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DAMS AND OTHER PLANNED MEASURES THE INTERNATIONAL LEGAL ASPECTS

Dr. Md. Nazrul Islam

1. Introduction

Dams are built for a number of purposes including for hydropower, industry and irrigation. Large dams on transboundary rivers have remained as a source of enormous tension between countries for many decades.[1] While their contribution to development is recognized even in the recent report of the World Commission on Dams, it is also warned there that construction and operations of dams in many cases involve "unacceptable and unnecessary price" in social and envirommmental tarms.[2] The Commission noted that large dams and diversion projects can led to the loss of forests and wildlife habitat, aquatic biodiversity and can affect downstream floodplains, wetlands, riverines, estuarine and adjacent marine ecosystem. The Commission therefore pointed out that clarifying the rights of the riparian states involving a proposed project on a transboundary river is "an essential step in identifying the legitimate claims and entitlement that may be affected by the project".[3]

This paper examines the international legal aspects of construction and operation of dams and other planned measures on transboundary rivers by analyzing the provisions of the 1997 UN Conventions on the Non-Navigational Use of International Watercourses. It aims to argue the desirability and scopes of application of the relevant provisions of 1997 Convention for effectuating an equitable resolution of the tensions associated with the construction of dams, barrages and other planned measures on the transboundary rivers of South-Asia.

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1 World Commission on Dams, "Dams and Development, A New Framework for Decision-Making, the Report of the World Commission on Dams", 2000, Executive Summary, p. xxxiii.
2 Ibid, An Overview, p. 5.
3 Ibid, Executive Summary, P. xxxiii.

It comprises of three parts. First: it analyses the relevant procedural principles of the 1997 Watercourses Convention to illustrate its effciency as a framework convention. Second: it examines the extent to which the 1997 Convention, as a treaty instrument, can be said to be potentially applicable to the disputes involving planned construction on the international rivers. Third: it examines the extent to which the provisions of the 1997 Convention can be evaluated as reflective of customary international law and what arguments could be made on the applicability of that 'customary law'.

1. The 1997 Watercourse Convention

The General Assembly adopted the convention entitled 'Convention on the Law of Non-navigational Uses of International Watercourses' [hereinafter the Watercourse Convention or the 1997 Convention or the Convention] on 21 May 1997, by a vote of 103 in favour [including Bangladesh] to 3 against with 27 abstentions [including India and Pakistan].[4] The Watercourse Convention was opened for signature on the same day and remained open for signature until 20 May 2000 (Article 34). It will enter into force on the 19th day following the dae of deposit of the 35th instrument of ratification, acceptance or accession with the UN Secretary General (Article 36).

The 1997 Watercourse Convention[5] is the only convention of a *universal* character on utilisation of the international watercourses.[6] It sets forth the general principles and rules governing non-navigational uses of international watercourses in the absence of specific agreements among the States concerned and provides guidelines for the negotiation of future agreements.[7] Although it preserves existing agreements, it recognises the necessity, in appropriate cases, of harmonising such agreements with its basic principles.[8]

4 UN, *GAOR*, 51st session, 99th Plenary meeting, 21/5/97, p.7-8.
5 See the text of the 1997 Convention in 36 *ILM 700* (1997).
6MaCaffrey and Sinjela, (1998), 'The 1997 United Nations Convention on international watercourses', 92 *AJIL* 106.
7UN *Press Release*, GA/924, 21/5/97 'General Assembly adopted Convention on the Law of Non-navigational Uses of International Watercourses',1.
8Article 3(1) and 3(2) of the 1997 Convention.

The 1997 Convention consists of seven parts containing 37 Articles: Introduction; General Principles; Planned Measures: Protection Preservation and Management; Harmful Conditions and Emergency Situations; Miscellaneous Provisions and Final Clauses. An annex to the Convention sets forth the procedures that could be used in the event the parties to a dispute have agreed to submit it to arbitration.

