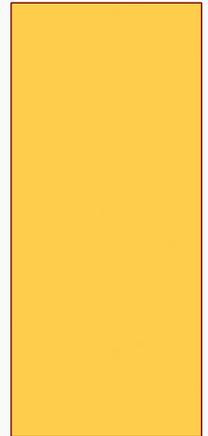


THE GRAND ETHIOPIAN RENAISSANCE
DAM:
A CATALYST FOR COOPERATION?

DR. JASMINE MOUSSA



WHAT IS CONTROVERSIAL ABOUT THE GERD?

- **Jan 2011:** Ethiopia announces dam without notifying Egypt and Sudan, and begins construction.
 - Huge dam: height = 145 m; length = 246 km; total area 1874 km²; power generation = 6,000 MW
- At Ethiopia's initiative, a consultation process begins
- **May 2013:** "The International Panel of Experts' report on the Grand Ethiopian Renaissance Dam"
 - Requested additional studies

- **Dec 2014:** Parties agree to hire international firms to conduct the studies, but contracts signed in Sept 2016.
- **March 2015:** Declaration of Principles on the GERD:
 - Article V: obligation to respect the outcome of the joint studies

**All throughout construction has continued unabated,
without regard to the studies.**

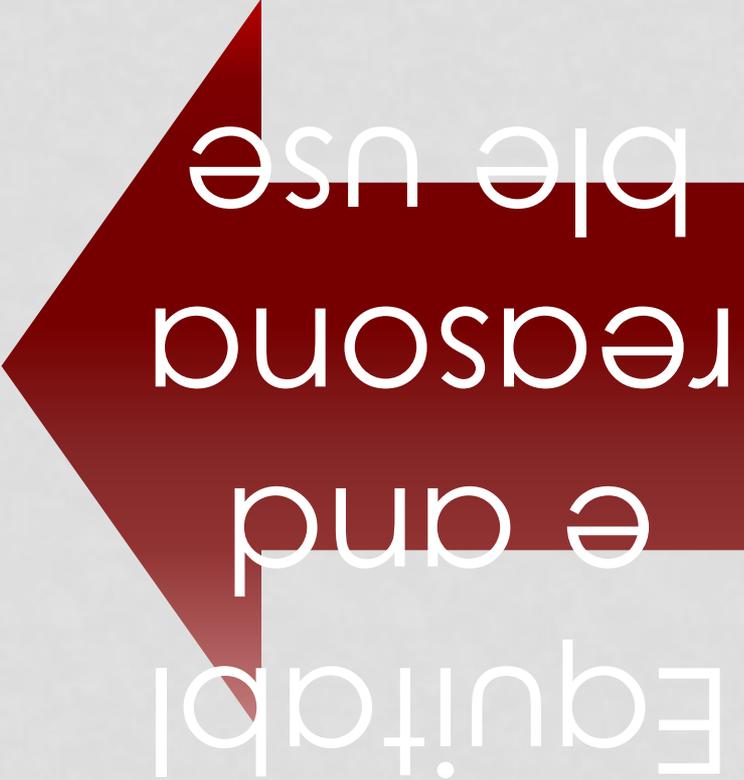
- Does the GERD achieve the correct balance between Ethiopia's rights and obligations under international law?
- Does customary international law allow Ethiopia an unfettered right to unilaterally initiate construction of the GERD and proceed with construction at a pace and way that disregards the dam impact studies?

THE GERD UNDER INTERNATIONAL LAW

- Legal Framework:
 - Specifically examining the GERD and not the right to construct dams in general: GERD design, size, height, reservoir capacity, pace of construction, etc.
- International Treaties/Agreements
 - March 2015 Declaration of Principles
 - Political understandings v. binding legal obligations?
 - Decision of the ICJ in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*
- Customary International Law
- Substantive and Procedural Obligations

CUSTOMARY INTERNATIONAL LAW

- Critique: Vague, indeterminate and ill-defined



Equitable
and
reasonable
use



No
significant
harm

SUBSTANTIVE OBLIGATIONS

- Article 7 UNWC:
 1. 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.
 2. 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.

- 2 obligations:

1. Due diligence obligation to take all appropriate measures to prevent significant harm
2. Assuming these measures are taken and the proposing state meets its due diligence obligation, then if harm nonetheless occurs there is an obligation to consult with the affected state to eliminate or mitigate harm, with due regard to equitable and reasonable use.

What if a State fails to meet its due diligence obligation?

Its responsibility is definitely engaged

EQUITABLE AND REASONABLE USE

- According to article 5 UNWC
 1. Watercourse States shall in their respective territories *utilize* an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal and sustainable utilization thereof and benefits therefrom, taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse

- Optimal utilisation is defined by the ILC in the following terms:
 - 'attaining maximum possible benefits for all watercourse States and achieving the greatest possible satisfaction for all their needs, while minimising the detriment to, and unmet needs, of each.'
- According to the ILC “The burden of proof for establishing that a particular use is equitable and reasonable lies with the State whose use of the watercourse is causing significant harm”.
- Relationship between equitable and reasonable use and no significant harm

FACTORS DETERMINING EQUITABLE AND REASONABLE USE

- a) Geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;
- b) The social and economic needs of the watercourse States concerned;
- c) The population dependent on the watercourse in each watercourse State;
- d) The effects of the use or uses of the water resources in one watercourse State on other watercourse States;
- e) Existing and potential uses of the watercourse;
- f) Conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;
- g) The availability of alternatives, of comparable value, to a particular planned or existing use.

PROCEDURAL OBLIGATIONS

- Articles 11-19 UNWC provide that watercourse States are under a duty to consult, exchange information and notify other States before implementing a planned measure.
- “The task before . . . [the Parties] will be to conduct their negotiations on the basis that each must in good faith pay reasonable regard to the legal rights of the other [to] . . . the facts of the particular situation, and having regard to the interests of other States [with] . . . Established . . . rights”

- What are good faith negotiations and consultations?
- upstream State is under the obligation ‘to take into consideration the **various interests** involved, to seek to give them every satisfaction compatible with the pursuit of its own interests, and to show that in this regard it is genuinely concerned to reconcile the interests of the other riparian State with its own’.

CONCLUSIONS

1. International law does not envision the unilateral development of a watercourse.
2. Every state has the right to equitable and reasonable use of a transboundary watercourse passing through its territory, with the implication that Ethiopia definitely has a right to harness the waters of the Nile to produce hydropower.
3. In exercising its equitable use, states should seek to maximise benefits for all watercourse States, while minimising the detriment to each.
4. Where there is a conflict of uses “it may be that all reasonable and beneficial uses cannot be realized to their full extent” (ILC).

It follows that:

- Where there are several different designs, techniques or modes of operation for a planned use, there is an obligation to implement the one that is least harmful, even if this does not correspond to the 'optimal' or most cost-effective design (Indus Water Kishenganga Arbitration).
- By analogy, considerations related to optimising energy productivity, minimising cost, minimising construction time to start energy production earlier are not justifications for causing harm.
- Can a new use that **intentionally** deprives another State of an existing use, when **other alternatives** of comparable value are available, be considered equitable and reasonable??

5. Every state should take all appropriate measures to prevent *significant harm*. If it does not take appropriate measures at all, or if it takes some but not other appropriate measures, then its responsibility is engaged.

WHERE TO GO FROM HERE?

THANK YOU!

- For questions, please contact me on:
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