International Law developments on the Sharing of Blue Nile Waters: a fairness perspective

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Abstract:

The principle of fairness operates alongside lofty principles of international law, such as equity and justice. However, these concepts often face criticism for being too vague to shed any meaningful light on the practical interpretation and implementation international law within specific fields. By analysing the cooperation between Egypt, Ethiopia and Sudan on the Blue Nile, this paper seeks to examine such criticism. The chapter suggests that the concept of fairness does have value as a framework for analysing both commitment and compliance in international law; and that exploring specific contexts, such as legal developments related to the Grand Ethiopian Renaissance Dam and relevant (legal) instruments, helps give it an objective and normative meaning. The chapter will also show how the realisation and compliance with principles of (international) law such as the fairness principle require an input from other disciples-- in this chapter's case the input from economics and hydrology have been used to try to objectively determine distributive justice as one crucial element of fairness.

Keywords: Fairness; Law of International Watercourses; Grand Ethiopian Renaissance Dam (GERD), Nile

Introduction

The principle of fairness operates alongside lofty principles of international law, such as equity and justice. However, these concepts often face criticism for being too vague to shed any meaningful light on the practical interpretation and implementation international law within specific fields. By analysing the cooperation between Egypt, Ethiopia and Sudan on the Blue Nile, this paper seeks to examine such criticism. The chapter suggests that the concept of fairness does have value as a framework for analysing both commitment and compliance in international law; and that exploring specific contexts, such as legal developments related to the Grand Ethiopian Renaissance Dam and relevant (legal) instruments, helps give it an objective and normative meaning. The chapter will also show how the realisation and compliance with principles of (international) law such as the fairness principle require an input from other disciples-- in this chapter's case the input from economics and

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hydrology have been used to try to objectively determine distributive justice as one crucial element of fairness.

Fairness, a well established concept in law, is often closely associated with the principles of equity and justice. Rawls maintains that, 'the fundamental idea in the concept of justice is fairness' (1958, p.164); Garner defines justice as, 'the fair and proper administration of the law' (1999, p.881), while describing equity as, 'fairness; impartiality; evenhanded dealing' (ibid, p.579). Chapman draws the distinction between 'fairness being concerned with process, e.g. a fair trial, and justice relating to the outcome, e.g. a just decision' (Chapman 1963, p.154). Judge Owada suggests that: 'considerations of fairness in the administration of justice requires equitable treatment of the positions of both sides involved in the subject-matter in terms of the assessment both of facts and of law involved' (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004, p.260).

As these opinions demonstrate, the distinction between fairness, equity and justice is not always clear. Despite the difficulties in defining fairness and demarcating its meaning from equity and justice, it has proven to be a popular tool by which to analyse various legal fields, including climate change (Soltau 2009), environmental protection (Louka, 2006; Franck, 1995, pp. 380-412; c.f. Hsu, 2004), sustainable development (Brown-Weiss, 1990), trade and investment (Frank, 1995, pp. 413-473), international arbitration (Desierto 2015; Saverian *et. al.* 2015), and corporate law (Mitchell 1993). Perhaps one of the most attractive facets of the concept of fairness is its perceived correlation to compliance. Franck, for instance, maintains that the degree to which a particular rule or principle is perceived to be fair will influence its 'compliance pull' (Franck, 1988, p. 706). A study of fairness, therefore transcends an examination of what is, or what is not, international law; and rather wrestles with the arguably more pertinent question of why international legal obligations are obeyed.

Given the rich literature on fairness, both in general theory and within specific legal fields, it is somewhat surprising that the concept has received little attention within the legal field of international watercourses. This paper seeks to rectify this shortcoming by suggesting where considerations of fairness may add value to the study the law of international watercourses; and also, where insights from the law of international watercourses, and cooperation over the Nile River Basin in particular, may inform more general ideas of fairness.

The paper is divided into three main sections. The first section outlines the linkages between the principle of fairness and the law of international watercourses. While numerous interpretations of the concept of fairness have been offered by scholars, this chapter concentrates on the seminal work of Thomas Franck. The second section analyses the specific case of the Nile River basin. Through a 'fairness lens', the section explores how the concept of fairness can help explain the strengths and weaknesses of the legal regime relating to the Nile. The section focuses primarily on the key legal instruments that have shaped, or reflected, cooperation on the Nile in general, and the Eastern Nile Basin in particular. The intention is to tease out examples of where considerations of fairness may have relevance to the creation, interpretation and application of international law relating to the Nile River Basin. The final section draws upon the two previous sections in order to offer insights for policy-makers and academics with an interest in the development of the Nile legal framework; and those more generally interested in the relationship between fairness and international law.

Applying fairness to the law of international watercourses

Building on Franck's concept of fairness (1995), which he examines within the context of international law and institutions, offers a framework by which to study fairness within the context of the law of international watercourses.

Franck suggests that, 'the fairness of international law, as of any other legal system, will be judged, first by the degree to which the rules satisfy the participants' expectations of justifiable distribution

of costs and benefits, and secondly by the extent to which the rules are made and applied in accordance with what the participants perceive as 'right process' (1995, p. 7). In offering this interpretation, Franck envisages that fairness is comprised of two key elements: legitimacy and distributive justice (1995, p. 7-9).