This section discusses the procedural principles of the Convention that are relevant to the construction of dams and other artificial structures on international watercourses. Part III of the Convention sets forth these procedural principles concerning new projects as well as changes in existing uses and Article 33 of Part VI describes the dispute settlement procedures. While discussing the above principles, this section takes into account the relevant 'Statements of Understanding' of the Sixth Committee Working Group[9] and the commentaries of International Law Commission (ILC) to the draft articles it adopted in 1994.[10]

1.2. Procedural principles concerning planned measures

Planned measures are defined as 'new projects or programmes of major or minor nature' as well as 'changes in existing uses of an international watercourse' and these measures essentially include dams, barrages and many other artificial structure.[11] Procedural principles concerning planned measures have been

9During the elaboration of 1997 Convention, the Chairman of the Working Group took note of the 'Statements of Understanding pertaining to certain articles of the convention. These Statements were included in the Report of the Sixth Committee Working Group to the General Assembly. McCaffrey and Sinjela, (1998), supra note 6, p. 102, described these Statements as *travaux preparatoires* of the 1997 Convention.

10These commentaries appear in *1994 ILC Report*, UN, GAOR, 49th session. Supplement no. 1, pp.197-327. The legitimacy of invoking ILC commentaries is established by the Sixth Committee Working Group during its elaboration of the Convention. The Sixth Committee Working Group (in 'Statements of understanding pertaining to certain articles of the Convention) "Throughout the elaboration of the draft Convention, reference has been made to the commentaries to the draft articles prepared by the International Law Commission as part of the contents of the articles".

11Para. 4 of the commentary to Article 11, 1994 *ILC Report*, ibid. p. 260

laid down in the 1997 Convention in order to achieve two objectives. One is to maintain an equitable balance between various uses of an international watercourse and the other is to avoid disputes relating to new projects by watercourse States.[12] From an early stage, the ILC underscored the necessity of these principles to address issues concerning new uses as well as existing uses.[13] Accordingly, the Convention incorporates a comprehensive set of procedural principles concerning planned measures.

a) Exchange of information: Article 11 defines obligations of exchange of information concerning planned measures. Under this article, watercourse States are required to exchange information, consult and, in appropriate cases, negotiate on the 'possible effects' of planned measures on the condition of an international watercourse. These obligations are unconditional, and irrespective of actual effects of planned measures.[14] These are intended to avoid problems inherent in a unilateral assessment of the effects of planned measures.

b) Notification: Provisions concerning notification of planned measures define more specific obligations for enabling a potentially injured State to evaluate possible effects of planned measures by other State. As Article 12 requires, before a watercourse State implements planned measures which 'may have a significant adverse effect' upon other watercourse States, she shall provide such States 'timely' notification of the planned measures. Notification shall be accompanied by 'available technical data and information including the result of any environmental impact assessment'. Under Article 13 and 14, the notifying State is also obliged to provide the notified State with any additional data and information requested for, and to restrain from implementing the planned measures during the period of reply by the notified State, which might extend from

12Para 1 of commentary to Article 12, ibid., 260.
13McCaffrey, Second Report, *YILC* (1986), II (2), pp. 139-141, paras. 192-7.
14Para 3 of the commentary to Article 11, supra note, 10, pp. 259-60.

six months to one year. Under Article 18, if a watercourse State fails to serve notification, the potentially affected Watercourse State can request the former State for such notification.

C) Consultation and Negotiation: Article 16 and 17 deal with obligations that follow notification of planned measures. According to Article 16, if the notifying State does not receive any reply from the notified State under Article 15, she can proceed with the implementation of planned measures subject to her obligation under Article 5[15] and 7[16]. On the other hand, if the notified State communicates to the notifying State that the planned measures would be inconsistent with the provisions of Article 5 or 7, then according to Article 17(1), both States have to begin consultation and, if necessary, negotiation with a view to arriving at 'an equitable resolution of the situation'. Article 17(2) provides that consultation and negotiation have to be conducted on the basis that each State 'must' in good faith pay reasonable regard to 'the rights and legitimate interests' of the other State. For that purpose, Article 17(3) requires the notifying State, if she is so requested by the notified State, to refrain from implementation of the planned measures for at least six months.

