

# Sink or Swim: Alternatives for Unlocking the Grand Ethiopian Renaissance Dam Dispute

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*For over five years, Ethiopia, Sudan, and Egypt have been negotiating the filling and annual operation of the Grand Ethiopian Renaissance Dam (“GERD”), but failed to strike a deal acceptable to them all. The recent involvement of the United States and World Bank in the negotiation only served to further complicate the dispute and escalate diplomatic tensions. The talks are currently deadlocked with the parties, particularly Egypt, engaging in a war of words and accusations. This article argues that the colonial and 1959 Nile Treaties (colonial Nile Waters Treaties) comprise the principal obstacle to the GERD negotiations. Examining the current sticking points and the proposals tabled by the United States and the World Bank, this article argues that the Washington process has been tilted towards preserving the status quo established by the colonial Nile Waters Treaties. Drawing on international law principles and precedents, this article argues that a preliminary agreement is not required to fill and test the GERD and that the U.S. Department of Treasury, the point U.S. agency in the negotiations that called for such an agreement, violated the principles of non-intervention, sovereignty, and sovereign equality.*

*The article further considers tripartite negotiation, mediation, and judicial intervention as possible*

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*alternatives for resolving the GERD dispute. In particular, this article calls upon the three states to limit the scope of the forthcoming Treaty on the GERD's filling and annual operation, to resort to pan African mediation, or to take their case to the International Court of Justice ("ICJ") if and when necessary. If the case is brought to the ICJ, it is argued, the court will likely find the status quo established in the colonial Nile Waters Treaties untenable and will more equitably allocate the Nile watercourse.*

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## INTRODUCTION

Egypt has long been the principal hegemon in the Nile Basin. Through a myriad of mechanisms, including a series of colonial treaties, Egypt has established an effective hydro-hegemony in the Nile Basin. This has prevented upstream countries, like Ethiopia, from utilizing the waters of the Nile.<sup>1</sup> Further, Egypt has used its strategic position in the Middle East as leverage to block international funds intended to help Ethiopia develop the Nile.<sup>2</sup> For long, Ethiopia lacked funds to develop irrigation projects.<sup>3</sup> This resulted in “one of Africa’s cruelest ironies: the land that feeds the Nile is unable to feed itself.”<sup>4</sup>

Eventually, Ethiopia decided to change the game by constructing the Grand Ethiopian Renaissance Dam (“GERD”). The GERD is a giant hydrologic project on one of the Nile River’s main tributaries—the Blue Nile in Ethiopia<sup>5</sup>—designed to generate 5,150 megawatts of

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1. See generally Mahemud Tekuya, *The Egyptian Hydro-Hegemony in the Nile Basin: The Quest for Changing the Status Quo*, 26 J. WATER L. 10 (2018).

2. For instance, Egypt blocked African Development Bank funds meant to aid Ethiopia in exploiting the Nile. See Ashok Swain, *The Nile River Basin Initiative: Too Many Cooks, Too Little Broth*, 22 SAIS REV. INT’L AFFS. 293, 298 (2002); see also Roger Thurow, *Ravaged by Famine: Ethiopia Finally Gets Help from the Nile*, WALL ST. J. (Nov. 26, 2003), <https://www.wsj.com/articles/SB106979937643978400> [https://perma.cc/R5T8-4UE7] (“Modern geopolitics have favored Egypt because of its strategic position in the Middle East. Major international lenders and development agencies have been loath to support anything upstream on the Nile that might disrupt the vital flow of water to Egypt . . .”).

3. Thurow, *supra* note 2.

4. *Id.*

5. The Nile is made up of several tributaries. Three tributaries—the Blue Nile, Sobat (Baro) River and the Atbara (Tekeze and Angereb) River—originate in Ethiopia and contribute 85–90% of the Nile waters. The other main tributary, the White Nile, originating in Lake Victoria and shared among Tanzania, Rwanda, Burundi, Kenya, Uganda, and the Democratic Republic of Congo, contributes the rest of the Nile flow. Generally, eleven countries share the Nile River. See Nile Basin Initiative, *The Water Resources of the Nile Basin*, in THE STATE OF THE RIVER NILE BASIN 25, 27–28, 36–39 (2012),

electricity from thirteen turbines.<sup>6</sup> The GERD reservoir will cover an area of 1,874 square kilometers and can hold seventy-four billion cubic meters (“BCM”) of water.<sup>7</sup> Solely financed by Ethiopia, the GERD is expected to provide electricity access for an estimated sixty-five million Ethiopians.<sup>8</sup> It will also support Ethiopia’s development endeavors through income from energy exports and serve to lift millions of people out of poverty.<sup>9</sup> Despite the fact that eighty-six percent of the Nile waters reaching Egypt originate in Ethiopia,<sup>10</sup> the GERD is only the second major dam on any of the Nile tributaries flowing from Ethiopian territory.<sup>11</sup>

Disputes over the filling and operation of the GERD have, once again, threatened security in Northeast Africa. Ethiopia maintains that the dam will not have a significant adverse impact on the two downstream states, Egypt and Sudan. Indeed, Ethiopia contends the GERD confer enormous benefits to Egypt and Sudan, including a more regular flow of water, better siltation prevention, a reduction in evaporation, and cheaper electricity.<sup>12</sup> As a result of these benefits and in a

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[http://sob.nilebasin.org/pdf/Chapter\\_2\\_Water%20resources.pdf](http://sob.nilebasin.org/pdf/Chapter_2_Water%20resources.pdf) [https://perma.cc/9NT2-5E48]; see also J.V. SUTCLIFFE & Y.P. PARKS, *THE HYDROLOGY OF THE NILE* 127 (1999).

6. *Power Generation Capacity of the GERD Slashed to 5150 MW—Ethiopian Minister*, EZEGA NEWS (Oct. 17, 2019), <https://www.ezega.com/News/NewsDetails/7331/Power-Generation-Capacity-of-GERD-Slashed-to-5150MW-Ethiopian-Minister> [https://perma.cc/4Z85-6E7G].

7. See INT’L PANEL OF EXPERTS [IPOE] ON THE GRAND ETHIOPIAN RENAISSANCE DAM PROJECT [GERDP], FINAL REPORT 7 (2013), ([https://www.scidev.net/filemanager/root/site\\_assets/docs/international\\_panel\\_of\\_experts\\_for\\_ethiopian\\_renaissance\\_dam\\_final\\_report.pdf](https://www.scidev.net/filemanager/root/site_assets/docs/international_panel_of_experts_for_ethiopian_renaissance_dam_final_report.pdf)) [https://perma.cc/SR4P-MFBU] [hereinafter IPOE FINAL REPORT].

8. Zeray Yihdego, *International Law Connotations of US-‘Mediated’ Nile Dam Negotiations and Outcomes: Why and How the Parties Should Regain Control* 0–3 (Mar. 18, 2020) (unpublished working paper), [https://www.researchgate.net/publication/340341053\\_International\\_Law\\_Connotations\\_of\\_USsponsored\\_GERD\\_'mediation'\\_WorkingPaper\\_Zeray\\_Yihdego\\_18\\_March\\_2020](https://www.researchgate.net/publication/340341053_International_Law_Connotations_of_USsponsored_GERD_'mediation'_WorkingPaper_Zeray_Yihdego_18_March_2020) [https://perma.cc/WMK4-D5PQ]; Mahmoud Aziz, *Ethiopia Demands ‘Fair and Serious’ Talks to Return to Negotiating Table Over Disputed Nile Dam: Ethiopian FM*, AHRAMONLINE (Mar. 17, 2020), <http://english.ahram.org.eg/News/365426.aspx> [https://perma.cc/N7VM-FA92].

9. *Id.*

10. See Nile Basin Initiative, *supra* note 5, at 36; see also J.V. SUTCLIFFE & Y.P. PARKS, *supra* note 5, at 127.

11. See Salman M.A. Salman, *The Grand Ethiopian Renaissance Dam: The Road to the Declaration of Principles and the Khartoum Document*, 42 WATER INT’L 512, 515–16 (2016). Ethiopia’s first major dam, the Tekeze Dam, sits on the Atbara River and was completed in 2010. *Id.* The Tekeze dam can store up to four BCM of water and has the capacity to produce more than 360 megawatts of electricity. *Id.*

12. See Rawia Tawfik, *The Grand Ethiopian Renaissance Dam: A Benefit-Sharing Project in the Eastern Nile?*, 41 WATER INT’L 574, 576 (2016).

historic break with its past practice of acting in lockstep with Egypt, Sudan has, since 2012, become more receptive to the GERD.<sup>13</sup> However, Egypt continues to maintain that any upstream dam on the Nile River represents an existential threat.<sup>14</sup>

Initially, Egypt rejected the project entirely. But later, it requested Ethiopia conduct an independent transboundary impact study before continuing with construction of the GERD.<sup>15</sup> When Ethiopia refused to halt the construction of the GERD, Egypt requested a reduction in the size of the dam.<sup>16</sup> In 2015, after painstaking negotiations,<sup>17</sup> Egypt, Sudan, and Ethiopia signed the Declaration of Principles (“DoP”) on the GERD.<sup>18</sup> The DoP provides a framework for further negotiation on the filling and annual operation of the dam, and reflects Egypt’s recognition of the importance of the Nile River to Ethiopia’s development.<sup>19</sup>

Despite this framework, however, the dispute over the filling and operation of the GERD persists. Egypt insists upon the preservation of its historic water share<sup>20</sup> and, as such, has demanded the GERD’s reservoir be filled over a long period, lasting about twenty

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13. See Rawia Tawfik, *Revisiting Hydro-Hegemony from a Benefit-Sharing Perspective: The Case of the Grand Ethiopian Renaissance Dam*, GERMAN DEV. INST. 1, 24 (2015) (describing Sudan’s position as “a turning point” in the hydro-political relations between the two downstream countries, Sudan and Egypt); see also Salman, *supra* note 11, at 516–19. Sudanese support for the project, however, has not been unwavering. See Kate Ng, *Sudan Boycotts Talks Over Controversial Mega-Dam in Ethiopia*, INDEP. (Nov. 24, 2020), <https://www.independent.co.uk/news/world/africa/sudan-ethiopia-boycott-talks-mega-dam-b1759672.html> [<https://perma.cc/T6JC-WPAE>].

14. See Salman, *supra* note 11, at 516–17; Tawfik, *supra* note 12, at 574; see also Tawfik, *supra* note 13, at 24.

15. See Tawfik, *supra* note 13, at 22.

16. Yihdego, *supra* note 8, at 0.

17. See generally Salman, *supra* note 11 (reviewing the negotiation process).

18. Agreement on Declaration of Principles on the Grand Ethiopian Renaissance Dam Project, Mar. 23, 2015, INT’L WATER L. PROJECT, [https://www.internationalwaterlaw.org/documents/regionaldocs/Final\\_Nile\\_Agreement\\_23\\_March\\_2015.pdf](https://www.internationalwaterlaw.org/documents/regionaldocs/Final_Nile_Agreement_23_March_2015.pdf) [<https://perma.cc/AZL9-FS55>] [hereinafter DoP].

19. *Id.*

20. Agreement for the Full Utilization of the Nile Waters, Egypt-Sudan, Nov. 8, 1959, 453 U.N.T.S. 51 (1959) [hereinafter 1959 Nile Treaty]. Article II, ¶ 4 of the 1959 Nile Treaty allocates the entire annual flow of the Nile (eighty-four billion cubic meters measured at the Aswan High Dam) between Egypt and Sudan. The Treaty allocated the lion’s share, 55.5 BCM, to Egypt, 18.5 BCM to Sudan, and left the remaining 10 BCM for evaporation. This 55.5 BCM of water is what Egypt considers as its “historic right.” Maha El Dahan, *Egypt Says Historic Nile River Rights Not Negotiable*, REUTERS (July 27, 2009), <https://www.reuters.com/article/us-egypt-nile-framework/egypt-says-historic-nile-river-rights-not-negotiable-idUSTRE56Q3LZ20090727> [<https://perma.cc/JZ44-ZKXP>].

years,<sup>21</sup> and that it should have a say in the operational management of the dam.<sup>22</sup> Ethiopia does not recognize Egypt's claim of "historic rights" regarding the Nile, but has offered to fill the reservoir over a period of four to seven years, despite the ability of the Blue Nile to support a fill period of three years.<sup>23</sup> Since the GERD is a national project, wholly within Ethiopian territory, Ethiopia insists on exclusive management of the dam and its operations.<sup>24</sup> Meanwhile, apart from some safety-related concerns, Sudan supports the GERD.<sup>25</sup>

For over five years, the three states have failed to resolve these outstanding issues. In August 2019, Egypt submitted proposals on the filling and operation of the dam<sup>26</sup> and later effectively internationalized the GERD negotiations<sup>27</sup> by involving the United States

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21. Elias Meseret, *Ethiopia Won't Be Forced by the US on Dam, Foreign Minister Says*, ASSOCIATED PRESS (Mar. 13, 2020), <https://apnews.com/39183ccfead1c0796ad38796d459ff3b> [<https://perma.cc/V4KX-75EX>] (interviewing the Foreign Minister of Ethiopia).

22. Bart Hillhorst, *Water Management in the Nile Basin: A Fragmented but Effective Cooperative Regime 1* (Georgetown University Ctr. for Int'l & Reg'l Stud. Occasional Paper No. 17, 2016) <https://ssrn.com/abstract=3447020> [<https://perma.cc/4APE-BLAU>]; Telephone Interview with Zerihun Abebe Yigzaw, Diplomat, Ministry of Foreign Affairs of Ethiopia (Apr. 13, 2020) [hereinafter Yigzaw Interview]. Yigzaw was a member of the Ethiopian GERD negotiating team.

23. Aidan Lewis, *Ethiopia Says Egypt Trying to Maintain "Colonial Era" Grip Over Nile*, REUTERS (Oct. 8, 2019) <https://www.reuters.com/article/us-ethiopia-dam/ethiopia-says-egypt-trying-to-maintain-colonial-era-grip-over-nile-idUSKBN1WN1OG> [<https://perma.cc/U5MW-Y3NV>].

24. It is worth mentioning that as part of its exclusive management of the dam, Ethiopia intends to provide Egypt and Sudan with data and information concerning the dam's annual operation. Article V of the DoP recommends "cooperation and coordination on the annual operation of GERD with downstream reservoirs" among the three states. DoP, *supra* note 18, art. V, ¶ 3.

25. See Salman M.A. Salman, *The Declaration of Principles on the Grand Ethiopian Renaissance Dam: An Analytical Overview*, in ETHIOPIAN YEARBOOK OF INTERNATIONAL LAW 203, 210 (Zeray Yihdego, Melaku Gobeye Desta & Fikremarkos Merso eds., 2017); see also Salman, *supra* note 11, at 516–17; and Tawfik, *supra* note 12, at 24; and Ng, *supra* note 13.

26. *Ethiopia Rejects Egypt Proposal on the Nile Dam*, AL JAZEERA (Sept. 19, 2019), <https://www.aljazeera.com/news/2019/09/ethiopia-rejects-egypt-plan-operate-nile-dam-190919073610904.html> [<https://perma.cc/832P-W9AE>] [hereinafter *Ethiopia Rejects Egypt Proposal*]; *Ethiopia Rejects Egypt's Proposal on the Filling, Operation of Grand Dam*, ADDIS STANDARD (Sept. 18, 2019), <https://addisstandard.com/news-ethiopia-outright-rejects-egypts-proposal-on-the-fillingoperation-of-grand-dam/> [<https://perma.cc/9FVW-8QA8>].

27. *Egypt Seeks International Support to End GERD Talks Deadlock*, DAILY NEWS EGYPT (Oct. 1, 2019), <https://www.dailynewsegypt.com/2019/10/01/egypt-seeks-international-support-to-end-gerd-talks-deadlock/> [<https://perma.cc/US9U-FD63>] [hereinafter *Egypt Seeks International Support*] (discussing Egyptian President Abdel Fattah el-Sisi's speech in the UN General Assembly); *Egypt Calls on 'Active' US Role Mediating Nile Dam Impasse with Ethiopia*, FRANCE 24 (Sept. 10, 2019), <https://www.france24.com/en/>

government and the World Bank as observers.<sup>28</sup> The three states have held meetings with the United States Department of Treasury and the World Bank's representatives in both Africa and Washington, D.C.<sup>29</sup>

The Washington talks, which were progressing well at first,<sup>30</sup> took a turn for the worse in January, resulting in a stalemate.<sup>31</sup> The United States, evidently going beyond its status as an observer in the talks, proposed an agreement that Ethiopia considered adverse to its national interests.<sup>32</sup> Ethiopia rejected the proposal and withdrew from the last meeting in Washington, D.C.<sup>33</sup> The U.S. Department of the Treasury requested that Ethiopia sign the proposed agreement and cautioned Ethiopia to refrain from testing and filling the GERD without an agreement with Egypt and Sudan.<sup>34</sup> Ethiopia expressed its disappointment with the statement and announced that it would proceed with filling the reservoir in parallel with the construction of the dam as agreed in the DoP.<sup>35</sup> Egypt, on the other hand, signed the United

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20191007-egypt-ethiopia-nile-river-dam-mediating [https://perma.cc/QS32-LUWY]  
[hereinafter *Egypt Calls on the U.S.*].

28. Press Release, U.S. Dep't of the Treasury, Joint Statement of Egypt, Ethiopia, Sudan, the United States, and the World Bank, (Nov. 6, 2019), <https://home.treasury.gov/news/press-releases/sm827> [https://perma.cc/UE78-MDZH] [hereinafter Joint Statement 1].

29. Declan Walsh & Somini Sengupta, *For Thousands of Years, Egypt Controlled the Nile. A New Dam Threatens That*, N.Y. TIMES (Feb. 9, 2020), <https://www.nytimes.com/interactive/2020/02/09/world/africa/nile-river-dam.html> [https://perma.cc/L4ZK-R9GH].

