming impacts of climate change as some of the Nile basin challenges; and it warned that these problems could send the region's already over-tapped water resources into crisis, leave economies weaker rather than engthending and do little to reduce ongoing conflict over the Nile.²⁰

Yosef Yacob has mentioned challenges of the Nile basin in relation to the questions of equitable utilization of the Nile River by giving emphasis on the legal aspects. Thus, in addition poverty, rapidly growing population, prolonged droughts and devastating famines, he has pointed out the Egypt's control over the water resources of Nile for national security and survival, the other riparian countries claim and attempt to establish

¹⁷ Supra note at 9

¹⁸ Kimberly E. Foulds (2002)., The Nile Basin Initiative: Challenges to Implementation, Paper presented at the Managing Shared Water Conference, Hamilton, Ontario, Canada,

¹⁹ Supra note at 4

²⁰ Supra note at 5

exclusive rights of exploitation to that part of the Nile waters within their territory, unilateral and competitive development programs over the shared water resources, their claim on the basis of sovereignty right and pursuit of national self interest, historical effects of the colonial period and later bilateral treaties, and absence of both customary and treaty laws as the potentials for conflicts over the uses and management of the water resources of Nile river.²¹ Further, as Kinfu Abraham has pointed out, all upstream states have made little use of the waters of the river while Sudan and Egypt, particularly the latter has been exploiting it extensively for irrigation and hydropower generation.²²

In sum, Nile basin is identified as one of international river basins that have been suffering from multifaceted challenges. The challenges of the basin in general, and conflicts over the waters of Nile in particular, has long history back as of colonial era; and studies show that they have been part of the challenges that affected early cooperative attempts on the Nile water resources. Next, let's see cooperative attempts on the Nile waters prior to the establishment of NBI and the problems confronted them. These include the attempts since colonial era up to the 1993 TECCO-NILE.

3.2. Early Cooperative Attempts on the Nile Waters and the Challenges therein

3.2.1. Colonial Era Attempts (1891-1950s)

Some writers say that cooperative attempts in the Nile basin goes back to the time when the British colony had occupied Egypt and most upper riparian countries of the Nile basin soon after 1882; and in this regard they cite the 1891 protocol between British and Italy as the initial point of colonial era attempt to cooperate on the Nile waters.²³ Due to this reason, these writers argue that it could have been opening point for emergence of cooperative attempts on the uses of the Nile waters.²⁴ Consequently, the colonial powers had entered in to various bilateral and trilateral accords on the Nile waters between, or

²¹ Supra note at 4.

²² Kinfu Abraham (2004). Nile Opportunities: Avenues toward a win-win Deal, Jointly Published by EIIPD & HADAD, Library of Congress Classification; P.15

²³ Supra note at 9, p.19; see also Abdelfatah Metawi (2003), Lessons Learned from Cooperation in the Nile basin, available at: <http://www.rosenberg.ucanr.org/documents/lessonslearnedfrom_cooperation_in_the_nile_basin.doc>, accessed on 25/09/2006

²⁴ Ibid

with or on behalf of the countries sharing the Nile waters.²⁵ These attempts were expanded when Britain began to unify the Nile basin as an integral whole and established control over the Nile waters both hydrologically by building a series of dams and legally by signing treaties with or on behalf of different basin's countries.²⁶ However, all the colonial era attempts were in favor of Britain and/or Egypt but detrimental to all the other Nile riparian states.²⁷

Concerning the colonial era accords on the uses and management of the Nile waters, including the 1891 protocol, about ten agreements were signed either between the colonial powers or between Britain and one of the African Nile basin state. Out of these agreements, five were between British and Egypt; two between British and Italy; and the remaining three were one each between Britain and Ethiopia, between British and Congo, and between British and Belgium.²⁸ In all such colonial era agreements one party was always British, and almost all were in favor Britain or Egypt.²⁹ For example, in April 1891 Britain and Italy signed a Protocol for the demarcation of their respective spheres of influence in East Africa, and it prevented construction of any irrigation projects on Atbara a tributary of Nile originating in Eritrea; in May 1902, Ethiopia and Britain (on behalf of the Sudan and Egypt) agreed that nothing should be built across the Blue Nile, Lake Tana, or Sobat that might impede the flow of the Nile; in 1906, Britain and the Congo Free State decided to prohibit any construction that would diminish the flow of the White Nile reaching the Sudan; the agreement between France, Italy and Britain in December 1906, and that between Italy and Britain in December 1925, also protected the flow of the Nile from any upstream diversions, especially under the later treaty, Britain recognized natural rights of Egypt with respect to the waters of Nile granting Egyptian

²⁵ Ibid; see also Ashok Swain (1997), "Ethiopia, the Sudan and Egypt: The Nile River Dispute", *Journal of Modern African Studies*, Vol.35, No.4.

²⁶ Abdelfattah Metawie (2003). *Lessons Learnt from Cooperation in the Nile Basin*, available at: <http://www.rosenberg.ucanr.org/documents/lessonslearntfrom_cooperation_in_the_nilebasin.doc>, accessed on 25/09/2006.

²⁷ *Supra* note at 9, pp.19-20

²⁸ *I'd*, p.13; See also *supra* note at 13, pp.47-49; further, see Kefyalew Mekonnen (1997), *A New Basin for a Viable Nile River Water Allocation Agreement*, A Paper Submitted to the 5th Nile 2002 Conference, Addis Ababa, Ethiopia, pp.3-5.

²⁹ Ibid.

priority to water needs and the right to veto any future hydroelectric project in any of her colonies along the Nile; in 1934, Britain and Belgium agreed that any amount of waters of Kagera river diverted for hydroelectric power was to be returned to its banks; etc.³⁰

Concerning the validity of colonial era accords, Egypt has been arguing that these accords remain valid and binding on the successor states while the upstream states have rejected them by citing different doctrines and claiming their vested rights on their common property. For example, the upstream states have denied validity of the colonial era accords on the basis of doctrines like: successor states do not inherit obligations arising out of treaties concluded by their predecessors; the principle of fundamental changes of circumstances on the basis of article 62 of the 1969 Vienna Convention on the Law of Treaties that stipulates that 'fundamental change of circumstances can be invoked to terminate an existing international treaty'; riparian states that were not party to such agreements also invoke the principle that says 'parties to those treaties can create rights and duties only to themselves, not to non-party states and also non-state-parties'.³¹

In sum, it is not difficult to adjudge from these colonial era agreements that they all lack shared vision and spirit of cooperation among riparian states except for the benefit of Britain and Egypt. They also lack institutional cooperation for an optimal utilization of the Nile waters but rather created potential for serious disagreements between upper riparian states and the lower riparian Egypt as these accords not only excluded many upstream states, but also left out issues of Nile waters sharing and management as well as environmental protection and sustainable development of the river.³² Even after the evacuation of colonial powers from the region and thus the British effort was ended with the end of its control in the Nile basin region, Egypt has been continuously invoking statusquo so that the impacts of those agreements remain complementing other challenges threatening the success of basin wide legal and institutional cooperative frame work in

³⁰ See for example, Ashok Swain (1997), "Ethiopia, the Sudan and Egypt: The Nile River Dispute", *Journal of Modern African Studies*, Vol.35, No.4. ;&Imeru-Aquatic Science 2005

³¹ Yehenew Tsegaye (2004), *The Nile Basin: From Confrontation to Cooperation*, 27 *Dalhousie Law Journals*, Dalhousie Law School, Canada: Dalhousie.

³² Yehenew, Id p 5

the basin.³³ The fear in this connection that is thought to be challenging the success of the Nile Basin Initiative (NBI) and the basin wide cooperative legal frame work is the Egypt's position for statuesque vis-à-vis the upper riparian countries resistance against validity of not only existing bilateral accords, but also the colonial era agreements.³⁴

Having seen this much about the attempts during colonial era and the defects therein, let us proceed to see the institutional and legal cooperative efforts and the challenges after the colonial period, between and among the independent Nile basin countries since the 1959 PJTC until the 1993 TECCO-NILE. These involve: the 1959 Permanent Joint Technical Commission (PJTC) and 1978 Nile Basin Commission (NBC) only between the two lower riparian countries: the 1967 Hydromet; the 1978 Kagera Basin Organization (CBO); the 1983 Undugu; the 1994 Lake Victoria Environmental Management Program (LVEMP); and the 1993 TECOO-NILE. This section will therefore given an overview of these earlier bilateral and multilateral cooperative attempts in the Nile basin as they have contribution in laying ground for the Nile Basin Initiative (NBI).

3.2.2. The Permanent Joint Technical Commission for Nile waters (PJTC)

After the British colonial power had left controlling the region, the first attempt started between independent Nile basin countries was the one concluded in 1959 between Egypt and the Sudan which were the British colony. PJTC was formed for the utilization of the shared Nile waters; and to regulate the river's waters and control its flow into the Mediterranean Sea.³⁵ The PJTC had also worked to increase the Nile yield by utilizing its waters and to jointly study and implement projects.³⁶ It was entrusted with the power of overseeing the 1959 agreement, coordinating a unified Egyptian-Sudanese position for

³³ Nabil M.El-Khodari (2002). The Nile Basin Initiative (NBI): Business as Usual? Paper accepted for presentation at International Conference of Basin Organizations, Madrid, Spain, Available at: <<http://nilebasin.com/wwf/doc/Madrid.htm>.>

³⁴ See supra notes 25 and 27

³⁵ Supra note at 22

³⁶ Ibid.

negotiation with other riparian states, planning the development of the Nile Basin, collecting data and information, and supervising projects.³⁷

Despite such a cooperative attempt by the two states through PJTC to increase the yield of Nile waters, the stated projects were stopped due to security problems.³⁸ To put it other ways, the coordinated effort under the umbrella of PJTC to expand the projects as well as to obtain recognition for the 1959 agreement was failed because the upstream states opposed both actions.³⁹ However, it has to be noted that, regardless of the fact that the upstream states never accepted it, the validity of the 1959 agreement between the two lower riparian states still remain as serious challenge of the Nile basin Initiative between the lower and upper riparian countries; especially between Ethiopia and Egypt. Egypt is still claiming statuesque while the upper riparian states are strongly resisting its validity saying that it is detrimental to them if remain valid law between Egypt and Sudan.⁴⁰

Although the coordinated efforts of Egypt and Sudan through PJTC had not got acceptance by the up stream countries, the two countries continued to pursue their own priorities by pushing upstream states for establishment of some kind of basin wide cooperation. One of these efforts was the 1978 proposal for a comprehensive basin wide accord that recommended establishment of Nile Basin Commission.⁴¹ It was about to conducting hydro meteorological studies, establishing data banks, sponsoring studies of the river control, preparation of working arrangements of dams and standardization of hydrological requirements as well as methods of measurements.⁴² Then the two countries launched a campaign in 1981 to secure the agreement on a more comprehensive arrangement that would provide for the planning and implementation of projects for the

³⁷ Supra note at 2, P. 77.

³⁸ Ibid.

³⁹ Supra note at 9, P.19.

⁴⁰ Supra note at 28

⁴¹ Supra note at 9.P.19

⁴² Supra note at 35and 22

over all economic development of the Nile basin although this effort also achieved little beyond the Badolite Declaration due to political and security problems.⁴³

In short, literature reveals that the coordinated efforts of Egypt and Sudan through PJTTC and NBC were unsuccessful, yet Egypt continued to pursue other multilateral and bilateral cooperation with some upper riparian countries. For example, the 1967 Hydro-met, the 1983 UNDUGU, the 1993 TECCO-NILE can be cited among the multilateral efforts while her exchange of memorandum with Uganda in 1991 and later in 1998 Agreement for Controlling the Water Hyacinth and to manage the upper Nile water catchments; her framework agreement with Ethiopia for General Cooperation in 1993 and in 1996 with Kenya to grant to excavate ground water wells in arid and Semi-arid Zones are some of the many bilateral cooperative attempts before the establishment of the basin wide imitative, NBI.⁴⁴ These efforts show how much Egypt has been concerned for the Nile waters. And it is also good to assume the effects of these bilateral agreements from perspective of international law if in case they are beneficial to one of these countries than the would be basin wide cooperative legal framework, like the colonial era and later only between the two lower riparian countries bilateral agreement. These would also complementing other challenges as they are laws between the contracting parties so that may affect the success of NBI, unless solution is sought for them side by side with the ongoing efforts for comprehensive basin wide legal framework.

3.2.3 Hydro-met

Hydromet, which also mean Hydro metrological survey of the Equatorial Lakes: Victoria, Kyoga and Albert, is the first regional cooperative attempt established as the Nile based organization in 1967 between six Africa countries: Burundi, Egypt, Kenya, Rwanda, Tanzania and Uganda.⁴⁵ Among the ten Nile basin countries Ethiopia and DR Congo (and the lately independent Eritrea) were not member of Hydormet, but the first two joined it has an observer in 1971 and 1977 respectively and remained observer until its annulment

⁴³ Supra note at 22

⁴⁴ supra note at 9, P. 20

⁴⁵ Supra note at 3, P. 104

in 1992.⁴⁶ Although not comprised all the riparian countries, Hydro-met is viewed as the first good example of technical cooperation attempt in the Nile basin, and also first to be assisted by two United Nations agencies: the World Meteorological Organization (WMO) and the United Nations Development Program (UNDP).⁴⁷

As the name itself implies, the main objective of Hydro-met was to undertake a hydro meteorological survey of the equatorial lakes motioned above, specifically to collect and analyze the hydro meteorological data, i.e., the meteorology, hydrology and hydraulics of the upper Nile basin.⁴⁸ The very reason for the establishment of a Hydro-met project was to mitigate the recurrent, unpredicted and unprecedented increase of rain fall in the equatorial lakes region that caused flood of the shores of the lakes and the wet lands of the southern Sudan as natural calamities, the effect of which resulted in the damage of large amount of properties and death of many people.⁴⁹

Despite the fact that hydromet was assisted by the two UN specialized agencies and is viewed as the first exemplary cooperative attempt for the development of the multilateral cooperation in the Nile basin, most of the projects planned by the hydro-met remained far from being realized and the project ended in 1992.⁵⁰ Writers have pointed out, interalia, the Egypt's influence through her technical and legal experts on the upper riparian by proposing new expanded plan to establish a Nile Basin planning commission for the total planning of the waters of Nile basin, which is outside the initial activities of the hydromet project; the Egypt's history of unilateral actions, her relative political and economic influence, unfavorable attitude towards true cooperation and negotiation with the upper riparian countries concerning the allocation and utilization of the Nile waters; political suspicion, lack of trust and only propounding about confidence building measures between the upper and lower riparian countries and the non membership of

⁴⁶ Supra note at 22

⁴⁷ supra note at 3 and 22

⁴⁸ supra note at 39

⁴⁹ I'd, P. 105

⁵⁰ Supra note at 3, P. 105; supra note at 4

Ethiopia as some of the major factors that deterred the success of the planned hydromet projects.⁵¹ On the other hand, it has been witnessed that, despite its failure to be effective basin wide cooperative arrangement, hydromet had contributed significant role in the moves towards cooperation in the Nile basin; and it seems for this reason that some writers cite it as the base of modern basin wide cooperation in the basin.⁵²

3.2.4 The Kagera Basin Organization (KBO)

The Kagera Basin Organization was a cooperative attempt that was established 1978 among four Nile basin countries that shared the Kagera River: Burundi, Rwanda, Tanzania and Uganda.⁵³ It was established with the view of joint development at the Rusumu fall for hydroelectric power, for the promotion of regional development in agriculture, transportation and other activities including energy.⁵⁴

The Kagera basin countries had established the Kagera basin organization side by side with the Hydromet to which they were also party; and it has been said that it was not necessarily because they wanted to have their own organization that could enable them to manage and develop the Kagera river basin, but was done with the intent of thwarting or sidetracking the ambitions of the down stream riparian states, Egypt and Sudan.⁵⁵

As has mentioned by waterbury, although this organization is viewed as motivated and sound river basin organization and still existing, its projects remained on paper mainly because of the political instability that led to civil wars in three of the member sates (Rwanda, Burundi, and Uganda) and limitation of resources.⁵⁶ The lesson from Kagera

⁵¹ For example, Dahilin Y. Mohamoda (2003: 20). Nile Basin Cooperation: A Review of the Literature, in Imeru Tamirat (1995:185). Constraints and Opportunities for Basin wide Cooperation in the Nile: A Legal Perspective stated that Hydromet has served as a significant forum for discussions regarding the creation of a viable mechanism for regional cooperation within the basin; see also supra note at 26.

⁵² Supra notes at 22 and 9, P.20.

⁵³ Supra note at 39

⁵⁴ Supra note at 22

⁵⁵ Dahilin.Y.Mohamoda (2003), Nile Basin Cooperation: A Review of the Literature on Current African Issues, No. 26, ISSN 0280-2171, in Waterbury (2002:155), Nile Basin National Determinants of Collective Action, Nordic Africa Institute, Uppsala, Sweden, P.20.

⁵⁶ Supra note at 22

river basin cooperative attempt is that if they get stable peace and financial support, their focus would be developing and managing their own Kagera river rather than cooperating with other riparian states on the uses and development of the Nile waters, unlike Egypt and Ethiopia, because their contribution to the Nile river is very little.

3.2.5 The Lake Victoria Environmental Management Program (LVEMP)

The LVEMP is a regional cooperation created in 1994 by tripartite agreement between three Lake Victoria's riparian countries, which are also the upstream countries of the Nile basin, such as Kenya, Tanzania and Uganda.⁵⁷ It came in to being after each of these countries had prepared national environmental action plans (NEAP) on problems such as water pollution, biodiversity loss and land degradation, deforestation, and damage to wet lands, all central concerns for the Lake and its catchments acknowledging that Lake Victoria demands urgent attention through regional cooperation.⁵⁸

Although the tripartite agreement to jointly prepare and implement LVEMP and signed in 1994, discussions to broaden regional environmental cooperation covering the Lake Victoria basin was started in late 1992 when these countries had prepared the National Environmental Action Plans (NEAPs).⁵⁹ This implies that the purpose of LVEMP was to jointly and cooperatively enhance the national environmental plans prepared earlier by each of the three Lake Victoria basin countries.

According to Abdel Fattah, the Nile Water Sector Chairman of Egypt, the objectives of LVEMP involve: (a) to maximize sustainable benefits to riparian communities from using resources within the basin to generate food, employment, and income, supply safe water, and sustain a disease free environment (b) to conserve biodiversity and genetic resources for the benefit of the global community; and (c) to harmonize national

⁵⁷ Ibid

⁵⁸ Ibid

⁵⁹ Ibid

management programs in order to achieve to the maximum extent possible, the reversal of increasing environmental degradation.⁶⁰

On the other hand, regardless of the appreciable cooperative efforts of the Lake Victoria basin countries through the LVEMP, and establishment of many bilateral or multilateral agreements or scattered cooperative institutions only between few riparian countries on one river or lake reveals that the countries in this group need to cooperate among themselves on the waters originating from their lakes than with lower riparian of Nile. Similarly, the issue of LVEMP with in three Lake Victoria basin countries would be among challenges that are frustrating the success of NBI just like the Kagera basin organization, or the bilateral agreements that Egypt concluded with some upstream Nile basin countries or with the Sudanese in 1959 and 1978, or the colonial era bilateral agreements already mentioned in the earlier discussions.

As Lake Victoria is shared not only among the three LVEMP member countries but also Burundi, Congo and Rwanda, waters of this Lake are their common property. But, the latter three are not party to LVEMP, unlike in the case of Hydromet.⁶¹ Thus, even from this viewpoint it is possible to infer that the countries created the LVEMP has divergent interests from the countries in the Kagera river basin. Further, the issues of Lake Victoria waters also concern Egypt and Sudan as the Lake contributes some amount of waters to the Nile River.

3.2.6 Undugu

Undugu, which means ‘brotherhood in Swahili’, is one of the early cooperative attempts in the Nile basin created in 1983 by seven East African countries, under the aegis of the OAU, consisting of Egypt, Sudan, Uganda, Rwanda, Burundi, Zaire (now called Democratic Republic of Congo) and Central African Republic, in fact the latter is non

⁶⁰ In the case of Hydromet, note that both of the Kagera basin countries and the LVEMP member states were party to it. International Rivers Network (IRN)(2003). *The Nile Basin: Can the Nile states Dam their way to Cooperation?* A back grounder on the NBI, available at http://www.irn.org/irncdnnilestates_dam_their_way_to_cooperation>, accessed

⁶¹ Supra note at 3, P. 105

riparian of the Nile, but neighboring state.⁶² Nevertheless, among the Nile basin riparian countries Ethiopia, Kenya and Tanzania were not joined the Undugu group but rather remain observers until its abolishment in 1993.⁶³

Unlike the other cooperative initiatives on the Nile waters, the objective of the Undugu grouping was to forge cooperation in the areas of infrastructure, cultural and trade issues relating to some development matters;⁶⁴ and to create confidence building by offering assistance for regional projects for pollution control and watershed management in the upstream states.⁶⁵ It was not aiming at responding to the sensitive issues frustrating the Nile basin such as concerning the uses and the looming demand for equitable sharing of their common property of the Nile waters.⁶⁶

The Undugu cooperative attempt was disbanded before achieving its objectives after ten years in 1992, though more than 66 meetings and conferences had been held at the technical and ministerial level during its lifetime.⁶⁷ That is, despite the Egypt's policy of confidence building, in 1993 at their 67th meeting, the ministers of water resources abolished Undugu and reorganized it in to TECCO-NILE.⁶⁸

Concerning the reason for the failure of the Undugu, writers have raised a number of justifications; for example according to Yosef Yacob, non inclusion of four riparian countries including Ethiopia; Egypt's overwhelming ambition for her own national interests on development projects; the Egypt's policy of confidence building, pollution control and watershed management in the up stream states to divert attention from the fundamental and contentious issues of the allocation/use of the Nile water were some

⁶² *I'd*, P. 106

⁶³ *Ibid*

⁶⁴ *Infra* note at 67

⁶⁵ *Ibid*

⁶⁶ *Supra* notes 56 and 58

⁶⁷ Yosef Yacob (2003), *The Futility of Nile Basin Cooperation: From Hydromet to the Nile Basin Initiative: An Enduring Exercise*, available at: (a) yyacob@Osgood.yorku.ca; (b) <http://www.ethio.net/ethio-waters/equitable-use-of-nile.htm>, accessed on 12/19/2005

⁶⁸ *Supra* note at 3,p.106

among other things.⁶⁹ He has also stressed on the Egypt's Nile master plan in the upper Nile basin without consultation and participation of the countries in whose territories the plan was proposed to construct works, and her resistance to the issues of utilization and management of the Nile water resources with the upstream states.⁷⁰ Yacob Arsano, on his part has expressed it saying that it was the Egypt's unwillingness to accept the principle of equal rights and equitable benefits to all riparian countries.⁷¹

In short, from the Egypt's confidence building policy in Undugu one could see that she has been trying to create different cooperative initiatives through which she can calmed down the question of upstream states on the Nile waters.

