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The Baardhere Dam and Water Infrastructure Project in Somalia—Ethiopia’s objection and the World Bank response

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Abstract Unilateral action by riparian states has been, by and large, the dominant approach for planned measures on shared watercourses. In planning and executing such measures, riparian states do not usually undertake any consultations with, or notification to, the other riparians, unless required to do so by an existing agreement or arrangement. The perceived sovereignty over international watercourses and the absence of a globally-binding treaty have been the main reasons for these actions. Despite this situation, the World Bank has, over the years, developed detailed policies and procedures for notification to, and for dealing with objections from, other riparians, for the projects it plans to finance. This paper discusses and analyses those policies and procedures, compares their main features with those of other international instruments, and examines their application by the World Bank to the Baardhere Dam and Water Infrastructure Project in Somalia, to which Ethiopia objected.

Key words international water law; objection; World Bank; Baardhere Dam; Ethiopia; Juba River; Somalia

INTRODUCTION

Watercourses that are shared by two or more states remain the only transboundary resource without an international treaty in force to regulate its sharing and management. After more than 25 years of preparatory work, the United Nations (UN) General Assembly adopted, on 21 May 1997, the United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses (the Watercourses Convention, or the Convention). However, more than 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 March 2011, only 23 states have become parties to the Convention. To enter into force, the Convention needs 35 instruments of ratification.

Prior to the adoption of the Convention, the most authoritative instrument in the field of international water law was “the Helsinki Rules on the Uses of the Water of International Rivers” adopted by the International Law Association (ILA) in 1966.
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require the Bank “to act prudently in the interests of the Articles of Agreement of the Bank themselves require the Bank “to act prudently in the interests of the Articles of Agreement of the Bank themselves require the Bank “to act prudently in the interests of the Articles of Agreement of the Bank themselves. Nonetheless, the Rules do not have a binding effect per se, because the ILA is not a non-official, non-governmental body, notwithstanding the fact that its scholarly work has contributed tremendously to the development of international law.

Multilateral and bilateral agreements have been concluded by some states on a small number of the close to 300 rivers, 100 lakes, and 300 aquifers shared by two or more of these states. However, most of these agreements do not encompass all the riparians to the respective watercourses. The Nile, Zambezi, Ganges, Jordan, Indus and the Mekong basins are examples of watercourses with partial agreements, concluded only by some of the riparians to each watercourse. Other major river basins, such as the Brahmaputra, the Tigris and Euphrates, and the Congo, remain without any sharing and managing agreement between any of the riparian states.

As a result, unilateral action has been, by and large, the dominant feature of development in this field in recent history, although there have been cases of collaborative projects or measures, mostly because of some existing agreements or arrangements. Such a unilateral action is usually carried out without consultations with, or notification to, the other riparians sharing the watercourses in question, and without any exchange of data and information. Many factors have contributed to this situation, including the perceived national sovereignty over the shared watercourses, the increasing and sharp competition over the limited water resources fuelled by population growth, and, as indicated above, the absence of a globally-binding treaty on international watercourses.

Notwithstanding this unsatisfactory state of international waters, the World Bank (the Bank) has been able to develop gradually elaborate policies and procedures for dealing with its financed projects on international waterways. These policies and procedures have addressed, in detail, the requirement of notification of the other riparians for the Bank-financed projects, as well as how to deal with any objection from one or more of the riparians to any such project. One project where the Bank policies and procedures on notification and objection were both put into effect was the Baardhere Dam and Water Infrastructure Project in Somalia (Baardhere Dam Project, or the Project).

In 1983, Somalia approached the Bank and requested the Bank to finance the Baardhere Dam Project. The Project was supposed to be constructed across the Juba River, which Somalia shares with Ethiopia and Kenya (see Fig. 1). After the initial studies, and following completion of the preparatory work, the Bank decided to go ahead with the appraisal and presentation of the Project for consideration by its Board of Directors, in accordance with its policies and procedures.

