

Time to Think about Ethiopia's Post-GERD Nile Policy

The eventual completion of the Grand Ethiopian Renaissance Dam will be a much-celebrated event in Ethiopian history for two oft-remarked reasons. Soaring 170 meters high, spanning 1,800 meters in width, and capable of generating 6,000 MW, the GERD will be Africa's largest hydroelectric dam. As such, it is a remarkable feat of modern engineering.

Just as the GERD's colossal dimensions have reshaped the landscape surrounding it, the dam's construction has upended the customary official rhetoric and politics of the Nile basin. Heretofore, Ethiopia limited itself to assertions of its right to develop the Nile; whereas, Egypt reacted to any minor suggestion of the mere consideration of construction by upper riparians as an existential threat to be met by an apoplectic reply. Construction of the GERD has pushed Egypt to grudgingly acknowledge that dialogue between riparian states is the only way to reach mutually acceptable solutions to competing claims over the Nile.

There is, however, a third, infrequently cited reason to laud the GERD's construction: its rekindling of Ethiopia's "can-do" spirit. Entirely self-funded, the dam imbues Ethiopians and the Ethiopian government with confidence that they can complete significant projects which are in the national interest. Relatedly, the major role being played by Ethiopian engineers and domestic contractors has enhanced the capabilities of Ethiopia's construction industry, enabling Ethiopia in the near future to exercise greater ownership of grand projects from their inception. Evidence of this increased technical prowess is reflected, for example, by the fact that following importation of the dam's first two turbines, the remaining turbines will be manufactured within Ethiopia by the state operated Metals and Engineering Corporation (METEC).¹

Having surmounted financial constraints and successfully skirted geopolitical pitfalls, Ethiopian policymakers need to begin to think of a post-GERD era. The Ethiopian government certainly ought to remain seized with matters relating to construction of the dam, but its completion is now a foregone conclusion. The focus of Ethiopia's Nile-related policy should now shift away from the GERD and towards successful completion of projects that will ensure the future integrated development of the Nile basin.

Negotiating Projects within a Broader Basin-Wide Context

An important Ethiopian policy goal in a post-GERD era should be expansion of the number of participants in future negotiations over Nile projects to encompass other upper riparian states. To date, negotiations over the GERD have primarily assumed a bilateral or trilateral character. Rendering negotiations more representative of the basin as a whole by including additional riparian states, would be consistent with an emerging international consensus that projects undertaken to develop international water basins should meet metrics for efficiency and environmental sustainability which are basin-wide in scope.

Pursuing an integrated approach to such development—which perforce requires representation of all states at the negotiating table—is also in keeping with the letter and spirit of

¹ Press Conference held by Dr. Debretsion Gebremichael, Deputy Prime Minister of Ethiopia. Broadcast by the Ethiopian Broadcasting Corporation on Oct. 14, 2015

the Cooperative Framework Agreement (CFA), which envisages precisely such a basin-wide approach. The CFA asserts that the Nile “binds [states] together” and specifically endorses the community of interest approach,² which ignores national boundaries and treats basins as an integrated whole when evaluating the most economically efficient and environmentally friendly use of a river.³

Strategically, ensuring that upper riparian states participate in discussions over specific projects, would fulfill another important function— restoring balance to negotiation dynamics. The inclusion of countries such as Uganda or Kenya, would ensure more robust representation of views promoting equitable utilization.

Moreover, bit-by-bit, negotiations over each discrete project and the individual agreements such negotiations will generate, could eventually accumulate into a comprehensive body of agreements. When considered *in toto* these may yield principles for the river’s exploitation in varying contexts, from irrigation to power generation. The more accommodating these negotiations are to broader participation, the more likely it is that states will view their positions as having been considered and reflected in emerging frameworks, thereby securing their buy-in and compliance. As Kimenyi and Mbaku put it:

“In the long run, compliance [with future agreements] will depend largely on the willingness of the Nile River basin’s relevant stakeholders to accept and respect any compact designed for the governance of the Nile River. How the compact is designed is critical: stakeholders will be more likely to accept and respect a compact that is designed through an inclusive and participatory process. It is only through such a process that the designers can produce an agreement that respects the interests of all riparians, both upstream and downstream.”⁴

Watch what you sign, Watch what you say

As a matter of policy, Ethiopia must therefore strive for broader participation in negotiations. Addis ought also to ensure that such discussions are framed and guided by international water law. Such a position is laudable and justifiable as a matter of principle. Advocating adherence to international law, however, is also in Ethiopia’s self-interest. Egypt’s insistence that it is entitled to an undiminished flow of the Nile in perpetuity, notwithstanding the rights and interests of upper riparians is untenable under international law. Explaining this clearly to other countries, and making this point regularly to the media, will inure to Ethiopia’s benefit.