Franck recognises the importance of legitimacy in the effective implementation of legal rules by suggesting that, 'in a community organised around rules, compliance is secured – to whatever degree it *is* – at least in part by a perception of a rule as legitimate by those to whom it is addressed' (Franck 1988, p.706). What constitutes a legitimate rule, according to Franck, is one that '*derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with right process*' (emphasis in the original) (Franck 1988, p.706). Legitimacy, according to Franck, can also be described as 'procedural fairness' (Franck 1995, p. 7), which demands that proper processes are in place to create, interpret and apply international law (Scobbie 2002, p. 910). This begs the question what might be deemed 'right process', or 'proper processes'? Franck provides some suggestions, by stating that, 'decisions about distributive and other entitlements will be made by those duly authorised, in accordance with procedures which protect against corrupt, arbitrary, or idiosyncratic decision-making or decision-executing' (1995, p. 7). While Franck therefore provides some pointers, what might constitute 'right process' within any given context requires further consideration.

The law relating to international watercourses recognises 'right process' in various procedural obligations concerning the creation, interpretation and application of international law (McIntyre 2010; Ziganshina, 2015). These procedural requirements are founded upon a general requirement that, '[w]atercourse States shall cooperate on the basis of sovereignty equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilisation and adequate protection of an international watercourse' (UNWC 1997; see also Leb 2013). In adding texture to this general duty to cooperate, the *Convention on the Law of the Non-navigational Uses of International Watercourses* ('UN Watercourses Convention' or 'UNWC'), goes on to set out detailed procedural requirements by which States must regularly exchange data and information (UNWC, 1997, Art. 9), notify and consult on any planned measures, including the sharing of any environmental impact assessment (UNWC, 1997, Arts. 11-19), and settle disputes in a peaceful manner (UNWC, 1997, Art. 33). The UN Watercourses Convention also infers the need for process when it requires watercourse States to, '*participate* in the use, development and protection of an international watercourse in an equitable and reasonable manner' (emphasis added) (UNWC, 1995, Art. 5(2)); 'take *appropriate measures* to prevent the causing of significant harm to other watercourse States' (emphasis added) (Art. 7(1)); cooperate on the prevention, reduction and control of pollution of an international watercourse (Art. 21(3)); prevent the introduction of alien or new species (Art. 22), protect and preserve the marine environment (Art. 23), manage and regulate an international watercourse (Arts. 24 & 25); maintain and protect installations (Art. 26); prevent and mitigate harmful conditions (Art. 27); and manage emergency situations (Art. 28). However, while the importance of process is implicit within these provisions, the detail is largely lacking. This therefore begs the question, whether a stronger focus and clarity on procedural fairness would help strengthen the implementation of the UN Watercourses Convention. The analysis of the Nile River Basin below will seek to explore where such clarity might be provided.

A further area where greater clarity might be gained relates to the law-making process. The requirement to cooperate in *good faith* under Article 8(1) of the UN Watercourses Convention, suggests that there are certain obligations upon States during the negotiation of legal arrangements (Leb 2013, pp. 31-32). This requirement is supplemented by, Articles 3 and 4 of the UN Watercourses Convention, which requires that States to negotiate watercourse agreement in good faith, or adjustments thereof (UNWC, 1997). However, despite good faith being an important benchmark to apply during negotiations, it is not defined in the UN Watercourses Convention. Recourse must therefore be made to general guidance, such as that offered by the International Court of Justice (ICJ) when it states that good faith negotiations between parties must be, 'meaningful, which will not be the case when either of them insists upon its own position without contemplating

modifications to it' (*North Sea Continental Shelf Cases*, 1969, p. 47; see also O'Connor, 1991; D'Amao, 1992; Liguori, 2009). Similarly, the Arbitral Tribunal in the *Lake Lanoux Arbitration* suggested that the obligation to negotiate in good faith would be breached in cases, 'of an unjustified breaking off of the discussions, abnormal delay, disregard of the agreed procedures, systematic refusals to take into consideration adverse proposals or interests….' (*Lake Lanoux Arbitration*, 1957, p. 23). While this general guidance is no doubt useful in guiding State negotiations, more could be done to expand on these general explanations of good faith, and provide specific guidance for States and other actors involved in the negotiation of treaty arrangements relating to international watercourses.

The second element of fairness, as set out by Franck, is distributive justice. Franck (1995) associates distributive justice with substantive issues concerning the allocation of resources. He suggests that:

> … when everyone can expect to have a share, but no one can expect to have all that is desired, the critical moment for considerations of fairness is met. It is only then that modes of allocation do not contend in the arena of a zero-sum game, one that pits the survival of each against the survival of all' (Franck 1995, p. 10).

Franck's observation shares familiar ground with the International Law Commission's (ILC) explanation of how equitable utilisation should be applied. The ILC commentary to the 1994 ILC *Draft Articles on the Law of the Non-navigational Uses of International Watercourses* (1994 Draft Articles), suggest that,

> …where the quantity or quality of the water is such that all the reasonable and beneficial uses of all watercourse States cannot be fully realised, a "conflict of uses" results. In such a case, international practice recognises that some adjustments and accommodations are required in order to preserve each watercourse State's equality of right. These adjustments or accommodations are to be arrived at on the basis of equity, and can best be achieved on the basis of specific watercourse agreement (ILC 1994, p. 98).

From this explanation, it would appear that Franck's notion of distributive justice aligns well with the principle of equity in international law. Like the ILC in its commentary to the 1994 Draft Articles, Franck does not use equity primarily in its broadest sense of filling gaps in the law, or as a general principle of law (Akehurst, 1976, pp.801-802; McIntyre, 2013, pp.113-117). A broad interpretation of equity may face criticism. Jennings for instance, describes applying equity to fill gaps in the law as tantamount to 'subjective appreciation' of facts and laws in dealing with legal claims and counter-claims (Jennings, 1986, p. 31). Different from this, Franck sees distributive justice, like equitable utilisation, as a substantive rule of apportionment (McIntyre, 2013, pp. 120-124), which arguably has more traction. Franck (1995), suggests that, such a substantive rule rejects making absolute or non-negotiable claims, which as noted earlier in the comments by the ICJ, would be at variance with the principle of good faith.