The Bank Operational Policy dealing with Projects on International Waterways (the Policy) requires that all the riparians, sharing any waterway where a Bank-financed project is to be carried out, should be notified of the project, and provided with its details, at the earliest possible opportunity, and be given a reasonable period of time to respond. The Policy sets forth detailed procedures for dealing with any objection to the project from any of the notified riparians. Accordingly, Ethiopia and Kenya were both notified of the Project and were furnished with the Project details. Ethiopia objected to the Project, claiming that the Project would result in adverse effects to its interests. The Bank undertook a thorough review of Ethiopia’s objection and decided that the objection warranted seeking the opinion of independent experts, as set forth in its Policy.

This paper first discusses the main elements of the Bank Policy for Projects on International Waterways, with special emphasis on the notification requirement to both downstream and upstream riparians, and how objections from one or more of the riparians are handled. It then examines the Baardhere Dam Project, Ethiopia’s objection to the Project, and the Bank’s handling of that objection. The paper finally concludes with some observations about the Bank Policy and the process.

THE WORLD BANK POLICY FOR PROJECTS ON INTERNATIONAL WATERWAYS

The World Bank was faced with the challenges emanating from projects on international waterways from the very early years 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 had 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". At the outset, the Bank proceeded with financing some projects where the effects of the projects on the shared rivers raised no concerns, and also when there was no dispute between any of the riparians.

However, this was not always the case with international basins and projects. For example, following the emergence of India and Pakistan as independent nations in 1948, as a result of the partitioning of the sub-continent, the Bank considered financing projects on the Indus River. However, the Bank was not able to proceed with the preparation of such projects, because of the dispute that emerged between the two countries over the sharing of the waters of the Indus Basin (Salman and Uprety, 2002). Similarly, the Bank was not able to finance the Aswan High Dam in Egypt, because, among other reasons, of the initial failure of Egypt and the Sudan to reach an agreement over the Nile River, particularly in light of the fact that the Aswan High Dam would inundate large areas in northern Sudan (Krishna, 1998).

International water law at that time was in its infancy. There were no established rules regulating the uses, management, and protection of shared watercourses to guide the Bank’s work in this area. Hence, the Bank had to develop its own approaches, keeping in mind some basic customary international law principles in this field, and its status as an international financial cooperative institution. Indeed, the Bank started developing a case-by-case approach to each project on an international waterway, based and depending on the circumstances surrounding each such project. One basic rule set forth from the start, which still governs the operations of the Bank, has been that the Bank will not finance any project that will cause appreciable harm to any other riparian. In other cases, the Bank required an agreement before it could finance the project. Such an agreement was required in the case of projects in India and Pakistan on the Indus River, as well as projects in Egypt and the Sudan on the Nile Basin. Those were clear cases where disputes existed among the riparians at that time, and in neither case was there an agreement at that time between the disputants.

However, there were other basins where no actual disputes existed at that time, but there was the potential for such a dispute to arise in case one of the riparians decided to undertake a project affecting the
shared basin. One such case was the Ghab Project in Syria. The operation was planned in the early 1950s to drain large areas of the Orontes River that Syria shares with Turkey and Lebanon. The Bank concluded its studies and decided to propose the project for consideration by its Board of Directors. However, upon learning about the proposed operation, Turkey objected and claimed that the project would take too much water off the Orontes River, resulting in major adverse effects to it. The processing of the project was halted to address Turkey’s objection. That objection prompted the Bank to issue its first policy for projects on international waterways in 1956, Operational Memorandum no. 8, Projects on International Inland Waterways (Salman, 2009). Although the policy did not include detailed substantive provisions, it did establish an early-warning system for dealing with such projects. It instructed staff that the Bank management should be informed promptly of any project the carrying out of which would involve the use of an international inland waterway. It further required that no steps were to be taken to investigate the merits of the project, or to process the project, without prior approval by management of procedures for dealing with the international aspects of the project.