It is critically important that higher level officials (and not just their advisers) be familiar with the key principles enunciated in well-established precedents so that they can be the most

² Agreement on the Nile River Basin Cooperative Framework. Preamble and Article 3 (9)

³ Caponera & Dominique Alh riti re, *Principles for International Groundwater Law*, 2 Nat. Resource Forum (1978) reprinted in *International Groundwater Law* 25, 51 (Ludwick A. Teclaff & Albert E. Utton eds., 1981); Owen McIntyre, “International Water Law: Concepts, Evolution and Development,” in *Transboundary and Water Management: Principles and Practice* (edited by Anton Earle), p. 67-70 (Earthscan, London; 2010); Christina Leb, *Cooperation in the Law of Transboundary Resources*, p. 52-55 (Cambridge, Cambridge University Press, 2013).

⁴ Mwangi S. Kimenyi and John Mukum Mbaku, *Governing the Nile River Basin: the Search for a New Legal Regime*, p. 121

tactful advocates of Ethiopia's national interest. Examples of noteworthy cases include the Lac Lanoux Arbitration⁵ and the Gabčíkovo Nagymaros case.⁶

More recent decisions by the International Court of Justice and the Permanent Court of Arbitration have further defined the jurisprudence concerning lawful use of transboundary waters. Among other things, the judgments have articulated legal principles concerning sustainable development, the lawfulness of planned diversions of rivers, and the need to guarantee a minimum downstream flow.⁷ Detailed analysis of such judgments goes beyond the scope of this article, but it is important to note that in these cases the final outcome hinged largely upon the tribunals' reading of treaties signed between the disputants which governed use of their shared rivers.⁸

Ethiopian authorities should therefore be alert to the monumental importance of devoting painstaking analysis to Nile-related agreements prior to signature. One can point to the CFA, of which Ethiopia has been a key proponent as an example of a positive agreement. The recent Declaration of Principles, a trilateral agreement between Ethiopia, Egypt and Sudan on the GERD can be deemed satisfactory, the outcome of reasonable compromise. The Declaration essentially incorporates the principles of equitable and reasonable use, as well as that of significant harm already present in the CFA and the UN Convention on the Non-Navigational Uses of International Water Courses.⁹ As is the case with other international agreements, the Declaration does not detail the meaning of these terms, nor how they operate in conjunction with one another. As such, the agreement's weaknesses largely reflect the infirmities of international water law.

Ethiopia, however, has also signed agreements which are unfavorable to it. One prime example is the 1993 Agreement between Egypt and Ethiopia, wherein the two countries refrain from engaging in "any activity related to the Nile waters that may cause appreciable harm to the interests of the other party."¹⁰ This Framework is problematic on several grounds. First, it does not reflect what one might posit is the higher threshold posed by the more common injunction against *significant* harm. Second, it does not counterbalance the notion of significant harm by mandating use which is equitable. Also troubling is the broadness in scope of what is circumscribed— *any* activity which is merely *related to interests*.¹¹

⁵ *Lac Lanoux Arbitration* (Spain v. France), 24 Int'l L. Rep. 101 (1957)

⁶ *Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia) [1997] ICJ 7.

⁷ See, for example, the Pulp Mills Arbitration before the ICJ (Pulp Mills on the River Uruguay (*Argentina v. Uruguay*), Judgment I.C.J. Reports, 2010, p. 14). See also the Kishenganga Arbitration before the Permanent Court of Arbitration (Indus Waters Kishenganga Arbitration (*Pakistan v. India*), Final Award of Dec 20, 2013), available at: http://www.pcacpa.org/PKIN%20Final%20Award%2c%2020%20December%202013d770.pdf?fil_id=2471

⁸ In the Pulp Mills dispute between Argentina and Uruguay, the ICJ relied on the River Uruguay Statute of 1975. In the Kishenganga Arbitration, the PCA relied upon the Indus Waters Treaty of 1960.

