

## **Downstream riparians can also harm upstream riparians: the concept of foreclosure of future uses**

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It is commonly believed that only upstream riparians can harm downstream riparians by affecting the quantity or quality of water flow to them. It is not generally realized that downstream riparians can also harm upstream riparians by foreclosing their future uses of water through the prior use of, and the claiming of rights to such water. This article analyzes the concept of foreclosure of future uses, and concludes that cooperation between riparian states can adequately address the concerns and interests of all riparians.

**Keywords:** Danube River; foreclosure of future uses; international water law; Nile River; riparian states; the World Bank

### **Introduction**

Evolution of international water law has been a very slow process. In 1970 the United Nations General Assembly adopted a resolution asking the International Law Commission (ILC), its legal arm, to study the topic of international watercourses with the view of its progressive development and codification. Forty years after the adoption of that resolution, there is still no global treaty in force regulating the sharing and management of international watercourses. It took the ILC close to 25 years to complete a draft Convention on the Law of the Non-Navigational Uses of International Watercourses (Watercourses Convention) and propose it to the General Assembly. The General Assembly took three more years before adopting the Convention on 21 May 1997, by a large majority exceeding 100 members. However, 13 years after its adoption, the Convention is yet to command the necessary number of ratifications to enable it to enter into force and effect. As of July 2010, only 19 states have become parties to the Convention. The Convention needs 35 instruments of ratification to enter into force and effect.

A number of reasons have contributed to this slow pace of ratification (Salman 2007a). One major reason is the misunderstanding by many water experts and water officials of the relationship between the principle of equitable and reasonable utilization and the obligation against causing harm, and which of the two principles prevails over the other. As a result of this misunderstanding there is a major confusion on the rights and obligations of upstream and downstream riparians. Downstream riparians subscribe, by and large, to the obligation

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against causing harm as they believe that the obligation protects their existing uses, and prohibits upstream riparians from undertaking any projects or measures which would affect these uses, and as a result, cause them harm. Based on this belief, downstream riparians require that they be notified of any activity upstream to ensure that such activity would not harm their interests. Most downstream riparians believe that this is a unilateral requirement and does not apply to upstream riparians. Along the lines of this thinking, it is also widely believed that only upstream riparians can harm downstream riparians, and not the other way around.

On the other hand, upstream riparians believe, by and large, in equitable and reasonable utilization because they see this principle as laying down the framework for ensuring that they obtain their fair share in the watercourse in question. They see existing uses as one of many factors for determining such equitable and reasonable utilization. Many of them refuse to notify downstream riparians of their planned measures because, they claim, they are not being notified by those downstream riparians of their planned measures on the shared watercourse. Each group of riparians, by and large, believes the Convention is biased in favour of the other, and that international water law is indeed on its side.

The purpose of this article is to discuss how each group of riparians can actually affect, and even harm, the other, and in particular to explain how upstream riparians can be harmed by downstream riparians through foreclosing their future uses of the waters of the shared watercourse.

### **Requirement of notification of both downstream and upstream riparians**

As indicated above, one of the major misunderstandings about international water law is that harm can only be caused by upstream riparians to those downstream. Based on this faulty belief, it is widely thought by a large segment of water resources specialists, both lawyers and non-lawyers, that notification is an exclusive right of downstream riparians, because only upstream riparians can harm downstream riparians. In other words, harm can only “travel” downstream with the flow of the waters, and accordingly, downstream riparians do not need to notify upstream riparians of any project or activity they are undertaking or plan to undertake because such project or activity cannot possibly harm the upstream riparians. The justification further raises the contention that the waters have already left the lands of the upstream riparian, so how can that upstream riparian be harmed or even affected?

It is obvious, and clearer, that the downstream riparians can be harmed by the physical impacts of water quantity and quality changes caused by use by the upstream riparians. The quantity of water flow can be decreased by the upstream riparians through construction of dams, canals and pipelines, and through the storage and diversion of the waters of the shared rivers. The quality of the water of the shared rivers can be affected by the upstream riparians through pollution caused by industrial waste, sewage or agricultural runoff.

It is much less obvious, and generally not realized, that the upstream riparians can be affected, or even harmed, by the foreclosure of their future uses of water, caused by the prior use, and the claiming of rights to such water by the downstream riparians. Projects on shared rivers in the downstream riparian states would help those riparians in acquiring, and later claiming, rights to the water abstracted under those projects. The availability and use of such waters in future by the upper riparians would have already been foreclosed by the downstream riparians. Such downstream riparians would usually invoke the principle of acquired rights and the obligation not to cause harm in the face of claims by the upstream riparians. The upstream riparians’ claims to part of the waters of the shared watercourse

under the principle of equitable and reasonable utilization would be countered by claims of historic rights and existing uses, and the obligation against causing harm by affecting them.