Operational Memorandum no. 8 underwent certain expansion and refinements in 1965. The application of the 1965 Memorandum was expanded from international inland waters to include semi-enclosed coastal waters, as discussed below. The Memorandum also required that the Executive Directors be informed of the international aspects of any project on an international waterway, and the manner in which those aspects were to be handled. The contents of this Memorandum, with minor revisions, and under different titles, continued to govern the work of the Bank until 1985, when it was replaced by an elaborate and comprehensive policy, entitled Operational Manual Statement (OMS) 2.32, Projects on International Waterways. The 1985 Policy was issued following an objection by Iran to the Igdir Aksu Irrigation Project in Turkey, which affected the Aras River that Turkey shares with Iran, and, at that time, with the Soviet Union. The main parameters of that OMS are still in place, last issued in 2001, as Operational Policy (OP) and Bank Procedures (BP) 7.50 (the Policy).

The Policy applies to the following types of international waterways:

(a) any river, canal, lake, or similar body of water that forms a boundary between, or any river or body of surface water that flows through, two or more states, whether Bank members or not;
(b) any tributary or other body of surface water that is a component of any waterway described in (a) above; and
(c) any bay, gulf, strait, or channel bounded by two or more states or, if within one state, recognized as a necessary channel of communication between the open sea and other states—and any river flowing into such waters.

Thus, the Policy defines the term “international waterway” in such a way to include not only shared fresh waters, but also semi-enclosed coastal waters. Such coastal waters could be bounded by two or more states. They could also fall within one state, but, in such a case, they should be recognized as a necessary channel of communication between the open sea and other states. They also include national rivers flowing into such waters. However, it should be clarified that the Policy deals with the qualitative aspects of the waters of those types of semi-enclosed waterways, while, in the case of rivers and lakes, both quantitative and qualitative aspects are covered by the Policy. Furthermore, the Policy applies regardless of whether the states sharing the waterway that may be affected by the proposed project are Bank members, or not.

The Policy applies to the following types of projects:

(i) hydroelectric, irrigation, flood control, navigation, drainage, water and sewerage, industrial, and similar projects that involve the use or potential pollution of international waterways; and
(ii) detailed design and engineering studies of projects under paragraph (i) above, including those to be carried out by the Bank as executing agency or in any other capacity.

As such, the Policy enumerates the projects covered, and these projects include not only projects involving installations and works, but also other types of projects, such as navigation. Detailed design and engineering studies for the enumerated projects are also included, because such design and studies could lead to investment projects.

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, or through pollution or otherwise. The notified riparian states are given a reasonable period, 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 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 good neighbourliness between the riparian states and prevent disputes among them.

As stated above, the Bank Policy as well as its practice have dealt with all the riparians to any watercourse in the same and equal manner. Accordingly, the Policy requires that all the riparians to the watercourse, whether upstream or downstream, be notified of the project, because each riparian can be affected by the activities of the other riparians.

Downstream riparians can be affected, or even harmed, by the physical impacts of water quantity and quality changes caused by water 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. On the other hand, 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 these riparians in acquiring, and later claiming, rights to the water abstracted under these projects. The availability and use of such waters in future by the other riparians would have already been foreclosed by the downstream riparians (Salman, 2010).

Moreover, it should also be noted 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 the view to attaining optimal and sustainable utilization thereof, and benefits therefrom. Along the same lines, 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 and the need to avoid unilateral action by one or some of the riparians, whether upstream or downstream, that could result in a dispute.

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 other riparians have been routinely faced and gradually understood. Based on this experience and the above-discussed rationale, the Bank Policy, in line with international water law, requires notifying both downstream and upstream riparians to any shared watercourse, and providing them with the project details to enable them to assess the effects of the proposed project on their interests. Riparians’ responses to such notification have varied and, consequently, the Bank has had to develop policies and procedures for addressing them, as discussed below.