30. Jacob Wirschafter, *U.S.-Led Talks Lead to Breakthrough as African Rivals Inch Closer to War Over Nile*, WASH. TIMES (Nov. 11, 2019), <https://www.washingtontimes.com/news/2019/nov/11/steven-mnuchin-mediated-talks-see-grand-ethiopian/> [https://perma.cc/5NP5-U5YQ].

31. Patsy Widakuswara, *No Deal from US-Brokered Nile Dam Talks*, VOICE AMERICA (Feb. 29, 2020), <https://www.voanews.com/africa/no-deal-us-brokered-nile-dam-talks> [https://perma.cc/Y2TX-R5DM]; Benita van Eyssen, *Trouble as Trump Dives into the Dispute Over Ethiopia's Nile Mega-Dam*, DEUTSCHE WELLE (Mar. 6, 2020), <https://www.dw.com/en/trouble-as-trump-dives-into-the-dispute-over-ethiopia's-nile-mega-dam/a-52663126> [https://perma.cc/4YAT-GQQF].

32. Meseret, *supra* note 21.

33. *Id*; *Ethiopia: US Being 'Undiplomatic' Over Nile Dam Project*, AL JAZEERA (Mar. 4, 2020), <https://www.aljazeera.com/news/2020/03/ethiopia-undiplomatic-nile-dam-project-200304060039736.html> [https://perma.cc/3RZU-DUN9].

34. Press Release, Steven T. Mnuchin, U.S. Sec'y of the Treasury, Statement on the Grand Ethiopian Renaissance Dam (Feb. 28, 2020), <https://home.treasury.gov/news/secretary-statements-remarks/statement-by-the-secretary-of-the-treasury-on-the-grand-ethiopian-renaissance-dam> [https://perma.cc/3NKJ-TW8V] [hereinafter Treasury Statement].

35. Press Release, Embassy of Eth., London, Statement of Ethiopia on the Negotiations on the Grand Ethiopian Renaissance Dam (Feb. 29, 2020), <https://www.ethioembassy.org.uk/statement-of-ethiopia-on-the-negotiations-on-the-grand-ethiopian-renaissance-dam/> [https://perma.cc/GE9N-L4XK] [hereinafter Statement of Ethiopia on the GERD] (responding to the Treasury Statement, *supra* note 34).

States' proposal and vowed to protect its interests in the Nile River "by all available means."<sup>36</sup>

Although disguised in talks over the GERD's filling and operation, the current tension between Ethiopia and Egypt is principally related to their longstanding disagreement over the validity of the 1902 Anglo-Ethiopian Treaty,<sup>37</sup> the 1929 Anglo-Egyptian Treaty,<sup>38</sup> and the 1959 Nile Treaty between Egypt and Sudan<sup>39</sup> (collectively, the "colonial Nile Waters Treaties"). This disagreement—which reached an apex during the negotiation of the Cooperative Framework Agreement ("CFA")<sup>40</sup>—is adversely impacting the GERD negotiations.

This article analyzes the implications of the colonial Nile Waters Treaties for the ongoing GERD dispute between Ethiopia and Egypt. The negotiations over the filling and operation of the GERD are the focus of a voluminous body of academic literature. Political scientists have extensively studied the hydro-hegemonic implications of the GERD in their effort to determine "who gets how much [of the Nile] water, when, where, and why?"<sup>41</sup> Other scholars have addressed

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36. *Egypt Vows to Use 'All Means' to Defend Nile Interests After Ethiopia Skips U.S. Talks*, HAARETZ (Feb. 29, 2020), <https://www.haaretz.com/middle-east-news/egypt/egypt-vows-to-use-all-means-to-defend-nile-interests-after-ethiopia-skips-talks-1.8600505> [<https://perma.cc/5MUW-JCPD>].

37. Treaties Relative to the Frontiers Between the Soudan, Ethiopia, and Eritrea, Eth.-U.K., May 15, 1902, [1902] U.K.T.S. 16 [hereinafter 1902 Anglo-Ethiopian Treaty].

38. Exchange of Notes Regarding the Use of the Waters of the River Nile for Irrigation Purposes, Egypt-U.K., May 7, 1929, [1929] U.K.T.S. 17 [hereinafter 1929 Anglo-Egyptian Treaty].

39. 1959 Nile Treaty, *supra* note 20.

40. Agreement on the Nile River Basin Cooperative Framework, *opened for signature* May 14, 2010, INT'L WATER L. PROJECT, [http://internationalwaterlaw.org/documents/regionaldocs/Nile\\_River\\_Basin\\_Cooperative\\_Framework\\_2010.pdf](http://internationalwaterlaw.org/documents/regionaldocs/Nile_River_Basin_Cooperative_Framework_2010.pdf) [<https://perma.cc/7X3D-GXRY>] [hereinafter CFA].

41. See generally Tawfik, *supra* note 12; Tawfik, *supra* note 13; Rawia Tawfik & Ines Dombrowsky, *GERD and Hydro-Politics in the Eastern Nile: From Water to Benefit-Sharing?*, in THE GRAND ETHIOPIAN RENAISSANCE DAM AND THE NILE BASIN: IMPLICATIONS FOR TRANSBOUNDARY WATER COOPERATION 113 (Zeray Yihdego et al. eds. 2018) [hereinafter GERD IMPLICATIONS]; Tadesse Kassa Woldetsadik, *The Grand Ethiopian Renaissance Dam and Ethiopia's Succession in Hydro-Legal Prominence: A Script in Legal History of Diplomatic Confront (1957–2013)*, 9 MIZAN L. REV. 369 (2015); Hala Nasr & Andreas Neef, *Ethiopia's Challenge to Egyptian Hegemony in the Nile River Basin: The Case of the Grand Ethiopian Renaissance Dam*, 21 J. GEOPOLITICS 969 (2016); Mohamed Salman Tayie, *The Grand Ethiopian Renaissance Dam and the Ethiopian Challenge of Hydro-political Hegemony on the Nile Basin*, in GRAND ETHIOPIAN RENAISSANCE DAM VERSUS ASWAN HIGH DAM: A VIEW FROM EGYPT 485, 501 (Abdelazim M. Negm & Sommer Abdel-Fattah eds., 2019); Mathias Devi Nielsen, *The Waters of The Nile: Ethiopia Challenging Regional Hydro-Hegemony* 7 (Spring 2015) (M.A. thesis, University of Copenhagen), [https://www.academia.edu/21662307/The\\_Waters\\_of\\_the\\_Nile\\_Ethiopia\\_Challenging\\_Regional\\_Hydro-Hegemony](https://www.academia.edu/21662307/The_Waters_of_the_Nile_Ethiopia_Challenging_Regional_Hydro-Hegemony) [<https://perma.cc/MQ8B-9UUZ>]; Intikhab Ahmad, *The New Hydro-*



whether the GERD will be a source of conflict or a catalyst for cooperation.<sup>42</sup> Engineers and hydrologic experts studied the GERD's positive and adverse effects and proposed various scenarios for the filling and operation of the dam.<sup>43</sup> Legal scholars have explored *some* of the substantive issues concerning the legal developments in the GERD dispute, including the DoP.<sup>44</sup> What the academic discourse regarding

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*Political Situation in Africa: Challenges for Nile River Basin Countries*, 22 WORLD AFFS. 60 (2018).

42. See, e.g., Int'l Crisis Grp., *Bridging the Gap in the Nile Waters Dispute*, Africa Report No. 271, at 24–26 (2019) (<https://www.crisisgroup.org/africa/horn-africa/ethiopia/271-bridging-gap-nile-waters-dispute>) [<https://perma.cc/Q46X-HJ3T>]; Dale Whittington et al., *The Grand Renaissance Dam and Prospects for Cooperation on the Eastern Nile*, 16 WATER POL'Y 595, 598, 606 (2014); *Nile Dam Talks: Unlocking a Dangerous Stalemate*, INT'L CRISIS GROUP (Mar. 16, 2020), <https://www.crisisgroup.org/africa/horn-africa/ethiopia/nile-dam-talks-unlocking-dangerous-stalemate> [<https://perma.cc/CM3S-BBWP>]; Ana Elisa Cascão & Alan Nicol, *Changing Cooperation Dynamics in the Nile Basin and the Role of the GERD*, in GERD IMPLICATIONS, *supra* note 41, at 90, 106–08; Robin Faißt, *How Mediation Based on African Approaches to Conflict Resolution Can Transform the Conflict Over the Nile*, 2019 CONFLICT TRENDS, no. 1, 2019, at 29; Ana Elisa Cascão & Alan Nicol, *GERD: New Norms of Cooperation in the Nile Basin?*, 41 WATER INT'L 550, 566–69 (2016); Hilhorst, *supra* note 22, at 8–24, 28–30; Meron Teferi Taye et al., *The Grand Ethiopian Renaissance Dam: Source of Cooperation or Contention?*, J. WATER RES. PLAN. & MGMT., Nov. 2016, at 1; SEIFULAZIZ MILAS, SHARING THE NILE: EGYPT, ETHIOPIA AND THE GEO-POLITICS OF WATER (2013); Timothy E. Petrov, *The Grand Ethiopian Renaissance Dam: Risk of Interstate Conflict on the Nile* 63–68 (2018) (M.A. thesis, Naval Postgraduate School), [https://calhoun.nps.edu/bitstream/handle/10945/61248/18Dec\\_Petrov\\_Timothy.pdf?sequence=1&isAllowed=y](https://calhoun.nps.edu/bitstream/handle/10945/61248/18Dec_Petrov_Timothy.pdf?sequence=1&isAllowed=y) [<https://perma.cc/7W73-EWU4>].

43. See, e.g., WOSSENU ABTEW & SHIMELIS BEHAILU DESSU, THE GRAND ETHIOPIAN RENAISSANCE DAM ON THE BLUE NILE (2018); Kevin G. Wheeler, *Cooperative Filling Approaches for the Grand Ethiopian Renaissance Dam*, 41 WATER INT'L 611 (2016); Ying Zhang et al., *Filling the GERD: Evaluating Hydroclimatic Variability and Impoundment Strategies for Blue Nile Riparian Countries*, 41 WATER INT'L 593 (2016); Andrew King & Paul Block, *An Assessment of Reservoir Filling Policies for the Grand Ethiopian Renaissance Dam*, 5 J. WATER & CLIMATE CHANGE 233 (2014); Ying Zhang et al., *Ethiopia's Grand Renaissance Dam: Implications for Downstream Riparian Countries*, J. WATER RES. PLAN. & MGMT., Sept. 2015, at 1; Noha Donia & Abdelazim Negm, *Impacts of Filling Scenarios of GERD on Egypt's Water Resources and Their Impact on Agriculture Sector*, in CONVENTIONAL WATER RESOURCE AND AGRICULTURE IN EGYPT 391 (Abdelazim Negm ed. 2018); Walaa Y. El-Nashar & Ahmed H. Elyamany, *Managing Risks of the Grand Ethiopian Renaissance Dam on Egypt*, 9 AIN SHAMS ENG'G J. 2383 (2018); Asegdew G. Mulat & Semu A. Moges, *Assessment of the Impact of the Grand Ethiopian Renaissance Dam on the Performance of the High Aswan Dam*, 6 J. WATER RES. & PROT. 583 (2014).

44. See generally Tekuya, *supra* note 1; Salman, *supra* note 11; Salman, *supra* note 25; Salman M.A. Salman, *The GERD and the Revival of the Egyptian-Sudanese Dispute over the Nile Waters*, in ETHIOPIAN YEARBOOK OF INTERNATIONAL LAW 79, 95 (Zeray Yihdego et al. eds., 2018) [hereinafter *Dispute Revival*]; ZERAY YIHDEGO, THE FAIRNESS 'DILEMMA' IN SHARING THE NILE WATERS: WHAT LESSONS FROM THE GRAND ETHIOPIAN RENAISSANCE DAM FOR INTERNATIONAL LAW? (2017); Dereje Zeleke Mekonnen, *Declaration of Principles on the Grand Ethiopian Renaissance Dam: Some Issues of Concern*, 11 MIZAN L. REV. 255 (2017); Mahemud Tekuya, *Governing The Nile Under Climatic Uncertainty: The Need for a Climate-*

the GERD lacks, however, is a detailed study analyzing the ramifications of the colonial Nile Waters Treaties on the GERD negotiations, the legitimacy of the United States' role in the GERD negotiations, the U.S. Treasury statement vis-à-vis international law, and solutions for resolving the GERD dispute.

This article intends to fill these gaps in the scholastic discourse on the GERD negotiations. The next part briefly introduces the disputes over the colonial Nile Water Treaties as well as the context for the fragmented legal regime that currently governs the Nile Basin. It also addresses the interplay between the colonial Nile Waters Treaties and the Declaration of Principles and submits that the latter does not abrogate the former. Part II analyzes the implications of the Nile Water Treaties for the post-DoP talks on the filling and operation of the GERD. It discusses the justifications for the involvement of the United States and the World Bank, and explores recent sticking points in the GERD talks. Part III examines whether—as the U.S. Treasury has suggested—a preliminary agreement is required to fill and test the GERD. It further probes the legitimacy under international law of the United States' involvement in the GERD. Part IV explores alternatives, such as negotiation, mediation, and judicial settlement, for resolving the GERD dispute. Finally, the article offers its concluding remarks and a call for Egypt, Ethiopia, and Sudan to, *inter alia*, stop approaching the Nile watercourse as a zero-sum game and cooperate for their mutual benefit.

## I. BACKGROUND: DISPUTE OVER THE COLONIAL NILE WATERS TREATIES

### A. Overview of the Nile Waters Agreements: A Fragmented Legal Regime

The legal regime governing the Nile Basin is fragmented. The Basin does not have a mutually acceptable legal framework applicable to all riparian states.<sup>45</sup> Currently, three types of legal instruments—bilateral treaties, a multilateral agreement establishing a framework for

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*Proof Basin-Wide Treaty*, 59 NAT. RES. J. 321 (2019) [hereinafter *The Need for a Climate-Proof Basin-Wide Treaty*]; Salman M.A. Salman, *Agreement on Declaration of Principles on the GERD: Levelling the Nile Basin Playing Field*, in GERD IMPLICATIONS, *supra* note 41, at 41; Zeray Yihdego et al., *How Has the Grand Ethiopian Renaissance Dam Changed the Legal, Political, Economic and Scientific Dynamics in the Nile Basin?*, 41 WATER INT'L 503 (2016).

45. STEPHEN C. McCaffrey, THE LAW OF INTERNATIONAL WATERCOURSES 262 (2007).

cooperation, and the DoP—are relevant to the use and allocation of Nile waters.<sup>46</sup>

Several bilateral treaties exist between riparian states and their former colonial powers concerning the flow of the Nile since the end of the 19th century.<sup>47</sup> Of these bilateral agreements, the 1902 and 1929 colonial treaties and the 1959 Nile Treaty between Sudan and Egypt are the most widely disputed.<sup>48</sup> They are referred to herein as the colonial Nile Waters Treaties, although the 1959 treaty was entered into after Egypt and Sudan had gained independence from the United Kingdom.

First, the 1902 Anglo-Ethiopia Treaty is a bilateral treaty concluded between Britain, on behalf of Sudan, and Ethiopia to determine the boundary between Ethiopia and Sudan.<sup>49</sup> Although the agreement is about boundary delineation, it contains a provision relating to the waters of the Nile that requires Ethiopia “not to construct, or allow to be constructed, any work across the Blue Nile, Lake Tana, or the Sobat which would *arrest* the flow of their waters into the Nile except in agreement with His Britannic Majesty’s Government and the Government of the Soudan.”<sup>50</sup>

Second, the 1929 Anglo-Egyptian Treaty is a bilateral treaty between Egypt and Britain, representing Sudan and its other East African colonies (Kenya, Uganda, and Tanganyika). The agreement, recognizing what it called the historical and natural rights of Egypt, gave Egypt veto power over any construction projects along the Nile and its

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46. Tekuya, *The Need for a Climate-Proof Basin-Wide Treaty*, *supra* note 44, at 330.

47. Fasil Amdetsion, *Scrutinizing the Scorpion Problematique: Arguments in Favor of the Continued Relevance of International Law and a Multidisciplinary Approach to Resolving the Nile Dispute*, 44 *TEX. INT’L. L.J.* 1, 22 (2008); Dereje Zeleke Mekonnen, *Between the Scylla of Water Security and Charybdis of Benefit Sharing: The Nile Basin Cooperative Framework Agreement—Failed or Just Teetering on the Brink?*, 3 *GOTTINGEN J. INT’L L.* 345, 351–55 (2011); *see also* Salman M.A. Salman, *The Nile Basin Cooperative Framework Agreement: A Peacefully Unfolding African Spring?*, 38 *WATER INT’L* 17, 18 (2013).

48. Salman, *supra* note 47, at 18–19.

49. *See generally* 1902 Anglo-Ethiopian Treaty, *supra* note 37.