The principle of equitable utilisation, as reflected in the UN Watercourses Convention (UNWC, 1997, Art. 5) is a well established principle of customary international law. In addition, there has been a considerable amount of scholarly work dedicated to examining equity within the context of international watercourses and, more generally to the allocation of shared resources (e.g. Fuentes, 1996; Kaya, 2003; Lipper, 1967; McIntyre, 2013; McCaffrey, 2007, pp. 384-405). What, then, is the benefit of looking at equity through a fairness lens? The notion of distributive justice, as set out by Franck, adds three important aspects.

Firstly, by placing equitable utilisation within a fairness framework, Franck recognises the importance of distributive justice to compliance. Franck maintains that, 'the perception that a rule or system is distributively fair, like the perception of its legitimacy, … encourages voluntary compliance' (Franck 1995, p. 8).

Secondly, in Franck's articulation of distributive justice there is an implication that allocation must not only be between States, but amongst a community, 'based … on a common, conscious system of reciprocity between its constituents' (Franck 1995, p. 10). While Franck's own application of legitimacy has been criticised as being overly positivist and focused on States (Brunée and Toope, 2002, pp. 52-3), a study of international watercourses provides an appropriate space by which to move beyond States and consider all constituents within a particular basin. Taking this further, it could be argued that distributive justice must account for multiple scales in allocating the uses and benefits that derive from international watercourses (Patrick, 2014). However, the law of international watercourses has traditionally been skewed towards State-State relations. Article 5 of the UN Watercourses Convention on equitable utilisation, for instance, provides that, 'Watercourse *States* shall in their respective territories utilise an international watercourse in an equitable and reasonable manner' (emphasis added) (UNWC 1997).

In relation to equitable utilisation, the only reference to non-State actors is framed in terms of factors that States must account for in their determination of what is equitable and reasonable, such as the population dependent on a watercourse and their social and economic needs (Art. 6) or vital human needs (Art. 10). As a counter to this State-State bias, human rights law is playing an increasingly influential role in relation to issues of access to water and adequate sanitation provision (UN GA Res, 2010; UN CESCR, 2002; Salman, 2004). To date, much of the focus of the right to water has been at a domestic level. More therefore needs to be done to understand the implications of the human right to water within the world's transboundary rivers, lakes and aquifers – especially given that 40% of the world's population rely on these shared waters (Archer, 2012; Bulto, 2013; Leb 2012; McCaffrey, 1992). A community-centric approach to distributive justice, which encompasses both State and non-State actors, offers potential to draw together these traditional disparate areas of the law of international watercourses. It ought to be noted that this line of argument is compatible with Rawls's law of peoples (1971) which expanded the concept of justice as fairness to an international arena.

Thirdly, the importance of recognising the interdependency between legitimacy and distributive justice is central to Franck's concept of fairness. In this regard, Frank comments that,

> [l]egitimacy and distributive justice are two aspects of the concept of fairness. While one has a primary procedural, and the other a primarily moral, perspective, they combine to answer the law-maker's version of the question posed by Socrates and Jeremy Bentham: 'What shall we do about sharing and conserving in order to maximise human well-being?' (Franck, 1995, p. 8-9).

However, Franck cautions that the two elements might not necessarily pull in the same direction given that distributive justice 'favours change', and legitimacy favours 'stability and order' (Franck, 1995, 7). Franck suggests that, [t]he tension between stability and change, if not managed, can disorder the system. Fairness is the rubric under which this tension is discursively managed' (Franck, 1995, p. 7).

The correlation between distributive justice and legitimacy resonates well with the law relating to international watercourses. This important correlation was recognised by the International Court of Justice in the *Case Concerning Pulp Mills on the River* Uruguay through the discussion of procedural norms (including notification, environmental impact assessment and consultation), and the substantive requirements of a bilateral treaty between Argentina and Uruguay (2010, pp. 37-9). However, the need to link distributive justice to legitimacy is often missing in the design of treaties relating to international watercourses (see for example, Garane & Abdul-Kareem, 2013; Ziganshina 2013), even though the determination of equitable utilisation is heavily reliant on the 'right processes' being in place to ascertain and reconcile competing needs and interests within a particular watercourse.

Through the introduction of the concept of equitable participation within the UN Watercourses Convention, the importance of linking substantive norms to process was not lost on the ILC (ILC 1994, p. 97). In their commentary to the 1994 Draft Articles, the ILC maintained that, the affirmative nature of the principle of equity encompassed not only, 'the right to utilise the watercourse', but also the duty to cooperate actively with other watercourse States 'in the protection and development' of the watercourse (ILC 1994, p. 97). This articulation of equitable *participation*, which found expression in Article 6 of the UN Watercourses Convention, demonstrates a clear attempt by the ILC to link the substantive principle of equitable utilisation, with the procedural requirements inherent in the duty to cooperate (as discussed above).

The linkages between substantive norms and process are also evident within the duty to take all appropriate measures to prevent significant harm (UNWC, 1997, Art. 7). This so-called 'due diligence' obligation, asks whether 'appropriate measures' were put in place to prevent that harm (Wouters, 2013, p. 236). Such measures might include procedural requirements to notify and consult (UNWC, 1997, Arts. 11-19), as well as those related to pollution, e.g. joint water quality objectives and criteria, techniques and practices to address pollution from point and non-point sources, and the creation of lists of substances to be banned, limited, investigated and/or monitored (UNWC, Art. 21(3)). The ICJ has also suggested that, 'due diligence… would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works' (*Case Concerning Pulp Mills on the River* Uruguay, 2010, p. 83). Further guidance can be sought from the *Convention on Protection and Use of Transboundary Watercourses and International Lakes* (UNECE WC, 1992), which sets out detailed legal, financial and technical measures that States should take to prevent, control or reduce 'transboundary impact'.