⁹ Agreement on the Declaration of Principles Between the Arab Republic of Egypt, the Federal Democratic Republic of Ethiopia, and the Republic of the Sudan on the Grand Ethiopian Renaissance Dam Project (2015), Arts. 3 and 4.

¹⁰ Framework for General Co-operation Between the Arab Republic of Egypt and Ethiopia (1993), Article 5.

¹¹ It would appear that Ethiopia never ratified the 1993 Agreement. However, non-ratification notwithstanding, having signed the treaty, Ethiopia must "refrain from acts which would defeat the [treaty's] object and purpose,"

Equally disconcerting is a joint statement by Egypt and Ethiopia following the 2014 meeting between Prime Minister Haile Mariam and President Sisi on the sidelines of the African Union Summit in Malabo. In that statement, Ethiopia pledges to “avoid *any potential* adverse effects of the GERD on the water uses of Egypt.”¹²[emphasis added]

These agreements evince a need for greater parsimony by Ethiopia in the give-and-take of negotiations. Authorities need advisers to parse through words and meticulously assess their import. Building teams with the technical and legal skills to do so will become more important in the future as agreements multiply and become staggeringly complex; assuming, of course, that riparian states reach treaties going beyond framework status.

As a matter of long-term strategy, Ethiopian government officials need also to be more careful to the substance and tenor of their public statements. Repeated pronouncements that the GERD is limited to hydroelectric use and will not cause any harm or diminishment in flow are unwise.¹³ Technically, this may be true, but caution must be exercised in order to ensure that Ethiopia is not precluded from uses— such as irrigation— to which it is entitled. Instead, public statements ought to emphasize Ethiopia’s commitment to equitable and reasonable use and to preventing *significant* harm from befalling Egypt.

Officials may be operating under the mistaken assumption that statements to the press have no binding effect. However, analysis of international legal precedents should encourage a sobering reassessment of such a view. Take the French Nuclear Test cases, for example. In those noteworthy cases, New Zealand and Australia brought suit against France, demanding that the ICJ order Paris to halt nuclear testing in the Southern Pacific. The ICJ first dismissed French objections to its jurisdiction. However, it then went on to dismiss the cases, holding that there was no longer any dispute to adjudicate because France, by virtue of its own officials’ statements was now *bound* to refrain from future nuclear tests in the Pacific. In holding that further French tests would be unlawful, the court considered *statements* such as a Note from the French Embassy in Wellington, a letter from the President of France to the Prime Minister of New Zealand, a communique’ issued by the Office of the French President, a press conference given by the French President, a speech made by the French Foreign Minister to the UN General

at least “until it has made its intention clear not to become a party [to it]...” See Vienna Convention on the Law of Treaties (VCLT), Art 18. Communicating to Egypt that it is Ethiopia’s position that the treaty has fallen into obsolescence given more recent agreements—in effect, “unsigneding” may be a viable course of action, though not without its political and legal problems. With regard to the possible legal challenges, see, for example, Edward Swaine, “Unsigneding,” 55 Stan. L. Rev. 2061 (2003). Alternatively, Ethiopia could take the position that provisions in the 1993 Agreement (especially, Art. 5) which are incompatible with elements of more recent treaties are no longer valid, as the 1993 Agreement’s provisions have been superseded by the latter. See Arts. 30 and 59 of the VCLT.

¹² Joint Statement by the Arab Republic of Egypt and the Federal Democratic Republic of Ethiopia, June 26, 2014 (available on the website of Egypt’s Ministry of Foreign Affairs: <http://www.mfa.gov.eg/English/Minister/Articles/Pages/ArticleInterviewDetails.aspx?Source=6781921f-3993-444a-859e-ee26ce851de8&articleID=6cf56d4e-8921-4ccc-92ac-6b921a5386e1>)

¹³ There will, of course, be a diminished flow to Egypt during the filling of the GERD’s reservoir. How quickly the reservoir will be filled (and consequently, the amount by which downstream flow will be reduced) is a matter of contention between Ethiopia and Egypt.

Assembly, and an interview and press conference by the French Minister of Defense. There were no bilateral or multilateral agreements at issue which the court could have considered.