50. *Id.* art. III (emphasis added). The Anglo-Ethiopian Treaty is the source of a bitter dispute between Ethiopia, Sudan, and Egypt. Egypt considers itself as a successor in this agreement and has claimed that Ethiopia needs Egyptian consent to build any project in the Nile. Ethiopia, the other hand, rejects this, claiming, *inter alia*, that it was not ratified by Ethiopia and that the meaning of the word *arrest* both in the Amharic and English versions does not preclude Ethiopia from using the waters. *See* Salman, *supra* note 47, at 18–19; Abadir M. Ibrahim, Note, *The Nile Basin Cooperative Framework Agreement: The Beginning of the End of Egyptian Hydro-Political Hegemony*, 18 *MO. ENV’T. L. & POL’Y REV.* 282, 299 (2011); Mohammed Abdo, *The Nile Question: The Accords on the Water of the Nile and Their Implications on Cooperative Schemes in the Basin*, 9 *PERCEPTIONS J. INT’L AFFS.* 47, 48 (2004).

tributaries.<sup>51</sup> It also allocated a volumetric quantity of water to each state: forty-eight billion cubic meters (“BCM”) for Egypt and four BCM for Sudan. In so doing, it determined the amount of waters each state received, which the 1959 Nile Treaty then used as the “established rights” of the two states.<sup>52</sup>

Third, the 1959 Nile Treaty is a bilateral treaty between Egypt and Sudan.<sup>53</sup> This Treaty was meant to allocate the net benefit generated from the Aswan High Dam (“AHD”).<sup>54</sup> Although more favorable to Sudan than the 1929 Anglo-Egyptian Treaty, the 1959 Nile Treaty also allocated the bulk of the Nile’s waters—55.5 BCM—to Egypt (sixty-six percent of the total eighty-four BCM water flow), only 18.5 BCM (twenty-two percent) to Sudan, and left the remaining 10 BCM (twelve percent) for evaporation.<sup>55</sup> The treaty does not recognize the rights of the upstream states.

51. The 1929 Anglo-Egyptian Treaty states:

Except with the prior consent of the Egyptian Government, no irrigation works shall be undertaken nor electric generators installed along the Nile and its branches nor on the lakes from which they flow if these lakes are situated in Sudan or in countries under British administration which could jeopardize the interests of Egypt either by reducing the quantity of water flowing into Egypt or appreciably changing the date of its flow or causing its level to drop.

1929 Anglo-Egyptian Treaty, *supra* note 38, art. IV, ¶ 2. In 1962, former British East Africa colonies Kenya, Tanzania and Uganda, adopting the Nyerere doctrine, declared that they were no longer bound by this treaty. However, Egypt has continued to deem the treaty as valid and binding on all parties under the principle of state succession. *See* Salman, *supra* note 43, at 18; Ibrahim, *supra* note 50, at 297–99; Amdetsion, *supra* note 47, at 23.

52. 1959 Nile Treaty, *supra* note 20, art. I, ¶ 1 (characterizing the aforementioned quantities as the “established right” of the parties).

53. *See generally id.*

54. As the 1929 Anglo-Egyptian Treaty determined the “established right[s]” of the two states, the 1959 Nile Treaty allocated only the net benefit generated from the construction of the AHD. Of the 32 BCM gross gain expected after the construction of AHD, the Agreement deducts 10 BCM for evaporation and seepage, and divides the remaining 22.5 BCM in a two-to-one ratio in favor of Sudan or 14.5 BCM for Sudan and 7.5 BCM for Egypt. *Id.* art. II, ¶ 3–4; *see also* Gretta Goldenman, *Adapting to Climate Change: A Study of International Rivers and Their Legal Arrangements*, 17 *ECOLOGY L.Q.* 741, 753–54 (1990). The net benefit is as follows:

Mean natural river supply at Aswan	84 BCM
Less over-year storage losses	-10 BCM
Egypt’s established right	-48 BCM
Sudan’s established right	-4 BCM
Total net benefit	22 BCM

55. *See* 1959 Nile Treaty, *supra* note 20, art. II, ¶ 4.

The Nile Basin Cooperative Framework Agreement (“CFA”)<sup>56</sup> is the other important legal instrument concerning the use and allocation of the Nile watercourse. The CFA was the result of the riparian states’ attempt to create a basin-wide legal and institutional framework to regulate the interstate utilization and management of the Nile River. The CFA negotiations began in the early 1990s and were formalized in the CFA Project in 1995.<sup>57</sup>

At the time, all riparian Nile states,<sup>58</sup> with the exception of Eritrea, participated in the project. With financial and technical support from the United Nations Development Program, the CFA Project provided for high-level legal and political negotiations toward the conclusion of a basin-wide agreement. A separate but parallel track supported by the World Bank, the Nile Basin Initiative (“NBI”), focused on development in the region and involved the same nine states that participated in the CFA process (the “Nile Basin States”).<sup>59</sup>

During the project’s negotiations, the fate of the colonial Nile Waters Treaties was the subject of controversy. The upstream states believed that the purpose of the CFA Project was to produce an inclusive agreement that would replace and supersede the Nile Waters Treaties. The lower riparian states—Egypt and Sudan—insisted that the new agreement must explicitly recognize the earlier treaties, referred to as “existing agreements,” which would continue to be binding upon all riparian states.<sup>60</sup>

In an attempt to bridge this gap, the negotiators of the CFA introduced the new, non-legal concept of “water security”<sup>61</sup> to replace the provision governing the relationship between the CFA and the existing agreements, on which no agreement could be reached.<sup>62</sup> The idea was that Egypt, concerned about water security, could be protected through a new provision and the relationship between the CFA and the “existing agreements” (whether the former supersedes the

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56. See generally CFA, *supra* note 40.

57. Telephone Interview with Professor Stephen C. McCaffrey, Legal and Institutional Consultant, Nile Coop. Framework Project (Nov. 2017) [hereinafter McCaffrey Interview].

58. The riparian Nile states include Burundi, the Democratic Republic of Congo, Egypt, Eritrea, Ethiopia, Kenya, Rwanda, Sudan, South Sudan, Tanzania, and Uganda.

59. *Id.*; Salman, *supra* note 47.

60. *Id.*; see generally Dereje Zeleke Mekonnen, *The Nile Basin Cooperative Framework Agreement Negotiations and the Adoption of a ‘Water Security’ Paradigm: Flight into Obscurity or a Logical Cul-de-Sac?*, 21 EUR. J. INT’L L. 421 (2010).

61. McCaffrey Interview, *supra* note 57; see also Mekonnen, *supra* note 60, at 436–40.

62. McCaffrey Interview, *supra* note 57.

latter or vice versa) could be governed by the general rules of international law.<sup>63</sup>

However, the Nile Basin States were not able to agree on the draft provision on water security contained in Article 14 of the draft CFA.<sup>64</sup> Specifically, the lower riparian states opposed the part of Article 14 providing that the parties “agree, in a spirit of cooperation not to significantly affect the water security of any other Nile Basin State.”<sup>65</sup> The lower riparian states insisted that the language should obligate all Nile Basin States “*not to adversely affect the water security and current uses and rights of any other Nile Basin State.*”<sup>66</sup>

The position of lower riparian states brought the long-standing dispute over the colonial Nile Waters Treaties back to the table as a request for unequivocal recognition of their validity against upstream states. The upstream states rejected that proposal and opened the agreement for signature on May 14, 2010.<sup>67</sup> The CFA has been signed by six upstream states and subsequently ratified by four states.<sup>68</sup> By its terms, the CFA requires six ratifications to enter into force and, consequently, the CFA neither binds the lower riparian states nor reallocates the waters of the Nile River.<sup>69</sup>

After signing the CFA, Ethiopia began construction on the GERD an estimated twenty kilometers upstream from the Sudan-Ethiopia border on the Blue Nile. Both Egypt and Sudan initially opposed the GERD, alleging that it would significantly and adversely affect their interests and violate the rules regulating the Nile watercourse.<sup>70</sup> However, after considering the numerous benefits conferred by the GERD, Sudan later changed its position to support the construction of the dam.<sup>71</sup> Gradually, after painstaking negotiations,<sup>72</sup> Egypt accepted

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63. *Id.*

64. *Id.*

65. *Id.*; Mekonnen, *supra* note 60, at 428.

66. Mekonnen, *supra* note 60, at 428 (emphasis added).

67. By opening the draft CFA for signature, the upstream states have used the document as a counter-hegemonic strategy. Among others, they used the document to politically isolate the lower riparian states and change the narrative that Egypt is the gift of Nile. Tekuya, *supra* note 1, at 14.

68. Ethiopia, Kenya, Uganda, Burundi, Rwanda, and Tanzania have signed the Agreement, but only Ethiopia, Tanzania, Rwanda, and Uganda have ratified it.

69. *See* CFA, *supra* note 40, art. 42.

70. *See* Salman M.A. Salman, *Grand Ethiopian Renaissance Dam: Challenges and Opportunities*, CIP REPORT, Oct. 2011, at 21, 23 (stating that Egypt and Sudan considered the GERD a violation of the 1902 Treaty).

71. *See* Salman, *supra* note 11, at 516–18; Tawfik, *supra* note 12, at 21, 23–24.

72. For a description of the negotiation process, see Salman, *supra* note 11.

the importance of the dam and the three states signed the Declaration of Principles on the GERD Project (“DoP”) on March 23, 2015.<sup>73</sup>

*B. The Colonial Nile Waters Treaties and the Declaration of Principles*

The DoP is a unique addition to the legal regime governing the use of the Nile watercourse. Unlike the colonial Nile Waters Treaties, the DoP expressly considers Ethiopia’s interests and recognizes the significance of the Nile River for the sustainable development of its people. It also codifies some fundamental principles of international water law—including the principle of equitable and reasonable utilization, and the “no significant harm” rule—as the governing rubric of the Blue Nile.<sup>74</sup> However, the legal effect of the DoP vis-à-vis the colonial Nile Waters Treaties is unclear. There are two questions worth asking: Is the DoP binding? And, if so, does it supersede the colonial Nile Waters Treaties? There are three ways to answer this first question.

First, the DoP may be a soft law instrument that does not bind Ethiopia, Sudan, and Egypt. This assertion is supported by the nomenclature of the document; declarations are not typically binding under international law.<sup>75</sup> Moreover, the DoP does not specify entry into force, ratification, or deposit of the document pursuant to Article 24(4) of the Vienna Convention on the Law of Treaties (“VCLT”).<sup>76</sup> This suggests that the parties did not intend the DoP to be a binding instrument.<sup>77</sup> If the DoP is, in fact, merely soft law, the issue of the

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73. See generally DoP, *supra* note 18.

74. *Id.* arts. III–IV.

75. Arnold N. Pronto, *Understanding the Hard/Soft Distinction in International Law*, 48 VAND. J. TRANSNAT’L L. 941, 951 (2015) (“The legal value of instruments adopted as ‘declarations’ or statements of principle is constrained by the limited authority of the adopting entity. Such instruments are legally indistinguishable from simple recommendatory texts.”).

76. See Vienna Convention on the Law of Treaties art. 24.4, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

77. The DoP has not been ratified by the three countries in accordance with their respective constitutions. In Ethiopia, the executive organ is empowered to negotiate international agreements, but such agreements must be ratified by the House of Peoples’ Representatives to be fully binding and have the force of law. CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, Aug. 21, 1995, art. 55 ¶ 12. In Egypt, the constitution empowers the president to “conclude treaties and ratify them after the approval of the House of Representatives.” CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Jan. 18, 2014, *as amended* Apr. 23, 2019, art. 151. Under its former leader, Omar al-Bashir, Sudan’s constitution structured treaty ratification in the same manner as required in Egypt. NATIONAL CONSTITUTION OF THE REPUBLIC OF SUDAN, July 6, 2005, art. 58, ¶ 1(k) (repealed 2019). However, Sudan’s new, provisional constitution brings it in line with Ethiopia’s approach.

relationship between the DoP and the colonial Nile Waters Treaties disappears. Nonetheless, the DoP is still important for the three states, as it provides guidelines for the GERD negotiations. Indeed, Ethiopia, Sudan, and Egypt may prefer the soft law nature of the DoP because it offers more flexibility in the GERD negotiations and facilitates compromise without significantly affecting their respective interests.

Alternatively, the DoP may be considered a legally binding instrument that must be enforced in good faith. While declarations are generally considered soft law, the title of a document is not wholly dispositive of its legal effect.<sup>78</sup> “Treaties are known by a variety of differing names, ranging from Conventions, International Agreements, Pacts, General Acts, Charters, through to Statutes, Declarations, and Covenants.”<sup>79</sup> With all these various titles possible, “the intent of the parties, as reflected in the language and context of the document, the circumstances of its conclusion, and the explanations given by the parties”<sup>80</sup>—rather than the document title—determines its legal effect.<sup>81</sup> Further, the DoP does not necessarily need to be ratified by Ethiopia, Sudan, and Egypt in order to have legal effect, because establishing the intention to be bound by a treaty is “governed by international law.”<sup>82</sup> Several aspects of the DoP suggest that the three parties was intended to be bound by it. For instance, phrases, such as the three states “*respect* the final outcomes of the Technical National Committee,”<sup>83</sup> “the three countries have *committed to . . .*,”<sup>84</sup> and “the three countries *shall take . . .*”<sup>85</sup>, imply the DoP is binding. Hence, the agreement does not seem to be merely a “gentlemen’s agreement.” Indeed, subsequent state practice also appears to suggest that the three states intended to be bound by the DoP. In December 2015, Ethiopia,

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DRAFT CONSTITUTIONAL CHARTER FOR THE 2019 TRANSITIONAL PERIOD, Aug. 17, 2019, arts. 16 ¶ 2, 25 ¶ 1(e) (Sudan).

78. See VCLT, *supra* note 76, art. 2.

79. MALCOLM N. SHAW, INTERNATIONAL LAW 93 (6th ed. 2008) (citation omitted).

80. Marian Nash (Leich), *Contemporary Practice of the United States Relating to International Law*, 88 AM. J. INT’L L. 515, 515 (1994) (quoting a memorandum from Robert E. Dalton, U.S. Department of State Assistant Legal Adviser for Treaty Affairs).

81. See, e.g., Maritime Delimitation and Territorial Questions Between Qatar And Bahrain (Qatar v. Bahr.), Judgment, 1994 I.C.J. 112, ¶ 30 (July 1) (finding the Minutes, like the exchanges of letters, “constitute an international agreement creating rights and obligations for the Parties”); see also Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. 7, ¶ 78 (Sept. 25).

82. Sir Humphrey Waldock, *First Report on the Law of Treaties*, [1962] 2 Y.B. INT’L L. COMM’N 27, 32, U.N. Doc. A/CN.4/144.

83. DoP, *supra* note 18, art. V (emphasis added).

84. *Id.* pmb. (emphasis added).

85. *Id.* arts. III–IV, VII & IX (emphasis added).



Sudan, and Egypt signed the 2015 Khartoum Document, agreeing to implement the DoP.<sup>86</sup>

Even if the DoP is hard law, the issue of the relationship between the DoP and the colonial Nile Waters Treaties becomes less crucial if the two legal regimes govern different subject matter or are found to be compatible with each other. For the reasons explained below, the DoP cannot supersede the colonial Nile Waters Treaties simply because it is binding upon the three states.

The third, and perhaps most convincing, argument to the question of the binding nature of the DoP would consider the DoP as a reflection of customary international law governing watercourses. The DoP binds the three states as an endorsement of existing international customs regulating transboundary watercourses. Confirming this view, the International Court of Justice (ICJ) in *Military and Paramilitary Activities in and Against Nicaragua* stated that “the effect of consent to the text of such resolutions cannot be understood as merely that of reiteration or elucidation . . . it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolutions themselves.”<sup>87</sup> Even if the DoP is non-binding, the two customary principles—equitable utilization and no significant harm—are binding on Ethiopia, Sudan, and Egypt by virtue of being rules of customary international law.<sup>88</sup> The three states’ official endorsement of these principles in the DoP can be seen as an indication of the existence of consensus to govern the Blue Nile based on contemporary international watercourse law.<sup>89</sup>

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86. See Salman, *supra* note 11, at 523–24. The relevant part of this document states that the three countries “reiterated their full commitment to implement the provisions of the Agreement on DoP signed in Khartoum on 23 March 2015.” Summary and Outcomes of the 4th Tripartite Meeting of Ministers of Foreign and Water Affairs on the Grand Ethiopian Renaissance Dam Project art. iii, ¶ 1, Dec. 29, 2015, INT’L WATER L. PROJECT, [https://www.internationalwaterlaw.org/documents/regionaldocs/Khartoum\\_Document\\_29\\_Dec\\_2015.pdf](https://www.internationalwaterlaw.org/documents/regionaldocs/Khartoum_Document_29_Dec_2015.pdf) [<https://perma.cc/XCC5-ANGA>].

87. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 188 (June 27) (internal quotations omitted).

88. See MCCAFFREY, *supra* note 45, at 375–77 (considering the two principles as customary international law); Joseph W. Dellapenna, *The Customary International Law of Transboundary Fresh Waters*, 1 INT’L J. GLOB. ENV’T ISSUES 264, 269–72 (2001).

89. Recent developments in the GERD negotiations further support this assertion. Egypt formally submitted letters to the United Nations Security Council requesting its intervention in the GERD dispute, after which Ethiopia and Sudan each submitted their own letters. In their respective documents, all three states invoked and subscribed to, *inter alia*, the equitable and reasonable utilization and no significant harm rule as customary international law governing the Nile Basin. See Permanent Rep. of Egypt to the U.N., Letter dated 19 June 2020 from the Permanent Rep. of Egypt to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2020/566 (June 19, 2020) [hereinafter Egypt’s Letter to the UNSC]; Permanent Rep. of Ethiopia to the U.N., Letter dated 22 June 2020 from the

The DoP is silent as to whether it supersedes the colonial Nile Waters Treaties and does not address the present applicability or legal status of the colonial Nile Waters Treaties. Salman Mohammed Salman considers this omission an indirect nullification and contends that the decision to omit references to the rights flowing from either the 1902 Anglo-Ethiopian Treaty or the 1959 Nile Treaty was demonstrative of Egyptian and Sudanese acceptance of “the new legal order established by and resulting from the DoP.”<sup>90</sup> Hence, this new order would replace the 1902 Treaty and the 1959 Nile Waters Agreement.<sup>91</sup> Although he does not provide any legal ground for this assertion, Salman appears to rely on the *lex posterior* doctrine and assumes that the DoP is binding.

