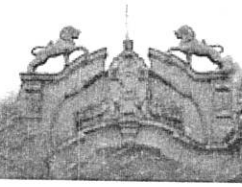


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COLLEGE OF LAW AND GOVERNANCE STUDIES
SCHOOL OF LAW

THE RIPARIAN DUTY TO INFORM ON PLANNED MEASURES UNDER
INTERNATIONAL WATERCOURSE LAW: THE CASE OF ETHIOPIAN
GRAND RENAISSANCE DAM

BY
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Addis Ababa, Ethiopia

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Human Rights)

A Thesis Submitted in partial fulfillment of the requirements of Masters of Degree in Law
(L.L.M in Public International Law), at Addis Ababa University College of law and governance
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Plagiarism Declaration

I, HAILE ANDARGIE WONDALEM, do hereby declare that the thesis 'The Riparian Duty to Inform on Planned Measures under International Watercourse Law: The Case of Ethiopian Grand Renaissance Dam' is my original work and that it has not been submitted for any degree or examination in any other university. Whenever other sources are used or quoted, they have been duly acknowledged.

Declared by:

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Date 11-07-2014

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Abbreviations

BCM	Billion Cubic Meters
CARU	Administrative Commission of River Uruguay (in its Spanish acronyms)
CFA	Cooperative Framework Agreement
CIDA	Canadian International Development Agency
DRC	Democratic Republic of the Congo
EIA	Environmental Impact Assessment
ENCOM	Eastern Nile Council of Ministers
ENSAP	Eastern Nile Subsidiary Action Program
FDRE	Federal Democratic Republic of Ethiopia
GERD	Grand Ethiopian Renaissance Dam
GTP	Growth and Transformation Plan
HYDROMET	Hydro-Meteorological Survey
ICAS	International Conference of American States
ICJ	International Court of Justice
IIL	Institute of International Law
ILA	International Law Association
ILC	International Law Commission
IPoE	International Panel of Expert
MRC	Mekong River Commission
NRBC	Nile River Basin Commission
OAU	Organization of African Unity

OECD	Organization for Economic Co-operation and Development
SADC	Southern Africa Development Community
SAP	Subsidiary Action Programs
SVP	Shared Vision Program
TECCONILE	Technical Cooperation Committee for Promotion of the Development and Environment Protection of the Nile Basin
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNDP	United Nation Development Program
UNECE	United Nations Economic Commission for Europe
UNGA	United Nations General Assembly
UNTS	United Nation Treaty serious
UNESCO	United Nations Educational, Scientific and Cultural Organization
VCLT	Vienna Convention on the Law of Treaty
WMO	World Meteorological Organization

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ABSTRACT

Considerable number of treaties and other rules of international water law envisages riparian states' obligation on the use of international watercourse. One of such obligation is the riparian duty to inform on planned measures. However, there are uncertainties about the essence and status of this obligation under international watercourse law. The issue is even more intricate in the Nile river basin where there is no full-fledged legal and institutional framework to regulate the matter. Hence, there exist different views on the substantive scope of the obligation to inform on planned measures. Quite recently, Ethiopia and Egypt are in disagreement over the construction of Grand Ethiopian Renaissance Dam (GERD). At the heart of the dispute, among other things, are the controversies over the riparian duty to cooperate, inform and consult on planned measures.

This research paper demonstrates the understanding of the riparian duty to inform on planned measures under international watercourse law. To this effect, the research first analyses the riparian duty to inform planned measures under international watercourse law. Then, it critically scrutinizes the provisions of the UN watercourse convention on non navigational use of international watercourse with regard to the riparian states duty to inform planned measures. Finally, a deep examination is made to observe GERD in light of the riparian duty to inform on planned measure under international watercourse law.

After a deep analysis on the above areas, the research argues that basic authorities of international watercourse law have provided that a watercourse state should or is at least recommended to provide notice of planned measures that could potentially cause significant adverse effect to other riparian states. Equally, the research argued that authorities are not unanimous with regard to the substantive scope of the obligation of notification.

Concerning GERD, the research argued that Ethiopia has no any treaty obligation to notify its projects to other riparian states. Nor does state practice in the Nile basin shows strict adherence to the principles of riparian duty to inform planned measures. Finally, the research, among other things, urges all the Nile river basin states to sign and ratify CFA within whose framework it would be possible to resolve contentious issues of riparian duty to inform on planned measures that may potentially cause significant adverse impact. The research also recommends the establishment of institutional framework for effective implementation of riparian duty of notification. It also urges a continued cooperation between Ethiopia, Sudan and Egypt as an absolute imperative.

CHAPTER ONE: INTRODUCTION

1.1. Background of the Study

Under international water law, procedural rules play vital roles in the realization of substantive right and obligations of watercourse states. Substantive rules of international water law for the use of shared freshwater resources, for example, require that the use of shared fresh water must be equitable and reasonable; watercourse states need to cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith.¹ For the obligation those set by substantive rules are general, it has to be accompanied by procedural obligations, which enhance the implementation of substantive rules. The procedural rules provide a framework for the early and amicable resolution of disputes in the utilization of shared fresh water by ensuring that interested parties are adequately informed of proposed projects and by providing a form of procedural due process for the participation of riparian states that in turns provides an opportunity for compromise to be reached.²

In particular, the system of notification of planned measure prescribes the procedural rules that state must follow in approaching the utilization of international watercourse. Without such procedural rules, a state would most likely discover the limits of its rights only by depriving another state of its equitable share and causing significant harm probably without intending to do so.³ It is thus possible that, in the absence of procedural rules permitting information sharing, notification of planned measures and consultations with other concerned states, a state's unilateral determination of its equitable share might be challenged by the other states.⁴ Cognizant of its relevance, procedural rules of duty to inform on planned measures have been included in many of international watercourse conventions⁵, regional agreements⁶, in the work of

¹ United Nation General Assembly, Resolution 51/299, Convention on the Law of the Non-navigational Uses of International Watercourses (1997), *opened for signature* May 21, 1997, 36 I.L.M. 700 Art. 8, [hereinafter referred as UN Watercourse Convention]

² Stephen McCaffrey (2001), 'The Contribution of the UN Convention on the Law of the Non-Navigational Uses of International Watercourses, *International Journal of Global Environmental Issues, Volume, 1, No. 3/4*, , p. 260

³ International Law Commission(1987) ,Yearbook of the International Law Commission Document: vol. II,no.1,p.30

⁴ International Law Commission(1987), note 3, p.33

⁵ UN Watercourse Convention (1997), note 1 at articles 11-19 explains the applicable procedures to encourage cooperation between riparian states when "planned measures" may adversely affect other riparian states.

governmental and nongovernmental organizations⁷ and international case law on international watercourse dispute.⁸

The UN Watercourses Convention provides detailed provisions related to the notification of *planned measures*.⁹ Part III of the convention, entitled “*planned measures*”, is the longest part of the Convention and consists of nine articles setting out procedural obligations of watercourse states for its planned measures. Those articles oblige the state planning a measure that may have significant adverse effects of planned measures upon other riparian states to provide such states with timely notification, accompanied by available technical data and related information, and to allow six months for response.¹⁰ In the absence of a reply to notification the Convention gives

⁶ In Africa, the Revised Protocol on Shared Watercourses in the Southern African Development Community (2001), [hereinafter SADC Protocol] included duty to inform on planned measures. The Revised Protocol was signed by: Angola, Botswana, Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. For more information and to see the text of the protocol, visit the SADC website at <http://www.sadc.int/overview/treaty.htm> last visited October 8, 2013). Article 4(b) of the SADC protocol provides ‘before a State Party implements or permits the implementation of planned measures which may have a significant adverse effect upon other Watercourse States, it shall provide those States with timely notification thereof. Such notification shall be accompanied by available technical data and information, including the results of any environmental impact assessment, in order to enable the notified States to evaluate the possible effects of the planned measures’. In Europe, we have the United Nations Economic Commission for Europe Convention on the Protection and Use of Transboundary Watercourses and International Lakes (hereinafter referred, UNECE) adopted in Helsinki, Finland on 17 March 1992 and entered into force on 6 October 1996. The convention under article 2(h) envisioned the establishment of joint bodies with the tasks to serve as a forum for the exchange of information on existing and planned uses of water and related installations that are likely to cause transboundary impact.

⁷ Notification is also envisioned in the work of International Law Association (ILA) that has provided further commentary on the issue of notification, International Law Association (ILA), the Helsinki Rules on uses of waters of International River. International law association Report of 52nd conference, Helsinki (14-20 Aug. 1966), Art. 29(2)-(4), Report of the fifty-second conference held at Helsinki 484, 518-19 (1966) [hereinafter Helsinki Rules]. The Helsinki Rules address the issue of notification in Chapter VI and XI, “Article 57(1) requires a state, regardless of its location in a drainage basin, to “furnish to any other basin State, the interest of which may be substantially affected, notice of any proposed construction or installation which would alter the regime of the basin.”

⁸ Lake Lanoux Arbitration (1957), Spain vs. France, 24 I.L.R. 101, 111-12 [hereinafter referred as Lake Lanoux Arbitration]. The tribunal was of the opinion that France was under obligation to provide information to and consult with Spain to take Spanish interest in to account in planning and carrying out the projected works.

⁹ Whilst “planned measures” are not defined by the Convention, it is generally taken to mean any intended projects or programme which may cause some form significant adverse effect (s) on a watercourse, either directly or indirectly. (UN Watercourses Convention User’s Guide Fact Sheet Series: Number 6 Notification Process for Planned Measures available at <http://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-6-Notification-Process-for-Planned-Measures.pdf> (accessed on 7/20/2013))

¹⁰ UN Watercourse Convention (1997), note 1, art. 11-19

the notifying state the right to proceed with the planned measure subject to its obligations under Articles 5 and 7 of the Convention.¹¹

The riparian duty to inform on planned measures has also been highlighted in international case law on international watercourse disputes. The most notable international decision relating to notification and consultation is the award of 16 November 1957 by the arbitral tribunal in the *Lake Lanoux* case between Spain and France. In this particular case, the tribunal was of the opinion that France was under obligation to provide information to and consult with Spain and to take its interests into account in planning and carrying out the projected works.¹² In the recent case of Pulp Mills, Argentina has initiated the proceedings before the ICJ claiming the violation of the Statute of River Uruguay of 1975, when Uruguay gave its unilateral permission for the construction of a mill on river Uruguay, without abiding by the obligations to notify and negotiate the project, as they are set out in the statute of River Uruguay.¹³ In this particular case too, ICJ underscored to the obligation of the riparian states to notify each other on their planned measures.

In the Nile basin, there have been some attempts to establish institutional and legal framework governing the utilization, development, conservation and management of the Nile. The Nile Basin Initiative (NBI) which was established in 1999 attempted to establish a basin wide legal and institutional framework, pending the Nile Basin Cooperative framework agreement (hereinafter called CFA) and the establishment of a Nile River Basin Commission (NRBC). In negotiation of the CFA, procedural rules regarding notification of planned measures were controversial.¹⁴ Early in the beginning of negotiation of the CFA, Ethiopia retained a reservation on the inclusion of the rules of planned measures in the framework text which is a reflection of its long held stand during the adoption of UN Watercourse Convention.¹⁵ Later on, during diplomatic negotiation in Kigali, Rwanda, Ethiopia ventured a new approach on the riparian duty

¹¹ UN Watercourse Convention (1997), note 1, art.16

¹² Lake Lanoux Arbitration(1957), note 8, para.73

¹³ Pulp Mills case concerning the River Uruguay (2006), (Argentina vs. Uruguay), , Provisional Measures of Order of 13 July 2006, I.C.J. p.133. The ICJ referred the obligation of riparian state to notify each other on their planned measures which they set themselves in Article 1 of the 1975 Statute. (hereinafter referred as Pulp Mills case)

¹⁴ Musa Mohammed (2009), How does the work of ILC and General Assembly on the International watercourse contribute towards a legal framework agreement for the Nile Basin?, Master thesis (unpublished),p7

¹⁵ Musa Mohammed Abseno (2009), *The Nile River cooperative Framework agreement: contentious legal issues and future strategies for Ethiopia*, a paper presented at the national consultation workshop on the Nile, p.14

to inform on planned measures.¹⁶ Ethiopia's strategy, in this regard was to carry out notification of information on planned measures through a third party mechanism instead of bilaterally between the riparian states.¹⁷ The Nile basin commission which would be established with the adoption of the CFA would serve such purpose.¹⁸ Conversely, downstream state wanted to strengthen the wording of the CFA to put more onerous obligation. Even, more controversial was the need by downstream states to introduce an interim arrangement pending the adoption of the CFA.¹⁹ At the end, the CFA stipulates the principle under article 8 which lay down obligation of Nile basin state to exchange information on planned measures through the Nile River Basin Commission. Compared to the UN Watercourse Convention and SADC Protocol, the CFA rule does not provide detail provisions. The framework agreement, for instance, is silent on when to notify, the period of reply to notification and the consequences of failure to comply with required procedures.

In March 2011, the Ethiopian government announced the plans to construct the Grand Ethiopia Renaissance Dam (hereinafter GERD) in the Blue Nile. The Dam is designed to have an installed capacity of 6,000 mega watt of electricity, becoming Africa's largest power plant.²⁰ It is located in the Benishangul-Gumuz regional state, GubaSirba Abbay, 40-42 kilometers from the border with Sudan.²¹ The dam is expected to generate enough electricity to meet domestic needs with excess available for export to countries in the region.²² Nonetheless, the construction of GERD precipitated renewed international legal squabble among the major riparian states of the Nile Basin, notably Ethiopia and Egypt.

At the heart of the matter on the Egyptian side, inter alia, is the allegation that the Ethiopian government failed to inform about the project which will have adverse impact on the overall uses

¹⁶ Girma Amare (2009), Contentious issues in the negotiation processes of Cooperative framework agreement on the Nile: paper presented in the consultative meeting to held in Addis Ababa, Ethiopia, p.10

¹⁷ Girma Amare (2009), note 16

¹⁸ Girma Amare (2009), note 16

¹⁹ Girma Amare (2009), note 16, p.11

²⁰ Hammond.M (2013.), *'The Grand Ethiopian Renaissance Dam and the Blue Nile: Implication for Transboundary Water Governance*, available at www.globalwaterforum.org//the-grand-ethiopian-renaissance-dam- accessed on 12 October 2013. See also Pamphlet prepared by the National committee on public participation of the Grand Ethiopian Renaissance Dam (2012), available at <http://www.hidasse.gov.et> accessed on 23 December 2013

²¹ Hammond.M (2013), note 20

²² Late PM Melese Zenawi interview with Egyptian TV (2010), available at <http://www.meleszenawi.com/egyptian-tv-interviews-meles-zenawi-on-nile-riv>, accessed on 2/12/2012

After thorough scrutiny of legal regime regulating riparian duty to inform planned measures in Nile river basin, the research likewise indicates on certain legal and institutional arrangements that should guide prospective planned measures.

1.5. Research Questions

Within the confines of preceding research objectives, this research anticipates to proffer to two general but important questions:

1. International watercourse law provides procedural rules purported to implement substantive right and obligation of watercourse states including riparian duty to inform on planned measures. In this regard what do treaties, case law and pertinent state practices envisage about the essence and substantive scope of the riparian duty to inform planned measures?
2. Both the UN Watercourse Convention and the Nile Basin Cooperative Framework Agreement provides rules concerning riparian duty to inform on planned measures. However, imprecision lingers with regard to the essence and scope of this duty, and how it is actually interpreted and applied in practical scenarios by watercourse states. Besides, whether Ethiopia has any obligation under international law to inform lower riparian states about GERD is a question of fundamental interest.

1.6. Scope of the Study

The thesis endeavours to present just one major principles of international watercourse law that regulate Non-Navigational use international watercourse law, the riparian duty to inform on planned measures. Hence, the range of the duty, the essence of the principle, and its normative framework shall be explored. In underpinning the GERD and the duty to inform on planned measures, the treaty regime regulating Nile basin and state practice in the Eastern Nile is the main focus of the study.

1.7. Methodology of the Study

The researcher employs a combination of several systems. The primary sources in conducting this research encompasses: a modest empirical imputes that have been drawn from open -ended interviews, carried out with key officials at the ministries responsible for Water and Energy in Ethiopia and Experts from Egyptian embassy. Further, the primary source in underpinning the legal analysis of the research depends on international watercourse conventions, mainly the UN Watercourse Convention and the draft text of the CFA notwithstanding the fact that the instruments have not been entered in to force.

As secondary sources of the research, official documents that identify state practice and articulated opinions of states, series of reports of the International Law commission (ILC), and relevant literatures shall likewise be drawn.

In underpinning the GERD, as it is relatively novice area with scanty academic literatures, the sparse sources of news paper, periodicals and official government statements in internet have been employed.

1.8. Structure of the Study

The study is structured within six chapters. In understanding the general framework of the study, chapter one of the research concentrate on dealing general back grounds, statement of problem, objectives, significance, methodologies and scopes of the studies. Chapter Two focuses on general scrutiny of procedural rules in international watercourse law. This chapter explores major principles of international watercourse law with special emphasis on riparian duty to inform on planned measures, as reflected in treaty practice, resolutions, declarations and case laws. Chapter Three deals with normative framework of the riparian duty to inform on planned measures under UN Watercourse Convention. Chapter Four analyses the existing Nile river basin treaties and state practice on issues of riparian duty to inform planned measures. Chapter five analyze the GERD and duty to inform on planned measures in international law. Lastly, the research ends with conclusion and recommendation under chapter six.

CHAPTER TWO: PROCEDURAL RULES OF INTERNATIONAL WATERCOURSE LAW

2.1. Introduction

International watercourses law is a legal regime that regulates the use, management and conservation of water resources shared by two or more nation.⁴¹ This branch of international law has developed its own substantive principles and norms specifically tailored to regulate states' conduct in the utilization, management and protection of shared fresh water resources and establish certain procedural rules that regulates their conduct while applying substantive rules.

The rules have evolved and crystallized through the treaty practice and the codification and progressive development efforts undertaken by the UN,⁴² private nongovernmental institutions,⁴³ and case laws. The treaty practice of state encompasses a broad range of instruments, from general framework agreements which provide basic principles for water resource development to specific contractual type legal and technical arrangements which set forth detailed operational schemes.⁴⁴

This chapter, inter alia, presents the basic principles governing international watercourse law and in particular the normative content of the riparian duty to inform planned measures as stipulated in treaty regime, case laws and the work of international governmental and nongovernmental forms.

⁴¹ William J. Consgrve(2003), note 29, p. 31

⁴² The codification and progressive development of international law is undertaken by the International Law Commission (ILC).

⁴³ Patricia Wouters (2000), *The Legal Response to International Water Conflicts: The UN Watercourses Convention and Beyond*, an excerpt from German year book of international law, p.94. Efforts by the IIL (1873) with a view to codify exiting rules or proposing new rules of international water law; and that of the International Law Association notably, the Helsinki Rules on the Uses of the Waters of International Rivers, Report of the Fifty-Second Conference of the International Law Association, 14-20 August 1966 play important role in the evolution of international watercourse law

⁴⁴ Patricia Wouters (2000), note 43, p.94

And works that are not liable to affect any of these three subjects are not included within the scope of the notification obligation, regardless of their nature or scope.¹⁰⁴ Alternatively, Uruguay went on arguing that, it has provided a timely notice to administrative council for Uruguay River. Uruguay has already acknowledged that notice is due at a point in time during the planning process, that is sufficiently in advance of operation to allow for the procedures of the 1975 statute to be followed; this is, for a meaningful assessment of the project by administrative council for river Uruguay and/or the notified State, for the provision of their views, and for good faith consultations between the parties, if required.¹⁰⁵ The point is simply that so long as notice occurs at a moment during the planning processes that it is sufficiently far in advance of operation – as opposed to mere construction -- so as to permit such consultative procedures, it would be regarded as timely. Uruguay also raised the point that there is no veto right under general international water law and it has no obligation to agree with Argentina.

Uruguay argued citing 1957 Arbitral Tribunal in the *Lake Lanoux case* which held that:

*International practice does not so far permit more than the following conclusion: the rule that States may utilize the hydraulic power of international watercourses only on condition of a prior agreement between the interested States cannot be established as a custom, even less as a general principle of law.*¹⁰⁶

From this Uruguay deduced that the obligations to give notice and to consult do not themselves imply an obligation to reach a prior agreement. The 1975 Statute creates a regime of prior notice, information sharing and consultation, but not prior consent.

Finally, the ICJ found that the obligation to inform Administrative Council for River Uruguay (CARU in its Spanish acronyms) of any plan falling within its purview under the statute and to negotiate with the other party is accepted by parties.¹⁰⁷ Based on this assumption, the Court examined whether Uruguay has complied with its obligations to inform CARU. Thence, the court ruled that since CARU serves as a framework for consultation between the parties, neither of parties may depart from that framework unilaterally, as they see fit, and put other channels of

¹⁰⁴ Pulp Mill case(Argentina Vs. Uruguay), counter memorial of Uruguay (2007),vol.1 P.60 available at <http://www.icj-cij.org/docket/files/135/15427.pdf> accessed on (11/18/2013)

¹⁰⁵ Counter Memorial of Uruguay(200), note 104,p.27

¹⁰⁶ Lake Lanoux Arbitration (1957), note 8, p. 129, para. 13

¹⁰⁷ Pulp Mills case (2006), Provisional Measures Order of 13 July, I.C.J., p. 133, Para.80

communication in its place.¹⁰⁸ Consequently, the court decided that the obligation of the state initiating the planned activity to inform CARU constitutes the first stage in the procedural mechanism as a whole which allows the two parties to achieve the object of the 1975 statute, namely, “the optimum and rational utilization of the River Uruguay”.¹⁰⁹

As regards to the content of the information which should be provided to CARU and as to when this should take place, the Court ruled that the state planning activities is required to inform CARU as soon as it is in possession of a plan which is sufficiently developed to enable CARU to make the preliminary assessment of whether the proposed works might cause significant damage to the other party. In any event, the duty to inform CARU will become applicable at a stage when the relevant authority has had the project referred to it and before the granting of that authorization.¹¹⁰ The Court concluded that Uruguay, by not informing CARU of the planned works before the issuing of the initial environmental authorizations for each of the mills, has failed to comply with the obligation imposed on it by Article 7, first paragraph, of the 1975 Statute.¹¹¹ In summary, the court finds that Uruguay has breached its procedural obligations under Articles 7 to 12 of the 1975 Statute of the River Uruguay.

2.3.3. The Works of Governmental and Non-governmental organizations

Various resolution, declaration and recommendation by international governmental and nongovernmental forums have likewise reflects on the riparian duty to inform on planned measures. Non-legally binding instruments such as declarations, resolutions, and recommendations adopted by the UN General Assembly and the works of different international nongovernmental forums contribute to the formulation and illumination of riparian duty to inform on planned measures.

To begin with earliest declarations, the 1933 International Conference of American States adopted the Declaration of Montevideo that provides not only for advance notice of planned

¹⁰⁸ Pulp Mills case(2006), note 107,para.83

¹⁰⁹ Pulp Mills case (2006), note 107,para.94

¹¹⁰ Pulp Mills case,(2006) note 107,para.94

¹¹¹ Pulp Mills case (2006) Provisional Measures , note 107

works, but also for prior consent.¹¹² In its Article 7, the Declaration adopted a general statement that the works which a state plans to perform in international water shall be previously announced and secures the consent of other riparian states; the announcement shall be accompanied by the necessary technical documentation in order that the other interested states may judge the scope of such works, and by the name of the technical expert or experts who are to deal, if necessary, with the international side of the matter.¹¹³ In the Declaration there is no qualification limiting the obligation to give notice to cases where the proposed work might cause adverse effect. Under this Declaration, then, the scope of the procedural obligation of a basin state is wider than the scope of its obligation in the Helsinki rule and the UN Watercourse Convention, the latter arising only when the other watercourse state is injured in some measures.