3.2.7 TECCO-NILE

TECCO-NILE, which means 'Technical Cooperation Commission for the Promotion and Development of Nile', was a sub-regional cooperation established after the member states proceeded to abolish the Undugu commission and reorganized it as Technical Cooperation Committee for the promotion of Development and Environmental protection of the Nile basin.⁷² To this end, Tesfaye Tafesse has expressed TECCO-NILE as an extended version of Hydromet while Yosef Yacob has described it as the reorganized form of the Undugu Commission.⁷³ TECCONILE was formed by the agreement reached between six Nile basin countries: Egypt, Sudan, Rwanda, Tanzania, Uganda and Zaire (now Democratic Republic of Congo) in 1992; and the agreement provides that future cooperation on the water resource of Nile should be pursued under TECCO-NILE.⁷⁴ Three riparian countries: Ethiopia, Kenya and Burundi and the later independent Eritrea

⁶⁹ Supra note at 67

⁷⁰ Ibid.

⁷¹ Yacob Arsano (1996), *Sharing Water Resources for Economic Cooperation in the Horn of Africa*, In *Trading Places: Alternative Models of Economic Cooperation in the Horn of Africa*, Uppsala, Life and Peace Institute, P.51

⁷² See supra notes at 12, p. 106; and at 67

⁷³ Ibid; and supra notes at 4.

⁷⁴ See supra note at 67

were not partners of TECCOO NILE but the former three participated in an observer status.⁷⁵

As Yosef Yacob has mentioned, the reason for abolishing Undugu was not to keep up enhancing the already regulated Undugu objectives like before, but to deal with the most contentious matters on the Nile waters, i.e., the legal issues regarding equitable use of the Nile waters.⁷⁶ Tesfaye has confirmed it stating that unlike its predecessors TECCOO-NILE was not limited to concentrate only on the environmental issues, but also concerned for the issues relating to water quality control as well as issue of an equitable entitlement of the Nile waters to the co-basin states as its objective.⁷⁷ Further more, Dahilon Yassin on his part has articulated that the purposes of TECCO-NILE were for the promotion of development and environmental protection in order to coordinate common interests and objectives of all Nile basin countries.⁷⁸

Since establishment, TECCO-NILE conducted series of trainings, meetings, workshops and conferences on various issues, prepared Nile River Basin Action plan (NRBBAP) that contained 22 projects, one of which was the D-3 project that was dealing with forging of basin wide legal and institutional cooperative framework amongst all the Nile basin countries.⁷⁹ TECCO-NILE also conducted series of Nile-2002 conferences as of 1993 with the view to provide forums to present technical studies related to the development of the Nile basin, to exchange views and to foster cooperation to build consensus on the desirability of regional cooperation.⁸⁰

In general, unlike the previous cooperative attempts, TECCO-NILE can be viewed relatively as a better forward step that contributed more to building consensus on the

⁷⁵ Ibid

⁷⁶ See supra note at 67: The objective of Undugu was promotion of Development and environmental protection.

⁷⁷ See supra note 3, p. 69.

⁷⁸ Supra note at 9, pp. 22-23.

⁷⁹ Supra note at 12, pp. 100-110; and also at 67

⁸⁰ Supra note at 78.

desirability of basin wide cooperation in the Nile basin, as it included the contentious legal issues on the Nile river, as it endeavored to coordinate common interests and objectives of all the basin's states, as it was during this period that Ethiopia and Egypt have changed their long years positions to negotiate on the principle of equitable uses. Further, from the above statements, it is possible to see that TECCO-NILE attempted to respond to one of the main contentious issues in the history of conflicts of interests between the upper and lower Nile riparian countries that had never been addressed in the earlier cooperative attempts on the Nile waters in respect of common interests and objectives of all the Nile basin countries.

Despite its encouraging projects and objectives and relative progress in NRBAP and positive contribution of the Nile-2002 conferences, TECOO-NILE became in to end before achieving its objective due to many factors, such as the promised fund was not secured and the money actually raised was insufficient to cover all the projects; and other factors. Therefore, subject to its contributions for and progress towards comprehensive basin wide cooperation, TECOO-NILE was substituted by the NBI in 1999.

To sum up, the issues relating to various earlier cooperative attempts in the Nile basin can be summarized as: subject to some contributions that they made as basement, non-of them (earlier cooperative attempts) were all inclusive and comprehensive in terms of both their agenda and memberships. The important breakthrough with the NBI, the central concern of this paper, is that it is all inclusive, except Eritrea, and comprehensive as well as importantly includes the issues of Nile waters entitlement or utilization among all the Nile Basin countries as its agenda. This will be dealt with in the next chapter in detail.

CHAPTER FOUR

PROSPECTS OF THE NILE BASIN INITIATIVE (NBI) FOR PERMANENT BASINWIDE COOPERATION

4.1. The NBI: Introduction

The Nile basin states have started to cooperate for sustainable and equitable approach to the Nile waters uses under the auspices of the transitional arrangement NBI, which is the the transitional arrangement NBI, which is the successor of TECCO-NILE, since 1999.¹ Comparing to the prior cooperative attempts on the Nile waters in the basin, the come within reach of the NBI can be seen as a better step forward in the history of cooperation on the Nile waters as it involves all the riparian states, except Eritrea, and inclusive objectives.² And, the overall concern of this chapter is about the Prospects of the NBI for permanent basin wide cooperation. Accordingly, the writer here tries to introduce what the NBI is, given an overview of its immediate backgrounds, discuss some major contents of the NBI programs and projects, including the Progresses in the legal and institutional cooperative framework, and the role of supporting partnerships in the NBI process. This is to examine particularly its prospects relating to the implementations and progress of the SVP, SAPs, and D-3 Projects as to whether they have been properly moving forward as per intended.

To begin with what it is, the Nile Basin Initiative, here after called the NBI, is an intergovernmental transitional arrangement established in February 1999 by and among all the Nile basin riparian countries, except Eritrea that participated in an observer status, to foster cooperation and sustainable development of the Nile River for the benefit of all until permanent legal and institutional basin-wide framework cooperation is established.³

¹ Nile Basin Initiative Background (1999), available at <<http://www.nilebasin.org/nbibbackground/htm>>

² Yehnew Tsegaye Walilegne (2004), *The Nile Basin: From Confrontation to Cooperation*, 27 *Dalhousie Law Journal* 503, Dalhousie Law School, Canada, p.11

³ See for example: (a) Transitional Committee Final Report (August 2001), Nile River Basin Cooperative Framework

Project (D-3), and Articles 1,2 and 15 of the Draft Ministerial Accord on the Nile Basin Initiative dated on 10 May, 2001 (b) International Rivers Network (IRN) (2004), *Linking Human Rights and Environmental*

The purpose of the NBI is to advance the Nile Basin Strategic Action Program in realization of the shared Vision of the Nile basin states for the Nile to achieve sustainable socio-economic development through the equitable utilization of, and benefit from the common Nile water resources.⁴ In this connection, Article 15(1) of, this Draft Accord has expressly provided that the Accord is a transitional arrangement for three \five\ years or until a final framework is put in place, whichever is earlier. This Provision further point out that the member states have committed themselves to have the final framework for cooperation in place within these three/four/five years; and one year prior to the expiry of the term of the transitional arrangement, the Nile-COM will review the status of the Cooperative Framework process and take appropriate measures.

Concerning the organs of the NBI, Arts.5-8 of the Draft Accord specify that it comprises three transitional organs: the Nile-COM, Nile-TAC and Nile-SEC that are entrusted with different responsibilities and functions in enhancing the process. The Nile-COM consists the water affairs ministers of the riparian states and is the highest decision making organ of the NBI; the TAC is composed of two senior officials from each Nile basin state and it serves as the technical organ of the NBI; and the Nile-SEC is the organ that carries out the day to day activities of the NBI under the direction of the Nile-TAC and also in charge of coordinating and monitoring the activities of the working groups of the two sub-programs.⁵ The Nile-SEC has acquired necessary legal recognition that enables it performing its functions by the 6th November 2002 Agreement, which also grants it diplomatic status as an international legally constituted institution in Uganda.⁶

Protection, IRN's editorial about the NBI's Dam Plans Published in *Development Today*, September 21, 2004; (c) Nile Basin Initiative Background (1999), available at: <<http://www.nilebasin.org/nbibbackground/html>>, accessed on 12/19/2005.

⁴(a) Transitional Committee Final Report on Nile River Basin Cooperative Framework Project (D-3), Article 3 of the Draft Ministerial Accord on the NBI (10 May, 2001);

(b) Yosef Yacob (2003), *The Futility of Nile Basin Cooperation: From UNDUGU to the NBI, an Enduring Exercise in Futility*, available at: <<http://www.ethionet.ethio-waters/equitable-use-of-nile.html>>, accessed on 12/19/2005

⁵ Ibid.

⁶ Meraji O Msuya (2002), *The Nile Basin and the Nile Basin Initiative: Texts and Reports- The Nile Speeches and Issues Notes*, Weitebildung und Entwicklung Gmbh, available at: <<http://www.nilebasin.org/nile-sec/htm>>

This Draft Accord is however silent about the permanent cooperative institution that will succeed the transitional arrangement NBI as well as about the permanent agreement on the Nile river basin cooperative framework. This means in other words, the Draft Accord on the NBI was silent concerning the basin wide cooperative legal and institutional framework, the central issue that pulled the upper Nile basin countries mainly Ethiopia, to join the NBI.⁷

4.2. Backgrounds to the NBI

Although the NBI was officially launched in February 1999, when the Nile COM adopted and signed the minute, it was not established incidentally, but rather an outcome of many factors and years of efforts of the riparian countries as well as international community.⁸ It means that it is a cumulative effect of multifaceted factors in the basin; different earlier cooperative attempts between and among different Nile riparian countries; negotiations and renegotiations among and between themselves and through third parties as well as contributions of international cooperative trends on trans-boundary shared waters.

To be specific on the contribution of cooperative attempts in the basin, although failed before achieving their goals due to different factors, earlier cooperative attempts in the Nile basin are identified that they were backgrounds to and also contributed a lot for the emergence of the NBI. In this regard, some writers have pointed out that cooperation on the Nile waters had been started in the form of bilateral agreements since the beginning of the 20th century by the colonial powers and later between the two lower riparian of Nile, Egypt and the Sudan.⁹

These writers argue that such agreements can be considered as background of the NBI. Some other writers have been identifying the 1967 Hydro-met as the beginning of modern multilateral /basin wide/ cooperative attempt on the Nile waters; and cooperative

⁷ Yacob Arsano and Imeru Tamrat (2005), Ethiopia and the Eastern Nile Basin, in *Aquatic Sciences Research Across Boundaries*, Vol.67, No.1, EAwag, Birkhauser, pp.16-26.

⁸ See chapter three in general.

⁹ See for example, Abdelfattah Metawie, *Lesson Learnt from Cooperations in the Nile Basin*, available at: http://rosenbergcaner.org/documents/lesson_learnt_from_cooperation_in_the_nile_basin_doc.>

attempt on the Nile waters; and these writers refer the Hydro-met as background of the NBI.¹⁰ Still there are writers who do not disregard the positive Contributions of the early cooperative accords and/or initiatives including that of hydro-met, but limit background of the NBI process to TECCO-NILE and Nile- 2002 Conferences. TECCO-NILE and Nile-2002 Conferences were respectively the official technical and semi- official cooperation and parallel and interdependent process that led to the establishment of the NBI.¹¹ The backgrounds that the writer also focuses on here are the two considering that they were immediate steps taken by the Nile basin countries since 1992.

4.2.1. TECCO-NILE

As has mentioned earlier, although attempts to cooperate on the Nile waters has long history far back since the beginning of 20th century, they were not comprehensive and not to the benefit of all Nile basin countries; but rather bilateral and for the advantages of one or two so that may not be easy to regard all early attempts as effective backgrounds of the NBI. Nevertheless, the agreement reached between the Council of Ministers of Water Affairs of member states of Hydro-met in December 1992 in Kampala, Uganda can be taken as the take off point of pursuing shift from a competitive to a comprehensive basin wide cooperation in the Nile basin region. In December 1992, the NILE-COM of the six countries: Egypt, Sudan, Rwanda, Tanzania, Uganda and DR. Congo met in Kampala, Uganda and agreed that future cooperation on the Nile water resources should be pursued for a transitional period under the name 'Technical Cooperation for the Promotion of the Development and Environmental Protection of the Nile basin, TECCO-NILE; and an agreement to this effect was signed in 1993 by the same while the other four countries were participated in an observer status.¹² At the time adopted the TECCO-NILE project, the NILE-COM also formed a technical committee acting as a steering committee of this framework; and the over all process was termed as the Technical Cooperation Committee

¹⁰ Tesfaye Tafasse (2001), *The Nile Question: Hydro-politics, Legal Wrangling, Modus Vivendi and Perspectives*, New Bruner wick, USA, pp.103-104.

¹¹ See for example, Dahilon (2003), *Nile Basin Cooperation: A Review of Literature*, in *Current African Issues*, No. 26, ISSN 0280-2171, Nordiska, Afrikainstitutet, PP.22-23

¹² *Ibid*, p.22

For the Promotion of the Development and Environmental Protection of the Nile basin (TECCO_NILE).¹³

In May 1995, the TECCONILE steering committee prepared a Nile River Basin Action Plan (NRBAP) that contained 22 projects, one of which is designated as the Nile River Basin cooperative framework (D-3 Project) within the TECCONILE framework.¹⁴ This project was created to serve as a forum to maintain and monitor the legal and political dialogue surrounding the Nile waters use with a mission to develop a permanent cooperative framework for management of the Nile water.¹⁵ To put it other ways, this D-3 project has been specifically dealing with forging for legal and institutional cooperative framework that would in last resort solve the problems of water allocation amongst the Nile riparian states.¹⁶ The immediate objectives of the D-3 project were to attain a regional co-operation acceptable to all the basin countries and to promote establishment of a cooperative framework which will facilitate basin wide cooperation in an integrated water resources planning and management.¹⁷ Its long-term objectives are to determine equitable entitlements for each riparian country for the use of Nile waters, and to enhance and promote the utilization of the Nile waters for maximum socio-economic benefits of the inhabitants of the basin.¹⁸

In the fall of 1996, each Minister of the NILE-COM nominated a three-person dialogue team to form a panel of experts, POE, to form the core issues of the dialogue process; and in 1997 the POE formed two study teams, namely the legal/institutional team, and the data/information (Technical resources) study team to review international practices and submit report to the NILE-COM, and thus it developed a strategic work plan and

¹³ Ibid; see also supra notes at 1, 3, 10, p.108.

¹⁴ Supra note at 10, pp. 106-107

¹⁵ Kimberly E. Foulds (2002), The Nile Basin Initiative: Challenges to Implementation, Paper Presented at the Managing Shared Water Conference, Hamilton, Ontario, Canada, 23-28 Jun, 2002, Available at: <<http://nilebasin.com/documents/kim1.htm>>

¹⁶ Supra note at 10, pp 106-107

¹⁷ Supra note at 11

¹⁸ Ibid

formulated the project document.¹⁹ Accordingly, the POE thus visited two international river basins' practices, such as the Mekong River Commission in Nov.1998, and the Senegal River Commission in Jun 1999 to get their practical experiences running on international river basins, to review other institutional and legal framework to draw applicable lessons for the Nile's work.²⁰

Further, it was since the TECCONILE process that international fund supporting agencies appear started showing assurance of widely supporting basin wide cooperation on the Nile waters. For example, the World Bank, UNDP and CIDA promised to lend money and coordinate donor support; and then became supporting partners of the NBI; become facilitating dialogue and cooperation among the basin countries and established a mechanism through which the Nile riparian countries work together for their mutual benefit and for sustainable use of the Nile River and its resources.²¹ In 1997 recognized that sustained cooperation on the Nile requires a permanent institution with development focus and agreement on core legal principles, the Nile basin countries established a forum for a process of legal and institutional dialogue.²² Subsequently in 1998, recognized that cooperative development holds the greatest prospects of bringing mutual benefits to the region, all the Nile basin countries, except Eritrea, joined in a dialogue to create a regional partnership to facilitate the common pursuit of sustainable development and management of Nile resources.²³

In short, it is possible to see, from the efforts made since 1992 up to 1998 through TECCO NILE that it was not only the immediate and fruitions background of the NBI, but also for creation of the D-3 project and Nile basin countries shared vision, and further even to say the first to focus on a long-term agenda and laid foundation for basin wide permanent cooperative legal and institutional framework. It can also be seen as the first

¹⁹ Ibid

²⁰ Ibid

²¹ Ibid

²² Supra note at 3, 9, 10.

²³ Ibid

initiative in which the participation of international fund supporting agencies appear effectively involved in laying foundation for the initiation of inclusive basin wide legal and institutional cooperative framework in the Nile basin.

4.2.2. The Nile 2002 Conferences

The Nile-2002 Conferences, a semi official annual forum parallel to and interdependent with the TECCO-NILE, was initiated by the Nile conference organized in February 1992 in Egypt to provide an informal mechanism for riparian countries dialogue and exchange of views by academicians and professionals between the Nile basin countries and also with the international community.²⁴ To put it other ways, it was a forum for scholars such as academicians and professionals, political leaders and other concerned international community as well as citizens from the Nile basin countries to discuss and develop common understanding on the Nile waters problems, indicating possible solutions, one of which was creating the NBI.²⁵

It was initiated with an initial aim of conducting a series of Nile conferences on a yearly basis in each of the ten riparian states as a multidisciplinary forum for an exchange of views by academia and professionals on issues related to transnational river, Nile.²⁶

The first Nile- 2002 Conference was launched in 1993 to provide an informal mechanism for dialogue among the Nile basin countries and with the international community under the auspices of TECCO-NILE and with the support of the Canadian International Development Agency (CIDA).²⁷ Around ten Nile-2002 series of Conferences were held since 1993 until 2002 in different countries, among which the first was to provide informal mechanism for dialogue among the riparian countries and to promote the

²⁴ DIIS (2003), Over View of Water Use and Water Conflict in the Lower Nile Basin, in the Role of the Poor and Implications for Water Management Institutions in the Future Water Related Conflict, Working Paper 2004/6 Presented at Conference on From Water War to Water Riots? Danish Institute for International Studies, Copenhagen, p.126.

²⁵ Ibid

²⁶ Supra notes at 10,p 107; and at 11,pp 23-24

²⁷ Dahilon Y.Mohamoda (2003).Nile Basin Cooperation: A Review of Literature, in Brunne and Toope (2002) Changing Nile Basin Region: Does Law Matters?, Current African Issues, No.26, ISSN 0280-2171, Nordiska Afrikainstitutet, p.24.

exchange of views between them and international community.²⁸ The 9th Nile-2002 conference, which was held in Nairobi in 2002, aimed at addressing solutions to the problems on the Nile waters with a theme of comprehensive water resources development of the Nile basin and building of confidence of a Nile basin community.²⁹

Regarding its contribution, many writers have mentioned that the Nile-2002 series of conferences have played significant roles in that: it brought together scholars and technical experts concerned for the Nile issues; it facilitated the exchange of views over Nile basin issues; it assisted policy makers to explore possibilities of basin wide cooperation on the development and management of the Nile's resources; and it helped in building consensus on the desirability of regional cooperation and on the Nile waters. For example, Dinar and Alemu have pointed out that the dialogues through the Nile-2002 conferences have changed the long-standing differences in the positions and power values of the riparian states.³⁰ Brune and Toope have also addressed that these Conferences played significant role in changing the positions and political climates between the Nile riparian countries and linking TECCO-NILE, NRBAP and NBI, in providing forums reflecting the possibilities of sub regional organizations within the Nile basin, in fostering genuine mutual learning from previously entrenched positions and thereby in creating enabling environment for the evolution of the D-3 project and also the NBI.³¹ Furthermore, Erlich has mentioned the contribution of the Nile-2002 conferences stressing that it was one of the fruitful process that opened dialogues between the two central countries, Ethiopia and Egypt, whose relations are historically characterized by suspicion and threats.³²

²⁸ Supra note at 10, pp 107-108.

²⁹ Supra note at 11, p 23.

³⁰ Dahilon (2003). Nile Basin Cooperation: A Review of Literature, in Dinar Ariel and Alemu Senai (2000), The Process of Negotiation over International Water Dispute: The Case of the Nile Basin, Current African Issues, No 26, ISSN 0280-2171, Nordiska Afrikainstitutet, p.24.

³¹ Supra note at 27, p.24.

³² Dahilon (2003), Nile Basin Cooperation: A Review of Literature, in Erlich (2002), The Cross and the River: Ethiopia, Egypt and the Nile, Current African Issues, No.26, ISSN 0280-2171, Nordiska Afrikainstitutet, p.24.

In general, from the above elaborations, it is possible to see that TECCO-NILE and Nile-2002 Conferences were not only the immediate back grounds but also that played significant roles in many respects for the evolution of the NBI process. For example: in changing the political climate along the Nile by providing forums for reflection upon the possibilities of sub regional organizations, in structuring the NRBAP, including the D-3 project, in opening dialogues particularly between the two central countries, Ethiopia and Egypt whose relations have historically been characterized by suspicion and threats, in changing their positions and power values and building consensus on the desirability of regional cooperation in the Nile basin; and in fostering genuine mutual learning and the evolution of previously entrenched positions, thereby helping to create an environment in which the NBI process was evolved. Therefore, comparing to other earlier cooperative attempts, the two can relatively be considered as effective immediate backgrounds for the evolution of the NBI process.

4.3. The Contents and Progresses of the NBI Prospects

4.3.1 The Nile Basin Countries' Shared Vision and Policy Guidelines

When established the NBI in 1999, the Nile basin countries have jointly set out Shared Vision and Policy Guidelines as terms of references and adopted, signed and put forth the document; and thus the prospects of the NBI are derived from and based on these terms of references.³³ The shared vision is to achieve sustainable socio-economic development through the equitable utilization of, and benefit from the common Nile basin water resources.³⁴ The policy guidelines provide a basin wide framework for moving forward with cooperative action, and set forth the following primary objectives of the NBI:

- 1) To develop the water resources of the Nile basin in a sustainable and equitable way to ensure prosperity, security, and peace for all its peoples;
- 2) To ensure efficient water management and the optimal use of the resources;
- 3) To ensure cooperation and joint action between the riparian countries, seeking win-win gains;

³³ See the Nile Basin Initiative Introduction (1999), available at: <<http://www.nilebasin.org/nbiintroduction.htm>>, accessed on 12/19/2005.

³⁴ See supra note at 9

- 4) To target poverty eradication and promote economic integration; and
- 5) To ensure that the program results in a move from planning to action.³⁵

As they stand, these shared vision and policy guidelines appear comprehensive, inclusive and also responsive to the divergent interests/conflicting issues/ between upper and lower Nile riparian countries on the Nile waters since long years back. And the prospects of NBI in general and its strategic action program in particular are based on these terms of references.³⁶ Its strategic action program comprises two complementary programs: a basin wide shared vision program (SVP) and subsidiary action programs (SAPs) at sub basin level.³⁷ Next, the contents and progresses of these complementary programs will be discussed.