The later-in-time, or *lex posterior*, principle under international law permits states to supersede past treaties by concluding a new treaty governing the same matter. However, the assertion that the DoP has replaced the colonial Nile Waters Treaties is questionable. First, per Article 59 of the VCLT, the later-in-time treaty supersedes the prior treaty when the two conflict on an analogous point of international law. As indicated above, the legal status of the DoP is unclear and may not be considered as a legally-binding treaty capable of abrogating a pre-existing treaty. As Professor Stephen McCaffrey rightly described it, the DoP is a “quasi-legal document” that merely rearticulates established principles under international watercourse law.<sup>92</sup>

Even if we assume that the DoP is a treaty, it falls short of fulfilling the requirements provided in the VCLT. The *lex posterior* doctrine applies when (1) both the former and new treaties relate to the same subject-matter, and (2) the parties intended the later treaty to govern the same matter, or the two treaties are “incompatible” and cannot be applied together.<sup>93</sup> The DoP does not satisfy the first and most important test because it regulates a different matter than the 1902 Anglo-Ethiopian Treaty. While the former provides framework for the GERD negotiations and, to some extent, for the use of the Blue Nile, the latter only addresses whether Ethiopia is required to obtain prior

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Permanent Rep. of Ethiopia to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2020/567 (June 22, 2020) [hereinafter Ethiopia’s Letter to the UNSC]; Permanent Rep. of Sudan to the U.N., Letter dated 24 June 2020 from the Permanent Rep. of the Sudan to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2020/586 (June 24, 2020).

90. See Salman, *supra* note 25, at 219.

91. See Salman, *supra* note 11, at 525.

92. MCCAFFREY, *supra* note 45, at 322.

93. VCLT, *supra* note 76, art. 59.

authorization from Britain (Sudan) before undertaking projects along the Nile tributaries.

With respect to the second requirement, the DoP is arguably a special agreement governing the GERD that can be applied concurrently with the colonial Nile Waters Treaties. As noted, the DoP and the 1902 Anglo-Ethiopian Treaty establish distinct regimes that do not conflict. As for the other Nile Waters Treaties, the DoP is a narrow agreement that has no relevance to other Nile tributaries such as White Nile, Sobat (Baro) and the Atbara (Tekeze and Angereb) rivers. To the extent that it does not address these Nile tributaries, the DoP does not replace the colonial Nile Waters Treaties.

If, however, Salman is correct in asserting that the DoP replaced the 1959 Nile Treaty, the latter treaty does not govern the Nile River as between Egypt and Sudan, who are parties to both instruments. But, as discussed below, Egypt and Sudan heavily relied on the 1959 Nile Treaty during the GERD negotiations.<sup>94</sup> This has two potential implications. The first and least plausible is that the DoP supersedes the 1959 treaty and Egypt and Sudan's subsequent reliance was erroneous. Second, and more plausibly, the DoP did not supersede the 1959 treaty, in which case Egypt and Sudan properly relied upon it.<sup>95</sup>

## II. FIRST FILLING AND ANNUAL OPERATION OF THE GERD: POST-DECLARATION OF PRINCIPLES NEGOTIATIONS

As indicated above, Ethiopia, Sudan, and Egypt participated in negotiations before adopting the DoP. The three states also established an International Panel of Experts ("IPoE"), which consists of ten members, two from each of the three states, and four members from outside the Nile Basin.<sup>96</sup> The IPoE, after studying the GERD and its potential impacts on the two downstream states, found the GERD would not cause significant harm.<sup>97</sup> It also recommended the three states conduct two studies: a transboundary impact study and a hydrological

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94. See the discussion *infra* Sections II.A and II.B.

95. If the DoP does not establish a new legal order, the question is whether the colonial Nile Waters Treaties remain valid. Section IV, *infra*, addresses this inquiry and indicates various grounds for invalidating the treaties.

96. Salman, *Dispute Revival*, *supra* note 44, at 95.

97. *Id.*; see also IPoE FINAL REPORT, *supra* note 7.

modeling study.<sup>98</sup> The three states agreed, in Article V of the DoP, to use the outcome of these studies to determine the guidelines and rules on the GERD's first filling and annual operation.<sup>99</sup>

#### A. *The Aftermath of the Declaration of Principles*

Following the adoption of the DoP, Ethiopia, Sudan and Egypt agreed that international consultants would conduct the studies under the supervision of the Technical National Committee ("TNC").<sup>100</sup> In September 2016, the TNC hired two French firms, BRLi Group and Artelia, to conduct the studies.<sup>101</sup> However, the initiation of the studies reignited the dispute over the colonial Nile Waters Treaties.

Egypt insisted that the baseline data to determine the impact should be its current use of the Nile waters.<sup>102</sup> In other words, Egypt claimed every drop of water that currently flows into the Lake Nasser reservoir of the AHD, including the waters that Sudan fails to use.<sup>103</sup> Sudan demanded the 1959 Nile Treaty water allocation serve as the baseline. Ethiopia rejected both positions, reiterating that it is not a party to the 1959 Nile Treaty and the baseline for the studies will not create rights in the three states.<sup>104</sup>

Later, Egypt attempted to include the World Bank as a mediator<sup>105</sup> and even sought to exclude Sudan from the GERD negotiations.<sup>106</sup> Ethiopia rejected Egypt's proposals, on the grounds that "[t]here is an opportunity for the three countries to resolve possible

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98. Salman, *Dispute Revival*, *supra* note 44, at 95. Note that Salman mistakenly describes the TNC as the "Tripartite National Committee" while the DoP, in actuality, establishes a "Technical National Committee." DoP, *supra* note 18, art. V.

99. *See* DoP, *supra* note 18, art. V.

100. *See* Salman, *Dispute Revival*, *supra* note 44, at 98.

101. *Id.* at 100.

102. *Id.*

103. Sudan currently uses only 12 BCM from its 18.5 BCM annual "share" under the 1959 Nile Treaty. Egypt uses around 61 BCM—approximately 5 BCM of which is water from Sudan's "share" under the 1959 Nile Treaty. *See id.* at 90.

104. *Id.* at 103.

105. Mu Xuequan, *Egypt Seeks World Bank as Technical Mediator in Ethiopia's Dam Issue*, XINHUA (Dec. 26, 2017), [http://www.xinhuanet.com/english/2017-12/27/c\\_136853702.htm](http://www.xinhuanet.com/english/2017-12/27/c_136853702.htm) [<https://perma.cc/PK3Q-VTZC>].

106. *See* Fasika Tadesse, *Egypt Proposes to Exclude Sudan from Dam Talks*, ADDIS FORTUNE (Dec. 30, 2017), <https://addisfortune.net/articles/egypt-proposes-to-exclude-sudan-from-dam-talks/> [<https://perma.cc/3E3C-XT59>].

disputes by themselves.”<sup>107</sup> They ultimately agreed to establish a new National Independent Scientific Research Group (“NISRG”) to study scenarios for filling and annual operation of the GERD.<sup>108</sup>

However, instead of refining and agreeing on the work of the NISRG, Egypt shortly thereafter reopened negotiations by submitting its own plan. In August 2019, Egypt proposed the GERD’s first filling “be conducted over a seven-year period, with a minimum release of forty billion meter cubic (“BMC”) of water annually and a guarantee to ensure that the AHD remained at 165 meters above sea level.”<sup>109</sup> In addition, the proposals would require Ethiopia to obtain approval from Egypt at various stages of the filling<sup>110</sup> and to release the entire average annual flow of the Blue Nile (forty-nine BMC) once the GERD becomes operational.<sup>111</sup> Egypt also proposed that it be allowed to open an office at the GERD site.<sup>112</sup>

Ethiopia rejected the proposals and labelled them an Egyptian “effort to maintain a self-claimed colonial era-based water allocation and veto power on any project in the Nile system.”<sup>113</sup> Egypt, in return,

107. Elias Meseret, *Ethiopia Refuses World Bank Arbitration over Nile River Dam*, ASSOCIATED PRESS (Jan. 21, 2018), <https://apnews.com/42dba7a51c0b4d0c90829d0c2c4e596b> [<https://perma.cc/2TK6-QUL4>].

108. See Fred Oluoch, *Joint Team to Study Likely Effects of Ethiopian Dam on Nile Waters*, EAST AFRICAN (May 19, 2018), <https://www.theeastafrican.co.ke/news/africa/Joint-study-effects-Ethiopian-dam-on-Nile/4552902-4570178-o5ju7nz/index.html> [<https://perma.cc/Z3CB-KYGE>].

109. Abraham D., *Cooperation is Imperative for an Agreement on Filling, and Operation of GERD*, WALTA (Sept. 23, 2019), <http://www.waltainfo.com/index.php/FeaturedArticles/detail?cid=50736> [<https://perma.cc/2U9R-426W>].

110. See Salem Solomon & Mohamed Elshinnawi, *Ethiopia Condemns Egyptian Proposal for Nile Water Usage*, VOICE AMERICA (Oct. 10, 2019), <https://www.voanews.com/africa/ethiopia-condemns-egyptian-proposal-nile-water-usage> [<https://perma.cc/W9Y3-Z25K>].

111. Addisu Lashitew, *Why Ethiopia, Egypt, and Sudan Should Ditch a Rushed Washington-Brokered Nile Treaty*, BROOKINGS INST. (Feb. 18, 2020), <https://www.brookings.edu/blog/africa-in-focus/2020/02/18/why-ethiopia-egypt-and-sudan-should-ditch-a-rushed-washington-brokered-nile-treaty/> [<https://perma.cc/QBM6-BXRB>]; *Ethiopia Rejects Egypt Proposal*, *supra* note 26.

112. Yigzaw Interview, *supra* note 22. It is worth mentioning that there is a precedent for this arrangement in the Nile Basin. Currently, Egypt has on-site office rights on the White Nile where the river leaves Lake Victoria. See Exchange of Notes Constituting an Agreement Regarding Co-Operation in Meteorological, and Hydrological Surveys in Certain Areas of the Nile Basin, Egypt-U.K., art. I, ¶ 3, Jan. 19–Mar. 20, 1950, 226 U.N.T.S. 287 [hereinafter Owen Falls Dam Treaty] (“The Resident Egyptian Engineer at the Owen Falls Dam . . . shall have access to all the Posts which are in Uganda in order to undertake periodical inspections to assure themselves that the posts are being satisfactorily maintained and the observations regularly collected.”).

113. Lewis, *supra* note 23.

claimed that the talks had reached a deadlock<sup>114</sup> and called upon the United States to mediate in order to overcome the impasse.<sup>115</sup> Initially, Ethiopia considered Egypt's claim to be "an unwarranted denial of the progress" made in the negotiations, and expressed hope that the three states could resolve their disputes without intervention.<sup>116</sup> But later, Ethiopian Prime Minister Abiy Ahmed Ali met with the Egyptian President in Russia, and the two leaders agreed "to resume talks" on the GERD.<sup>117</sup> Ethiopia accepted the United States' invitation and came to Washington D.C., where delegates of the three states met with the U.S. Secretary of the Treasury and the President of the World Bank.<sup>118</sup> They agreed to resume talks, with the United States and the World Bank serving as observers.<sup>119</sup>

### *B. Egypt's Bid to Preserve the Status Quo—And Its Hegemony*

Egypt's 2019 proposal outlines the following five requirements: (1) that Ethiopia fill the GERD slowly while releasing forty BCM of water every year; (2) that Egypt maintain its water surplus in the AHD reservoir (165 meters above sea level); (3) that Ethiopia obtain approval from Egypt at various stages of the filling and operation of the dam; (4) that Ethiopia release the entire flow of the Nile waters after the filling of the GERD; and (5) that Egypt's on-site-office right on the upper White Nile at the Owen Falls Dam in Uganda is replicated in Ethiopia at the GERD.<sup>120</sup> The proposal is extremely advantageous to Egypt.<sup>121</sup>

Egypt's proposal would—directly or indirectly—impose the colonial Nile Waters Treaties on Ethiopia and preserve status quo and

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114. *Egypt Seeks International Support*, *supra* note 27 (discussing Egyptian President Abdel Fattah el-Sisi's speech in the U.N. General Assembly).

115. *Egypt Calls on the U.S.*, *supra* note 27.

116. *Egypt Says 'Deadlock' in Nile Dam Talks with Ethiopia*, AL JAZEERA (Oct. 6, 2019), <https://www.aljazeera.com/news/2019/10/egypt-deadlock-nile-dam-talks-ethiopia-191006070043565.html> [<https://perma.cc/L6KY-VYCH>].

117. *Egypt, Ethiopia 'Agree' to Resume Talks on Massive Nile Dam*, AL JAZEERA (Oct. 24, 2019), <https://www.aljazeera.com/news/2019/10/egypt-ethiopia-agree-resume-talks-massive-nile-dam-191024140822273.html> [<https://perma.cc/UHG5-ERST>].

118. *See* Joint Statement 1, *supra* note 28.

119. *Id.*

120. Yigzaw Interview, *supra* note 22; *see* Owen Falls Dam Treaty, *supra* note 112, for a similar arrangement in Uganda.

121. *Why Ethiopia Rejected the U.S.-Drafted GERD Deal*, ETHIOPIAN INSIGHT (Apr. 2, 2020), <https://www.ethiopia-insight.com/2020/04/02/why-ethiopia-rejected-the-u-s-drafted-gerd-deal/> [<https://perma.cc/YCA3-SWZL>] [hereinafter *Why Ethiopia Rejected the U.S. Deal*].

Egypt's hydro-hegemony. The third requirement, for instance, effectively reifies Egypt's understanding of the 1902 Anglo-Ethiopian Treaty on Ethiopia by giving Egypt veto power over upstream projects.

The fourth requirement, meanwhile, presupposes the validity of the 1959 Nile Treaty—to which Ethiopia is not a party and thus not bound to respect. Although the GERD is limited to electricity production, agreeing to release the entire flow of the Nile after the completion of the GERD will foreclose Ethiopia's existing and future right under international law to use the Nile waters for other essential consumptive purposes. The standard should not be the 1959 Nile Treaty, but rather the customary international norm of equitable and reasonable utilization.<sup>122</sup> The ICJ has underscored the foundational nature of this principle, recognizing that both upstream and downstream riparian states have a “basic right to an equitable and reasonable sharing of the resources of an international watercourse.”<sup>123</sup> This norm thus requires a balanced use of the Nile waters by each of the Nile Basin States.

In practice, Egypt's requirements would prevent Ethiopia from using its reasonable and equitable share of the riparian rights. First, they would delay production of electricity and prevent Ethiopia from getting the expected returns from the GERD. As a result, Ethiopia would be less able to eliminate extreme poverty among its citizens, which is the GERD's main purpose.<sup>124</sup> Second, the requirement that Egypt maintain current water levels in the AHD reservoir may unreasonably require Ethiopia to subsidize Egyptian water rights based on events beyond its control. For one, Egypt could use or export the Nile waters before they reach the AHD, making the water stored in the AHD below 165 meters above sea level (“MASL”). Ethiopia would then be forced to compensate Egypt for Egypt's loss from its own share of the water. Moreover, maintaining the AHD at 165 MASL will be difficult in the future because of climate change. The Nile Basin is experiencing droughts that are increasing both in frequency and

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122. *Report of the Commission to the General Assembly on the Work of its Forty-Sixth Session*, [1994] 2 Y.B. INT'L L. COMM'N, 96–97, U.N. Doc. A/CN.4/SER.A/1994/Add.1 (Part 2) [hereinafter *46th ILC Report*]; *Convention on the Law of the Non-Navigational Uses of International Watercourses*, May 21, 1997, 2999 U.N.T.S. 52106 [hereinafter *U.N. Watercourse Convention*]; see *Gabčikovo-Nagymaros Project (Hung./Slovk.)*, Judgment, 1997 I.C.J. 7, ¶ 78 (Sept. 25); see also MCCAFFREY, *supra* note 45, at 375–77; see generally, Dellapenna, *supra* note 88 (describing equitable and reasonable utilization as customary international law).

123. *Gabčikovo-Nagymaros Project*, 1997 I.C.J. ¶ 78.

124. Daniel Berhane, *Ethiopia's Dam on the Nile Launched*, HORN AFFS. (Apr. 2, 2011), <https://hornaffairs.com/2011/04/02/ethiopia-great-dam-on-nile-launched/> [https://perma.cc/D6KP-YWWH]

magnitude.<sup>125</sup> Therefore, arguably, the GERD will end up being a second reservoir for Egypt.

Finally, agreeing to the last proposal would require nothing short of a surrender of Ethiopian sovereignty. While past practice shows that joint or transnational projects require shared management, strictly national projects should be independently managed.<sup>126</sup> The GERD is an Ethiopian project whose operation should be left solely to Ethiopia. Ethiopia would, of course, remain obligated under general international law to use the Nile waters equitably and reasonably,<sup>127</sup> to exercise due diligence to avoid causing significant harm to the lower riparian states,<sup>128</sup> and to regularly share data and information.<sup>129</sup>

### *C. The GERD Washington Talks: Illuminating the Sticking Points*

Once Ethiopia rejected Egypt's proposal, Egypt sought to internationalize the negotiations and convince the international community that the tripartite talks failed to deliver the expected result and that the dispute could not be resolved absent third-party involvement. The President of Egypt, Abdel Fattah el-Sisi, in his speech at the U.N. General Assembly, stated that the GERD "negotiations have not yielded the desired results" and called for international interventions to break

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125. Manuel Schiffler, *Conflicts over the Nile or Conflicts on the Nile?*, in *WATER IN THE MIDDLE EAST: POTENTIAL FOR CONFLICTS AND PROSPECT FOR COOPERATION* 137, 146 (Waltina Scheumann & Manuel Schiffler eds., 1998) (predicting the Nile's flow will decrease by up to 78 per cent).