On the other hand in 1974, the Council of Organization for Economic Co-operation and Development (OECD) adopted Recommendation 74/224 on principles concerning transfrontier pollution.¹¹⁴ Although the recommendation is meant to have general application, it is directly relevant to present study. According to the Recommendation, prior to the initiation in a country of works or undertakings which might create a significant adverse effect, the planning state should provide early information to other countries which are or may be affected by such measures. The scope of obligation of the planning state is limited to those planned measures with *significant* transfrontier effect on the other state, not for all planned measures. The Recommendation also sets prior notification to be followed by negotiation and consultation. Consequently, the notified state and the planning state should enter into consultation on an existing, or foreseeable transfrontier effect at the request of a country which is or may be directly affected and should diligently pursue such consultations on this particular problem over a reasonable period of time.¹¹⁵ In the course of negotiation, the watercourse state should refrain from carrying out projects or activities which might create a significant risk of transfrontier effect.

¹¹² Declaration of Montevideo concerning the industrial and agricultural use of international rivers, resolution LXXII adopted by the Seventh International Conference of American States at its fifth plenary session, 24 December 1933, *The International Conferences of American States, First Supplement, 1933 (Washington (D.C))*

¹¹³ Montevideo Declaration (1933), note 112, art. 7

¹¹⁴ Principles concerning transfrontier pollution(1974), recommendation C(74)224 adopted by the Council of OECD and the Environment), p 142

¹¹⁵ Principles concerning transfrontier pollution(1974), note 114, art. 7

A different institutions; the Institute of International Law (IIL) and International Law Association (ILA), have made vital contribution in the development of international watercourse law. The IIL explored the riparian duty to inform on planned measures from as early as 1911 Madrid declaration.¹¹⁶ The institute declared that:

*When a stream forms the frontier of two states, either of these states may not, without the consent of the other, and without special and valid legal title, make or allow individuals, corporations, etc. to make alterations therein detrimental to the bank of the other State.*¹¹⁷

The institute here requires not only prior notification but also prior consent of the riparian states. The scope the obligation of notification is confined to planned measures detrimental to the bank of the other state and hence notification and prior consent is not a prerequisite in case where the proposed project has little or no effect on the other riparian state.

Again, the IIL during its session held at Salzburg from 4 to 13 September 1961, adopted a resolution that among other things, provided for a riparian duty of notification and consultation of planned measure if it 'seriously' affects other state.¹¹⁸ In specifics, Article 5 of the resolution envisages that works or utilizations that have adverse effect may not be undertaken except after previous notice to interested States. Unlike its predecessor, the Madrid Declaration, wherein prior consent is a requirement to embark on planned measures, the Salzburg resolution only requires prior notification of planned measures with serious adverse effect. In case, when objection is made by the notified state, the notifying state will enter into negotiations with a view to reaching an agreement within a reasonable time. For this purpose, the states in disagreement should have recourse to technical experts and, should occasion arise, to commission and appropriate agencies in order to arrive at solutions assuring the greatest advantage to all concerned.¹¹⁹ The resolution further stipulates the obligation of notifying state during negotiation and consultations. During such time, every state must, in conformity with the principle of good faith, refrain from undertaking the works or utilizations which are the object of the dispute or

¹¹⁶ Institute of International law (1911), international regulation regarding the use of international watercourse for the purpose other than navigation. Year book of Institute of International law, Madrid session vol.24, p.365

¹¹⁷ Madrid declaration (1911), note 166, art. 1.

¹¹⁸ Institute of International law (1961), Resolution on the use of international non maritime water, Year book of Institute of International law, vol. 49, no.2, Salzburg Session p.381-384 (hereinafter called Salzburg resolution)

¹¹⁹ Salzburg Resolution (1961), note 118, art. 6

from taking any other measures which might aggravate the dispute or render agreement more difficult.¹²⁰

Similarly, the International Law Association (ILA), a highly-regarded non-governmental organization of legal experts founded in 1873, completed its best known study of the 'customary international law' of transboundary water resources in 1966 otherwise referred as Helsinki Rules.¹²¹ In relation of the obligation to notify planned measures, Article XXIX, paragraph 2 of the Helsinki Rule provides that a:

*'State, regardless of its location in a drainage basin, should in particular furnish to any other basin State, the interests of which may be substantially affected, notice of any proposed construction....'*¹²²

Pursuant to the Helsinki Rules, the planning state is bound to notify other watercourse state only if a planned measure might cause *substantial injury*, not to every proposed project. Furthermore, the obligation of a planning state, is limited to furnishing only information that is '*reasonably available*', therefore, a state cannot be put to the expense and trouble of securing statistics and other data which are not already at hand or readily obtainable.

Another point worth noting is the form of notice. An explicit statement that the notice must be in writing is not found in the Helsinki Rules. Article XXIX, paragraph 2, of the Helsinki Rule merely provides that the notice should include 'essential fact'. It may be argued that under this Article both the notice and the essential facts may be given orally, but it is difficult to imagine a planned measure that merited the giving of notice and whose essential facts could be communicated orally.¹²³ The reality surely is that the complexity of the plans of which notice must be given will almost always force states to put their notice in written form.

¹²⁰ Salzburg Resolution (1961), note art. 7

¹²¹ The project was begun in 1954 and produced an interim report to the Association's Conference in New York in 1958. See also International law association research project on the law and uses of international rivers, pp.197-198 (1959)

¹²² Helsinki Rules on the Uses of the Waters of International Rivers (1966), in Report of the Fifty-Second Conference of the International Law Association Held at Helsinki, 1966

¹²³ Charles B. Bourne (1972), "Procedure in the development of international drainage basins: Notice and exchange of information, *university of Toronto Law Journal*, vol. XXII p. 178

However, even the most recently adopted SADC protocol does not explicitly mention that the notice should be in a written form.¹²⁴

In relation to how much notice must a state give before it may embark on a project and within what time must the states receiving notice respond, Article XXIX paragraph 3 of the Helsinki Rules states that 'the notice should afford the recipient state a reasonable period of time to make an assessment of the probable effect of the proposed construction or installation and to submit its views thereon to the State furnishing the notice'. Hence, it is pretty clear that the Helsinki Rules do not prescribe time limits for notice and for reply thereof. The desirability of prescribing time limits for notice and for reply is, nevertheless, recognized in other treaty practice of states. For example, the SADC protocol obliges parties to give six months notice before beginning operations to utilize the water.¹²⁵

Obviously, the state receiving the notice must be allowed sufficient time to study the facts and to reply stating its view of the planned measure. And the planning state may not proceed with its project before it receives a reply to it or the time for reply has expired. However, the Helsinki Rules only indirectly recommends the suspension (Article XXIX, paragraph 3) and does not clearly make legally binding obligation to suspend a proposed use. Therefore, a state may legally proceed unilaterally to implement its plans of utilization. It would, of course, do so at the risk of being held liable for damages for injury to the rights of other watercourse states as well as being subject to the provision in Article XXIX, paragraph 4, that a utilization undertaken without notice shall not be given the weight normally accorded to temporal priority in use in the event of a determination of what is a reasonable and equitable share of the waters of the basin. Thus, failure prevents an important factor from being placed on the scales used to weigh the equities of competing utilization as the use is not considered current use. In case laws, however, legal sanctions are provided. For example in the Corfu Channel case, there is support for the proposition that under international law, a riparian state may be responsible to a co-basin state for damage caused when that damage could have been avoided if timely notice of the danger had been given.¹²⁶

¹²⁴ Revised SADC protocol (2000), note 6, art.4

¹²⁵ Revised SADC protocol (2000), note 6, art.4(2)

¹²⁶ Coruf Channel case (1949), note 62

2.4. Conclusion

The foregoing discussion analyzed the weight that treaty practice of states, case laws and international governmental and nongovernmental organization attach to the principle of the duty to inform on planned measures. The authorities agree that a state should or recommended to give notice of planned measures to other riparian states. Thus, the concern is not whether these procedures are desirable and recommended, but whether or not they are legally binding on basin states. The authorities are not unanimous on this point and do not lead to a clear-cut conclusion. It is true that, in the Helsinki Rules, the International Law Association did not make prior notice mandatory. However, many incidences of case laws and some treaty practice of states make the riparian duty to inform planned measures mandatory. There is also no uniform formulation as to when the planning state should give notice, how much time should a state give before it embarks on the proposed project and with in what time the notifying state shall respond to notice of planned measure. Besides, authorities explored so far do not clearly prescribe legal sanction for a breach of one of the procedural rules. But, still the 1966 Helsinki Rules prescribe a sanction for failing to give notice of a work or utilization (article XXIX, paragraph 4). Hence, in the absence of authority supporting any other specific sanction, the general principles of international law will govern the matter. In other words, an injured basin state must rely on the usual international law remedies available to a state for any injury.

In some circumstances, therefore, it may have a good claim for damages for injury caused by the failure of a watercourse state to observe a procedural rule it may even get an injunction ordering a co-basin state not to proceed with a project until it has complied with the rule.¹²⁷ Here, it is important to note that the effect of failure to give notice apply only when the watercourse exceeds its equitable use. If the damage caused fails within scope of equitable use of the planning state, the later may not be obliged to pay damage despite some injury.

¹²⁷ Charles B. Bourne(1992) note 34 at p.206

CHAPTER THREE: THE RIPARIAN DUTY TO INFORM ON PLANNED MEASURES UNDER THE UNITED NATION CONVENTION ON THE LAW OF NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSE

3.1. Introduction

In 1970, the UN General Assembly commissioned the International Law Commission (ILC) to draft a set of articles to govern Non-navigational Uses of Trans-boundary Water.¹²⁸ After 21 years of extensive work, in 1991 the ILC prepared the draft text of the UN Watercourses Convention. Considerable discussion had been made during 1991–1997 on the ILC's draft. And on 21 May 1997, the UN General Assembly adopted the Convention on Non-Navigational Uses of International Watercourses.¹²⁹ The convention provides a framework of substantive and procedural rules that may be applied and molded to suit the characteristics of particular watercourses.

According to Article 36(1) of the Convention, 35 instruments of ratification, approval, acceptance or accession are necessary to bring the Convention into force. However, the convention does not still secure the minimum requirement for it to enter in to force. Although the Convention has not yet entered into force, some of the principles adopted by the Convention have become norms of international legal practice.

Part III of the Convention deals with planned measures; it sets forth procedural requirements that states must follow in utilizing international watercourse. While some of these principles are generally accepted as general principles of international law, their interpretation as to when and how exactly to notify planned measure is often the centre of debate.¹³⁰

The main focus of this chapter, thus, is to explore the normative content of the riparian duty to inform on planned measures under the UN Watercourse Convention and under the specific

¹²⁸ Report of the International Law Commission on the Work Forty-Six Session (1994), U.N.GAOR, 49th Sess., Supp.No.10, at 195, U.N.Doc.A/49/10/1994 a available at <http://www.un.org/law/ilc/index.htm> accessed on 12 January 2014

¹²⁹ Report of ILC (1997), note 128, p. 123. Out of 133 nations, 103 nations votes in favor (including Bangladesh, Finland, Jordan, Syria, USA, Mexico Slovakia and Nepal), 27 nations abstained (including Egypt, Ethiopia, India, Israel, Rwanda and France) and three nations votes against the Water Convention (Burundi, China and Turkey).

¹³⁰ Alistair Rieu-Clarke et al(2012), *UN watercourse convention user Guide* First paperback edition United Kingdom, p.123

prescriptions of customary international law. Consequently, the research investigates the basic question of when watercourse states assume the duty to inform planned measures, what form such notice takes, the response given by the state receiving the notice, consultation and negotiation on planned measures, and the effect of giving or failure to give notice.

3.2. Information Concerning Planned Measures

There are reasons that urge watercourse states to exchange information concerning planned measures. In the first place, watercourse states are physically interdependent and the exchange of information concerning planned measures allows watercourse states to synchronize their existing or future uses with the new use or to determine whether the new use will be equitable and reasonable or otherwise. Secondly, the exchange of information concerning planned measure promotes cooperation between watercourse states, and thus leads to higher efficiency in the exploitation of the resources of an international watercourse.¹³¹

However, the status of the principle continued to be controversial under international customary law. Some authorities have supported the idea that the duty of notification of planned measures reached the status of customary international law and binds riparian states irrespective of absences of treaties obligation. Whereas others made the rule mere recommendatory and can only be claimed on the basis of specific treaties or decision of an organ. In this regard, the Lake Lanoux arbitration throws a light on status of the principle under customary international law. The arbitral tribunal had treated the matter as part of customary international law saying that:

'...It has to be remembered, though, that international law does not require reaching an agreement between the parties regarding a planned measure, the general rule of prior notification has reached the status of a customary international legal obligation; being applicable regardless of whether a special agreement between the initiating and the potentially affected states exists'.¹³²

¹³¹ The Report of ILC(1994), note 129, p.124

¹³² Lake Lanoux Arbitration (19957), note 8, parars.129-30

In the above statement, although the decision was based on the terms of the treaty between the two countries¹³³; it does, however, indicate that there is a general principle of customary international law requiring states to take the interests of other watercourse states into consideration and that this necessarily leads to the obligation to give notice, to consult and to negotiate.¹³⁴ Some leading contemporary commentators in the field of international water law shared this view. Charles Bourne elaborated that the duty to provide neighboring states with prior notice of plans to exploit a shared natural resource is an obligatory requirement under customary international law.¹³⁵ In summarizing the procedural rules as set down in Part III of the UN Watercourse Convention, Bourne concluded that:

*for the most part, the basic requirements of the exchange of information, notice, consultation, and negotiation now form part of customary international law.*¹³⁶

However, Bourne argued that the ILC has engaged in beneficial progressive development of the law with regard to the six-month time limit and on condition of notification. Moreover, Owen McIntyre argued that the procedural rules set down in the 1997 UN Watercourse Convention codifies and formalizes many existing rules of customary international law.¹³⁷ The fact that the UN Watercourse Convention was prepared by International Law Commission (ILC), the United Nations body responsible for the progressive development of international law also implicate the statue of the principle of planned measures under international law.¹³⁸ The ILC did not, however, indicate which of the provisions codify the law set forth in the existing rules of customary international law and which progressively develop it. According to MacCafrey, most important elements of the Convention—equitable utilization, prior notification – are, in large measure, codifications of existing norms.¹³⁹ He argued that obligation to provide prior notification of such planned measures was accepted by most delegations to the negotiations of

¹³³ France had complied with the procedure prescribed by article XI of the Additional Act to the Treaties of Bayonne, of 26 May 1866, before proceeding with its plan to divert the waters of Lake Lanoux; under that article, France had undertaken to give prior notice of works that might change the course or the volume of a watercourse flowing into Spain, so that the interests that might be involved on both sides would be safeguarded.

¹³⁴ Lake Lanoux Arbitration (1957), not 8 parars. 129-30

¹³⁵ Charles B. Bourne (1971), International Law and Pollution of International Rivers and Lakes, 6 U.BRIT. COLUM. L. REV. vol. 115, P. 122

¹³⁶ Charles B. Bourne (1971), note 135

¹³⁷ OWEN McIntyre (2006,) The Role of Customary Rules and Principles of International Environmental Law in the Protection of Shared International Freshwater Resources, Vol.46, p 188

¹³⁸ United Nations, Statute of the International Law Commission (1982), Doc. A/CN.4/4/Rev.2.

¹³⁹ International Law Commission (1991), Year book of international law commission, vol. 2, no, 1, p. 45,

the UN Watercourse Convention except Ethiopia, Rwanda and Turkey,¹⁴⁰ providing evidence that states have no longer unfettered discretion to do as they alone wish with the portion of an international watercourse within their territory. One thing which sufficiently clear in this regard is that the notice of planned measures is becoming increasingly inescapable though the debate on whether or not the duty to inform on planned measure has attained customary international law status is ongoing and not yet precisely settled.

Regardless of the controversies on status of the principles under customary international law, Article 11 of the UN Watercourse Convention lays down a general obligation on watercourse states to provide each other with information concerning the possible effects of planned measures. 'Possible effects' includes all potential effects of planned measures, whether adverse or beneficial. Here, Article 11 of the convention goes beyond Article 12 and subsequent articles, which concern planned measures that may have a *significant adverse effect* upon other watercourse states. This wider scope is attributable to the difficulties of determining the seriousness or otherwise of planned measures among watercourse states. It is thus the duty of watercourse states to exchange information concerning planned measures with one another with regard to all questions that may arise concerning the use of international rivers and to abstain from any unilateral action that may affect the interests of other riparian states without giving these states every opportunity of studying and expressing their opinion upon the questions involved.¹⁴¹

Literature and treaty practice of states varies on this component of the principles i.e. on the issues when the obligation to inform other watercourse states should arise. Some authorities propound that a state is required to give notice of all utilizations, even those that will cause no injury. In line with this view, the 1933 Declaration of Montevideo adopted, in its Article 7, a more general statement, that works which a state plans to perform in international water shall be previously announced to the other riparian states. There is no qualification limiting the obligation to give notice to cases where the proposed work might cause injury. Besides, Professor H.A. Smith and M. Svelte held the view that it is the duty of all riparian states to consult fully and freely with one another with regard to all questions that may arise concerning the use of international rivers and

¹⁴⁰ Stephen McCaffrey (2001), The Contribution of the UN Convention on the Law of the Non-Navigational Uses of International Watercourses, *International Journal of Global Environmental Issues*, p 250-256

¹⁴¹ Stephen McCaffrey (2001), note 140

to abstain from any unilateral action without giving other watercourse every opportunity of studying and expressing their opinion upon the questions involved.¹⁴² Since it is a difficult question for a state to determine with any accuracy, not to mention impartiality, how a proposed utilization will affect its rights and interests, prior notice of all utilizations would seem to be a desirable condition precedent to the taking of action to implement them.¹⁴³

The weight of modern authoritative opinion, however, supports a more limited proposition. The 1961 Salzburg Resolution and the 1966 Helsinki Rules, both products of influential groups of international lawyers, would confine the requirement of notice to cases involving a threat of serious injury. Articles 4 and 5 of the 1961 Salzburg Resolution, for example, require prior notice of works that seriously affect the possibility of utilization by other states. Likewise, Article XXIX, paragraph 2, of the 1966 Helsinki Rules provides that 'a state should in particular furnish to any other basin state, the interests of which may be *substantially affected*, notice of any proposed construction.'¹⁴⁴ Supporting this views Schwebel noted the following:

*Doubts, divergences of criteria or convictions, or impasses cannot be resolved if the system states are not in communication with one another, particularly at the technical level of project and programme data and information, at least where these works and activities may have significant transnational impact. . . .*¹⁴⁵

Therefore, these agreements and many others containing similar provisions illustrate the widespread practice of states of agreeing to notify and consult each other with regard to proposed uses that could significantly affect the other states' use of or interest in an international watercourse.

Article 12 of the UN Watercourse Convention takes the general obligation one step higher, and introduces a set of provisions on planned measures that may have a 'significant adverse effect' upon other watercourse states. These articles establish a procedural framework designed to assist watercourse states to cooperate with each other and maintain equitable balance between their

¹⁴² Prof. Smith Aaron (1991), The Economic Uses of International Rivers Inter-American Bar Association, Proceedings p,152

¹⁴³ Prof. Smith(1991), note 142

¹⁴⁴ Helsinki Rules(1966), note 122, art.19 Para 2

¹⁴⁵ International Law Commission(1982),Yearbook of International Law, vol. 2.no.1, pp. 175

respective uses of an international watercourse. Article 12 provides that a watercourse state should, before it implements or permits the implementation of planned measures which may have a 'significant adverse effect' upon other watercourse states, provide those states with timely notification thereof; such notification shall be accompanied by available technical data and information, including the results of any environmental impact assessment, in order to enable the notified states to evaluate the possible effects of the planned measures.

The provision has incorporated a number of themes which are worth explaining. The first point is the timing at which the planning state obliged to give notice of its planned measures and comply with procedures prescribed in Articles 13-19 of the convention. Principally, there are three different arguments on this issue. Some authorities have taken the view that the obligation arises to all planned measure even if the implementation will not have effect on another watercourse state. As mentioned above, Montevideo Convention,¹⁴⁶ adopted wider approach in notification of planned measures; there is no qualification limiting the obligation to give notice to cases where the proposed work might cause injury. This sort of argument is justified as there is no easy test for determining what slight and serious injury constitutes in any given setting. The argument is, however, criticized for it would delay projects in giving and replying on planned measures even though the implementation might not have adverse effect on the other watercourse states.¹⁴⁷

Other authorities submit that the obligation of the planning state arises only when the implementation of planned measure may have *serious adverse effect* on another watercourse states.¹⁴⁸ The introduction of a *serious effect* qualification for initiation of the procedure has been criticized as narrowing too strictly the opportunity of another watercourse to assess and raise timely objections to planned measures.

Still, there are writers whose position lay between the two extremes: notice of 'all planned measures' and notice only of 'measures that may have serious adverse effect'. Accordingly, the obligation to give notice arises only when another watercourse state might be *adversely* affected

¹⁴⁶ Seventh Pan-American Conference on the Industrial and Agricultural Use of International Rivers adopted at Montevideo, 24 December 1933, in (1934), *American Journal of international law* vol.28, p54

¹⁴⁷ Charles B. Bourne (1992), note 34, p.66

¹⁴⁸ Alistair Rieu-Clarke et al note 130, p.145

2.2. Basic Principles of International Watercourse Law

Article 38 (1) (c) of the Statute of the ICJ refers to the general principles of law recognized by civilized nations as one sources of international law. Watercourse law as one branch of international law applies these principles as a source. This section of the chapter explores a few general principles applicable to the use, management and conservation of international watercourse law.

2.2.1. Principles of Equitable and Reasonable Utilization

The principle of equitable and reasonable utilization rests on a foundation of shared sovereignty and equality of rights.⁴⁵ Early formulations of the principle found in national practice, particularly in connection with adjudications within federal states and international decision involving transboundary water resources. The most cited national decision in this regard is equitable apportionment of decisions of USA Supreme Court in the case between Kansas vs. Colorado.⁴⁶ In that case the Court concluded that there must be adjustment of rights on *the basis of equality of rights* as to secure as far as possible to Colorado the benefits of irrigation *without depriving* Kansas of the like beneficial effects of a flowing stream.⁴⁷

The principle of equitable and reasonable utilization has also been endorsed in ICJ's decision concerning the Gabčíkovo-Naymaros Project case.⁴⁸ Majority of judges in responding the issue whether or not Czechoslovakia (succeeded by Slovakia) entitled to put in to operation of its variant alternative, they underlined on the principles of equitable and reasonable utilization of shared water resource and argued that the operation of Variant 'C' alternative led Czechoslovakia to appropriate, essentially for its use and benefit, between 80 and 90 per cent of the waters of the Danube despite the fact that the Danube is a shared international river. Consequently, the Court decided that Czechoslovakia, by unilaterally assuming control of a shared resource, violated the generally accepted rules of equitable and reasonable utilization of

⁴⁵ Rahaman, M.M. (2009), Principles of international water law: creating effective transboundary water resources management', *International Journal on Sustainable Society*, Vol. 1, No. 3, pp.207–223.

⁴⁶ U.S. Supreme Court, Kansas Vs. Colorado, 206 US 46 (1907) available at <http://supreme.justia.com/cases/federal/us/206/46/> accessed on 2/14/2014

⁴⁷ Kansas Vs. Colorado (1907), note 46

⁴⁸ Gabčíkovo-Nagymaros project (Hungary Vs Slovakia) (1957), note 27

natural resource of international watercourse and in turn deprived Hungary of its right to an equitable and reasonable share of the natural resources of the Danube River.

The UN Watercourse Convention in its Article 5 sets out the fundamental rights and duties of States with regard to the utilization of international watercourse. It stated that:

Watercourse states shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse states with a view to attaining optimal and sustainable utilization thereof and benefits there from, taking into account the interests of the watercourse states concerned, consistent with adequate protection of the watercourse.

