

Dispute Settlement on Transboundary Hydropower Projects: Lessons for the Grand Inga Project

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1. Towards an African Regional Approach to International Water Law

Since 2011, Egypt, Ethiopia and Sudan have engaged in tripartite negotiations to address the dispute on the Grand Ethiopian Renaissance Dam ('GERD'). Contrary to suggestions that the contentious 1929 and 1959 treaties on the utilization of the Nile River were referred to in the GERD dispute-settlement process,¹ the tripartite negotiations have been guided by the 2015 Khartoum Declaration of Principles ('DOP').² These principles are included in recent conventions such as the Framework Cooperation Agreement of 2010 for the Nile Basin,³ largely inspired by the 1997 United Nations ('UN') Convention on the Law of Non-Navigational Uses of International Watercourses.⁴ So far, the Khartoum Agreement and Document have guided the three parties as well as countries (the United States and United Arab Emirates) and organizations (the World Bank and the African Union) that have provided their good offices or facilitation to the negotiation process between Egypt, Ethiopia and Sudan.

Like the 2015 Khartoum Agreement, a Convention on the Prevention and Resolution of Disputes Arising From the Management of Shared Water Resources in Central Africa was adopted by the Economic Community of the Central African States ('ECCAS') in 2020.⁵ This convention can be instrumental not only in the resolution of potential conflicts in the implementation of the Grand Inga project by the Democratic Republic of the Congo ('DRC'), but also in the prevention of such conflicts. This policy brief examines the added value of both regional instruments on the dispute-settlement regime in the management of shared water resources in Africa and

their practical implications for dispute-settlement mechanisms and processes.

On the basis of the 2015 GERD dispute-settlement legal framework and the 2020 ECCAS Convention, I will conclude that the progress of a regional legal regime to settle disputes on shared water resources and its implementation by regional dispute-settlement mechanisms would contribute to the doctrine of 'African Solutions for African Problems' in international water law. Before proceeding to this analysis, it is important to briefly examine this doctrine and its relevance to international dispute settlements.

The concept of 'African Solutions for African Problems' was first elaborated in 1993 by a political economist from Ghana, Professor George Ayittey. He "used the concept to galvanize Africans to reject the imposition of several unworkable foreign templates in Africa and urge African elites to take charge of the crisis on the continent".⁶ The doctrine has been implemented in some areas of co-operation among African States. For example, to address post-conflict related issues, African States have adopted the Declaration on the African Solidarity Initiative (also called 'Africa Helping Africa').⁷ The African Union dispute-resolution regime was also influenced by the doctrine. The establishment of the African Union Peace Architecture, including bodies like the Panel of Wise and the African Court of Justice and Human Rights, illustrates this trend. Self-reliance on African dispute-resolution mechanisms has been an increasing practice. The GERD dispute-settlement framework and the 2020 ECCAS Convention are important milestones in the crystallization of an African regional approach to international water law. Such an approach should be applied to hydro-power projects such as the GERD and Grand Inga.⁸

2. The GERD Dispute Between Egypt, Ethiopia and Sudan

During the colonial period, the British, who dominated the largest part of Eastern Africa, developed a legal regime that provided pre-eminence to Egypt in the use of the Nile Basin. The 1929 agreement between the United Kingdom and Egypt (the 'Nile Water

¹ Biruk Kedir Mohammed, "How the Concept of 'African Solutions for African Problems' Can Be Applied to Resolve the GERD Dispute", in *Open Journal of Political Science*, 2021, vol. 11, no. 4, p. 594.

² Agreement on Declaration of Principles Between the Arab Republic of Egypt, the Federal Democratic Republic of Ethiopia and the Republic of the Sudan on the Grand Ethiopian Renaissance Dam Project (GERDP), 23 March 2015 ('Khartoum Agreement' or 'DOP') (<https://www.legal-tools.org/doc/zp0os4b2/>).

³ Agreement on the Nile River Basin Cooperative Framework, 14 May 2010 (<https://www.legal-tools.org/doc/fkih8ce1/>).

⁴ Convention on the Law of Non-Navigational Uses of International Watercourse, 21 May 1997 ('Watercourses Convention') (<https://www.legal-tools.org/doc/5b0c6b/>).

⁵ Convention pour la prévention et la résolution pacifique des conflits liés à la gestion des ressources en eau partagée de l'Afrique Centrale, 30 June 2020, Decision No. 006/CEEAC/CCEG/XVII/20 ('ECCAS Convention') (<https://www.legal-tools.org/doc/46maf15/>).