HOW OBJECTIONS BY ONE OR MORE OF THE RIPARIANS ARE HANDLED UNDER THE BANK POLICY

Responses of riparians to notifications concerning Bank-financed projects on international waterways have varied. Because of the Bank’s Policy basic requirement that it would not finance a project that would cause appreciable harm to any riparian, and the confirmation of this in every Bank-financed project, a number of riparians’ responses have been positive. However, there have been other cases where requests for additional information, additional time, or both, were received from one or more of the riparians. Such requests have always been granted. There have also been cases where no response has been received from one or more of the notified riparians. In such cases, the Bank usually proceeds with the processing of the project based on its determination that the project would not cause appreciable harm to any of the other
riparians, and the fact that this determination has not been challenged by any of the notified riparians. In a few cases, there have been objections by one of the riparians to the proposed project. It should be clarified at the outset that the Bank Policy does not give any riparian veto power over any project it proposes to finance. Thus, detailed procedures for dealing with the objection have to be established.

Understandably, the Bank had difficulties in its early years with such objections and how to handle them. As discussed above, the Bank issued its first policy for projects on international waterways in 1956, as a result of the objection by Turkey to the Ghab Project in Syria. However, that policy did not include any clear provisions on how to handle objections from one or more of the riparians for a project proposed for financing by the Bank. The matter had to wait until 1985, when OMS 2.32 was issued as a result of Iran’s objection to the Igdir Aksu Project in Turkey. The OMS included detailed provisions on how the Bank would handle such an objection. The same provisions are reiterated with minor adjustments in paragraphs 6–12 of the Bank’s current BP 7.50 Projects on International Waterways.

These paragraphs state that, if one of the riparians objects to the proposed project, then a memorandum is prepared by the Project staff and sent to the Bank management. The memorandum addresses: (a) the nature of the riparian issues; (b) the Bank staff’s assessment of the objection raised, including the reasons for them and any available supporting data; (c) 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; (d) 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 (e) 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 paragraphs 8–12 of the BP.

Following submission of the memorandum referred to above, the Bank management may decide, depending on the project and the objection: (i) to proceed with project processing, or (ii) to refer the matter to the Operations Committee (the Bank’s highest projects review committee), or (iii) to seek the opinion of independent experts. If the latter decision is taken, then the Sustainable Development Network Vice Presidency (SDNVP) of the Bank would initiate the process. The Policy requires the SDNVP, in consultation with the Legal Vice Presidency (LEGVP), to maintain a roster of highly qualified independent experts, which consists of ten names, and to update it at the beginning of each fiscal year. The SDNVP, in consultation with the Regional Vice President (RVP) and the LEGVP, selects one or more independent experts from that roster. The experts selected may not be nationals of any of the riparians of the waterway in question, and also should not have any other conflict of interest in the matter. The experts are engaged and their terms of reference prepared jointly by the offices of the SDNVP, LEGVP and the RVP. The experts are provided with the background information and assistance needed to complete their work efficiently.

The experts’ terms of reference require that they examine the Project Details. If they deem it necessary to verify the Project Details or take any related action, the Bank makes its best efforts to assist. The experts would meet on an ad hoc basis until they submit their report to the Bank management, who may ask them to explain or clarify any aspect of their report. It should be emphasized that the experts have no decision-making role in the Project’s processing—their technical opinion is submitted for the Bank’s purposes only. Furthermore, as the Policy emphasizes, such opinion does not, in any way, determine the rights and obligations of the riparians. The experts’ conclusions are reviewed by the RVP and the SDNVP in consultation with the LEGVP.