4.3.2. The NBI Strategic Action Program

As has mentioned above, the Strategic Action Program comprises two complementary programs: a basin wide shared vision program (SVP) and the subsidiary action programs (SAPs) at sub basin level. The basin wide shared vision program (SVP) is a broad based program of collaborative action for the exchange of experience and capacity building, and it comprises a set of seven projects.³⁸ The subsidiary action programs (SAPs) are two joint sub-basin programs: one in the Eastern Nile and the other in the Nile Equatorial Lakes regions, and their common objective is to translate the shared vision into action, realizing trans-boundary development opportunities within the agreed basin wide framework.³⁹

Although the SVP and SAPs are complementary programs and mutually reinforcing each other to translate the Nile basin counties' common vision into action, they are also two different programs that have their own specific purposes, projects and also targeting to

³⁵ Ibid.

³⁶ Ibid.

³⁷ Supra note at 6

³⁸ Ibid

³⁹ Ibid

overcome specific challenges in the basin.⁴⁰ It seems appropriate to discuss them separately to identify and assess the progresses in each program. Hence, the two will be separately discussed next.

4.3.2.1. The Shared Vision Program (SVP)

The SVP is a basin wide program that focuses on projects performed at the macro level (whole basin), and its primary purpose is to create an enabling environment for cooperative development and management of the water resources in the Nile basin through a set of basin wide projects.⁴¹ Its mission is the creation of a coordination mechanism and an enabling environment through action on the ground.⁴² In order to create an enabling environment, the SVP articulates the following seven projects:

- 1) Nile transboundary Environmental Action: to provide a strategic framework for environmentally sustainable development of the Nile river basin and to support basin wide environmental action linked to trans-boundary issues;
- 2) Nile Basin Regional Power Trade: - to establish the institutional means to coordinate development of regional power markets among the Nile basin countries;
- 3) Efficient Water Use for Agricultural Production: to provide a sound conceptual and practical basis to increase the availability and efficient use of water for agricultural production;
- 4) Water Resources planning and Management: - to enhance critical capacity for a basin wide perspective to support development, management and protection of Nile basin water resources in an equitable and sustainable manner;
- 5) Confidence Building and Stakeholders Involvement; to develop confidence in regional cooperation under the NBI at basin wide and local levels and to ensure stakeholder involvement in the NBI and its projects;
- 6) Applied Training; to strengthen institutional capacity in selected areas of water resources management in public and private sectors and community groups; and
- 7) Socio-Economic Development and Benefit Sharing;-to strengthen

⁴⁰ Ibid

⁴¹ Supra note at 9

⁴² Supra note at 15

the Nile river basin socio economic cooperation and integration.⁴³

Except differing in focus and scope, these projects are built up on each other to serve as catalysts for Nile river basin socio-economic cooperation and integration. To make it clear, these projects individually or collectively contribute to build foundation for regional cooperation in supporting basin wide engagement and dialogue, develop common strategic and analytical frameworks, build practical tools and demonstrations, develop models to better understand the intricacies of the Nile river hydrology and different development scenarios that could play out along the river; and so strengthen human and institutional capacity.⁴⁴

For example, if we see the Socio-economic development and Benefit sharing project, its development objective is to form a range of basin wide development scenarios and to specify the benefits accruing from the implementation of such scenarios together with some notions of how benefits will be shared while its fundamental aim is providing opportunity for riparian dialogue for wide range of society including in sectors or thematic areas.⁴⁵ This is done to identify and assess a range of cooperative development scenarios; develop criteria, methods and framework for sharing the benefits and costs of cooperative development scenarios, and for managing attendant risks; and strengthen national and regional capacities for policy and macro-economic analysis that can support further cooperation opportunities identified through the scenario development process.⁴⁶

Over all, the Socio-economic Development and Benefit Sharing Project is aiming at promoting socio-economic cooperation and development of the Nile basin countries through dialogues, exchange and integration of quests for development and poverty eradication projects to foster cooperation through three inter related sets of activities: building scenario and socio economic information bases, riparian dialogue for private

⁴³ Supra note at 23

⁴⁴ Ibid

⁴⁵ Ibid

⁴⁶ Ibid

sector cooperation and investment, and capacity strengthening to ensure integrity, synergy and optimal sequencing with minimal duplication of the SVP by setting up monitoring matrix.⁴⁷

Therefore, in sum, except differing in their specific purposes, it is possible to see from the detailed activities of each project that all the SVP projects are built up on each other to serve as catalysts for the realization of the Nile river basin socio-economic cooperation and integration, which is the ultimate objective of the NBI. The issue is, however, that it is not clear whether one project will come after the accomplishment of the other, and as to when they all will be completed.

Concerning the progresses of the SVP, the forward moving of its projects appear very slow. For example, the 'Efficient Water Use for Agriculture Project' has become operational starting from September 2006 and the Netherlands government is its sole donor.⁴⁸ Hence, although it seems have a potential to address the problems in designing and employing efficient water utilization, the delay to launch it, relatively insufficient amount of money allocated to it, and reliance on a single donor (the Netherlands government) may reduce the efficiency of the project.⁴⁹ Regarding the Nile Trans-boundary Environmental Action Project, although it was the first SVP project in demonstrating the move from planning to action and currently enjoying relatively a highest fund, i.e. around 39.1 USD, with no funding gap from donors such as GEF/WB, UNDP, Canada and the Netherlands, its progress seems slow as it is yet not fully materialized.⁵⁰ The progress of other projects would not be different, if not, in similar footing with the two.

On the whole, no matter how each SVP project has specific objectives so that differs in focus area, collectively they are to create enabling environment for cooperative

⁴⁷ Supra note at 6.

⁴⁸ Tesfaye Tafesse and Wondwesan Michdgo (2006), *The Role of NBI in Alleviating Food Security and Environmental Degradation in Ethiopia*, Paper for the Nile Development Conference.

⁴⁹ Ibid.

⁵⁰ Ibid

development and management of the Nile water resources to establish an integrated and comprehensive approach to build strong foundation for regional cooperation. However, the progresses of all the SVP projects seem slow so that in such pace, it may take long years to achieve its objective or may fail without success as also many of its projects are yet not accomplished so far, even today after nine years of establishment of the NBI. Having this in mind, let's see the contents and progresses of the subsidiary action programs (SAPs) that focus on the actual development projects at the sub-basin level, from planning to action on the ground.

4.3.2.2. The Subsidiary Action Programs (SAPs)

Subsidiary action programs (SAPs) are sub-basin level Programs established to translate the shared vision in to action, realizing trans-border development opportunities within the agreed basin wide framework.⁵¹ In particular, SAPs focuses on the measures to be taken for actual joint development projects at the sub-basin levels: one in the Eastern Nile region and the other in the Nile Equatorial Lakes region. The former is termed as Eastern Nile Subsidiary Action Program (ENSAP), and it comprises Egypt, Ethiopia and Sudan while the latter is identified as the Nile Equatorial Lakes Subsidiary Action Program (NELSAP), and it embraces six Equatorial Lakes' countries: Burundi, Kenya, Rwanda, Tanzania, Uganda and D.R. Congo.⁵² Despite this grouping of the member states, some writers point out that Egypt and Sudan are found both in the ENSAP and NELSAP groups.⁵³

The aim of SAPs in general is to come up with actual development projects at the grass roots level and to move from planning to action.⁵⁴ In this regard, El-Zain has mentioned

⁵¹ Ayenew Tessera (2005). "The Imperative Need for Watershed Management in the Eastern Nile Basin, in El-Zain (2000) Development Priorities for the Nile Basin Countries: What Difference Can the NBI Make? established in proceedings of the Conference on Management of Water Resources in Ethiopia, IDR (Addis Ababa University), Ethiopia, P. 132

⁵² Nabide Isah Kiti, NBI National Focal Point Officer-Uganda (2006), Contribution of Nile Basin Initiative (NBI) to the Attainment of Millennium Development Goals (MDGs) by Riparian States, a Case Study of Uganda, Paper for the Nile Development Conference.

⁵³ See for example supra notes at 9; chapter 3, foot note 4.

⁵⁴ Kinfe Abraham (2004), Nile Opportunities: Avenues toward a Win-Win Deal, Jointly established ELLPD and HADAD, Library of Congress Classification, pp 350-355

that SAPs are the actual development projects that are formed to take decisions at the lowest appropriate level to facilitate the development of real action on the ground.⁵⁵ It is also with view that these projects would yield investment opportunities from which all the Nile basin countries would be benefited equally.⁵⁶ The Policy Guidelines need to be taken into consideration for the implementation of the SAPs projects are:

- 1) Appropriate planning level that will involve the needs of those affected;
- 2) Build on principles of equitable utilization, no significant harm and cooperation;
- 3) Range of development project options which vary depending on the nature of the needs and opportunities in the different geographical areas;
- 4) Investigation which seek solutions that have benefits for all involved and distribute benefits, costs, and risks equitably as well as use resources efficiently and protect the environment; and
- 5) Bundling several projects into a program which provides the opportunity to counter balance the positive and negative impacts of different projects.⁵⁷

The overall contents of the SAP projects in general include: water supply and sanitation, irrigation and drainage development, flood management, weed and pollution control, promotion of trade and industry, telecommunication development, marketing and storage of agriculture and disaster forecasting and management, fisheries hydropower, transport, navigation and ecotourism development, water quality management, biodiversity conservation, river regulation, water hyacinth control, water use efficiency improvements, water harvesting and conservation, water use efficiency improvements, water harvesting and conservation, water shed management and soil erosion control, reduction of evaporation losses from swamps, and waste water treatment.⁵⁸ The issue that is not clear here is that it has not mentioned the time for the accomplishment of the SVP, as to whether the SAPs projects will be started after the former or not, and also as to when their implementation will be started and ended.

⁵⁵ Supra note at 51

⁵⁶ See supra note at 25, p 113.

⁵⁷ Ibid

⁵⁸ See for example, supra notes at 9, 10,11, and 15

The activities mentioned above refer to the overall contents of the SAP projects so that one may not easily identify the specific contents and progresses of the projects at each sub basin. So, having this overview in general, now let's proceed to see separately the contents and progresses of the SAPs projects at each sub basin group (ENSAP and NELSAP).

4.3.2.2.1. The Eastern Nile Subsidiary Action Program (ENSAP)

As has already mentioned above, ENSAP comprises: Egypt, Ethiopia and the Sudan; and their cooperative goal is to develop the water resources of the Eastern Nile basin in a sustainable and equitable way for the entire people of the sub region.⁵⁹ To put it in other way, ENSAP is an investment-oriented program designed to develop the water resources of the Eastern Nile Basin in a sustainable and equitable manner to ensure, among other things, prosperity, security, peace, food production and protect the environment of the sub basin.⁶⁰ These projects are classified into two: phases. The first is the Summary Project Identification of Eastern Nile—that is specifically called the integrated development of the Eastern Nile (IDEN), and the initial set of proposed sub-projects within the IDEN framework are expected to be fully defined at the next phase of the project cycle, i.e., during the project preparation process.⁶¹ As stated in the ENSAP Project Identification Document, the long-term program objectives of ENSAP are to:

- a) Ensure efficient water management and optional use of the resources through equitable utilization and no significant harm;
- b) Ensure cooperation and joint action between the Eastern Nile countries seek in win-win goals;
- c) Target poverty eradication and promote economic integration and
- d) Ensure that ENSAP results in a move from planning to action.⁶²

⁵⁹ See supra note at 9.

⁶⁰ Ibid

⁶¹ Supra note at 7

⁶² Supra note at 9

The Integrated Development Program of the Eastern Nile (IDEN) project, which is also named as the first ENSAP project, comprises the following major sub projects:

- a) Irrigation and drainage development sub project,
- b) Watershed management sub project,
- c) Baro-Akobo Sobat multipurpose water resources development sub project,
- d) Eastern Nile hydropower development and power trade investment program,
- e) Ethio-Sudan transmission interconnection sub project,
- f) Eastern Nile planning model sub project,
- g) Flood and drought management preparedness and early warning sub project, and
- h) Eastern Nile joint multipurpose program.⁶³

Concerning the development of ENSAP, at the meeting held in Addis Ababa in May 1999, the ENCOM considered opportunities for cooperative development within the Eastern Nile so that established a joint technical team (ENSAPT) that will define and prioritize the common areas of interest of the three Eastern Nile countries on water resources and water related projects.⁶⁴ Accordingly, the ENSAPT has identified and prepared proposal of a regional integrated, multipurpose development projects for the management and development of Eastern Nile waters supposing that the ENSAP comprises actual development projects at the sub-basin level and that will allow the move from planning to action by addressing what needs to be done at regional level and the development opportunity with trans-boundary implications.⁶⁵

In December 2002, the ENCOM of the Eastern Nile sub basin countries has established a sub basin institution named as the Eastern Nile Technical Regional Office (ENTRO) and entrusted to it the responsibility to undertaking these projects; i.e., identification and preparation of the sub regional integrated multi-purpose development projects.⁶⁶ The progress of these projects up to 2004 appears not clear; and it might be because the

⁶³ Supra note at 48

⁶⁴ Ibid.

⁶⁵ Ibid

⁶⁶ Ibid

concerned officials had kept secret their activities as some writers have mentioned; yet possible to adjudge based on the time table set in 2004 and from some indicating situations after 2006.⁶⁷

Concerning the recent progresses of the ENSAP projects, in October 2004 the Eastern Nile Council of Ministers decided to fast track 'Irrigation and Drainage project' and agreed to carry out feasibility studies in each of the ENSAP member country.⁶⁸ The Eastern Nile Council of Ministers (ENCOM) at its 19th meeting in Alexandria, Egypt, on Feb 15th, 2005 and its 20th meeting in Rwanda, Kigali, on March 17th, 2005 agreed to launch the first phase of identification of a major program of multipurpose development of the Eastern Nile.⁶⁹

According to the 2006 ENTRO Annual Report, pre project preparation activities of the 'Integrated Watershed Management' project are already finalized and submitted to the funding agency; and selection of sites for the national level programs is also completed, but the detailed preparations was anticipated to be completed in May 2007 but yet not.⁷⁰ Currently, the Baro-Akobo-Sobat Multipurpose Project is under revision due to its multifarious problem and discussion is going on with African Development Bank (ADB) to secure fund.⁷¹ Nonetheless, as Tesfaye and Wondwasen have expressed, at the moment, there are no national coordinators at all, and the project is in its infancy stage, and the project preparation is not yet functional unlike the other ENSAP projects⁷²

According to the recent IDEN project status report, the watershed management project's fast track implementation would have been started at the beginning of 2007, and be finished within 3-5 years by the Ethiopian government and ENTRO with financial support mainly from the World Bank and African Development Bank; but has mentioned

⁶⁷ Ibid

⁶⁸ Ibid

⁶⁹ Ibid

⁷⁰ Ibid, in ENTRO annual report, 2006

⁷¹ Ibid

⁷² Ibid

that it is also yet not started.⁷³ The implementation process of the Eastern Nile Planning Model and the Flood Preparedness and Early Warning project is yet not started as per its calendar soon in this year.⁷⁴ Further, although the Ethio-Sudan Transmission Interconnected project has shown promising progresses and expected to be fully finalized by the year 2007, it is yet not materialized. The Eastern Nile Regional Power Trade Investment Program is also late and its implementation would have been started in the middle of 2007 but yet not.⁷⁵ The Eastern Nile Joint Multipurpose Project is a recently launched basin-wide project with the aim of bringing the three countries under one project to achieve regional integration and cooperation.⁷⁶

In sum, although seem to be very slow, there are progress indicating clues in the ENSAP. Never the less, it is not difficult to see that any of the ENSAP project has not so far been translated from plans on the paper to the actual action on the ground. Hence, even if one may say that there are progresses in the ENSAP projects, it is clear that they are not going on within their normal schedule and pace, so that may not realize the intended cooperation before adopting clear legal and institutional framework and until the fund supporting international institutions approve these projects and submitted the fund to start implementing the projects. Having this in mind, let us proceed to see the cases in the NELSAP group.

4.3.2.2.2. The Nile Equatorial Lakes Subsidiary Action Program (NEL-SAP)

It was at a meeting of Ministers and other representatives of the six upper Nile riparian counties of the Nile Equatorial Lakes region in Arusha, Tanzania, on December 3, 1999, that the Ministers, in joint resolution, agreed to establish the NELSAP.⁷⁷ And then, like the ENSAP process, the Ministers of these countries decided to form a transitional

⁷³ Ibid

⁷⁴ Ibid

⁷⁵ Ibid

⁷⁶ Ibid

⁷⁷ Supra note at 9

51

institutional arrangement to oversee the identification and preparation of NELSAP that is consisting of NEL-COM and a Technical Advisory Committee (NEL-TAC).⁷⁸ The NELSAP was thus established to achieve joint action on the ground to promote poverty alleviation, economic growth, and the reversal of the environmental degradation in the Equatorial Lakes sub-basin within the framework of the NBI.⁷⁹ As has expressed by the NBI Secretariat, NELSAP is a long term program with multiple effects in broader economic integration.⁸⁰

The NELSAP comprises two broad categories of Projects. One is the Environment and Natural Resources Management Projects; and the other is the Hydro power Development and Power Trade Project. The former involves three integrated trans-boundary River Basin Management Projects such as:

- a) Kagera Trans-boundary Integrated Water Resources Management and Development project;
- b) Mara Trans-boundary Integrated Water Resources Management and Development project; and
- c) Sio Malaba Malakisi

Transboundary Integrated Water Resources Management and Development project.⁸¹ This latter project further comprises other three sub projects: Regional Agriculture, Fisheries and Catchments Management Projects (Lake Albert Edward Fisheries Project) and Water Hyacinth Abatement in the Kagera River. The second NELSAP Project is Hydro power Development and Power Trade project in Nile Equatorial Lakes region; and it also involves three major projects such as: Rusumo Falls Hydro Electricity Power Project between Burundi, Rwanda, Tanzania; the Ranking and Feasibility study of Hydro Electric Power in Nile Equatorial Lake region; and four Transmission interconnection project that links Kenya- Uganda, Democratic Republic of Congo-Burundi-Rwanda, Burundi-Rwanda, and Uganda- Rwanda.⁸²

⁷⁸ Ibid

⁷⁹ Ibid

⁸⁰ Supra note at 6

⁸¹ Supra note at 52

⁸² Ibid

In general, the NELSAP projects are the investment projects in agriculture development, fisheries development, water resources management, water hyacinth control, hydraulic development and power transmission inter connection. And they were prepared by small coordination unit that was also given responsibility to facilitate implementation of the projects; and thus the unit selected some fast-tracked projects for the implementation phase.⁸³ Never the less, even if established in 1999 just like the ENSAP, NELSAP started even the preparation of fast-tracked projects in 2004; and none of them have entered in to the implementation phase so far as pointed out by Nabide Isah Kiti.⁸⁴ Thus, it is possible to infer that the forward moves of the NELSAP group in general, and developments in their specific projects in particular appear even more slow than that of the ENSAP.

4.4. Progresses Relating to the Cooperative Legal Framework.....?

Here, the writer intends to assess the links between the NBI and progresses in the cooperative legal framework. Knowing the link between the two helps one to see whether the NBI strategic action program can easily be realized without or before the adoption of the permanent legal and institutional cooperative framework or if the later is stacked for whatever reason. As many writers have addressed, the D-3 project is one of the central projects of the NBI and the latter was established as a transitional organization pending ratification of the legal and institutional cooperative framework.⁸⁵ But before assessing the link between the two, knowing what the D-3 project is, its mission, immediate and long-term objectives as well as its progress seems appropriate as would help to identify its contribution to and influences on the proper enhancement of the NBI. Therefore, let's see these issues first.

4.4.1. The D-3 Project: Its Establishment and Objective

The D-3 project, which is also called the 'Nile River Basin Cooperative Framework, one of the 22 projects of the NRBAP, was endorsed and created by TECCO-NILE in May 1995, with the financial support of

⁸³ Ibid

⁸⁴ Ibid

⁸⁵ See for example *supra* note at 15 and *infra* note at 97.

UNDP.⁸⁶ It's over all concern was about the equal entitlement of the Nile water to the co-basin states, that means to deal with the issue of a cooperative legal framework to solve the problems of water allocation amongst the Nile riparian countries; to serve as a forum to maintain and monitor the legal and political dialogue surrounding the Nile waters use; to play essential role in facilitating a dialogue/negotiation/process between the Nile riparian countries.⁸⁷

The Nile River Basin Cooperative Framework (D-3 project) aims at providing support to the Nile river basin countries in defining an adequate and acceptable framework for cooperation that may pave way for equitable and legitimate use of the Nile river basin water resources; and its mission is to develop a cooperative framework for management of the Nile river basin waters.⁸⁸ The immediate objective of the project is to attain a regional cooperative framework acceptable to all Nile basin countries in order to promote basin wide cooperation in an integrated water resources planning and management; and its long term development objective is to achieve milestones which would determine net equitable entitlements for each riparian country on the uses of the Nile waters and thereby to enhance and promote the utilization of the Nile waters for optimum sustainable socio-economic benefits for all inhabitants in the basin.⁸⁹

In short, as can be envisaged from the above statements, the D-3 project is clearly concerned about the legal and institutional cooperative framework acceptable to all the Nile river basin countries, especially about the determination, augmentation and promotion of equitable utilization of the Nile waters for each Nile riparian country. Next is about the progresses of the legal and institutional cooperative framework. i.e., the output of the D-3 Project. In this regard, the author tries to assess its progress focusing on legal principles and rules incorporated in the Draft Cooperative Legal Framework that have been central point of discussions and disagreements between members of the contracting parties participated at different levels starting from preparation of the Draft

⁸⁶ Supra note at 10, p 106

⁸⁷ See respectively supra notes at 10, p 106; 15; and 9

⁸⁸ Supra note at p 110

⁸⁹ Ibid

Agreement by the POE, then during reexamination/revision by the transitional committee (TC) and now under negotiation by the Negotiating Committee (NC).

4.4.2. The Progresses in the Cooperative Legal Framework

It is not the intention of the author to assess and comment the contentious legal and institutional issues here as these issues will be discussed in the next chapter, but briefly to show the progresses relating to the cooperative legal framework starting from the D-3 Project, through the Draft Cooperative Framework and then of the Proposed New Text of the Draft Agreement.

To begin with the D-3 project, after approved the Nile River Basin Cooperative Framework Project (Project D-3) in Arusha in 1995, each minister of the Nile basin countries nominated a three person dialogue team to form the panel of experts (POE) in the fall of 1996 to form the core of the dialogue process.⁹⁰ The process of the D-3 project began in 1997 when the Nile basin countries recognized that sustained cooperation with a development focus and agreement on core legal principles, and then established a forum for a process of legal and institutional dialogue called the POE that comprises two study teams, namely the legal/ institutional team, and the data/information (Technical resources) team.⁹¹

Between the two teams of the POE, the legal/institutional study team was given a task of preparing draft cooperative framework.⁹² Accordingly, it was assigned to consider as many relevant provisions of international water laws on trans-boundary rivers as possible before drafting the cooperative framework for the Nile; and to make study and submit a report involving recommendations on an appropriate multidisciplinary framework for legal and institutional arrangements to the Nile-COM. These include, among other things, assessment of the status of international water laws and the existing legal and institutional frameworks; the identification of relevant and applicable principles to the Nile basin; the

⁹⁰ Supra note at 9

⁹¹ Supra note at 10, pp 109-110.