126. For instance, the Manantali Dam on the Senegal River and the Kariba Dam on the Zambezi River are joint projects run together. See Robert Rangeley et al., *International River Basin Organizations in Sub-Saharan Africa*, 7–8, World Bank, Technical Paper No. 250 (1994). Chinese unilateral dams on the Mekong River, on the other hand, are managed independently. See generally Madeleine De Simone, *On the Forecast: Easing Tension Over Hydraulic Power Along the Mekong* (Project on Int'l Peace & Sec., Student Policy Brief No. 5.2, 2013). Furthermore, all the dams and reservoirs build in Egypt and Sudan are unilateral projects managed independently without the involvement of Ethiopia or other upstream states.

127. U.N. Watercourse Convention, *supra* note 122, arts. 5–6; CFA, *supra* note 40, art. 4; see also DoP, *supra* note 18, art. IV. See McCaffrey, *supra* note 45, at 375–77 (considering the principle of equitable and reasonable utilization and no significant harm rule as customary international law); see *supra* note 89, and accompanying text for the relevancy of the principles in the Nile Basin.

128. U.N. Watercourse Convention, *supra* note 122, art. 7; CFA, *supra* note 40, art. 5; DoP, *supra* note 18, art. III.

129. Ethiopia also promised to share data and information in the CFA and DoP. See CFA, *supra* note 40, arts. 7 ¶¶ 2–3, 8, 30 ¶ 9; DoP, *supra* note 18, art. VII.



the deadlock.<sup>130</sup> Egypt further requested that the United States and World Bank join the negotiation process to resolve the impasse.<sup>131</sup>

In complex multilateral talks, like those around the GERD, it is important to scrutinize the relationship between the negotiating parties and third parties involved, because such relationships may influence the third parties' neutrality. Here, Egypt has a close relationship with the World Bank, as its nationals have occupied high positions within the World Bank and Egypt has benefitted from its development programs.<sup>132</sup> The same can be said of Egypt's relationship with the United States. For example, President el-Sisi met with President Donald Trump in April 2019 and has received high praise from President Trump.<sup>133</sup> Ethiopia does not maintain close relationships with either the World Bank or the United States. As such, Ethiopia's concerns that the Washington D.C. talks were not on a level playing field had some validity.

However, in January 2020, Ethiopia's fears were realized when the United States assumed the role of a mediator, as opposed to a mere observer,<sup>134</sup> submitting proposals on the GERD's filling and operation. The United States then pressured Ethiopia to accept these proposals. Ethiopia rejected these entreaties.<sup>135</sup> The principal sticking points related to how Ethiopia should fill and operate the GERD during drought or prolonged dry years<sup>136</sup> and what mechanisms for dispute resolution would be available.<sup>137</sup>

### 1. Sticking points: The Three Drought Mitigation Mechanisms

In a joint statement issued on January 15, 2020 Egypt, Sudan, and Ethiopia underscored the necessity of developing drought mitigation mechanisms for three kinds of situations: (1) drought, (2) prolonged drought, and (3) prolonged dry years during the filling and

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130. *Egypt Seeks International Support*, *supra* note 27.

131. *Egypt Calls on the U.S.*, *supra* note 27; Mu, *supra* note 105.

132. Amdetsion, *supra* note 47, at 12.

133. Clark Mindock, 'Where's My Favourite Dictator?' *Trump Comment on Egyptian President 'Met with Stunned Silence', Report Says*, INDEPENDENT (Sept. 13, 2019), <https://www.independent.co.uk/news/world/americas/us-politics/trump-egypt-president-sisi-favorite-dictator-meeting-a9104951.html> [<https://perma.cc/3EAA-SPRW>].

134. Kifle Worku, "Egypt Is Sailing Against the Wind, Squandering Its Opportunity," *Diplomat Zerihun Abebe*, ETHIOPIAN PRESS AGENCY (Mar. 26, 2020), <https://www.press.et/english/?p=20054#> [<https://perma.cc/NHR5-65V6>]

135. *Id.*

136. *Why Ethiopia Rejected the U.S. Deal*, *supra* note 121.

137. Yigzaw Interview, *supra* note 22.

operation of the GERD.<sup>138</sup> The proposal from United States and the World Bank detailed drought mitigation mechanisms applicable in such situations.<sup>139</sup>

*a. Filling of the GERD*

According to the proposals submitted by the United States and World Bank, a “drought” occurs when the GERD’s release is below thirty-seven BCM. If a drought coincides with the filling years, Ethiopia is expected to release the “flow” of the Nile River and supplemental water from the GERD. “Prolonged drought” is when the release from the GERD is below thirty-nine BCM for four years. During the filling period, a prolonged drought would require Ethiopia to release the river flow and 62.5 percent of the water above 603 MAS of the GERD for the following four years. “Prolonged dry years” occur when the GERD’s release is below forty BCM for four consecutive years. Ethiopia must release the flow and fifty percent of the GERD storage above 603 MASL for the next four consecutive years in the event of prolonged dry years during the dam’s filling.<sup>140</sup>

The U.S. and Egyptian proposals have two common features: (1) Ethiopia is expected to release the “flow” of the Blue Nile to the downstream states, which constitutes all of the Blue Nile’s water that reaches the GERD reservoir, and (2) Ethiopia can incur certain quantities of water debt that must be paid from the reservoir of GERD. The first feature forecloses Ethiopia’s right to use the Blue Nile’s flow—which includes the waters of its tributaries—prohibiting Ethiopia from using the waters above the GERD equitably and reasonably.

The second feature is similarly adverse to Ethiopia’s interests. Analogous international practice shows that upstream states are allowed to deliver below the minimum quantity of water during severe drought seasons and repay the water during normal seasons.<sup>141</sup>

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138. Press Release, U.S. Dep’t of the Treasury, Joint Statement of Egypt, Ethiopia, Sudan, the United States and the World Bank, (Jan. 15, 2020), <https://home.treasury.gov/news/press-releases/sm875> [<https://perma.cc/SJ3L-C98E>] [hereinafter Joint Statement 2].

139. Yigzaw Interview, *supra* note 22.

140. See Egypt’s Letter to the UNSC, *supra* note 89, annex II.

141. For instance, the 1944 agreement between the United States and Mexico on the Rio Grande and Colorado Rivers has provisions governing possible problems resulting from drought. With respect to both the Rio Grande and Colorado Rivers, the treaty allows upstream countries to deliver below the minimum quantity of the water during severe drought seasons and repay the water during the normal seasons. See Utilization of the Waters of the Colorado and Tijuana Rivers and of the Rio Grande, Mex.-U.S., arts. 4.B(c)–(d), 10(a)–(b), Feb. 3, 1944, 59 Stat. 1219 [hereinafter 1944 Colorado Treaty].

However, water debt and repayment are relevant only when there is a water-sharing arrangement between riparian states. Here, there is neither a water-sharing arrangement nor a minimum water quantity allocated to Egypt and Sudan. Therefore, the concept of water debt is inappropriate. International treaty law demonstrates that the riparian states must help shoulder the burden caused by drought. The proposals for the GERD's filling and operation impose the burden of drought solely on Ethiopia.

The implication of agreeing to release water from the GERD's reservoir is nothing short of recognizing the inequitable water-sharing scheme under the 1959 Nile Treaty. In other words, if Ethiopia is required to release water from its own reservoir, it does not have any share from the Nile waters. The proposals on the long-term operation of the dam support this conclusion.

And, if Egypt does indeed have "established rights" in the flow of the Blue Nile, the question remains: against whom are such rights enforceable? Egypt does not have a treaty right vis-à-vis Ethiopia; under the 1959 Nile Treaty, Egypt only has such a right against Sudan. Therefore, any right Egypt has against Ethiopia must derive from customary international law. Ethiopia did not exercise forbearance in constructing a GERD-type dam earlier out of any sense of legal obligation (*opinio juris*).<sup>142</sup> Any such forbearance was due to a combination of other factors, including threats from Egypt<sup>143</sup> and a lack of funding from international financial institutions.<sup>144</sup> Thus, any Egyptian right to a given flow of the Blue Nile is enforceable only against Sudan.

*b. "Long-Term" Operation of the GERD*

The definitions of drought, prolonged drought, and prolonged dry years in the long-term operation are similar to the definitions provided in the filling period. The only difference is the amount of water

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142. See North Sea Continental Shelf Cases (Ger. v. Den.; Ger. v. Neth.), Advisory Opinions, 1969 I.C.J. 44, ¶ 77 (Feb. 20) (discussing the two elements of customary international law, state practice and *opinio juris*).

143. Egyptian officials have previously been willing to threaten war on Ethiopia in their attempt to safeguard Egypt's hegemonic status in the Nile Basin. Early on, Anwar el-Sadat, President of Egypt from 1970 to 1981, signaled that Egypt was ready to go to war to avert "any action that would endanger the water of [the] Blue Nile." In 1988, Boutros Boutros-Ghali, then Egyptian Minister of State of Foreign Affairs, also stated that ". . . the next war in our region will be over the waters of the Nile, not politics." Hosni Mubarak, former Egyptian President threatened to "bomb Ethiopia" if it built any dam on the Blue Nile. More recently, Morsi, who took power following President Mubarak, emotionally revealed that Egypt would trade a drop of blood for every drop of its Nile waters. See Tekuya, *supra* note 1, at 11.

144. See Swain, *supra* note 2, and accompanying text.

to be released from the GERD. During the drought period, Ethiopia must release the flow and more waters, the amount of which is to be agreed upon by the parties, from the GERD. During prolonged drought periods and dry years, Ethiopia must release the flow and all available water above 603 MASL of the GERD within four (five in case of prolonged dry years) years.<sup>145</sup>

All the concerns raised above as to the filling of the GERD apply here. Further, agreeing on the long-term operation of the GERD has two additional and devastating consequences for Ethiopia. First, since the “flow” includes the entire quantity of water that is naturally available, Ethiopia, which contributes all Blue Nile waters, would not have a share of water allocation from the Blue Nile. In sum, Ethiopia would be prohibited from using the Blue Nile’s tributaries for irrigation or hydroelectric power generation. Second, it would recognize Egypt’s claim to established rights (55.5 BCM) and, consequently, impose the 1959 Nile Treaty on Ethiopia.

In light of increased water scarcity and severe droughts in the Nile Basin due to climate change,<sup>146</sup> it will be impossible for Ethiopia to release forty BCM from the GERD, let alone get a share of the Blue Nile. Even worse, Ethiopia will be in perpetual water debt and, therefore, forced to release more waters from the GERD. In effect, this will make the GERD an Egyptian storage facility—the GERD reservoir’s evaporation rates will be lower than those of Lake Nasser, the Aswan High Dam’s (“AHD”) reservoir.<sup>147</sup> But this is an incidental benefit. It would be unrealistic to expect Egypt to plan its entire project around this goal.

The DoP provides the framework for the GERD talks and, as such, the forthcoming GERD Treaty should be in line with the DoP. The scope of the GERD Treaty envisaged in Article V of the DoP is limited to the GERD.<sup>148</sup> Ethiopia should, therefore, agree to release only the inflow of the GERD (i.e., the water that enters the GERD reservoir minus normal evaporation).

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145. See Egypt’s Letter to the UNSC, *supra* note 89, annex II.

146. Schiffler, *supra* note 125, at 146 (predicting the Nile’s flow will decrease up to 78%).

147. Salman, *supra* note 11, at 516 tbl.1. Studies by British engineers in the early 20th century had shown already that dams at the African Great Lakes and Lake Tana would be the most suitable locations for storing water with minimal evaporation. See HAGGAI ERLICH, *THE CROSS AND THE RIVER: ETHIOPIA, EGYPT, AND THE NILE 2* (2002) (discussing early dam proposals in the upstream states and stating that they “would provide reservoirs of minimal evaporation for over year or “century” storage”); see also ROBERT O. COLLINS, *THE NILE 25* (2002) (asserting that the Aswan High Dam was “not at all the kind of well-planned storage scheme that [Harold E. Hurst, British hydrologist, Director-General of the Physical Department of the Egyptian Ministry of Public Works] had in mind”).

148. DoP, *supra* note 18, art. V.

Given that the proposals proffered by Egypt and the United States did not address obligations when the GERD's release is above forty BCM, Ethiopia would likely have a water share during normal operation of the GERD when the Blue Nile's average flow is forty-nine BCM. Egypt already requested that Ethiopia release the entire flow of the Blue Nile during the GERD's normal operations, but Ethiopia rejected the proposal outright.<sup>149</sup> Even if we assume that Egypt, Ethiopia, and Sudan share the remaining nine BCM of water, it seems that Ethiopia would not get much water from the Blue Nile. Given the increase in average global temperature due to climate change, the GERD's reservoir is projected to evaporate at an annual rate of two BCM.<sup>150</sup> This is much less than the ten to fifteen BCM annual evaporation in Egypt from Lake Nasser,<sup>151</sup> but it still affects the water share. That means the net water the three states must share will be less than seven BCM. Considering this, one may wonder how much Ethiopia would get from the Blue Nile.

Generally, it can be said that drought is a natural phenomenon that should be addressed collectively.<sup>152</sup> The burden of drought mitigation is not solely Ethiopia's to bear. Egypt, Sudan, and Ethiopia should support one another in mitigating drought, without placing the entire burden on any one state.

## 2. Disagreement Over Dispute Resolution

Although the above-discussed proposals by Egypt effectively impose the colonial Nile Waters Treaties on Ethiopia, Egypt sought additional means to safeguard its status quo. To that end, Egypt proposed and included a binding arbitration clause in the U.S. draft agreement. Ethiopia rejected this provision, demanding instead that the three states resolve disputes by themselves and resort to mediation only when necessary.<sup>153</sup>

Ethiopia's approach seems appropriate for several reasons. First, the DoP does not require compulsory and binding dispute resolution. Article X of the DoP contemplates disputes arising from the

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149. Yigzaw Interview, *supra* note 22.

150. Salman, *supra* note 11, at 516 tbl.1.

151. The 1959 Nile Treaty already allocated ten BCM towards water for evaporation. 1959 Nile Treaty, *supra* note 20, art. 2, ¶ 4.

152. Kaori Tembata & Kenji Takeuchi, *Collective Action and Cooperation in Drought Response*, GLOB. WATER F. (June 18, 2018), <https://globalwaterforum.org/2018/06/18/collective-action-and-cooperation-in-drought-response/> [<https://perma.cc/BHE2-TLQB>].

153. Yigzaw Interview, *supra* note 22.

GERD and indicates that they be resolved through the consultation of the national ministries tasked with water management. If the dispute cannot be resolved, the matter is referred to the respective heads of state, who *may* resolve the dispute or refer it to mediation.<sup>154</sup>

Moreover, imposing compulsory resolution mechanisms for disputes arising from the GERD is contrary to the principle of reciprocity.<sup>155</sup> In the past, Egypt and Sudan constructed several dams and reservoirs without consulting—and even over objections from—Ethiopia.<sup>156</sup> These dams and reservoirs significantly harmed Ethiopia by foreclosing its future use of Nile waters,<sup>157</sup> and yet Ethiopia did not have recourse to compulsory dispute resolution. An approach that subjects the GERD to compulsory dispute resolution and leaves other downstream dams and reservoirs without any analogous recourse is rather problematic. Currently, there is no structure in place to ensure accountability in the use and activities of downstream states. Ethiopia is unable to challenge Egypt's possible exportation of water from AHD in the absence of any mechanism for dispute resolution. By parity of reasoning, the GERD should also not be subject to binding dispute resolution. One possible compromise, however, might be to subject the

154. DoP, *supra* note 18, art. X.

155. Reciprocity is the relationship between two states when each of them gives the subjects of the other certain privileges on the condition that its subjects enjoy similar privileges in the other state. *Reciprocity*, BLACK'S LAW DICTIONARY (5th ed. 1979). As there is no centralized enforcement mechanism under international law, the principle of reciprocity plays an extremely significant role in relations between sovereign nations and the pragmatic application of existing international law. *See generally* Francesco Paris & Nita Ghei, *The Role of Reciprocity in International Law*, 36 CORNELL INT'L L.J. 93 (2003); *see also* Robert O. Keohane, *Reciprocity in International Relations*, 40 INT'L ORG. 1, 5–6 (1986).

156. For instance, Ethiopia objected to the construction of the Toshka Project and the Peace Canal, and stated that it “in the most categorical manner, [does] not recognize . . . [them] as having any consequence to what is and will always be its fair, legitimate and equitable share of the Nile waters.” *See* Ethiopia's Letter to the UNSC, *supra* note 89, at 16.

157. *See* Salman M.A. Salman, *Downstream Riparians Can Also Harm Upstream Riparians: The Concept of Foreclosure of Future Uses*, 35 WATER INT'L 350, 352 (2010) (quoting Ethiopia's Note Verbale of 20 March 1997, as saying “Ethiopia wishes to be on record as having made it unambiguously clear that it will not allow its share to the Nile waters to be affected by a fait accompli such as the Toshka project, regarding which it was neither consulted nor alerted.”). McCaffrey has posed the question:

[I]f a downstream state continued to develop its water resources to the extent that it threatens to foreclose otherwise reasonable future uses of the watercourse by an upstream state, could this constitute the causing of ‘significant harm’ to the upstream state? And, does the downstream state in these circumstances have any procedural obligations toward the upstream state regarding new projects it plans?

Answering both questions in the affirmative, McCaffrey concluded that “[j]ust as a downstream state may be harmed by uses upstream, so also may an upstream state be harmed if its present or future use is limited in favor of a state downstream.” MCCAFFREY, *supra* note 45, at 412–13.

GERD to compulsory dispute resolution with the other downstream dams and reservoirs through a basin-wide legal and institutional framework as suggested below.