⁶ Adeoye O. Akinola, "We Must Return to the True Meaning of 'African Solutions to African Problems' – But Not Where African Elites Are the Problem", *University of Johannesburg News*, 25 March 2022.

⁷ See African Union, "'Africa Helping Africa' Declaration on the Launch of the African Solidarity Initiative (ASI) for the Mobilization of Support for Post-Conflict Reconstruction and Development in Africa", Press Release, 15 July 2012.

⁸ See Bonaya Adhi Godana, *Africa's Shared Water Resources: Legal and Institutional Aspects of the Nile, Niger and Senegal River Systems*, 1st ed., Frances Pinter, London, 1985, pp. 101–121.

Agreement’) includes provisions prohibiting any upstream country from developing projects with a negative impact on the flux of the Nile River.⁹ The same treaty granted the right to consult on any hydropower project on the tributaries or affluents of the Nile which could potentially contribute to the reduction of water to be used by Egypt. In 1959, Egypt and Sudan signed a water-sharing agreement allocating 55,5 billion cubic metres (‘BCM’) to the former and 18,5 BCM to the latter; the remaining 10 BCM were dedicated to evaporation losses from their reservoirs.¹⁰

After independence, most upstream countries, including Kenya, Uganda, Tanzania and Ethiopia, rejected the 1959 Agreement and proclaimed their right to equitable use of the Nile Basin. It is in this context that Ethiopia developed the GERD hydropower project which is nearing completion on the Blue Nile approximately 30 km upstream of the Sudanese border, to become the largest hydropower project in Africa. Egypt and Sudan argued that their use of water will be affected by this project. In particular, Egypt claims the potential reduction of water reaching its territory and population, while Sudan raised the risk of the collapse of the GERD and potential floods on 20 million of its population in the eastern region.

In 2011, after the eruption of the dispute, the three countries launched tripartite negotiations, including the following main steps: (i) the establishment of an Independent Panel of Experts in 2014 to assess the potential impacts of the GERD on the utilization of the Nile water, whose recommendations on the benefits of the project were not accepted by Egypt; (ii) the signature by the three countries of the Khartoum Agreement on Declaration of Principles in March 2015; and (iii) the subsequent reaffirmation by the three States Parties to the Khartoum Agreement in the Khartoum Document adopted in December 2015.

3. The 2015 Agreement on Declaration of Principles Between Egypt, Ethiopia and Sudan on the GERD Dispute Settlement

The 2015 Khartoum Agreement includes two categories of provisions including four general principles and six principles specific to the GERD. The first category (Principles I to IV) integrates general principles, some of which are included in the 1997 UN Watercourses Convention, even though the three countries never signed or ratified this agreement. General principles include the principle of co-operation (I); the principle of development, regional integration and sustainability (II); the principle of equitable and reasonable utilization (III); as well as the principle not to cause significant harm (IV).

The second category of principles relates to the filling and operation of the GERD, including the principles to co-operate on the first filling and operation of the dam (V); of confidence-building (VI); of exchange of information and data (VII); of dam safety (VIII); of sovereignty and territorial integrity (IX); and the principle of peaceful settlement of disputes (X).¹¹ According to the latter, the three countries

will settle disputes, arising out the interpretation or implementation of this agreement, amicably through consul-

tation 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.¹²

It was foreseen that the 2015 Khartoum Agreement would serve as a basis for the development of an agreement on the filling and operation of the GERD. Since 2015, the three parties were unable to reach an agreement and the long-standing negotiations were blocked for a while. Contentious issues to reach such an agreement included the legal nature of the agreement (binding or not binding), the monitoring mechanism for the filling of the dam, and the dispute-settlement system (recourse to a third party or not).

As the tripartite negotiations stalemated, the United States provided its good offices to address contentious issues. With the assistance of the World Bank, the United States drafted and proposed to the parties an agreement on the filling and operation of the GERD in February 2020. It was rejected by Ethiopia, alleging the United States was partial in its mediation. In July 2020, in order to address the stalemate, the African Union took over from the United States and the World Bank by offering its facilitation of the tripartite negotiation process.