Although the concept of foreclosure of future uses is not widely comprehended, there have been correspondence, scholarly work, international legal instruments, judicial decisions and projects expounding the concept. As early as 1961, the then prime minister of India, Jawaharlal Nehru, and the then president of Pakistan, Mohammad Ayub Khan, had a series of exchanges on the Ganges River which India and Pakistan shared at that time, before the birth of Bangladesh. In one of those exchanges, Prime Minister Nehru wrote to President Ayub Khan: "One more matter to which I must also refer, is the distinction you still seem to make between the rights of upper and lower riparians in paragraph 7 of your letter, which implies that the lower riparian can proceed unilaterally with projects, while the upper riparian should not be free to do so. If this was to be so, it would enable the lower riparian to create, unilaterally, historic rights in its favor and go on inflating them at its discretion thereby completely blocking all development and uses of the upper riparian. We cannot, obviously, accept this point of view" (Crow 1995, p. 89). It is worth noting that India is the upper riparian on the Ganges River, *vis-à-vis* Pakistan at that time, and Bangladesh now. Prime Minister Nehru was clearly ahead of his time on this issue. The use of the terms "unilateral" and "blocking" in this paragraph indicates a clear and succinct understanding by Nehru of riparian relations in general, and of the concept of foreclosure of future uses in particular.

Another example indicating an understanding of the concept of foreclosure of future uses is Ethiopia's Note Verbale of 20 March 1997, addressed to Egypt, on the Toshka or New Valley Project which Egypt was constructing and which draws water from the Nile River. Ethiopia is the upper riparian of the Nile Basin. The Note Verbale stated: "Ethiopia wishes to be on record as having made it unambiguously clear that it will not allow its share to the Nile waters to be affected by a *fait accompli* such as the Toshka project, regarding which it was neither consulted nor alerted." Commenting on this paragraph of the Note Verbale, and on the Toshka Project, Professor John Waterbury noted that: "The creation, *de novo*, of projects that use significant amounts of water may, and probably will, become the basis for asserting new acquired rights founded in established use. Egypt's action in the New Valley (or in the Sinai through the Peace Canal), in Ethiopia's view, preempts Ethiopia's right to harness the Nile water. If the principle of first in time, first in right prevails, then Ethiopia will have to forgo projects of its own in order to protect Egypt's use rights in the New Valley or in Sinai. Ethiopia will suffer appreciable harm in order not to cause harm to Egypt." Clarifying those thoughts further, Professor Waterbury went on to state: "Debating this project with Egypt may establish that downstream states, contrary to geographical logic, can cause appreciable harm to upstream states by preempting their options, in short by foreclosing the future" (Waterbury 2002, pp. 84–85). Similar to Nehru's paragraph quoted above, the use by Ethiopia of the terms "*fait accompli*", and by Professor Waterbury of "preempts" and "forecloses" indicates a clear understanding of the effects on upstream states of projects in downstream states.

Along the same lines, Professor Stephen McCaffrey posed the following question: "If a downstream State continued to develop its water resources to the point that it foreclosed otherwise reasonable future uses of the watercourse by an upstream State, could this constitute the causing of 'significant harm' to the upstream State? And, does the downstream State have any procedural obligations toward the upstream State regarding new projects it plans?" Professor McCaffrey answered both questions in the affirmative and concluded that: "Just as a downstream State may be harmed by uses upstream, so also

may an upstream State be harmed if its present or future use is limited in favor of a State downstream” (McCaffrey 2007a, p. 788).

The *Zwillikon Dam* case which was decided by the Swiss Supreme Court in 1878 also addressed this issue. The case arose in the Canton of Zurich in Switzerland between the villages of Zwillikon and Aargau which share the stream called Jonabach. The village of Zwillikon, which is the upstream riparian, constructed a dam on the stream. That action was challenged by Aargau, the downstream riparian, claiming established rights over the stream which would be adversely affected by the dam. The Swiss Supreme Court concluded that “where the relations among component units of a federal State are at stake, a rule of international law derived from the law of good neighborliness applies. According to that rule, the exercise of a right may not affect the right of a neighbor. The two rights are equal, and, in the event of a conflict, a reasonable arrangement has to be found on the basis of the relevant circumstances” (Smith 1931, pp. 39–40). Thus, the Swiss Supreme Court, as early as 1878, pronounced the equality of all the riparians in the uses of the shared river; such equality is to be translated into reasonable arrangements. As discussed below, these two elements, equality and mutually acceptable arrangements, are actually the basis of the concept of equitable and reasonable utilization.

In addition to state practice, scholarly commentaries and judicial decisions discussed above, there are treaties that have addressed the issue of harm to upstream riparians. One recent treaty which addressed the concept of foreclosure of future uses is the Senegal River Water Charter which was concluded by Mali, Mauritania and Senegal in May 2002, and which Guinea became a party to in 2006. Article 4 of the Charter enumerates a number of principles for allocation of the waters of the Senegal River among the riparians. These principles include “the obligation of each riparian state to inform other riparian states before engaging in any activity or project likely to have an impact on water availability, and/or the possibility to implement future projects” (italics added). This paragraph clearly protects all the riparians of the Senegal River, both downstream and upstream, with the upstream riparians, Guinea and Mali, receiving a clear and explicit reference in the Water Charter to the protection of their rights from the lower riparians, namely Senegal and Mauritania.

Judging from the above references, there has been a gradually growing understanding of how downstream riparians can actually affect upstream riparians through the foreclosure of their future uses. Although those references have not quoted any international legal instruments, a close reading of some of those instruments indicates that this matter has not been overlooked by such instruments, as discussed below.