⁹² Ibid

identification of existing uses and needs, the exploration of the potentials of the basins; and also to recommend the process, methodology and activities that will lead to the determination of equitable and legitimate rights of water use in each riparian country.⁹³

In accordance with the assignment given to it, the POE study teams developed a strategic work plan and formulated the project document; and then had visited the practices of the Mekong and Senegal River basins to get their practical experiences in running on these river basins to get relevant international practices.⁹⁴ A study tour to the Mekong River visited the Mekong River Commission while a study tour to the Senegal River visited the Senegal River Commission with the purpose to review their institutional frameworks and to draw applicable lessons for the Nile work.⁹⁵ To this end, note that the Mekong river is shared among six countries out of which China is not party to the Mekong Cooperative framework and to the Commission; and the Senegal river basin is shared only among three states while the Nile river is shared among ten riparian countries as has already been discussed. In the view of the writer, the visit did not supply enough experiences to consider and draw lesson for the Nile basin all-inclusive cooperative framework. It would have been appear sound, had they visited, in addition, or rather the experiences of international rivers such as Danube, Rhine, Niger and others, which are shared by more than eight riparian countries and which have multilateral legal and institutional comparative agreements.

The team was also advised to consider other relevant factors which helps for attaining equitable and legitimate water use of the Nile basin such as: the amount of water that are currently used the benefits that are derived from Nile water use, the trend line of such waters use, population size and growth trends as well as other socio-economic and physical parameters.⁹⁶

⁹³ Imeru Tamrat (2004), *Bilateral and Multilateral River Basin Institutions: Lessons for the Nile Basin*, Paper Submitted at National Water Forum organized by the Ministry of Water Resources, Addis Ababa, Ethiopia, October 25-27,2004.

⁹⁴ Supra note at 91

⁹⁵ Ibid

⁹⁶ Ibid

These issues are, in general, the essential components of the D-3 project that the POE study team was required to include in the Draft Agreement and then to submit its report to the NILE-COM. In general, the POE held six round discussions on the Draft Cooperative Framework since the project was signed in December 1997 up till submitted its final report at the 8th annual meeting of the Nile COM held in Khartoum, Sudan in August 2000.⁹⁷ But, before presented to the Nile-COM, it submitted the Revised Draft Cooperative Framework for further discussions and comments to the respective Nile basin governments at the end of 1999.⁹⁸

The Draft Cooperative Framework comprises six parts with total number of 39 Articles: the first part of the Draft Agreement comprises General principles (Article 3); the second is about the Rights and Obligations of the riparian states (Articles 4-14); part three is about Institutional Structure (Arts. 15-30); part four is regarding Subsidiary Institutions (Arts. 31-32); part five about miscellaneous provisions (Arts.33-34); and the last part is about final clause (Arts. 35-39).⁹⁹

Concerning the discussions on the legal issues in the Draft Agreement, the POE members of the upper and lower Nile riparian countries did not reach agreement on the statements of many provisions.¹⁰⁰ And thus at least a member of the POE from either upper or lower riparian state has registered note of reservation or proposed alternative, among other things, on the following principles: principle of 'equitable and reasonable utilization' [Arts.(3.2) & (4.1-16)]; principle of 'prevention of causing significant harm[Arts.(3.5) & (5.1-2)]' ; principle relating to the 'right of Nile basin states in using waters of Nile within their territories' [Arts.3.6]; principles relating 'information concerning planned and existing measures, exchange of data and information, environmental impact assessment and audit [Arts.,3.6,8&10), 7,8,9]; a principle concerning existing agreements [Art.3.15&Art.14] all of which are discussed under the first two parts of the Draft

⁹⁷ Ibid

⁹⁸ Ibid

⁹⁹ Transitional Committee Final Report (August 2001), Draft Agreement on the Nile River Basin Cooperative Framework, Entebbe: Uganda. Pp.3-14.

¹⁰⁰ Ibid

Agreement.¹⁰¹ To put it briefly, either of the two groups has notes of reservation on Articles 3 (heading statement, sub arts. 3,8,11,14 & 15), 4(sub arts.2,5 & 6), 5(subarts.1&2), 8(4), 9(2&4), 10(b), 11,14,18,24(12 and 13), 26(4), 30(7), and 31(2). The details will be discussed in chapter five.

Another important issue in the Draft Agreement is about the permanent institutional cooperative framework. In this regard, it has recognized the establishment, purposes and objectives and functions of the basin wide-Nile River Basin Commission, and sub-basin and national subsidiary institutions such as: Sub-basin organizations/arrangements and National Nile Focal Point Institutions as has respectively mentioned under part three [Articles 15 and 30] and part four [Arts.31 and 32].¹⁰²

Almost all of these notes of reservations or alternative proposals were made by the POE members of the three principal stake holders, Ethiopia that contributes 86% to Nile on the one side, and Egypt and the Sudan that use the greatest amount of the Nile waters but contribute little or nothing to it on the other side.¹⁰³ Although, this would not lead one to the total conclusion that the NELSAP group countries have no concern on the issues that created disagreement between the ENSAP group states, it is possible to see that they are less concerned and looks for their own advantages. Nonetheless, it is obvious that they have real interests, like Ethiopia, on some provisions of the Draft Agreement such as Art 14 so that should play useful roles in getting agreement on the contentious provisions.¹⁰⁴ The POE produced the revised version of a draft cooperative framework to the Nile COM in August 2000, but failed to get acceptance and ratification except acknowledgement.¹⁰⁵ To this end, the Nile-Com said, "some key issues remain to be resolved and thus agreed to extend the dialogue process to seek further agreement on these outstanding issues".¹⁰⁶

¹⁰¹ Ibid

¹⁰² Ibid

¹⁰³ Ibid

¹⁰⁴ Ibid

¹⁰⁵ Ibid; see also supra note at 10, pp 111-113.

¹⁰⁶ Supra note at 6

Next, after observed that the agreement was not possible to reach, in its 8th meeting of August 2000, the Nile-COM formed a Transitional Committee (TC) composed of two members from each Nile riparian country to further re-examine the matter at stake; and it was given a six month ultimatum to accomplish its task and submit to the Nile-COM again, yet it was appointed in January 2001.¹⁰⁷ It convened two meetings and discussions on the Draft Cooperative Framework text; and submitted its work after a year to the Nile-Com at the meeting held in Cairo in February 2002.¹⁰⁸ The TC added some clauses on the revised draft Cooperative Framework text prepared by the POE, i.e., its preamble, scope, use of terms, and final clauses [such as signature, ratification or accession, entry in to force, authentic text, depository and function of the depository and signature format]; it also rearranged the text of the draft from 'Nile River Basin Cooperative Framework' in to the 'Draft Agreement on the Nile River Basin Cooperative Framework'; and it also reviewed and revised the Draft Ministerial Accord on the NBI.¹⁰⁹ Apart from the works mentioned above, the TC decided that additional final clauses, if any, would be left for the determination of the Negotiating Committee; not to lift the notes in the Framework text; recommended that Output 2 be considered by the Negotiating Committee and additional consultation be held among Nile-Com members.¹¹⁰

As far as the work of the TC is concerned, apart from adding certain provisions and rearranging the Framework text, that might be considered as an step, it is possible to say that the TC was unable to lift a number of notes of reservations registered by the members of the POE in the Framework text. This means that it did not try to see the central issues for which it was formed and that the Nile-COM referred to it to review and revise.

The most recent development concerning legal and institutional cooperative framework is related to the work of the Negotiating Committee. It was established in December 2003,

¹⁰⁷ Supra note at 99, its Transmittal Note

¹⁰⁸ Ibid.

¹⁰⁹ Ibid, particularly referring to the Work of the TC.

¹¹⁰ Ibid

consisting of very senior government officials, to perform the works recommended by the TC to be accomplished by this committee.¹¹¹ It is not possible to comment the works of this committee since its establishment until October 2006 because, as many authors have mentioned, during this period almost all the works of this committee was kept secret.¹¹² It would be because it was ordered to keep it secret until agreement be reached on the legal principles caused to be points of disagreement in the earlier discussions among the members of the POE as well as on the meeting of the Nile-COM held in August 2000. But, recently some sources address that there are progresses in the works of this committee and that it has lifted some of the notes of reservations registered by the POE members in the Draft Framework text, for example, it is possible to see these progresses from Version 2(6/9/06) texts submitted for discussion as well as from very recent information in July 2008 that has declared that the countries have reached an agreement on all provisions except Art.14.¹¹³

Therefore, comparing to the many notes of reservations and alternative proposals registered by members of the POE in the Draft Agreement, it is not difficult to understand that currently there is great progress. Indeed, although they are few (if not one) in number, they are the fundamental legal principles that have been central points of differences between upper and lower Nile riparian states on legal issues on the Nile waters. These include for example: the principle of 'Water Security' to replace a text on 'Existing Agreement (Art.14), 'Exchange of Data and Information' (Art.7) instead of the existing texts of Art. 7 'Regular exchange of data and information' and Art.8 'Planned measures', the establishment of the NRBC (Art. 15) and Sub Basin Organizations and Arrangements (31) that will succeed the NBI and its Subsidiary institutions.¹¹⁴ This version provides some alternative proposal texts that will replace the conflicting texts in the provisions of the Draft Agreement. Accordingly:

¹¹¹ See supra note at 2, pp 5-12

¹¹² See example supra note at 54

¹¹³See Cooperative Frame work Texts for Discussion, Version 2(6/9/06); ETV NEWS, Ethiopian Water Resources Minister has mentioned that the countries now reached agreement on all provisions except Art.14, Addis Ababa, Ethiopia, ENA July 2008

¹¹⁴ Ibid

A/ a text on 'Water Security' is proposed to replace a text on 'Existing Agreement'. According to this new proposal, Article 14 is about Water Security, not about existing treaties. It is read as: '...The states therefore agree, in a spirit of cooperation and taking in to account the provisions of Articles 4 and 5: a) To work together to ensure that all states achieve sustain water security, b) Not to adversely affect the water security or the present and future users or rights of any other Nile basin state."¹¹⁵

Concerning the inter relationship between the proposed new text of Art. 14 and other provisions of the proposed text of the Cooperative Framework, Stephen McCaffrey (October 5, 2006) has mentioned that the new text on water security is compatible with the other provisions of the Cooperative Framework.¹¹⁶ For example, he has pointed out that paragraphs (a) and (b) of the proposed new text of Art.14 apply Arts. 4 and 5 to the question of water security in that the words 'achieve and sustain' in the former paragraph imply the kind of process that is envisaged in Art.4 while the words...'not to cause significant harm, present and future users or rights' in the latter paragraph draws and applies Art.5, i.e., obligation not to cause significant harm.¹¹⁷

Furthermore, Stephen McCaffrey (Jun 8, 2006) has mentioned that if new needs are recognized, states can introduce new principles or concepts and this has been practicing in a number of watercourse agreements; and as an example, he has listed some new principles that states have introduced in order to solve new needs recognized among them.¹¹⁸ For example, the principles of 'sustainable development', 'equitable participation', 'community of interest', 'vital human needs', and 'human right to clean water' are new principles or concepts that have been increasingly introduced in international watercourse agreements such as: in the 2000 revised SADC Protocol, in the 2003 Protocol for Sustainable Development of Lake Victoria Basin, in the 1997 UN

¹¹⁵ Ibid

¹¹⁶ Stephen McCaffrey (October 5, 2006),), A Note on the relationship of proposed Article14 with other provisions of the Cooperative Framework, in Cooperative Framework Texts for discussion, Version 2(6/9/06)

¹¹⁷ Ibid

¹¹⁸ Stephen McCaffrey (Jun 8, 2006), A Note on new Principles in International Water Agreements in Cooperative Framework Texts for discussion, Version 2 (6/9/06)

Convention on the Law of the Non-navigational Uses of international Water courses, and in the 2002 Senegal River Charter.¹¹⁹ Based on such justifications, he recommended that states do not hesitate to include new principles, like the 'water security' in their agreements when they recognize new needs or believe that it is appropriate to do so.¹²⁰

However, Ethiopia has registered an objection particularly to paragraph (b) and proposed an alternative formulation read that 'to utilize the Nile River system in accordance with the principles of equitable utilization and causing no significant harm.'¹²¹ According to the formulation proposed by Ethiopia, the whole paragraph of Art. 14 is read as: "...The States therefore agree, in a spirit of cooperation (a) to work together to ensure that all Nile basin states achieve and sustain water security through equitable and reasonable utilization in accordance with Art.4; (b) not to cause significant harm to the water security or the present and future uses or rights of any other Nile basin state in accordance with Art.5.¹²² Note also that the concept of 'water security' is a new principle not only in the context of the Nile River Basin Cooperative Framework, but also in many international watercourses agreements, including in the 1997 UN Convention on the Law of the Uses of Non-navigational International Watercourses.¹²³

B/The second important issue in respect of the governing legal principles, that can also be seen as progress, is that instead of the existing text of Art.7 'Regular exchange of data and information' and Art.8 'Planned measures', one Article with three sub-articles is proposed; and it is Art.7 'Exchange of Data and Information'.¹²⁴ Concerning the relationship between the proposed new texts of Art. 7 and the existing texts of Arts. 7 & 8, Stephen McCaffrey (October 6, 2006) has mentioned that the new proposed text of Art. 7 combine the existing Art. 7 and Art.8 and thus in so far as the exchange of relevant information is

¹¹⁹ Ibid

¹²⁰ Ibid

¹²¹ Ibid

¹²² Ibid

¹²³ See the Provisions of the 1997 UN Convention on the Law of the Uses of Non-navigational International Watercourses

¹²⁴ Supra note at 29

concerned nothing is lost by combining the two articles.¹²⁵ Nevertheless, Ethiopia has again entered a reservation suggesting that Art.8 should be deleted altogether as it can be covered by Art.7 and the issue of planned measures becomes relevant if and only if a water sharing arrangement acceptable to the basin states is put in place.¹²⁶

C/ The other important issue in the proposed new texts of the Draft Agreement is relating to the progress seen in the institutional cooperative formwork. In this regard, unlike the Draft Agreement, the proposed new text clearly specifies that the basin wide Nile River Basin Commission and the Sub Basin organizations/Arrangements /are the successor of the NBI and its sub-basin subsidiary institutions.¹²⁷ The existing Draft Agreement has no provisions that clearly address the relation between the Nile River Basin Commission and the NBI as well as whether or not the former is the successor of the latter. But the proposed texts of new Art. 15 and Art.30 (a) have clearly addressed that the NRBC be the successor of the NBI including its Secretariat, Subsidiary Action Program Offices and Units, and Shared Vision Program Project Management Units.¹²⁸ In addition, Art.30 (a) of the new proposed text provides that the NRBC shall succeed to all rights, obligations and assets of the NBI.¹²⁹

Further, concerning Sub-basin organizations and arguments, Art.31 of the existing Draft Agreement consists four sub articles out of which the Egyptian and Sudanese member of the POE entered a reservation to sub article 2 that now becomes sub art.3 and extended in its scope.¹³⁰ That means, the proposed text of new Art.31 now comprises five sub provisions, including one additional paragraph. And, it is read as:

“Sub basin organizations and Arrangements established under this Framework or those of the NBI to which the NRBC is the successor by virtue of Art.30 (a) of present

¹²⁵ Ibid

¹²⁶ Ibid

¹²⁷ Arts. 15, 30 [a] and 31.

¹²⁸ Ibid

¹²⁹ Ibid

¹³⁰ Ibid

Framework, shall be governed by the provisions of this Framework, according procedures to be established by the NRBC.”¹³¹

In short, the institutional structures of the successor of the NBI (the NRBC), and the sub basin subsidiary organizations and arrangements, and their functions and purposes seem clearly described; and even there is no registered note of reservation in the proposed new text of the Draft Agreement. This can also indicate that there is a progress regarding the institutional cooperative framework. Now the issue appears to be the delay of establishing the said NRBC together with the fundamental legal principles on which an agreement has yet not been reached.

D/ The uses of terms such as ‘Nile River Basin‘ and ‘Nile River System‘ are other issues given attention in the proposed text of new Art 3. These terms are used in many provisions of the proposed Cooperative Framework text. The working group has proposed references that these terms represent under all provisions; and according to the proposal, wherever there is reference to utilization of water, the term ‘Nile River System‘ should be used; and where there is a reference to environmental protection, conservation or development, the term ‘Nile River Basin‘ should be used.¹³² This can also be considered as one of the progresses seen from perspective of legal issues.

In general, from the above discussions on the D-3 Project/ the legal and institutional cooperative framework/, it is not difficult to see that there are encouraging progresses in narrowing the earlier broader gaps and extreme divergent positions between the lower and upper riparian states on the conflicting legal issues in the draft agreement proposed by the Negotiating Committee, particularly from the 2006 new texts. More interestingly, the recent information that declares that countries now reach agreement on other provisions of the Draft Agreement, except on issues relating to existing accords, could be remarkable indication of the progress relating to the cooperative legal framework; and

¹³¹ Ibid

¹³² Supra note at 113

this seems to be good indicator of the fact that there is relative progresses in this regard; and it could be because of repeated discussions, dialogues, negotiation and renegotiations

Nonetheless, although the two lower riparian have not registered reservations, Ethiopia has still reservation on three fundamental legal principles of the new proposed cooperative framework text of the 2006.¹³³ To this effect, concerning the difficulties of reaching agreement on such governing principles, some writers, for example Burunne and Toopee, Waterbury, and Kristin Wiebe have mentioned that reaching an agreement on such important issues requires time and the determination to make solemn compromises on the part of riparian countries, mainly the principal stakeholders, Egypt and Ethiopia.¹³⁴

4.4.3. The Link between NBI and Cooperative Legal

Framework

The NBI and D-3 Projects appear strongly linked in many respects, among which one is that both are the projects designed by the Nile basin states to realize their shared vision as can be envisaged from the respective objectives and missions of their projects. Concerning the links between these projects, Tesfaye Tafesse has addressed that the NBI was established as a transitional organization pending the ratification of the ongoing cooperative framework agreement or the D-3 Project.¹³⁵ Dahilon Yasin Mohamoda and Kristin Wiebe have also addressed that the D-3 project is one of the central projects of the NBI and the latter is to put in place the legal foundation for the major issues, and also that will most likely adopt the general principles of the existing international watercourse legal instruments.¹³⁶

¹³³ See Version 2 of the New Proposed Cooperative Framework Texts, 2006.

¹³⁴ See for example supra note at 27 and infra note at 136

¹³⁵ Supra note at 10, P.109.

¹³⁶ Dahilon (2003), Nile Basin Cooperation: A Review of Literature, in Waterbury (2002), Nile Basin National Determinants of Collective Action; and in Kristin Wiebe (2001), The Nile River: Potential for Conflict and Cooperation in the face of Water Degradation, Current Africa Issues, No.26, Nordiska Africa institutet p.27

The NBI is a transitional arrangement supposed to be replaced by a permanent cooperative institution mentioned in the Draft Agreement, i.e., the Nile River Basin Commission (NRBC).¹³⁷ According to the proposed Draft Cooperative Agreement, the NRBC is not only the successor of the NBI, but also the bearer of further responsibilities, including collecting and securing funds from both the member states and international supporting agencies and enhancing/implementing the projects started under the NBI programs.¹³⁸ On the other hand, it is witnessed from the Draft Agreement that the successor of the NBI, i.e., the permanent institution (NRBC) and the legal instrument (NRBA) will be established by the same cooperative framework. This is also an indicator of the relation between the two.

Other writers have expressed the link between the NBI and the D-3 project in that establishing cooperative legal framework is prerequisite for the success of the NBI. For example, Delayer and Gray have emphasized that the cooperative legal framework is prerequisite to cooperatively undertake development projects on shared waters.¹³⁹ They have also added that without appropriate legal framework and adequate rules acceptable to all the riparian countries, cooperative attempts on the cross border water resources would not be successful so that law is a major determinate in finding and maintaining legitimate and sustainable solutions should conflicting issues arise.¹⁴⁰ There are also writers who stressed on the establishment of cooperative legal and institutional framework as the prerequisite of getting financial support for development projects on cross-border water one of which is the Nile waters. In this regard, as they say, the World Bank's legal regulation no 7.50 of 1995 has clearly mentioned that riparian nations must establish cooperative legal rules and agree amongst themselves as a pre requisite to get financial support from the Bank for development projects on cross-border water

¹³⁷See Art 15 of the Draft Agreement on the Nile River Basin Cooperative Framework, Transitional Committee Final Report, Entebbe, Uganda, 31 July 2001.

¹³⁸ *Supra* note at 133, Arts. 15, 30, and 31

¹³⁹Mulugeta Fiseha and Tesfaye Taffessie (2004), *Proceeding of Conferences on Management of Water Resources in Ethiopia* (ed), Addis Ababa, IDR, AAU Printing Press, p 68

¹⁴⁰ *Ibid*

resources.¹⁴¹ This regulation seems directly applicable to the SAP's projects designed by the Nile riparian countries on the Nile waters as they are endeavoring to implement these projects mainly with the financial support from the World Bank without having common basin wide accord.

Further, at larger extent, the NBI projects are heavily depending up on international fund supporting agencies, mainly on the World Bank that is also the coordinator of other fund supporting international agencies.¹⁴² And these international fund supporting agencies are currently underlining the establishment of the NRBC as a prerequisite to support the development projects going on under the auspices of the NBI.¹⁴³ It could be due to this fact that international fund supporting institutions have been supporting the ongoing NBI process through the 'Nile Trust Fund' established under the World Bank instead of directly submitting their supports to the Nile SEC, and now stressing that they do not want to continue in such a way unless the Nile basin countries establish the NRBA.¹⁴⁴

Therefore, as basin wide agreement is pre requisite for the World Bank to support construction of projects on international rivers including those found in the Nile basin, it would be a prerequisite for the Nile basin countries to adopt the Nile Basin Cooperative Agreement not only in order to properly implement the big projects they designed under the transitional arrangement NBI, but also because to a larger extent, they are funded and supported by the World Bank.

In sum, from the above discussions, it is possible to understand that there is strong links between the NBI and the D-3 Projects and also between their objectives. The unresolved legal and institutional issues in the Draft Agreement of the Nile River Basin cooperative Framework could thus affect the proper foreword moves of the NBI programs, mainly

¹⁴¹ Supra notes at 15; 23, p 159

¹⁴² Ibid

¹⁴³ Ibid

¹⁴⁴ The NC Request to Ethiopia that the latter gives order regarding the actions to be taken on the main points of registered notes of reservations in Version 2 (6/9/06) of the New Proposed Cooperative Framework Texts, Expert's Professional Opinion/advice to the Ethiopian government (Amharic Version, unpublished, Confidential), Addis Ababa Ethiopia, 2006.

implementation of the SAPs projects. Hence, the writer strongly believes that the adoption of the Nile River Basin Cooperative Framework is a prerequisite for the proper implementation of NBI projects. Having this in mind, next let's see the roles of Supporting Partnerships in the NBI process and also how much they are stressing the establishment of permanent legal and institutional cooperative framework for the implementation of the NBI projects.