4. African Union Facilitation of Tripartite GERD Negotiations

It should be noted that in July 2014, the African Union actively engaged in the process of the tripartite negotiations on the GERD. At the summit of the Heads of State and Government held in Malabo (Equatorial Guinea), President Abdel Fattah el-Sisi of Egypt met with the then Prime Minister of Ethiopia, Hailemariam Desalegn. This meeting was an important milestone in this process and paved the way to resumption of the tripartite negotiations leading to the signing of the 2015 Khartoum Agreement. Due to the failure of the parties to reach an agreement on the filling and operation of the GERD, and after the collapse in early 2020 of the use of the United States’ and World Bank’s good offices, the African Union resumed its intervention in the tripartite negotiations by offering its good offices.

On 26 June 2020, under the presidency of the then-Acting Chairperson of the African Union, President Cyril Ramaphosa (South Africa), the Bureau of the African Union Assembly of Heads of State and Government hosted a video-conference during which a discussion of the state of the GERD dispute was held. While recognizing the willingness of Egypt, Ethiopia and Sudan to reach a peaceful solution to their dispute and the settlement of the pending issues, the Bureau stressed the importance of reaching a ‘win-win’ solution, in a spirit of solidarity and co-operation. The Chairperson of the African Union called on the parties to resume the tripartite negotiations, with the objective of signing an acceptable agreement on the pending issues. The African Union then confirmed its willingness to facilitate this process. Taking over from the President of South Africa as the new acting Chairperson in February 2021, President Félix-Antoine Tshisekedi of the DRC was able to convene a ministerial meeting in early April 2021, to revitalize the tripartite negotiations between the three parties.¹³

The establishment of a dispute-settlement mechanism is one of the pending contentious issues related to the filling and operation of GERD. In September 2021, the African Union Facilitation team proposed the following modalities for a mechanism to the parties:

⁹ Exchange of Notes Between Her Majesty’s Government in the United Kingdom and the Egyptian Government on the Use of Waters of the Nile for Irrigation, 7 May 1929 (<https://www.legal-tools.org/doc/a4imxdao/>).

¹⁰ Agreement (with annexes) for the full utilization of the Nile waters, 8 November 1959 (‘1959 Agreement’) (<https://www.legal-tools.org/doc/9423snai/>).

¹¹ For more detail, see Salman M.A. Salman, “The Grand Ethiopian Renaissance Dam: The Road to the Declaration of Principles and the Khartoum Document”, in *Water International*, 2016, vol. 41, no. 4, pp. 512–527.

¹² Khartoum Agreement, p. 5, see *supra* note 2.

¹³ Ntumba Luaba Lumu and Mutoy Mubiala, *La facilitation par la R.D. Congo des négociations tripartites entre l’Égypte, l’Éthiopie et le Soudan sur le Grand Barrage Éthiopien de la Renaissance (GERD)*, 1st ed., Ita’yala Printer, Kinshasa, 2022, pp. 39–40.

(i) in the event of a dispute arising regarding the interpretation, application or implementation of the memorandum of understanding to be signed, each of the parties may request the organization of negotiations through the Technical Coordination Committee ('TCC', a tripartite expert body established in the framework of the negotiations with a view to settling the dispute); (ii) if, 30 days after a request for negotiation by one of the parties, the TCC fails to settle the dispute, each of the parties may refer to the Committee of Ministers; and (iii) if, 30 days after its referral to the latter, the dispute has not been resolved, either party may refer the matter to the Joint Panel, an *ad hoc* body that reviews and recommends solutions regarding the interpretation and application of the memorandum of understanding at the request of the parties. Each party will nominate two experts to be members of the Joint Panel, the African Union appointing two additional members. Panel members will be appointed on the basis of their professional qualifications, not as representatives of a particular State. The recommendations of the Joint Panel must be accepted by the parties before they take effect.

The African Union Facilitation also proposed an alternative to the Joint Panel consisting of the appointment of a conciliation commission charged to hear the parties, examine their claims and objections, establish the facts, and make proposals to the parties in order to reach a solution. The commission will be composed of independent experts chosen from among experts appearing on a roster established by the parties in consultation with the African Union. The parties shall apply the recommendations of the conciliation commission in good faith.

When Ethiopia proceeded to undertake the first filling of the GERD in June 2021, there were increased tensions in the region of the Horn of Africa. Tunisia, backed by Egypt, brought the matter to the UN Security Council. At its meeting on 7 July 2021, the Council called on the GERD parties to refrain from war rhetoric and to resume their tripartite negotiations pursuant to African Union facilitation.¹⁴ The second filling of the GERD in November 2021 without a signed memorandum of understanding, and the start of dam operations in early 2022, presented Egypt and the Sudan with a *fait accompli*. The only recommendation of the African Union Facilitation to the three parties was to find a way to apply the principle of regional co-operation, as included in the 2015 Khartoum Agreement.