The convention envisioned both right and obligation of watercourse states. Thus, a watercourse state has both the right to utilize international watercourse in equitable and reasonable manner and obligation not to exceed its right to equitable utilization (not to deprive other watercourse states of their right to equitable utilization). Instead, watercourse states shall utilize international watercourse with a view to attaining optimal utilization thereof and benefits there from consistent with adequate protection of the watercourse; the attainment of optimal utilization and benefits is the objective to be sought by watercourse states in utilizing an international watercourse.

The expression 'attaining maximum possible benefits for all' implies that watercourse state shall endeavour to achieve the greatest possible satisfaction of all their needs, while minimizing the detriment to, or unmet needs of, each.⁴⁹ Pursuant to sub Article 2 of Article 5, watercourse states shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the convention. Hence, the UN Watercourse Convention not only articulates the equitable utilization, but also embraces the progressive concept of 'equitable participation'.⁵⁰ It is also worth mentioning at this juncture that principle of equitable and reasonable utilization does

⁴⁹ Tadesse Kassa Woldetsadik (2013), *International watercourse law in the Nile basin: Three States at Crossroad*, Routledge Taylor and Francis, London and New York, p, 198.

⁵⁰ Tadesse Kassa Woldetsadik (2013), note 49, p.149

mean that each watercourse state is entitled to an equal share of the uses and benefits of the watercourse.⁵¹

In determining equitable and reasonable share relevant factors such as the geography of the basin, hydrology of the basin, population dependent on the waters, economic and social needs, existing utilization of waters, potential needs in future, climatic and ecological factors to a natural character and availability of other resources should be taken into account.⁵² And the weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors, Article 6(3) of UN Watercourse Convention.

In the Nile River Basin, states have different views of what constitutes equitable and reasonable utilization. Indeed, Egypt claimed that any use that affects its current use is inequitable and unreasonable while it considers its current use as equitable and reasonable because they were the first to make use of the water.⁵³ According to Egyptian point of view equitable utilization is increasing the current flow of the Nile or to use their expert expression 'equitable utilization to the increased Nile water flow and sharing the benefit'.⁵⁴ With regard to relevant factors of determining equitable and reasonable utilization, Egypt argued that existing use and availability of other water resources should be accorded a primary factor for determining equitable utilization.⁵⁵

Upper stream states, most notably Ethiopia, on the other hand a different view of what amounts to reasonable and equitable use. For Ethiopia, because its territory contribute through the three head streams- the Baro-Akobo (Sobat), the Blue Nile and Atbara-Tekeze, 84 percent of the Nile flow⁵⁶, has endeavored in diplomatic and legal discourse to broaden the legal horizon of its position of utilizing equitable share of the Nile. This position of Ethiopia has been expressed, for example, during the fifty-first working session of the sixth legal committee of UN.

⁵¹ Patricia K. Wouters (2005), *Sharing Transboundary Waters :An Integrated assessment of Equitable Entitlement : The legal Assessment by the International Hydrological Programme (IHP) of the United Nations Educational, Scientific and Cultural Organization (UNESCO)*, (rue Miollis, 75732 Paris Cedex 15, France publisher), p.21

⁵² UN Watercourse Convention(1997), note1, art.6

⁵³ Stephen MacCaffrey and Mpazi Sinjela (1998), *The 1997 convention on International watercourse*, American Journal of International Law, vol 97, no.110

⁵⁴ Interview with Ahmed Abdul-Aziz (2013), note 23. *National water resources for Egypt -2017*, (Cairo, 2005), p.22

⁵⁵ Interview with Fekeahmed Negashi (2013), director of boundary and transboundary River affair at FDRE ministry of water resource and Energy, 11/09/2013, 4:00-5:00 pm

⁵⁶ Tadesse Kassa woldestadik (2013), note 49 ,p.211.

Ethiopia presented a proposal arguing that the contribution of the water by watercourse states to an international river shall be stipulated as an independent determining factor of equitable and reasonable utilization in the Convention.⁵⁷ However, the move was rejected because the theme has been covered by hydrological factors under Article 1(a) of Article 6. However, Ethiopia's position has got support in the Nile Basin Cooperative Framework Agreement for it explicitly provided that the contribution of each basin state to the water of the Nile River system shall likewise be considered as one of the factors affecting equitable apportionment, Article 4(2(h)).

In explaining weight to be given for each analysis factor and circumstances affecting the equitability of uses in the Nile Basin, a scholar in the field noted the following:

*It is evident that Ethiopia cannot claim an absolute priority in the beneficial use of the resources of the Blue Nile simply because the Nile River pours from its jurisdiction in significant proportion, in much the same as Egypt and Sudan cannot legally demand the river to flow as in its natural state because they have deeply entrenched interest represented through pattern of pre-existing use.*⁵⁸

Therefore, the weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors which must be considered on the basis of the whole to reach conclusions.⁵⁹

2.2.2. Principles of the Duty Not Cause Significant Harm

In general, a state is responsible, under international law, for activities within its jurisdiction or control that cause significant injury to the territory of another.⁶⁰ In the context of international watercourse law, no state is allowed to use the watercourses in its territory in such a way as to cause significant harm to other watercourse states or to their environment, including harm to human health or safety, to the use of the waters for beneficial purposes, or to the living organisms of the watercourse systems.⁶¹ This conception is also strongly rooted in treaty practice and international case law. In the 1949 *Corfu Channel case*, the ICJ sustained every state's

⁵⁷ Tadesse Kasssa woldestadiK(2013), note 49,p. 213

⁵⁸ Tadesse Kasssa woldestadiK(2013), note 49

⁵⁹ The UN Watercourse Convention (1997), note 1, art. 6(3)

⁶⁰ Trial Smelter case (1963), U.S. Vs. Canada 3 R. International Arbitral Awards

⁶¹ Rahaman, M.M. (2009), note 45, p.211

obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.⁶²

As it is set forth in Article 7 of the UN Watercourse Convention, watercourse states are under obligation to take 'all appropriate measures' to ensure that activities conducted under their jurisdiction do not cause significant harm to the territory of other riparian. The UN watercourse convention conveys qualification in stipulating level of harm. Thus, the qualifying term 'significant' implies that harm must be higher than merely perceptible or trivial (which would be considered insignificant); but could be less than severe.⁶³ The effect or harm thus must have at least an impact of some consequence, for example on public health, industry, agriculture of the affected state but not necessarily a momentous or grave effect, in order to constitute transgression of an interest protected by international law.⁶⁴

The issue of preeminence between the principles of equitable and reasonable utilization and that of not to cause significant harm has to date continue to be a point of disagreement. If equitable utilization is the controlling legal principle, a watercourse state may develop its water resources in a manner that is equitable and reasonable even though such development would cause significant harm to established uses. If, on the other hand, the obligation not to cause significant harm is dominant, a watercourse state could not engage in development, no matter how equitable and reasonable, that causes significant harm to the other uses. Nonetheless, close examination of sub Article 2 of Article 7 of the UN Watercourse Convention seems to give precedence to equitable utilization principle over the duty not cause significant harm doctrine. This preposition is inferred from the implicit acknowledgment in sub Article 2 of Article 7.⁶⁵ The provision prescribes that the riparian's duty not cause significant harm in fact *prohibits other* states from causing harm that exceeds a certain threshold i.e. when such utilization exceeds its equitable entitlement.⁶⁶ Therefore, the harm inflicted within the limit of equitable utilization would not be regarded as violating the rights of the other watercourse state. Besides, the preposition that the

⁶² Corfu Channel case (1949), Judgment of April 9th I.C.J. Reports 1949, P.25

⁶³ Patricia Wouters (2011), note 51, p.56

⁶⁴ Tadesse Kassa Woldestadik (2013), note 49 p.97

⁶⁵ Paragraph 2 of Article 2 reads 'where significant harm nevertheless is caused to another watercourse State, the States whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures, having due regard for the provisions of articles 5 and 6, in consultation with the affected State, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation'.

⁶⁶ Tadesse Kassa Woldestadik (2013), note 49, p.98

duty not cause significant rule does not enjoy inherent preeminent is supported by article 10 of the UN Watercourse Convention which provides that 'any conflict between uses of an international watercourse is to be resolved with reference to Article 5 and 7.

The ICJ's judgment in the *Gabcikovo-Nagymaros* case would appear to support this conclusion. In its judgment, the Court referred on several occasions to the principle of equitable utilization as the basic right of states sharing international watercourse. Hence, what is prohibited is a conduct by which one state *exceeds* its equitable share, or deprives another state of its equitable share of the uses and benefits of the watercourse.⁶⁷

The application of the duty not to cause significant harm is very difficult in the Nile basin. For one thing, the term significant harm is nowhere defined in the Nile Basin Cooperative Framework Agreement (CFA). The CFA is simply a verbatim copy of article 7 of the UN Watercourse Convention wherein its relationship with equitable utilization is not clearly delineated.

In most cases, Ethiopia claimed that the principles of equitable utilization should be given credence over the riparian duty not causing significant harm. Hence, for Ethiopia the riparian duty not cause significant harm is said to be violated only when a state has exceeded its equitable and reasonable use.⁶⁸ In an interview with Egyptian TV late PM Melese Zenawi noted the following:

*'Ethiopia understands Egypt is the creation of the Nile. In the same manner Egypt must accept the fact that Ethiopia, the sources of 85% of the Nile, must benefit from this resources. Ethiopia, does not claim to the equal share of the Nile, but let us divided equitably and Egypt shall revisit its old position saying that single reduction the status quo is harm on it.'*⁶⁹

This proposition has also propounded by Ato Fekeahmed he states that:

For long time and now, Egyptian authority takes the view that every use that affects its current use as causing significant harm. On the other hand, Ethiopia

⁶⁷ Gabcikovo-Nagymaros project case (1997), note 27, para. 86-89

⁶⁸ Christina M. Carroll (1999), *Past and future legal framework of the Nile River Basin*, Georgetown International law review, vol. 12:269

⁶⁹ Egyptian TV interview with Meles Zenawi (2010), note 22

*propounds that rule of equitable and reasonable utilization has preeminence over the duty not to cause significant harm. Hence, any use within ambit equitable use, even though it has some effect on the current use of Egypt and Sudan, should not be considered as to causing significant harm.*⁷⁰

Whereas Egyptian point of view is different from Ethiopia's position. The official view emphasized on the principles of not cause significant harm. Recently, for example, the former Egyptian president, Mohamed Mursi said, *If drop water is missed our blood will be the alternative.*⁷¹ The statement quite understandably shows the extent of Egyptian position which seems to extend to the no harm rule.

2.2.3. Principles of Cooperation

As water is one of the most widely shared resources of the planet which often constitutes a border between states or flow across different countries, it can be a factor for cooperation among watercourse states. It stems from the broader and somewhat elusive principles of good-neighbourly relations under international law.⁷²

Indeed, good-faith co-operation between states with regard to utilization of an international watercourse is an essential basis for the smooth functioning of other procedural rules and, ultimately, for the attainment and maintenance of an equitable allocation of the uses and benefits of watercourses. Cooperation is also necessary in order to enable watercourse state take all appropriate actions for the fulfillment of the 'due diligence' obligation not to cause significant harm.

Consequently, broad support for this general obligation is found in the treaty practice, case law, and resolutions of international organizations.⁷³

⁷⁰ Interview with Fekeahmed Negashi (2013), note 55

⁷¹ Daily NEWS available at <http://www.dailynewsegypt.com/2013/06/12/ethiopia-frustrated-by-egyptian-statements-on-gerd/> last accessed on 14 February 2014

⁷² For example, UN Water Conference held at Mar del Plata in March 1977, and the Interregional Meeting of International River Organizations convened by the UN in Dakar, Senegal 1981 underlines the importance of inter-State co-operation and the necessary organizational structures both at the international and regional levels and for specific watercourses.

⁷³ Helsinki Rules (1966) note 7, (Articles XXIX [1], XXIX [2], XXXI), the UN Watercourses Convention note 1 (Articles 5.2, 8, 9, 11, 12, 24.1, 25.1, 27, 28.3, 30), 1960 Indus Waters Treaty (Articles VI–VIII), 1995 SADC protocol on shared

The UN Charter recognizes international economic and social cooperation with a view to create of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights.⁷⁴ Moreover, the Charter of Economic Right and Duties of states calls for prior consultation among states in respect of shared natural resources in order to achieve optimum use of such resources without causing damage to the legitimate interest of others.⁷⁵ For water is the most shared natural resource in the world, Article 3 of the resolution embraces cooperation in the utilization of international watercourse law as an essential principle of international water law⁷⁶

Article 8 of the UN Watercourse Convention contains a responsibility of each riparian state of an international watercourse to cooperate and exchange data and information regarding the state of the watercourse on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilization and adequate protection of an international watercourse. By combining sovereign equality with territorial integrity, the convention formally ignored such principles as absolute territorial sovereignty and integrity to recognize the principles of state sovereignty and its corollary state responsibility according to which each basin state is free to act within its own territory but becomes liable in the event that its activities cause a prejudice to the territorial integrity of another basin state.

Even though it is implicit, the concept of duty to cooperate has also been enshrined in sub Article 2 of Article 5 of the Convention as concomitant to the principles of equitable and reasonable uses. This part provides that 'watercourse states shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner'. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof.

watercourse systems (Articles 2–5), 1995 Mekong Agreement (Preamble, Articles 1, 2, 6, 9, 11, 15, 18, 24, 30), 2004 Berlin Rules (Chapter XI, Articles 10, 11, 56, 64) and 1992 UNECE Water Convention (Articles 6, 9, 11, 12, 13, 14, 15, 16)

⁷⁴ The Charter of the United Nations, (1945), San Francisco, Article 55 available at Charter of the United Nations, 26 June 1945, San Francisco, *available at* <http://www.un.org> accessed on 23 February 2013

⁷⁵ General Assembly resolution on Economic and Social cooperation, resolution, 3281 (XXIX) of 12 December 1974, art.3

⁷⁶ International Law Commission (1979), *Yearbook international law* vol.2. no.1, p. 171,

The same is stipulated in Article 4 of the Act regarding navigation and economic co-operation between the states of the Niger Basin (Act of Niamey)⁷⁷ in which the contracting states undertake to establish close co-operation with regard to the study and execution of any project likely to have an appreciable effect on certain features of the regime of the river, its tributaries and sub-tributaries, their conditions of navigability, agricultural and industrial exploitation, the sanitary conditions of their waters and the biological characteristics of their fauna and flora. Article 5 of the same agreement provides for the establishment of an intergovernmental organization in order to further the co-operation between the riparian States.⁷⁸

2.3. Riparian Duty to Inform on Planned Measures under International Watercourse Law

Procedural requirements and mechanisms are essential elements of watercourse agreement. They provide the means through which the substantive rules are implemented. One of such rules is the obligation between watercourse states with regard to riparian duty to inform on planned measures. The riparian duty to inform of *planned measure*⁷⁹ is one of the key elements of such procedural rule. Treaty regimes, case laws and works of international governmental and nongovernmental forums have made notable contributions to the evolution and clarification of riparian duty to inform on planned measures. The following section of this chapter covers these authorities expounding obligation of riparian state to notify planned measures.

2.3.1. The Riparian Duty to Inform Planned Measures in the Treaty Practice of States

There are a significant number of treaties that reveal recognition of the need for a spectrum of procedures relating to the utilization of international watercourses, ranging from the provision of data and information to notification of planned measures with regard to an international

⁷⁷ Niamey convention is adopted on 26 October 1963 at the Conference of the Riparian States of the River Niger, its tributaries and sub-tributaries (Niamey, 24-26 October 1963) and entered into force on 1 February 1966)

⁷⁸ Niamey Convention (1963), note 77. Article 5 goes on to provide that the organization will be entrusted with the task of encouraging, promoting and co-coordinating studies and programmes concerning the exploitation of the resources of the Niger River basin

⁷⁹ A planned measure is new projects or programmes of a major or minor nature, or any change in existing uses of the waters of a watercourse state. see also Patricia K. Wouters et.al (2005), Sharing Transboundary Waters an Integrated assessment of Equitable Entitlement, UNESCO working paper p.54

watercourse that may affect another state. These contain treaties within and outside the UN system.

From the early treaty practice, mention to riparian duty to inform on planned measure is made in the 1954 convention between the former Yugoslavia and Austria concerning water economic question relating to the Drava River.⁸⁰ The Drava River convention in its Article 4, envisages that Austria, the upper riparian states shall when seriously contemplating plans for new installations to divert water from the Drava basin or for construction work which might affect the Drava river regime to the detriment of Yugoslavia, undertake to discuss such plans with the Federal People's Republic of Yugoslavia. Unlike most modern treaty practices in which no distinction has been made between upper and lower riparian states, the Drava river convention selectively imposes duty to notify only upon upper the riparian state, Austria. This seems due to the misconceptions that only upper riparian states would cause harm to the lower riparian state. However, in reality since project undertaken by lower riparian state may as well lay facts on the ground, this may cause significant harm to interest of upper riparian state as well.

The 1975 statute of the Uruguay River, adopted by Uruguay and Argentina⁸¹ contains detailed provisions on conditions of notification requirements, the content of the notification, the period for reply, and procedures applicable in the event that the parties fail to agree on the proposed project. Pursuant to the statute a party planning the construction of new channels, the substantial modification or alteration to existing ones, or the execution of any other works of such magnitude as to affect navigation, the regime of the river or the quality of its waters, shall so inform the Commission, which shall determine expeditiously, and within a maximum period of 30 days, whether the project may cause appreciable harm to the other party.⁸² It is pretty clear from the wording of the convention that the planning state informs other watercourse states not only on the development of new use but also modification and alteration of existing ones. Unlike many cases where a watercourse state by itself determines the possible effect of planned

⁸⁰ Convention between Yugoslavia and Austria concerning water economy questions relating to the Drava, signed at Geneva on 25 May 1954: *art. 4* (United Nations, *Treaty Series*, vol. 227, p. Ml; *Legislative Texts*, p. 513, No. 144; document A/5409, para. 697)

⁸¹ Statute of the Uruguay River (Uruguay and Argentina), signed at Salto (Uruguay) (1975), United Nations, *Treaty Series*, Vol. 1295, No. 21425, p. 332 (*arts. 7 to 12*)

⁸² Uruguay River statutes(1975), note 82, art.7

measure, the Uruguay River statute empowers the Administrative Commission of River Uruguay to determine whether or not a planned measure causes appreciable harm to other party.

The 1995 Mekong river⁸³ agreement has likewise acknowledged the procedural duty of riparian state to inform on planned measures. Procedural rules and mechanisms established under the 1995 Mekong Agreement are further developed by the Mekong River Commission.⁸⁴ Accordingly, the Mekong River Commission (MRC) adopted two essential documents: Procedures for data and information exchange and sharing, put into effect on November 1, 2001, and preliminary procedures for notification, prior consultation and agreement, approved on November 12, 2002.⁸⁵ The primary objective of the first document is to operationalize the data and information exchange and to make available, upon request, basic data and information for public access. The second document establishes the procedures to be applied by the Mekong basin states in the case of planned measures defined as any proposal for a definite use of the waters of the Mekong river system by any riparian, excluding domestic and minor uses of water not having a significant impact on mainstream flows;⁸⁶ this involves any kind of water retention and diversion for the purposes of electricity generation, irrigation, and flood management.⁸⁷

Among regional agreements, there have been many attempts towards regulating the uses of shared watercourses. The Protocol which was signed in Johannesburg, South Africa, by ten of the eleven members of the SADC on August 23, 1995 is exemplary in this respect.⁸⁸ The 1995 Protocol embraces provisions that require a riparian to notify other states of any planned

⁸³ The Mekong River Basin drains an area of some 800,000 km² in six States (Laos, Thailand, China, Cambodia, Vietnam, and Myanmar), stretching some 4,200 kilometers from its headwaters in the Tibetan highlands to its discharge into the South China Sea. It is the second largest river in eastern Asia and the 11th longest in the world. In 1995, the four lower riparian States (Cambodia, Laos, Thailand, and Vietnam) concluded the Mekong Agreement. See Mekong River Commission Basin Development Plan Programme, Phase 2, Assessment of Basin-wide Development Scenarios Main Report April 2011, at <http://www.mrcmekong.org/assets/Other-Documents/BDP/Assessment-of-Basin-wide-dev-Scenarios-MainReport-2011.Pdf>, last accessed on 11/15/2013

⁸⁴ Sergei Vinogradov (2003), Transforming potential conflict in to cooperation, the Role of international water law, UNSCO Technical document in hydrology serious NO.2, p.63

⁸⁵ Mekong River commission Guide line on Notification submission, Prior Consultation and Agreement(herein after referred as PNPCA), at Lao people's democratic republic (2005)available at <http://www.mrcmekong.org> accessed on 11/17/2013

⁸⁶ Mekong River commission Guide line(2002), note 84

⁸⁷ Mekong River commission Guide line(2002), note 84, p.23

⁸⁸ Revised SADC protocol (2000), note 6

measures of utmost urgency originating within its territory.⁸⁹ It also includes provisions for notification of other potentially affected states and competent international organizations of any emergency originating within its territory.⁹⁰ In the second scenario, the Protocol states obligation to notify non watercourse states potentially affected by such acts. However, the provision on the riparian duty to inform on planned measures was quite cursory; therefore, the Summit of Heads of States of the SADC decided to revise the 1995 Protocol. The revision process began in late 1998 and culminated in the completion and signing of the Revised Protocol on 7 August 2000.⁹¹ The revised SADC Protocol contains detail procedures outlining the riparian duty to inform planned measures. Article 4 of the Protocol on planned measures is a restatement of Articles 11 through 19 of the UN Watercourse Convention. These provisions include the same issues addressed by the UN Watercourse Convention regarding notification to other riparian of planned measures that may have a significant adverse effect, the period for reply, obligations of the notifying state during the period for reply, reply to notification, or absence of a reply.

Article 4(1) (a) of the Revised Protocol provides that state parties shall exchange information and consult each other and, if necessary, negotiate the possible effects of planned measures on the condition of a shared watercourse. Watercourse states have a general obligation to provide each other with information concerning the possible effects of planned measures, both positive and negative. The purpose of this procedural framework is to assist watercourse states in maintaining an equitable balance between their respective uses of an international watercourse, by helping to avoid disputes and providing a context for negotiations if harmful effects are unavoidable. The second paragraph of Article 4 went on stating the riparian states' duty to inform planned measures with significant adverse effect. Hence, before a state party implements or permits the implementation of planned measures which may have a significant adverse effect upon other watercourse states, it shall provide those states with timely notification thereof.⁹² Such notification shall be accompanied by available technical data and information, including the results of any environmental impact assessment, in order to enable the notified states to evaluate the possible effects of the planned measures.

⁸⁹Southern African Development Community (SADC), Johannesburg (28Aug 1995), The convention on Shared Watercourse Systems in the Region, article 2(10)

⁹⁰ Revised SADC protocol (2000), note 6, art. 2(9)

⁹¹ Patricia Wouters (2011), note 51, p.57

⁹² Revised SADC protocol (2000), note 6 at article 4(1)(a)

2.3.2. Case Laws

With regard to case law, as subsidiary sources of international law, it is known that international judicial decisions contribute to the determination of the existence of the riparian duty to inform on planned measures. The award of 16 November 1957 by the arbitral tribunal in the *Lake Lanoux* is a typical example. The case involved a hydroelectric project, proposed in 1950 by Electricite de France and adopted by the French Government, which would entail the diversion of waters of Lake Lanoux, situated in the eastern Pyrenees entirely within France.⁹³ The French government proposed to carry out works for the utilization of the waters of the lake. The Spanish government feared that these works would adversely affect Spanish rights and interests, contrary to the treaty of Bayonne of May 26, 1866, between France and Spain and the additional act of the same date.⁹⁴ Thus, the Spanish claimed that it was entitled to prior notification and agreement under article 11 of the 1866 additional act to the treaty of Bayonne and general international law without which such works could not be undertaken.