4.5 The Role of Supporting Partnerships in the NBI Process

The role of supporting partners in enhancing cooperation among riparian countries especially of developing regions on the uses, management and development of cross boarder shared waters, is believed to be significant.¹⁴⁵ These supporting partners include international/regional agencies, countries, NGOs and civil societies. And, different supporting partners have been involved and supporting in different degrees in the process of cooperating Nile basin states since early cooperative attempts until the currently ongoing NBI process. In this regard, comparing to their involvement in the earlier cooperative attempts on the Nile waters, the participation of, particularly fund supporting agencies in financing, facilitating dialogues and negotiating the Nile riparian states through the NBI process appears to be better.¹⁴⁶ Here, the writer intends to assess the roles of the supporting multilateral and bilateral intuitions such as ICCON, the World Bank, NGOs and Civil societies in the ongoing NBI and legal and intuitional cooperative framework processes. ICCON is considered to be a land mark point for the evolution of many supporting partners and also identified as a long-term partnership of the NBI so that the writer prefers to begin with its role.

4.5.1. ICCON

An ICCON is a process through which growing partnerships evolved and began playing more roles in the NBI process.¹⁴⁷ ICCON, which means an International Consortium for Cooperation on the Nile, was a unique forum conceived as a long term partnership of the riparian states and international community established on June 27, 2001 at Geneva

¹⁴⁵ See for example supra notes at 15 and 25

¹⁴⁶ See Chapter three for their involvements in the Early Cooperative Attempts

¹⁴⁷ Supra note at 10, p 113.

aiming at encouraging further dialogue on cooperation, sustainable development and poverty alleviation in the Nile basin.¹⁴⁸

The objective of the ICCON was to seek coordinated and transparent support for cooperative water resources projects in the Nile basin.¹⁴⁹ Positively considering the Nile-COM's requests to organize and raise broader donor support at ICCON1 on May 30, 2001, the World Bank announced the establishment of a financing mechanism called the Nile Basin Trust Fund (NBTF), which is, as the Bank says, a streamlined and cost effective vehicle to administer donor support for the NBI.¹⁵⁰ And, then the Bank accepted the request and invited donors to a consultative meeting in Geneva, Switzerland in June 2001 and for Nile riparian countries to present the development project plans they sought to undertake.¹⁵¹ The NBTF was established not only to administer donor support, but also the SVP and preparation of the SAPs, and the overall facilitation and general support to related activities.¹⁵²

The first meeting of International Consortium for Cooperation on the Nile which is termed as ICCON, was held from June 26-28, 2001 in Geneva, Switzerland; and, celebrated cooperation between the Nile basin countries and has established partnerships that will lead to sustainable development and management of the River Nile for the benefit of all.¹⁵³ Regarding its role, Abdel Fattah has impressively addressed that ICCON was a major mile stone that brought ministers and senior officials from Nile basin countries together with a broad range of bilateral and multilateral donors and other interested parties such as civil society, professionals organizations, media and NGOs for the first time.¹⁵⁴

On the ICCON1, all the ten Nile basin countries, 15 supporting countries, many international and regional institutions and representatives of Nile basin based NGOs were

¹⁴⁸ Ibid; see also supra note at 4 (b)

¹⁴⁹ Supra notes at 2; 4 (b); 9; 11; etc.

¹⁵⁰ Supra notes at 1;6, 9

¹⁵¹ Ibid

¹⁵² Supra note at 9

¹⁵³ Ibid

¹⁵⁴ Ibid

attending the first meeting of the ICCON and pledged to support the NBI.¹⁵⁵ On that meeting, many states and international institutions promised to become bilateral supporting partners of the NBI.¹⁵⁶ Further, growing partnerships to the NBI also welcomed the contributions of NGOs and civil societies and private sectors.¹⁵⁷ The contribution of ICCON for the ongoing NBI process is also addressed in that it has formalized the partnerships of the Nile basin countries for equitable use and sustainable development of the Nile.¹⁵⁸

In sum, the contribution of ICCON for the ongoing NBI process can be observed from the above discussions that it was a unique forum and long-term partnership of Nile states and international community; it encouraged further dialogues on cooperation, sustainable development and poverty alleviation in the Nile basin; pulled many international institutions, countries, NGOs and civil societies pledged to be NBI's supporting partners; and offered avenue for raising and coordinating fund from various sources. Next, let's see the roles of the World Bank (among international fund supporting agencies), NGOs and civil societies respectively.

4.5.2. The World Bank

The initial supporting partners of the NBI include the UNDP, CIDA, and the World Bank while others promised to be bilateral or multilateral supporting partners on the ICCONI.¹⁵⁹ In this regard, the CIDA began supporting when TECCO-NILE created the NRGAP in 1995 and UNDP simultaneously started supporting the D-3 project in particular while the World Bank started supporting the process since 1997.¹⁶⁰ After consented to support, the World Bank suggested that leadership be a collaborative measure among these three donor agencies (the World Bank, CIDA, and UNDP).¹⁶¹ After

¹⁵⁵ Supra note at 15

¹⁵⁶ Such as: Denmark, Finland, Germany, Italy, the Netherlands, Norway, Sweden, U.S.A. and UK, IUCN, NDB, IRN, NEPAD, IAG, WWF, GEF, FAO, SIDA, UNEP, UNESCO, etc

¹⁵⁷ IRN (2005), *The Nile Basin: Linking Human Rights and Environmental protection*, available at: <<http://www.irn.org/irn.can.the.nile.states.dam.their.way.to.cooperation/htm>>

¹⁵⁸ Supra note at 15

¹⁵⁹ Ibid

¹⁶⁰ Supra note at 25, pp 158-159

¹⁶¹ Ibid, pp 127-128

acquired the role of facilitating the process, the World Bank emphasized on the need of participation of all riparian states on dialogue to propose cooperative development and environmental management and to supporting the financial requests on a case-by-case basis.¹⁶² The Bank then facilitated dialogue, contributed finance for the proposed cooperative projects and preparation of the ICCON; and at this meeting, it also organized and raised broader donor support and invited them to contribute for the NBI projects, and established a financing mechanism, the NBTF, to administer donor support for NBI projects that the Nile basin states designed to undertake.¹⁶³

Therefore, it is indisputable to say that the involvement of World Bank in the NBI process has significant influential role since its establishment until the recent progresses; and the NBI is heavily dependent upon it, both in its creation and for its actual operation.¹⁶⁴ Nevertheless, may be because of its financial policies that forbidden it not to support development projects on international waters in the absence of basin wide cooperative agreement among the co-basin states, in our case, before the establishment of the NRBA, it would be difficult for it to freely support fund for the implementation of the SAPs projects.¹⁶⁵ On the other way, this financial restriction would help the Bank to push/influence the Nile basin countries to hasten the establishment of the NRBA in order to get financial support from the Bank for their SAPs projects.

4.5.3. The NGOs

The proponents for NGOs involvement in the NBI process stress that acknowledging the involvement of NGOs in all aspects and stage of development programs will help ensuring its success by building confidence and for realizing confidence building.¹⁶⁶ Growing partnerships to the NBI also welcomed the contributions of NGOs and Civil Societies at ICCON; and to facilitate this process, in 2001 the World Conservation Union (IUCN) agreed to establish the Discourse Desk in Entebbe, Uganda and to create forum

¹⁶² Ibid

¹⁶³ Supra notes at 6, 15, 25, etc

¹⁶⁴ Supra note at 25, pp.123 and 158-159

¹⁶⁵ See supra notes at 10, 11, 15, 25 p 158

¹⁶⁶ Ibid

for NGOs, and Civil Society participation in the NBI.¹⁶⁷ The IUCN became a partnership of the World Bank, WWF, GEF and CIDA to financing the NBI and also coordinating the NGOs and civil society.¹⁶⁸ The Nile Basin Discourse was officially launched in Nairobi, Kenya in December 2003 with the goal to promote dialogued on sustainable and equitable development, pace and mutual understanding within the Nile river basin; and its main tasks are to encourage debate, to exchange information between countries and to provide independent advice to the NBI and to ensure active dialogue and cooperation between the civil society and the governmental process.¹⁶⁹ Further, the World Commission on Dams (WCD) had been advocating for participation of the Nile basin civil societies and the public at large in the NBI decision making processes beginning from planning up to implementation of the projects as stake holders; and then IRN become monitoring partner of the NBI believing that involving NGOs and civil societies be a way to ensure the projects.¹⁷⁰ Yet, some authors point out that the NBI marginalized them not to participate in decision making process at the planning stage.¹⁷¹

4.5.4. The Civil Society

Public Participation is defined as the process through which stakeholders' influences and share control over development initiatives, decisions and resources affecting them.¹⁷² This indicates that active involvement of the public; particularly the specific concerned stakeholders groups, such as civil society, in planning and decision-making process and thus shares ownership and responsibility. Concerning the public/civil societies and private sectors involvement in the NBI process, at ICCON1 the Nile basin countries officially welcomed and promised to continue in collaboration with them.¹⁷³ It seems a result of this readiness that they declared at ICCON1 that an NGO called Nile Basin

¹⁶⁷ IUCN, Wetlands & Water Resources Programmes of IUCN-The World Conservation Union, available at: <<http://www.iucu.org/homepage>>, accessed on 12/13/2005.

¹⁶⁸ Ibid

¹⁶⁹ Supra note at 1(c)

¹⁷⁰ Ibid

¹⁷¹ Ibid

¹⁷² Ibid; see also the NBI-SVP on Confidence-building and Stakeholders involvement at supra note 25, P.132.

¹⁷³ Supra notes at 1(c), 15, 25, 167

Discourse was established as a supporting partner of the NBI to encourage public participation in the NBI.¹⁷⁴ Accordingly, its main tasks include encouraging debate and exchange information between countries, providing independent advice to the NBI through the Nile-SEC, and ensuring active dialogue and cooperation between the civil society and the governmental processes.¹⁷⁵ Further, for similar reason IRN was assigned to monitor the involvement of civil society in the NBI¹⁷⁶

Concerning the need of public involvement, the DISS has described it as follows: firstly, it is rights of the public to participate in and influence decision making concerning one's livelihood and the learning and capacity building process involved; secondly, public participation is believed to improve the quality of decision making by providing local knowledge and perspective on a wide range of issues affecting problem definition and resolution so as to take in to account both local and trans-border conditions and interests; thirdly, any type of participation improves the credibility and public support for water management projects, increasing the level of acceptance and legitimacy of the project; fourthly, participation also rises the sense of ownership to the prefect and thus the interest and responsibility that people are ready to assume to make the project a success; and fifthly, ensuring public participation potentially improves implementation and monitoring projects and often turns out to be the most effective decision making process because it minimizes the risk of costly and violent protests and riots at later stages.¹⁷⁷ However, there are indications that NBI marginalized public/civil society's participation in decision making process. For example, IRN reveals that NBI has marginalized the participation of Nile basin civil society to implementation stage.¹⁷⁸

To sum up, many writers reveal that NBI is a hurdle in the path for permanent cooperation among the Nile basin countries on the uses, management and development of the Nile waters. The proponents express that the success of NBI would solve deep-rooted

¹⁷⁴ Ibid

¹⁷⁵ Supra notes at 1(c) and at 167

¹⁷⁶ Ibid

¹⁷⁷ Supra note at 25

¹⁷⁸ Supra note at 1(1)

challenges of the basin and the fundamentally conflicting issues between the upper and lower Nile riparian countries since long years ago. They further stress that its success also provides security and sustainable water supply for downstream states and development opportunists for the upstream countries; for example, Kimberley E. Foulds states that the optimism ingrained with in the NBI mission and programs provides a source of resistance against the growing and seemingly insurmountable Challenges facing the Nile basin countries.¹⁷⁹ The World Bank, on its parts has expressed that the NBI will serve as a new development paradigm of regional cooperation and it can be an example of how international waters can become catalysts for cooperation and development and stability.

Indeed, in comparison with the prior cooperative attempts in the Nile basin, the Nile basin countries' commencement for permanent basin wide cooperation on the Nile water resources through the NBI process can be admired in many respects, because among other things; firstly, the NBI involves all the Nile riparian countries, except Eritrea; secondly, it comes up with broad based mission, objectives, programs and projects that address many growing and seemingly overwhelming challenges, which had not been addressed in the earlier cooperative initiatives; framework is in progress side by side with the NBI project; fourthly, the differences between upper and lower riparian on governing principles has now come down to only three general principles of provisions of the Draft Cooperative Agreement so that the NBI will lately to be replaced by the permanent basin wide institution (NRBC). Despite these encouraging progresses, both in the NBI and D-3 Projects, there are still strong suspicions that the NBI prospects would not be successful due to different yet unsolved existing but growing challenges and other newly emerging problems that would affect not only the implementation of the NBI projects but also the adoption of the cooperative legal framework. These challenges will be dealt with in the next chapter.

¹⁷⁹ Supra note at 15

CHAPTER FIVE

CHALLENGES CONFRONTING THE NILE BASIN INITIATIVE

5.1 The Challenges in the Nile Basin in general

In the preceding chapter, we have seen the prospects of the NBI for permanent basin wide cooperation and the progresses relating to the cooperative legal framework. We have also observed that despite the progress and achievements so far, a number of challenges and problems remain unresolved that would affect the success of the NBI. This chapter thus briefly highlights the challenges in the basin that also affected the success of early cooperative attempts on the Nile waters in general, and then discusses the major challenges still threatening the success of the NBI in particular to examine as to whether or not the latter can achieve its objective regardless of these challenges and finally to recommend plausible solutions.

Literature on challenges to the NBI prescribes a number of problems and challenges that could affect its success. In this regard, many scholars from different disciplines have assessed these issues from different perspectives, but all specify some common problems and challenges. To this end, in addition to the already existing challenges in the basin and those affected the success of the prior cooperative initiatives on the Nile waters, some identify the NBI projects themselves and situations of supporting partnerships as challenges to the success of NBI. For example, according to Kimberly, E. Foulds, while the potential success of the NBI provides a broad spectrum of physical projects and intangible regional benefits, the development of the NBI projects (SVP and SAPs) have potential to create and incite further conflict.¹ His suspicion is related to the impacts of constructing high dams for hydroelectric power and large scale irrigation, as he argues, that would result in competing projects in that they would reduce the amount of Nile and further would result in resettlement of those currently living in the region.² IRN also reveals that there is no enough water in the Nile River to meet the various competing

¹ Foulds (2003), The NBI: Challenges to the Implementation, Paper presented at the Managing Shared Water Conference, Hamilton, Ontario, Canada, available at: <<http://www.nilebasin.com/documentes/kim.html>>

² Ibid.

unilateral large scale irrigations and hydropower projects in addition to the already built and under construction in some riparian states of Nile so that the schemes for these big projects are threat to the success of the NBI.³ Concerning the impact of constructing large-scale irrigation and hydro power projects at sub basin level through SAPs, IRN further points out that constructing these big projects, combined with the coming impacts of the climate changes, could send the region's already over-tapped water resources in to crisis, leave economies weaker rather than stronger, and do little to reduce the ongoing conflicts between the Nile riparian states on the Nile waters.⁴ Hence, as the two writers have stressed, that these factors will affect the success of NBI as there is no an established cooperative legal framework that can regulate these sub basin projects.

In addition to the above mentioned negative consequences of the NBI projects, Foulds has also described other challenges that could affect the success of NBI process, such as the Egypt's regional dominance and historical disregard for other riparian countries; lack of legal framework on the utilization and management of the Nile waters; maintenance of up stream down stream conflicts of interests; the very real problems of poverty, recurrent droughts, and ongoing armed conflicts in at least four and between two, of the NBI stake holder countries.⁵ IRN, on its part, has described, among other things, competing and poorly planned unilateral projects, climate changes, poverty, environmental degradation marginalization of NGOs and Nile basin civil societies not to participate in decision making Process, especially at the planning stage, of the NBI process as the major challenges that would affect the success of the NBI.⁶

Abdel Fattah Metawie, the Nile Water Sector Chairman of Egypt, has listed eight critical risks that would affect the smooth implementation of the NBI process. These include: Political instabilities both at a national scale and between countries; the preeminent threat of global climate changes; lack of commitment of individual countries at national level to guarantee the support given to NBI activities; the global economic situation which may

³ IRN (2005), *The Nile Basin: Can the Nile States Dam Their way to Cooperation*, available at: <http://www.irn.org/irn.can.the.nile.states.dam.their.way.to.cooperation/htm.>>

⁴ Ibid.

⁵ Supra note at 1

⁶ Super note at 3

negatively influence the donor support through probable failure to establish sustainable funding mechanisms; inability to building capacities of staff of different back grounds at a regional level to ensure sound management for a comprehensive basin wide coordination; inefficiency to promoting the institutional capacity at a national level; resistance to changes for reasons such as difference of interests of people and nations in the basin; and the role of the press in disseminating information on NBI activities.⁷

Dahilon Yasin Mohamoda has also identified that the Nile basin countries in the first place should have reached agreement up on the governing principles and legal framework so as to implement particular project.⁸

Accordingly, he has stressed that it is not possible to promote action on the ground or sub basin activities before a basin-wide cooperative legal and institutional framework is adopted.⁹ The said basin wide cooperative framework is however yet not adopted even today after nine years since it was drafted, so that is threatening the success of NBI process.

Olli Varis has identified the constraints of implementing the NBI projects as a nexus of natural, human and socio-economic developments (including politics).¹⁰ Dahilon has discussed the same in an elaborated way. According to the latter, the major challenges to NBI include: Upstream-downstream conflicts of interests and Unilateral decisions to implement development projects, the consequences of climate change, armed conflicts in the region that continue to cerate regional instability, and the lack of a legal framework.¹¹ The Danish Institute for International Studies (DIIS) has identified the following as the achievements of the NBI so far: the creation and formulation of forum for riparian dialogue and collaboration as well as securing substantial funding for the process, the

⁷Abdel Fattah Metawie, Lesson learnt from Cooperation in the Nile Basin, available at: <http://www.resenberg.ucamr.org/document/lesson_learnt_from_cooperation_in_the_nile_basin.doc>

⁸ Dahilon Y.Mohamada (2003), Nile Basin Cooperation: A Review of Literature, Current African Issues, No. 26, Nordiska, p. 32

⁹ Ibid

¹⁰ Dahilon (2003). Nile Basin Cooperative: A Review of Literature, in Olli Varis (2002). The Nile Basin in a Global Perspective: Natural, Human and Socio-economic Resources nexus, Current African Issues, No.26, Nordiska African institute, p.29

¹¹ Super note at 8, p.29

development of a common vision and subsequent action plans, and the construction of an operational decision making structure and related infra-structure.¹² The major challenges of the NBI, as DIIS has described, is now related to the processes after the development of collaboration and institutionalization of this process, that is relating to the concrete action and implementation of multilateral and bilateral projects at basin-wide, regional and local levels.¹³ The major constraints and shortcomings of the NBI to implement these projects, as addressed by this working paper, are thus none establishment of a legal frame work; practically less competence of offices in each country dealing with the main components of the shared vision program, and lack of genuine inclusion of the civil societies and NGOs in the planning and operational process.¹⁴

Nabil M. EL-Khodari on his part has described the following as the problems facing the NBI: lack of commitment from international supporting institutions to pushing establishment of a legal framework; absence or lack of binding agreement between and among the Nile basin countries on the equitable and just distribution of the Nile waters; the planned development projects under the NBI programs are suspected of affecting the natural flow of the Nile waters as all countries prepared them only depending on their own needs and absence of rules that governs the distribution; increasing tension and instability in the region; lack of transparency as procedural problem from part of international fund supporting partners, particularly the World Bank, that is the main agency managing the NBI; lack of involvement of UN specialized agencies, such as UNDP, UNEP, FAO and UNESCO in the NBI process; lack of transparency of the NBI to genuinely involve concerned sectors of civil society, academia, media and international and national agencies /NGOs/ to participate with the required skills to suggest a better alternative on the NBI proposed projects.¹⁵

¹² DIIS (2003), Overview of the Water use and Water Conflict in the Lower Nile Basin, DIIS Working paper 2004/6 presented at Conferences on From Water War to Water Riots, Copenhagen, DIIS, p.127

¹³ Ibid

¹⁴ Ibid

¹⁵ Nabil M.El-Khodari (2002), The Nile Basin Initiatives (NBI): Business as Usual? Paper Accepted For Presentation at International Conferences of Basin Organization, Spain: Madrid, November 4-6, 2002.

Mohammed Abdo and Imeru Tamrat have stressed, among many other things, that the critical challenges confronting the success of the NBI are absence of legal and institutional cooperative framework that involves all stakeholders, lack of full commitment from the Egypt side on the issue of Nile water sharing/allocation/ more than expounding integrated development projects on environmental concern and tourism.¹⁶

In the view of the writer of this paper, in addition to the above discussed problems, the moves even after ICCON1, both in translating the NBI programs in to the actual projects on the ground at the sub-basin level and failure of reaching agreement on different governing principles in the Draft Agreement may affect the success of the NBI. This can be inferred from the progresses since then as all the moves appear very slow. For example, the Negotiating Committee in charge of revising the Draft Agreement yet not agrees on the fundamental governing principles; the silence of the new proposed text of the Draft Agreement concerning the existing bilateral accords on the Nile water, the introduction of principle of 'water security' which is very new concept and that does not expressly invalidated the existing bilateral accords; delaying the establishment of the would be successor of the NBI, i.e., the NRBC together with these conflicting legal issues in the Draft Agreement and also actual implantation of the SAPs projects on the ground at the sub basin level would be new challenges that may escalating the existing threats to the success of the NBI.¹⁷

Further, the NBI does not as such signify and assurance by the lower riparian states, particularly by Egypt; because firstly, it would be difficult for Egypt to make concession which would have an impact on the amount of water allocated to it in order to allocate more water resources to the other states; secondly, Egypt's proposal to meet her future

¹⁶ (a) Mohammed Abdo (2005), *The Nile Question: The Accords on the Water of Nile and Their Implications on the Cooperative Schemes in the Basin*, *Perceptions Journal of International Affairs*; Vol.19, No.2, summer ed; Turkey: Center for Strategic Research, PP.45-55;

(b) Imeru Tamrat (2004), *Bilateral and Multilateral River Basin Institutions: Lessons for the Nile Basin*, Paper Submitted at the National Water Forum organized by the Ministry of Water Resources, Addis Ababa, Ethiopia, October 25-27,2004

¹⁷ (a) See for example, the Transitional Committee Final Report (August 2001), *Draft Agreement on the Nile River Basin Cooperative Framework*, Entebbe: Uganda. pp.314;

(b) *Cooperative Framework Texts for Discussion*, Version 2(6/9/06)

food requirements through desert reclamations which will require an increased use of Nile waters; thirdly; Egyptian often favor wide-ranging regional schemes that down play the importance of Nile water sharing/allocation/ and still want to put in place integrated development projects such as environmental concerns, tourism, etc.¹⁸ There fore, the cumulative effect of these challenges would affect the successes of the NBI.