This section has demonstrated that an analysis of fairness within the context of international watercourses has its merits. The value in combining an analysis of process, in broad terms, with issues of substance, is a clear feature in the study of fairness, and critical to an understanding of why laws generate 'compliance pull' (Franck, 1988, p. 706). Through the above analysis of the law of international watercourses the importance of linking substantive considerations of distributive justice to procedural considerations is evident. However, it has also been shown that there are some notable areas where the linkages could be strengthened. Three key areas are noteworthy. Firstly, laws relating to international watercourses, as shown above, are rule-based, whereas Franck regards distributive justice and legitimacy as a moral and legal concepts respectively. This in turn means that a study of the law of international watercourses through a fairness lens can focus greater attention on the factors that influence compliance. Secondly, the law of international watercourses is still primarily concerned with State-State relations and therefore fails to pick up on the broader community-oriented and multi-level aspects of distributive justice. Thirdly, while the importance of 'right process' with respect to law creation are captured in general principles such as good faith, more detail is required in order to guide States and other actors when they negotiate water-specific treaty arrangements. These key areas will be considered further in the following section, by exploring fairness in relation to legal developments on the Blue Nile.

Fairness and the Blue Nile

Early Nile Treaties and fairness

Several treaties relating to the Nile waters were concluded from the end of the 19th Century to the 1950s. One of the most significant of those treaties, in terms of fairness considerations, was the 1902 Treaty between Great Britain (on behalf of Sudan) and Ethiopia (Nile Treaty 1902). While the treaty primarily focused on establishing the border between Ethiopia and Sudan, it also required Ethiopia, '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 except in agreement with His Britannic Majesty's Government and the Government of Soudan' (Art. III). Article III of the 1902 Nile Treaty is amongst the key colonial treaty provisions which were, and still are, invoked to oppose the

construction of any project on major Nile tributaries stemming from Ethiopia (Shetewy 2013, pp. 34-35).

Then in 1929 an agreement was concluded between the United Kingdom (again on behalf of Sudan) and Egypt relating to the, 'Use of the Waters of the River Nile for Irrigation Purposes' (Nile Treaty, 1929). The text of the 1929 Nile Treaty stated that:

> Except with the previous agreement of the Egyptian Government, no irrigation of power works or measures are to be constructed or taken on the River Nile and its branches, or on the lakes for which it flows, so far as all these are in the Sudan or in countries under British administration, which would, in such a manner as to entail any prejudice to the interests of Egypt, either reduce the quantity of water arriving in Egypt, or modify the date of its arrival, or lower its level (Art. 4(ii)).

30 years later, and despite Ethiopia serving notice in 1957 that it would unilaterally develop the Nile water resources within its territory, Egypt entered into a treaty with by then independent Sudan that was boldly titled 'the Full Utilisation of the Nile Waters' (Nile Treaty, 1959). The 1959 allocated the entire available average annual flow of the Nile between Sudan (18.5 billion cubic meters), and Egypt (55.5 billion cubic meters) (see McCaffrey, p. 269; Degefu, 2003, p.99).

The conclusions of these bilateral arrangements raise a number of issues relating to legitimacy and distributive justice. A key question concerns whether the States can rely upon, or be obliged to comply with, a treaty that was entered into by a former colonial power. While state succession to treaties is a contested area of international law, the *Vienna Convention on the Succession of States in respect of Treaties* stipulates that, '[a] newly independent State is not 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, 1978, Art. 16). This provision supports a wider doctrine of 'clean state' or 'non-devolution' that suggests that all (bilateral) treaties, especially those which lack universal appeal, are not assumed to be succeeded by independent or newly created states (Maluwa, 1999, p 69; Leb, & Tignino, 2013, 425).

One suggested exception to this 'clean state' rule relates to treaties that establish boundaries (Shaw, 1996, p. 97, 104). Article III of the 1902 Treaty was part of a boundary treaty. However, if one looks into the history of the provision, it is clear that, in order to protect Britain's interests in the Nile, it was separately negotiated for about three years before being inserted into the 1902 Treaty at the last minute (Woldestadik, 2013, p. 100; Garretson, 1967, p. 277). Additionally, Article III restricts activities concerning an international watercourse, rather than stipulating that particular piece of land, lake or territorial waters within a state's sovereign territory (Shaw, 1996, p. 77). It would therefore seem to fall outside the boundaries exception.

While the 'clean state' doctrine may therefore be relied upon to question the legitimacy of the 1902 and 1929 Treaties with respect to Sudan, Ethiopia was an independent State when it entered into the 1902 Treaty (Aal, 2013, p. 27). This might preclude Ethiopia setting forth arguments based on succession, although other issues relating to fairness have been raised. The unevenness of the deal between a colonial power and a country under exigent threat from different colonial powers may raise questions of 'right process' (Degefu, 2003, p. 99). The Nile colonial-era treaties, including the 1902 Treaty, were instigated by the self-interest of colonial powers rather than the shared interest of the community of Nile riparian states. For this reason, and despite the claim of pursuing 'a civilising mission', such colonial treaties, have been 'discontinued in international law' as substantively flawed and discriminatory (Boyle & Chinkin, 2007, pp. 28-9). Moreover, the circumstances of concluding the 1902 Treaty, including its ambiguity, subsequent rejection and non-ratification by Ethiopia are significant factors to take into account when questioning its procedural fairness.

