

Legal Commitments regulating the Establishment of Water Projects on International Rivers Application Study over the Nile Basin

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First: Concepts of the legal Regulations for the Establishment of Water Projects



The legal regulations governing the establishment of water projects on international rivers have become one of the basic legal principles which the riverine states should follow when establishing or inaugurating such projects in order to realize the optimum and sustainable use for the benefit of the Nile Basin countries. This should, also, prevent the eruption of any international conflicts that might threaten the international peace and security.

Rules of the international law on water had emerged from the embryo of the scientific and customary practices of the riverine states on the level of international basins centuries ago, then became binding legal rules. Such rules aim to organize relations between the countries of the same basin concerning the distribution of its waters. In this respect, objective regulations play a pivotal role to ensure the optimum and fair usage of the mutual water resource. These regulations, in general, are represented in the no-harm principle; in addition to the principles of water protection and management.

The No-Harm Principle

Principle of non-injury is one of the essential principles in the field of the usages of river waters. Such a principle has been adopted in various international conventions, charters and declarations, not to mention its legal applications. In this respect, an old Roman legal rule says “Use what you possess without harming others”, which calls upon us to understand the exact concept of harm and define the legal foundation for the principle of not causing harm.

Harm is defined as: infringing a legal right or a legitimate interest for a subject of international law. And the country is held liable if it caused any harm that would lead to reducing the share of a certain riparian country, or reducing the amount of water flowing to the other riparian countries, or causing changes to the nature of water by draining natural and industrial pollutants into the river. In the

respect of some juristic opinions harm, in the field of the usages of the international river waters, is represented in affecting the amount or the quality of the water flowing across the borders to another riparian country

The Concept of Protecting the Riverine Environment

In general, the concept aims to protect the riverine environment from all forms of harm. Yet, pollution is the most dangerous aspect that currently faces the environment and water pollution is one of the most dangerous problems that face the usage of international river waters.

In this respect, the reduction in water resources is no more the main problem facing the water resources. Thus, various researches had been made by experts and specialists on how to obtain suitable amounts of a high quality of water.

Generally speaking, pollution means any change that occurs in the nature and kind of water as a result of either direct or indirect human practices. The term "Water Pollution" is defined in Helsinki Rules in Article 9 of Chapter 9, and she used the term "Water Pollution" to refer to any "detrimental change resulting from human conduct in the normal composition, content, or quality of the waters of any international drainage basin". Moreover, the Institute of International Law defined pollution as mentioned in paragraph 1 of Article 1 of Athens Resolution is-

sued on September 12, 1979 concerning the treatment of rivers and lakes pollution. In this respect, the concept of "pollution" was defined as "any physical, chemical or biological alteration in the composition or quality of waters which results directly or indirectly from human action and affects the legitimate uses of such waters, thereby causing harm."

Second: Procedural Regulations for Establishing Water Projects on International Rivers

The Concept of Prior Notification

Prior notification in one of the forms of the principle of river cooperation among the countries sharing the same basin, since it is one of the requisite procedures which should be taken by the countries that would like to establish water projects, including dams in order not to harm the interests of other states.

In case one of the basin countries intend to introduce new usages on its water or to modify the current uses in a way that negatively affects the interests of the rest of the basin countries, it should abide by the prior notification by notifying such countries with the intended works and procedures and providing them with all the information related to this respect. This is to give enough time for the countries liable to harm in order to study such works and determine to what extent they will be affected. Moreover, arti-

cles 11 and 12 of the 1997 UN Convention on the Law of the non-Navigational Uses of International Waters stipulates the necessity of exchanging information among the countries of the same water course and of inter-consultation and negotiations when necessary, concerning the possible repercussions of the proposed measures that might be harmful to other states. Such a notification should include the available technical information and data, including the results of any operation so as to assess the environmental effect, thus, in turn, enabling the notified countries to evaluate the repercussions of the proposed measures.

Prior notification is considered one of the important commitments in the field of using the international river waters which the countries sharing the same basin should commit to, being a tool for enhancing cooperation among such states. This should be represented in realizing the optimum and rational use of such waters in light of showing good intentions from all basin countries. In this respect, the commitment to apply the procedures of prior notification is one of the requirements of showing good intention and good neighborliness. Thus, it aims to protect the ecological systems and the standards of environmental protection for international rivers, in addition to ensure the participation of all states in evaluating the impact of such activities

on the river environment, which in turn lead to realizing conciliation between the basin countries that might, apparently, seem conflicting.