In the course of its opinion, the Tribunal made a number of important statements concerning riparian duties to inform on planned measures under international water law. Most importantly, the Tribunal had to decide, inter alia, whether France had complied with the procedure prescribed by article 11 of the additional act to the treaties of Bayonne, of 26 May 1866, before proceeding with its plan to divert the waters of Lake Lanoux; under that article, France had undertaken to give prior notice of works that might change the course or the volume of a watercourse flowing into Spain, so that the interests that might be involved on both sides would be safeguarded.

In responding to this issue, the tribunal held that France had scrupulously observed the provisions of article 11 by giving notice and making full disclosure of plans, by consulting and negotiating about the scheme, by suggesting modifications of it, and by carefully considering the Spanish interests that might be affected by it.⁹⁵ Since Spain based its position not only on the treaty and the additional act, but also on generally accepted rules of international law, the

⁹³ Lake Lanoux arbitration (1957), note 8, para.9-12. See also Year book of international law commission 1974, Vol. II (Part Two), p. 196, and document A/5409, para. 1064)

⁹⁴ Boundary Treaty between Spain and France) of 26 May 1866 and its Additional Act of the same date. Year book of international law commission (1974), vol. 2 ,no.2, p. 196

⁹⁵ *Lake Lanoux Arbitration (1957)*, note 8, para.73. See also Year book of international law commission (1974), vol.2, no.1, p.197

tribunal found that it was possible to demonstrate general rule of international law concerning obligation of riparian state on the proposed use of international watercourse. Stated otherwise, the tribunal firstly addressed the question whether France had, under customary international law, the obligation to give prior notice of planned measures. Secondly, the tribunal pinpointed the issue of whether France had the obligation to prior agreement with Spain before launching a project on Lake Lanoux. With regard to the first question the tribunal concluded that there is a general principle of customary international law requiring states to take the interests of co-basin states into consideration and this necessarily leads to the obligation to give notice of planned measures.⁹⁶

The Tribunal then turned to the second basic question involved in the case, namely Spain's contention that the execution of the French project requires the preliminary agreement of the two governments, and that in the absence of such agreement the country which proposed the project could not have freedom of action to undertake the work. In addressing the question, the Tribunal concluded that neither international customary law nor general principles of law requires prior agreement between the upper and lower riparian states concerning proposed uses.⁹⁷ Instead, international practice prefers to resort to less extreme solution, limiting itself to requiring states to seek in terms of an agreement by preliminary negotiation without making the exercises of their competence conditional on the conclusion of agreement.

Another important case involves the Pulp Mill case. On 4 May 2006, Argentina filed an application for the indication of provisional measures against Uruguay for the alleged breach by Uruguay of obligations under the 1975 statute of the River Uruguay.

The dispute concerns the breach by Uruguay of obligations under the Statute of the River Uruguay in respect of the authorization and construction of two pulp mills on the River Uruguay without notification to Argentina.⁹⁸

According to Argentina, the statute provides for an obligatory procedure for prior notification and consultation through Administrative Commission of the River Uruguay for any party

⁹⁶ Lake Lanoux Arbitration (1957), note 8, para. 14

⁹⁷ Lake Lanoux Arbitration (1957), note 8, Para. 13

⁹⁸ Pulp Mills on the River Uruguay (2006), ARGENTINA v. Uruguay) filed in the Registry of the Court on 4 May, p.5 para.2 (herein after called Pulp Mill case)

planning to carry out works liable to affect navigation, the regime of the river or the quality of its waters. Consequently, it objects to the unilateral authorization by Uruguay of the Spanish company to construct a pulp mill and claims that the notification and consultation procedure was breached, in spite of many protests submitted to the government of Uruguay and to administrative commission of River Uruguay.⁹⁹ Argentina became aware of the project through the Uruguayan media and requested the Uruguayan government to comply with its obligations under Article 7 of the 1975 statute and respect the riparian duty to notify on planned measures.

Argentina argued before International Court of Justice that despite repeated requests by its government, the Uruguayan government persisted in its refusal to follow the procedures prescribed by the 1975 Statute.¹⁰⁰ And even those pieces of information supplied by Uruguay remained fragmentary and inadequate, contain inaccuracies and omissions, and in particular provide no assessment of transboundary impact or of the choice of sites.¹⁰¹ The Argentine government, therefore, asked for work on construction of the mills to be suspended, in the hope that Uruguay will revert to complying with the 1975 Statute.

On the basis of the forgoing statement of fact and law, Argentina's requests ICJ to adjudicate and declare that Uruguay breached the obligations incumbent upon it under the 1975 Statute and the other rules of international law to which that instrument refers.¹⁰² In particular Argentina argued that Uruguay breached the obligation of prior notification to Uruguay River Administrative Council and to the government of Argentina; that Uruguay shall cease its wrongful conduct and comply scrupulously in the future with the obligations incumbent upon it; and Uruguay shall make full reparation for the injury caused by its breach of the obligations incumbent upon it.¹⁰³

On the other hand, Uruguay argued that, as per first paragraph of Article 7, the triggering event for the obligation to notify Uruguay River Administrative Council is when one party plans the implementation of a work that is of sufficient magnitude that it could affect navigation, the regime of the river, and/or quality of its waters.

⁹⁹ Pulp Mill case (2006), note 98 at para.3

¹⁰⁰ Pulp Mill case (2006), note,98 para.11

¹⁰¹ Report of the Argentine delegation on the issue, Buenos Aires, 3 February 2006 available at <http://www.icj-cij.org/docket/files/135/10779.pdf> accessed on 11/17/13

¹⁰² Pulp Mill case (2006), note 98, para.25-27

¹⁰³ Pulp Mill case (2006), note 98, para.25-27

by the planned measures.¹⁴⁹ This proposition seems to have been adopted by the International Law Commission (ILC). In its commentary on Article 12, the Commission pointed out that the threshold established in Article 12 is intended to be *lower than that of 'significant harm'* under Article 7, but does not refer merely to some effects.¹⁵⁰ As a result, the position taken by the ILC is that notice of a planned measure must be furnished only when their implementation may have *a significant adverse effect up* on the other watercourse state and not for every measure with little or no adverse effect on the other watercourse state.

Besides, the obligation under the same provision with regard to notification is accompanied by the duty to provide 'available technical data and information'; of course, the basin state in question cannot be called upon to or cannot be put to the expense and trouble of securing statistics and data which are not already at hand or readily obtainable. In case a state which has been notified requests data or information that is not readily available, but is accessible only to the notifying state, it is deemed appropriate for the former to cover the expenses incurred in producing the additional material.¹⁵¹

The phrase 'implements or permits the implementation of' is intended to make clear that Article 12 of the convention covers not only measures planned by the state, but also those planned by private entities. Thus, in the case of measures planned by a private entity, the watercourse state in question is under an obligation not to authorize the entity to implement the measures and not to allow it to go forward with their implementation before notifying other watercourse states as provided in Article 12 of the UN Watercourse Convention. Here, notifying other states should become effective not only where the riparian state plans new constructions, projects that may cause adverse effect to the rights or interests of another system state, but also where alterations of or additions to existing constructions, projects or use may cause such harm.¹⁵²

Relating point here is the manner of giving notice of planned measure: should it be in a written form or orally? A clear indication is not found in the UN Watercourse Convention.

¹⁴⁹ Helsinki Rules (1966), note 22, under Article XXIX, paragraph 2, of the Rules adopted by the International Law Association provides that 'a State ... should in particular furnish to any other basin State, the interests of which may be *substantially* affected, notice of any proposed construction

¹⁵⁰ Charles Bourne (1972), note 123, pp.172-176

¹⁵¹ Report of the International Law Commission on the Work of its Forty-Sixth Session, UNGAOR, 49th Session, Supp (No. 10), UN Doc A/49/10 (1994), Art 12 para .5

¹⁵² International Law Commission (1983), Yearbook of the International Law Commission, vol. 2. no. 1, pp.175

Under the relevant provision, it is only envisioned that such notification shall be accompanied by available technical data and information, including the results of any environmental impact assessment, in order to enable the notified states to evaluate the possible effects of the planned measures. It would generally be difficult to imagine giving notice on planned measures whose essential facts are communicated orally. It would have been better, therefore, to have removed any doubt about this by adding *in writing* after the word *notice* in Article 12. Doing so would have been in accordance with the trend in some treaties on international Rivers to state expressly that a required notice shall be in writing.¹⁵³

On the other hand, one notes that the UN Watercourse Convention requires a timely notification of planned measures so that other watercourse states can take precautionary measures. The requirement of ‘timely’ notification has been intended to allow for a thorough evaluation of the possible effects by the other watercourse states at an early stage in the planning process, and thus provide the basis for meaningful consultations and negotiations in case they are deemed necessary (Article 18). This view has recently been shared by ICJ in the Pulp Mills Case. Specifically the court held that:

‘...the planning state, Uruguay, has the obligation to inform Uruguay River Administrative Commission as soon as it is in possession of a plan which is sufficiently developed to enable the Commission to make the preliminary assessment of whether the proposed works might cause significant damage to the other party. In any event, the duty to inform the Commission will become applicable at the stage when the relevant authority has had the project referred to it with the aim of obtaining initial environmental authorization and before the granting of that authorization.’¹⁵⁴

Where the Court stated in its judgment that notification should have taken place at a very early stage prior to the authorization of the project on the Uruguay Rive¹⁵⁵; and rejected Uruguay’s reasoning that ‘the requirement to inform cannot occur in the very early stages of planning,

¹⁵³ Agreement between USA and Canada, Can. T.S. No. 2; 15 U.S.T. 1555; 542 U.N.T.S. 244. Article xii (3) provides: ‘The United States of America shall exercise its option [to build Libby dam] by written notice to Canada and see articles 4(8) and 7(2), and annexure D, sections 5 and 19.

¹⁵⁴ Pulp Mill case note(2006), note 98, paras.10- 109

¹⁵⁵ Pulp Mills Case (20006), note 98, at para. 99

because there would not be sufficient information available to the Commission for it to determine whether or not the plan might cause significant damage to the other state.¹⁵⁶

3.3. Period to Reply to Notifications and Obligations of the Notifying State during the Period for Reply

Inherent in the principle of notification is the obligation to allow the notified watercourse state a reasonable time to study and assess the information received and the possible effects for such other state. It is also equally reasonable to give the notified states the possibility to request additional necessary information and data. And in cases where this is obviously practical, a reasonable extension of the time-limit must be granted.

The question that remains answered is how much notice time must a state give before it may embark on a project and within what time must the states receiving notice respond to it. The UN Watercourse Convention has primarily left to the watercourse states to agree upon a period of time that is appropriate to the respective cases; the opening clause of Article 13 – ‘*unless otherwise agreed*’ - only intends to encourage states to agree upon an appropriate period themselves. Hence, the initial period for reply as well as the possible extension provided in the convention applies in the absence of a specific agreement between the states concerned dealing with this matter. In other words, if the watercourse states did not fix a specific period for reply, a six months period has been provided as a reasonable period of time. In complicated cases, it may be too short for an adequate assessment of the information and data contained in a notification and of the implications of a planned measure for a recipient state; in such cases, a six-month period may not be appropriate to examine the possible effect of planned measures and hence should be prolonged accordingly for another six months.¹⁵⁷

Article 14 of the Convention provides the obligation of the notifying state during the period for reply. There are twofold obligations on the part of the notifying state. The first is that the notifying state shall cooperate with the notified states by providing them, on request, with any additional data and information that is available and necessary for an accurate evaluation. Secondly, the notifying state shall not implement or permit the implementation of the planned

¹⁵⁶ Pulp Mills Case (2006), note 98, p.100

¹⁵⁷ UN Watercourse Convention(1997), note 1, art.13(b)

measures without the consent of the notified states. The purpose of this rule requiring a suspension of work is to give a watercourse state an opportunity to study how the planned measure may affect it and to raise objection if it so wishes. If the notifying state was to proceed with the planned project before the notified state has an opportunity to assess the potential impacts of the measures, the notifying state would most certainly not be in a position - due to a lack of sufficient information- to determine whether the planned measure was in compliance with Articles 5 to 7 of the Convention.¹⁵⁸ The duty not to proceed with implementation is thus intended to assist watercourse states in ensuring that any measures they plan will not be inconsistent with their obligations under Articles 5 and 7.

However, various literatures and works of international governmental and nongovernmental forums adopted different preposition on this particular issue. The *Helsinki Rules* opted not to adopt a fixed period; it rather provides what it is called 'reasonable period of time'. Hence, a state providing the notice should afford to the recipient state *a reasonable period of time* to make an assessment of the probable effect of the proposed construction or installation and to submit its views thereon to the state furnishing the notice.¹⁵⁹ Such a criterion of 'a reasonable of period of time' would reflect a somewhat flexible time standard to fix the appropriate period of time on a case by case basis. However, it is difficult to judge what reasonable period of time constitutes in any given situation, and this leads to potential controversy between the notifying and notified states.

On same issue, Montevideo declaration adopted more definite period comparable to UN Watercourse Convention. The declaration in its article 8, allows a period of three months for reply to a notice. Similar provision appears more frequently in modern treaties. For example, in the 2000 SADC protocol parties undertook to give six months notice before beginning operations to planned measures, Article 4(1) (c).

¹⁵⁸ Yearbook of the International Law Commission (1987), Vol. II (Part 1) 15-46, document A/CN.4/406 and Corr.1 and Add.1 & 2

¹⁵⁹ Helsinki Rules (1966), note 22. Article XXIX, paragraph 3, of the Helsinki Rule provides: 'a state providing the notice should afford to the recipient *a reasonable period of time* to make an assessment of the probable effect of the proposed construction or installation and to submit its views thereon to the State furnishing the notice.'

3.4. Reply to Notification of Planned Measure

Article 15 of the UN Watercourse Convention deals with the obligation of the notified state with regard to its response to the notification provided under Article 12. As laid down in sub Article 1 of Article 15, the notified state shall communicate its findings concerning possible effects of the planned measures to the notifying state 'as early as possible, within the period applicable pursuant to Article 13 (within a period of six month period), or in the case where a notified state has requested an extension of time due to special circumstances, within the period of such extension.' If a notified state completed its evaluation in less than six months or in less than the additional six months where an extension was requested, however, Article 15 of the convention calls for the notified state to inform the notifying state immediately of its findings. The requirement to inform the notifying state immediately of its findings can be considered as an extension of the principle of good faith since it tries to avoid any unnecessary delay of the project in case the findings conclude that the planned measures are consistent with Articles 5 and 7 of the Convention. Further, immediate response provides a trigger for the consultation and negotiation process as soon as possible, in case the findings suggest non-compliance with the principle of equitable and reasonable utilization or the duty not cause significant harm.¹⁶⁰

If the notified state finds that implementation of the planned measures would result in a breach of the obligations of equitable and reasonable utilization or obligations not cause significant harm, it shall communicate the same to the notifying state within the period specified in Article 13, with an explanation of the finding.¹⁶¹

The explanation must be documented, supported by an indication of the factual or other bases for the finding, and must set forth the reasons for the notified state's conclusion that implementation of the planned measures would violate Articles 5 or 7 of the convention.

¹⁶⁰ Alistair Rieu-Clarke et al (2013), note 130, p.148

¹⁶¹ UN Watercourse Convention (1997), note 1. Article 13 of the UN watercourse convention that provides Period for reply to notification reads: Unless otherwise agreed:

(a) A watercourse State providing a notification under article 12 shall allow the notified States a period of six months within which to study and evaluate the possible effects of the planned measures and to communicate the findings to it; (b) This period shall, at the request of a notified State for which the evaluation of the planned measures poses special difficulty, be extended for a period of six months.

There is, however, an obvious difficulty in the unilateral determination of what a state's equitable entitlement would mean by the notified state in a given situation. The basic issue is how the notified state knows whether or not the contemplated project by notifying state is equitable and reasonable on the basis of which it accepts or rejects planned measure by the notifying state. It may even be a very difficult task for the notified state to determine, in the absence of a joint mechanism with notified states to determine the issue, or a very close working relationship with them. Of course, Article 6 of the UN Watercourse Convention sets forth a non-exhaustive list of factors to be taken into account in making the determination. These factors will doubtless be of assistance to the notified state in making equitable utilization determination. But, such determination is much better suited to be implemented through very close cooperation between the states concerned, ideally through a joint commission, or other impartial third party.

For different reasons, the state that has been given notice of a proposed work may fail to raise objections to it within the time frame fixed in the Convention. In such cases, sub Article 1 of Article 16 of the UN Watercourse Convention allows the notifying state that receives no communication to proceed with or permit the implementation of its plans - subject to two conditions. First, as it would be improper to allow the notifying state to implement a different project or an altered plan; it must implement in accordance with the notification and any other data and information provided to the notified state. Second, the implementation of the planned measures must be consistent with the obligations of the notifying state under Articles 5 and 7 of the Convention. Thus, despite the notified state's failure to reply to the notice, the notifying state should implement or permit the implementation of planned measure in such a way that does not contravene the principles of reasonable and equitable use or the obligation not to cause significant harm to other watercourse state.

Again, this procedure becomes complicated because of the difficulties involved on the part of the notifying state in determining its entitlements 'without contravening equitable use or the obligation not to cause significant harm. How does notifying state, for example, know whether its planned measure is equitable and reasonable vis-à-vis notified state? This may be a very difficult thing for notifying state to determine, in the absence of a joint mechanism with notified or cooperative relationship between the notifying and notified state. List of factors enshrined under Article 6 still helps the notifying state in making equitable determination. If the matter is

not resolved to the satisfaction of any of the states concerned, the dispute settlement procedures of Article 33 of the Convention would be applicable.

3.5. Consultation and Negotiation Concerning Planned Measures

The obligation of the planning state to enter in to consultation will arise in consequence of two circumstances. First, the obligation arises if within six months period referred in Article 13, the notified state objects to the planned measure on the ground that would be inconsistent with the provisions of Articles 5 or 7.¹⁶² Second, the obligation arises when a watercourse state has reasonable grounds to believe that another watercourse state is planning measures that may have a significant adverse effect upon it, and requests the planning state to comply with the processes of consultation and negotiation.¹⁶³

In both cases, the purpose of consultation and negotiation is to arrive at an *equitable resolution* of the dispute involving the planned measure. The term 'equitable resolution' includes, among other things, modification to the initial plan so as to eliminate its potentially adverse effect, adjustment of other uses being made by either of the states, or the provision by the notifying state of compensation (monetary or other) acceptable to the notified state.¹⁶⁴ This does not, however, mean removing of all harms. As Prof. MacCaffrey expressed the rule does not require modification and change to the extent of removing all harm to the other watercourse state, but only such changes as will avoid impermissible appreciable harm.¹⁶⁵

Sub Article 2 of Article 17 concerns the manner in which the consultations and negotiations are to be conducted. They shall be pursued on the basis that each state must in good faith pay reasonable regard to the rights and legitimate interests of the other states. Negotiating in good faith 'implies honesty, fairness, tolerance, lack of prejudice, consideration for the position, interests and needs of others, flexibility, willingness to seek a solution and, above all, cooperation.'¹⁶⁶ It implies to act in good faith to carry out an act with honest intent, fairness and

¹⁶² UN watercourse convention (1997), note 1, art.17

¹⁶³ UN watercourse convention (1997), note, art. 18 para.1

¹⁶⁴ UN watercourse convention (1997), note 1, art.18

¹⁶⁵ International Law Commission (1987), Year Book of International law Commission (1987), vol. 2, no.1

¹⁶⁶ N Zawahri, Dinar, and G Nigatu (2010), Governing International Freshwater Resources: An Analysis of Treaty Design. Paper presented at, New Orleans, p.23

sincerity, and with no intention of deceit.¹⁶⁷ The manner of consultation and negotiation was also addressed by Charter of Economic Rights and Duties of States in its article 3 as ‘a processes of good faith consultation and negotiation purported to achieve optimum use of shared resources without causing damage to the legitimate interest of others.’ The concept has also been inspired by the award of the tribunal in the Lake Lanoux Arbitration. The Tribunal was of the opinion that watercourse states should undertake consultation and negotiation according to the rules of good faith, taking into consideration the various interests involved, to seek to give them every satisfaction compatible with the pursuit of its own interests, and to show that in this regard it is genuinely concerned to reconcile the interests of the other state with its own.¹⁶⁸

Sub article 3 of Article 17 requires the notifying state to suspend implementation of the planned measures during period of consultation and negotiation. Suspension seems reasonable, since proceeding with the planned measures during the period of consultations and negotiations would not be consistent with the concept of ‘good faith’ required by sub article 2 of Article 17. The period of suspension should be the subject of agreement by the states concerned who are in the best position to decide upon a length of time that is appropriate under the circumstances. In the event that they are not able to reach agreement, however, Article 17 sets a period of six months period. Unlike the Lake Lanoux case where the arbitrator decided that the fact that there is a dispute between two states is not in itself enough to require suspension of a project by an implementing state¹⁶⁹, in the UN Watercourse Convention the notifying state shall, if so requested by the notified state at the time it makes the communication, refrain from implementing or permitting the implementation of the planned measures for a period of six months unless otherwise agreed.¹⁷⁰ The restriction in the UN Watercourse Convention is the agreement of parties; if the planning state and notified state agrees otherwise the planned measure may be continued during the processes of consultation and negotiation. If, however, the state fails to agree on it the planning state is duty bound to suspend the implementation for a period of six months.

¹⁶⁷ N Zawahri, Dinar, and G Nigatu (2010), note 166, p.24

¹⁶⁸ Lake Lanoux arbitration(1957),note 8 p.281

¹⁶⁹ Lake Lanoux arbitration(1957),note 8, p.39

¹⁷⁰ UN Watercourse Convention(1997) note 1, art.17(3)

The same is also envisioned under Article 7 of the Salzburg resolution of the IIL which stated that during the negotiations, every state must, in conformity with the principle of good faith, refrain from undertaking works or utilizations which are the object of the dispute or from taking any other measures which might aggravate the dispute or render agreement more difficult.¹⁷¹

Once this period has expired, the notifying state may proceed with implementation of its plans, subject to its obligations under Articles 5 and 7. It is also important to note that, under the UN Watercourse Convention, the obligation to consult and negotiate does not imply an obligation to require a prior consent. In other words, it is an obligation of conduct, not an obligation of result. This understanding is in line with Lake Lanoux arbitration which stipulates that international practice prefers to resort to less extreme solutions [than requiring prior agreement]. Thus, one speaks, although often inaccurately, of the 'obligation of negotiating an agreement'.¹⁷² The tribunal underlined that it did not find clear and convincing evidence that either customary international law or the regime established by the Treaty of Bayonne between France and Spain which restricted French sovereignty to the extent of subjecting the execution of works on transboundary watercourses to Spanish consent.¹⁷³ Thus, the arbitral tribunal concluded that prior consultation is neither a right to veto the use nor unilateral right to use water by any riparian without taking into account other riparian's rights.

3.6. Notification up on Request

The planning state may fail to notify other watercourse states for various reasons. For one thing, the planning state may opt to keep silence irrespective of the planned measures' adverse effects to the other watercourse states. On the other hand, the planning state may have made an assessment of the potential effect of the planned measures causing significant adverse effect upon other watercourse states and concluded in good faith that no such effects would result therefrom.

Article 18 of the UN Watercourse Convention addresses the situation in which a watercourse state is aware that measures are being planned by another state (or by private parties in that state)

¹⁷¹ *International Law Commission*(1974), Year Book of International Law Commission vol. 2.no.2 ,p. 202

¹⁷² *Lake Lanoux* (1957), note 8, p.128, para. 11.

¹⁷³ Yearbook International Law commission (1974), note 171,para. 1065

and believes that they may have a significant adverse effect upon it, but has received no notification thereof.