### **Riparians’ relations under the Helsinki Rules and the Watercourses Convention**

The most authoritative instrument in the field of international water law prior to the adoption of the Watercourses Convention by the UN General Assembly in 1997 was “the Helsinki Rules on the Uses of the Water of International Rivers”, often referred to as “the Helsinki Rules”. The Helsinki Rules were adopted by the International Law Association (ILA) in 1966, and were widely accepted and quoted by states and scholars, and considered as reflecting customary international law (Bourne 1997). However, they do not have a binding effect *per se* because the ILA is a non-official, non-governmental body, notwithstanding the fact that its scholarly work has contributed tremendously to the development of international law (Bogdanovic 2001).

The work of the ILA, as reflected in the Helsinki Rules, centres on the principle of equitable and reasonable utilization. Indeed, the factors enumerated in the Rules for determining what constitutes equitable and reasonable utilization are widely accepted and

quoted, and have been, by and large, reiterated, 30 years later, in the UN Watercourses Convention. These factors include: the geography, hydrology and climatic conditions of the basin; past and existing utilization; and the economic and social needs of each basin state and the population dependent on the basin. They also include: availability of other sources; the cost of alternatives; avoidance of unnecessary waste; practicability of compensation; and the degree to which the needs of a basin state may be satisfied without causing substantial injury to a co-basin state. The Helsinki Rules do not include any provisions on the obligation not to cause harm. The only reference made is to the factor for equitable and reasonable utilization dealing with existing uses.

It should be noted that the requirement for notification under the Helsinki Rules does not distinguish between downstream and upstream riparians. The Helsinki Rules require that: "A state, regardless of its location in a drainage basin, should furnish to any other basin state, the interests of which may be substantially affected, notice of any proposed construction or installation which would alter the regime of the basin in a way which might give rise to a dispute . . ." The Rules define the term "Basin State" as the "state the territory of which includes a portion of an international drainage basin".

As noted above, the Convention reiterates in Article 6, by and large, the factors for equitable and reasonable utilization of the Helsinki Rules. Indeed, the Convention acknowledges the valuable contribution of international organizations, both governmental and non-governmental, to the codification and progressive development of international law in this field. However, unlike the Helsinki Rules, the Convention includes a separate article on the obligation not to cause significant harm, in addition to Articles 5 and 6 on equitable and reasonable utilization (Salman 2007b).

Article 7 deals with the obligation not to cause significant harm, and requires the watercourse states to take all appropriate measures to prevent the causing of significant harm to other watercourse states. Agreement on which of the two principles (equitable and reasonable utilization, and the obligation not to cause harm) takes priority over the other proved quite difficult, and the issue occupied the ILC throughout its 23 years of work on the Convention. Each of the seven ILC *rapporteurs* dealt with the issue differently, either equating the two principles, or subordinating one principle to the other. The issue was discussed by the Sixth Committee of the United Nations (the Legal Committee) which was convened as the Working Group of the Whole. Sharp differences within the Working Group between the riparian states on those two principles dominated the discussion. As mentioned earlier, lower riparians tend to favour the no harm rule, as it protects existing uses against impacts resulting from activities undertaken by upstream states. Conversely, upper riparians tend to favour the principle of equitable and reasonable utilization, because it provides more scope for states to utilize their share of the watercourse for activities that may impact on downstream states. After a lengthy debate by the Working Group, a compromise regarding the relationship between the two principles was reached. The compromise addressed and linked Articles 5 and 6 (on equitable and reasonable utilization) and Article 7 (on the obligation not to cause significant harm). The new language of Article 7 requires the state that causes significant harm to take measures to eliminate or mitigate such harm "having due regard to articles 5 and 6". As stated earlier, these two articles deal with the principles of equitable and reasonable utilization. The new language was accepted by both groups of riparians, because "this new formula was considered by a number of lower riparians to be sufficiently neutral not to suggest a subordination of the no-harm rule to the principle of equitable and reasonable utilization. A number of upper riparians thought just the contrary, namely, that that formula was strong enough to support the idea of such a subordination" (Caflich 1998, p. 13). Although this compromise language paved the way for the adoption

of the Convention by the United Nations General Assembly on 21 May 1997, the misunderstanding seems to have resurfaced and prevailed soon after that, resulting in the current slow process of ratification of the Convention.

However, notwithstanding this compromise language, most experts in the field of international law believe that the Watercourses Convention has subordinated the obligation not to cause significant harm to the principle of equitable and reasonable utilization (Bourne 1997, Caffisch 1998, Paisley 2002, McCaffrey 2007b, Salman 2007a). This conclusion is based on a close reading of Articles 5, 6 and 7 of the Convention. Article 6 enumerates a number of factors for determining equitable and reasonable utilization. These factors include: (1) “the effects of the use or uses of the watercourse in one watercourse State on other watercourse States”; and (2) “existing and potential uses of the watercourse”. These same factors will also need to be used, with other factors, to determine whether significant harm is caused to another riparian, because harm can be caused by depriving other riparians of the water flow and thereby affecting their existing uses.