In general, the challenges discussed above can be summarized as: absence of basin wide cooperative agreement and lack of commitments to pushing its adoption; impacts of the early bilateral agreements on the Nile waters as they are yet not expressly invalidated even in the new draft text but rather come up with other new principle, including, principle of water security; divergent interests of the riparian states, i.e., their unilateral competing action/plans to construct various Macro dams for hydropower generation and large scale irrigation schemes of development projects through the NBI programs; various hydro political and socio-economic problems in the basin such as rapid population growth, Poverty, recurrent drought and water iniquity; global climate changes; environmental degradation; armed conflicts and political instability in the region, suspicion and mistrust between upper and lower riparian stats and interferences by one state in the affairs of other state; lack of genuine inclusion of NOGS and civil society in the decision making progress of the NBI projects, especially at planning stage; lack of transparency from part of international fund supporting partnerships, mainly the World Bank and difficulties in the policy of latter to support development project on cross boundary rivers in the absence of basin wide agreements. In the view of the writer, these problems are interrelated and interdependent so that the impact of on would give birth to the other.

On the other hand, no matter how individually or collectively all of them may have significant impacts on the implementation of the NBI, in the view of the writer, the major challenges that would seriously threatening the success of the NBI are: Divergent interests of the Nile riparian countries in the NBI projects and on the legal principles governing the uses of Nile waters; Instability in the region and interferences by one

¹⁸ See for example supra notes at 8; 15; and 16.

riparian state in the affairs of other states; the unsolved legal and institutional issues in the Draft Agreement, and problems relating to supporting partners. Subject to the significant impacts of other challenges, these appear critical challenges that may lead the NBI to failure like its predecessors. Next, these major challenges will be discussed subsequently.

5.2. Major Challenges Threatening the Success of the NBI

5.2.1. Divergent Interests of the Nile Basin Countries

Literature on conflict of interests on the Nile water resources reveals that the Nile riparian countries have severe divergent interests and different expectations of cooperation on the Nile waters, both in the past and present days.¹⁹ These diversions and differences are often observed either between the upper and lower riparian states in general, or between the three central actors: Ethiopia, Egypt and the Sudan, and sometimes including Uganda.²⁰ For the purpose of this paper, the writer classifies the Nile riparian countries in to three categories based on the amount of water they contributed to the Nile River, their divergent interests on the Nile waters and expectations from the NBI. Accordingly, they are categorized as the Nile Equatorial Lakes group; the Eastern Nile upper riparian: Ethiopia; and the lower Nile riparian: Egypt.

5.2.1.1 The Nile Equatorial Lakes Group

The countries in this group are Burundi, Democratic Republic of Congo, Kenya, Rwanda, Tanzania and Uganda.²¹ These countries are sharing not only the Nile river, but also the Equatorial lakes such as Victoria, Kyoga and Albert, which flow in to the main Nile through the Whit Nile.²² In addition to the main Nile and the Equatorial Lakes, four of these countries: Burundi, Rwanda, Tanzania and Uganda are also sharing the Kagera

¹⁹ See supra note at 8, p.25

²⁰ Ibid

²¹ Ibid, p.28

²² Ibid

river, whose water flows in to Nile through Lake Victoria.²³ In general, the Great Lakes region countries are jointly contributing about 14% of their waters to the Nile River.²⁴

These countries have relatively large and stable amount of rainfall and several other water resources out side the Nile basin; and thus less dependent on the Nile river so that may have less interest to cooperate with the lower Nile riparian states in the uses and management of the Nile waters.²⁵ In other words, this is to mean that, although they contribute about 14% to the Nile river, they are not dependent on the Nile river, but on the water resources of their own lakes and rivers so that may prefer more to cooperate among themselves on the large amount of water resources of the lakes and rivers outside the Nile basin. Therefore; it is logical to assume that unlike the Sudan and Egypt that are almost completely depending up on the Nile waters, the Great Lakes region countries are less interested or would be reluctant to cooperate with the lower riparian on the utilization and management of the waters originating from their region and flowing in to Nile unless they get more advantage from cooperating with the lower riparian countries.

Concerning the interests of the Great Lakes region countries, Nabil El-Khodari has stated that they essentially do not need the Nile water but assistance for investment, preferable trade agreements, etc in exchange of their contribution to Nile and legible share of water needed by the Eastern Nile group (Egypt, Ethiopia and the Sudan).²⁶ In this connection, Tesfaye Tafesse has pressed that the Equatorial Lakes group sates presently utilize not more than 0.05 billion m³ of the Nile water; and even this is by Uganda for non-consumption purpose (producing power) from the Owen fall Dam, in fact under the regular monitoring of permanently stationed Egyptian hydrologists and engineers.²⁷

²³ Ibid

²⁴ See Tesfaye Tafasse (2001), *The Nile Question: Hydro-politics, Legal Wrangling, Modus Vivendi and Perspectives*, New Bruner wick, USA, p.28.

²⁵ Ibid

²⁶ Supra note at 12 p.146

²⁷ Supra note at 24, p. 50

After addressing that the Equatorial Lakes group countries are less interested to cooperate on the Nile waters but more in the Equatorial Lakes waters, Waterbury has stressed that these countries are concerned mainly by the fact that “their Lakes may one day be targeted as sites for the storage of water to augment the downstream discharge of the Nile”.²⁸ Further he added that it is not so much what they might gain from the Nile basin as what they may be asked to give up that concern the Equatorial Lakes.²⁹ This implies that these countries have agreed to cooperate on the Nile waters with the lower Nile riparian countries fearing that their Lakes would be targeted as sites for the water storage to augment the downstream discharge of the Nile without their consent. Hence, these can also indicate the rationales behind these countries to join the NBI, i.e., not because they get more benefit from Nile water, but simply to protect their interests in the waters of the Equatorial Lakes, and if possible to get financial support from fund supporting international agencies through the NBI for their joint and/or individual development projects. Regarding this last view, Dahilon Yassin Mohamoda has pointed out that many of the great Lakes group states agreed to cooperate with others on the Nile waters in order to promote their own development endeavors by assistances from supporting partners, and expressly to challenge the legality of the colonial era bilateral accords such as the 1929 treaty.³⁰ For example, he has pointed out that the Kenyan and Ugandan parliaments called on their government to denounce the 1929 treaty and seek support from other riparian countries, and further suggested that Egypt should pay an annual compensation for use of the water in case of any new agreement in the future are indicators.³¹ This can also indicate the truth that they continue to cooperate with the lower riparian through the NBI process only if it benefits them more than being cooperated among them selves. In this regard, Sam.L.Laki has mentioned the interests of the Nile Equatorial Lakes countries on Nile waters stating that many of the upstream countries may not want to be a position of locking them selves in to agreements that will not serve them in the future, and thus do

²⁸ Dahilon (2003), Nile Basin Cooperation: A Review of Literature, in Waterbury (2002), Nile Basin National Determinants of Collective Action; and in Kristin Wiebe (2001), The Nile River: Potential for Conflict and Cooperation in the face of Water Degradation, Current Africa Issues, No.26, Nordiska Africainstitutet pp.27-28

²⁹ See at supra note 8, pp.28-29

³⁰ Ibid.

³¹ Ibid

not seem interested in arriving at agreements on the full utilization of the Nile waters at this time.³² Ashok Swain has confirmed the above view stating that majority of the Nile Equatorial Lakes countries are less interested in cooperating on the Nile water allocation and development projects because they depend mainly upon the Lake Victoria as source of fresh water while their dependence on the Nile river is negligible.³³

The other point that would be an evidence for the suspicions that the Nile Equatorial Lakes group countries may not continue to cooperate on the Nile waters with the lower riparian through the NBI process can be envisaged from the earlier initiatives they formed among themselves. For example, the establishment of the Kagera Basin Organization (KBO) among Burundi, Rwanda, Tanzania and Uganda on the Kagera river, and of the Lake Victoria Environmental Management projects (LVEMP) among the Uganda, Tanzania and Kenya on the Lake Victoria side by side with the Hydro-met and TECCO-NILE respectively as has already been discussed in chapter three.

In addition to the above mentioned group interests, the development projects in each country can be witness of their internal divergent interests. For example, DR. Congo in shipping and finishing on Lake Albert; Burundi and Rwanda in the hydropower generation on the Kagera river, Tanzania, which is not only the member of NBI, but also of the KBO and the Lake Victoria basin group, in developing and conserving the Lake Victoria sub-basin group and also to the NBI, is concerned mainly with issues of pollution and the spread of the water hyacinth, and she has seen herself more as broker in the Nile basin so that less interested in any binding accords on the Nile waters use; and Uganda, which is said to be the fourth central actor on the Nile next to Egypt, Sudan and Ethiopia, in the consumptive use of Nile waters, especially for irrigation, and has been challenging legality of the 1929 treaty and also voiced that Egypt should pay an annual compensation to Uganda for use of the water in case new agreement in the future.³⁴

³² Dahilon (2003), Nile Basin Cooperative: Review of Literature, In Saml.Laki (1998), Management of the Water Resources of the Nile Basin, Current African Issues, No.26, Nordiska Afrikainstitutet, P.32

³³ Dahilon (2003), Nile Basin Cooperative: Review of Literature, In Ashok Swain (2003).The NBI: Too Many Cook-Too Little Broth, Current African Issues,,No.26, Nordiska Africaininstitutet,P.32

³⁴ Ibid

Further, as has already discussed in chapter four concerning the progresses of the NELSAP projects, the countries in this group have yet not entered in to the implementation stage of the projects; and the participations of members of the POE and Negotiating Committee of these countries on the discussions on the provisions of the Draft Cooperative Framework since 1999 until now have also been not more than simple observation with almost no notes of reservations, unlike the members of the Eastern Nile group.³⁵

On the whole, from the above expressions of different writers, one can easily observe that the Nile Equatorial Lakes countries have divergent interests among them selves and also collectively apart fro the ENSAP group so that they would be less interested to cooperate with others on the utilization and management of Nile waters, whether through the ongoing NBI or the future NRBC or Nile River Basin Agreement. In the view of the writer thus, they agreed to cooperate with the lower Nile riparian states either because of external pressures, or to object the legality of the colonial era and later bilateral agreements between Egypt and the Sudan that they believe affecting their rights and interests, and still to protect their interests and rights in any new agreements, which if not cooperating may put further risk up on them; and to get support for the development projects on their own lakes and rives from fund supporting partners. Except for these reasons and unless become certain, they would not agree to locking themselves in to basin wide cooperatives that will not serve them more than or equal to the amount of water they contribute to the Nile river. Having in mind the interests of the countries in this group, let's proceed to see the interest of Ethiopia that contributes the lion's share to the Nile River.

5.2.1.2 The Eastern Nile Upper Riparian Group: Ethiopia

Ethiopia, one of the countries in the NBI's ENSAP group, is contributing about 86% to the Nile river, but utilizing less than 1% of it, i.e., 0.65 billion m³ annually.³⁶ In the

³⁵ See also the Final Report of the Transitional Committee (2001); Cooperative Framework: Texts for discussions, Version 2(6/9/06)

³⁶ See supra note at 24 ,p.44

history of conflict of interests on the Nile waters, relatively the conflicts among other riparian states or between them and Egypt have not been frustrating as between the central actors: Ethiopia which contributes 86% but not utilizing the Nile water even 1%, and Egypt that contributes nothing but utilizing more than 95% of the water.³⁷

A number of writers have mentioned the seriousness of conflict of interests between the two from different perspectives. For example, Kimberly E. Foulds has expressed the seriousness of conflict of interests between the two on the Nile water in relation with its impact on the success of NBI. He has mentioned it saying that ‘regardless of the level of cooperation achieved by the NBI, countries like Ethiopia have reached the stage where they have no choice other than to utilize the Nile waters for irrigation, hydropower generation and other population needs’³⁸ On the other hand, Nabil El-Lkodhari has pointed out that Egypt does not want construction of development projects for irrigation or hydro power generation in Ethiopia, leave alone on the Nile tributaries, even on the other Ethiopian rivers or lakes.³⁹ This can also be evidenced from Abdel Fattah Metawie’s warning to the African Development Bank that when the latter notified Egyptian that it was considering financing 50 million for the construction of a dam in Ethiopia on “Koka’ lake.⁴⁰ Abdel Fattah Metawie’s warning statements to the Bank were: ‘with out developing the Blue Nile basin, you are really suffering in Ethiopia, and you have to expect a crisis in the area.⁴¹ Nabil El-Khodari has emphasized the above statements sating that ‘This is by far a much more sympathetic tone than the preciously documented threats of war by Egypt and the interference to block financing any irrigation project in Ethiopia’.⁴²

³⁷Yacob Arsano and Imeru Tamrat (2004), Ethiopia and Eastern Nile Basin, in Aquatic Sciences Research Across Boundaries, Vol.67, No.1 (2005}, EAWAG:Birkhauser, p.22

³⁸ Supra note at 1

³⁹ Supra note at 12, p 148

⁴⁰ Supra note at 7

⁴¹Abdel Fattah Metawie, Chairman of the Nile Water Sector in Egypt’s Ministry of Water Resources and Irrigation; see his warning to the Bank in the DIIS working paper 2004/6, p.147

⁴² Supra note at 15

Yosef Yacob also reveals that Egypt often tries to threaten Ethiopia whenever the latter wants to construct dam for irrigation or hydroelectric power on Nile water originating in her own territory.⁴³ For example, in 1977 when Ethiopia announced her intention to irrigate the Blue Nile basin, Egypt immediately warned to take strong counter measures, including war, if any act is taken by Ethiopia to alter the course of the Blue Nile River.⁴⁴ In this regard, president Sadat of Egypt stated that “if Ethiopia undertakes any action that will affect our full rights to the Nile waters, there is no alternative to the use of force... we will retaliate when something happens, but we have to be ready with plans and alternatives to firmly stop any action; and 1999, when Ethiopia announced to build a dam on the Blue Nile river, president Mubarak of Egypt also elicited a threat to bomb Ethiopia.⁴⁵ Dahilon Yassin Mohamoda has expressed the seriousness of conflict of interests between the two countries from perspective of position of their scholars on every Nile waters issues. He has specified that while all Egyptian writes argue for statuquoe, Ethiopian Scholars argue in favor of new meaningful and effective cooperative agreement that nullify early bilateral, that accommodates the interests of all the riparian countries, and that recognize fresh Nile water redistribution arrangement.⁴⁶

In general, from the above explanations it is possible to understand that now Ethiopia has reached critical stage and obliged to use the Nile waters so that consented to enter new agreement to cooperate with the nothing contributors to the River so as to peacefully and legally use the waters of Nile with in her own territory. It is also possible to see that Egyptians have been threatening and miss understood Ethiopia on her development plans relating the construction of dams for irrigation and hydropower generation even on the tributaries of the Nile River. Nonetheless, it implies that unless the development projects proposed by Ethiopia in the NBI are properly translated in to actual action on the ground there would be high probability for the NBI to fail before achieving its goal. Having this in mind, next let's see the Egypt's deep rooted interests on the Nile waters.

⁴³ Yosef Yacob (2003). *The Futility of Nile Basin Cooperation: From Hydromet to the Nile Basin Initiative*, available:<<http://www.ethio.n/ethio-water/equitable-use-of-nile.html>>

⁴⁴ Ibid

⁴⁵ Ibid.

⁴⁶ Supra note at 8

5.2.1.3 The Lower Nile Riparian: Egypt

In addition to the above mentioned points, the Egyptians interest on the Nile waters can easily be inferred from the wordings of Abdel Hadi Radi, a Water Resource Minster of Egypt. This official has put their interest on the Nile waters saying that objecting validity of the earlier bilateral accords on the Nile waters that allocated water to Egypt is “redline that can never be crossed”, leave alone by Ethiopia, even by the Sudan itself.⁴⁷ Egypt’s interest on the Nile waters can also be inferred from early cooperative attempts on the River with other Nile riparian states as has already been discussed in chapter three.

Although Egypt and Sudan are in the ENSAP group, they have also been participating in the NELSAP.⁴⁸ This is also another indicator of the fact that she is to protect her interests on the waters flowing from Equatorial Lake in to Nile. Elhance has mentioned the interest of Egypt on the Nile waters saying that she is the strongest Nile riparian state so totally dependent on the waters of a single river. Nile, that flows in to it from sources outside its territory and to which its own territory add so little waters.⁴⁹ Yacob Arsano has also mentioned that the better utilization of Nile in Egypt is borne out of necessity because the country is fully dependent on it and most of her people depends on the Nile waters and has made greater use of the Nile water than all the riparian countries combined.⁵⁰ It would be due to this fact that Egyptians consider any attempt to construct dams for irrigation or hydropower generation by the upstream states on the waters flowing in to Nile as threat to the national security of Egypt and thus have been warning to use all available means to counter such threat and ready to go to war against any development of water utilization schemes in the upper riparian countries that may limit water availability in Egypt.⁵¹

⁴⁷ Supra note at 43

⁴⁸ See for example supra notes at 11, and at 43.

⁴⁹ DIIS (2003), in Elhance (1999). *Hydro Politics in the Third World: Conflict and Cooperation in International Rivers Basins*, DIIS Working Paper 2004/6 Presented on Conference *From Water War to Water Riots?*, Copenhagen, DIIS, P. 114

⁵⁰ Yacob Arsano (1997), *Predicaments of Cooperation in the Nile Basin*, Paper Presented for the 13th International Conference of Ethiopian Studies, Kyoto, Japan.

⁵¹ See supra note at 8, p.38.

So far, 10 major dams have been constructed on the Nile (five in Egypt, four in Sudan and one in Uganda) all of which except one, are to serve Egyptian.⁵² The near absence of dams on the Nile catering for other than Egyptian may indicate how much highly she is interested in and concerned for the Nile waters more than the upstream riparian countries did earlier, and many writers point out that Egypt has often been pursuing national water and food security to develop gigantic hydrological projects without paying attention to the needs and rights of other riparian states (except perhaps for Sudan).⁵³ This situation appears to be changed today due to many factors that are forcing them to share the using of the Nile waters with Egypt;⁵⁴ and it surely increases conflict of interest between Egypt and the upstream countries.

Some writers have mentioned that Egypt has been influencing donor institutions not to support for construction of dams for hydropower generation and irrigation development projects in the upstream states, particularly in Ethiopia.⁵⁵ This direct or indirect influences of Egypt on the fund supporting international institutions not to support for development in the upstream states could include the support they made for the implementation of the NBI projects and in effect directly or indirectly may impede the dialogues/negotiations on the legal and institutional cooperative framework at least by delaying reaching agreement in time. In this regard, Yacob Arsano and Imeru Tamarat have addressed that the irony of the present situation is that Egypt has no willingness to accept legal and institutional mechanisms on an equitable and negotiated basis.⁵⁶ Further, Seifulaziz Milas has expressly underlined that the issue of whether or not the NBI will achieve its objectives is primarily depending upon whether the lower riparian states, particularly Egypt, is really committed to cooperate to make it a success, or attempt to

⁵² *Supra* note at 49, p.142.

⁵³ *Ibid*

⁵⁴ See *supra* note at 15.

⁵⁵ See for example, *supra* notes at 1, 11 and 36.

⁵⁶ *Supra* note at 37

exploit it as a mechanism of delaying the adoption of the permanent basin wide legal and institutional cooperative framework.⁵⁷

On the whole, from these explanations one can assume how much Egypt is highly interested in and concerned for the Nile waters more than other riparian countries. Thus, despite she has been pretending to cooperate with the upstream states on the Nile waters, Egypt may not agree on the construction of any development projects and establishment of any new cooperative agreement that may reduce the advantages she has already acquired by the earlier bilateral accords or that may limit her future water needs, whether they be the NBI projects or the Nile River Basin Cooperative Agreement. Egypt may also continue to interfering and influencing fund supporting intuitions not to support for the construction of dams for irrigation and hydropower generations in the upstream states on the waters flowing in to Nile. This regional dominance of Egypt in the name of necessity or national security, her direct or indirect influences on the fund supporting international institutions not to support for development projects in upstream states, and using dialogues as delaying mechanisms of the adoption of the cooperative legal and intuitional frame work not only indicates the Egypt's greater interest on the Nile waters more than other riparian states but rather that there are extreme divergent interests among the three groups of the Nile riparian countries on the utilization, management and development of the Nile waters. This diversion of interests among the three groups would be one of the major challenges that would affect the success of the NBI mainly implementation of the SAPs projects and establishment of the permanent legal and institutional cooperative agreement.

5.2.2. Instability in the Region and Interferences in the Affairs of other States

Instability in the Nile basin region and interference by a riparian in the affairs of other states are also identified as other major challenges that contributed to the failure of early cooperative attempts on the Nile waters before achieving their goals, and also that have been confronting other regional cooperative attempts to create integration in the area,

⁵⁷ Milas (2001). EU Assistance for Conflict over Water Resources: The Ethiopian Nile Basin, Food Security, Poverty and Conflict Risk, available at: <<http://nilebasin.com/documents/kims.htm>>

including in all Horn of Africa.⁵⁸ They are still identified as serious problems that would continue to challenge future cooperative arrangement on the Nile water, including the processes started through the NBI, even after the latter is replaced. This sub section thus explores how instabilities in the region and interferences by a Nile riparian state in the affairs of others can affect the success of the NBI.

As far as instability in the Nile region is concerned, many writers say that it affects the smooth relation between these countries and its effect may in one way or the other affects the success of the NBI and/or future cooperative agreements on the utilization of the Nile waters, especially between the ENSAP groups. In this regard, Dahilon Y has described armed conflict in the region as still continues to create regional instabilities which in effect would seriously affect the success of the NBI.⁵⁹ Kimberly E.Foulds has also repeated the same addressing that armed conflicts have been going on in at least four and between two of the Nile riparian countries and still continue to create regional instability and it would confronting the success of the NBI.⁶⁰ As has been stressed by Dahilon, political unrest due to civil wars in Burundi, DR. Congo, Ethiopia, Rwanda, Sudan and Uganda has contributed lots for the failure of the early cooperative initiatives on the Nile waters.⁶¹ And, many of the countries in the region are still suffering from internal conflicts and it counties to dominate many of these countries. For example, the recent crisis in Darfur of Sudan, DR. of Congo, Uganda, and the on-off internal conflicts in Ethiopia can be cited as the fact on the ground. Further more Abdel Fattah Metawie has strengthening the same saying that political instability, both at a national scale and between countries, is critical risk that will affect the success of the NBI.⁶² He also added that political instabilities, both at a national scale and between neighboring countries, have always been a burden of African nations and represent an eternal threat that endangers the smooth implementation of cooperative initiatives.⁶³

⁵⁸ Supra note at 16(a), pp 45-55.