The convention allows other watercourse state to request the planning state to apply the provisions of Article 12 (determination of whether the plans will have significant adverse effect or not). In order for the other watercourse states to be entitled to make such a request, however, two conditions must be satisfied. The first is that the requesting state must have *serious reason to believe* that measures are being planned which may have a significant adverse effect upon it. Consequently, for any planned measure with *no or little adverse effect*, the other watercourse state is not allowed to make a request. The second condition is that the requesting state must provide a documented explanation setting forth its reasons. These conditions are intended to require that the requesting state have concrete reasons - instead of vague and unsubstantiated apprehension. Further, a serious and substantiated belief is necessary, particularly in view of the possibility that the planning state may be required to suspend implementation of its plans under sub Article 18 of the Convention.

Sometimes, even though the other riparian states have reason to believe that planned measures have significant adverse effect and thereby request notification thereof, the planning state on the other hand may find that it is not under obligation to provide a notification arguing that its planned measures do not have *significant adverse effect*. In such cases, the Convention obliges the planning state to inform the other state about its finding providing a documented explanation setting forth the reasons for such finding.¹⁷⁴ If, however, this finding does not satisfy the other state, the latter may request the planning state take another look at its assessment and the two states may promptly enter into consultations and negotiations. Once again, implementation of the plans is to be suspended for six months - unless otherwise agreed - at the request of the potentially affected state, so as to allow room for meaningful discussions.¹⁷⁵

¹⁷⁴ UN watercourse convention(1997), note 1 at article 18(2)

¹⁷⁵ UN watercourse convention(1997), note 174

3.7. Exceptions to the Duty to Notify Planned Measures

The UN Watercourse Convention provides exceptions to the main rules of riparian duty to inform planned measures. These are exceptions in a sense that the planning states are not required to adhering to the strict requirements of Articles 12-18 of the Convention. The real needs of these exceptions are premised on balancing undeniable interest of the planning state to retain confidentiality in sensitive circumstances or to protect interest of overriding importance that require immediate implementation without awaiting the expiry of the period allowed for reply to notification, consultation and negotiations.¹⁷⁶

The first exception is found in Article 19 of the convention, which provides that a watercourse state may immediately proceed with measures that are of the utmost urgency in order to protect public health, public safety or other equally important interests. The article refers to highly exceptional cases in which interests of overriding importance requires the immediate implementation of planned measures. The interest involved in this exception includes the need for protecting public health, public safety or other equally important interests such as protecting the population from the danger of flooding.

Nonetheless, right of the state to proceed with implementation is subject to its obligations under paragraph 2 and 3 of Article 19. Paragraph 2 requires a state which proceeds with the measures to immediately provide the 'other watercourse states with a formal communication of the urgency of such measures, together with all relevant data and information'. The third paragraph of Article 19 requires that the state which proceeds to immediate implementation shall enter 'promptly' into consultations and negotiations with the other state(s) concerned, if and when requested to do so by those states. Again, the process of consultations and negotiations has to be carried out in the fashion indicated in Article 17 (1) and (2), i.e. on the basis of 'good faith' and with the goal to achieve an equitable resolution of the situation.

The other exception from this stipulation on riparian duty to inform on planned measure is provided for in Article 31 of the UN Watercourse Convention. Hence, the notifying state is not required to divulge data or information that is vital to its national defense or national security. This exception involves information ranging from strategic or military types of information to

¹⁷⁶ Charles Bourne note(1971),note 123,p.192

matters of trade secret.¹⁷⁷ The exception may further be widened to include the protection of any major facility such as a dam, power plant, or factory as subjects of national security.¹⁷⁸ Recognizing the subjectivity of this exception, the Convention had attempted to narrow the scope by requiring the planning state to cooperate in good faith with other watercourse states with a view to providing as much information as possible under the circumstances.¹⁷⁹

3.8. Effect of Failure to Comply with Procedural Rules

If a state is under a duty to notify its planned measures, the next logical question that needs examination is what effect breaches of the duty entails. In general, one can identify two kinds of failure to comply with procedural rules of the UN Watercourse Convention. On the one hand, the planning state may proceed with the execution of a project without complying with the provisions of Articles 12-14 of the UN Watercourse Convention. On the other hand, the notified state may fail to comply with Article 15 of the convention - failing to respond to the notification of planned measures.

The effect of failure to comply with its obligation on the part of the planning state is not explicitly provided under the UN Watercourse Convention. As discussed before, the 1966 Helsinki Rules of the International Law Association which merely recommend that prior notice be given contain in article XXIX, paragraph 4, attaches some legal significance to a failure to give that notice. The prescription of the Helsinki Rules is that a utilization undertaken without notices shall not be given the weight normally accorded in the event of a determination of what is a reasonable and equitable share of the waters of the basin. Thus, it prevents an important factor from being placed on the scales used to weigh the equities of competing utilization.

From the general rule of international law, the consequence of such failure will be that the watercourse state is liable for inequitable and unreasonable harm caused to other system states as a result of the planned measure in question. The other watercourse state would thus normally be compensated for the value of its sacrifice; such compensation might be financial, or it might be in the form of electricity supplies, flood control measures, enlargement of another use, or other

¹⁷⁷ International Law Commission (1982), Yearbook of international law commission vol.2, no.1, p. 65,

¹⁷⁸ International Law Commission (1982), note 177

¹⁷⁹ UN Watercourse Convention (1997), note 1, art. 31

goods, provided that such damage could have been avoided if timely notice of the danger had been given.¹⁸⁰

As presented above, if, within the period of six months, the notified state fails to respond to the notice of planned measure, the notifying state may subject to its obligation under articles 5 and 7, proceed with the implementation of the planned measures, in accordance with the notification and any other data and information provided to the notified states.¹⁸¹ This proviso clearly eliminates any undue delay where the other watercourse state cannot show that the planned measure involves significant adverse effect or is withholding its response for whatever reason. Here, it is clear that the notifying state remains legally bound by provisions of equitable utilization and the duty not to cause significant harm rules, and the unresponsive notified state can lay claim under Articles 5 and 7. Bourne submitted that this constitutes lack of balance in the treatment of the notifying and notified states for failure to comply with the required procedure; while the former is legally bound by all provisions of Article 5 and 7, the later may ignore procedural rules with impunity.¹⁸² The same author proposed that in circumstance where the notified state does not respond to notice in due time, it should thereafter be stopped from raising claims under Article 5 and 7 as result of the implementation of planned measures.¹⁸³

¹⁸⁰ International law Commission (1982), *Yearbook of international law* vol. 2, no.1 p. 67

¹⁸¹ UN Watercourse Convention (1997), note 1, art. 16

¹⁸² Charles Bourne, note 123 ,pp.69-70

¹⁸³ Charles Bourne, note 123, P.70

3.9. Conclusion

The UN Watercourse Convention has extensively elaborated the obligation of watercourse states in the implementation of planned measures on an international watercourse. The Convention provides the obligation of a watercourse state to exchange information and consult each other on the possible effect of planned measures on the condition of an international watercourse. In this regard, the convention set forth wider approach that the watercourse states are under obligation to exchange information on the possible effect of planned measures which may encompasses both negative and positive effects.

The convention also provides for detailed procedural rules requiring watercourse states to notify planned measures before implementing such schemes that may have a *significant adverse* effect upon other watercourse states. But, it is difficult and at times impossible for a state to determine on its own the effect of planned measure on other watercourse states. The rule therefore lacks precision on an essential matter. Nonetheless, the planning state may determine its equitable entitlement taking in to account factors provided under Article of 6 of the Convention.

The planning state must also allow the notified state six months period to study the matter and provide, up on request, additional information that is available and necessary for an accurate evaluation of planned measure, and refrain from implementation. The notified state on the other hand, has the obligation to communicate its finding to the notifying state within six months period. If a notified state finds that implementation of the planned measures would be inconsistent with its equitable utilization or causes significant adverse effect, it shall attach to its finding a documented explanation setting forth the reasons for the finding. Thence, the implementing state must enter in to consultation and negotiations with the notified state. The obligation to enter in to consultation and negotiation also arises when other watercourse state has serious reason to believe that the measure planned by a state, a notice of which has not been received, may have a significant adverse effect upon it.

The Convention also provides a few exceptions to the rule of riparian duty to inform planned measures. This mostly relates to implementation of measures that are of utmost urgency in order to protect public health, public safety or other equally important interests. Under these exceptional circumstances, therefore, a watercourse state is allowed to implement planned measures without the need for respecting procedural rules regulating riparian duty to notify planned measures.

CHAPTER FOUR: NORMATIVE FRAMEWORK OF NOTIFICATION OF PLANNED MEASURES IN THE NILE BASIN

4.1. Introduction

The Nile is one of the world's longest rivers shared by eleven countries - Egypt, Sudan, Ethiopia, Eritrea, Tanzania, Uganda, Burundi, Rwanda, D.R. Congo, Kenya and South Sudan.¹⁸⁴ The average annual flow of the Nile water is estimated to be 84 billion cubic meter (bcm). The Nile River has four major tributaries: the Abay (Blue Nile), Tekeze (Atbara) and Baro-Akobo (Sobat) originate in the Ethiopian highlands that contribute more than 86 per cent of the Nile water; and the White Nile, originating from the Equatorial Lakes region contributes 14 percent as measured at the Aswan Dam.¹⁸⁵

The populations of Nile basin states has increased alarmingly by a rate of three percent per annum and is projected to reach 800 million by 2025, and one billion by 2050.¹⁸⁶ In spite of this, Egypt takes the lion share in terms of water use which depends on the river for about 97% of the water supplies, yet contributes virtually no water to the Nile.¹⁸⁷ Sudan comes second in terms of utilization of the Nile water. Save the recent venture of Grand Renaissance Dam, Ethiopia has made few use of Nile water. In the area of irrigation, there are among other things small-scale irrigation schemes in the Abbay valley, Baro- Akobo, Tekeze and Fincha.¹⁸⁸ In the area of hydro power development Fincha, Tiss-Abbay, Tekeze and Tana Beles hydro power generation plants are worth mentioning. The use is, however, insignificant compared with the country's hydroelectric power potential, 144,710 GW hour/yr potential, of which the combined potential of the Abbay, Tekeze and Baro-Akobo is 102,710 GW hour/yr.¹⁸⁹

¹⁸⁴ Facts about the Nile basin initiative available online at <http://www.nilebasin.org/> accessed on 8 January 2014

¹⁸⁵ Swain Ashok (1997), Ethiopia, Sudan and Egypt: The River Nile dispute. *Journal of Modern African Studies* vol. 35, no. 4, p. 665-694

¹⁸⁶ Crhistina M.carroll (1999), note 68, p.275

¹⁸⁷ Shapland Greg (1997,) *Rivers of Discord International Water Disputes in the Middle East*, Newyork, st. martins Press.pub. P,60

¹⁸⁸ Jacob Arsano (2004), *Ethiopia and the Nile: Dilemmas of National and Regional Hydro politics*, thesis Center for Security Studies, Swiss Federal Institute of Technology, Zurich ETH Zentrum SEI, Seilergraben, p,159

¹⁸⁹ Jacob Arsano (2004), note 188

Although the River Nile connects eleven states, to date, there is no, an all inclusive legal and institutional framework that ensures the equitable and sustainable utilization of its waters. The particular focus of this chapter is, however, on the normative framework of the riparian duty to inform on planned measure in the Nile basin. This chapter would first explore the trends of riparian cooperation in the Nile basin. The riparian duty to inform on planned measures is one of the key aspects of cooperation. The rule will be examined in view of the existing Nile treaty regimes and state practices in the Eastern Nile states. The analysis also attempts to investigate the rule of riparian duty to inform planned measures in the context of Ethiopia's decision to construct the Grand Renaissance dam.

4.2. Riparian Cooperation in the Nile Basin

Most international river basins such as the Mekong, Senegal, Niger and the Uruguay rivers have institutional and legal frameworks that enable cooperation in the use, management, and conservation of their waters. In contrast, comprehensive cooperation between and among all the Nile basin state still remains far from a definite prospect. Until the late 1990s, hegemonic control and competition which constituted the central preoccupation of the colonial powers has been replicated by the independent riparian along the downstream Nile, engendering regional distrust and lack of integrated activities.¹⁹⁰ Consequently, for a very long period, cooperation was either absent or nominal with the exception of initiatives that focused on environmental protection, and at the sub basins level, it was mainly geared towards protecting the interest of Egypt and to some extent Sudan. After the 1990s, however, a remarkable shift has been witnessed in the tone and substance of state-to-state relationships along the Nile basin. In this respect, the establishment of the Nile Basin Initiative (NIB) and the consequent adoption of the Nile River Basin Cooperative Framework Agreement (CFA) could be regarded as break through attempts of basin wide cooperation in the Nile region.

¹⁹⁰ Dereje Zeleke(2010), the Nile Basin Cooperative Framework Agreement Negotiations and the Adoption of a 'Water Security' Paradigm: Flight into Obscurity or a Logical Cul-de-sac? *European Journal of International law* Vol. 21 No. 2, pp. 421-440

4.2.1. Pre-NBI Riparian Cooperation over the Nile Basin

Before the establishment of the NBI, there had been limited attempts aiming at the establishment of institutional and legal frameworks for the Nile basin. Nonetheless, most of these enterprises had been labeled as delaying mechanisms that had the sole objective of prolonging the life span of the status quo in the Nile Basin rather than establishing comprehensive basin wide institutional and legal frameworks.¹⁹¹

In 1967, with funding from the United Nations Development Program (UNDP) and the World Meteorological Organization (WMO), Hydromet was established for purposes of Hydro-meteorological Survey of Lakes Victoria, Kiyoga and Albert. Its objectives included to study, analyze and disseminate to member countries meteorological data on the equatorial lakes and rivers.¹⁹² In specifics, it purported to evaluate the water balances in the Lake Victoria, Kioga and Albert; to regulate the lake's level as well as the flow of water through the Lake. However, within 25 years of its operation, the Hydromet achieved no significant substantive impact on harmonizing the upstream-downstream polarization of interests - except the generation of some hydrological data.¹⁹³

Hydromet's signatories were Egypt, Kenya, Sudan, Tanzania and Uganda, as well as the donor organizations of UNDP and the WMO.¹⁹⁴ In the initial stages, Ethiopia showed no interest to participate in Hydromet due to its suspicion that the institution was dominated by Egypt and Sudan.¹⁹⁵ However, in 1971, Ethiopia joined Hydromet as observer.

Again in 1983, Undugu was established in Khartoum upon the initiation of Egypt under the support of the Organization of African Unity. The Undugu was initially established between Egypt, Sudan, Uganda, Congo Democratic Republic and Central African Republic (obviously the later is not Nile Basin country).¹⁹⁶ Ethiopia, Kenya and Tanzania chose to stay in the forum with an observer status. Ethiopia challenged that the Undugu, having no legal standing or terms of

¹⁹¹ Yacob Arsano (2004), note 188, p.215

¹⁹² Yacob Arsano (2004), note 188

¹⁹³ Yacob Arsano (2004), note 188, p.216

¹⁹⁴ Yacob Arsano (2004), note 188

¹⁹⁵ Tafese Tesfaye (2001), the Nile question: hydro politics, legal wrangling, Modus Vivendi and prospective, p.104

¹⁹⁶ Tafese Tesfaye (2001), note 195

reference as a legitimate body, had no competence to submit a plan of action for the Nile basin.¹⁹⁷

Though the forum was established to create cooperation in such common fields as culture, environment, telecommunication, electric power, trade, and water resource development,¹⁹⁸ the Undugu failed to lead to meaningful and concrete cooperation due to financial and political problems, as well as Egypt's loss of its initial commitment.¹⁹⁹ Egypt kept on developing giant irrigation and land reclamation projects without any consultations with the other riparians, thereby undermining the very cooperative initiative it had introduced.²⁰⁰ All in all, Undugu's achievement was limited in organizing and attaining conferences and ministerial meetings that do not provide level grounds for cooperation.

In 1992 another initiative - the TECCONILE (Technical Cooperation Committee for Promotion of the Development and Environment Protection of the Nile Basin) was established in Kampala, Uganda again on the basis of Egypt's proposal.²⁰¹ Egypt, Sudan, Rwanda, Tanzania, Uganda and Democratic Republic of Congo were the founding members. TECCONILE aimed to attain technical cooperation in the form of assistance to member states in developing national master plans and their integration in to a Nile basin development action plan; it also aspired to develop an infrastructure and build the capacity and techniques required for the development of the basin's water resources. Yet, it remained that until 1998; the organization's achievements had not been significant, simply limited to its modest contribution towards the Nile Basin Action Plan.²⁰² The main reasons for the failure of TECCONILE is attributed to the absence of adequate funding; and the reluctance on the part of Ethiopia and Kenya to remain as observers insisting that the downstream nations of Sudan and Egypt must acknowledge the rights of the upstream nations.²⁰³

¹⁹⁷ Tafese Tesfaye (2001), note 195, p.214

¹⁹⁸ Tafese Tesfaye (2001), note 195

¹⁹⁹ Dereje Zeleke(2010), *note 190*, p.224

²⁰⁰ Dereje Zeleke(2010), *note 190*, p.225

²⁰¹ Dereje Zeleke(2010), *note 190*, p.215

²⁰² Dereje Zeleke(2010), *note 190*

²⁰³ Tafese Tesfaye (2001), note 195, p.107

Kenya and Ethiopia also claimed that establishing a legal and institutional framework should be given top priority instead of concentrating on the design and implementation of vague long-term objectives.²⁰⁴

During all the pre-NIB endeavors of cooperation, Ethiopia argued that any attempt to establish sustainable cooperation in the Nile basin should address the fundamental issue of the establishment of sound institutional and legal framework that replaces the long overdue question of regulatory and institutional procedures. For the most part, Ethiopia viewed the older cooperation enterprises in the basin as mostly superficial for often, they had single technical subjects as their centerpiece.²⁰⁵

4.2.2. Nile Basin Initiative (NBI)

The NBI was officially launched in 1999 at Dares Salam, Tanzania, by the Council of Ministers of Water Affairs of the Nile basin states (Nile-COM) as ‘an inclusive transitional mechanism for cooperation until a permanent cooperative framework is established’.²⁰⁶ The Nile-COM principally agreed to come up with a Subsidiary Action Program (SAP) and Institutional and Legal Framework known as the D-3 Project.²⁰⁷ The SAP aimed to create an enabling environment for cooperative management and development in the Nile basin. This in turn was organized in two sub-basins – the Nile Equatorial lakes basin (NELSAP) and the Eastern Nile Basin (ENSAP), which refer to the catchment areas of the White and Blue Niles respectively.

The structure facilitated project proposals, consultation and dialogue among the basin countries.²⁰⁸

²⁰⁴ Tafese Tesfaye (2001), note 195, p.107

²⁰⁵ Interview with Ato FekeAhmed Negash(2013) , note 55

²⁰⁶ Facts about Nile basin initiative, available online at <http://www.nilebasin.org> accessed on 3/18/2014. See also Brunnee and Toope(2002), ‘The Changing Nile Basin Regime: Does Law Matter?’, *Harvard International Law Journal* vol.43,p. 122–131

²⁰⁷ Nile basin initiative available at http://www.nilebasin.org/index.php?option=com_content&task=view&id=13&Itemid accessed on 28 December 2013

²⁰⁸ Yacob Arsano,(2004), note 188, P.217. Of the 57 project proposals seven were short-listed and were presented to the ICCON (International Consortium for Cooperation on The Nile) conference, held during June 26 – 28, 2001,in Geneva. ICCON is an international forum of bilateral, multilateral and private funding agencies from which the Nile basin countries seek funding pledges for their shared vision projects

However, a mutually acceptable legal and institutional framework had been difficult to agree on. The disagreements were already noted in December 1999 during the deliberation on the draft legal / institutional framework prepared by a UNDP consultant.²⁰⁹ The upstream countries insisted that a new framework must disregard all previous agreements to which they are not a party. On the other hand, the downstream countries hoped that a new framework would take into account the previous agreements as an integral part of a new arrangement. Besides, Ethiopia made reservations to the inclusion of provisions on the prior notification of planned projects and the no harm rule.²¹⁰ Egypt and Sudan, in turn, made reservations to provisions affecting their existing use of the Nile. Due to many reservations registered by the riparian states, the draft agreement was not signed, and in 2000 the NBI had to announce that ‘substantive issues in the cooperative framework agreement remain unresolved.’²¹¹

4.2.3. The Nile Basin Cooperative Framework Agreement

It took a decade for the negotiations which commenced in 1997 to produce a draft cooperative framework agreement. In June 2007, during its 15th meeting in Entebbe, Uganda, the Nile COM concluded negotiation and agreed on all articles of the draft Cooperative Framework Agreement, except one which dealt with water security under Article 14(b).²¹²

During the Sharm El Sheik meeting, seven upper riparian countries decided that the CFA be open for signature for a year period, starting 14 May 2010, and resolved to sign the Agreement.²¹³ As of today, the CFA has been signed by six countries namely Burundi, Ethiopia, Kenya, Rwanda, Tanzania, and Uganda. The Republic of South Sudan, formally admitted to the NBI since July 2012, and the Democratic Republic of Congo are expected to follow same suit. Nationally, the framework is also ratified by Ethiopia and Rwanda²¹⁴ while Uganda²¹⁵ and Kenya has declared their intention to ratify the CFA.²¹⁶

²⁰⁹ Yacob Arsano,(2004), note 188, P.211

²¹⁰ Tafesse Tesfaye (2001), note 195 p, 111.

²¹¹Tafesse Tesfaye (2001), note 195, p. 112

²¹² Patricia Wouters (2013), *International Law – Facilitating Transboundary Water Cooperation* Global Water Partnership Technical Committee (TEC), background paper, No.17, Printed by Elanders, p8

²¹³ Patricia Wouters (2013), note 212

²¹⁴ Ethiopian Reporter (2014), Ethiopia and Rwanda have so far ratified the bill available at <http://www.thereporterethiopia.com/index.php/news-headlines/item/1737-kenya-closer-to-ratifying-the-cfa-bill-on-the-nile> accessed on 3/20/2014

In contrast, Egypt and Sudan campaigned for the inclusion of a sub - article in the CFA to maintain the status quo of the monopoly over the Nile waters as established by the colonial powers and the Egyptian-Sudanese bilateral agreement signed in 1959. Upstream states consistently reiterated that they do accept neither the letter nor the spirit of the colonial or subsequent agreements that denied their sovereign rights and legitimate interests in use of Nile waters.

The CFA, as provided in its preamble, is a framework agreement to strengthen cooperation and govern relations among the basin countries with regard to the Nile River Basin. It aspires to promote integrated water management, sustainable development and harmonious utilization of the water resources of the Basin, as well as their conservation and protection for the benefit of present and future generations. It also provides for the establishment of a permanent Nile River Basin Commission through which member countries will act together to manage and develop the resources of the Nile. Most importantly in the context of the present chapter, the Commission will act as an appropriate clearing house to new projects or planned measures in the Nile River basin and hence regulate the use of the basin water resources.

4.3. The Normative Framework Governing Notification of Planned Measures in the Nile Basin

In the following section, the legal basis of riparian duty to inform on planned measure would be systematically analyzed in the context of Nile basin. The presentation shall explore a handful of agreements concluded on Nile River in the past which may enlighten on the actual workings of riparian duty to inform on planned measures under international watercourses law. In particular, the practice of the Eastern Nile states of Ethiopia, Sudan and Egypt is investigated. Finally, concluding with analyses of the Grand Ethiopian Renaissance Dam (GERD) in line with the international law rule of riparian duty to inform on planned measures.