As mentioned above, the Bank has been faced with very few instances in which an objection for a project was received from one or more of the riparians to the shared international waterway. In all of these cases except one, either the objection was overruled, or an agreement was reached between the parties, and the Bank proceeded with the processing of the project. As stated earlier, the Bank Policy does not give any riparian veto power over a project, because the Policy itself does not allow the Bank to finance a project that is expected to cause appreciable harm to any other riparian. However, the Policy strikes a balance through seeking the opinion of independent experts on the objection when such an objection is substantiated. It should be added that resort to independent experts by the Bank has been rare, and such opinion thus far has only been sought in the Baardhere Dam Project, as discussed below. The process of the independent experts contrasts with the procedures set forth in other international legal instruments, as discussed in the next section.
PROCEDURES FOR HANDLING OBJECTIONS UNDER OTHER INTERNATIONAL INSTRUMENTS

A number of other international legal instruments dealing with shared watercourses have addressed the issue of objection by one of the riparian states to a project proposed by another on the shared watercourse. This section is limited to a brief discussion of the procedures set forth in the Helsinki Rules and the Watercourses Convention. As indicated earlier, the Helsinki Rules, although not binding per se, were the most comprehensive and widely accepted norms regulating the sharing and management of international watercourses. As mentioned in the Introduction, the Watercourses Convention was adopted in May 1997 by a large majority of the UN General Assembly, but it has not yet entered into force.

The Helsinki Rules (the Rules), as discussed above, require notification of other riparian states of any projects or programmes that may substantially affect the interests of these states. The Rules do not deal with an objection to a proposed project per se, but rather with a question or dispute relating to the present or future utilization of the waters of an international drainage basin as a result of such a project (Bogdanovic, 2001). The Rules recommend that the basin states try to resolve any question or dispute arising therefrom through negotiations. Failing that, they could refer the question or dispute to a joint agency, and request the agency to survey the international drainage basin and to formulate plans or recommendations for the fullest and most efficient use thereof in the interests of all such states. If the question or dispute cannot be resolved in this manner, the Rules recommend that the parties seek the good offices, or jointly request the mediation, of a qualified international organization, or of a qualified person. If the parties fail to resolve their dispute through these procedures, the Rules recommend that they form a commission of inquiry, or an ad hoc conciliation commission, which shall endeavour to find a solution. Finally, the Rules recommend submitting the dispute to an ad hoc arbitral tribunal, or to the International Court of Justice, if the commission could not reach a solution, or if the solution was not accepted to the parties (Bourne, 1997).

The procedures proposed under the Watercourses Convention are, by and large, similar to those set forth by the Helsinki Rules (Salman, 2007). The Watercourses Convention requires notification to other states of planned measures that may have significant adverse effects on such states. The Convention stipulates that, if a notified state finds that implementation of the planned measures would be inconsistent with Articles 5 and 7 of the Convention (regarding equitable and reasonable utilization and the obligation not to cause significant harm), it shall attach to its finding a documented explanation setting forth the reasons for the determination. Subsequently, the notifying state and the notified state shall enter into consultations and, if necessary, negotiations with a view to arriving at an equitable resolution of the situation. The consultations and negotiations shall 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(s). During the course of the consultations and negotiations, the notifying state shall, if so requested by the notified state at the time it makes the communication, refrain from implementing or permitting the implementation of the planned measures for a period of six months, unless otherwise agreed.

It should be added that the Watercourses Convention states that, in the event that the implementation of planned measures is of the utmost urgency in order to protect public health, public safety, or other equally important interests, the state planning the measures may, subject to Article 5 (on equitable and reasonable utilization) and Article 7 (on the obligation not to cause harm), immediately proceed to implementation. In such a case, a formal declaration of the urgency of the measures shall be communicated without delay to the other watercourse states. However, the states planning such measures shall, at the request of any of the other watercourse states, enter into consultations and negotiations with such a state.

In addition to these special provisions dealing with consultations and negotiations concerning planned measures, the Watercourses Convention includes a separate article on settlement of disputes. Article 33 of the Convention lays out a number of procedures for resolving disputes, including fact-finding, as well as options for submitting the dispute to the International Court of Justice, or to arbitration. The Article asks the parties to consider the report of the fact-finding commission in good faith. In addition, the Watercourses Convention includes a detailed Annex on Arbitration (McCaffrey, 2007).