The early Nile Treaties might also be questioned from the standpoint of distributive justice. As noted in the previous section, distributive justice is founded upon the notion of equity, which in the context of international watercourses requires waters to be utilised in an equitable and reasonable manner (UNWC, 1997, Art. 5). Both the 1929 and 1959 Agreements may be questioned on the basis of distributive justice given that they effectively aim to allocate the waters of the Nile between the two most downstream States, without seeking to account for the 'community' of relevant factors and circumstances, including, the needs and interests of upstream States. The exclusion of upstream States during their negotiation might also raise a further question of procedural fairness; and would certainly be at variance with Article 4 of the UN Watercourses Convention and the entitlement of watercourse States to participate in the negotiation of an agreement that applies to the entire international watercourse (UNWC, 1997).

Assessing the fairness of such old Nile treaties in light of the UN Watercourses Convention may be questioned on the basis that none of Nile Basin States are parties to that Convention. However, there appears consensus that the basic substantive and procedural duties contained in the Watercourses Convention reflect customary international law in the field and are thus applicable to all States (McCaffrey, 2007). Additionally, the legitimacy of those provisions, and their 'compliance pull' may be secured by a more explicit recognition of key rules and principles by Nile Basin States, and arguably other actors in the basin. One explicit recognition would be if the Nile Basin States became party to the UN Watercourse Convention. Short of that, it could be argued, as will be discussed below, that some of the key provisions of the UN Watercourses Convention have been endorsed within cooperative instruments relating to the basin. Finally, the 1902 Nile Treaty also illustrates the correlation between distributive justice (substantive) and legitimacy (procedure). While the right to veto plans in Article III of the Treaty is a procedural requirement it is difficult not to think that it might hinder achieving an equitable solution. Such a right runs the risk of jeopardising an exercise wherein all relevant factors and circumstances are taken into account, and weighed on the basis of the whole, in the determination of what might constitute an equitable use of an international watercourse.

Post-1959 Developments in the Nile and fairness

While the earlier Nile treaties proved controversial amongst the Nile Basin states, attempts were made to find a more cooperative path in the later part of the 20th Century (Brunée and Toope 2010, pp. 108-110). That effort resulted in the adoption of the *Framework for General Co-operation between the Arab Republic of Egypt and Ethiopia* (1993). The 1993 Framework recognised the 'mutual interest' in the Nile (preamble), together with their commitment to the principle of international law, including 'good neighbourliness', 'peaceful settlement of disputes', and 'non-interference in the internal affairs of states' (Preamble and Art. 1, Framework, 1993). In terms of distributive justice, the 1993 Framework is short on detail. There is no reference to equity. More generally, Article 4 obliges the States to cooperate, 'on the basis of rules and principle of international law' (Framework, 1993), and Article 5, stipulates that, 'each party shall refrain from engaging in any activity related to the Nile Waters that may cause appreciable harm to the interests of the other Party' (Framework, 1993). Such an approach departs from the UN Watercourses Convention, which recognises that some harm may be tolerated if deemed equitable (Art. 7(2), UNWC, 1997). A question can therefore be raised over the interpretation of the 1993 Framework Instrument, and the extent to which distributive justice finds expression therein. Subsequent, legal developments, which will be discussed below, would suggest a need to interpret the 1993 Framework in light of the principle of equitable utilisation.

The legitimacy of the 1993 Framework is also cause for debate (Abdo, 2004, p. 51; Shetewy, 2013, p.35). Under Article 2 (1) (a) of the Vienna Convention on the Law of the Treaties, a 'treaty', is described as 'an international agreement concluded between States in written form and governed by international law….' (Vienna Convention, 1969). Pursuant to this definition, the binding nature of agreements depends on whether it can be ascertained that the parties intended to be legally bound by the instrument (Crawford, 2012, pp 372-3). In relation to its content, the 1993 Framework offers a

mixed set of messages. While some provisions are couched in soft terms such as, 'the parties reaffirm their commitment' (Art. 1), 'the parties are committed to' (Art. 2), 'the parties recognise' (Art. 3), and 'the parties shall endeavour' (Art. 8); other provisions suggest stronger commitment, e.g., 'the two parties agree' (Art. 4), 'the two parties shall refrain' (Art. 5), 'the parties will create appropriate mechanisms' (Art. 7). At least some of the provisions of the Framework may therefore be said to be normative in character.

Examining the particular circumstances surrounding the Framework confounds the instruments uncertain status. Egypt registered the 1993 Framework within the UN. Such a practice is consistent with the requirement under Article 102(1) of the Charter of the United Nations (1945), which provides that, 'every treaty and every international agreement entered into by any Member of the United Nations…shall *as soon as possible* be registered with the Secretariat and published by it' (emphasis added). Egypt's action would appear to demonstrate that it believed that the 1993 Framework was a legally binding treaty. The fact that Egypt relied upon the Framework, as well as the 1902 Nile Treaty, in formulating its position regarding the Grand Ethiopian Renaissance Dam (GERD) reinforces this position (Egyptian Ministry of Foreign Affairs, undated). Conversely, the Treaty was not registered until 17 years after its signing, which would hardly comply with the 'as soon as possible' requirement under the UN Charter. The legal significance of registration is also unclear. Unlike its predecessor, the League of Nations Covenant (Art. 18), non-registration of an agreement does not in itself decide whether an agreement is legally binding or not (Charter of the United Nations, 1945, Art 102(2)). The ICJ and other UN organs do not therefore consider registration of an instrument when dealing with cases involving agreements concluded between states (Martens, 2012, p. 2109). Moreover, the framework has no procedures for its ratification, which, while not conclusive, offers an important sign of the legally binding nature of an agreement.