### III. THE ROLE OF THE UNITED STATES IN THE GERD TALKS UNDER INTERNATIONAL LAW

Following the disagreement over the United States' proposal, and after the parties attempted to prepare the final agreement, the U.S. Treasury, with technical support from the World Bank, drafted an agreement open for signature by the parties.<sup>158</sup> Egypt endorsed the agreement, while Ethiopia requested more time for national consultation.<sup>159</sup> Ethiopia duly notified all parties of this request,<sup>160</sup> reminded the U.S. Treasury of its observer status,<sup>161</sup> and demanded that the United States not send the draft agreement to Addis Ababa.<sup>162</sup> The U.S. Treasury disregarded Ethiopia's request by undertaking separate bilateral meetings with Egypt and Sudan.<sup>163</sup> The U.S. Treasury then issued a surprising statement requesting Ethiopia sign the agreement, and warned Ethiopia to refrain from filling and testing the GERD without an agreement with Egypt and Sudan.<sup>164</sup>

These exchanges raise a fundamental issue as to whether it was legitimate for the U.S. government to involve itself when, formally, it was merely an observer to the negotiations. Assuming, *arguendo*, the legitimacy of U.S. participation, there remains the question of whether Ethiopia is required to conclude an agreement with Sudan and Egypt before beginning filling the GERD. The following section addresses both issues, addressing first the constraints on Ethiopia's rights to fill the dam prior to reaching an agreement, before moving on to discuss the question of U.S. involvement in the negotiation process.

#### *A. The U.S. Treasury Statement: Is a Preliminary Agreement*

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158. Press Release, U.S. Dep't of the Treasury, Joint Statement of Egypt, Ethiopia, Sudan, the United States, and the World Bank, (Feb. 13, 2020), <https://home.treasury.gov/news/press-releases/sm907> [<https://perma.cc/VH6H-VYGA>] [hereinafter Joint Statement 3].

159. Meseret, *supra* note 21.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. Treasury Statement, *supra* note 34.

*Necessary to Fill the GERD Reservoir?*

In an apparent fit of pique at Ethiopia's refusal to accept its terms, on February 28 the U.S. Treasury made a statement which includes the following: "[c]onsistent with the principles set out in the [DoP], and in particular the principles of not causing significant harm to downstream countries, final testing and filling should not take place without an agreement."<sup>165</sup> Considering the first filling and testing of the GERD as part of dam construction, Ethiopia stated that it will start filling and testing the dam regardless of an agreement as permitted under the DoP.<sup>166</sup> Egypt rejected this, claiming that by filling and testing the dam Ethiopia was in violation of Article V of the DoP, which—according to Egypt—requires all three states to reach an agreement on the rules of filling and operating the dam before such process can begin.<sup>167</sup> However, Egypt's position contravenes the DoP. The DoP does not require the parties to reach an agreement prior to Ethiopia's initial filling the GERD, but rather states that "[t]he three countries . . . will utilize the final outcomes of the joint studies . . . to [a]gree on guidelines and rules on the first filling of GERD . . . in parallel with the construction of GERD."<sup>168</sup>

Ethiopia's position is certainly open to dispute. Arguably, the first filling and the construction of the dam are two different things, which are treated separately in the DoP. But even assuming this argument is true, Ethiopia could still legally fill the dam without an agreement. First, under Article 31 of the VCLT, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."<sup>169</sup> "[I]t would be contrary to good faith to use the failure to cooperate as an excuse to deny a fundamental right of a state, to develop and make an equitable use of its shared resource," and here, the GERD is a project within Ethiopia's shared watercourse.<sup>170</sup>

In addition, if a preliminary agreement was required, Egypt would have the "veto power" it already claims under the Nile Waters Treaties. Giving Egypt this veto power would further contravene international law governing due diligence obligations of transboundary

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165. *Id.*

166. Statement of Ethiopia on the GERD, *supra* note 35.

167. Samar Samir, *Egypt Slams Ethiopia for Renaissance Dam Remark*, EGYPT TODAY (Mar. 1, 2020) <https://www.egypttoday.com/Article/2/82175/Egypt-slams-Ethiopia-for-Renaissance-dam-remarks> [<https://perma.cc/682R-VSHA>].

168. DoP, *supra* note 18, art. V, ¶ 2(a).

169. VCLT, *supra* note 76, art. 31.

170. Yihdego, *supra* note 8, at 7.



harm.<sup>171</sup> Egypt's veto power would also impose the colonial Nile Waters Treaties on Ethiopia, defeating the DoP's purpose of ensuring equal rights to the three states to use the Nile watercourse.<sup>172</sup> Moreover, Egypt's veto power would undermine the GERD's purpose of generating hydroelectric power, boosting the economic development of Ethiopia, and promoting transboundary cooperation and regional integration through the generation and supply of sustainable and reliable clean energy on financially attractive terms.<sup>173</sup>

The silence of the DoP similarly justifies Ethiopia legally filling the GERD without an agreement. The DoP requires only that the three states use studies to agree on the first filling and annual operation of the dam.<sup>174</sup> There is an obligation to negotiate in good faith and use the studies to strike a deal establishing filling and annual operation of the dam. But the DoP is silent on the question of what happens if the parties fail to reach an agreement. In this absence of guidance, the DoP does not seem to prohibit Ethiopia from filling and testing the GERD without an agreement. And, per the Permanent Court of International Justice in *Lotus*, it is a longstanding principle of international law that "everything which is not prohibited is permitted."<sup>175</sup> As such, it is reasonable to conclude that, under international law, Ethiopia is permitted to fill the GERD without an agreement.

It is true that states are required to take all appropriate measures to prevent and mitigate significant transboundary environmental harm. However, the nature of this obligation is one of due diligence, requiring states only to expend reasonable effort under the circumstances to avoid harm.<sup>176</sup> The due diligence standard is evident from Article 7(2) of the 1997 U.N. Watercourses Convention which sets forth a process to be followed "[w]here significant harm . . . is caused to another watercourse State"<sup>177</sup> despite the taking of "all appropriate measures to

171. *Gabčíkovo-Nagymaros Project* (Hung./Slovk.), Judgment, 1997 I.C.J. 7, ¶ 88 (Sept. 25).

172. DoP, *supra* note 18, pmb1.

173. *Id.* art. II.

174. *Id.* art. V ¶¶ 2–3.

175. *S.S. Lotus* (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7). Indeed, with the introduction of *erga omnes* and *jus cogens* norms, and recent human rights developments, proponents of natural law theory have challenged that part of the *Lotus* principle, which considers states' consent as the sole source of international law. Nonetheless, this article's argument remains unaffected by this development, as it recognizes both state consent and these new norms as sources of international law. The argument here is that no international law, regardless of its source, whether state consent or other norms, prohibits Ethiopia from filling and testing the dam without an agreement with Sudan and Egypt.

176. See McCaffrey, *supra* note 45, at 437–40.

177. U.N. Watercourse Convention, *supra* note 122, art. 7, ¶ 2.

prevent the causing of significant harm to other watercourse States.”<sup>178</sup> Due diligence is an obligation of conduct, rather than one of result.<sup>179</sup>

The *Lake Lanoux* case between France and Spain<sup>180</sup> provides a useful illustration of this due diligence obligation. There, the tribunal denied the Spanish claim that the French project’s execution required the preliminary agreement of both states and that absent such agreement, France could not freely undertake the planned works (including a complex inter-basin transfer of water from Lake Lanoux).<sup>181</sup> The tribunal instead concluded it was neither a customary rule nor a general principle of law that states may only exploit the hydraulic power of international waterways after the conclusion of a preliminary agreement between the concerned states.<sup>182</sup>

The ICJ reaffirmed this principle in its 2010 *Pulp Mills on the River Uruguay* judgment.<sup>183</sup> One of the core issues before the Court was whether Uruguay was entitled to proceed with the construction of a pulp mill on the Uruguay River after having failed to reach an agreement with Argentina,<sup>184</sup> with whom it had a treaty governing the use of the shared River Uruguay.<sup>185</sup> Argentina asserted that Uruguay could not continue the works without a favorable ruling from the Court,<sup>186</sup> as the treaty provided for ICJ adjudication in the event of a dispute surrounding the treaty.<sup>187</sup> The Court, however, allowed Uruguay to proceed with the construction “at its own risk,” concluding that nothing prohibited Uruguay from proceeding with construction absent treaty terms requiring—rather than permitting—parties to submit the matter before a court.<sup>188</sup> The Court further explained the mechanisms for

178. *Id.* art. 7, ¶ 1.

179. The ILC’s articles formed the basis of the negotiations leading to the adoption of the UN Watercourse Convention. The ILC’s commentary on Article 7 is relevant and it begins as follows: “The Commission, in this article, is setting forth a process aimed at avoiding significant harm as far as possible while reaching an equitable result in each concrete case.” *46th ILC Report, supra* note 122, at 103. This is hardly an absolute prohibition of harm.

180. *Lake Lanoux (Fr. v. Spain)*, 12 R.I.A.A. 281 (Arb. Trib. 1957).

181. *Id.* ¶¶ 10–11.

182. *Id.* ¶ 12 (emphasis added).

183. *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. 14 (Apr. 20).

184. *Id.* ¶¶ 46–47.

185. *Statute of the River Uruguay*, Arg.-Uru., Feb. 26, 1975, 1295 U.N.T.S. 340.

186. *Pulp Mills*, 2010 I.C.J. ¶ 153.

187. In the event of a disputed project on the River Uruguay on which no agreement is reached after 180 days, Article 12 directs parties to Article 60, which states: “[a]ny dispute concerning the interpretation or application of the Treaty and the Statute which cannot be settled by direct negotiations may be submitted by either party to the International Court of Justice.” *Statute of the River Uruguay, supra* note 185, arts. 12, 60.

188. *Pulp Mills*, 2010 I.C.J. ¶¶ 154–55.

dispute resolution in question did nothing to alter the rights and obligations of the parties “as long as the Court has not ruled finally on them” and that such rights included “that of implementing the project, on the sole responsibility of that party, since the period for negotiation has expired.”<sup>189</sup>

In both cases, the court declined to compel a preliminary agreement prior to project-commencement, motivated by the fact that such requirement otherwise hinders what the tribunal in *Lake Lanoux* called the state’s “right to act alone as a consequence of unconditional and arbitrary opposition of another state.” Ruling otherwise, the tribunal explained, would be “to admit a ‘right of consent,’ a ‘right of veto,’ which at the discretion of one state paralyzes another state’s exercise of its territorial competence.”<sup>190</sup>

Concerns regarding the safety of the GERD can be addressed under Ethiopia’s due diligence obligation. Since 2010, Ethiopia has taken various measures in accordance with its international obligations to prevent harm to the downstream states. Ethiopia conducted transboundary impact studies, initiated a tripartite committee,<sup>191</sup> and established an International Panel of Experts (“IPoE”) which confirmed that the design and construction process of the dam was in line with “a number of international Standards, Codes, and Guidelines.”<sup>192</sup> Egypt, Sudan, and Ethiopia recognized all of these measures in Article VIII of the DoP.<sup>193</sup> Given that ensuring the GERD’s safety is a continuous process, Ethiopia should, in good faith, continue to implement all dam safety-related measures.

It can thus be concluded that the U.S. Treasury Department’s statement requiring a preliminary agreement for filling and testing the GERD goes beyond the requirements of international law governing

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189. *Id.* ¶ 155.

190. *See* *Lake Lanoux* (Fr. v. Spain), 12 R.I.A.A. 281 (Arb. Trib. 1957), ¶ 11. This reasoning is also supported by general international law, as reflected in the 2001 Draft articles of the International Law Commission on Prevention of Transboundary Harm from Hazardous Activities, Article 9 of which states that “[i]f the consultations . . . fail to produce an agreed solution, the State of origin shall nevertheless take into account the interests of the State likely to be affected in case it decides to authorize the activity to be pursued.” Int’l L. Comm’n Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 160 (2001). In explaining the purpose of this article, the International Law Commission stated that “the State of origin is permitted to go ahead with the activity, for the absence of such an alternative would, in effect, create a right of veto for the States likely to be affected.” *Id.* at 161.

191. Wondyifraw Qerenso, *Egypt: Better to Unshackle the Nile*, REPORTER (May 12, 2018), <https://www.thereporterethiopia.com/article/egypt-better-unshackle-nile> [https://perma.cc/JSB7-YE9J].

192. IPoE Final Report, *supra* note 7, at 21.

193. DoP, *supra* note 18, art. VIII.

transboundary watercourses. Ethiopia can begin filling and testing the GERD without an agreement with Sudan and Egypt.

*B. The U.S. and the GERD Talks: From Observer to Self-Proclaimed Mediator?*

Diplomatic avenues such as consultation, mediation, and conciliation are recognized peaceful dispute settlement mechanisms under international law.<sup>194</sup> In accordance with state sovereignty, these mechanisms afford disputing states the opportunity to control the process. The DoP recognizes these mechanisms in Article X, and urges the parties to resolve disputes through consultation, negotiation, and only as a last resort to “jointly request for conciliation [or] mediation.”<sup>195</sup>

Consequently, in order for the United States’ participation in the GERD talks to be legitimate, the three states must have jointly requested its active engagement and consented to its proposed solutions. There is, however, no available evidence supporting an assertion that either Ethiopia or Sudan consented to the United States’ or World Bank’s mediation. There are only statements by Ethiopia accepting the United States and the World Bank as observers to the negotiations, not mediators.<sup>196</sup> Therefore, it can be argued that the United States and the World Bank acted contrary to Article X of the DoP by actively participating in the GERD negotiations as a mediator without obtaining Ethiopia’s (or Sudan’s) consent.

While the Trump Administration expressed its willingness “to facilitate the preparation of the final agreement,”<sup>197</sup> reports indicate that Ethiopia did not consent to the United States’ preparation of a final agreement.<sup>198</sup> Therefore, when U.S. Secretary of the Treasury Steven T. Mnuchin stated that the United States had “agreed” to facilitate, he was only speaking on behalf of the United States.

But, even assuming that the United States was tacitly authorized “to facilitate the preparation of the agreement,” the draft agreement is still illegitimate. Facilitating the preparation of an agreement is vastly different from drafting an agreement without the consent or input of the actual parties, Egypt, Sudan, or Ethiopia. No reasonable

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194. U.N. Charter art. 33, ¶ 1.

195. DoP, *supra* note 18, art. X.

196. *See, e.g.*, Joint Statement 1, *supra* note 28; Joint Statement 2, *supra* note 138; Joint Statement 3, *supra* note 158. All the joint statements issued by the U.S. Department of the Treasury refer to the United States and World Bank as observers.

197. Joint Statement 3, *supra* note 158.

198. Meseret, *supra* note 21.

construction of Secretary Mnuchin's statement or its provenance that would authorize the United States to unilaterally (or jointly with Egypt) draft an agreement and impose it on the parties.<sup>199</sup>

Indeed, Ethiopia actually officially demanded that the U.S. Treasury Department not draft and send an agreement to Addis Ababa.<sup>200</sup> Instead, the U.S. Treasury Department ignored this instruction and urged Ethiopia to sign the agreement. And, without any mandate to do so, it also interpreted the DoP and warned Ethiopia to refrain from filling or testing the dam without an agreement with Sudan and Egypt. In this way, the U.S. interfered with Ethiopia's foreign affairs, in violation of Ethiopia's sovereignty, and restricted its use of the Nile waters. This course of conduct suggests that the United States itself "violated the rules of non-intervention and the principles of sovereignty and sovereign equality."<sup>201</sup> Further, because the United States acted through the Treasury Secretary,<sup>202</sup> it is responsible for such infringements and, under Article 30 of the Articles of the International Law on State Responsibility, must cease its course of conduct, and offer appropriate assurances and guarantees that it will adjust its actions accordingly.<sup>203</sup>

#### IV. ALTERNATIVES FOR UNLOCKING THE GERD DISPUTE

The colonial Nile Waters Treaties comprise the principal obstacle to the GERD negotiations; yet, Egypt, Sudan, and Ethiopia are not openly discussing them. Addressing the colonial Nile Waters Treaties is a *sine qua non* for the success of GERD negotiations. To that end, the parties should rely on negotiation, pan-African mediation, or judicial intervention to resolve the dispute.

##### A. Negotiation

For future GERD negotiations to be successful, the three states should address the ramifications of the colonial Nile Waters Treaties by (1) limiting the scope of the forthcoming treaty on the GERD's filling and annual operation, and (2) resorting to the CFA for water allocation and long-term operation of the GERD.

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199. Yihdego, *supra* note 8, at 14.

200. Meseret, *supra* note 21.

201. Yihdego, *supra* note 8, at 16.

202. *Id.*

203. *Id.*; Int'l L. Comm'n, *supra* note 190, at 28.

## 1. GERD Treaty: First Filling and Annual Operation

Delineating the scope of a possible GERD treaty is the first, and perhaps most important, way of addressing the inequitable ramifications of the colonial Nile Waters Treaties. The three states can and should address the problems associated with the colonial Nile Waters Treaties by explicitly stating in the forthcoming treaty:

- (1) that nothing in this treaty shall be construed as recognition of the colonial Nile Waters Treaties;
- (2) that nothing in this treaty shall be construed as allocation of waters between the three countries;
- (3) that nothing in this treaty shall prohibit Ethiopia from equitably using the Nile waters upstream of the GERD; and
- (4) that this treaty concerns only the GERD and therefore nothing in the treaty shall associate the GERD with the AHD.

The forthcoming treaty should further ensure equitable filling of the GERD reservoir without causing significant harm to the downstream states. The three states must consider the factors provided in Article IV of the DoP, including climatic and hydrological conditions of the river, the effect of the GERD's use on other riparian states, population, existing and potential water uses, efficient utilization of water resources, and the water contribution of each state for ensuring equitable filling of the GERD.<sup>204</sup>

It is worth mentioning that the January 15, 2020 joint statement<sup>205</sup> did not consider all of the factors provided for in the DoP.<sup>206</sup> The statement was selective<sup>207</sup> in only considering drought mitigation, “the hydrological conditions of the Blue Nile and the *potential impact* of the filling on downstream reservoirs.”<sup>208</sup> This cherry-picking approach, which disregards equitable and reasonable utilization and focuses only on potential impact, was inappropriate and contrary to the cardinal principles of international watercourse law.<sup>209</sup> The forthcoming treaty should, therefore, consider drought and hydrological

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204. DoP, *supra* note 18, art. IV.