On the other hand, commitment to prior notification is based on two points; *first*: the necessity of submitting the technical information and data concerning the water project under construction, especially in regards of its impact on the natural flow of water and its effect on the kind and quality of water. Moreover, the country establishing such a project should present all the technical data that might affect the fair and suitable usage of the common water resources among the basin countries.

Second: the necessity of time-bound of prior notification represented in presenting the requisite data and information within the right time so that the basin countries which might be affected from the establishment of such projects can make studies and determine the effect of this project on their people. In this respect, the 1997 UN Convention on the Law of the non-Navigational Uses of International Waters had determined a period of six months -and can be extended to a similar period according to Article 13 of the same convention- as a suitable period for conducting such studies. In this respect, it is noticeable that the period of prior notification can be extended according to the text “unless otherwise agreed upon”, thus up hoist-

ing the values of cooperation among the countries sharing the same basin. This should be done within a framework of respecting the principles of good intention and good neighborliness, along with putting into consideration the idiosyncrasy of every basin. Thus, it is important to stress the fact that prior notification takes various forms, as it might just be a certain kind of notification with the measures supposed to be taken. It can also be considered as a kind of preventive commitment that is taken to prevent inter-conflicts among states, not to mention being a chance for consultation and negotiation among the basin countries over the implementation of such measures.

As regards the stance of the international adjudication concerning prior notification, the ruling of the arbitration authority on the conflict between France and Spain over Llano Lake, 1957, had contributed to adopting the concept of prior notification on the international level. In this respect, the arbitration authority had contributed to defining the features of the principle of prior notification, especially concerning the essence of this principle, as, in this vein, the arbitration committee made sure that France had fulfilled its legal duty in this respect, and that Spain could have evaluated the information concerning the project within the framework of the information provided in the prior notification in this

respect.

Furthermore, the court ruling of the International Court of Justice issued in 2010 concerning the conflict between Uruguay and Argentina over Pulp Mules Project, had asserted the importance that Uruguay should send a notification and make consultations with Argentine before starting the implementation of such project. It stressed that this is a commitment on Uruguay by virtue of 1975 Treaty between both states which makes it incumbent upon Uruguay to notify and consult with Argentina before implementing this project. In this respect, Argentine had filed a suit before the International Court of Justice, 2006, presenting various legal arguments, salient of which is Uruguay's infringement of the commitments mentioned in 1975 Treaty on Uruguay River, in addition to its infringement to the rules of the international law in general.

As regards the World Bank, its policy concerning financing water projects on the international level is mainly based on the prior notification as a commitment on part of the countries establishing water projects on international rivers. This should also be accompanied with all related data and technical studies, thus guaranteeing a state of general concordance among the one-basin countries.

Furthermore, the World Bank had further adopted the negative points so as not to offer the necessary finance

for such projects. In 1984, the World Bank started asking for submitting an assessment for the environmental impact of such projects if those states asked for the finance of the World Bank.

In 1989, by virtue of its policies, the World Bank adopted operational directives no. 400, 401 which required the necessity of evaluating the environmental effect while applying the designs of the projects, thus asserting the commitment of the state establishing the project to present all the project-related data with the prior notification so as to conduct special studies over the possible negative effects from the ecological, environmental and economic aspects, thus harming the interests of other basin countries.

The Principle of Settling River Conflicts with Peaceful Means

The principle of settling and resolving International conflicts with peaceful means has always been one of the stable principles in the conscience of the international societies. This came upon the rise in awareness of the importance of reaching a peaceful co-existence and of finding peaceful means to solve their conflicts. In this respect, article 33 of the UN Charter mentioned the peaceful means of resolving conflicts.

In this vein, a set of diplomatic and judicial means had been adopted by the UN concerning the settlement of international conflicts that should be

applied on all international conflicts, including those related to international rivers. Thereupon, the riverine states should resort to those means for resolving their conflicts. Thus, salient diplomatic means are negotiations, investigation, mediation, conciliation and good offices.