The contrast between the procedures on notification and objection set forth in the Helsinki Rules and the Watercourses Convention on the one hand, and those of the Bank on the other, stems from the
basic difference regarding the nature of the projects in each case. The projects or planned measures would seriously or substantially affect other riparians in the case of the Helsinki Rules; they could have a significant adverse effect in the case of the Watercourses Convention. However, as explained earlier, the Bank will not finance a project that could cause appreciable harm to other riparians. If appreciable harm would be caused by the project to any of the other riparians, then the Bank will discontinue processing either of the entire project or of the component that could cause appreciable harm. The Bank would only finance the project that may cause appreciable harm if the issues are resolved through negotiations, and an agreement is reached between the riparians on the proposed project.

If the objection to the project is substantiated, the Policy suggests urging the parties to resolve the issues through amicable means, such as consultations, negotiations, and good offices. Failing that, the Bank may seek the opinion of independent experts on the objection. The process of the independent experts is meant to verify to the Bank its finding that the project would indeed not cause appreciable harm to any of the riparians.

Accordingly, the procedures established by the Bank are less complex than those set forth in the Helsinki Rules or the Watercourses Convention. The rationale behind the Bank procedures lies in the premise that the Bank will not finance a project that will cause appreciable harm. However, the Bank, as required by its Policy, will provide the riparians with the opportunity to make their own assessment, and will seek the opinion of independent experts if a challenge to its determination is made and substantiated. This was the essence of the process followed in the Baardhere Dam Project, as discussed in the next two sections.

THE BAARDHERE DAM PROJECT

The Baardhere Dam and Water Infrastructure 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 ha of land. The proposed Dam was located on the Juba River, 35 km upstream of the town Baardhere in Somalia (see Fig. 1). 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 discharging into the Indian Ocean (Caponera, 2003). Thus, Ethiopia is the upstream riparian state, and Somalia is the downstream riparian. Kenya is a riparian state 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 OMS 2.32 Projects on International Waterways referred to earlier, the Bank informed Somalia of the need to notify Ethiopia and Kenya of the Project. However, because of the strained relations between Somalia and Ethiopia at that time, Somalia asked the Bank to undertake the notification on its behalf.

Consequently, the Bank notified the Government of Ethiopia of the proposed 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 judgement, 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, with the view of reaching an agreement that would be mutually satisfactory to both riparian states. Ethiopia went further and suggested negotiations with Somalia to determine the amount of water of the Juba River that each country would be allocated. 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. As a result of Ethiopia’s objection,
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 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. Under those circumstances the question arose whether—for the first time—the Bank should seek an opinion of independent experts pursuant to paragraphs 11(e) and 13 of OMS 2.32 of 1985, and its Annex A, “Technical Advice of Independent Experts”.

**APPOINTMENT, ROLE AND REPORT OF THE INDEPENDENT EXPERTS**

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 Mr Lloyd A. Duscha, Dr Boonrod Binson (both engineers) and Dr Dante Caponera (a water lawyer). Mr Duscha was selected by the two other experts as the chair of the independent experts. The terms of reference required the independent experts to: (a) examine the nature of the riparian issues; (b) 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 (c) 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 take steps, as necessary, to verify Ethiopia’s claims on past and proposed uses of the Juba River and its tributaries. 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 1989 (Report of the Independent Experts, 1989). The Report discussed 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. In this connection, 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-state 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 harm to Ethiopia or Kenya, because 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.” 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. 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 conclude 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 in particular, 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 water rights the Project may help Somalia establish, that amount would be within Somalia’s equitable and reasonable...
share, and would not foreclose Ethiopia’s future uses. 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.