Thus the principles concerning planned measures basically lay down obligations proceeding to actual dispute. These principles and Article 33 (concerning dispute resolution) appear to form

15 Article 5 of the Convention requires a watercourse State to exercise her rights to utilise an international watercourse in an 'equitable and reasonable manner'. The objectives are to attain 'optimal and sustainable utilization', to take into account the interests of the other Watercourse States concerned and at the same time, to ensure 'adequate protection of the watercourse'. Article 6 contains a non-exhaustive list of factors to be taken into account in determining whether an utilisation of international watercourse is equitable and reasonable. These factors include conservation, protection, development and economy of use of the water resources along with other long established factors: the natural condition of the watercourse, social and economic needs of the watercourse States, dependent population, effect of a use of the watercourse on other watercourse States, existing uses of the watercourse and available alternatives.

16 Article 7 requires a watercourse State to 'take all appropriate measures to prevent causing a significant harm' to other watercourse States. If significant harm, however, is caused, Article 7 requires the State causing such harm to give due regard to Article 5 and 6 and to consult the affected State in order to eliminate or mitigate such harm and to discuss the question of compensation in appropriate cases.

an integral procedural framework for implementing equitable utilisation of international watercourses.

13. Dispute settlement: compulsory fact-finding

Article 33 contains dispute settlements procedures in order to respond to the 'complexity' and 'inherent vagueness' of the criteria to be applied for equitable utilisation of international watercourses.[17] These dispute settlement procedures can be invoked gradually: first bilateral methods, thereafter optional methods of third-party settlement and lastly, if optional methods are not agreed, a mandatory Fact-finding Commission.

Bilateral settlement: Anicle 33(2) requires the disputing States to enter into negotiation before making any effort for third party settlement. Negotiation has to be conducted in good faith and in a meaningful way for an equitable solution of the dispute.[18] If negotiation fails, the watercourse States can make use of any existing joint watercourse institution established by them.

Optional third-party settlement: Article 33(2) provides for optional procedures of third party dispute settlement, which are as follows: mediation or conciliation by a third party or submission of the dispute to arbitration or to the International Court of Justice (ICJ). Article 33(10) provides an automatic process of submission of dispute to arbitration or to the ICJ. According to this, while ratifying, accepting, approving or acceding to the Convention, a State can declare, in a written instrument submitted to the Depository, that she recognises such submission as compulsory *ipso facto*. However, this process of dispute settlement would apply in respect of only those States who would make similar declaration. With regard to the process of establishment and operation of the arbitral tribunal, the Parties may accept the provisions laid down in the Annex to the Convention or they can agree different provisions.

17para. 21 of the Commentary to Article 7, *1994 ILC Report*, supra note 10, p. 244.
18Para 2 of the commentary Article 33, *1994ILC Report*, supra note 10, p. 323.

Mandatory Fact-finding Commission: Making resort to the methods of third-party settlement under Article 33(2) and Article 33(10) essentially depends on consent of all the States involved in the dispute. In contrast, Article 33(3) and 33(5) make provisions for submission of a dispute to a Fact-finding Commission, which can be established by any of the parties to a dispute. The purpose of such Fact-finding Commission would be to facilitate resolution of a dispute through the 'objective knowledge of the facts'.[19] Article 33 put noticeable emphasis on Fact-finding Commission by making detail provisions to explain the procedures concerning the appointment and functions of such Commission.

2. Applicability of the 1997 Convention as a treaty instrument

From our above discussion, it can be said that the 1997 Watercourse Convention has the potentials of minimizing the risk of dispute that may be caused by the construction of dams, barrages and other planned measures on international rivers. Article 3 of the Convention addresses the question of existing projects disputes on which are not fully covered by existing agreements. The first three provisions of Article 3 of the 1997 convention read:

> Watercourse agreements
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> 1. In the absence of an agreement to the contrary, nothing in the present Convention shall affect the rights or obligations of a watercourse State arising from agreements in force for it on the date on which it became a party to the present Convention.
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> 2. Notwithstanding the provisions of paragraph 1, parties to agreements referred to in paragraph 1 may, where necessary, consider harmonizing such

19Para 4, ibid., p. 324.

agreements with the basic principles of the present Convention.