⁵⁹ Supra note at, 8, p.29

⁶⁰ Foulds, Supra note at 1.

⁶¹ Supra note at 8, p.31

⁶² Supra note at 7

⁶³ Ibid

Regarding the political instabilities in the region due to conflicts between countries, the Ethio-Eritrea war from 1998-2000 and current threats and counter threats between the two as well as the past and recent wars between Ethiopia and Somalia can also be cited as good example. To this end, while Ethiopia and Eritrea are stakeholders of the Nile waters, Somalia is not but neighboring Ethiopia; and these conflicts can surely make unstable Ethiopia and thereby her development plans through the NBI projects.

As long as interferences by one riparian state in the affairs of another is concerned, it revolves around the conflicting interests on the uses and management of the Nile waters mainly between Egypt and the upper riparian states as has already been discussed earlier. Egypt is almost completely dependent only on the waters of Nile that flows in to it from sources outside its territory and to which its own territory adds so little waters so that for Egyptian Nile may be a matter of life and death and is an issue of national security.⁶⁴ As a result, the Egypt's top policy priorities has been to safeguard the security of the Nile waters; and her political relations and other related considerations, both in the Nile basin and in the Horn of Africa, are tied to the Nile waters.⁶⁵

It would be true that Egyptians may fear that the upper riparian states may start widely using waters of Nile originating from within their territory if they get stable and economically capable enough to utilize. Hence, as many writers point out, Egypt may not stop interfering in the affairs of upstream states through different means to make them unstable so that not to use the Nile waters. In this regard for example, Abdul Mohammed has mentioned that if Ethiopia were to exploited more Nile waters, which may soon become an issue of survival for Ethiopia, given its chronic vulnerability to drought and famine, Egypt will become gravely concerned so that directly or indirectly seeks to

⁶⁴ Supra note at 1, and 12

⁶⁵ Yacob Arsano (1996). *Sharing Water Resources for Economic Cooperation in the Horn of Africa*, In *Trading Places, Alternative Models of Economic Cooperation in the Horn of Africa*, Uppsala: Life and Peace Institute, p.41

dominate Sudan and encircle other upper riparian, especially Ethiopia, not to engage in the development plans focusing on the utilization of the Nile waters.⁶⁶

This can be inferred from Egyptians top policy priority to safeguard the security of Nile using different mechanisms: by discouraging donor assistance to upstream countries; by influencing international financial institutions (the World Bank, IMF, Africa development Bank) to block financing of any large scale hydrological and irrigation works in the upper riparian; by claiming on the basis of the advantages and rights that she acquired from the World Bank's Operational Policy Directive 7.50 that prevents the Bank from supporting or lending money for the upper riparian states if Egypt says that such development project may affect water availability in Egypt; and by posing psychological warfare and indirectly supporting one of two neighboring states in war or proxy actors in case of internal conflicts.⁶⁷ In addition, media have been reporting that Egypt supported Somalia in the recent war with Ethiopia in favor of the Islamic court group; and Eritrea is said to be still supporting not only the Somalia's but also Ethiopian proxy actors.⁶⁸

In general, as some writers have addressed, Egypt has been directly or indirectly interfering in the affairs of upper riparian states to keep them unstable so that not endanger the countries discharge of the Nile water into Egypt. Therefore, in addition to instabilities in the upstream states, this Egypt's interferences in the affairs of upper riparian through different means, especially by supporting one of two neighbor states in war or proxy actors and by influencing international institutions not to support for development projects in the upstream states would seriously affect the success of the NBI.

5.2.3 Unanswered Legal Issues threatening the success of NBI

5.2.3.1. Absence of basin wide Legal and Intuitional Cooperative Framework

In the preceding chapters, we have seen that there are unanswered legal issues wrangling over the uses and management of the Nile waters; and in the first topic of this chapter that these unanswered legal issues are among the challenges that have been confronting any

⁶⁶ Abdul Mohamed (2007). Ethiopia Strategic Dilemma in the Horn of Africa, available at: [http://hornofafrica.ssrc.or/Abdul Mohammed/print.html](http://hornofafrica.ssrc.or/Abdul%20Mohammed/print.html), accessed on 5/27/2007

⁶⁷ Ibid; see also for example supra notes at 65, p.41; at 1; at 12, PP.120-147; at 24, PP.83-118; at 57

⁶⁸ Supra notes at 11;65; 66

cooperative attempt on the Nile waters. These unanswered legal issues include: absence of legal and intuitional cooperative framework involving all the riparian countries on the utilization and management of the Nile waters, the delay to reach an agreement between upper and lower riparian states on the fundamental principles that will govern the uses and management of the Nile waters, traits concerning validity of existing accords place of customary international laws on the Nile waters, and the conflicting legal issues in the Draft Cooperative Agreement. There is strong suspicion that these unanswered legal issues would affect the activities started under the auspices of the NBI. The writer thus intends to assess their impacts on the success of NBI.

Concerning the impact of the absence of inclusive basin wide legal and institutional cooperative framework, as has already been discussed in the preceding chapters and also here in above, it was one of the major reasons for the failure of the earlier cooperative attempts on the Nile waters.⁶⁹ And thus, as has also discussed under chapter four, it was with the view to curtail such a problem that all the Nile basin countries agreed and established the NBI and prepared the Draft cooperative framework project for permanent cooperation.⁷⁰ For example, as Yacob A. and Imeru T. have mentioned, the very reasons for Ethiopia to join the NBI was on the conditions that cooperative framework acceptable to all riparian states will be created; equitable and reasonable water use rights will be established for all basin countries; and the Ethiopia's acceptance to take part in the process of preparing the D-3 project was in anticipation of changing the existing upstream down stream differences, especially between the Eastern Nile basin countries.⁷¹ The said permanent cooperative legal and intuitional framework is however yet not established so that not only the absence, but also the delay of adopting this cooperative framework would have certain impacts on the implementation of the projects started under the auspices of the NBI.

⁶⁹ See also for example, *supra* notes at 8; 12; 15; 24; 43; 65;

⁷⁰ See *supra* notes at 24, 38, and 43

⁷¹ See *supra* note at 38

In the absence of established all inclusive basin wide legal and institutional cooperative framework, there are other conflicting legal issues that would affect the success of the NBI. Because of the absence of such all inclusive cooperative framework, the other conflicting legal issues that may affect the success of the NBI include: the divergence between up and down stream states on the validity of both the colonial treaties and later bilateral accords between Egypt and other riparian states; and as to whether or not existing international watercourses laws, like the 1997 UN Convention on the Uses of Non-navigational International Watercourses, international practices in other basins can serve as customary international law if in case conflict arises between Nile basin countries. These legal issues will be subsequently discussed next.

5.2.3.2. Traits pertaining to Validity of Existing Accords

Questions relating to existing accords have not got precise answer even by the Draft Agreement on the Nile River Basin Cooperative Framework. Because firstly, the provisions that deal with the existing agreements (Art. 3.15 and Art. 14) appear include both the colonial and later bilateral agreements; secondly, although it requires their conformity with the Cooperative Framework and which are inconsistent with the Framework shall be null and void to the extent of their inconsistency, Egypt and Sudan entered reservation and proposed that the Principles to the Cooperative Framework shall be without prejudice to the existing agreements; and thirdly, the Draft Cooperative Framework is silent about the role of customary international law on the Nile.⁷² These issues are parts of the legal issues wrangling over the Nile waters so that they would affect the implementation of the NBI projects in the absence of basin wide cooperative agreement. The writer has many reasons to say so; because even recently there are two divergent positions in this regard. On the one hand, some writers, especially Egyptians still argue that there are already legal frameworks in place for governing the Nile system. For example, the Egypt's higher officials and senior scholars are still stressing that existing bilateral agreements concluded between the Nile basin countries are effective laws between the contracting parties and should be regarded as having territorial

⁷² Transitional Committee (August 2001), Draft Agreement on the Nile River Basin Cooperative Framework, Final Report, Entebbe: Uganda. Pp.7&13.

character.⁷³ Further, the proponents of the validity of colonial treaties argue in respect of treaties on succession of states .Accordingly, they proposed that treaties of a territorial character have been unaffected by a succession of states.⁷⁴

On the other hand, many others strongly argue that they are no more valid. For example, according to scholars such as Collins, Mohammed Abdo, Girma Amare, Kefyalew Mekonnen since these treaties were bilateral in nature and also made in favor of the then Britain and later Egypt, but against the rights and interests of all upper riparian states, and more importantly as they were negotiated by the colonial powers, with out the consent of the existing independent sovereign countries, based on the British colonial aspirations, these treaties are not only devoid of legal application to other Nile riparian states, but further were rejected after the independence of the states on whose behalf the British signed the agreements.⁷⁵ Other writers further argue that the colonial agreements never have binding effect on the successor states because of the “clean state doctrine” that reads that ‘Successor states do not inherit obligations arising out of treaties concluded by their predecessors’; on the basis of principle of “fundamental change of circumstances” that is also mentioned under Art. 62 of the 1969 Vienna Convention on the Law of Treaties which stipulates that “fundamental change of circumstances can be invoked to terminate an existing international treaties’; on the basis of the Nyerere doctrine that states that ‘treaties concluded by former colonies lapsed just when they evacuated from the region.⁷⁶

There are further indications that colonial treaties would be an obstacle for basin wide cooperation. For example, Mohammed Abdo has pointed out that these treaties undermine the emergence of basin wide shared understanding and the evolution of a communal identity between the riparian states.⁷⁷ DIIS also provided that although most

⁷³ Magdy Hefny and Salah El-Din Amer (2005), Egypt and the Nile Basin, in *Aquatic Sciences Research Across Boundaries*, Vol. 67, No. 1 (2005); pp.45-47

⁷⁴ Ibid.

⁷⁵ See for example, *supra* notes at 16, 28, *infra* notes at 86 & 87

⁷⁶ See for example, Yeheneu Tsegaye Walilegne (2004), *The Nile Basin: From Confrontation to Cooperation*; 27 *Dalhousie Law Journal*, Canada: Dalhousie Law School, p.5.

⁷⁷ *supra* notes at 16

countries disclaimed all treaties signed under colonial rule, Egypt maintained claiming right to veto under principle of 'acquired rights'.⁷⁸ Further, Dahilon Y. Mohamoda has indicated that the upper Nile riparian countries are still disclaiming the validity of treaties signed under colonial rule while Egypt claims *status quo*.⁷⁹ For example, as he has pointed out, members of the Kenya and Uganda parliaments called on their governments to denounce the legality of treaties signed under colonial rule and seek support from other East African countries, and further suggested that Egypt should pay an annual compensation for use of the Nile waters in case of any new agreement in future.⁸⁰

Concerning the existing bilateral accords, many writers have pointed out that existing Nile agreements can not draw effect on riparian states not party to them, and the parties to those treaties can create rights and duties only to themselves, but not to non-party States.⁸¹ But, as Mohammed Abdo has pointed out, if these bilateral accords remain applicable between those states that had concluded them, they may become obstacle to any basin wide cooperation on the Nile water, including on the implementation of the NBI projects.⁸² Further, if these agreements are effective between the contracting parties, nothing prevents Egypt from claiming any one that favors her so long as they are not expressly repealed by the draft basin wide cooperative framework.

As one party to all these bilateral agreements has often been Egypt and all of them are in favor of her interests, it is obvious that she may not want to loose the advantages and interests acquired therein from these accords, especially from the 1959 Agreement for the full utilization of the Nile.⁸³ Hence, it is not difficult to assume that Egypt is seriously concerned about the existing bilateral accords, including the 1993 Framework for General Cooperation with Ethiopia. See for example that articles, 4, 5 and 6 of this framework have no mentioned about equitable use while principle of no harm rule and other crucial

⁷⁸ *supra* notes at 12

⁷⁹ *supra* notes at 8

⁸⁰ *Ibid*

⁸¹ *Supra* notes at 16; 37; 50 65; 76.

⁸² *Supra* note at 16(a)

⁸³ See for example *supra* note at 11, in Aaron T. Wolf (2003).

phrases that clearly favor Egypt are prescribed in it.⁸⁴ Art. 4 provide that the issue of the use of the Nile waters shall be... based on the rules and principles of international law. But remember that both Ethiopia and Egypt have not signed the 1997 UN Convention on the Laws of the Non-navigational Use of International Watercourse.⁸⁵ If so, to which international law it is referring? Is to state practices or old riparian states doctrines? Why it ignored the principles of equitable use while under Art. 5 it specifies that engaging in any activity related to the Nile waters that may cause appreciable harm to the interests of the other party? This principle favors Egypt in its very nature. Further, Art 6 underlines that the two have agreed to cooperate on projects that could enhance the volume of flow and reduce the loss of Nile waters. In short, even this General Cooperative Framework favors Egypt not Ethiopia. There fore, it is not difficult to understand that all the bilateral accords that Egypt concluded with other riparian countries on the Nile waters are in favor of Egypt to that even if she has agreed, Egypt may not easily waive these acquired rights and advantages by these bilateral accords

5.2.3.3. Place of customary International Laws on the Nile

Waters

Customary international watercourse laws include different international agreements on international watercourses and states practices/ riparian state doctrines. Concerning the relevance of customary international watercourse laws, while some writer argue that there has never been legal guidelines on the uses of the Nile waters, there are also who argue that there are customary international watercourse laws. While the first group even went as far as to say that there is no international law or common sense that prevents upper riparian states to utilize the Nile waters originating from within or flowing through their territories, some writers from the second group accept that the 1997 UN convention on the Uses of Non-navigational International Watercourses and the 1966 Helsinki rules on

⁸⁴ See the 1993 Ethio-Egypt Framework on General Cooperation

⁸⁵ Ibid

the Uses of the Waters of International rivers can serve as customary international law in the absence of all inclusive basin wide agreement.⁸⁶

In relation with different doctrines governing international water apportionment, Kefyalew Mekonnen and Peter Beaumont have listed some doctrines as state practices. According to Kefyalew Mekonnen (1997), there are five different theories on sovereignty principles that often claimed by riparian states in general.⁸⁷ Peter Beaumont has described these principles in different approach for same purpose.⁸⁸ In addition to the principles described above by the two authors, some writers add another principle termed as 'Principle of Limited Territorial sovereignty', which seems a compromise between the Absolute Territorial Sovereignty and the Absolute Territorial Integrity.⁸⁹

So long as these doctrines are concerned, there have been state practices as some riparian countries, especially the lower Nile riparian, have been claiming the doctrines that favor them more even this days as customary international law.⁹⁰ The most popularly accepted principle that many writers argue for is the principle of 'equitable and reasonable use' in the modern international law as it states that all riparian states have both rights to use and obligations not to affect the rights of their neighbors.⁹¹ In the case of the Nile riparian states, while currently Ethiopia is claiming for principle of equitable use, Egypt is claiming prior appropriation, historical, natural or acquired rights, no appreciable harm rule, etc.⁹²

⁸⁶ Kefyalew Mekonnen (1997). A New Basin for Viable Nile River Water Allocation Agreement, A Paper submitted to the 5th Nile-2002 Conference, Addis Ababa, Ethiopia, available at: <<http://www.ethiopian.com/abay/engin.htm/>>; see supra note at 74; see also Imeru T. (2005), and Mohammed A. (2005)

⁸⁷ Kefyalew Mekonnen (1997). A New Basin for Viable Nile River Water Allocation Agreement, A Paper submitted to the 5th Nile-2002 Conference, Addis Ababa, Ethiopia, available at: <<http://www.ethiopians.com/abay/engin.htm/>>

⁸⁸ Peter Beaumont (2000). The 1997 UN Convention on the Law of Non-navigational Use of International Water Courses: Its strengths and Weaknesses from a Water Management perspective and the Need for New Workable Guidelines: Water Resources Development, Vol.16, No.4, Carfax Publishing, PP.479-483

⁸⁹ Ibid.

⁹⁰ See for example, supra notes at 16; 65, 24; 87.

⁹¹ Ibid

⁹² Ibid

Therefore, in the absence of basin wide cooperative agreement on the Nile waters, a country that thinks favored more from may claim any doctrine that favors here as state practice if in case conflict arises. Thus this state may invisibly struggle against/if not to delay/the adoption of the cooperative framework and also implementation of the NBI projects. To this end, the suspicion is that Egypt may be using the NBI as a means of delaying the adoption of the cooperative framework that establishes the successor of the NBI, i.e., the NRBC.⁹³ In the view of the writer thus, in the absence of basin wide cooperative framework, the cumulative effect of the diverse interests of the riparian states concerning the place of customary international rules, including state practices, would have impacts on the implementation of the NBI projects as every activity in the contemporary world is being governed by law.

5.2.3.4. The Conflicting Legal issues in the Draft Cooperative Agreement

The process of transforming the transitional arrangement (NBI) to the permanent basin wide cooperative institution (Nile River Basin Commission) is yet not accomplished as per the agreement reached among the riparian states when they established the former.⁹⁴ See for example that Art.15 of the Draft Ministerial Accord on the NBI specifies that the NBI is a transitional arrangement for 3-5 years; and also that the Draft Agreement on the Nile River Basin Cooperative Framework points out that the latter be the successor.⁹⁵

As far as the conflicting legal issues in the Draft Cooperative Agreement are concerned, when the Draft document was presented to the Nile COM in 2000, agreement was not reached on many provisions of the draft document.⁹⁶ But it is possible to observe, from the 2006 new text of the Draft Agreement that shows that the difference is now reduced

⁹³ Kinfe Abraham (2004), Nile Opportunities: Avenues toward a Win-Win Deal, Jointly established ELLPD and HADAD, Library of Congress Classification, pp 350-355

⁹⁴ Transitional Committee Final Report (August 2001), Articles 1 and 15(1) of the Draft Ministerial Accord on the NBI dated on 10 May 2001.

⁹⁵ Ibid

⁹⁶ See for example, Articles 3(heading statement, sub arts.3, 8,11,14&15), 4(sub arts.2,5,&6), 5(subarts.1&2), 8(4), 9(2&4), 10(b),11,14,18, 24(13), 26(4), 30(7), and 31 (2); see also Yacob &Imeru, in Aquatic Sciences.p.23

to only few provisions which deals with the central governing principles such as: equitable and reasonable uses, no significant harm rule, exchange of information/data and planned measures and water security\instead of existing treaties/as well as from very recent information from ENA (in July 2008) that declares that agreement has reached on all provisions of the draft agreement except on Art.14 that talks about existing accords.⁹⁷

Concerning the existing agreements, agreement is yet not reached on the texts of both the Draft Cooperative Framework and the 2006 Version 2 (6/9/06) texts of the Cooperative Framework for discussion; and nothing is mentioned in both documents about the status of customary international law on the Nile waters.⁹⁸ In the Draft Agreement, Art.14 provides about the existing agreements while in the latter document it is about a new principle called 'Water Security', not about the existing agreements.⁹⁹

The 2006 Version 2(6/9/06) text is read as: '...The states there fore agree, in a spirit of cooperation and taking in to account the provisions of Articles 4 and 5: (a) to work together to ensure that all states achieve and sustain water security, (b) not to adversely affect the water security or the present and future users or rights of any other Nile Basin State."¹⁰⁰ The Negotiating Committee has tacitly passed over existing agreements and replaced it by new principle. Nevertheless, although the Committee seems did it to cleanup the lower riparian reservation to the provisions of Arts. 3(15) and 14 of the Draft Agreement, the introduction of this new principle has arisen reservation from Ethiopia, and other new questions such as: what is the fate of existing agreements? Does this new principle exist in the 1997 UN Convention on the Uses of the Non-navigational International Watercourses as well as in other basins that have basin wide cooperative agreements on international watercourses? If no, why need to start introducing this new

⁹⁷ Version 2(6/9/06) of the October 2006 Cooperative Framework Text for Discussion; see also ENA:ETV NEWS (July 2008), Ethiopian Ministry of Water resources declared that agreement has already been reached except on Art.14.

⁹⁸ See the Transitional Committee's Final Report on the Provisions of the Draft Cooperative Agreement; and Version 2(6/9/06) of the October 2006 Cooperative Framework Text for Discussion.

⁹⁹ Ibid

¹⁰⁰ Ibid

principle in the cooperative framework on the Nile waters? What are the legal ramifications, if any, of doing so?

Regarding the two documents, while Egypt and Sudan entered reservation to Arts. 3(15) and 14 of the Draft Agreement and proposed that the Principles and the Cooperative Framework shall be without prejudice to existing agreements, Ethiopia has registered an objection to paragraph (b) 'to utilize the Nile River System in accordance with the principles of equitable utilization and causing no significant harm'.¹⁰¹ Further, note that the concept of water security' is a new principle not only in the context of the Nile River Basin Cooperative Framework but also in many international watercourses agreements, even it is not found in the 1997 UN convention on the Law of the Uses of Non-navigational International Water courses.¹⁰²

Therefore, because: firstly, the provisions of the Draft Agreement that deal with the existing agreements appear referring to both the colonial and later bilateral agreements; secondly, although it requires their conformity to the Framework and which are inconsistent with the Framework shall be null and void to the extent of their inconsistency, Egypt and Sudan entered reservation and proposed that the Principles and the Cooperative Framework shall be without prejudice to existing agreements; thirdly, the new proposed text is silent about the existing agreements and comes with new principle that lead Ethiopia registered objection; fourthly, both the Draft Cooperative Framework and the proposed new text are silent about the place of customary international law. Hence, in addition to increasing existing suspicion that NBI is means of delaying establishment of permanent basin wide cooperation, it would undoubtedly not only extending negotiations on the cooperative framework but also may pull back implementation of the NBI projects.

Regarding Arts. 7 and 8 of the Draft Agreement that respectively deal with the principles on 'regular exchange of data and information' and 'information concerning planned measures', Ethiopia entered a reservation suggesting that Art.8 should be deleted altogether as it can be covered by Art.7 and the issue of planned measures become

¹⁰¹ Ibid

¹⁰² See the 1997 UN Convention on the Law of the Uses of Non-navigational International Watercourses.

relevant if and only if a water sharing agreement acceptable to the basin states is put in place while Egypt and Sudan proposed that 'the provisions on planned measures of the 1997 UN Convention on the Law of the Non navigational Uses of International Watercourses (part three, Arts. 11-19) be substituted for Art.8'.¹⁰³ Instead of the existing texts of Arts. 7 and 8, in Version 2 text, one article with three sub-articles is proposed; and it is Art.7 entitled 'Exchange of Data and Information'. Regarding the proposed text of new Art. 7, Ethiopia has still registered reservation on planned measures fearing that, while only now she has planned to constructing project on the Nile water within her territory, if request to provide relevant data and information, the lower riparian states, which already have many big constructions on the Nile, may object to deliver the requested data and information on the ground that it will reduce the amount of water reaching them, so that accepting this provision cripples Ethiopia's construction plan.¹⁰⁴ In addition, the Ethiopian members of the Committee proposed an alternative that exchange of information concerning planned measures be through third party, i.e. through the rules and procedures of the would be established NRBC.¹⁰⁵

The other important legal issue threatening the success of the NBI is relating to the establishment of institutional cooperative framework. The NBI was established in February 1999 as a transitional arrangement for (three/four/five) years or until a final framework for cooperation is put in place, whichever is earlier.¹⁰⁶ It further points out that the member states committed themselves to have the final framework for cooperation within these three/four/five years; and one year prior to the expiry of the term of the transitional arrangement; the Nile-COM will review the status of the Cooperative framework process and take appropriate measures.¹⁰⁷ However, in this Ministerial Accord nothing is mentioned about the permanent institution that will succeed the transitional arrangement NBI, i.e. silent concerning the institutional cooperative framework, one of

¹⁰³ Ibid.