Moreover, Article 7(1) of the Watercourses Convention obliges the watercourse states, when utilizing an international watercourse in their territory, to take all appropriate measures to prevent the causing of significant harm to other watercourse states. When significant harm nevertheless is caused to another watercourse state, then Article 7(2) of the Convention requires the state causing the harm to “take all appropriate measures, having due regard to 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”. As noted before, Articles 5 and 6 of the Convention deal with equitable and reasonable utilization. As such, Article 7(2) requires giving due regard to the principle of equitable and reasonable utilization when significant harm has nevertheless been caused to another watercourse state. The paragraph also indicates that the causing of harm may be tolerated in certain cases such as when the possibility of compensation may be considered. Accordingly, a careful reading of Articles 5, 6 and 7 of the Convention should lead to the conclusion that the obligation not to cause significant harm has indeed been subordinated to the principle of equitable and reasonable utilization. Hence, it can be concluded that, similar to the Helsinki Rules, the principle of equitable and reasonable utilization is the fundamental and guiding principle of the UN Watercourses Convention, and consequently, of international water law.

Professor Charles Bourne, confirming this line of thinking opined, “Today, however, the doctrine of prior appropriation has almost been universally rejected in favour of the doctrine of equitable utilization. Under the latter doctrine, a state is always entitled to ‘a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin’, and ‘the past utilizations of the waters of the basin, including in particular existing utilization’ is only one of the many other factors to be taken into account in the determination of its share” (Bourne 1997, p. 158).

Professor Lucius Caffisch went further and stated that the main users of international watercourses have usually been lower riparians because of the typical topography of most river basins – mountainous in upper riparians, and levelled plains in downstream riparians. In his view, if the no-harm rule were to prevail over the principle of equitable and reasonable utilization, it would heavily advantage lower riparians and disadvantage upstream states, and “the economic and social growth of any newcomer, in particular upstream countries, would be stunted” (Caffisch 1998, p. 13).

Commenting on the relationship between the two principles, Professor McCaffrey stated “. . . while the no-harm principle does qualify as an independent norm, it neither embodies an absolute standard nor supersedes the principle of equitable utilization where

the two appear to conflict with each other. Instead, [the no-harm principle] plays a complementary role, triggering discussions between the states concerned and perhaps, in effect, proscribing certain forms of serious harm” (McCaffrey 2007b, p. 408).

On the issue of notification of other riparians, the Convention states that “before a watercourse State 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.” Thus, the Convention does not limit notification to downstream riparians. Rather, it deals with significant adverse effects “upon other watercourse states”. Indeed, the Convention does not even mention the terms “downstream” and “upstream” riparians in any of its provisions. It refers throughout its articles and paragraphs to “watercourse State”. It defines “watercourse State” to mean “a State Party to the present Convention in whose territory part of an international watercourse is situated . . .” It is worth noting that the Helsinki Rules have gone further than the Watercourses Convention by emphasizing the requirement of notification regardless of the location of the state in the drainage basin.

In addition to the above, it should also be emphasized that the basic principles of international water law are based on cooperation and good neighbourliness of all the riparians of the shared watercourse, downstream as well as upstream. These principles, as enunciated in the Watercourses Convention, call for regular exchange of data and information between all the riparians, and their participation in the use, development and protection of the international watercourse, with a view to attaining optimal and sustainable utilization thereof, and benefits therefrom. A few months after the adoption of the Convention, the International Court of Justice (ICJ) had the opportunity to expound those principles further, and emphasize the primacy of the principle of equitable and reasonable utilization, as discussed below.

### **The Gabčíkovo–Nagyymaros case**

The *Gabčíkovo–Nagyymaros* case between Hungary and Slovakia was decided by the ICJ in September 1997, four months after the Convention was adopted by the UN General Assembly (*Gabčíkovo–Nagyymaros* 1997). This is the first international water dispute to be referred to, and decided by, the ICJ. The dispute involves complex legal issues, including the law of treaties, state responsibility, environmental law, and the concept of sustainable development, as well as international watercourses (Sands 1998).

The dispute arose between Hungary and Czechoslovakia regarding two barrages over the Danube River envisaged under a Treaty concluded in 1977 by the two countries. Construction began in the late 1970s, but in the mid-1980s, environmental groups in Hungary claimed negative environmental impacts of the barrages and began protesting against the project, forcing the Hungarian government to suspend work in 1989. Czechoslovakia insisted that there were no negative environmental impacts, and decided to proceed unilaterally with a provisional solution consisting of a single barrage on the river where it is wholly in Czechoslovakia. However, this meant the diversion of a considerable amount of the waters of the Danube into the bypass canal provided for in the Treaty, which is situated within its territory. Czechoslovakia claimed that this was justified under the 1977 Treaty. In May 1991, Hungary decided to terminate the 1977 Treaty invoking nearly all the grounds of treaty termination under the 1969 Vienna Convention on the Law of Treaties, as well as ecological necessity. In October of that year, Czechoslovakia implemented its provisional solution, diverting a large portion of the Danube River into the bypass canal. The situation became more complicated with the split of Czechoslovakia in December 1992

into two countries (the Czech Republic and the Slovak Republic, or Slovakia), and the agreement that Slovakia would succeed in owning the Czechoslovakian part of the project. By that time Czechoslovakia had already dammed the Danube and diverted the waters into its territory. The two countries agreed in April 1993, basically under the pressure from the European Commission (EC), to refer the dispute to the ICJ.