The ICJ noted:

“It is well recognized that declarations made by way of unilateral acts concerning legal or factual situations, may have the effect of creating legal obligations. Nothing in the nature of a *quid pro quo*, nor any subsequent acceptance, nor even any reaction from other States is required for such declaration to take effect. Neither is the question of form [i.e., verbal or written] decisive. The intention of being bound is to be ascertained by an interpretation of the act...France has conveyed to the world at large...its intention effectively to terminate its atmospheric tests. It was bound to assume that other States might take note of these statements and rely on their being effective. It is true that France has not recognized that it is bound by any rule of international law to terminate its tests, but this does not affect the legal consequences of the statements in question...”¹⁴

The lesson to be drawn here is clear: statements by officials at the highest level— even in the absence of signed “binding” documents— cannot be made and subsequently reneged upon at will.¹⁵ Guarding against the risk that Ethiopia be estopped from further development of the Nile requires attentiveness not only to what is signed, but also to what is said.¹⁶

The Nile as a Catalyst for Increased Development and Integration

A third long-term goal of Ethiopia’s Nile policy should be to scrutinize projects so that they take shape in a manner ensuring maximum economic gain and regional integration. This is an area where the Ethiopian government has an already strong record. Transmission lines connecting Ethiopia’s power grid to Kenya, Sudan and Djibouti have been built and small amounts of power have been sold to all three countries. Moreover, Ethiopia recently inked a deal to provide 2,000 MW to Kenya.¹⁷ This marks the starting point for clean and more effective monetization of Ethiopia’s natural resources.

In the future, Ethiopia can build upon this solid foundation to reap additional dividends from its waters. For instance, further integration of eastern and southern African power grids will allow Ethiopia to sell power beyond its immediate sub-region. Indeed, Addis is already

¹⁴ Nuclear Tests (*New Zealand v. France*), Judgment, I.C.J. Reports 1974, p.457 (Paras 46-53).

¹⁵ The author is not conceding that statements by Ethiopian officials up to this point have actually estopped Ethiopia from making use of the Nile for irrigation. Several valid arguments (which cannot be adequately addressed here) can be proffered in Ethiopia’s defense. Nevertheless, officials’ statements have introduced an unhelpful element of uncertainty. It is the task of Ethiopia’s officials and their advisers to strive to minimize vulnerabilities (especially when such vulnerabilities are self-inflicted).

¹⁶ Others have similarly urged the Ethiopian government exercise restraint in its statements lest these be considered to be preclusive at a later stage. See, for example, Tadesse Woldestadik, “Conveying a Wrong Signal on the Limits of Sovereign Entitlements” *The Ethiopian Reporter* (Jan 15, 2015); also by the same author and published in the same newspaper, “Ethiopia’s Nile Diplomacy: from Strapping Defiance to Regression.”

¹⁷ Speech by Ethiopian Foreign Minister, Dr. Tedros Adhanom on Oct 23, 2015 at Chatham House. Transcript available here:

https://www.chathamhouse.org/sites/files/chathamhouse/events/special/15.10.26.%20Ethiopia%20FM%20Transcript_0.pdf

forward-thinking in this area, having announced its intention to provide power to Rwanda,¹⁸ and before its internecine strife, Yemen.¹⁹ In the negotiation of purchase power agreements, adequate attention must be paid to agreed-upon rates. The prices negotiated must, on the one hand, be reasonable enough to attract states; but on the other hand, remuneratively meaningful for Ethiopia.

Going forward, future projects should also be built with a view to exploiting the opportunity for irrigation. Currently, Ethiopia irrigates only 5% of its potentially irrigable 3.5 million hectares of land. Successful use of the Nile for irrigation purposes would make a significant dent in these figures. Moreover, it would blunt the impact of recurring rain shortages, of which the El-Nino spurred-drought is a stark reminder.

This article has highlighted the long-term goals and considerations which should inform Ethiopia's Nile-related strategies and policymaking. Neglect of long-term thinking is a predicament common to governments elsewhere, because state apparatuses are often better equipped to focus on crisis-management and short-term objectives. Ethiopia has tried to buck this trend in the economic arena by drawing up development plans running through 2025. This approach should encompass policymaking in foreign affairs, including its non-economic dimensions. Otherwise, Ethiopia will be precluded from harnessing the Nile in ways which allow it to reap full geopolitical *and* economic gain.

¹⁸ Yohannes Anberbir "Ethiopia, Rwanda Keen on Electricity Connection," The Ethiopian Reporter, 18 April, 2015.

¹⁹ "Ethiopia to Sell Power to Yemen," Addis Fortune, Feb 16, 2014