205. Joint Statement 2, *supra* note 138.

206. DoP, *supra* note 18, art. IV.

207. Yihdego, *supra* note 8, at 3–4.

208. Joint Statement 2, *supra* note 138 (emphasis added).

209. The statement imposes much of the drought mitigation burden on Ethiopia and does not adequately address significant principles such as “equitable utilization” or “significant harm.” Yihdego, *supra* note 8, at 4. It instead makes reference to the “potential impact” of a project and therefore—relative to a duty to prevent significant harm—raises the threshold for, and increases the scope of, the harms that must be prevented during filling. *Id.*

conditions “as part of the factors to determine an equitable and reasonable filling of the GERD.”<sup>210</sup>

Under the statement’s proposed framework, Ethiopia would further need to fill the dam “during the wet season, generally from July to August . . . [while taking] appropriate mitigation measures for Egypt and Sudan during drought, prolonged drought period and prolonged dry years.”<sup>211</sup> Based on this principle, the U.S. proposal agreement included the three aforementioned drought-mitigation mechanisms. As noted, the mechanisms would compel Ethiopia to release the “flow” of the Blue Nile and more water from the GERD reservoir without any *quid pro quo*. The mechanisms also presuppose the water share allocated in the colonial Nile Waters Treaties and impose all drought mitigation related burdens on Ethiopia. Hence, such mechanisms should be excluded from the forthcoming treaty. Because there is no water-sharing arrangement between the three states, Ethiopia’s obligation to release water from the GERD reservoir should be equitable and reasonable; Ethiopia’s drought-related treaty commitment should be limited to releasing the “inflow” of the GERD.

As for the filling period, filling the GERD in a two- to four-year timeframe may significantly affect the interests of Sudan and Egypt.<sup>212</sup> Filling the GERD slowly—over the course of ten or more years—will significantly and adversely impact Ethiopian interests.<sup>213</sup> Therefore, the forthcoming treaty should establish a fair and reasonable filling plan that “considers factors such as the right season, the impact of swift and prolonged filling on all parties, and the attainment of a middle ground that considers filling the dam primarily, but not exclusively, during the wet season between five to seven years.”<sup>214</sup> In so doing, the treaty “will significantly mitigate the impact of filling the dam on downstream states while granting an equitable, reasonable and timely return to Ethiopia’s investment and entitlement to produce electricity.”<sup>215</sup>

Concerning the annual operation of the dam, the forthcoming treaty, as envisaged in Article V of the DoP, should establish a coordination mechanism through the three ministries responsible for water. The three states should use this mechanism to exchange data and information. Ethiopia should annually notify the other parties of its

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210. *Id.*

211. Joint Statement 2, *supra* note 138.

212. Yihdego, *supra* note 8, at 5.

213. *Id.*

214. *Id.*

215. *Id.*

operation plan, and how much water it will release from the GERD. Egypt and Sudan should also notify Ethiopia and one another of how they are using the Nile waters and how much water is stored in their respective reservoirs on an annual basis.

The treaty should also be flexible and adaptive to address the uncertainty associated with climate change and population growth in the Nile Basin.<sup>216</sup> The treaty should include an amendment provision, a review procedure, and a termination or revocation clause. These provisions will give the three states the resilience needed to revise filling and operational guidelines, as hydrological and existing conditions change. Additionally, with respect to the termination clause, revoking a treaty through an abbreviated period of notice—say six months or a year—is inappropriate in a treaty regulating a permanent structure such as the GERD.<sup>217</sup> Therefore, the treaty must reconcile the flexibility required for adapting to climate change with the certainty required for the proper management of dams by requiring a long period of notice—anywhere between ten to fifteen years, to withdraw from the treaty.<sup>218</sup>

## 2. The Cooperative Framework Agreement: Water Allocation and Long-Term Operation

The CFA, if accepted by Sudan and Egypt, will establish a new legal regime governing the use and allocation of the Nile waters. The CFA does not use a fixed and volumetric strategy for water allocation, which encourages flexibility. Instead, it requires equitable and reasonable utilization as its allocation strategy.<sup>219</sup>

The CFA also foresees the establishment of the Nile Basin Commission (NBC) as an institutional framework for Nile basin governance.<sup>220</sup> The NBC would possess a wide range of powers, including the ability to examine and determine optimal water use and distribution

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216. See generally Tekuya, *The Need for a Climate-Proof Basin-Wide Treaty*, *supra* note 44 (discussing the need for building flexibility in the Nile Watercourse Treaties).

217. Stephen C. McCaffrey, *The Need for Flexibility in Freshwater Treaty Regimes*, 27 NAT. RES. F. 156, 160 (2003).

218. For example, the treaty between the United States and Canada governing hydroelectric power production and flood protection (permanent structures) for the Columbia Basin imposes a notice requirement of ten years prior to termination. Treaty Relating to Cooperative Development of the Water Resources of the Columbia River Basin, Can.-U.S., art. XIX, ¶ 2, Jan. 17, 1961, 15 U.S.T. 1555. For a similar recommendation, see Tekuya, *The Need for a Climate-Proof Basin-Wide Treaty*, *supra* note 44, at 345.

219. CFA, *supra* note 40, art. 4, ¶ 1.

220. See *id.* art. 15.



among the Nile basin countries.<sup>221</sup> It would also have a broad scope;<sup>222</sup> it would be entrusted with rule-making authority<sup>223</sup> and empowered to resolve disputes within the Nile Basin.<sup>224</sup> Considering the need for coordinated dam operation and integrated water resource management, the NBC is best positioned to manage the long-term operation of the GERD. But, for this to happen, Egypt and Sudan must accede to the CFA.

Of course, the question remains why, given both states' previous opposition to the CFA, Egypt and Sudan would accede to the CFA now. But the current hydro-political context of the Nile Basin is significantly different than it was during the CFA negotiations. The GERD, which has brought about a *de facto* change in the status quo, will affect the Nile's flow during the filling period. The GERD, therefore, represents a bargaining chip that Ethiopia can use to negotiate concessions from Egypt and Sudan.

As noted earlier, Sudan has recognized the advantages it would gain from the GERD and has aligned itself with Ethiopia. Egypt, on the other hand, remains concerned about the GERD's impact on the status quo of the current Nile water allocation. It is likely, then, that Egypt will accept the CFA, if it regulates the operation of the dam in a way that protects Egyptian interests. Ethiopia should, therefore, concede that NBC will manage the GERD's operation. Since Egypt needs some form of input into the operation of GERD and Ethiopia rejected Egypt's demand to maintain an office at the dam site, NBC management of GERD operations remains a reasonable compromise. As the NBC makes binding decisions by consensus,<sup>225</sup> Egypt's interests will be protected better.

Egypt may be further incentivized to accept the CFA by the need to avoid unilateral exploitation through cooperative use of the Nile River. Egypt, after all, cannot prevent Ethiopia from constructing the GERD. This fact creates a risk, to Egypt, that other riparian states may follow Ethiopia's lead and begin unilaterally developing the Nile River. Therefore, the CFA would protect Egypt's interests by ensuring cooperative use of the Nile waters.

Upstream states are beginning to assert their right to use the Nile. Given Egypt's geographic and hydrologic vulnerability by virtue of being a downstream state, a legal regime that protects its interest is

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221. *Id.* art. 24, ¶ 12.

222. *See id.* art. 24.

223. *Id.*

224. *Id.* arts. 24, ¶ 13, 33.

225. *Id.* art. 23, ¶ 5.

a necessity. Egypt (and Sudan) should therefore be urged to accept the CFA as it sufficiently safeguards their interests through equitable and reasonable utilization, cooperative utilization, the “no significant harm” principle, and binding dispute resolution mechanisms. In addition to empowering the NBC to make binding decisions,<sup>226</sup> the CFA already contains terms that would allow parties to submit to binding arbitration and judicial settlement through the ICJ.<sup>227</sup> Since these dispute resolution mechanisms have basin-wide applications, the CFA is a reasonable compromise to resolve the three states’ disagreement over the need for including a compulsory dispute resolution in the GERD treaty.

### B. Mediation

Egypt has demonstrated its amenability to third-party mediation and even formally requested the United Nations Security Council (“UNSC”) to intervene in the GERD dispute.<sup>228</sup> In response, the UN Secretary-General António Guterres encouraged the three states to resolve outstanding issues and “achieve a mutually beneficial agreement.”<sup>229</sup> Further, the UNSC, in an unprecedented move, held an open session on the GERD dispute, where most of the members encouraged the three states to resolve their dispute through the African Union (AU).<sup>230</sup>

As of the writing of this article, the three states are undertaking tripartite negotiations under the auspices of the AU. The United States remains engaged in the negotiations.<sup>231</sup> As such, if the tripartite negotiations fail, Egypt will likely call upon the United States and the World Bank to continue their active role in mediating the dispute. Indeed, the U.S. Treasury Department, in its February 28, 2020 statement, signaled that it would “remain engaged with the three countries until they sign the final agreement.”<sup>232</sup>

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226. *Id.* art. 23, ¶ 6.

227. *Id.* art. 33, ¶ 1(a).

228. See Egypt’s Letter to the UNSC, *supra* note 89.

229. Press Release, Sec’y-Gen., Secretary-General Encouraged by Good Progress in Trilateral Talks to Reach Agreement over Grand Ethiopian Renaissance Dam, U.N. Press Release SG/SM/20088 (May 19, 2020), <https://www.un.org/press/en/2020/sgsm20088.doc.htm> [<https://perma.cc/98J7-BFCZ>].

230. *Egypt Warns of ‘Existential Threat’ From Ethiopia Dam*, AL JAZEERA (June 30, 2020), <https://www.aljazeera.com/news/2020/06/egypt-warns-existential-threat-ethiopia-dam-200630103858360.html> [<https://perma.cc/N229-RGWC>].

231. Treasury Statement, *supra* note 34.

232. *Id.*

Although mediation is one of the dispute resolution mechanisms included in Article X of the DoP, it is not mandatory. Article X states that “[i]f the [p]arties are unable to resolve the dispute through consultation or negotiation, they may jointly request for conciliation, mediation *or* refer the matter for the consideration of the Heads of State/Head of Government.”<sup>233</sup> The legal status of the DoP is unclear; only some of its components—namely Articles III and IV on the prevention of significant harm and equitable utilization, respectively<sup>234</sup>—impose a legal obligation. Article X of the DoP is clear in this regard. Unlike Articles III and IV, which use “shall,” Article X uses the term “may” which, in the legal lexicon, makes the whole provision an optional stipulation that has no binding effect.<sup>235</sup>

Moreover, even if Article X were binding, Ethiopia is not obligated to refer the matter to mediation. The Article allows the three parties to either request mediation jointly or refer the matter for the consideration of their leaders. As the word *jointly* indicates, recourse to mediation is impossible if and when one party refuses. Ethiopia retains the ability to refer the matter to its Prime Minister.

Ethiopia may, however, find mediation politically expedient. If so, Ethiopia should oppose the involvement of the United States and the World Bank as mediators. Unfortunately, the United States and the World Bank cannot be neutral mediators in this issue. Although both Ethiopia and Egypt are strategic partners of the United States with respect to counterterrorism,<sup>236</sup> Egypt remains a more important ally to the United States than Ethiopia.<sup>237</sup> Moreover, the intimate relationship between President el-Sisi and President Trump undermines the United

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233. DoP, *supra* note 18, art. X.

234. *Id.* arts. III–IV.

235. *May*, BLACK’S LAW DICTIONARY (6th ed. 1990) (“[M]ay’ usually is employed to imply permissive, optional or discretionary, and not mandatory action or conduct.”). *See* Pronto, *supra* note 75, at 952.

236. ROBERT G. BERSCHINSKI, AFRICOM’S DILEMMA: THE “GLOBAL WAR ON TERRORISM,” “CAPACITY BUILDING,” HUMANITARIANISM, AND THE FUTURE OF U.S. SECURITY POLICY IN AFRICA 42 (2007) (stating “U.S. policy in the Horn of late . . . has been exclusively dictated by the GWOT [global war on terror].”). *See also* Mohamed Elmenshawy, *Egypt’s War on Terror: ISIS, President Sisi, and the U.S.-led Coalition*, MIDDLE E. INST. (Nov. 6, 2014), <https://www.mei.edu/publications/egypts-war-terror-isis-president-sisi-and-us-led-coalition> [<https://perma.cc/SW3X-WJ4P>].

237. Mehari Taddele Maru, *The Trump Trap*, ADDIS STANDARD (Mar. 11, 2020), <http://addisstandard.com/commentary-the-trump-trap/> [<https://perma.cc/8USL-4MSZ>] (“All allies are equal, but some are more than equal. Egypt is far strategic an ally [sic] of the US and Israel that it is difficult to imagine how Washington or any other power close to it can be an impartial arbiter on the Nile. Given that the Camp David agreement is the cornerstone on which the US-Egypt relation is founded, it would be almost impossible for the US to treat other riparian states equally.”).

States' neutrality.<sup>238</sup> President Trump's "deal of the century" to resolve the Palestine-Israel conflict represents a microcosm of the United States' bias towards Egypt. The plan is not limited to Palestine and Israel but includes other neighboring countries like Jordan, Egypt, and Lebanon.<sup>239</sup> At the same time as it halted 100 million dollars of foreign assistance to Ethiopia as a result of the GERD dispute,<sup>240</sup> the Trump Administration simultaneously committed to grant nine billion dollars to Egypt for participating in efforts to resolve the Israel-Palestine conflict.<sup>241</sup> The United States has further pledged to help Egypt realize its interests relating to the Nile River and the GERD.<sup>242</sup> Therefore, if Ethiopia accepts the United States as a mediator, the GERD and Ethiopia's rights in the Nile waters may become a "sacrificial lamb" for the realization of the "deal of the century."<sup>243</sup> The pressure during the Washington, D.C. negotiations, the drought mitigation proposals drafted by the United States and World Bank, the statement issued on February 28, the U.S. Treasury Secretary's answer in the Congress,<sup>244</sup> and the decision to block foreign aid to Ethiopia taken altogether demonstrate that the Trump Administration cannot be neutral.

The World Bank is similarly likely to favor Egypt. In the 1980s and 1990s, many Egyptian professionals occupied key political and environmental positions in the World Bank and developed the World

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238. In addition, Trump is also quoted to have called el-Sisi his "favorite dictator." Mindock, *supra* note 133.

239. See generally THE WHITE HOUSE, PEACE TO PROSPERITY: A NEW VISION FOR THE PALESTINIAN PEOPLE AND THE MIDDLE EAST REGION (2020), <https://www.whitehouse.gov/wp-content/uploads/2020/01/Peace-to-Prosperity-0120.pdf> [<https://perma.cc/V35T-DR39>].

240. Patricia Zengerle, *U.S. to Cut \$100 Million in Aid to Ethiopia Over Dam Dispute*, REUTERS (Sept. 15, 2020), <https://www.reuters.com/article/usa-ethiopia-int/u-s-to-cut-100-million-in-aid-to-ethiopia-over-dam-dispute-idUSKBN25T2ZD> [<https://perma.cc/9VCT-GSRH>].

241. *\$9 Billion for Egypt in Return for Deal of the Century*, MEMO MIDDLE E. MONITOR (June 24, 2019), <https://www.middleeastmonitor.com/20190624-9-billion-for-egypt-in-return-for-deal-of-the-century/> [<https://perma.cc/A25U-TFTG>].

242. Alula Alemayehu, *Ethiopia and the Nile: Sacrificial Lamb for the "Deal of The Century"?*, ADDIS STANDARD (Feb. 3, 2020), <http://addisstandard.com/opinion-ethiopia-and-the-nile-sacrificial-lamb-for-the-deal-of-the-century/> [<https://perma.cc/Z2AY-BLZG>]; see also PEACE TO PROSPERITY: THE ECONOMIC PLAN: PROGRAMS AND PROJECTS 49 (2020), [https://www.whitehouse.gov/wp-content/uploads/2019/06/MEP\\_programsandprojects.pdf](https://www.whitehouse.gov/wp-content/uploads/2019/06/MEP_programsandprojects.pdf) [<https://perma.cc/HPK3-9X6A>] (asserting that the U.S. promised to "[s]upport water infrastructure projects in the Sinai to bolster broader economic development"). Recall that Egypt is developing the Peace Canal project to divert the Nile from its natural flow to the Sinai in order to irrigate the desert. Egypt has started the project over Ethiopia's objections and, though it has not yet been finalized, possible assistance from the United States may improve the likelihood of the project's completion.

243. Alemayehu, *supra* note 242.

244. See Widakuswara, *supra* note 31.

Bank Operational Directive 6.50.<sup>245</sup> Like the colonial Nile Waters Treaties, the Directive favors the existing status quo by conditioning funding for projects on the consent of all Basin States. Egypt has repeatedly opposed World Bank funding for several developmental projects in the Nile and Ethiopia.<sup>246</sup> Moreover, the fact that the World Bank assisted in drafting the U.S. proposal<sup>247</sup> and actively engaged in the Washington, D.C. negotiations as a mediator without Ethiopia's consent shows that the World Bank is not a neutral mediator.

As indicated above, the AU is already engaged in the GERD negotiations as an observer rather than a mediator. So far, the AU is facilitating talks and the three states are trying to resolve the dispute by themselves. Given the mutual suspicions among the three states and their disagreements over the sticking points, it is unlikely that they will resolve the dispute by themselves. If mediation becomes necessary, it must be initiated in the spirit of "African solutions for African problems" and with neutral mediators. As external parties are biased towards Egypt due to its geopolitical advantages, the AU and the Council of Water Ministers of the Nile Basin States ("Nile-COM") should be more involved and should mediate the GERD dispute. The AU and Nile-COM will likely be neutral because the three states are members of both organizations, which do not have the same vested interests as the United States and World Bank.