In a brief summary, the ICJ ruled in September 1997 that Hungary was not entitled to suspend or terminate the work on the project in 1989 on environmental grounds, and that Czechoslovakia, and later Slovakia, was also not entitled to operate the project based on the unilateral solution it developed without an agreement with Hungary. The ICJ further decided that Hungary was not entitled to terminate the 1977 Treaty on any of the grounds under the Vienna Convention, nor on the basis of ecological necessity, and thus the Court ruled that the Treaty was still in force. The ICJ concluded that Hungary and Slovakia must negotiate in good faith in the light of the prevailing situation, and must take all necessary measures to ensure the achievement of the objectives of the Treaty of 1977, in accordance with such modalities as they may agree upon.

The ICJ addressed the issue of the suffering of harm by one riparian, and attributed that to the deprivation of such a riparian of the right to an equitable and reasonable utilization of the shared watercourses, which it called a “basic right”. The ICJ stated that it “. . . considers that Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube ... failed to respect the proportionality which is required by international law”. The ICJ went further and emphasized the concept of equitable and reasonable utilization when, referring to the project under consideration, it directed that “the multi-purpose programme, in the form of a co-ordinated single unit, for the use, development and protection of the watercourse is implemented in an equitable and reasonable manner”. It is worth noting that the ICJ made no reference to the obligation not to cause harm to other riparians. The ICJ emphasized the principle of equitable and reasonable utilization further by linking it to the concept of equality of all the riparian states. It quoted from the 1929 judgment by its predecessor, the Permanent Court of International Justice (PCIJ), where the PCIJ stated “[the] community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others.”

In the above-quoted paragraphs the ICJ has confirmed some basic principles of international water law, namely the equality of all riparians (whether downstream or upstream) in the uses of the shared watercourse, as well as non-recognition of unilateral action by one riparian which would result in depriving other riparians of the right to an equitable and reasonable share of the respective watercourse.

### **The policies and procedures of the World Bank**

The World Bank was faced with the challenges emanating from projects on international waterways from the very early days of its operations in the late 1940s (Salman 2009). Those challenges started to emerge following the processing of irrigation, hydropower and water supply projects on international rivers. From the start, the Bank realized and acknowledged its unique character as an international financial cooperative institution, and concluded that it has to handle those types of projects with extra caution. Indeed, the Articles of Agreement of the Bank themselves require the Bank “to act prudently in the interests both



of the particular member in whose territories the project is located and of the members as a whole”.

The Bank issued its first policy for projects on international waterways in 1956. This policy was updated and refined in 1965, and was later elaborated in 1985. The current version of the policy was issued in 2001 as Operational Policy and Bank Procedures 7.50, “Projects on International Waterways” (or, “the Policy”) (Salman 2009).

The Bank Policy states that cooperation and goodwill of all of the riparians is essential for the efficient utilization and protection of the waterway. The Policy goes on to indicate that the Bank attaches great importance to the riparians making appropriate agreements or arrangements for this purpose, and declares the readiness of the Bank to assist the riparians achieve this end. Thus, cooperation is based on both reciprocity as well as the need to avoid unilateral action by one or some of the riparians. The Policy stipulates that the international aspects of a project on an international waterway are dealt with at the earliest possible opportunity in the project cycle. The prospective borrower is required to notify the other riparians (both upstream and downstream) of the proposed project and its details. The notification contains, to the extent available, sufficient technical specifications, information and other data (the Project Details) to enable the other riparians to determine as accurately as possible whether the proposed project has the potential for causing appreciable harm through water deprivation (whether actual deprivation as in the case of downstream riparians, or foreclosure of future uses as in the case of upstream riparians, as discussed below), or through pollution or otherwise.

The notified riparian states are given a reasonable period of time, which could range from two to six months, depending on the nature of the project, to respond. If the prospective borrower indicates to the Bank that it does not wish to give notification, normally the Bank itself does so on behalf of the borrower. If the prospective borrower does not wish to give notification, and objects to the Bank’s doing so, the Bank discontinues processing of the project. This stipulation is appropriate and understandable given the nature of the World Bank as an international financial cooperative institution, as well as the need to maintain the good neighbourliness between the riparian states and prevent disputes among them. Accordingly, the Policy requires that all the riparians, whether upstream or downstream, be notified of the project.

Because of the extensive practical experience that the Bank has gained with regard to projects on international waterways, the effects of its financed projects on upstream riparians have been routinely faced and gradually understood. Through such experience, it has become clear that, just as upstream riparians can cause harm to downstream riparians by affecting their existing use, downstream riparians can harm upstream riparians by foreclosing their future uses and depriving them of their right to an equitable and reasonable utilization of the shared waterway. It should be added in this connection that the practical application of the Bank Policy in this area has also demonstrated the close inter-linkages between the principle of equitable and reasonable utilization, and the obligation not to cause harm, as also indicated by the ICJ. Based on this experience and the above-discussed rationale, the Bank Policy, in line with international water law, requires notifying both downstream as well as upstream riparians, and providing them with the project details to enable them to assess the effects of the proposed project on their interests. As an example, a project on the Mekong River in any of the six riparian states of the Mekong would require notifying all the other five, regardless of their location on the river. Similarly, a project on the Nile in any of the ten riparian states would require notification of all the other nine riparians, both of the Blue Nile as well as the White

Nile. Accordingly, both groups of riparians are treated equally with regard to notification as well as the procedures for dealing with objections from either of them, as will be discussed below.