In connection with the recommendation for a framework agreement, the independent experts proposed that they be permitted to visit the appropriate ministry heads in Ethiopia, Kenya and Somalia to provide a vehicle for facilitation of negotiations between these riparians. The Bank indicated that such facilitative efforts were beyond the terms of reference and the role set forth for the independent experts under the Bank Policy. Moreover, the Bank took note of the fact that the relationship between Somalia and Ethiopia at that time was not conducive to any mediation, as evidenced by Somalia’s response to Ethiopia’s suggestion of negotiations of water sharing arrangements for the Juba River.

The independent experts were, no doubt, eminent authorities in their fields. It is worth noting that they represented both engineering and international water law, the most relevant disciplines to both the Project and the objection. Clearly, the experts conducted their assignment in a fair and transparent manner; and in an independent environment, being selected by, and reporting to, a unit other than the unit processing the Project. However, it was unfortunate that they did not visit Somalia and Ethiopia to get more information on the Project, and on Ethiopia’s objection. If that had been done, it would have addressed the qualifications of the experts’ Report, and would have given their report its full weight. It would have also established a complete story, and thus a comprehensive precedent.

A few weeks 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 objection or protests from Ethiopia.

**CONCLUSION**

The World Bank has faced the challenges of projects on international waterways from the very early years of its operations in the late 1940s. Those challenges became more complex as the Bank operations started to grow in volume, size and variety, and as the membership of the Bank started to expand—from 38 states in 1946, to 148 in 1985, and to 185 in 2010. Gradually, and through learning experience, the Bank developed policies and procedures for dealing with the complex and intricate issues arising therefrom. The Bank was able, in 1985, about 40 years after it commenced its operations, to arrive at an elaborate and comprehensive Policy that adequately addressed these issues. The Policy benefitted from, and contributed to, the emerging principles of international water law, and is based on the character of the Bank as an international financial cooperative institution. The Policy was adopted by its Board of Directors, which represents all its member countries, after a thorough discussion. Its implementation, and the implementation of the previous policies during the last 55 years, has been closely monitored by all the riparians. Indeed, the Policy has been characterized by the distinctive characteristics of its practical application and global reach.

The Baardhere Dam Project presented the Bank with the unique challenge of a substantiated and well-argued objection from one of the notified riparians. There were no established principles of international water law in the mid-1980s, particularly on objections from one of the riparians, for the Bank to rely on, or get guidance from. Yet, the Bank was able to deal with the objection in a transparent and fair manner; acknowledging the rights of, and possibility of harm to, Ethiopia, and confirming, through an independent and credible process, that the Project would not cause appreciable harm to such rights. It is worth adding, however, that the independent experts’ process would have had its full weight if the experts had been able to complement their desk work with field visits to Somalia and Ethiopia.

As indicated above, the objection by Ethiopia to the Baardhere Dam Project in Somalia has been the first, and thus far the only, time that the Bank appointed independent experts to give an opinion on an objection by another riparian state to a project in an international waterway proposed for Bank financing. The subsequent objections that the Bank received from other riparians to some of its projects on international waterways were all dealt with by the Bank management. In all of them, the Bank decided to proceed with the projects despite the objections, because of its conclusion that the projects would not cause appreciable harm to the interests of the objecting riparians, and also because it found no merits warranting the appointment of independent experts.
Unfortunately, the situation in Somalia did not allow implementation of the Baardhere Dam Project to proceed. As a result, the determination of the Bank that the Project would not cause appreciable harm to Ethiopia was not tested in practice. Yet, despite the incomplete story, the Baardhere Dam Project has resulted in putting in place a road map for dealing with objections, comprising a process for the selection and work of independent experts, if and when such experts are to be appointed once more under the Policy for another Bank-financed project. Such a road map is indeed worth replication by other institutions and riparians, as well as through other international legal instruments, for avoidance and resolution of international water disputes.

Note Dr Salman M. A. Salman worked as Lead Counsel and Water Law Adviser of the World Bank until December 2009. Currently he is an academic researcher and a consultant on water law and policy.

REFERENCES