To date, the tripartite negotiations have not succeeded due to several factors, including troubles and armed conflicts in both Ethiopia and Sudan. The negotiations were expected to resume on 27 August 2023 after a three-year suspension, but this was not the case because of the unilateral filling and operationalization of the GERD by Ethiopia.

In October 2021, the panel assisting the Facilitation team held a workshop of experts for a lesson-learned exercise from the GERD experience in relation to the Congo Basin. The governance of the latter is also fragmented and similar to that for the Nile Basin. This could negatively affect some projects, in particular the Grand Inga

hydropower project.

5. The Grand Inga Dam Project on the Congo River: Relevant GERD Dispute Lessons

The Grand Inga project is another major hydropower project, as illustrated by its inclusion in the integrated projects of the African Union Agenda 2063. Several African countries have expressed interest in benefiting from this project (for example, South Africa signed a bilateral treaty with the DRC on the Grand Inga Hydro-power Project on 29 October 2013). However, there is a risk of potential conflict between the main beneficiary of the Grand Inga project, the DRC, and several upstream riparian countries of the Congo River. For example, the Lake Chad replenishment project, initiated by the Lake Chad Basin International Commission (Cameroon, Chad, Niger, Nigeria, Algeria, the Central African Republic, Libya and Sudan are members), entails transfer of water from the Ubangi River (an upstream affluent of the Congo River) to Lake Chad to prevent that it dries up completely. Romano Prodi – former President of the European Commission and UN Special Envoy for the Sahel – has observed that the populations around Lake Chad cannot not wait any longer for replenishment of Lake Chad. If implemented, this large-scale transfer of water would reduce the flow of water into a Grand Inga dam. DRC political and academic elites have engaged in a debate on this issue and pressed the government to initiate a dialogue with concerned upstream riparian countries, including Cameroon and the Central African Republic both of which are Member States of the ECCAS, like the DRC.

As mentioned above, the ECCAS adopted in 2020 the Convention for the Prevention and Resolution of Disputes Arising from the Management of Shared Water Resources in Central Africa. It is relevant to the prevention and resolution of potential disputes over the Grand Inga project. The ECCAS Convention is timely and may contribute to the relaunch of Grand Inga in light of the recent re-engagement of the World Bank,¹⁵ following suspension of its funding and participation in 2007.

Article 64 of the ECCAS Convention – on the building of major hydraulic infrastructures – provides that States Parties engage in consultations with the objective to develop common infrastructure or infrastructure of common interest. Even though the Grand Inga project is owned by the DRC, it is an integrating project of regional interest. This is why the DRC government should involve the other riparian countries of the Congo Basin – contrary to Ethiopia's stance with regard to the GERD. Article 6 promotes a co-ordinated approach to major infrastructure developments. Legally, and in accordance with international water law, such an approach can contribute to an equitable and reasonable use of the shared water resource of the Congo Basin. Another added value of broader consultation and co-ordination on this big hydropower project is that it will prevent a potential conflict with some upstream riparian countries such as Cameroon and Chad that are involved in the Lake Chad replenishment project to transfer water from the Ubangi River to the Lake Chad Basin. Such consultations would provide opportunities to concerned governments to discuss and address the adverse impact of the Lake Chad project and pave the way for a constructive reconciliation of the two projects. This would be in line with Article 66 of the ECCAS Convention which provides for consultations to prevent significant harm to other riparian countries.

The 2020 ECCAS Convention includes several provisions in-

¹⁴ Statement by the President of the Security Council, UN Doc. S/PRST/2021/18, 15 September 2021 (<https://www.legal-tools.org/doc/keutql82/>). It should be noted that the Horn of Africa has been the theatre of several inter-State conflicts in the region, beyond water sharing: for example, in the past 30 years, between Ethiopia and Eritrea (1996–2000), Ethiopia and Somalia (2006–2009), Kenya and Somalia, and Sudan and South Sudan (since 2011). Egypt has often played a geo-strategic role against Ethiopia, which is involved in most of conflicts in the area. For more details on the dynamics of conflicts in the region, see Erika Holmquist and Anna Ida Rock, "Regional Security Dynamics in the Horn of Africa", in *FOI Studies in African Security*, FOI Memo No. 8194, Swedish Defence Research Agency, Stockholm, 2023.