### **Implementation of the World Bank policies: the Baardhere Dam Project**

The processing of the Baardhere Dam and Water Infrastructure Project in Somalia explains amply and practically the concept of foreclosure of future uses. The Project consisted of the construction of a multipurpose dam about 600 m long and 75 m high to regulate the flow of the Juba River, generate hydropower and control floods. The Project also included the construction of irrigation and drainage systems for about 5000 hectares of land. The proposed dam was located on the Juba River, 35 km upstream of the town of Baardhere in Somalia. The Juba River is fed by three main tributaries, the Genale, the Wabe Gestro and the Dawa, which originate in Ethiopia, with the Dawa becoming a boundary river with Kenya. These rivers converge at Dolo, near the Somali borders with Kenya and Ethiopia, forming the main Juba River. The river flows through Somalia before emptying in the Indian Ocean (Caponera 2003, pp. 221–222). Thus, Ethiopia is the upstream riparian and Somalia is the downstream riparian. Kenya is a riparian by virtue of the Dawa tributary. No agreement has been concluded on the river, nor have there been any basin management arrangements.

Processing of the Project started in 1983. In 1985, following adoption by the Bank of its Policy for Projects on International Waterways referred to earlier, the Bank informed Somalia of the need to notify Ethiopia and Kenya, the other riparians of the Juba River, of the Project. However, because of the strained relations between Somalia and Ethiopia at that time, Somalia asked the Bank to undertake the notification to Ethiopia and Kenya on its behalf. It is worth noting that Somalia neither challenged, nor commented on the Bank's message on the need to notify Ethiopia, the upstream riparian of the Juba River.

Consequently, the Bank notified the Government of Ethiopia of the proposed Baardhere Dam Project in September 1986. The notification included information on the Project's basic design features ("Project Details") in order to enable Ethiopia to make its own determination as to the likely impact of the Project, and stated that in the Bank's judgment, the Project would not cause appreciable harm to Ethiopia. Pursuant to the Bank Policy, Ethiopia was asked to send any comments it may have within a period of six months, hence no later than March 1987.

In its reply in March 1987, the Ethiopian Government took the position that Ethiopia had the potential to impound all the discharge of the Juba River for irrigation and hydropower development, and that the Project did not take into consideration its present and future irrigation and hydropower developments. Ethiopia provided some basic plans and data for the use of the waters of the Juba River, and concluded that the Project would result in appreciable harm to her interests since it would take away her rights to such waters. The Government of Ethiopia suggested prior negotiations with Somalia concerning the use of the waters of the Juba River and the amount of water that would be allocated to each of them with a view to reaching an agreement which would be mutually satisfactory to both riparian states. Kenya was also notified of the Project but no response was received from Kenya.

The Bank concluded that Ethiopia's response to the notification amounted to an objection to the proposed Project. The Bank was concerned that Ethiopia's future uses could appreciably harm the Project. However, Ethiopia responded that the Project would adversely affect her future uses of the Juba River. Ethiopia's response, in essence, indicated an understanding on the part of Ethiopia of the concept of foreclosure of future uses.

Indeed, Ethiopia, the upstream riparian of the Nile River, objected to the bilateral negotiations of Egypt and Sudan on the allocation of the Nile waters, and to the Aswan High Dam in Egypt, and to the Roseiris Dam in the Sudan, in the late 1950s. As discussed before, Ethiopia also objected to the Toshka Project in Egypt in the 1990s. Ethiopia's contention has been that those projects would establish prior water uses that would later be claimed as acquired rights by Egypt and Sudan, thus foreclosing Ethiopia's future uses. Those same arguments were the basis of Ethiopia's objection to the Baardhere Dam Project.

As a result of Ethiopia's objection to the Baardhere Dam Project, the Bank proposed that Somalia should hold negotiations with Ethiopia over the sharing of the Juba River. The Somali Government was not amenable to the idea of negotiations with Ethiopia, or the use of the good offices of a third party to facilitate a resolution of the issues raised by Ethiopia. Instead, Somalia proposed that the Bank should make its own assessment of Ethiopia's objection and claims. Ethiopia's proposal of negotiations conferred credibility on its objection, and made it difficult for the Bank to underrate it.