3. Watercourse States may enter into one or more agreements, hereinafter referred to as "watercourse agreements", which apply and adjust the provisions of the present Convention to the characteristics and uses of a particular international watercourse or part thereof.

It is evident from the above provisions of Article 3(3) that the utility of the Convention lies mostly in the requirement that the future watercourse agreements would 'apply and adjust' the provisions of the Convention to 'the characteristics and uses of a particular international watercourse or part thereof'. Article 3(2) of the Convention, however, provides that if it is necessary, the contracting Parties to the Convention 'may' 'consider' harmonising existing agreements with the basic principles of the Convention.[20] The necessity of such harmonisation lies in the broader spectrum the 1997 Convention has covered and in the efficiency of the procedural techniques the said Convention has established.[21]

3. Relevance of the 1997 Convention as codification of customary law

The 1997 Convention is based on the draft articles the International Law Commission adopted in 1994.[22] As a product of ILC's study, these articles represent the 'codification and progressive development' of international law of the non-navigational uses of international watercourses.[23] This has been

20 To quote McCaffrey and Sinjela, (1998,)7 supra note 6, p. 98, the Convention 'mildly encourages' conecrned States to consider such harmonisation.

21 For example, see a comparison between the 1997 Convention and the 1997 Ganges Waters Treaty between Bangladesh and India in Islam, M.N, (1999), "Equitable sharing of the Ganges: Applicable procedural principles and rules under international law and their adequacy", PhD thesis. SOAS. University of London, pp. 300-305.

22 McCaffrey and Sinjela, (1998), 'The 1997 United Nations Convention on international Watercourses', 92 AJIL 106.

23The ILC was established in 1946, under Article 13, Para. 1(a) of the UN Charter, to promote 'progressive development' and 'codification' of international law. on International Law Commission. see Sinclair. (1987), *the International Law Commission.*

confirmed in para 2 and 3 of the preamble of the 1997 Convention. If we take into account the meanings of 'codification' and 'progressive development', as they are explained in the Statute of the ILC the 1997 Convention can be said to have incorporated both existing or emerging rules (codification) and developing principles of international law (progressive development).[24]

The ILC, as its usual practice, did not specify which of the provisions of the 1994 draft articles are 'codification' of law and which provisions are 'progressive development of law'. However, the commentaries, which the ILC made to the draft articles of 1994 and which the Sixth Committee Working Group invoked during negotiation of the 1997 Convention, made some valuable indications as to the status of the principles enshrined in the articles.

3.1. Customary rules in the 1997 Convention

While making commentaries to the draft articles, the ILC used various phrases like 'established rule of international law', 'basic rule', 'well established rule', 'general obligations' which are indicative of their status as rules of customary law. In the context of Ganges case, we would here focus only on the principles of equitable utilisation, no harm and the procedural principles.

1. As regards Article 5 on equitable utilisation and participation, the ILC commentary provides that this article sets out 'the fundamental rights and duties of States' and that one of the 'most basics' of these is the 'well-established rule' of equitable utilisation which is 'complemented' by the principle' of

24As Article 15 of the ILC Statute (quoted in Harris, 1998, *Cases and materials on international law*, 66) provides, 'progressive development' of international law means 'the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States', and 'codification' means 'the more precise formulation and systemisation of rules of international law in fields where there already has been extensive State practice, precedent and doctrine'.

25Para 1 of the commentary to Article 5, *1994 ILC Report*, supra note 10, p. 218.

26Para 10, ibid., p. 222.

equitable participation.[25] The ILC observed that 'all available evidences of the general practice of States, accepted as law, in respect of the non-navigational uses of international watercourse ... reveal an overwhelming support for the doctrine of equitable utilisation as a general rule of law'.[26] It is thus obvious that equitable and reasonable utilisation of international watercourses is existing rule of customary law.

