

# Perspectives on the Declaration of Principles regarding the Grand Ethiopian Renaissance Dam

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## I. Introduction

On March 23, 2015, Egypt, Ethiopia and the Sudan signed a declaration of principles on the Grand Ethiopian Renaissance Dam<sup>2</sup> (GERD). Since then, an intense debate has been going on regarding the modalities and core principles which were spelled out in the Declaration. Unfortunately, the principles contained in the Declaration have invited unhealthy rhetoric, particularly within Egypt, Ethiopia and among the Ethiopian diaspora. There are two fundamental reasons for the negative discourses. The first one involves the non-cooperative, zero-sum game strategic behavior that is inherent within the actions of the parties. Game theorists, political scientists and economists very well know that shared watercourses invite unilateral and self-interest maximizing actions- the well-known zero-sum positions being the dominant solution. Added to this is the emotive nature of the Nile River that was instigated and imposed upon the peoples of the region by colonialism. The second has to do with Egypt's long-held historical ambitions to control the sources of Nile and colonial era position that is still reflected in the Declaration. On closer examination, we find that several of the current stipulations of the Declaration include many of the key elements of the 1929 and 1959 "Nile Water Agreements" that Ethiopia was not a part to. Consequently, the Declaration is framed not in a positive-sum game- "win-win" manner.

Cognizant of the fact that the construction of the Grand Renaissance Dam has become a game changer, with its strong potential to lead for cooperation, we attempted to show that Egypt's policy towards Ethiopia has been unsustainable. We did so in our [April 30, 2014](#) commentary. Even though we did not have the full and official Declaration in hand at the time of writing, we also attempted to raise awareness as well as our concerns using a [short commentary](#) that we disseminated on March 23, 2015. In particular, we called for (i) the translation of the actual Agreement into various Ethiopian languages; (ii) the revision of certain clauses; and (iii) as Egypt's President was heading to address the Ethiopian Parliament and request for ratification, we called upon the Government of Ethiopia to defer this process to allow time and space for reflection. After the release of that commentary, [Aiigaforum.com](#)<sup>3</sup>, a website that is close to the Government of Ethiopia, posted a document which purports to be the final and authentic version of the Agreement. Except for the location of the signing, and singular-plural uses of certain terms,

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<sup>2</sup> <http://english.alarabiya.net/en/perspective/analysis/2015/03/31/Will-Egypt-still-get-its-fair-share-of-Nile-water-.html>

<sup>3</sup> <http://aigaforum.com/documents/Final-full-text-of-egypt-sudan-ethiopia-agreement-on-nile-use.pdf>

see for example “resources” versus “resource” in the preamble and the sequence of the numbering of Principles III and IV of the Agreement, when compared to other versions available in the internet, the document appears to be authentic.<sup>4</sup> Though speculations are rife that the final agreement is still a secret, because of the importance of the matter, for this commentary we have used the version that was made available by [Aigaforum.com](http://Aigaforum.com).

Many have opined and welcomed the recent Egyptian diplomatic overture towards Africa, and its acceptance of the construction of the GERD, in particular. Even though the current tripartite Agreement seemed to have temporarily eased the recent tension among the parties, and despite some of the positive aspects of the Egyptian diplomatic overtures and its intent to cooperate as spelled out in the Declaration, we observe that the Agreement is unsustainable in its current form. In fact, our examination of the Declaration of principles leads to the conclusion that the clauses are designed to re-assert the 1929 and 1959 water sharing agreements and the much criticized [\*Framework for General Co-operation Between the Arab Republic of Egypt and Ethiopia, July 1993, Cairo, Egypt\*](#)<sup>5</sup> that was signed by the then Presidents of Egypt and Ethiopia. In this follow up commentary on GERD, we independently examine, in a non-technical manner, the elements of the tripartite Agreement which was signed in Khartoum on March 23, 2015. We do so by identifying omissions, sticky points and mistakes that need attention. Consistent with our April 30, 2014 commentary on this topic, we attempt to decouple political posturing within Ethiopia from the trans-boundary water issues that are facing the country. In doing so, we focus on the substantive issues so that the country avoids the repeat of the mistakes in the Algiers Agreement of 2000 between Eritrea and Ethiopia and the series of diplomatic maneuvering that created a landlocked country in 1993.<sup>6</sup> We decided to incorporate the clauses that are contained in the Declaration for the reader’s convenience.

