

USE OF AMBIGUITY IN TRANSBOUNDARY RIVER BASINS NEGOTIATIONS: THE CASE OF THE NILE RIVER BASIN

Ana Elisa Casção

Department of Geography, King's College of London, United Kingdom

Email: ana.cascao@kcl.ac.uk

Abstract

The aim of the article is to critically assess the role of constructed ambiguity in the negotiations process and design of agreements in the Nile River Basin, and how this ambiguity can eventually contribute to resolve the long-lasting deadlock in the Basin. According to Fischhendler (2008a and 2008b), the role of ambiguity in the design of water treaties has thus far been overlooked; the author has developed a framework to analyse several types of deliberate ambiguity and to examine the potential for “constructive ambiguity” and/or “destructive ambiguity”, applied to the case of the 1994 Israeli-Jordan water agreement. This paper adopts and modifies the framework in order to understand the role of ambiguity within the context of asymmetric power relations in the Nile River Basin. The power analysis is informed by the “Framework of Hydro-Hegemony” (Zeitoun and Warner 2006), developed to examine dynamics of transboundary water conflicts and cooperation. This paper aims to answer to the following research questions: Is ambiguity a power tool used by the hegemonic riparian states to prevent significant changes in the hegemonic *status quo*, or is ambiguity a bargaining tool used by the non-hegemonic riparian states to promote alternative hydropolitical agendas? Or, ultimately, is ambiguity a functional tool to create an illusionary consensus between divergent positions and policies?

Ambiguity in international water law and transboundary river basins negotiations

International water law, including the *1997 United Nations Convention on International Watercourses*, is characterised by normative ambiguity, namely in its provisions concerning “equitable and reasonable utilisation of the water resources” (ILC 1997). On one hand, some authors consider that ambiguity and related flexibility enable the riparian states negotiating and seeking agreements, while facilitating conflict resolution on complex shared river basins (Benvenisti 1996; Wolf 1999). On the other hand, some consider that the ILC rules are “of no great help for these are marked by a high degree of interpretative ambiguity” (Chimni 2005). Vinogradove et al. (2003) highlight “unambiguous legal instruments are essential in creating effective and sustainable institutional frameworks”. Moreover, it is recognised that often the non-compliance with specific water agreements are “a consequence of ambiguous treaty provisions” (Wouters et al. 2005).

Ambiguity had been deliberately incorporated in several transboundary water negotiations and agreements, such as: the 1994 Israeli-Jordan Water Agreement (Elmusa 1995; Dombrowsky 2003); the 1993-1995 Israel-Palestine water negotiations (Isaac 1995; Jagerskog 2003); the 1954 and 1996 India-Nepal water agreements on the Kosi and Mahakali rivers respectively, and the 1996 India-Bangladesh Ganges Treaty (Salman and Uprety 2002). Despite the fact that water agreements were signed between riparian neighbours, these cases evidence subsequent legal controversies, added ambiguity, difficulties in implementing the agreement, and often a prolongation of the conflict of interests between the parties. The analyses of these particular cases are expected to throw light on the development of the negotiations in the Nile River Basin case-study.

Ambiguity in the negotiations for a new water agreement in the Nile River Basin

The Nile River Basin had often been considered a hotspot for water wars (Starr 1991; Bulloch and Darwish 1993; Gleick et al. 1994), although armed interstate conflicts have not occurred in the Basin.

Relationships between Nile upstream and downstream riparian states have rather been characterised by a strong conflict of interests and divergent claims concerning the legal allocation of the shared resources. On one hand, the downstream riparians – Egypt and Sudan – claim “historical rights and priori use” over the Nile water resource, based on the bilateral 1959 Agreement (Caponera 1993; Waterbury 2002). Egypt and Sudan argue that future upstream uses of the Nile waters must not harm the current uses and rights of the downstream countries. On the other hand, the upstream riparians claim for an equitable utilisation and distribution of the shared waters, highlighting the need to legally allocate rights for future uses of water and the need to renegotiate past legal agreements (Kliot, 1994; Arsano 2005). Conciliation of the two divergent positions and solutions for the long-lasting legal deadlock in the Nile Basin appears a complex task.

Multilateral cooperation in the Nile Basin had been adopted by the riparian states by the beginning of the 1990s. Conditions on Ethiopian participation led in 1997 to the riparians’ negotiations for the establishment of a Cooperative Framework Agreement, called the D3 Project at the time (Arsano and Tamrat 2005). These high-level political negotiations (1997-2007) have run in parallel with the activities of the Nile Basin Initiative. The final goal of these negotiations was to achieve a multilateral legal framework which will be the foundation of a permanent river basin organisation – the Nile Basin Commission. The creation of the Commission is a *sine qua non* condition to receive massive international funds for water projects in the Basin, which explains the role of external actors on pushing forward the conclusion of the Agreement.

Ambiguity has played a role in the Nile negotiations and in the draft document concluded in June 2007. In order to conciliate the upstream-downstream divergent bargaining positions, the ambiguous concept of “water security” as a legal principle was introduced (Art. 14 of Draft Agreement, 2007). The aim was to accommodate the divergent claims of upstream and downstream riparians, and simultaneously incorporate “equitable utilisation” and “no harm”, which are often contradictory principles. Deliberately, the mention of the 1959 Agreement was avoided in the draft agreement, and no clues about the maintenance or supersession of the “old” agreement were given. Different interpretations of the Draft Agreement thus became possible. The structure and wording of the draft agreement put in evidence the deliberate use of ambiguity as a way to defuse conflictive positions and to de-block the stalemate in the enduring negotiations. Nevertheless, in July 2008 the agreement had not yet been ratified by the Heads of State and there had been a reported inflexibility by the downstream riparians to accept any kind of concessions, even if those are ambiguous (see *The Standard*, 29 June 2007).

The Nile River Basin case-study will provide insights on the advantages, risks and costs associated with the use of ambiguity in transboundary river basins negotiations and agreements. What seems to have been designed as “constructive ambiguity” can eventually turn into “destructive ambiguity”, such as occurred in the case of the Israeli-Jordanian water agreement (Fischhendler 2008a, 2008b). Potential future case-scenarios related to the use of ambiguity in the Nile Basin negotiations will be discussed.

Pros and Cons of Constructed Ambiguity and Recommendations

In brief, this article aims to provide insights into the *pos and cons* of use of constructed ambiguity in transboundary river negotiations, taking into account the recent negotiations in the Nile River Basin. The *pos* of the use of ambiguity are: it can increase flexibility in stiff negotiations; it can help to accommodate the divergent interests involved; it can defuse, to a certain extent, the conflictive positions of the negotiators; it can create room for the riparians to reach an agreement through political compromise; and, possibly it de-blocks the enduring negotiations towards a final agreement. The *cons* of the use of ambiguity are: it can induce different and diverse interpretations; it can increase legal controversies; it can make difficult the implementation of the agreement; it might encourage non-compliance with the provisions of the agreement; and, finally, it can contribute for the prolongation and/or resumption of conflicts between the riparian states.

The recommendation of the author is that negotiators of the riparian states and the third parties involved in the negotiations in the Nile River Basin should take into consideration the *pos and cons* of using constructed ambiguity, namely analysing previous cases in other transboundary river basins. The negotiators and external legal advisors should then develop the *BATNA – Best Alternative To A Negotiated Agreement* (Fisher and Ury 1991) while understanding which issues can and cannot be addressed through the use of constructed ambiguity.

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