2. According to the ILC commentary, the no-harm principle enshrined in Article 7 sets forth the 'general obligation' for watercourse States and such obligation is reflected in various international conventions and treaties.[27]

3. The 1997 Convention does not provide any rigid formula for implementation of equitable utilisation or for assessing the extent to which infliction of harm would be equitable in each particular case. It requires the watereourse States to comply with procedural principles for determination of that question. In this respect, as the ILC commentaries provide, regular exchange of data and information on the watercourse condition is 'the general minimum requirement',[28] data and information supply on new uses or on changes in existing uses amounts to 'general obligation',[29] notification of new project is 'embodied' in various sources of state practice,[30] consultation is 'required in similar circumstances' in international instruments and decisions.[31] Among dispute settlement provisions, negotiation in good faith and in a meaningful way is 'a well-established rule of international law',[32] fact-finding has received 'considerable attention by States' whereas other methods of third-party settlement are optional in the text of Article 33.[33]

The ILC commentaries thus reflect that: 1) equitable utilisation

27Paras 3-7 of the commentary to Article 7, ibid., pp 236- 9.
28Para 1 of the commentary to Article 9, ibid, p. 250
29Para 2 of the commentary to Article 11, ibid., p. 259.
30Para 6 of the commentary to Article 12, ibid., p. 262.
31Para 2 of the commentary to Article 17, ibid., pp. 274-5.
32Para 1 of the commentary to Article 33, ibid., p. 323.
33Para 4, ibid., p. 324

and no-harm principles are established rules of international law. 2) The principle of negotiation for dispute settlement in relation to planned measures including dams and barrages is an established rule. ILC commentaries are not that much specific about the customary status of principles of notification, information exchange and consultation. These obligations are, however, inseparable from the obligation of negotiation in the sense that a negotiation without notification and information exchange can serve the objective purposes for which the negotiation is required. These principles thus cannot be taken as anything less than establishe rule of customary law. The status of the provision concerning Fact-finding Commission is merely in a formative stage.

4. Conclusion

The strength of the 1997 Watercourse Convention lies in its emphasis on the observance of the procedural principles for achieving equitable resolution of water utilisation disputes. In the international domain, the benefits of enhancing the role of procedural principles concerning the planned measures including dams and barrages are being increasingly recognised even in some dearth water areas.[34] This is done by concluding treaty instrument for establishing competent joint institution for integrated river basin development and management.[35]

The 1997 Convention represent a synthesis of the modern and traditional methods for effectuating equitable and reasonable utilization of the international rivers. As found in the foregoing

34 For example, see, the Zambesi River Systems Agreement of 1987, 31 *ILM* 814; The Kagera River Basin Agreement of 1977, 1089 *UNTS* 165. The Conventions on Senegal River of 1972, in UN Natural Resources/Water Series no 13, (sales no. E.F 94.II A.7, 16 and 21). International donor agencies' and countries' preference for such integrated development plan has already become noticeable. It can be assumed that after the adoption of the 1997 Convention, whatever would be its legal force, this preference would become more dominant in the coming years. See, in this regard, Sergent, (1994), 'comparison of the Helsinki Rules to the 1994 UN draft artichs' 8 *Vill. Envtl.* L.J. 477.

35As it is observed in the Report of the ILC on the work of its 46th session (in UN, *GAOR*, 49th session, supplement no. 10, p. 224, para. 12), these 'modern agreements' rather than 'specifying the respective rights of the parties', have gone 'beyond the principle of equitable utilisation by providing for integrated river basin management'.

discussions, it has enormous potentials in preventing and resolving disputes concerning construction and operation of dams and diversion projects on international rivers. The Convention has special importance in the South-Asian context given the unresolved and partially resolved disputes concerning the utilization of the rivers of this region.[36] It is, therefore, suggested that the construction of planned measures on the transboundary rivers in the South Asia should be regulated by the comprehensive procedural techniques as enunciated in the 1997 Convention.

36 For example the tensions concerning the Ganges, Teesta, Gandak, Gangara, Koshi and Mahakali. Although many of the project, on these rivers are now covered by bi-lateral agreements, in most cases these agreements failed to fully resolve the tensions because of their limitations in addressing the procedural principles. See. Islam M.N., n. 21, pp. 111-28, 277-79.