¹⁰⁴ The Committee requested order from the government of Ethiopia on the main notes of differences in the new proposed text, Amharic Version, un published.

¹⁰⁵ Ibid

¹⁰⁶ Transitional Committee Final Report (August 2001), Articles 1 and 15(1) of the Draft Ministerial Accord on the NBI dated on 10 May 2001.

¹⁰⁷ Ibid

the central issues that pulled the Nile basin countries together when established the NBI at Dares-Salaam on February 22, 1999.

Regarding this draft Accord, Ethiopia was not participated in the discussion on its review and finalization and registered reservation stating that: (a) NBI is an institution duly established and signed in February 1999 at Dares-Salaam so that no need to conclude an accord to grant the NBI a legal status; (b) the Agreed Minutes of Dares-Salaam establishing NBI have to be succeeded by the cooperative framework which will be the output of the D-3 project; (c) Uganda was not asked to come up with agreement to be concluded among the basin countries

prior to the framework agreement; (d) Ethiopia can not participate in the decision of the Accord but will continue to fulfill her commitment under the NBI.¹⁰⁸ Regardless of the Ethiopia's registered reservation on the Accord that granted a legal status to the NBI, the latter has acquired diplomatic status of international legal personality in 2001, and since then it has been performing its function.¹⁰⁹

On the other hand, when come to the Draft Agreement on the Nile River Basin Cooperative Framework, it is dealing with both legal and institutional cooperative framework. The institutional cooperative framework here refers to mainly the basin wide Nile River Basin Commission (NRBC) whose establishment is provided under Art. 15 of the Draft Agreement.¹¹⁰ It has also recognized the establishment and functions of sub basin and national subsidiary institutions. According to this Draft Agreement, while part three specifies about the establishment, purpose and objective, and organs of the NRBC and their functions (Arts. 15-30), part four describes about the establishment of sub-basin and national subsidiary institutions such as: Sub-basin Organizations/Arrangements and National Nile Focal Point Institutions undertaking purposes, functions and activities consistent with those of the NRBC (Arts.31 and 32).

Concerning the differences between the members of the POE on the provisions of the Draft Agreement, the lower riparian disregard the need for specific provision on the Conference of Heads of State and Government as an organ of the NRBC, and have

¹⁰⁸ Ibid

¹⁰⁹ Ibid

¹¹⁰ Ibid

registered note of reservation on the functions and activities of the COM, TAC and Sub-basin Organizations as respectively provided under Arts. 17(a), 24(12 & 13), 26(4), 30(7/e) and 31(2). For instance, as provided under Arts.24 (12) the POE members of Egypt and Sudan proposed that the COM shall promote and facilitate the implementation of the equitable and reasonable utilization in each country, in particular the prevention of significant harm and the prior notification.¹¹¹ The Ethiopian member of the POE entered a reservation only on Arts.24(13) and 30(7/e).Regarding these Provisions, the Ethiopian position is that they should be deleted altogether as they can be covered by Art.7 and the issue of planned measures becomes relevant if and only if a water sharing arrangement acceptable to the basin states is put in place, but the Egyptians and the Sudanese proposed its deletion on the ground that the subject be covered by the UN Convention dealing with planned measures.¹¹²

Apart from the above, unlike the Draft Ministerial Accord on the NBI that expressly provided that the NBI is the successor of the TECCO-NILE, in this Draft Agreement there is no provision that provides as to whether NRBC is the successor of the NBI and also whether the latter continues or ceases to perform its functions and activities after the establishment of the former; yet none of the members of the POE from both groups has registered note of reservation or proposed the inclusion of like provision in the Draft Agreement. However, under the proposed Version 2 Cooperative Framework text, the provisions dealing with the establishment of the Nile River Basin Commission (Art.15) and Sub Basin Organizations and Arrangements (31) appear reformulated.¹¹³ In contrast to the Draft Agreement that seems lacking clarity as to whether or not the NRBC is the successor of the NBI, the proposed texts of new Art.15 and Art.30 (a) have clearly addressed that the NR BC be the successor of the NBI including its Secretariat, Subsidiary Action Program Offices and Units, and Shared Vision Program Project

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ See Cooperative Framework Texts for Discussion, Version 2(6/9/06)

Management Units.¹¹⁴ In addition, Art.30 (a) of the new proposed text provides that the NRBC shall succeed to all rights, obligations and assets of the NBI.¹¹⁵

Concerning the Sub-basin Organizations and Arrangements, while the Egyptian and Sudanese member of the POE entered a reservation to the paragraph of Article Art.31 (2) of the existing Draft Agreement, under the proposed text of new Art 31 it becomes subart.3 and also has substantial change in its scope of application.¹¹⁶ That is, in the Draft Agreement, it reads that 'the parties to the Framework that are also members of sub basin organization or arrangements...' in the proposed new text however it says: "...that are also members of other sub basin organization or arrangements ..."¹¹⁷ In addition, the proposed text of new Art 31 has included one additional paragraph which is read as: "Sub-basin organizations and Arrangements established under this Framework or those of the NBI to which the NRBC is the successor, shall be governed by the provisions of this Framework, according procedures to be established by the NRBC".¹¹⁸

Concerning the delay in the adoption of cooperative framework, the preparation of the draft cooperative agreement was started before the establishment of the NBI and submitted to the NILE-COM in 2000 for discussion and deliberation, but yet not adopted even after nine years as still the riparian countries could not able to agree on all provisions of the Draft.¹¹⁹ In this regard, some writers still comment that the NBI would not be successful because of the differences between upper and lower riparian states on the remaining disputing fundamental principles of the provisions of the Draft Agreement, and in effect this will delay the establishment of the permanent institution (NRBC) that will be the successor of the NBI as this issue is also suspended there in the draft together with these fundamental principles.

¹¹⁴ Ibid

¹¹⁵ Ibid

¹¹⁶ Ibid

¹¹⁷ Ibid

¹¹⁸ Ibid

¹¹⁹ See supra note at 97.

Hence, not less than the absence, this delay in the adoption of the Cooperative Agreement could be serious to threaten the success of the NBI. Therefore, like its predecessor cooperative initiatives, the NBI would fail before achieving its goals not only because of absence of basin wide cooperative framework, but also because of the delay in the adoption of the cooperative framework. And if truly need to implement the NBI projects/entering in to the actual activities on the ground, the cooperative framework should first take place at least as it may help to settle disputes if conflict arises on the implantation process of its projects.

5.2.4. Problems Relating to Supporting Partners

As has already seen in chapter four, the roles of external supporting partners, such as international fund supporting institutions, super power states, NGOs and civil societies, have been given greater attention recognizing that they have been contributing lots for the process of the ongoing NBI projects. Particularly the roles of fund supporting agencies was underlined that they are more significant not only in financing the NBI process, but also in facilitating dialogues and negotiating the Nile riparian countries to cooperate on the uses, management and development of the Nile waters.

In contrast, some writers however view the involvement of some international fund supporting agencies and super power states, mainly the World Bank and USA, in the NBI process as they are using it as a strategy of postponing establishment of the permanent basin wide legal and institutional cooperative framework.¹²⁰ For example, while the NBI is heavily dependent up on the World Bank, both in its creation and for its actual operations on the ground on the one hand, its policy No.7.50 prevents supporting or give loans for any development projects on transboundary watercourses in the absence of basin wide legal and institutional cooperative agreement and also prohibits assistance for water resources development projects of upstream countries without downstream approval may be including for the SAPs projects, on the other hand.¹²¹

Hence, as this policy serves to discourage downstream countries participation in collaborative negotiations, Egypt may exercise her rights derived from this policy and resist the

¹²⁰ Ibid

¹²¹ Supra notes at 1, and at ¹²

Bank not to support to construct dams for irrigation or hydropower generation in the upstream states.

As has pointed out by Getachew Woliyu, only between 1994 and 2004 USA donated and sold weapons costing \$14.83 billion and is providing upward of \$ 2 billion annually in an aid form to Egypt.¹²² This also implies that USA and Egypt have strong political and economic relations so that the former may act in favor of the latter than other Nile basin countries. Further, other most developed countries, especially the G-8 member states that promised to financially supporting the NBI require that the latter will focus on the long-term social and environmental development programs, i.e., on sustainable development while almost all the Nile basin counties, except Egypt, are much more interested in the short-term economic gain as almost all are facing severe economic problems.¹²³ This indicates that there is divergent interests between the donor developed nations and the fund seeker developing Nile basin governments. These developed supporting countries may also directly or indirectly influence many international fund supporting agencies, including the World Bank, not to support the short term economic gain plans of the SAPs projects except on the issues of sustainable development, i.e., environmental protection, which are in deed the ever slogan of Egypt.¹²⁴ Therefore, international fund supporting partners are not free so that may not freely and quickly run in to supporting the SAPs projects of the NBI due to the above mentioned factors unlike the needs of almost all upper Nile basin countries, and thus it would seriously affect the success of the NBI as the latter is heavily dependant on them.

To sum up, the divergent interests between the upstream and down stream states, instability in the region and interferences by one state in the affairs of other states, unanswered legal issues, and the problems relating to external supporting partners appear be the major challenges that may affect the success of the NBI process.

¹²² Getachew Woliyu (2006), *Ye Abay Mezez*, which means the Impact of Blue Nile in Amharic, Banawi printing house, Addis Ababa, Ethiopia, PP. 90- 99.

¹²³ *Supra* notes at 1, and 12

¹²⁴ *Ibid*

SUMMARY, CONCLUSION AND PLAUSIBLE SOLUTION

Here is to go over the main points discussed in the preceding chapter, draw conclusion and then recommend plausible solutions that will contribute for the success of the NBI. To this end, understanding international cooperative experiences on international waters and early attempts on the uses of Nile waters would show us forecast as to whether or not the prospects of the NBI would be successful and thereby to propose appropriate ways to endure the challenges facing its move towards permanent cooperation. In the view of the writer, observing the trends of success and failure therein would help to draw sounder conclusion than only from what have been said about the prospects of the NBI and the challenges facing it. Hence, the writer tries to go through it starting from chapter two up to chapter five.

Summary and Conclusion

To begin with chapter two, international trends show that there have been both conflicts and cooperations on international watercourses, between and among the upper and lower riparian states in many international river basins. These trends also denote that there have been conflicts in international river basins where there is no or loose cooperation among the riparian states.

As cooperation could not occur without legal and institutional cooperative framework, cooperative framework, cooperative framework, it is also international trend that there have been challenges to such framework though vary frameworks though very in degrees and places. Currently however, the uses and management of international rivers is not issue of conflict between states of North America and Europe as the riparian states have already established basin wide cooperative legal and institutional framework; and incase if conflicts rise, they can solve them by the treaties or regional agreements signed among the combasin states. It is possible to learn from there tends that currently there is no little conflicts in such basin as they have inclusive basin wide cooperative agreements and institutions that can regulate and control the utilization and management of their shared

Waters: and in case of conflicts, that they have been solving it by such agreements or using global watercourse laws to which they are party or citing them as customary international laws.

In contrast, in many international river basins of Africa, Asia, and South America, whether shared between few or among many countries, among other things, absence of basin wide agreements or weak/powerless cooperative institutions on the uses and management of shared waters are still an issue of conflict between upper and lower riparian states. Even if there, at least one or two of the riparian would not be party to the cooperatives. For example, in the Mekong river basin, China has not ever been partner of any Mekong river basin cooperative initiatives established since 1949 up to the 1995 Mekong River Basin Agreement; and all were among the lower riparian states.

In some river basins, riparian states have both bilateral and multilateral accords while some states signed only bilateral accords with one or two riparian states, but not willing to enter in to multilateral agreements; and further in some river basins, riparian states concluded only bilateral accords only with their neighboring states.

Interestingly, in the regions where international rivers were the driver of conflict, the likelihood of conflicts over the uses and management of such waters rise, among other things, with low institutional capacity when there is no treaty or other regional agreement, or when relations between the riparian states are especially bad over other issues. From this statement, it is possible to see that not only absence, but also establishing cooperative institutions that have low capacity could not able to cease conflicts on the uses of international rivers so that construction of any development project by one riparian on shared waters can be high driving force for more conflict and more political intricate.

Further, it confirms that absence of agreement could be worst scenario. If so, it is not difficult to infer that in absence of treaty or basin wide agreement if any riparian constructs or plans to construct high dams for hydro electric power generation or large scale irrigation projects on the shared waters, it is obvious that it will be heightening tensions, regional instability and conflicts between riparian states. In effect, leave alone

establishing inclusive basin wide legal and institutional cooperative framework, it may require many years, even decades, to resolve the conflicts or to create regional stability.

In many international river basins of developing regions which have not basin wide legal and institutional cooperative framework so far, studies show that lots of efforts have been made with the involvement of third parties, including influential international supporting donors and super power nations to cooperate the riparian states. However, in almost all such cases, except in the Indus river basin case between India and Pakistan, the participation international supporting institutions had not resulted in creating inclusive basin wide had not resulted in creating inclusive basin wide cooperative agreements so far. For example, in the Mekong river basin case, though series of efforts have been made to create cooperation among the riparian states since 1949 up till the 1995 Mekong Commission with the support of international commission with the support with the support of international supporting institutional such as the UN agencies, Economic Commission for Asia and Far East (ECAFE), UNDP, etc, their support did not able to create all inclusive basin wide cooperation so far, among other things, because of USA's intervention and Chinas refusal to cooperate with the lower riparian. This shows us that if their involvement is controlled or influenced by external super power states or challenged by internal powerful states, their being fund supporting partner or negotiator would mean nothing unless all the concerned basin's states agree and equally committed themselves to create basin wide cooperative agreement

We have also seen that while many riparian states of all regions have signed and become party to the 1997 UN Convention on the Law of Uses of Non-navigational International Watercourses, majority of the Nile basin countries, that have no all-inclusive permanent legal and institutional cooperative framework so far, were voted against or abstained in the voting record of the Convention. This means in other words, Nile basin countries are neither party to the 1997 UN Convention known as modern international watercourses law, nor have permanent all-inclusive legal and institutional cooperative framework. All the sum, comparing cooperation and conflicts on the utilization of international rivers international trends points that in the basins where such waters have been the driver of conflict, the record was however overwhelmed by cooperation. For instance, in the last

50 years while only 37 acute conflicts have been recorded, 157 treaties have been negotiated and signed during the same period, and the total number of water related issues are weighted towards cooperation. It also express that establishing weak cooperative have been facing many challenges, which indeed affected their success.

Among many other things, absence of treaty or basin wide agreement, low institutional capacity, unilateral development plans or construction of high dams for hydroelectric power or large scale irrigation purposes, trust lacking and controlled involvement of international supporting institutions, external interferences, etc are identified as the major challenges that have been confronting cooperative attempts of many international river basin of the developing regions yet not have basin wide cooperation.

As far as Nile basin is concerned, there have been lots of interrelated challenges that have been confronting the basin in general, and both the early attempts as well as the ongoing cooperative attempts in particular. On the whole, these challenges involve: rapid population growth, environmental degradation, poverty, climate changes, frequent disaster, political intricacies, mistrust and suspicion, regional instability due to internal and external conflicts, interferences by a riparian in the affairs of others, unilateral development projects, lacking ability and transparency of international fund supporting partners absence of inclusive basin wide cooperative agreement and other legal issues wrangling on the uses and management of the Nile waters, etc.

As regards the early cooperative attempts and challenges faced them, although there had been several accords and multilateral institutional cooperative attempts since colonial era until the establishment of the NBI, none of them were successful because, in addition to Above mentioned problems, all these cooperative initiative were between two and six riparian states, and all the then accords were bilateral and in favor of one powerful state (Egypt). By and large, all these cooperative attempts were established with different objectives and with the support of different international supporting institutions such as UNDP, CIDA, GEF, the World Bank, OAU, etc. despite the involvement of such huge fund supporting international institutions, none of them achieved their goals.

However, it is possible to say that they laid basis for the establishment of the NBI. Particularly, TECCO-NILE can be regarded as the first notable and immediate background of NBI in that it addressed longstanding and central issues of conflicts between upstream and down stream states on the Nile Waters, i.e, concerning fair and equitable Nile waters allocation /utilization and establishment of basin wide legal and institutional cooperative framework involving all riparian countries; and lastly resulted in the evolution of the transitional arrangement-NBI in 1999.

The prospects, progress and challenges of the NBI are central issue of the study. In comparison, it is possible to say that NBI is better than its predecessors in may aspects firstly, it involves all the Nile basin states, except Eritera; secondly, it has recognized fundamental issues of conflicts on the Nile waters, mainly between the upper and lower Nile riparian countries; and thirdly, it was established with clear and encouraging shared vision to enhance wide ranging programs and projects to achieve sustainable socio-economic development through the equitable utilization of, and benefit from, the common Nile basin water resources; fourthly, it has pulled together all the concerned Nile basin states and fund supporting international agencies to discuss, negotiate and develop draft legal and institutional cooperative framework though yet not finalized and adopted.

The general objective of NBI's SVP is to create an enabling environment thorough exchanging experience and confidence building for cooperative management and development; of the SPAs is to translate the shared vision in to action on the ground, realizing trans-boundary development opportunities for mutual benefits of all member states in each group. Hence, the NBI is considered to be a hurdle/road map for permanent cooperation.

Despite the encouraging beginning some progresses in its projects so that considered to be road map for permanent cooperation, the success of NBI is becoming doubtful due to many reasons: in the first place, except the changes mentioned above, almost all other challenges of the basin and those affected the success of early cooperative attempts are still existing so that undoubtedly confront the NBI; secondary, the development projects planned within the NBI programs themselves are identified as potential threat to its

success; thirdly, no matter how prepared the draft cooperative framework, agreement has not been reached so that the legal and institutional issues in the draft are yet not answered; fourthly, because the NBI is a transitional arrangement until permanent NRBC is put in place, it appears powerless to appropriately enhance and implement its projects as yet not entered in to the implementation phase; fifthly, in large extent, NBI is highly dependent upon international supporting institutions both in its creation and implementation, yet they seem not respect their pledge at ICCONI and have been warning not to support fund unless the Nile basin states adopt the cooperative agreements, and further participation of NGOs and civil societies appear restricted; etc.

Overall, although it is undeniable fact that the NBI is distinct from its predecessors in many aspects, it is also feared to be not successful because of these challenges, even today. Therefore, subject to the complementing effects of many other problems, in the view of the writer, the major challenges that would seriously affect the success of the NBI can be summarized as follows:

Divergent interests of all the NELSAP and ENSAP groups; Instability in the region and interference of one riparian state in the affairs of others; unanswered legal issues; and problems relating to external supporting partnerships. Therefore, if need to save the NBI from failure, it requires urgent solution; and the writer recommends the following plausible solutions.

Plausible Solution

The divergent interests of the three groups of Nile basin countries: the Nile Equatorial Lakes group, the Eastern Nile upstream (Ethiopia), and the Eastern Nile downstream (Egypt and Sudan) on the Nile waters and NBI have to be compromised their differences rather than sticking on specific group or national interests. In this regard, particularly Egypt should stop visibly or invisibly influencing other stakeholders and lobbying supporting partners to sustain both her acquired opportunities and future national needs regardless of their negative effects on the other riparian states and restricting legal rights of the latter on their common property. On the other hand, the upper riparian states also should not take extreme position simply because the Nile waters originate from their

territories, but because they have equal legal rights to equitably use their common Nile waters. Thus all have to take in to consideration the highly increasing population growth and climate change together with their unilateral competing development plans that if they do not urgently agree and establish the cooperative framework may not only affect the success of NBI, but also may lead upper and lower and riparian states in to war on the uses of waters of the river.

Both the internal and external conflicts in the region as well as interferences of one state in the affaires of other states may not only affect smooth / diplomatic relations between the concerned countries, but further highly distress their positive contributions in the NBI process as well as smooth discussions and negotiations on the adoption of the permanent basin wide cooperative framework. Therefore, in the countries where there are internal and external conflicts, the conflicting parties themselves need to peacefully and democratically negotiate and solve their differences, if need with the help of African /AU proxies or illicitly attempting to hamper external supports for development projects for any riparian should be stopped, and AU and other world community also have to condemn and sanction such acts.

Although supporting partners (fund supporting international agencies, NGOs, and civil societies) were expected playing vital roles in the NBI process and also they pledged, currently the situation appear otherwise. To this end, particularly the World Bank (that was given sky- scraping and wide responsibilities such as coordinating other supporting institutions and nations, managing the fund, facilitating dialogues and negotiations between the Nile riparian states⁰ is suspected of lacking commitment and transparency, indirectly playing favoring Egypt using the NBI as a ploy of delaying implementation of the NBI projects and adoption of he basin wide legal and institutional cooperative framework; and also its financial polices (such as operation directives 7.50 and 6.50) to support for development projects on trans- boundary rivers prevent it from supporting the NBI projects in the absence of cooperative agreement and also put Egypt at liberty to oppose saying that the construction of development projects would affect her interest. Therefore, if the World Bank and its partners truly need to realize the NBI prospects and to create Nile River Basin Cooperative Framework, it has to push the riparian states,

especially Egypt, to urgently adopt the cooperative legal framework and begin implementing the NBI projects rather than encouraging extension of dialogues and negotiations. It also has to either revise its financial policy or freely support the NBI projects regardless of these directives, or it has to withdrawn itself from holding such responsibilities in the NBI.

The NBI has to genuinely involve NGOs and Nile basin civil societies in the decision making process. On the other hand, NGOs also need not magnify only the defects of the NBI and the World Bank, but rather they have to approach and understand the problems and contribute constructive assistance to sustain the NBI than increasing suspicion and mistrust thereby leading it to failure.

Legal issues appear to be forefront challenges threatening the success of the NBI so that require clear and urgent solution. Accordingly, among things others, in the first place, adoption of clear all inclusive basin wide agreement on the uses and management of the River's waters; secondly, the future cooperative agreement should clearly specify the fate of existing bilateral accords, places and roles of international watercourse laws and riparian states doctrines; thirdly, all Nile basin countries better ratif the 1997 UN Convention on the uses of none navigational international waters, and let the latter serve as customary international law until the Nile River Basin Agreement is adopted; fourthly, the countries yet not reach agreement on some fundamentally governing provisions (according to recent undisclosed sources mainly on the fate of existing accords) of the Draft Cooperative Agreement. They need to agree and adopt the Nile River Basin Agreement, and then the NRBC need to promptly start is work in order to enter in to the proper implementation of the NBI projects.

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