²¹⁵ Prof. Ephraim Kamuntu (2013), according to Ugandan the minister of water and environment, country is to ratify the Cooperative Framework Agreement (CFA), a new treaty that is seeking to replace the controversial colonial agreements governing the Nile available online at <http://www.newvision.co.ug/news/644297-uganda-to-ratify-new-river-nile-agreement.html> accessed on 3/19/2014

²¹⁶ John Rao Naoro (2010), *The Status of the Nile River Basin Cooperative Framework* available on line <http://www.afriwater.org/articles/363-the-status-of-the-nile-river-basin-cooperative-framework-2010> accessed on 8 January 2014

4.3.1. Nile Basin Agreements and the Riparian Duty of Notification

Several water agreements have been concluded regulating the Nile during and after the colonial era.²¹⁷ To begin with, on 15 May 1902 Britain signed a frontier delimitation agreement with Ethiopia.²¹⁸ The agreement was outcome of British pursuit of such a broad strategy to guarantee the unimpeded flow of the Blue Nile to downstream states.²¹⁹ Although the treaty had been framed as a border arrangement aimed at delineating the boundary between Ethiopia and Anglo-Egyptian Sudan, a water provision was included in the third article which requires the prior consent of Great Britain and Sudan. Article III of the treaty has a nexus to notification and consultation on planned measures for it requires not only prior notification but also authorization.

The treaty was drawn up in Amharic and English language, both languages equally authentic and official. Article III of English version of the treaty reads as follows:

*His Majesty Emperor Menelik II, King of Kings of Ethiopia engages himself towards the Government of his Britannic Majesty, not to construct or allow to be constructed any work across the Blue Nile, Lake Tana or Sobat which would arrest the flow of their water in to the Nile except in agreement with his Britannic Majesty's and the Government of Sudan.*²²⁰

²¹⁷These agreements include: the Protocol between the UK and Italy government for the demarcation of their respective share of influence in the East Africa from Ras Kasar to Blue Nile (15 April 189); Treaty between Ethiopia and the UK Relative to the Frontier between the Sudan, Ethiopia and Eritrea, Addis Ababa(May 1902), London Printed for his Majesty's stationary office, Harrison and Sons, St. Martins Lane, (herein after called the Anglo-Ethiopian treaty); Treaty between the United Kingdom and Independent state of Congo to define their respective sphere of influence in Eastern and Central Africa, London (9 May 1906); Agreement between the UK, France and Italy respecting Abyssinia (9 May 1906) (these agreements can be found in E. Hertslet, *The Map of Africa by Treaty*, 3rd edn. (London, Frank Cass 1967), (noted in '*The River Nile in the post-colonial age*', edited by T. Tvedt. London: I.B. Tauris, 161-178); 1925 Exchange of Notes between the UK and Italy respecting concession for barrage at Lake Tana and Railway across Abyssinia from Eritrea to Italy Somaliland 50 LNTS (1925; the Exchange of Notice between his Majesys's government in the United Kingdom and the Egyptian government in regard to the use of the Water of the River Nile For irrigation purpose, Cairo(1929)

²¹⁸ Treaty between Ethiopia and the UK Relative to the Frontier between the Sudan, Ethiopia and Eritrea, Addis Ababa(May 1902), London Printed for his Majesty's stationary office, Harrison and Sons, St. Martins Lane, (herein after called the Anglo-Ethiopian treaty)

²¹⁹ Yacob Arsano (2004), note 188 at P,97

²²⁰ The Anglo-Ethiopian treaty (1902), note 218, Art. 3. See also Edward Ullendorff (1967), *The Anglo-Ethiopian Treaty of 1902 Bulletin of the School of Oriental and African Studies, University of London*, Vol. 30, No. 3, Fiftieth Anniversary Volume, Pp 641-654

Whereas the Amharic version reads as follows:

፫ተኛ፡ ክፍል፡፡
ጃገሆይ፡ ዳግጣዊ፡ ምኒልክ፡ ገጉሠ፡ ነገሥት፡ ዘኢትዮጵያ፡
በጥቁር፡ ዓባይና፡ በባሕረ፡ ጻና፡ በሰባት፡ ወገዝ፡ ወደ
ነጭ፡ ዓባይ፡ የሚወርደው፡ ውሀ፡ በአገገሊዝ፡ ጠገን፡
ጋራ፡ አሰታድዎ፡ ሳይሰጡ፡ ወገዝ፡ ተዳር፡ አዳር፡ የሚደ
ፍገ፡ ሥራ፡ አገዳይሰሩ፡፡ ወይም፡ ወገዝ፡ የሚደፍገ፡ ሥራ፡
ለጣሠራት፡ ለጣገም፡ ፈታድ፡ አገዳይሰጡ፡ በዚህ፡ ውል፡
አድርገዋል፡፡

A literal translation of the Amharic text more or less read:²²¹

His majesty Menelik, King of kings of Ethiopia, has agreed in this treaty not to construct, nor authorize anyone to construct a work that blocks up/stops up from river bank to river bank the water descending from Black Abbay, from Lake Tana, and from the Sobat River towards the White Abay without previously agreeing with the Britain government.

Successive governments, both in Great Britain (and later the Sudan) and in Ethiopia construed Article III of the accord as stipulating contrasting scales of obligation; the word *arrest* surfaced as controlling and contentious part of the treaty.²²² Great Britain had naturally advocated the wider view that obliges Ethiopia not to arrest the flow of the rivers in whatsoever way without prior authorization by it - which in turn presupposes obligation on the part of Ethiopia to inform any planned measures. In fact, Great Britain deduced from the treaty and pursued its policies on the assumption that Ethiopia had been bound to completely refrain from laying any water control on the Nile and its tributaries without prior notification and subsequent authorizations by its government, the scale of the construction or its impact on the sustained flow of the watercourse

²²¹ Tadesse Kassa Woldestadik (2013), note 49, p.57

²²² Tadesse Kassa Woldestadik (2013), note 49, p.58

notwithstanding.²²³ For example, in the course of 1922 when the Lake Tana Dam concessions negotiation was being undertaken, major Dodds, the British delegate in Ethiopia reminded Ethiopia of its obligation not to construct any work 'which would diminish the volume of water flowing in to the Nile without consultation with British government.'²²⁴

The scope of the framing of Ethiopia's obligation varied depending on which line of interpretation one adopts. But generally, it was argued that Ethiopia consented to seek the consent of Britain and later Sudan before engaging in any construction which entailed that Ethiopia is not only duty bound to inform the former but also has to secure prior authorization before it embarks on works on the above mentioned rivers and Lake Tana.²²⁵

On the other hand Ethiopia's argument, both in the past and now, largely deviated from the reading mentioned above. Firstly, Ethiopia contested the validity of the 1902 agreement on various grounds. Although controversially, it was asserted that the treaty's conclusion had involved coercion manifested in a political environment where there were perceived threats to Ethiopian sovereignty over its natural resources; to use a catching expression by one author, 'the glowing state of inequity instituted by the treaty gravely jeopardized Ethiopia's development prospect, and hence could afford a legal ground for calling the nullity of the arrangement' on a number of legitimate grounds.²²⁶ Besides, the validity of the 1902 treaty has been contested by Ethiopia on the basis of fundamental change of circumstances as stipulated under the relevant provisions of the Vienna Convention of the Law of Treaties.²²⁷ In this regard, it was submitted that among others the establishment of Sudanese self-rule in the mid twentieth century had represented a radical transformation of the status quo fundamentally affecting the position of the parties to the original accord; the very purpose which the 1902 treaty sought to achieve, i.e. upholding of the welfare of the British colonial establishment in the Sudan and Egypt and the friendly relationship between Great Britain and Ethiopia, could not no longer be fulfilled through the same treaty scheme.²²⁸

²²³ Tadesse Kassa Woldestadik (2013), note 49,p.58

²²⁴ Tadesse Kassa (2013), note 49, p.63

²²⁵ Crhistina M.carroll (1999), note 68, p.278

²²⁶ Tadesse Kassa (2013), note 49, p.112

²²⁷ United nation Vienna Convention on the Law of treaty (1966), Vienna UN Treaty serious Voll .1155, 331, Art.62

²²⁸ Tadesse Kassa (2013) note 49, p.117

In addition, by operation of the rules of state succession, Ethiopia would now be required to discharge the obligation to an essentially different party, a fact which itself depicts fundamental changes from the original anticipations of Great Britain and Ethiopia within the framework of the 1902 treaty.²²⁹ Consequently, Ethiopia can base its claim for calling the abrogation of the agreement on the basis of fundamental change of circumstances.

As alternative to arguments forwarded on the validity of the agreement, Ethiopia also defended a wider construction of the treaty on the bases of technical interpretation. It submitted that under the 1902 treaty, the agreed upon obligation under article III was about *not stopping* the entirety of the waters of the Abay, Lake Tana and Sobat. The ordinary meaning of the text therefore does not prevent any Ethiopian uses that merely diminish (and do not completely obstruct) the water's flow. Substantiating the position of Ethiopia, one author noted the following:²³⁰

'In 1907, a few years after the conclusion of the treaty, Emperor Menelik was engaged in negotiation for the insertion of an interpretative note into the Anglo-Ethiopian treaty, which he computed would water down its down beating implication. Then, the Emperor succeeded in retaining Lord Cromer's guarantee that the terms of article III of the treaty do not imply any intention of interfering with local rights, so long as no attempt is to be made to arrest or interfere in any way with the flow of these rivers....'

In concluding this argument the writer argued that the broader construction of the Anglo-Ethiopian Treaty as maintained by Great Britain would in effect turn the country in to a state of *permanent servitude* as regards its key resources, and such a view would prove objectionable to any politically independent state and legally the subject of intensive scrutiny; a limitation of such a scale would distress sovereign prerogatives and cannot be upheld unless it has found an unequivocal expression in a treaty undertaking.²³¹

This line of interpretation entails that Ethiopia did bound itself neither to inform nor to secure consent of Britain and later Sudan for any contemplated projects of a nature that *do not totally arrest* the flows of the aforesaid rivers and Lake Tana. This is currently propounded by Ethiopian

²²⁹ Tadesse Kassa (2013) note 49, p.117

²³⁰ Tadesse Kassa (2013) note 49, p.64

²³¹ Tadesse Kassa (2013) note 49, p.66

government with regard its Grand Renaissance Dam project. Among others, the government has consistently defied the interpretation of the 1902 treaty as obliging Ethiopia to secure the consent of Great Britain and later Sudan for the contemplated projects that have no the effect of arresting the flow rivers and Lake Tana entirely. In an interview with a key official at the Ministry of Water, Irrigation and Energy in Ethiopia, it was affirmed that:²³²

‘...technically the 1902 Anglo-Ethiopian treaty does not prohibit unilateral construction of dams in those rivers and lakes, nor does the treaty oblige Ethiopia to inform and require consent of Sudan; currently, while constructing a facility such as the Grand Ethiopian Renaissance Dam, Ethiopia’s actions do not arrest the flow the river in its entirety and forever.’

All in all, it would appear from the above discussion that the riparian duty to inform on planned measure can’t be inferred indisputably from the contents of the 1902 Anglo-Ethiopian treaty. Nor does it provide details of procedure to be followed in case of contemplated projects.

On the other hand, the 1929 agreement between the UK - acting on behalf of Sudan and its Eastern African colonies (Kenya, Uganda and Tanzania), and Egypt has been concluded to satisfy long standing downstream interests.

The agreement officially recognizes the ‘natural and historical right of Egypt to the waters of the Nile’ and vests in it a right to veto water development works undertaken by upstream riparian states that could jeopardize Egyptian interests.²³³

The Treaty also provided for upstream water works to be administered ‘under the direct control of the Egyptian Government and left Sudan’s water allocation subordinated to Egypt’s water needs.’²³⁴ Consequently, without a previous notification and agreement of the Egyptian Government, no irrigation or power works or measures are to be constructed or taken on the River Nile and its branches, or on the lakes from which it flows, so far as all these are in the Sudan or in countries under British administration, which would, in such a manner as to entail

²³² Interview with Fekeahmed Negashi(2013), note 55

²³³ Exchange of Notes between His Majesty’s Government in the United Kingdom and the Egyptian Government on the Use of Waters of the Nile for Irrigation, Cairo, 7 May 1929, 93 LNTS p. 43 (hereinafter the 1929 Agreement)

²³⁴ The 1929 Agreement, note 217 para, 4(ii) and 4(iv)

any prejudice to the interests of Egypt, either reduce the quantity of water arriving in Egypt, or modify the date of its arrival, or lower its level.²³⁵

Upon independence, Sudan declared that it was not bound by the 1929 agreement - objecting to Egypt's veto rights and the restriction on Sudan's development.²³⁶ Consequently, after rounds of intensive negotiation, Egypt and Sudan signed the 1959 Agreement for the full utilization of the Nile waters in which Sudan recognizes Egypt's historical rights; the waters were allocated to the two states only.²³⁷ The agreement provided that after the Aswan High Dam becomes fully operational, Sudan would receive 18.5 bcm and Egypt would receive 55.5 bcm as long as Nile yield remains the same.²³⁸ The two downstream states also presume future demands of other riparian states and agreed to present a unified view in any other negotiation concerning the Nile water.²³⁹

Ethiopia was not a party to both the 1929 and 1959 agreements, and hence could not be bound by the terms of those agreements. In this respect, Article 34 of the Vienna Convention on the Law of Treaty clearly states that 'a treaty does not create either obligations or rights for a third State without its consent.' Hence, whatever the procedural or substitutive provisions which may have been stipulated in those agreements with regard to notification on planned measures will not bind Ethiopia.

In 1993, a framework agreement on the Nile Waters was signed between Ethiopia and the Arab Republic of Egypt.²⁴⁰ The accord has eight Articles of which five deals with the Nile water issues. The overall objectives of the agreement, as provided in its preamble, were to consolidate the ties of friendship, enhancing cooperation between the two countries, and to establish a broad base of common interest for the realization of their full economic and resource potentials. Under its substantive part, the two countries undertake to refrain from any activity related to the Nile waters that may cause *appreciable harm* to the interests of the party (Article 5).

²³⁵ The 1929 Agreement, note 217, para,4(b)

²³⁶ Dellapenna (1997), 'The Nile as a Legal and Political Structure', in E.H.P. Brans, E.J. de Haan and A. Nollkaemper, eds., *The Scarcity of Water: Emerging Legal and Policy Responses* (London, Kluwer Law International p. 125.

²³⁷ Agreement between the Republic of the Sudan and the United Arab Republic for the Full Utilization of the Nile Waters, Cairo, 8 November 1959, 453 UNTS p. 6519 (hereinafter the 1959 Agreement)

²³⁸ The 1959 agreement, note 217, at article 2(3)

²³⁹ The 1959 agreement, note 217, art. 5

²⁴⁰ Framework for General Co-operation" signed between the Arab Republic of Egypt and Ethiopia at Cairo July 1, 1993. See also Max -plank institute (1994), encyclopedia of public International Law, publication Vol. 1. P. 595

The framework agreement goes on specifying the procedural rules in its Article 6 and 7. In this regard, the signatories undertook to *consult and cooperate* in projects that are mutually advantageous, such as projects that would enhance the volume of flow and reduce the loss of Nile waters through comprehensive and integrated development schemes (Art.6). Under Art.7, the parties agreed that they shall hold periodic consultations on matters of mutual concern, including the Nile waters, in a manner that would enable them work together for peace and stability in the region.

Closely looking at the provisions of article 6 and 7 of the framework agreement, the stipulations which were meant to be undertaken within the context of joint mechanisms seem to refer to the doctrine of prior notification and consultation. In general, the arrangement would appear to provide support to Egypt's long-term position of requiring its authorization and vetoing projects of upper riparian, although it would have effect only and only when jointly agreed upon procedures and mechanisms are in place. For Ethiopia, the notion of prior consultation has not been in line with its negotiation strategy during UN watercourse convention as well as in the CFA; until recently, it has consistently refused the inclusion of a specific rule on notification of planned measures. Elucidating on the issues, one author commented:

..in view of the fact that Egypt has never consulted Ethiopia on any of her mammoth projects, including the construction of Aswan High Dam, the Nile waters diversion to West and East Sinai and the construction of the Mega project which involves a huge diversion of the Nile waters to the newly reclaimed western desert area of Egypt, the stipulation of 'periodic consultation' seems to refer to upstream Ethiopia again being required to hold consultation with downstream Egypt in cases where the former intends to utilize the water resources within her own territories...which would appear unacceptable.²⁴¹

Setting aside also the substantive expectations of agreement, the 1993 framework agreement has not been ratified by either of the governments. The Council of Representatives was an organ mandated to ratify international agreements under the Transitional Charter of Ethiopia, while the

²⁴¹ Yacob Arsano (2004), note 188, P.103

House of Representatives assumed same powers after the adoption of the FDRE constitution.²⁴² Therefore, the agreement serves merely as a memorandum of understanding.

Turning to basin wide agreements, the concept of riparian duty to inform on planned measures has been formally introduced under the CFA adopted in 2010. The CFA stipulates the principle that the Nile basin states shall exchange information on planned measures through the Nile River Basin Commission.²⁴³

However, the concept has not been sufficiently addressed in the CFA, and lacks details of how and when the obligation would arise, the amount of period of notice and the effect of failure to provide notice of planned measures. Hence, unlike the SADC protocol and other basin specific agreements with detail procedural rules of notification on planned measure, the CFA only provides the principle of a duty to inform on planned measure as a cardinal principle of the framework agreement leaving the details, presumably, to be drawn by the Nile Basin Commission. The commission, among other things, is vested with the power to promote and facilitate the implementation of the principles, rights and obligations provided for in the framework; to serve as an institutional framework for cooperation among Nile Basin states in the use, development, protection, conservation, and to facilitate closer cooperation among the states and peoples of the Nile River Basin in the social, economic and cultural fields.²⁴⁴

From the expressed power of the commission one can infer that implementation of principles such as cooperation among Nile Basin states in the use, development, protection, conservation, is the matter to be dealt by the commission.

In summary, one can note that the stated agreements in the Nile river basin barely provide clear procedures with regard to the principle of a riparian obligation to inform on planned measures.

²⁴² Interview with Ato Fekeahmed Negash, note 49. Transitional period charter of Ethiopia (1991), No.1 22 July 1991, Addis Ababa, art. 9(h). And also the agreement has never been ratified by the house of people representatives which is mandated ratify international agreements concluded by the Executive as pre article 55(12) of FDRE Constitutions.

²⁴³ Agreement on the Nile River Basin Cooperative Framework, article 8. The Framework shall be open for signature by all States in whose territory part of the Nile River Basin is situated, from 1st of August 2009 to 1st of August 2011 in Entebbe, Uganda

²⁴⁴ Agreement on the Nile River Basin Cooperative Framework (2011), note 243, art. 16

4.3.2. State practice in the Eastern Nile concerning planned measures

Article 38(1) (b) of the ICJ Statute presents two traditional elements important in the formulation of international customary law: general state practice and *opinion juris*. Customary law emanates from the past conduct of states and comes into existence if a practice is extensive, virtually uniform and supported by a sense of legal obligation (*opino juris*).²⁴⁵ Though most rules relating to shared watercourses may be envisioned in treaty instruments, state practice nevertheless plays an important role in understanding the perception of states to certain principle of international watercourse law. The practice of states becomes even more important where the relations between states are not subject to any specific treaty regime. The relationship between the Eastern Nile basin states of Sudan, Egypt and Ethiopia has that element and character. For one thing, not *all* the Nile basin states have signed the Cooperative Framework Agreement. On the other hand, none of the Eastern Nile basin states are party to the UN Watercourse Convention. Thus, comprehensive treaty regimes in the Nile basin do not provide a clear normative basis with regard to the principle of the duty of notification on planned measures.

The following section, therefore, presents the practice of the Eastern Nile states as relating to the application of notification on planned measures. The scrutiny would help to deduce trends of states' adherence to the principles of cooperation in general and notification of planned measures in particular.

To start with the practice of downstream states, Egypt has undertaken giant projects in Nile River on different occasions. In 1970, for example, Egypt completed the construction of the Aswan High Dam.²⁴⁶ A question that should be raised is whether or not Egypt had ever provided appropriate notification to upstream nations, from whence the entirety of the waters comes.

In relation to the construction of the Aswan High Dam which was undertaken within the framework of the negotiations between Egypt and Sudan for full utilization of the Nile waters, Egypt proceeded with the building of the edifice without prior information, consultation and

²⁴⁵ Kelly Patrick (1970), *Twilight of customary law Virginia, Journal of International Law, Vol.40, No.2* p.450-544

²⁴⁶ Aswan High Dam, Arabic Al-Sadd al-Ālī, rockfill dam across the Nile River, at Aswan, Egypt, completed in 1970 (and formally inaugurated in January 1971) at a cost of about \$1 billion. The dam, 364 feet (111 meters) high, with a crest length of 12,562 feet (3,830 metres) and a volume of 57,940,000 cubic yards (44,300,000 cubic metres), impounds a reservoir, Lake Nasser, that has a gross capacity of 5.97 trillion cubic feet (169 billion cubic metres) available at <http://www.britannica.com/EBchecked/topic/40203/Aswan-High-Dam>: accessed on 13January 2014

participation of the upstream nations.²⁴⁷ The unilateral action of Egypt and in part Sudan went to an attempt to transfer water to places outside of the natural basin without any regard to the interest of the upstream states. Upper riparian states including Ethiopia have never been notified, although Ethiopia protested against the construction of the dam itself as well other beyond-basin transfer initiatives. The downstream response was contrary to the very principles of prior notification and consultation. This is particularly evident from the fundamentals of Egypt's national policy on the subject - which is influenced by the following reported statement by its late president Anwar Sadat.²⁴⁸

'Once I have decided to divert the Nile waters into Sinai I am not obliged to consult and secure permission from Ethiopia if they do not like our measures, they can go to hell.'

Since 1997, Egypt unilaterally adopted the implementation of grandiose schemes of water diversion out of the natural valley of the Nile River for new resettlements and urbanization. The plan includes horizontal expansion of projects over the Nile water so as to increase agriculture by 35 percent as a result of the expansion of two mega project in Toshka and Sinai.²⁴⁹ These projects purport to create a home to over 20 percent of the population.²⁵⁰ In so doing, Egypt has never notified the upstream states in any way, but has argued, quite consistently, that it is acting within its 1959 shares.²⁵¹ The unilateral measures in fact show that Egypt has not adhered to the principles of notification on planned measures.

Likewise, in line with the authorization provided under the 1959 treaty, Sudan carried out several projects without consulting and notifying other riparian states of the Nile basin, including Ethiopia. After the 1959 bilateral agreement with Egypt, Sudan, started the construction of Rosaries Dam in 1961 and completed same in 1966 - again without giving due regard to the interest of Ethiopia and other upstream states.²⁵² As recently as in 2013, the Sudanese government inaugurated the heightening of the Al-Rosaries Dam which would enable the nation

²⁴⁷ Yacob Arsano (2004), note 188 p.220

²⁴⁸ Yacob Arsano (2004), note 188 p.220 (noted from Anwar Sadat speech written on the Egyptian Gazette, June 5, 1980)

²⁴⁹ National Water Resource plan of Egypt(2005), National Water Resource Plan for Egypt -2017, p21

²⁵⁰ National Resource Plan(2005), note 250, p.25

²⁵¹ Girma Amare (2009), note16, p.9

²⁵² Al-Rossires Dam Encourages Agriculture in Blue Nile State available at <http://news.sudanvisiondaily.com/details.html?rsnpid=199448>, accessed on 14 January 2014

to increase its irrigable land to 2 million hectares, power generation by 50% and water storing capacity from 3 to 7.4 billion cubic meters, without any official consultation and notification to Ethiopia.²⁵³

In a nutshell, major projects by downstream states have been constructed unilaterally without notification to upstream state specially Ethiopia whence more than 85 percent of the Nile floods flow. Embarking on projects without notification, consultation or participation of the upstream states is partly attributed to the monopolistic mind set instituted by the colonial and post-colonial treaties and subsequent practices, and most importantly, the erroneous belief that riparian states' duty to inform on planned measures applies only in upstream-downstream relationships and not the vice versa. Harm is generally perceived as emanating only from the actions of upstream states. In this respect, for example Egypt has inaccurately argued that only geographically upstream states have duty to inform on planned measures; in this regard, one Egyptian official noted the following:²⁵⁴

Pursuant to the principles of good neighborliness and good faith cooperation, Ethiopia owes the obligation to inform planned measures to other riparian states; but when it comes to the question of whether Egypt too had obligation to inform Ethiopia the construction of Aswan High Dam and the Toshka projects, Egypt would have the obligation to inform only out of courtesy and not legally obliged as the named projects planned by a lower riparian state do not cause adverse effect to upper riparian states. There exists a difference between lower and upper riparian states with regard to how the duty to inform on planned measure is conceived.