## II. Analysis of the Agreement

There are ten principles stated in the current Agreement. Below we provide comments for each element in the Agreement. For convenience, we juxtapose the Agreement (as published in [www.aigaforum.com](http://www.aigaforum.com)) *in italics* and our comments follow the article. Concluding remarks are provided in section III.

### *I. Principle of cooperation*

- *To cooperate based on common understanding, mutual benefit, good faith, win-win, and principles of international law;*
- *To cooperate in understanding upstream and downstream water needs in its various aspects.*

## Our Brief Assessments:

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<sup>4</sup> <http://hornaffairs.com/en/2015/03/25/egypt-ethiopia-sudan-agreement-on-declaration-of-principles-full-text/>

<sup>5</sup> <http://ocid.nacse.org/tfdd/tfdddocs/521ENG.pdf>

<sup>6</sup> <http://unmee.unmissions.org/Default.aspx?tabid=57>

- (1) This article is not very different in spirit from the framework for cooperation that was signed between Egypt and Ethiopia in 1993. The intent of this principle appears to invoke clauses in the [UN's Convention on the Law of the Non-Navigational Uses of International Watercourses that was adopted on 21, May, 1997](#)<sup>7</sup> and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. res. 2625, Annex, 25 UN GAOR, Supp. (No. 28), U.N. Doc. A/5217 at 121 (1970). It is however important to note that 17 years after its adoption, other than the United Kingdom no major power has signed the non-navigational use of international waters Convention. By the end of 2014, [only 38 countries](#) (out of about 194 Member States) have signed/accepted and ratified it<sup>8</sup>. It is also interesting to note that 11 of the 38 countries are located in the African continent. None of the three countries (Egypt, Ethiopia and Sudan) have signed, accepted or ratified this Convention.
- (2) The most controversial element of the 1997 UN Convention is Article 7 which deals with “not to cause significant harm” by upstream countries on downstream countries. Concerned by the ramifications of this clause, many upstream countries that have important trans-boundary rivers are either shying away from ratifying the Convention or are openly objecting it as the Convention: (i) does not provide for compensation to upstream countries for lost opportunities, and (ii) exposes them to indeterminate and an uninsurable risk. As we shall see below, Article 7 features in both the recently signed tripartite Agreement (without recognition of opportunity costs and damage limitation clause) and in Article 5 of the 1993 agreement between Egypt and Ethiopia.
- (3) The Phrase “principles of international law” neither implicitly nor explicitly recognizes the existence of [Nile Basin Cooperative Framework Agreement](#). Hence it fails to guide a comprehensive agreement pertinent to the region.<sup>9</sup>
- (4) The phrase “in its various aspects” suggests that downstream countries need *additional waters* or if they decide to develop new habitations, the upstream countries may have to give up their development opportunities. Research shows that downstream countries are usually densely populated and industrialized, have flatter topographies and hence their water needs are higher than upstream countries. Furthermore, even though the Agreement is about the GERD (see the heading and the preamble of the Agreement), the Article is sweeping and covers the entire river system as we shall see below.

## *II. Principle of Development, Regional Integration and Sustainability;*

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<sup>7</sup> [http://legal.un.org/ilc/texts/instruments/english/conventions/8\\_3\\_1997.pdf](http://legal.un.org/ilc/texts/instruments/english/conventions/8_3_1997.pdf)

<sup>8</sup> [http://www.internationalwaterlaw.org/documents/intldocs/watercourse\\_status.html](http://www.internationalwaterlaw.org/documents/intldocs/watercourse_status.html)

<sup>9</sup> <http://www.nilebasin.org/>

- *The purpose of GERD is for power generation, to contribute to economic development, promotion of trans-boundary cooperation and regional integration through generation of sustainable and reliable clean energy supply.*

#### **Our Brief Assessments:**

The text states that the purpose of the project is to generate “sustainable and reliable clean energy supply”. There are no auxiliary purposes and can be interpreted to exclude, for example, the use of the waters for fishing, recreation, education and small scale industrial and irrigation projects around the dam. We do think that there are costs (risks) agreeing to this clause by the upstream country. There are no provisions for planting trees (timber, coffee, etc.), for example, to mitigate the erosion and evaporation, capture the carbon and/or put the soil into better use. This clause is, therefore, devoid of shared benefits and responsibilities.