Regardless of whether or not the 1993 Framework is legally binding, the ambiguity surrounding its content and legal status raises serious questions over its legitimacy. Such questions are no doubt responsible for a lack of detailed follow-up by the States in implementing and ensuring their compliance with the requirements of the instrument. This record would therefore support Franck's argument that where questions of distributive justice and legitimacy are raised, the compliance pull of an instrument is likely to be low.

Following the 1993 Framework, the next major legal development related to the Nile was the establishment of the Nile Basin Initiative (NBI) in 1999 and the adoption of the Nile Cooperative Framework Agreement (CFA) (CFA, 2010; Salman, 2013, pp. 19-20). The NBI was established by all Nile riparian States - except Eritrea, which had observer status - and was supported by the World Bank, UN Development Programme and other donors. South Sudan joined the NBI on 5 July 2012. This intergovernmental organisation set out a shared vision, 'to achieve sustainable socio-economic development through equitable utilisation of, and benefit from, the common Nile Basin water resources' (NBI, 2016). Equity was therefore front and centre in the aspirations of the NBI. Cooperation between States through the NBI has led to the development of joint investment projects at sub-basin levels, coordinated by the Nile Equatorial Lakes Subsidiary Action Program Coordination Unit (NELSAP-CU), and the Eastern Nile Technical Regional Office (ENTRO) (Brunnée and Toope 2002). The NBI was designed to be a transitional arrangement towards a more comprehensive basin wide legal and institutional framework (Salman, 2013, p. 19). Adoption of the CFA was considered to be a critical milestone in that transition (Salman, 2013, p. 19).

The text of the CFA was developed over more than a decade. The process began in 1997 with a panel of experts helping prepare text and background documents (NBI, 2016). Between 2000 and 2001, the text was converted into a draft Agreement by a transitional committee (NBI, 2016). Basin states then formed a negotiations committee from 2003 to 2005 in order to negotiate a draft agreement (NBI, 2016). This led to a draft text, which was submitted to the Council of Ministers of Water Affairs of the Nile Basin States (Nile-COM) in March 2006 (NBI, 2016). By June 2007, Nile-COM had completed its negotiations of the CFA, with all but one reservation - Article 14b related to Water Security (NBI, 2016). Attempts were made at various governmental levels, including with Heads of

State, to address the reservation, but to no avail (Mekonnen, 2010, p. 428). On 13th April, 2000, seven countries agreed to open the CFA for signature. That decision was opposed by Egypt and Sudan (NBI, 2016). On 14th May, 2010 four countries signed the CFA, with Kenya (19 May, 2010) and Burundi (28 February 2011) following (NBI, 2016). To date Ethiopia (13 June, 2013), Rwanda (28 August, 2013), and Tanzania (26 March, 2015) have ratified the CFA (NBI, 2016).

In terms of content, the CFA reflects a healthy balance between substantive norms and process. Through its incorporation of the principle of equitable and reasonable utilisation (Article 4), the duty to take all appropriate measures to prevent significant harm (Article 5), and the protection and conservation of the Nile River Basin and its ecosystems (Article 6), the substantive duties of the CFA closely mirror the UN Watercourses Convention (CFA, 2010). The balance between equitable and reasonable utilisation and the duty to take all appropriate measures to prevent significant harm, found in the UN Watercourses Convention, is also found in the CFA. One slight variation between the CFA and the UN Watercourses Convention concerns the factors and circumstances that should be taken into account when determining what is equitable and reasonable. Article 4 of the CFA offers two additional factors that should be considered, namely '[t]he contribution of each Basin State to the waters of the Nile River system', and '[t]he extent and proportion of the drainage area in the territory of each Basin State' (CFA, 2010). However, the difference in the articulation of the relevant factors and circumstances in the two instruments is negligible given that both lists do not profess to be exhaustive.

Again, drawing on the UN Watercourses Convention, the CFA emphasises the importance of procedure for the implementation of substantive norms. Key procedural requirements contained in the CFA include the regular exchange of data and information (Art. 7), including in relation to planned measures (Article 8), environmental impact assessment and audits (Art. 9), the establishment of the Nile Basin Commission (Articles 15-33), and the peaceful settlement of disputes (Art. 33) (CFA, 2010). Notable from the standpoint of procedural fairness, and a requirement that is not explicitly contained in the UN Watercourses Convention, is the commitment that Nile Basin States shall, 'allow all those within a State who will or may be affected by the project in that State to participate in an appropriate way in the planning and implementation process' (CFA, 2010, Art. 10). While it could be argued that this is an explicit statement of what is implied in the due diligence requirement to *take all appropriate measures* to prevent significant harm (Art. 5, CFA, 2010 and Art 7, UNWC, 1997); its inclusion strengthens the importance assigned to the role of non-State actors within the implementation of cooperative arrangements.

Most of the text of the CFA might therefore be seen as consistent with the concept of fairness, at least in as much as the UN Watercourses Convention is. However, broader process-related issues and disagreements over Article 14 on Water Security raise questions over the legitimacy of the instrument. A major bone of contention throughout the negotiation of the CFA relates to the long-standing difference of opinion between upstream and downstream States on the Nile concerning existing uses of and rights to the Nile Waters (Mekonnen, 2010; Salman, 2013, pp.21-22). Egypt and Sudan proposed that Article 14(b) should read: 'Nile Basin States … agree, in a spirit of cooperation … not to adversely affect the water security *and current uses and rights* of any other Nile Basin State' (emphasis added), (Article 14b and Annexe, CFA). Burundi, the Democratic Republic of Congo, Ethiopia, Kenya, Rwanda, Tanzania and Uganda proposed slightly different wording that omitted the reference to current uses and rights (Article 14b and Annexe, CFA).