As regards the judicial mean, it clarifies that the disputing parties should resort to international arbitration of the International Court of Justice to resolve their conflicts. In this respect, the judicial means play a vital role in solving international conflicts, especially those concerning the use of the international rivers' waters.

Third: Ethiopia's Abidance by the Rules of Establishing Water Projects

Several water projects have been established on the Ethiopian headwaters so as to be used in generating electricity and cultivating lands. Salient projects in this respect are Tekeze Dam that was established over one of Atbara River tributaries and Tana Beles Project over Tana Lake.

It is well known that Egypt never opposed the World Bank's finance to some Ethiopian dams over the Nile that takes around 180 million m³ of water from Egypt and the Sudan's share. Moreover, in 2001, Egypt accepted Ethiopia's request from the African Development Bank to finance other dams, thus proving that it does not wish to obstruct the Nile Basin

Countries' development plans, especially Ethiopia's, as long as such plans are adopted according to the principles of the international law of waters and within the framework of inter-consultation and negotiation among the Basin Countries, while guaranteeing that Egypt's share will not be affected.

In April 2011, Ethiopia officially declared its intention to build a huge dam over the Nile water. It clarified that this dam will be a national project that will lead their country towards a new renaissance, thus naming the project "the Renaissance Dam." In this respect, Ethiopia set the practical procedures for establishing the dam concomitantly with settling an agreement with Egypt and the Sudan, the downstream countries, to form the International Committee of Experts to evaluate the potential impact and effect of this dam. However, it is clear that the Ethiopian vision in this respect is blur, especially which it changes some of the essential data related to the project from time to another. For example, Ethiopia declared that the storage capacity of the dam is 12 billion m³, then changed it to 30 billion m³ and finally declared that it is 60 million m³, thus contradicting the requirements of good intention and good neighborliness that makes it incumbent upon the country establishing the dam to submit all the studies and technical data to the coun-

tries that might be affected from this project.

Legally, the International Committee of experts which was formed from Egypt, Sudan and Ethiopia is not considered a kind of prior notifications; rather, it came in the framework of the rules of international courtesies among states. This is based on the fact that the procedures of prior notification compels the states establishing water projects to submit all necessary studies and data to the other basin countries that might be negatively affected from the project. It also compels those states not to start establishing any project except after receiving a response from the other countries on the notification; the matter which do not apply in the case of the Renaissance Dam as Ethiopia started building the dam despite the aforementioned committee. Yet, this committee might be a chance for Egypt to turn the Southern Nile Technical Regional Office (ENTRO) to a permanent international committee so as to become a permanent institutional mechanism for administering the Eastern Nile; following the example of some international committees in managing international water courses.

As regards Ethiopia's commitment to preserve Egypt's historical rights; Ethiopia is committed to implement the rules mentioned in the Demarcation Treaty that was ratified between Menelik II of Ethiopia and Great Britain, 1902. This Treaty includes Ethio-

pia's pledge not to establish any projects neither on the Blue Nile nor on the Sobat or on Tana Lake that might have a negative impact on the Nile water.

Moreover, Ethiopia had ratified the General Framework Agreement for Cooperation with Egypt, upon which Ethiopia pledged not to violate Egypt's historical rights. This Agreement had also highlighted the importance of cooperation between both states. It includes a pledge from both parties to refrain from any activity that might harm the interests of the other party concerning the Nile water. They also pledged to conduct consultations and cooperate in implementing projects of mutual benefits aiming at increasing the water flow and reducing the loss of water within the framework of comprehensive and integrated development plans. Moreover, both parties decided to establish a mechanism for consultation over issues of mutual interest. However, Ethiopia is currently trying to renounce this agreement under the

pretext of not being ratified by the Ethiopian parliament. Yet, the Vienna Convention on the Law of Treaties, 1969, which is considered the main reference for all international treaties, stipulates that countries which sign international treaties should abide by the rules mentioned thereto, even without the ratification of their parliaments. This is supported by the fact that the treaties which Ethiopia had previously signed upon the General Framework Agreement for Cooperation with Egypt are deep rooted legal principles in the field of using the waters of international rivers, especially that such an Agreement had been signed between two fully independent states. This, in turn, ends Ethiopia's previous allegations over the treaties that had been signed under occupation, not to mention the direct commitment with the interests of the other party concerning the Nile water which represents a direct recognition of Egypt's historical rights of the Nile water.