#### *III. Principle Equitable and Reasonable Utilization*

- *The three countries shall utilize their shared water resources in their respective territories in an equitable and reasonable manner*
- *In ensuring their equitable and reasonable utilization, the three countries will take into account all the relevant guiding factors listed below, but not limited to the following outlined:*
  - Geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;*
  - The social and economic needs of the Basin States concerned;*
  - The population dependent on the water resources in each Basin State;*
  - The effects of the use or uses of the water resources in one Basin State on other Basin States;*
  - Existing and potential uses of the water resources;*
  - Conservation, protection, development and economy of use of the water resources and the costs of measures taken to that effect;*
  - The availability of alternatives, of comparable value, to a particular planned or existing use;*

#### **Our Brief Assessments:**

- (1) Even though this principle appears to be normal, it obligates Ethiopia to continue honoring Article 5 of the 1993 cooperation framework between Egypt and Ethiopia.

- (2) Sub article III (e), which deals with the existing and potential uses of the water resources is a sticky point. It shall continue to be a source of tension as it is the focal point of the relationship between upstream and downstream countries. It needs to be examined in the light of the principles that are enshrined in the Nile basin framework.
- (3) Sub article III(f) does not sufficiently obligate downstream countries to invest in water conservation and rationalization. The laxity in this sub article legitimizes the increased demand for water by downstream countries.
- (4) The scope of the Agreement does not include ground water resources available in downstream countries.

#### *IV. Principle of Not to Cause Significant Harm*

- *The Three Countries shall take all appropriate measures to prevent the causing of significant harm in utilizing the Blue/Main Nile.*
- *Where significant harm nevertheless is caused to one of the countries, the state whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures in consultations with the affected state to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.*

#### **Our Brief Assessments:**

As indicated above, this clause is taken from Article 7 of the 1997 UN Convention on the Law of the Non-navigational Uses of International Watercourses 1997- ([effective as of April, 2014](#)). The “obligation not to cause significant harm” is related to the age-old economic theory of externality which features in European trans-boundary waters and environmental agreements, in the form of the “polluter pays principle”. The UN Convention states that:-

“(a) Watercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States.

(b) Where significant harm nevertheless is caused to another watercourse State, the States whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures, having due regard for the provisions of articles 5 and 6, in consultation with the affected State, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.”

Article #2 of the 1997 Convention defines the term “watercourse” as follows:-

““Watercourse” means a system of surface waters and ground waters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus”

It is interesting to note that the tripartite Agreement avoids the use of the term “watercourse” and hence excludes the ground water resources in Egypt and Sudan that

recent geoscience studies are indicating.<sup>10</sup> Furthermore, it is important to note that the “international law” is selectively used here to strengthen the position of the initiator-originator of the current text.

- (1) The opening paragraph of the tripartite Agreement starts with a rather misleading sentence. It states that “the three countries shall take all appropriate measures....” The article specifically deals with damages and not “causing significant harm in utilizing the Blue/Main Nile”. The Blue/Main Nile originates from the highlands of Ethiopia and contributes approximately about 85% of the water to the Nile River system, and hence this clause is about Ethiopia. Downstream countries are not affected by this clause as Ethiopia is. The clause is unambiguous in giving downstream countries right to “take appropriate measures to prevent significant damage” by the upstream country. The obvious issue that emerges here is sovereignty over the waters of the Blue/Main Nile, and the issue is more than likely to be a sticky point in that neither sovereign equality nor territorial integrity clauses (see Principle # IX below) are sufficient to protect Ethiopia. In fact there is concern that it can be construed as a voluntary ceding of sovereignty by Ethiopia.
- (2) The phrase “significant harm is not defined” and there are no thresholds about water sharing, physical damages arising from faulty construction/management of the dam and Act of God. Hence it is subject to various interpretations.
- (3) The clause refers to the Blue Nile/Main River. The Blue Nile/Main River has tributaries. In the absence of an exclusion clause for the tributaries, the clause maybe used to restrict Ethiopia from developing irrigation projects on any of the tributaries of Blue Nile.