The Bank Policy addresses in detail the issue of objection by one or more of the riparians and how the Bank should deal with such an objection. The Policy states that if one of the riparians objects to the proposed project, the Project Team prepares a memorandum for senior Bank management which would address: (1) the nature of the riparian issues; (2) the Bank staff's assessment of the objection raised, including the reasons for them and any available supporting data; (3) the staff assessment of whether the proposed project will cause appreciable harm to the interests of the other riparians, or be appreciably harmed by the other riparians' possible water use; (4) the question of whether the circumstances of the case require that the Bank, before taking any further action, urge the parties to resolve the issues through amicable means such as consultations, negotiations and good offices (which will normally be resorted to when the other riparians' objections are substantiated); and (5) the question of whether the objection is of such a nature that it is advisable to obtain an additional opinion from independent experts, as detailed in the Bank Policy. As indicated earlier, the Policy does not distinguish between downstream and upstream riparians, and requires notification to both. The above-discussed procedures confirm this approach. Indeed, the phrase "interests of the other riparians" in sub-paragraph (c) above has been routinely interpreted to include, *inter alia*, foreclosure of future uses by the downstream riparians.

Following submission of the memorandum referred to above, Bank management may decide, depending on the project and the objection, (1) to proceed with project processing; (2) to refer the matter to the Operations Committee (the highest Bank projects review committee); or (3) to seek opinion of independent experts.

Under the circumstances of the objection by Ethiopia to the Baardhere Dam Project, the question arose whether – for the first time – the Bank should seek an opinion of independent experts pursuant to its Policy. After extensive internal deliberations, the Bank decided to proceed with the appointment of independent experts to provide an opinion on Ethiopia's objection to the Baardhere Dam Project. Following thorough and extensive preparations, three such experts were duly appointed in October 1988. The independent experts selected were Lloyd A. Duscha and Dr Boonrod Binson (both engineers), and Dr Dante Caponera (a water lawyer). Duscha was selected by the other two experts as the chair of the independent experts. The terms of reference required the independent experts to: (1) examine the nature of the riparian issues; (2) assess whether the proposed Project would cause appreciable harm to other riparians, or would be harmed by the use of water by other riparians; and (3) give an opinion on the staff assessment of the riparian issues. Specifically, the experts would examine the Project Details and other studies, as well as Ethiopia's objection, and as necessary take steps to verify Ethiopia's claims on past and proposed uses of

the Juba River and its tributaries. The experts would also assess the viability of the Project if water flow in the proposed Baardhere Dam is depleted, reduced or altered by Ethiopia. To ensure their independence, the experts were appointed and directed to report to the Senior Vice President, Operations, and not to the Vice-President of the Africa Region where the Project was being processed. Additionally, the Bank ensured that there was no conflict of interest on the part of any of the experts. The terms of reference of the experts included the possibility of field visits to Somalia, Ethiopia and Kenya.

The independent experts were furnished with all the Project reports, information and data, as well as Ethiopia's objection. After studying this information, the experts met and deliberated during the last week of May 1989, and finalized and submitted their report to the Bank on 31 May (Report of the Independent Experts 1989). The Report discussed both the technical issues associated with the Project, as well as the basic principles of international water law. The independent experts cited a number of conventions and treaties of general relevance to the three riparian countries. They also cited the only treaty directly related to the Juba River, that is the Treaty between the Empire of Ethiopia and the Republic of Kenya respecting the Boundary between the two countries signed in Mombasa, Kenya, on 9 June 1970. The Treaty has no bearing on the Baardhere Dam. Article VII of the Treaty provides that with respect to the Dawa River between Malka Rie and Malka Marie, canalization of floodwaters shall be permitted for cultivation, but no work shall be undertaken which might be prejudicial to the downstream water supply or which might alter the course of the river. Furthermore, the experts noted that both Ethiopia and Somalia are parties to the 1968 African Convention on the Protection of Nature and Natural Resources. The Convention requires the Contracting States to coordinate the planning and development of water resources projects, to consult with each other thereon, and to set up inter-states commissions to study and resolve problems arising from the joint use of these resources, and for the joint development and conservation of such resources.

The independent experts stated that the Baardhere Dam would not cause physical appreciable harm to Ethiopia or Kenya as the dam was downstream of both states and its reservoir limit was well within Somalia. They accepted as valid the analysis of the Bank staff that projected a 20–36% decrease in mean annual runoff due to abstraction and evaporation in Ethiopia. The independent experts noted further that: "Regardless of the true figure, it appears unlikely that development could be at a rate which would create a negative factor during the economic life of the project. It could however, become a factor during the physical life of the project." The experts also noted that it was possible to decrease the flow of the Juba River upstream of Somalia to the severe detriment of the Project. Equally important was the observation of the experts that the Project could become a detriment to Ethiopia by virtue of prescriptive rights gained with time. This point was discussed again in connection with the general discussion of the principles of international water law. In that connection the experts observed that, "present reasonable uses shall take into consideration the legitimate future requirements of a co-basin state which at present is not in a position to develop the same water resources in its territory". The experts also underscored the principle of international water law of equitable and reasonable utilization of the waters of the Juba River among the three riparians, and thought that it was indispensable that negotiations between those riparians should take place with a view to concluding a framework agreement.

The independent experts concluded that, considering the data available to them, the Bank staff performed a reasonable and prudent analysis in developing its assessment, and

that without direct knowledge of the actual situation or the future plans of Ethiopia particularly, the independent experts were in no position to dispute the conclusions reached by the Bank staff, which the experts deemed sound.