Evidently, such perception has no support under the rules of international watercourse law. Indeed, the rule on notification on planned measures operates to both upstream and downstream states. Downstream development creates facts on the ground and that obviously affects the future use of the river by up-stream states; in light of this, downstream states too have to notify up stream states of such planned measures.

²⁵³ http://www.diu.gov.sd/en/index.php/home_en/show/94#.UtTsgRQQSXs, accessed on 14 January 2014

²⁵⁴ Interview with Ahmed Abdelaziz (2013), note 23

Moreover, the UN Watercourse Convention does not at all make distinction on riparian duty to inform on planned measures on the basis of state's geographical location.

Coming to Ethiopia's practice, for quite a long period, the government of Ethiopia has consistently opposed to the inclusion of a provision on riparian duty to inform on planned measure in agreements that sought to regulate Transboundary Rivers. Ethiopia's stand can be inferred from the position it took at different international and regional negotiation forums regulating shared watercourses. During the 1974 United Nations Water Conference in Mar Del Plata, Argentina, for example, Ethiopia made it clear that 'it is the sovereign right of any riparian state, in the absence of any international agreement, to proceed *unilaterally* with the development of water resources within its territory.'²⁵⁵ This position of Ethiopia has been maintained until recently; following the conclusion of the negotiation on the UN Watercourse Convention, Ethiopia protested the inclusion of some provisions and later abstained from voting in favor of the Convention alleging, among others, that Part III of the Convention puts an onerous burden on upper riparian state.²⁵⁶

In its most recent venture, however, it would seem that Ethiopia has adopted a new approach accepting, unilaterally and out of a sense of good neighborly relationships, the moral obligation to notify riparian states on planned measures and involve them in some form of consultative processes. This has been done by carrying out the exchange of information on planned measures through third party mechanisms than through bilateral arrangements involving the riparian states directly.²⁵⁷ Even then, the application of such proposition has been proposed by the Ethiopian government. An official from the Ministry Water, Irrigation and Energy of Ethiopia affirmed that in principles, Ethiopia accepts the provision of notification of planned measures as envisioned in the CFA, and must be conducted through the Nile Basin Commission and not via individual states.²⁵⁸

²⁵⁵ Gebre Tsadik Degefu (2010) note 38, pp.133-134

²⁵⁶ Mohammed Abdo, The relevance and contribution of UN watercourse convention towards resolving the problems in the Nile basin available at http://www.dudee.ac.uk/cepmlp/journal/html/Vol15/Vol15_8.pdf accessed on 7/22/2013

²⁵⁷ Girma Amare (2009), note 16, p.10

²⁵⁸ Interview with Fekahmed Negash (2013), note 49

4.3.3. Implications

From the foregoing agreements and existing practice of states in the Eastern Nile, one can deduce a few implications of the principle of riparian duty with regard the duty to inform on planned measures. The 1929 and 1959 agreements only gave Egypt a veto power in the basin and imposed obligation on other parities to get authorization for any development enterprise on the river, hence going beyond the commitment of notification on contemplated projects.

As far as Ethiopia is concerned, the 1902 Anglo-Ethiopian treaty had stipulated the requirement of prior consent under Article III of the agreement. However, whether this provision obliges Ethiopia to notify planned measures or, even, to obtain prior consent from Britain and later the Sudan very much depends on a careful construction of the scope of the treaty and on the continued validity of the agreement. Merit wise, Ethiopia has outlined the circumstances on which the validity of the agreement could be challenged. Besides, there had always existed a contradiction between the parties concerning the treaty's technical interpretation on such key words as 'arrest'. The Amharic version of the treaty and later communications between the British government and Emperor Menelik II lead to the conclusion that Ethiopia did not bind itself to get authorization for planned measures other than those that arrest the flow of the river in its totality.

Likewise, the practice of states in the Eastern Nile offers no help in elucidating the states' duty to inform on planned measures. While the level of resource utilization is patently low, hence raising little issue, if any, one would also observe that a unilateral practice has generally prevailed in relation to the use, planning and management of Nile River in Ethiopia.

All in all, one can conclude that the principles of riparian duty to inform on planned measures is neither regulated indisputably by all-inclusive legally binding treaty nor supported by consistence state practices of the Nile basin states.

CHAPTER FIVE: THE GRAND ETHIOPIAN RENAISSANCE DAM

5.1. Background view: Physical Information and Context of its Development

Ethiopia had had a long established desire to construct dam within its territories and gratify the ever-growing demand of its population for electricity, domestic uses and irrigation. In the late 1930's, G.J. White Engineering, US based Corporation, carried out a complete survey of Lake Tana project to construct a barrage on Lake Tana's outlet to the main Abbay River area.²⁵⁹ But the project did not take off for two reasons: first, the British Labor government put diplomatic pressure on the US government so that the G.J. White Engineering Corporation would not continue with its planned project on the head-waters of the Nile, second, the Italian invasion of Ethiopia was already looming, and Ethiopia was preoccupied with how to avert the impending invasion.²⁶⁰

The next initiative involved the Abay (Blue Nile) Master Plan Study conducted by the US Bureau of Reclamation. The intensive study of the Abbay basin project proceeded for five years (1959-1964), the result of which was a comprehensive report on the hydrology, water quality, hypsography, geology, sedimentation, mineral resources, land resources, ground water and the local socio-economic situation.²⁶¹ However, in spite of the relatively long period it took accomplish the study and the important proposals, the projects were never implemented with the exception of Fincha agro industry which only took off in the 1980s in an entirely different context.²⁶²

In 1962, a German engineering team carried out an extensive study of the Gilgal Abbay basin to determine the development potential of the basin. The study identified a great potential for producing oil seeds, pulses and fodder at a commercial scale, and indicated that the export of the crops which would earn foreign exchange for the country.²⁶³

²⁵⁹ Yacob Arsano (2004), note 188, p.151

²⁶⁰ Yacob Arsano (2004), note 188, p.153

²⁶¹ Yacob Arsano (2004), note 188, p.153

²⁶² Yacob Arsano (2004), note 188, p.154

²⁶³ Yacob Arsano (2004), note 188, p.154

The findings of the study, however, could not be translated into actual investment ventures because the Gilgal Abbay development project was subsumed in the larger Abbay basin study being carried out during 1958 – 64.²⁶⁴

Again, Ethiopia constructed Tis Abay (Tis Abay-I) hydropower plant in 1964 located approximately 35 km downstream of Lake Tana.²⁶⁵ By diverting water from upstream of the Tis Issat Falls, the power plant makes use the installed capacity of the power plant is 11.4 MW and initially relied entirely on the natural flow of the river.²⁶⁶ The second power station (Tis Abay-II), with an installed capacity of 72 MW, was also completed in 2001.²⁶⁷ Besides, Tana Beles Integrated Water Resources Development Project is also one of the major projects undertaken in the Abbay River-Basin. The plant has an installed capacity of 460 MW.²⁶⁸ It was inaugurated in May 2010.²⁶⁹

In April 2011, Ethiopia's late Prime Minister Meles Zenawi laid the foundation stones of the GERD as part of Ethiopia's Growth and Transformation Plan (GTP).²⁷⁰ At the end the current GTP, the country aspires to increase hydropower generation from the current 2060 MW to 10,000 MW by 2015 and the GERD, with a potential capacity of 6000 MW, would play a key role in achieving this goal.²⁷¹ The physical site of the GERD located in the Beneshangul-Gumuz Regional state, Guba-Sirba Abay, about 20-40 kms East of Ethiopian border with the Sudan.²⁷² On completion, the dam will create an artificial lake covering an area 1680 km³ holding about 74 billion cubic meters of water.²⁷³

²⁶⁴ Yacob Arsano (2004), note 188, p.154

²⁶⁵ Abeyu Shiferraw and Matthew P. McCartney (2014), investigating environmental flow requirements at the source of the blue Nile River available at <http://publications.iwmi.org/pdf/H041853.pdf> accessed on 3/21/2014

²⁶⁶ Abeyu Shiferraw and Matthew P. McCartney(2014), note 265

²⁶⁷ Abeyu Shiferraw and Matthew P. McCartney(2014), note 265

²⁶⁸ TANA-BELES MONITORING AND EVALUATION PROJECT MID-TERM REVIEW (2012), available at <http://www.tana-beleswme.org/repandnews/repanddocs/wmereports/2012-0806-tana-beles-wme-report-59-mid-term-review.pdf> accessed on 3/21/2014

²⁶⁹ TANA-BELES MONITORING AND EVALUATION PROJECT MID-TERM REVIEW (2012), note 268

²⁷⁰ Growth and Transformation Planning for the Next Five Years (2011-2015)', Ministry of Finance and Economic Development of Ethiopia, July 2010

²⁷¹ http://www.hidasse.gov.et/web/guest/home/-/asset_publisher/7OTn/content accessed on 15 January 2014

²⁷² The office of national council for coordination of public participation on the construction of GERD, available at http://www.hidasse.gov.et/web/guest/home/-/asset_publisher/qB6d/content/s-h-a-r-e-d-d-e-s-t-i-n-y accessed on 15 January 2014

²⁷³ The office of national council for coordination of public participation on the construction of GERD, available at http://www.hidasse.gov.et/web/guest/home/-/asset_publisher/qB6d/content/s-h-a-r-e-d-d-e-s-t-i-n-y accessed on 15 January 2014

The project is expected to meet such growing demands for electricity in Ethiopia, and would be employed to strengthen hydropower trade with many neighboring African states. Of the 6,000 MW of electricity generated by the GERD, only 2500 MW of power will be used domestically.²⁷⁴

5.2. Divergent Perceptions Relating to the GERD

Ethiopia's unilateral decision to construct the GERD has naturally created divergent opinion between the main Nile riparian states: Egypt, Sudan and Ethiopia - and the international community at large. The Ethiopian government has consistently argued that it has the sovereign right to exploit its water resources for developmental needs of the nation.²⁷⁵ Further, the government has outlined that the project will be beneficial not only for Ethiopia but also for the downstream countries in many aspects. First, the flow of the Nile waters will be regulated from season to season and hence water hazards emanating from flooding will decrease, especially in Sudan; Sudan has been challenged by floods and silt accumulation, and Egypt too is troubled by the excessive water lost through evaporation on the Lake Nasser.²⁷⁶ Second, Ethiopia has time and again declared that a clean and cheaper energy will be supplied from the Dam and will be made available to the region that would foster cooperation in Africa.

Especially after 28 May 2013 in which Ethiopia conducted diversion of the river to make way for the dam construction, leaders, politicians, think-tanks, and the media in Egypt forwarded divergent opinions. Although the mainstream thinking along the Egyptian reiterated serious concerns about Ethiopia's measures, a few Egyptian hydrologists and Nile experts argued the dam would not decrease water discharge reaching Egypt.

²⁷⁴ Official physical information about the Grand Renaissance dam can be found at the official web site of the office of National council for the coordination of public participation on the construction of Grand Ethiopian Renaissance Dam available at <http://www.hidasse.gov.et/web/guest/home/> accessed on 15 January 2014

²⁷⁵ Interview by Aljazeera with late PM Meles Zenawi (2011), Struggle over the Nile, Part I: Masters no More', documentary, broadcasted 7 June 2011, available at <http://english.aljazeera.net/programmes/struggleoverthenile/2011/06/2011667594146703.htm> accessed on 20 December 2013

²⁷⁶ Interview by Aljazeera with late PM Meles Zenawi (2011), note 275

One author, a hydrologist from the University of Alexandria, indicated that the GERD may actually increase water flow to Egypt.²⁷⁷ He contended that:

*‘during the flood season in late August and early September, the majority of Egypt’s water arrives in Lake Nasser, where it is stored for approximately ten months until peak agriculture season in July the following year. During this period, approximately twelve percent of the stored water evaporates. On the other hand, the evaporation level in the Ethiopian highland water storage projects is only three percent.. Therefore, the water being stored in the GERD, where there will be less evaporation, will help to conserve water.’*²⁷⁸

However, most media outlets and official government statements put forward pessimistic opinions on Ethiopia’s unilateral measures and about the potential benefits of the dam. Among other issues, Egypt argued that it was not formally informed by the Ethiopian government about the dam and insisted that despite its entitlement to receive information about the dam, it did so only from the media.²⁷⁹ Egypt submitted that Ethiopia should tender notification about the project before launching any construction.²⁸⁰ Ethiopia countered the argument that this would happen only through the Nile Basin Cooperative Framework.²⁸¹

On the other hand, Egypt also raised its concerns that the GERD will reduce its share of the Nile which has been explicitly recognized under the 1929 and 1959 treaties.

²⁷⁷ Haytham Awad (2012), Grand Ethiopian Renaissance Dam: Egypt’s enemy or a blessing in disguise? available <http://www.egyptindependent.com/news/grand-ethiopian-renaissance-dam-egypt%E2%80%99s-enemy-or-blessing-disguise> accessed on 23 January 2014

²⁷⁸ Haytham Awad (2012), note, 277

²⁷⁹ Interview with Ahmed Abdelaziz (2013), note 23

²⁸⁰ Ethiopian Reporter (2013) weekly Vol. 1254, No 3. See also Interview with Fekeahmed at note 49

²⁸¹ Kendie, Daniel (199), Egypt and the Hydro-Politics of the Blue Nile River Northeast African Studies , Volume 6, Number 1-2, 1999 (New Series), pp. 141-169 (Article) Published by Michigan State University Press , p.12 .An interview with Fekeahmed note 49. In the interviews, the official affirmed the researcher that the Egyptian public diplomacy group had submitted request to late PM Melese Zenawi about the Renaissance dam and the PM responded that would happen only through Nile basin cooperative Framework agreement.

On one occasion, Egypt's ex-president Mursi blatantly announced his confirmation that 'all options are open to deal with this subject and if a single drop of the Nile is lost, their blood will be the alternative.'²⁸²

Not only politicians but also some academic elites joined hands in Egypt composing destructive views about the GERD. In a widely circulated report by Cairo University professors, it was maintained that 'the current design capacity of the GERD (74 bcm) will have harsh negative impact on the share of the water reaching to Egypt and also on the production of electricity from the High Dam and the Aswan Dam during the filling period of the lake the GERD and during its operation; this negative impact shall escalate during the drought period wherein the water supplies to both Egypt and Sudan shall conflict with the water needed to produce electricity from the GERD.'²⁸³

The group suggested that the holding capacity of the Renaissance Dam should not to exceed 14 billion cubic meters.²⁸⁴ In addition, the group proposed that Ethiopia shall commit for the advance notice for any future projects including their executing procedure in light of the UN Watercourse Convention. The later recommendation of the expert group is line with the long established position of Egypt to have a veto over projects of upper riparian states. However, the professors and experts failed to provide a legally justified reason as to why Ethiopia shall commit for advance notice on future projects in circumstance where Ethiopia has abstained from adopting the 1997 UN Watercourses Convention.

Despite the initial disinclination and treading, Sudan backed the construction of the dam. Sudan's president Al- Bashir, at his latest meeting with Prime Minister Hailemariam Desalegn of Ethiopia confirmed that 'his government understands the mutual benefits the project could offer

²⁸² Perry and Alastair Macdonald (2013), President Mursi said that 'all option are open to Egyptian over Ethiopia dam available on line at <http://www.gulf-times.com/Opinion/189/details/356859/Egypt-and-Ethiopia-must-settle-dam-row-through-dialogue> accessed on 18 January 2014

²⁸³ Cairo University's report on Ethiopia's Great Renaissance Dam (2013), The Cairo University professors and experts in the faculties of engineering and agriculture have formed a group called "Group of Nile Basin" (GNB). The purpose of the group is said be to support the effort of Government of Egypt and the decision makers with regard to GERD. The scope of GNB shall include analytical studies of the Ethiopian Dams, prepare and implement numerical water models to study the side effects of these dams and collecting all recent scientific studies in this field. And the group prepared report about the Ethiopia's great Renaissance Dam available online at <http://egyptianchronicles.blogspot.com/2013/06/cairo-universitys-report-on-ethiopias.html> accessed on 24 January 2014

²⁸⁴ Cairo University's report on Ethiopia's Great Renaissance Dam (2013), note 283

for Ethiopia and Sudan, and he will extend the necessary support to ensure the successful completion of the massive hydro-power project.’²⁸⁵ Likewise, Sudan’s Agriculture and Irrigation Minister, Dr. Abdulhalim Al-Mutaafi affirmed Sudan's support for the construction of the Grand Ethiopian Renaissance Dam which he called a model of development for the region.²⁸⁶ He further explained that “the building of the dam is beneficiary for downstream countries as it enables them to receive regulated free water, stating that Sudan spends \$12 million to remove mud from the irrigation channels of the Gezira Scheme; the Minister advised the dam construction should be executed with a sense of cooperation and mutual benefit for Sudan and Egypt.’²⁸⁷

The unilateral decision to construct the GERD has also raised opinion among leaders and representative of international organizations. Amid the rising tensions between Egypt and Ethiopia, Dr. Nkosazana Dlamini Zuma, chairperson of the African Union Commission, urged the Nile basin states in general, and Ethiopia and Egypt in particular, to produce a win-win solution. She added that ‘both countries need the water of the Nile, Egypt argued its *historic rights* to the Nile are guaranteed by two treaties from 1929 and 1959 which give it veto power over upstream projects; but a new deal was signed in 2010 by other Nile Basin countries, including Ethiopia, allowing them to work on river projects without Cairo’s prior agreement.’²⁸⁸

Similarly, Uganda’s president Yoweri Museveni contended that ‘the threat of the Nile is not the construction of dams but the lack of electricity and underdevelopment in the tropics; this is what the whole of Africa needs to do.’²⁸⁹

In summary, there have been divergent views on the economic, social and legal implications of the GERD towards riparian states. Save for the Egyptian government’s stance, however, many

²⁸⁵ Sudanese president backs Ethiopian dam ahead of Nile talks available on line at <http://english.ahram.org.eg/News/88321.aspx> 5 Dec 2013, accessed on 18 January 2014

²⁸⁶ Sudanese Minister (2013), Renaissance Dam model of development in the region: available at http://www.hidasse.gov.et/web/guest/news/-asset_publisher/WX1k/content/renaissance-dam-model-of-development accessed on 20 December 2013

²⁸⁷ Sudanese Minister, Renaissance Dam model of development in the region (2013), note 286

²⁸⁸ Egypt and Ethiopia urged to resolve Nile dispute,(2013) available on line at <http://www.bdlive.co.za/africa/africanews/2013/06/13/egypt-ethiopia-urged-to-resolve-nile-dispute> accessed on 18 January 2014

²⁸⁹ President Museveni interview with Nile TV (2013) http://primeradio.org/index.php?option=com_content&view=article&id=97:museveni-warns-egyptian-government&catid=36:prime-news accessed on 9 January 2014

reiterate the established discernment which supports riparian states' right to development - including the construction of the GERD.

5.3. The GERD and Riparian duty to inform on planned measures

As discussed in the preceding chapters, the general principle of riparian duty to inform on planned measures has received wider support in treaty regimes, case laws, resolution of governmental and non-governmental forums as well as under the UN Watercourse Convention - although its specific formulations and procedures varied. As to whether Ethiopia has such an obligation under international water law - and particularly in the context of the GERD, one needs to examine treaty regimes and the practice of the states in the Nile basin and the nature of this obligation under general international watercourses law.

Across the Nile basin, the research has demonstrated, there is no single comprehensively binding treaty regime which imposes a duty Ethiopia to notify the nature and details of its planned projects to other riparian states. Nor did state practice in the region support an obligation to notify on planned measures. Obviously, the 1902 Anglo-Ethiopian agreement stipulated that the Ethiopian will not 'construct, or allow to be constructed, any work across the Blue Nile, Lake Tana or the Sobat which would arrest the flow of their waters into the Nile except in agreement with His Britannic Majesty's Government and the Government of the Sudan [the English version]. Whether this provision binds Ethiopia to notify planned project or even more, to obtain prior consent from Sudan to construct the GERD is subject to interpretative dilemmas involving the treaties and the continuing validity of the agreement itself.²⁹⁰ For one thing, it was argued earlier that the glowing state of inequity instituted by the treaty has gravely jeopardized Ethiopia's 'natural rights and in turn Ethiopia's development prospect which could serve as a legal ground for calling the nullity of the arrangement. Second, by operation of the rules of state succession, Ethiopia would now be required to discharge the obligation to an essentially different party, Sudan, a fact which itself represents fundamental changes from the original stipulation of the Anglo-Ethiopian agreement.²⁹¹ Hence, the treaty's is nullified as a result of change of circumstance by virtue of the stipulation of Article 62 of Vienna Convention on the Law of Treaties.

²⁹⁰ Tadesse Kassa(2013), note 49, p.112

²⁹¹ Tadesse Kassa(2013), note 49, p.112

Alternatively, as demonstrated above, the technical interpretation of the 1902 Anglo-Ethiopian treaty does not clearly imply Ethiopia's obligation to inform the GERD to Sudan or Egypt in the contemporary setting of the Nile basin legal discourse. Under the 1902 treaty, the agreed upon obligation under article III was about not stopping the entirety of the waters. The construction of the GERD that purports to generate hydropower will not stop the flow of the river in its totality and forever. At this juncture, it is also important to note that the 1902 treaty has empowered only Sudan to get consulted by Ethiopia. Sudan, however, has all along been positive about the shared benefits of the GERD and has not strongly claimed a right to be notified about the project in pursuance of the 1902 treaty.²⁹²

The foregoing discussion suggests that Ethiopia's duty to inform downstream countries with regard to the construction of the GERD cannot be premised on any specific treaty framework which sets out the rights and duties of riparian states. In case where there is no all inclusive legally binding treaty or where the existing treaty is disputed, resort may be made to the rules of general international law on the non-navigational uses of international watercourses.

Hence, the next approach entails exploring Ethiopia's duty on the subject under international watercourse law. As discussed before, case laws, the works of the Institute of International Law (IIL), International Law Association (ILA) and the UN Watercourse Convention have made vital contribution to the development of the principle of the duty to inform on planned measures. All these would help to shed light on the question of whether or not Ethiopia has a duty to notify the GERD to other watercourse states.

The IIL explored the riparian the duty to notify on planned measures during its session in Salzburg held from 4-13 September 1961; among other things, it provides for a riparian duty of notification and consultation of planned measure if it *seriously* affects other states.²⁹³ Similarly, the Helisinki Rule of the ILA under Article XXIX, paragraph 2 provided that a 'state, regardless of its location in a drainage basin, should in particular furnish to any other basin State, the interests of which may be substantially affected, notice of any proposed construction.'

More importantly, the UN Watercourse Convention, the most cited set of rules regulating non-navigational uses of international watercourse envisages the principles of notification of planned

²⁹² Fekeahmed (2013), note 55

²⁹³ Salzburg resolution(1996), note, 109

measure in a detailed fashion. In specifics, Article 12 of the Convention provides duty to inform on planned measures that may have '*a significant adverse effect*' upon other watercourse states.

Pursuant to the wording of all aforementioned authorities, it is evident that the scope of obligation of the planning state is not applicable for all planned measures as such. Instead, the obligation, if at all it assumed as representing a rule of customary international law, would arise only when a planned measure might cause *substantial injury, seriously affects or cause significant adverse effect* to other watercourse states.