### *C. Judicial Intervention*

The ICJ provides another appropriate dispute resolution forum to resolve lingering questions regarding the validity of the colonial Nile Waters Treaties. The ICJ has developed a reputation for resolving international water disputes with expertise and fairness.<sup>248</sup> Further, "[w]ater adjudication is a rich and old area" of international law<sup>249</sup> that

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245. Amdetsion, *supra* note 47, at 12.

246. See ROBERT G. WIRSING ET AL., INTERNATIONAL CONFLICT OVER WATER RESOURCES IN HIMALAYAN ASIA 145 (2013).

247. Joint Statement 3, *supra* note 158 ("The United States, with technical support from the World Bank, has agreed to facilitate the preparation of the final agreement for consideration . . .").

248. McCaffrey has remarked that major international water controversies have increasingly been brought before the I.C.J., to good effect. MCCAFFREY, *supra* note 45, at 301.

249. Joseph W. Dellapenna & Joyeeta Gupta, *The Evolution of Global Water Law*, in THE EVOLUTION OF THE LAW AND POLITICS OF WATER 3, 12 (Joseph W. Dellapenna & Joyeeta Gupta eds., 2009).

international tribunals, like the ICJ, have considerable expertise in resolving.

The ICJ's jurisdiction is based on reciprocity and consent, by acceptance of compulsory jurisdiction, joint referral, or as specifically provided in a treaty.<sup>250</sup> Ethiopia has not accepted the compulsory jurisdiction of ICJ,<sup>251</sup> and so, Egypt and Ethiopia should jointly refer the dispute to the ICJ and request the Court resolve the following questions: Is the 1902 Anglo-Ethiopian Treaty binding? If so, does it prohibit Ethiopia from equitably using the Nile River? Is Ethiopia bound by the "historic" or "established" rights provided for in the 1959 Nile Treaty?

On the Ethiopian side, there have been several arguments made as to why the 1902 Anglo-Ethiopian Treaty does not give veto power to the downstream states. Abadir Ibrahim summarizes Ethiopia's principal arguments as follows:

- (1) The 1902 Agreement never came into force as neither Ethiopia nor Britain ratified it and the Ethiopian government rejected the agreement in the 1950s.<sup>252</sup>
- (2) Ethiopia has a right to relieve itself of the duties imposed in that treaty since Britain already violated the terms of the treaty by giving support to and recognizing the Italian invasion of Ethiopia.<sup>253</sup>
- (3) The treaty places a duty on Ethiopia not to "arrest" the waters of the Nile. The meaning of the word "arrest" in Amharic is a total blockage and does not preclude Ethiopia from using the waters.<sup>254</sup>

To take these arguments in turn: the first is inadequate on its face. The argument combines a pair of premises: (a) that the 1902 Anglo-Ethiopian Treaty was not ratified, and (b) that Ethiopia rejected the Treaty in the 1950s. The first premise is misleading because, as Ibrahim notes, Article V of the Anglo-Ethiopian Treaty requires only

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250. Statute of the International Court of Justice art. 36, ¶ 2.

251. For the list of countries that *do* recognize the compulsory jurisdiction of the ICJ, see *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, ICJ, <https://www.icj-cij.org/en/declarations> [<https://perma.cc/7SPR-CS4H>].

252. Ibrahim, *supra* note 50, at 299.

253. *Id.*

254. *Id.*

Britain's, not Ethiopia's, ratification.<sup>255</sup> Moreover, the treaty was, in fact, ratified by Britain.<sup>256</sup>

Even if the United Kingdom had failed to ratify the treaty, the claim fails to stand when considering Ethiopia's practice. During the war with Eritrea, Ethiopia invoked several articles of the 1902 Anglo-Ethiopian Treaty before the Eritrea-Ethiopia Boundary Commission, arguing for their continued validity.<sup>257</sup> Thus, regardless of the ratification, the court is unlikely to accept the argument that the Treaty never entered into force, since Ethiopia has admitted its operationality. As for the second premise, under international law, persistent objection or denunciation is not a valid method of abrogating a treaty.<sup>258</sup> While the 1950s objections can exempt Ethiopia from customary obligations, the court will likely reject this argument.

The second argument presupposes the existence of material breaches of the Treaty. Article 60 of the VCLT allows states to terminate, in whole or in part, a bilateral treaty if the other party violates "a provision essential to the accomplishment of the object or purpose of the treaty."<sup>259</sup> As can be understood from the preamble and all provisions of the Anglo-Ethiopian Treaty, the main purpose of the Treaty was to ensure friendly relations between Ethiopia and Britain by settling a longstanding boundary dispute between Sudan and Ethiopia. Ethiopia's independence and sovereignty are essential for the accomplishment of the object and purpose of the Treaty. In recognizing Italy's invasion of Ethiopia, and the inclusion of Ethiopia's territories into Italian East Africa colony,<sup>260</sup> Britain committed a material breach of the 1902 Anglo-Ethiopia Treaty. As such, the Court may arguably allow Ethiopia to terminate Article III of the Treaty, at least.<sup>261</sup>

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255. Ibrahim, *supra* note 50, at 299; 1902 Anglo-Ethiopian Treaty, *supra* note 37, art. V.

256. Britain's ratification was delivered at Addis Ababa on October 28, 1902. HB Deb. (Dec. 8, 1902) (vol. 116) cols. 204–05. The U.K. Foreign & Commonwealth Office lists the ratification date as August 21, 1902. U.K. FOREIGN & COMMONWEALTH OFFICE, <https://treaties.fco.gov.uk/awweb/pdfopener?md=1&did=74175> [https://perma.cc/9QUG-952Z].

257. See Decision Regarding Delimitation of the Border Between Eritrea & Ethiopia, XXV R.I.A.A. 83 (Eri.-Eth. Boundary Comm'n 2002).

258. VCLT, *supra* note 76, art. 56.

259. *Id.* art. 60.

260. For a discussion of the French and British responses to the Italian invasion of Ethiopia, see generally R.A.C. Parker, *Great Britain, France and the Ethiopian Crisis 1935–1936*, 89 ENG. HIST. REV. 293 (1974).

261. Given the general preference for the stability of treaties, and considering the fact that VCLT makes treaty withdrawal or termination very narrow, one can dispute this argument and contend that Britain recognition of Italy's invasion of Ethiopia cannot constitute a material

The third argument is based on alleged discrepancies between the English and Amharic versions of the Treaty, and thus requires a proper investigation of the two versions of the Treaty. The English version of Article III of the Treaty reads:

His Majesty Emperor Menelik, King of Kings of Ethiopia, engages himself towards the Government of his Britannic Majesty not to construct or allow to be constructed any work across the Blue Nile, Lake Tsana, or the Sobat, which would arrest the flow of their waters into the Nile except in agreement with His Britannic Majesty's Agreement and the Government of the Sudan.<sup>262</sup>

Whereas the Amharic version of the Treaty reads:

ጃንሆይ ዳግማዊ ምኒልክ ንጉሥ ነገስት ዘ-ኢትዮጵያ ከጥቁር አባይና ከባህረ ጣና ከሶባት ወንዝ ወደ ነጭ አባይ የሚወስደውን ውሃ ከእንግሊዝ መንግስት ጋር አስቀድመው ሳይስማሙ ወንዙን ከዳር እስከ ዳር የሚደፍን ስራ እንዳይሰሩ ወይም ወንዝ የሚደፍን ስራ ለማሰራት ለማንም ፈቃድ እንዳይሰጡ በዚህ ውል አድርገዋል።<sup>263</sup>

The Amharic version, as translated by Professor Tadesse Woldetsadik, reads:

His Majesty Menelik II, King of Kings, Ethiopia, has agreed into this treaty not to construct, nor authorize anyone to construct a work that blocks up/stops up from river bank to river bank the water descending from the Black Abbay, from the Tana Sea, and from the Sobat River towards the White Abbay without previously agreeing with the English Government.<sup>264</sup>

As the Amharic version demonstrates, the 1902 Anglo-Ethiopian Treaty does not prohibit Ethiopia from equitably using the Nile waters. The Treaty only prohibits Ethiopia from *blocking up* or *stopping up* the entire flow of the Nile waters without the consent of Britain. The Treaty leaves within Ethiopia's discretion irrigational, industrial, or domestic uses of the Nile waters. However, Britain's understanding of the Treaty is different, and Britain advocated for a

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breach of the 1902 Anglo-Ethiopian Treaty. Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. 7, ¶ 46 (Sept. 25).

262. 1902 Anglo-Ethiopian Treaty, *supra* note 37, art. III.

263. TADESSE KASSA WOLDETSADIK, INTERNATIONAL WATERCOURSES LAW IN THE NILE RIVER BASIN: THREE STATES AT A CROSSROADS 57 (2013). The translation of the treaty is Professor Woldetsadik's own.

264. *Id.*



broader view that prohibits Ethiopia from arresting the flow of the Nile waters in any way without prior authorization.<sup>265</sup>

Pursuant to Article 33 of VCLT, both versions of the Treaty are equally authentic texts and the terms of the Treaty are presumed to have the same meaning in each text.<sup>266</sup> The Court will presume that the term *arrest* in Article III of the Treaty has the same meaning as its Amharic equivalent. The root verb in the Amharic version, *daffana*, denotes the English equivalent meaning of “to stop up, to fill, plug or close tightly, or to block a passage.”<sup>267</sup> Similarly, the lexical and contextual meaning of the term *arrest* in the English version of the Treaty conveys “to stop, check, break automatically a motion; to cease. . .or discontinue or as a device for stopping motion.”<sup>268</sup>

Both the Amharic and English versions of the Treaty are clear: neither the term *arrest* nor its equivalent *daffana* “appear to insinuate a controversial language.”<sup>269</sup> In fact, the description of the English version echoes “the corresponding Amharic text which had been constituted as ‘ወንዙን ከዳር እስከ ዳር የሚደፍን ስራ እንዳይሰሩ’; literally, the latter translates to denote the meaning ‘not to block up/stop up from river bank to river bank.’”<sup>270</sup> Therefore, the Court would likely accept Ethiopia’s argument and rule that the Treaty does not prohibit Ethiopia from equitably using the Nile waters, even without Britain’s consent (or now that of Sudan, which arguably succeeded to the treaty following its independence in 1956).<sup>271</sup>

Concerning Egypt’s claim for historic or established rights, Ethiopia previously challenged the legal relevancy of the 1929 and 1959 Nile Waters Treaties based on the treaty law principle of *pacta tertiis nec nocent nec prosunt*, according to which “[a] treaty does not create either obligations or rights for a third party without its

265. *Id.* at 72.

266. VCLT, *supra* note 76, art. 33.

267. WOLDETSADIK, *supra* note 263, at 75.

268. *Id.*

269. *Id.*

270. *Id.*

271. The general international rule governing state succession is that newly independent states do not inherit rights and obligations of former states. Embodied in Article 16 of Vienna Convention on the Succession of States in Respect of Treaties (“VCSST”), the clean state (*tabula rasa*) theory entitles the newly independent states not to be bound “to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates.” Vienna Convention on the Succession of States in Respect of Treaties art. 16, Aug. 23 1978, 1946 U.N.T.S. 3. There is an exception to this principle, however. It is a well-established principle that real or dispositive boundary treaties survive the impact of succession and bind the successor states. *See id.* art. 11.

consent.”<sup>272</sup> As Ethiopia did not sign or accede to the other Nile Water Treaties, the Court will likely hold that they are devoid of any legal relevance vis-à-vis Ethiopia. The allocation provided in the 1959 Treaty may establish a regional custom within the Nile Basin, which would bind Ethiopia; however, this requires consistent state practice and *opinio juris*.<sup>273</sup> As indicated above, there is neither consistent state practice nor *opinio juris* justifying historic or established right in the Nile Basin. Further, Ethiopia has objected to both the Treaty and Egypt and Sudan’s unilateral exploitation of the Nile waters since the 1920s.<sup>274</sup> Thus, Ethiopia can be considered a persistent objector that is not bound by any custom that could be established in the 1959 Nile Treaty.

## CONCLUSION

Ethiopia, Sudan, and Egypt have long disagreed about the validity of the colonial Nile Waters Treaties. The dispute, exacerbated by the construction of the GERD, is now threatening the peace and stability of North-Eastern Africa. Egypt, considering the dam as an existential threat, and recently requested that the UN Security Council intervene into the GERD dispute. The UNSC held an open session on the GERD dispute and encouraged the three states to resolve their dispute through the African Union (“AU”).

At the time of writing this article, the three states are undertaking tripartite negotiations under the auspices of the AU. For the negotiations to move forward, the implications of the colonial Nile Waters Treaties must be dispensed with.<sup>275</sup> The AU should help the three

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272. VCLT, *supra* note 76, art. 34.

273. See North Sea Continental Shelf Cases (Ger. v. Den.; Ger. v. Neth.), Advisory Opinions, 1969 I.C.J. 44, ¶ 77 (Feb. 20); see also SHAW, *supra* note 79, at 81–88.

274. For instance, immediately after its conclusion, Ethiopia opposed the 1929 Anglo-Egyptian Treaty, contending it protected Egypt’s interests without reciprocity, and during the negotiation of the 1959 agreement, Ethiopia sent aides-memoires to all diplomatic missions in Cairo notifying them that “[it] has the right and obligation to exploit its water resources for the benefit of present and future generations of its citizens [and] must, therefore, reassert and reserve now and for the future, the right to take all such measures in respect of its water resources.” See Amdetsion, *supra* note 47, at 27–28. In relation to unilateral exploitation, see Ethiopia’s Letter to the UNSC, *supra* note 89, at 16.

275. It should be emphasized that any attempt to resolve the GERD dispute without addressing the ramifications of the colonial Nile Waters Treaties will be a Sisyphean endeavor. This is because the colonial Nile Water Treaties have already created a negative bargaining zone where mutual agreement is extremely challenging. In such a scenario, where Egypt continues to rely on the colonial Nile Water Treaties, Ethiopia’s highest offer will be lower than Egypt’s reservation price—the rights it already has under these accords. Yet, as Ethiopia

states to create a positive bargaining zone by (1) restricting the scope of the ongoing talks to the filling and annual operation of the GERD, and (2) encouraging the states to resort to the CFA for water allocation, dispute resolution and long-term operation of the GERD.

Otherwise, Ethiopia will have no option but to continue filling the GERD without an agreement with Sudan and Egypt.<sup>276</sup> Ethiopia will continue the unilateral filling not only because it is permissible under international law, but also because the downstream states' past behavior suggests they cannot be relied upon to come to an agreement and will instead drag out the negotiation in perpetuity. As for Sudan and Egypt, there are suggestions that neither state will be immediately affected by the filling as there should be sufficient water in the system to compensate for the amount Ethiopia plans to hold back.<sup>277</sup> Moreover, as the GERD is a non-consumptive hydroelectric project, it will not have any adverse impact after the filling is completed. Therefore, regardless of whether AU-facilitated talks become successful or not, the real dispute between the three states will boil down to whether and to what extent Ethiopia can use the Nile waters for consumptive purposes, including irrigation.

As the Nile watercourse is already appropriated by Egypt and Sudan, Ethiopia's future utilization will cause harm, perhaps significant, to current and existing uses of the two downstream states.<sup>278</sup> Under international law, such use will be considered a violation of the no-significant-harm principle only when it exceeds Ethiopia's equitable entitlement.<sup>279</sup> To the extent the harms inflicted upon Sudan and Egypt

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rejects the validity of the colonial Nile Water Treaties, its highest offer is likely below what Egypt is guaranteed under these agreements. In this situation, there will be no positive overlap between the two countries' reservation points and reaching an agreement will be unlikely.

276. Kathryn Salam, *The Blue Nile Is Dammed*, FOREIGN POL'Y (July 24, 2020), <https://foreignpolicy.com/2020/07/24/the-blue-nile-is-dammed/> [https://perma.cc/BQR2-8C6D].

277. Solomon & Elshinnawi, *supra* note 110; *see also* Essayas Kaba & Semu Moges, *Why Is Now the Right Time to Start the Filling of the Grand Ethiopian Renaissance Dam (GERD)?*, E.-AFRICANIST (June 1, 2020), <https://eastaficanist.com/2020/06/01/why-is-now-the-right-time-to-start-the-filling-of-the-grand-ethiopian-renaissance-dam-gerd/> [https://perma.cc/7QTP-EAVC].

278. It is worth mentioning that, in its letter to the UNSC, Egypt called upon Ethiopia to respect the "current and existing uses." Egypt's Letter to the UNSC, *supra* note 89. The use of *existing* usage rates as a baseline is actually a more severe imposition than a return to the terms of the 1959 Nile Treaty because Egypt is currently using sixty-one BCM, preventing Sudan from using the full share to which it is entitled under the agreement. Salman, *Dispute Revival*, *supra* note 44, at 90.

279. *See The Law of the Non-Navigational Uses of International Watercourses*, [1986] 2 Y.B. INT'L L. COMM'N 87, U.N. Doc. A/CN.SER.A/1986/Add.1; McCaffrey, *supra* note 45, at 399.

are within the limit of Ethiopia's exercise of equitable utilization, such exercise should not be regarded as infringing the rights of the downstream states. In the absence of a binding treaty determining the equitable share of the three states, judicial intervention will eventually become necessary, and ICJ would be an appropriate body to adjudicate the controversy.

Ultimately, as the demand for water increases due to population growth, economic development, and urbanization, and climate change threatens the supply, the three states and the other Nile Basin States will have to collaborate and increase their overall water-use efficiency. They will need to stop approaching the Nile watercourse as a zero-sum game and cooperate for their mutual benefits. In the end, the Nile Basin States will sink or swim together.