Thus, the independent experts confirmed the determination of the Bank that the Project would not cause appreciable harm to Ethiopia, and would not be harmed by Ethiopia's possible water use. In essence, the experts concluded that whatever "prescriptive rights gained by time" on the waters of the Juba River the Project may help Somalia establish, such water rights would still be within Somalia's equitable share, and would not deprive Ethiopia of its equitable and reasonable share. However, the experts qualified this conclusion by two factors, the data made available to them, and lack of direct knowledge of the actual situation in Ethiopia. Although the possibility of a field visit was included in the terms of reference, no such visit took place.

A few months after the Report of the independent experts was submitted, the political and security situation in Somalia started to deteriorate, and as a result the Bank suspended processing of the Project. Eventually, the situation in Somalia put an end to the processing of the Baardhere Dam Project, as well as to all Bank operations there. It would have been quite pertinent to see how Ethiopia would have reacted to the decision of the Bank to proceed with the Project despite its objection, and how the Bank would have addressed any further responses or protests from Ethiopia.

Riparians' relations have posed a major challenge to the World Bank with regards to its projects on international waterways. However, those projects provided the Bank not only with the opportunity of operationalizing the concept of equality of all riparians, but also of pioneering processes and procedures for the actual implementation of the concept of the foreclosure of future uses.

## **Conclusion**

The above discussion of correspondence and scholarly work, court decisions, treaties and other international legal instruments, and the World Bank policies and practice as expounded by the Baardhere Dam Project, indicates clearly that harm is indeed a two-way matter. Just as upstream riparians can harm downstream riparians by interfering with the flow of the shared river, or polluting its waters, downstream riparians can also harm upstream riparians by foreclosing their future uses through the prior use of waters, and the claiming of rights to such waters. Prime Minister Nehru addressed the concept of foreclosure of future uses 50 years ago in a very eloquent and articulate manner. He clarified how unilateral action by the lower riparians could create historic rights which would block development and uses by the upper riparians. This statement has no doubt contributed immensely to the sowing of the seeds for the concept of foreclosure of future uses, and to the gradual emergence and comprehension of this concept.

In 1966, five years after Nehru's statement, the ILA, through the Helsinki Rules, indicated that action by one riparian can affect other riparians regardless of the location of those riparians on the shared river. Hence, the Rules called for notification of any state whose interests may be substantially affected. Building on the Helsinki Rules, the UN Watercourses Convention avoided using the terms "downstream riparian" and "upstream riparian" altogether, and instead used the inclusive and neutral term "watercourse states." Similarly, the Convention requires notification of the other watercourse states, which in effect means both downstream as well as upstream riparians. Along the same lines, the Senegal River Water Charter requires notification for "any activity likely to have an impact

on water availability and the possibility to implement future projects”, thus protecting both the downstream as well as the upstream riparians.

The World Bank policies, procedures and practice have contributed considerably to the clarification and elaboration of the concept of foreclosure of future uses. The practical application of the requirement of notification under the Policy of all the riparians, both downstream as well as upstream, has provided an opportunity for clarifying the rationale for the concept. It has also assisted in explaining the close linkages between the concept of foreclosure of future uses and the principle of equitable and reasonable utilization which the ICJ pronounced as the cardinal principle of international water law. In the Baardhere Dam Project not only was Ethiopia, the upper riparian, notified of the Project, but it also objected to the Project. That objection provided the Bank with a challenge and opportunity. Part of the challenge related to the fact that there were no established principles of international water law in the mid-1980s on objections by any riparian, let alone by upper riparians. The Bank was guided by the emerging principles of international law, its character as an international financial cooperative institution, as well as its practice, to address that challenge. It was eventually able to use the Project as an opportunity to clarify the concept of foreclosure of future uses and to contribute to its comprehension, elaboration and progressive development. It is worth noting that the objection to the Baardhere Dam Project came from an upper riparian that was already conversant on the matter through its dealings with the lower riparians on the Nile River. As indicated earlier Ethiopia’s message in this regard has been that it “will not allow its share of the Nile waters to be affected by a *fait accompli*”. It is also worth noting that the independent experts addressed the issue of the foreclosure of future uses in a similar way, when they dealt with the “prescriptive rights gained by time.” Like the ICJ decision on the *Gabčíkovo–Nagymaros* case 10 years later, the experts also underscored the principle of equitable and reasonable utilization. However, the experts concluded, in essence, that whatever water rights the Project may help Somalia establish, such water rights would still be within Somalia’s equitable share, and would not foreclose Ethiopia’s future uses.

The clarification and elaboration of the concept of foreclosure of future uses highlights the fact that measures undertaken by any riparian, regardless of its location on the shared watercourse, will have effects on all other riparians. This, in turn, underscores the basic principle of international water law that cooperation and goodwill of all the riparians, upstream as well as downstream, is the *sine qua non* for the efficient use, equitable sharing and sound management of shared watercourses. Such cooperation is appropriately manifested in the establishment of a mechanism, inclusive of all the riparians, for exchange of data and information, for planning and executing of joint projects and programmes, as well as for dealing with disputes. An inclusive and effective mechanism would properly address the concerns and demands of all the riparians in a transparent and fair manner. In this way, cooperation would dispense with the upstream–downstream divisions of riparians, and could thus render academic the debate on which riparian can actually cause harm to which riparian.

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