V. *Principle to Cooperate on the First Filling and Operation of the Dam*

- *To implement the recommendations of the International Panel of Experts (IPOE), respect the final outcomes of the Technical National Committee (TNC) Final Report on the joint studies recommended in the IPOE Final Report throughout the different phases of the project.*
- *The three countries, in the spirit of cooperation, will utilize the final outcomes of the joint studies, to be conducted as per the recommendations of the IPOE Report and agreed upon by the TNC, to:-*
  - a) *Agree on guidelines and rules on the first filling of GERD which shall cover all different scenarios, in parallel with the construction of GERD.*

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<sup>10</sup> See for example <http://sajg.geoscienceworld.org/content/117/1/97.abstract>

b) *Agree on guidelines and rules for the annual operation of GERD, which the owner of the dam may adjust from time to time.*

c) *Inform the downstream countries of any unforeseen or urgent circumstances requiring adjustments in the operation of GERD.*

d) *To sustain cooperation and coordination on the annual operation of GERD with downstream reservoirs, the three countries, through the line ministries responsible for water, shall set up an appropriate coordination mechanism among them.*

e) *The time line for conducting the above mentioned process shall be 15 months from the inception of the two studies recommended by the IPoE.*

#### **Our Brief Assessments:**

- (1) Implicit in Article V is that the project is going ahead. Only the filling of the reservoir and operational/functional matters of the dam are to be negotiated. The presumption is that the pace of the filling should be slow enough to supply water to downstream countries but fast enough to satisfy Ethiopia's needs as the [NPR's reporter](#) has put it.
- (2) This article however crucially depends on a report that is yet to be produced. The [leaked IPoE report](#) vindicates Ethiopia on many fronts and as we indicated in our April 30 2014 commentary the deficiencies are not insurmountable. It remains to be seen whether the TNC report will be different from the one produced by IPoE. Notwithstanding this, the environmental aspect of the TNC report is expected to echo Egyptian concerns. It is important that the environmental impact assessment of the project be comprehensive and linked to (i) current and potential ground water resources in downstream countries and (ii) the rather wasteful use of the resource in downstream countries and pollution around the delta.
- (3) Sub article V(b) refers to the "owner" of the dam, in the singular, and resolves the speculation about joint ownership, at least for the moment. As a result of the sensitivity of the project, we encourage the Government of Ethiopia not to allow either equity or linked participation at this time.<sup>11</sup>

#### *VI. Principle of Confidence Building*

- *Priority will be given to downstream countries to purchase power generated from GERD.*

#### **Our Brief Assessments:**

- (1) Clean energy production and sale reduces the downstream countries' dependency on fossil fuel generated energy. Hence, this is not just a "confidence building" issue. It has

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<sup>11</sup> <http://www.tigraionline.com/articles/ethiopia-rejects-egypt.html>

direct and measurable economic consequences, and hence needs to be imputed in the pricing of electricity for the proposed sale.

- (2) In many economies electricity falls within rate regulated industries. Hence, pricing for domestic use will be different from pricing for export. International pricing will be a more complicated issue and may not be easily decoupled from the type of intergovernmental relationships that emerge in the region.
- (3) The word “will” is equivocal since it has several meanings in the legal lexicon as in thesaurus, and hence may serve as a point of future contention.

*VII. Principle of Exchange of Information and Data Egypt, Ethiopia, and Sudan shall provide data and information needed for the conduct of the TNC joint studies in good faith and in a timely manner.*

**Our Brief Assessments:**

- (1) As indicated earlier, the IPoE had already stated that the social and environmental aspects of the project in downstream countries need an additional study. The availability of such information should enable Ethiopia to complete the study. As indicated above, the study however needs to be comprehensive, and does not have to be confined to the project.
- (2) Data accuracy, completeness and integrity can be sticky problems.
- (3) Certain technical (engineering design, formulae, etc.) information might be proprietary and therefore confidential. The parties need to determine the minimum level of disclosure.

*VIII. Principle of Dam Safety*

- *The three countries appreciate the efforts undertaken thus far by Ethiopia in implementing the IPoE recommendations pertinent to the GERD safety.*
- *Ethiopia shall in good faith continue the full implementation of the Dam safety recommendations as per the IPoE report.*

**Our Brief Assessments:**

- (1) Dam safety is as important for Ethiopia as it is for downstream countries. Notwithstanding this it is important to ensure that “best practice” is followed so that habitations and civilizations in downstream countries are not threatened by faulty construction and substandard operations.
- (2) Downstream countries are formally acknowledging Ethiopia’s compliance effort, and it is good.



#### IX. *Principle of Sovereignty and Territorial Integrity*

- *The three countries shall cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilization and adequate protection of the River.*

#### **Our Brief Assessments:**

- (1) The concept of “sovereign equality” features in many international agreements, conventions and constitutive acts (example the African Union), and is defined in the UN 1990’s Declaration on Principles.<sup>12</sup> It states that “sovereign equality” includes the following elements: (a) States are judicially equal; (b) Each State enjoys the rights inherent in full sovereignty; (c) Each State has the duty to respect the personality of other States; (d) The territorial integrity and political independence of the State are inviolable; (e) Each State has the right freely to choose and develop its political, social, economic and cultural systems; (f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.<sup>13</sup>
- (2) This article is fairly standard and also features in the 1993 framework. However, it is unlikely to override the articles the dealt with damages and rights that appear to have been voluntarily ceded to downstream countries in connection with the Blue/Main Nile and its tributaries.