From a fairness standpoint, the reference to current uses in the CFA might be seen as at variance with distributive justice and the notion of equity. Franck recognises the importance of flexibility within the application of distributive justice when he cautions against the use of, 'a simple rule in circumstances requiring a more calibrated response' (Franck, 1990, p. 77). Such a need for flexibility, in order to take account of the range of interests within a particular watercourse, as well as changes over time, is reflected in Articles 10 of the UN Watercourses Convention, which reads: 'no use of an international watercourse enjoys inherent priority over other uses' (UNWC, 1997). However, the trade-off between flexibility and 'compliance pull' is not lost on Franck. He stresses

the importance of having effective mechanisms, or processes, in place so that any, 'ambiguity can be resolved case by case' (Franck, 1988, p.724). A major challenge for Nile Basin may therefore be to convince all States in the legitimacy of transboundary laws and institutions that can secure equitable outcomes in perpetuity without laying down rigid allocations of the waters of the Nile.

A major initial step in meeting this challenge will be to address the legitimacy issues surrounding the CFA. Egypt and Sudan did not approve the final text, and have not subsequently signed nor ratified the instrument (NBI, 2016). This is a significant bar on the emergence of basin-wide cooperation (McKenzie, 2012, p. 571), which has led some to consider the CFA as untenable and also sparked a call to negotiate a new legal regime for the Nile (Kimenyi & Mbaku, 2015, pp. 83-89); others are calling for Sudan and Egypt to join in by asking the question-- if the two endorsed the 2015 Declaration of Principles on the Ethiopian Renaissance Dam why not the CFA? (Salman, 2017a). Irrespective of how this discussion will unfold, the process of adopting the CFA clearly demonstrates the importance of focusing on 'right process' in the negotiation and adoption of legal instruments. The adoption of the CFA without the consent of Egypt and Sudan can be seen as a major barrier to promoting the legitimacy of the CFA.

The Grand Ethiopian Renaissance Dam (GERD) and fairness

While debates over the legal relevance and the fairness of the CFA continue, 'facts on the ground', in the shape of the GERD have also shaped cooperative arrangements within the basin. The GERD is under construction on the Blue Nile, approximately 20 kilometres from the Sudanese border in Ethiopia. Once complete the project will be 145 m high, with an installed capacity of more than 6,000 megawatts. The energy produced by the project is intended for domestic consumption and export to other Nile riparian countries (Salman, 2017b). While Ethiopia considers the dam as a key for its national development efforts, Egypt is concerned with its potential impact on its economy and its existing uses of the waters of the Nile (Tawfik, 2017).

For this and other geo-political reasons (Cascao & Nicol, 2017) the dam was a source of tension between Egypt and Ethiopia before President Al-Sisi came to power in June 2014. After then, painstaking negotiations, including the establishment of an International Panel of Experts (made up of 6 members from each country and four external experts), resulted in the adoption of the 'Declaration of Principles between The Arab Republic of Egypt, the Federal Democratic Republic of Ethiopia and the Republic of the Sudan on the Grand Ethiopian Renaissance Dam Project' ('DoPs') during March 2015 (DoPs, 2015).

The DoPs is founded upon 'principles of cooperation', which include 'common understanding', mutual benefit', 'good faith', and 'principles of international law' (Art. I, DoPs, 2015). Relevant principles of international law referred to in the text, include the 'Principle of Sovereignty and Territorial Integrity', whereby the three States commit to, 'cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilisation and adequate protection of the River' (DoPs, 2015).

Substantive principles are also contained within the DoPs. Article III stipulates that the three countries shall, 'take all appropriate measures to prevent the causing of significant harm in utilising the Blue/Main Nile', and Article IV stipulates that they will 'utilise their shared water resources in their respective territories in an equitable and reasonable manner' (DoPs, 2015). Notably, Article III also recognises that,

> …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.

Article III, through the use of the term 'where nevertheless is caused', appears more in line with the UN Watercourses Convention and the CFA in suggesting that some level of harm may be tolerated, even if it is significant. This is substantiated by the suggestion that the mitigation of harm may be appropriate, without having to comply with a stronger requirement to eliminate such harm. However, unlike Article 5 of the CFA, and Article 7 of the UN Watercourses Convention, Article III of the DoPs falls short of explicitly linking significant harm to the principle of equity. This raises a question of how provisions addressing the same matter, should be dealt with. In this regard, the ILC has commented that, 'it is a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations' (ILC 2006). It might therefore be concluded that while not explicit, Article IV should be read in tandem with Article III, and in favour of the recognition under customary international law that the principle of equitable and reasonable utilisation provides the overarching framework for determining distributive justice. Such an approach is substantiated by the list of factors that should be taken into account when determining what is equitable and reasonable, which are taken verbatim from the CFA. These factors include both the *effects* of the use or uses of the water resources in each Basin State (emphasis added) (Article IV(d), DoPs, 2015).

A number of provisions of the DoPs then relate specifically to the GERD. In general terms it is recognised that, 'the Purpose of GERD is for power generation, to contribute to economic development, promotion of transboundary cooperation and regional integration through generation of sustainable and reliable clean energy supply' (Art. II). The adoption of this article reflects an endorsement by all three countries of the regional significance and acceptance of GERD. Article II is followed by requirements whereby the three countries agree, upon the basis of joint studies, to develop guidelines and rules on the first filling of GERD and its annual operation (Article V). The joint studies are to be facilitated through a Technical National Committee (TNC) of Egypt, Ethiopia and Sudan, 'to provide the necessary data and information in good faith and in a timely manner' (Art. VII). The three countries also agree, pursuant to Article V, to 'sustain cooperation and coordination on the annual operation of GERD with downstream reservoirs'. In addition, Ethiopia commit to, 'inform the downstream countries of any unforeseen or urgent circumstances requiring adjustments in the operation of GERD' (Art. V(c)).