¹⁵ Jamie Smyth and Rob Rose, "World Bank 'Optimistic' About Giant African Hydro Project", *Financial Times*, 8 February 2024. According to this newspaper article, after the existing Inga 1 and 2 dams, the planned Inga 3 dam "would be larger, with output roughly double that of China's Three Gorges Dam".

spired by the UN 1997 Watercourses Convention and the 1992 Convention on the Protection and Uses of Transboundary Watercourses and International Lakes ('UN Water Convention').¹⁶ As far as dispute settlement is concerned, the Convention provides in Article 73 the following mechanisms: (i) negotiations in good faith; (ii) the submission of cases to the ECCAS dispute-settlement mechanisms; (iii) the submission of cases to the African Union's dispute-settlement mechanisms; and (iv) the submission of cases to the International Court of Justice or international arbitration. The spectrum of dispute-settlement mechanisms in the ECCAS Convention confirms the trend observed in the recent practice of African States prioritizing regional and sub-regional mechanisms over universal bodies.

Regarding the field under review, the ECCAS Convention provides in its Article 64 that States arrange joint major hydraulic infrastructure for an equitable sharing of assets. Such joint projects would prevent disputes among the riparian countries in the same basin. This was not done for the GERD. It should be done for the Grand Inga project. As a framework agreement, the ECCAS Convention should guide the development of inter-State arrangements for transboundary water co-operation between the Congo Basin's riparian countries. Both the ECCAS Agreement and the DOP are framework agreements that need to be concretized through the conclusion of specific agreements. The former has a comparative advantage over the DOP for three main reasons. First, legally, the DOP is a non-binding agreement, whereas the ECCAS has been adopted as a binding treaty. Second, while the ECCAS Convention addressed both prevention and dispute settlement, the DOP only provides a framework for dispute settlement. Third, even in this last scenario, the DOP does not provide space for third party interventions.

Furthermore, the ECCAS Convention includes a more institutionalized dispute-settlement architecture with a spectrum of third-party mechanisms, notably several African sub-regional and regional mechanisms and, most importantly, the recourse as a last resort to the International Court of Justice. The ECCAS Convention provides reliable mechanisms and tools to address disputes such as the GERD conflicts, and could better address potential disputes on the Grand Inga project. It more closely reflects the existing law relating to shared water resources, as stipulated in the 1997 UN Watercourses Convention and 1992 Water Convention. This underlines the importance of the Congo Basin's riparian countries participating in the ECCAS Convention, the implementation of which will be instrumental for the development of the Grand Inga Dam project.

6. Concluding Remarks

It results from the above analysis that the DRC has to learn from the GERD dispute experience when planning to develop the Grand Inga project, which is similarly a major water infrastructure. First, according to international water and environmental law, this

¹⁶ Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 17 May 1992 ('1992 Water Convention') (<https://www.legal-tools.org/doc/yysk6mmce/>).

large-scale project requires close consultation with the other riparian countries of the concerned international river basin. This is a preventive action to potential conflict with downstream or upstream countries. In practice, the achievement of lasting peace in the context of the planning and development of trans-boundary hydropower projects requires the involvement of the other riparian countries concerned by the project. Unfortunately, this was not done by Ethiopia when planning and developing the GERD project and it is yet to be done by the DRC for the Grand Inga project.

The 2020 ECCAS Convention, which promotes an inclusive and co-operative approach to the construction of this kind of major water infrastructure, will be instrumental in this regard. The World Bank and the UN Economic Commission for Africa, which usually provide financial and technical support in this field, can assist with the development of an inclusive governance of the Grand Inga project. In addition to preventing a dividend conflict between the DRC and the other riparian countries of the Congo Basin, such an inclusive approach could foster regional integration in Central Africa, thus paving the way for the expected pivotal role of the planned Grand Inga dam for the development of the African continent, according to the African Union Agenda 2063.

As far as dispute settlement is concerned, while both the 2015 Khartoum Agreement and the 2020 ECCAS Convention include substantive and procedural principles drawn from the 1997 UN Watercourses Convention as well as the 1992 Water Convention, the ECCAS Convention provides a more institutionalized and reliable dispute-settlement framework. As ECCAS Member States, the DRC and other basin States interested and involved in the Grand Inga dam project have to expedite the ratification and implementation of the 2020 ECCAS Convention.

Finally, in prioritizing recourse to African dispute-settlement mechanisms for their implementation, the two regional legal regimes make a significant contribution to the application of the African Union doctrine of 'African Solutions for African Problems' in international water law.

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