#### X. *Principle of Peaceful Settlement of Disputes*

- *The Three countries will settle disputes, arising out of the interpretation or implementation of this agreement, amicably through consultation or negotiation in accordance with the principle of good faith. If the Parties 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.*

#### **Our Brief Assessments:**

This article is also fairly standard. It evolves from the UN 1990 Convention and that of the UN Charter. When this article is read together with Principle 1 of this tripartite Agreement, it brings back the 1997 Convention and the mediation, arbitration and determination role of the International Court of Justice. Ethiopia’s experience with arbitration has not been good and the Algiers Agreement and the ruling made by the Eritrea-Ethiopia Boundary Commission<sup>14</sup> are too fresh to be forgotten. Despite this fact, with lopsided clauses stacked against Ethiopia and in

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<sup>12</sup> “Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. res. 2625, Annex, 25 UN GAOR, Supp. (No. 28), U.N. Doc. A/5217 at 121 (1970)”.

<sup>13</sup> <https://www1.umn.edu/humanrts/instate/principles1970.html>

<sup>14</sup> <http://www.haguejusticeportal.net/index.php?id=6162>

the absence of sound rules and principles governing the Nile water allocation and management, a “third party”, particularly in the context of the Nile Basin Cooperation Framework Agreement may lead to a better outcome.

### **III. Concluding Remarks**

In summary, when the recent tripartite Agreement on the GERD is compared with the 1993 bilateral agreement, though in many respects the spirits of the two agreements appear similar, there are also important differences. The current Agreement reaffirms Article 5 of the 1993 agreement which favored Egypt, includes terms about compensation for damages, restricts the scope of the dam project, recognizes “rights” to take action on the Blue/Main Nile, is sloppy on water utilization in downstream countries, and the non-exclusion of the tributaries from the Agreement cumulatively put Ethiopia at a disadvantage.

The obvious and fundamental question that arises in the minds of many observers is whether a reasonable government representative of an independent upstream country, irrespective of his/her political credo, would sign without duress, the tripartite Agreement in its present form. In light of the above analysis and consistent with our initial reaction of March 24, 2015, we reiterate our statement that no free nation should be subjected to be a party to such a lopsided and risky Agreement.

We also think the shared Nile waters represent opportunities for all riparian counties. However, the good fortunes emanating from the Nile could only be leveraged if all riparian countries are able to overcome the seemingly self-interest maximizing but counter-productive zero-sum game actions. The Nile Basin can facilitate the much needed African regional integration if all parties know how to share both the cost and benefit from this rich resource. Hence, the central point of departure for making bilateral, tripartite, quadripartite (as the case may be) agreements should be the Nile Basin Cooperative Framework Agreement, which includes all the riparian states and centers around the equitable sharing of the trans-boundary watercourses. Egypt must not be allowed to divide and maintain its supremacy by undermining the regional cooperation framework that is already in motion.

Hence, in the interest of equitable, fair, sustainable, comprehensive solution that guarantees shared benefits and responsibilities, we, therefore, call upon:

- Policymakers and stakeholders of all riparian counties to understand that trans- boundary water flows, by their nature, are susceptible to the tragedy of the commons- that attempts by individual nations acting independently or in a dominant manner could only damage the common resource, and recognize that only shared responsibilities could guarantee shared benefits;
- The parties to the current Declaration rectify the unfair, unequitable and unsustainable clauses that are damaging any party, Ethiopia, in particular;

- All political parties in the riparian states refrain from using the shared waters of the Nile for their self-preserving interests;
- The Declaration and future negotiations should evolve from the laudable Nile Basin Cooperative Agreement;<sup>15</sup>
- Any signed treaties and declaration of principles be immediately translated into major Ethiopian and other riparian states languages so that the general public is aware of what is going on;
- Hydrologists, economists, lawyers, ecologists, geoscientists, sociologists, water engineers and diplomats etc., in the region to make professional contributions so that the water sharing problem is resolved for the benefits of all in the region.

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<sup>15</sup> <http://www.nilebasin.org/>