What constitute a *serious* or *substantial injury* is often disputable and is decided on a case by case basis. The next questions that need to be explored are therefore whether the GERD has a significant adverse effect on other watercourse states, especially Sudan and Egypt. How does one constitute 'significant adverse effect' in the context of the GERD? What criterion applied to determine the effect of the GERD on other watercourse states?

The exact meaning of significant adverse effect is still a point of difference between Ethiopia and Egypt. However, it must be shown that there is a real impairment of use as a result of unreasonable use of watercourse by planning states. What are to be avoided are concerning a particular project or use, which have a significant adverse effect upon other watercourse states and not every minor effects. The Arbitral Tribunal in Lake Lanoux case, in which Spain insisted upon delivery of Lake Lanoux water through the original system, found that:

'... at the lowest water level, the volume of the surplus waters of the Carol, at the boundary, will at no time suffer a diminution; in the absence of any assertion that Spanish interests were significantly affected in a tangible way, the tribunal held that Spain could not require maintenance of the natural flow of the waters'.²⁹⁴

Elucidating the substantive scope of adverse transboundary effect, one author listed some instances which include that transboundary damage embodies a certain category of environmental damage, including physical injury, loss of life and property or impairment of the environment or *diversion of an undue amount of shared water* (emphasis added).²⁹⁵

²⁹⁴ Lake Lanoux(1957), note 8 p. 123, para. 6

²⁹⁵ Hanquin Xue (2003), Transboundary damage under international law Cambridge university press, p,4

However, there are no justifiable reasons under international water law which purports that the construction of a hydropower dam by itself causes significant adverse effect on downstream states.

As affirmed by Ethiopia time and again, the GERD is a hydroelectric project which would benefit riparian states in many aspects than causing adverse effect.²⁹⁶ With the exception of Egypt, all riparian states also seem to extend support to the GERD on considerations of its positive effect. Sudan, for example, has accepted the fact that the GERD will minimize the evaporation loss from dams located in less favorable downstream desert settings where for example the evaporation at the Jebel Aulia dam in Sudan amounts to 3.5 BCM per annum. What is more, increased power availability for the entire region will also enhance regional power trading among the three countries, Ethiopia, Sudan and Egypt.

The claims raised by Egypt have not been based on concrete scientific facts conducted at the site of the dam. Therefore, as far as the GERD is destined to generate electric powers, its construction could not have significant adverse effect on downstream states of Sudan and Egypt. All this would lead to conclude that despite the fact that Ethiopia has abstained from voting on the UN Watercourse Convention and hence is not bound by it, the provisions of the Convention would still favor Ethiopia for they only require prior notification of planned measures that cause significant adverse effect on other watercourse states.

Some scrutiny of state practice in the Eastern Nile states has revealed no evidence of compliance to the riparian duty to inform on planned measure. The downstream states of Sudan and Egypt have never notified and exchanged information with Ethiopia.

²⁹⁶ Alemayehu Tegen (2013), Ethiopian Minister of Water, Irrigation and Energy told the Associated Press that Egypt should not worry about a diminished water share from the Nile. Alemayehu, said that we don't have any irrigation projects around the dam. The dam is solely intended for electricity production ... So there should not be any concerns about a diminished water flow," "Even during the period when we would be filling the reservoir, we are going to employ a careful and scientific water impounding technique to make sure the normal flow is not significantly affected," the minister added. available at <http://bigstory.ap.org/article/official-dam-will-not-significantly-affect-egypt> accessed on 18January 2014

Likewise, the voting record of Ethiopia indicates that the country has no support to the principles of riparian duty to inform on planned project. Ethiopia did not vote in favor of the UN watercourse Convention, it actually abstained.²⁹⁷

In light of these essential facts, it could be concluded that the principle of notification has got no support among the Eastern Nile basin states. And under these circumstances, Ethiopia does not have legal obligation to provide notification on its planned measures and execution of the projects, at least not in the scale and type anticipated by Egypt - except that which it may choose to do in the interest of good neighborliness and cooperation.

5.4. The Establishment International Panel of Experts (IPOE): Mandate and Implications

The GERD has caused concern among the downstream countries and particularly Egypt. To address such apprehension, Ethiopia invited Egypt and Sudan to form an International Panel of Experts (IPOE), with a view to reviewing the technical integrity of design documents of the GERD. Prior to the commencement of the Panel's work, the water ministers of the three countries met in Addis Ababa, and after thorough discussions, agreed on the terms of reference, procedures and activities of the Panel.²⁹⁸

The terms of reference provides objectives, mandate, and scope of the work and composition of the panel. Accordingly, the panel was meant to provide transparent information sharing, solicit understanding of the benefits accruing to each of the three countries, scrutinize the impacts, if any, of the GERD on the two downstream countries, and build confidence between Ethiopia and the two downstream neighbors.²⁹⁹ The Panel was also tasked with proposing recommendations to the governments of the three states on issues of concern that might be considered in the future.

²⁹⁷ Professor Eckstein Gabriel (1997), study and analysis on voting records of states on the UN Watercourse Convention available at: <http://hdl.handle.net/10601/952> . The convention was adopted by a UN General assembly in May, 1997 by a vote of 103 for, against with 27 abstentions and 3 abstention. Ethiopia is among those states that abstained. For the latest list of countries that submitted instruments of ratification see here: http://www.internationalwaterlaw.org/documents/intldocs/watercourse_status.html accessed on 23 January 2014

²⁹⁸ Terms of Reference of the International Panel of Expert (IPOE) on the Grand Ethiopian Renaissance Dam (2011), art. 2

²⁹⁹ Terms of Reference of the International Panel of Expert (IPOE) on the GERD (2011), note 298, art. 4

Composition wise, the Panel was constituted of two experts from each of the three riparian states and four international experts chosen through the consensus of the riparian states.

Since its establishment, the Panel reviewed the design and feasibility studies of the GERD, conducted site visits in an effort to observe the process of the construction, held six meetings in the three riparian countries, discussed all the issues that surfaced during those meetings and also held consultations with the contractors and consultants associated with the project.³⁰⁰ After successive field trips in Ethiopia and a series of meetings in Cairo, Khartoum and Addis Ababa, the IPoE submitted its final report to the governments of the three riparian states on June 1, 2013.

The report has not been made public, but different opinions have been forwarded shortly after the official submission of the report. The Ministry of Water, Irrigation and Energy of Ethiopia announced its version of what the report concluded stating that ‘the design of the GERD is based on international standards and principles and the report showed that the Dam offers high benefit for all the three countries and would not cause significant harm on both the lower riparian countries.’ It more over stated that ‘the panel of experts has suggested additional assessment on the possible impact of the GERD and proposed ideas that would help the basin countries benefit better from the Dam.’³⁰¹ Whereas the Egyptian position is not clearly assessed, Medias and public states seem to reject to the panels reports.

When one assesses its implication, it is clear that the Panel was not mandated to recommend whether the project should be halted or not. In the first place, it was not out of an international legally binding duty that Ethiopia had undertaken such initiative. Its decision was engendered by good faith and confidence building considerations between Ethiopia and downstream countries. This is evident from subsequent statement of the Ethiopian government as well as the preamble of the terms of reference of the IPoE. In this tune, Ethiopia’s Ministry of Foreign Affairs issued a statement stating that Ethiopia was making a goodwill gesture, involving no formal overture to

³⁰⁰ News of week in the horn (2013)
http://www.ethemb.se/ee_eth_aweekinthehorn/Volume%202%20%2815%29%20-%20June%207%202013.pdf
accessed on 9January 2014

³⁰¹ press release of the ministry of Water Irrigation and Energy(2013),
<http://www.mowr.gov.et/index.php?pagenum=12> accessed on 1june 2013

the Egyptian government; the establishment of the Panel doesn't mean that Ethiopia is giving up on the Dam project'.³⁰²

On the other hand, Egypt interpreted the gesture as entailing that the dam project was put under suspension until the experts committee approves its soundness. Egypt's Minister of Irrigation and Water Resources, Dr. Mohamed Bahaa El-Din argued Ethiopia will not continue to build the dam until the Panel completes its work.³⁰³

Then, the issue to consider would be whether Ethiopia is obliged, within the terms of reference of IPOE, or even under international law, to halt the construction of the dam pending the production of the report or subsequent thereto.

First, it is worth to note that Article 3 of the terms of reference of the Panel clearly states that the Panel's mandate is solely limited to assessing the impact of the dam on lower riparian countries and to presenting its findings to the concerned governments - Ethiopia, Egypt and Sudan.

Second, under the UN Watercourse Convention, it had already been established that a watercourse state is allowed to request the planning state to determine whether the plans will have significant adverse effect, and if so, demand the suspension of the contemplated project until the outstanding issues are resolved. In order for the other Watercourse state, Egypt in our case, to be entitled to make such a right, however, two conditions must be satisfied as prescribed under article 18 of the UN Watercourse Convention. The first is that the requesting state must have *serious reason to believe* that measures being planned by Ethiopia may have a significant adverse effect upon it. Additionally, the watercourse state must provide a documented explanation setting forth its reasons. Given that any actual or potential significant harm is not proven by Egypt, and more importantly, by an impartial third party, Egypt's possible request to Ethiopia to halt the construction of the project appears to be not a question of international law for Ethiopia. In particular, neither customary international law nor general principle of law obliges a state to get permission for damming an international river from downstream countries, unless stipulated in an agreed treaty between concerned parties.

³⁰² Statement by the former Foreign Affairs Ministry Minister Hailemariam Desalegn (2011), available at <http://www.mfa.gov.et/> accessed on 12 June 2013

³⁰³ Ethiopia diverts Blue Nile for controversial dam build' (*BBC News*, 28 May, 2013) available online at <http://www.bbc.co.uk/news/world-africa2696623> accessed on 23 September 2013

CHAPTER SIX: CONCLUSIONS AND RECOMMENDATIONS

6.1. Conclusion

The main purpose of this research undertaking is to proffer a comprehensive scrutiny of the principle of riparian duty to inform on planned measures under international watercourse law and in this context to reflect on the nature of Ethiopia's duty of notification in relation to its contemporary undertaking in the GERD.

The treaty practice of states, case laws and the works of international governmental and non-governmental organization widely envisage the principle of prior notification of planned measures. These authorities of international watercourse law have generally agreed that a watercourse state should or is at least recommended to provide notice of planned measures that could potentially cause significant adverse effect or substantial effect to other riparian states. It was also demonstrated that authorities are not unanimous with regard to the substantive and procedural scope of the obligation of notification. They differ on issues of whether the principle of notification on planned measures is legally binding or constitutes a mere aspiration; as to when the planning state is obliged to give notice of planned measure, how much time should a state give before it embarks on the proposed project, with in what time the notified state shall respond to the notice of planned measure and on the effects of failure to comply with notification of planned measures.

The UN Convention on the Law of Non Navigational Uses of International Watercourse has also been the focus of investigation. In this regard, it was shown that the Convention stipulates a very elaborate set of procedural rules applicable to states in the implementation of planned measures on an international watercourse. The Convention sets forth procedures that a watercourse state may take before implementing or permits the implementation of measures that may have a *significant adverse effect* upon other watercourse states. The obligation of the planning state is, it was shown, to give a timely notice of planned measures that should be accompanied by available technical data and information when the contemplated plan may have *significant adverse effect* and not just any type of effect. The obligation of states subsequent to notification was also analyzed as envisioned under the Convention. The implementing state must, as the case may be, enter in to consultation and negotiations with the notified state.

It was also found that the Convention provides exceptions to the rule of riparian duty to inform on planned measures on considerations of emergency situations and national security concerns.

The normative framework of riparian duty to inform on planned measure in the Nile river basin was likewise presented in detail. In this respect, it was demonstrated why the existing Nile river basin agreements have failed to regulate riparian duty to inform on planned measures. Principally, the 1902 Anglo-Ethiopian treaty provided obligation on Ethiopia to inform and consequently get the consent of British and later Sudan as a successor state before implementing or permitting the implementation of projects across the Blue Nile, Lake Tana or the Sobat which *would arrest* the flow of their waters in to the Nile. Nonetheless, the nature of this obligation and continued validity of the agreement has sparked argumentation, challenged both on the basis of its own merit and technical interpretations.

A new Nile Basin Cooperative framework agreement has also been agreed upon by the majority of the upper riparian states and was made open for signature and ratification, although Egypt and Sudan choose to remain outside the framework. The CFA has normally stipulated the concept of riparian duty to inform on planned measures. However, it has been found that the stipulation has not addressed the principle in sufficient details and no procedures have been set to guide its implementation. This is to say that the concept has been envisaged in a very general form - leaving the detailed rules and procedures to be established by the Nile River Basin Commission in the future.

With regard to state practice on the subject, it was concluded that practice among the Eastern Nile basin only shows the prevalence of unilateral measures than notification and consultation. Lower riparian states have undertaken giant projects on Nile River at different times without notification and consulting the upstream nations, from whence almost the entirety of the waters comes from. Ethiopia had consistently opposed the formulation of a principle which prescribes riparian duty to notify in various international negotiation forums. It has been found that recently, Ethiopia adopted new approach to carry out the obligation of notification on planned measures through third party mechanisms instead of bilateral procedures involving the riparian states directly.

Finally, the research concluded with critical analyses of the GERD in light of the rules of international watercourses law regulating riparian obligation of notification on planned

measures. The unilateral decision to construct the GERD has engendered divergent opinions across the basin - and the international community at large. Egypt has submitted it has a right to get prior information and consultation about the project and argued the unilateral announcement by Ethiopia as unfair and against international law of good neighborliness and cooperation in good faith. However, it was demonstrated that Ethiopia has made essential contribution in complying with the principle by taking its own initiative on the establishment of a tripartite panel of experts. This has contributed its own role in building confidence among riparian states and served as a stepping-stone for further cooperation.

It is also revealed that Ethiopia has no any treaty obligation to furnish information about its projects to other riparian states - including Sudan and Egypt. Besides, neither does customary international law nor general principles of law oblige a state to get permission for damming an international river from downstream countries, unless stipulated in a treaty between the concerned states. In any event, concrete scientific evidence has not been presented by Egypt that proves that the construction of the dam will in itself cause significant adverse effect on downstream states, hence stalling it request for cessation of construction on the GERD.

6.2. Recommendations

Based on the conclusions drawn above, the study makes the following recommendations.

Since Nile River is a shared resource, the interest of watercourse states can only be safe and protected if all the riparian states cooperate in the use and management of the watercourse. The implementation of the substantive and procedural rules of international watercourses law could be effective only through good faith cooperation between riparian states. Thus, the Nile riparian states must cooperate on the basis of equality, mutual benefit and good faith.

The Nile basin states may not have to accede to the 1997 UN Watercourse Convention, but can agree on a positive utilization of some of the most widely accepted rules of international watercourse law incorporated in the Convention. The rules and particularly those dealing with the principle of riparian duty to inform on planned measures are quite detailed procedural guidelines and could facilitate a smooth exchange of information and implementation of the principle. Off course, the Convention did not require prior agreement between states before they could carry out projects on shared rivers. In any event also, Ethiopia has abstained from voting in favors the UN Watercourse Convention alleging that the obligation of notification on planned

measures has laid down an onerous duty on upstream states. However, the fact remained that Ethiopia appreciates the value of the principle and has changed its position on the subject as demonstrated during the negotiations of the CFA. Ethiopia's declaration of interest to exchange information concerning planned measures through the Nile River Basin Commission is a praiseworthy undertaking which must be emulated by Egypt as well.

The Nile river basin states would need to establish an effective basin-wide legal framework for addressing the peculiar characteristics of the basin. Hence, all the Nile river basin states are urged to sign and ratify the Cooperative Framework Agreement within whose framework it would be possible to resolve contentious issues of riparian duty of notification on planned measures that may potentially cause significant adverse impact. The ratification of the CFA is therefore imperative for two reasons. First, the framework has formally recognized obligations of basin states to exchange information concerning planned measures. Second, it establishes the Nile Basin Commission, an institutional modality for a detailed regulation and implementation of notification on planned measures.

The principle of a duty to inform on planned measures could not really have a meaningful application outside of a mutually agreed institutional framework. Hence, the Nile basin states need to understand the importance of basin wide institutional framework that could serve as a channel and clearing house of information exchange concerning planned measures.

Concerning the GERD, the three states - Sudan, Egypt and Ethiopia should act on the basis of the principles of international law which dictate, among others, good neighborliness and cooperation in good faith. Ethiopia should continue its role in building confidence among the riparian states which serve as a stepping stone for further cooperation. Egypt and Sudan should also pursue the same move with a view to achieving a mutually gratifying order in the river basin. The governments of the riparian states must sit and discuss the matters on a round table, setting aside political niceties that target on short-term gains. Continued cooperation in light of the recommendations of the IPoE is an absolute imperative which can in the future serve as a precedence in settling disputes between riparian states.

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Persons Interviewed

1. Ahmed Abdulaaziz, second secretary and legal Expert at Embassy of Arab Republic of Egypt in Ethiopia, 17November 2013
2. Fekeahmed Negashi, Director of Boundary and Transboundary River affair at FDRE Ministry of water, Irrigation and Energy, 11 September 2013

Annexes

Annex I: Interview questions

1.1. Interview with Fekeahmed Negashi, Director of Boundary and Transboundary River affair at FDRE Ministry of water, Irrigation and Energy, 11 September 2013

A. Introduction

This interview basically aims at gathering pertinent knowledge of Ethiopia's perspective about international watercourse law perceptible of Ethiopia. The main objective of this research remains to a comprehensive scrutiny of the scope of the riparian duty to inform on planned measures under international watercourse law. In specifics, the interview emphasized on soliciting relevant legal knowledge on the Riparian duty to inform planned measures under international watercourse law taking the GERD as a case in point.

B. Questions

1. How do you assess Riparian states' cooperation in the Nile basin?
2. Why Ethiopia did not inform other riparian states about the Grand Renaissance dam?
3. Some argued that the 1902 Anglo-Ethiopian Treaty obliged Ethiopia to not only to inform but also secure consent before embarking any project on Blue Nile, Sobat and Lake Tana. How do you respond for such kind of prepositions?
4. What is Ethiopia's position with regard to the riparian duty to inform planned measure?
5. It there institutional and legal frameworks that puts obligation up on Ethiopia to inform its project such as the GERD other watercourse of the Nile?
6. Is the establishment of IPoE has something to do with Ethiopia obligation to consult and inform the planned measures?

1.1. Interview With Ahmed Abdulaaziz, second secretary and legal Expert at Embassy of Arab Republic of Egypt in Ethiopia, 17 November 2013

A. Introduction:

This interview basically aims at gathering pertinent knowledge of international watercourse law and perceptible of lower riparian state. The main objective of this research remains to a

comprehensive scrutiny of the scope of the riparian duty to inform on planned measures under international watercourse law. It especially emphasized on soliciting relevant legal knowledge on the Riparian duty to inform planned measures under international watercourse law taking the GERD as a case in point.

B. Questions

1. How do you assess the Cooperation between riparian states in the Nile Basin so far?
2. In the year 2011 Ethiopian government has officially launched the construction of GERD. The Ethiopian government has stated that the project will play vital role in fostering cooperation between riparian states. Do you think that the project will foster cooperation among all Nile riparian states?
3. What potential impacts of the proposed GERD project would downstream communities is concerned with?
4. What do you think are the responsibilities of Ethiopia in relation to the construction of the GERD? And how do you evaluate the Compatibilities or otherwise of Ethiopia's Planned measures with respect to International watercourse law?
5. Do you think that the Ethiopian government had had obligation under international watercourse law to notify its planned measure to Egypt and other watercourse states?
6. Is there any institutional and legal framework that binds Ethiopian government to inform its planned measures to other riparian states?
7. Let me ask you a relating question, the issue of securing prior consent. *'In Thursday, 19 September 2013 Al -Ahrām online wrote that 'as of 1902, there have been a numbers of agreements on the uses of Nile water. The bulk of these agreements specify that no dams or other irrigation projects should be built on the Nile without prior notification to all the Basin states. This is a precondition consistent with international law and with the applied regulations adopted by the basin states of other rivers.'* From your point of view, do you think that Ethiopia, pursuant to international water, law should get the consent and permission of Egypt and other lower riparian states to construct dams?
8. How do you evaluate practices of state in the Nile basin with regard to riparian duty to notify planned measures?
9. Recently, Sudan, Egypt and Ethiopia have established tripartite panel of experts to assess the impact of GERD on downstream states. What is the assessment of the result on the part of your country?

Annex II:

Terms of reference of International Panel of Expert (IPoE) of the Grand Renaissance Dam

1. Background

The Grand Renaissance Dam (GRD) is under construction in the Abbay Gorge by the Government of Ethiopia (GoE). The GoE is convinced that the Dam has huge benefit to all the three riparian countries namely Egypt, Ethiopian and Sudan. To that end, the GoE has invited in good faith the two downstream countries Egypt and Sudan to form an international panel of experts to review the design document of the GRD, provide transparent information sharing and to solicit understanding of the benefit and cost accrued to the three countries and impacts if any of the GRD on the two downstream countries so as to build trust and confidence among all parties.

2. Objective

The overall objective of IPoE is to build confidence among the three countries around the GERD. The specific objective of the IPoE is to provide sound review/assessment of the benefit to the three countries and impacts of the GRD to the two downstream countries, Egypt and Sudan.

3. Mandate

The role of the IPoE is mainly facilitative, focused on promoting dialogue and understanding around GRD-related issues of interest to the three countries and thus contributes to regional confidence and trust building.

4. The scope of the Work

The overall task of the IPoE is to review the study/ design document of the GRD relating to benefit to the three countries and the impact on the two downstream countries. All assessment of the IPoE shall be based on the study /design documents of the GRD and other relevant information provided by the Ethiopian Government. The scope of work of the IPoE shall include the following:

- 4.1. Identify key themes/issues that are of concern to each country related to the GRD. These themes/issues shall be used to identify information/ analysis requirements.
- 4.2. Based on the information/analysis requirement identified above, IPoE shall request GoE for available study document
- 4.3. Review benefit to the three countries and impact of the GRD on the two downstream countries based on the study documents provided

- 4.4.If the design/study documents do not provide information required by the IPoE and/or the information provided are inadequate, IPoE shall record identified information gaps and bring to the attention of the owner for consideration.
- 4.5.Convvene joint meeting to review study documents provided and create understanding on issues of mutual interest. When deemed necessary, as part of the assessment, IPoE shall conduct field visits
- 4.6.Examine benefits accruing to countries and the region due to the GRD
- 4.7.Examine identified major impacts, Environmental, Social and Economic on the downstream countries and mitigation measures provided by the study documents
- 4.8.Bring unaddressed concern to the attention of the Owners for consideration
- 4.9.Define its modus operands including
- a. Agreement on the Terms of Reference of the IPoE by the three countries
 - b. Procedure for selection of International panel
 - c. Period of the IPoE
 - d. Frequency of meeting
 - e. Consensus building
 - f. Rules regarding disclosure of findings; notably with the press
 - g. Documentation of deliberation
 - h. Other issues as need

5. Composition

IPoE is a panel of experts drawn from the three countries (Egypt, Ethiopia and Sudan) assisted by International Exerts mobilized by the three countries to provide an independent technical review of the study and design documents about the GRD. The representation of the three countries will be equal one/two member(s) from each country. Maximum of four international experts will join the panel. Members of IPoE shall have necessary technical competence in area of water resource, Hydrology, and environment to effectively deliberate on the issues and make significant contribution.

6. Reporting

IPoE will document its meeting and assessments. The panel will submit all its reports to the Governments of Ethiopia, Egypt and Sudan. Apart from their respective governments as mentioned above, members of the IPoE cannot either collectively or individually address the domestic or international press on matters of their deliberation.