Finally, the DoPs obligate the three countries, 'to 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' (Art. X). If, however, the parties are unable to settle their dispute through consultation or negotiation, 'they may jointly request for conciliation, meditation, or refer the matter for consideration of the Heads of State/ Heads of Government' (Art. X). While falling short of requiring arbitration or adjudication, this provision is in line with the more general requirement under international law that States should settle their disputes in a peaceful manner (Art. 33, Charter of the United Nations, 1945).

As with the 1993 Framework, the legal status of the DoPs is not clear. The absence of formal procedures by which the States can demonstrate their consent to be bound by the instrument, e.g. entry into force, ratification, and registration raises the uncertainty surrounding the instrument (Art. 24, Vienna Convention, 1969). The countries have not ratified the DoPs, nor have they formally denounced the early agreements (Aman, 2015). Moreover, the Egyptian Constitution is arguably at variance with the DoPs in committing the State to maintain, 'Egypt's historic rights' in the Nile River' (Art. 44, *Constitution of the Arab Republic of Egypt*, 2014).

Conversely, and as discussed above, ratification is not an essential criterion in determining whether or not an instrument is legally binding. Also, inconsistency with national laws does not preclude an international agreement being legally binding upon a state (see Art. 27, Vienna Convention, 1969). Additionally, a state does not need to officially denounce prior legal commitments in order to endorse subsequent legal commitment (Art 59 (1) (b), *Vienna Convention*, 1969). Such an abrogation of old Nile treaties based on the doctrine of *lex prior* can be justified and necessary for progressive development of the law (Klabbers, 2011, p.197). In terms of the text of the instrument, the DoPs

certainly appears to have some normative character. Many of its provisions are couched in terms such as, 'the three countries shall' or 'will' (Art. II, Art. IV, V, VI, VIII, IX, X, DoPs, 2014). As discussed above, the DoPs also reflects endorsement by the countries of established principles of customary international law, such as equitable utilisation and no significant harm, and thus provides a rule-based procedural and substantive framework in the Eastern Nile Basin.

Fairness – what insights from the Blue Nile?

The study of the key cooperative agreements pertaining to the Blue Nile, as well as the law of international watercourses, demonstrates that there is considerable merit in focusing on questions of fairness. In particular, this study has shown the merits of coupling issues of legitimacy or 'right process', with questions of distributive justice, when considering legal regimes relating to international watercourses.

Form and fairness

States enter into a wide range of cooperative agreements, with varying degrees of commitment, and for numerous different reasons (Guzman, 2005). The choice of instrument has certain trade-offs. Raustiala, for instance, suggests that an 'overly deep' agreement, 'may lead to numerous violations, which could undermine future credibility or create political backlash against international cooperation' (2005, p. 613). Conversely, in the case of non-binding instruments, or what Raustiala calls 'pledges', 'states may negotiate deep pledges but do little or nothing to implement them' (2005, p. 611).

The study of the Nile illustrates the diverse range of instruments that States use in a bid to further cooperation. The colonial era treaties would appear to fit into the mode of a legally binding treaty and express normative commitment. Similarly, the CFA is an attempt to establish a basin-wide legally binding treaty. What, therefore, is the implication of choosing legally binding cooperative arrangements? Are they more likely to generate compliance? In the case of the Nile, it would appear that legitimacy issues have overshadowed questions of form. The early treaties are highly contested, primarily concerning matters of state succession, which are themselves disputed. Much work has been done by scholars in an attempt to ascertain the legality of these treaties (e.g. Woldetsadik, 2013), but such analysis arguably misses a much more pertinent issue. From a legitimacy standpoint it is clear that all States do not perceive these instruments to be fair, and their compliance pull is subsequently limited.

For different reasons, the compliance pull of the CFA is also a cause for concern. Contentious issues both in terms of its content, ie., Article 14(b), the process of its adoption, and subsequent limited number of ratifications are likely to influence its 'compliance pull'. However, subsequent developments both within and outwith the basin (as discussed below) may well shape the future significance of the CFA.

The form of the 1993 Framework and the DoPs is unclear. This in itself raises the question of whether ambiguity regarding the formal status of an instrument hinders compliance, or whether 'constructive ambiguity' might be seen as beneficial in furthering cooperation whilst avoiding any potential impasse in negotiations (Hafner, 2013). There has been considerable discussion on the implications of 'constructive ambiguity' within treaty terms (Fishhendler, 2008; Pehar, 2001), and the difference between legally binding (hard law) and non-legally binding (soft law) instruments (e.g. Shelton, 2000). However, less attention has been paid to the question of whether ambiguity as to the legal status of an instrument is in itself beneficial or not.

A rich avenue for further empirical research would be to explore the perception of States and other actors as to the legitimacy of the differing forms of cooperating arrangements that exist within the

Nile, and other transboundary river basins; and consider what implications those perceptions have on the 'compliance pull' of such instruments. From a glance, it would appear that the ambiguity pertaining to the 1993 Framework agreement may have contributed to its poor 'compliance pull'. For the DoPs it is too early to tell, although, despite some setbacks, initial signs would suggest that the states are taking their commitments thereunder seriously. Through subsequent meetings, the three countries have reaffirmed their commitment to the DoPs, and initiated the joint studies referred to in the instrument (Salman, 2016, p. 13). Ultimately, the 'compliance pull' of the DoPs, and questions over form, might only be seriously tested when there are disagreements over its implementation and the way in which they are dealt with by both sides, or if the political will of any of the States to implement it changes.

Equity as distributive justice

An analysis of the key legal agreements relating to the Blue Nile has shown that there has been a gradual shift towards the notion of distributive justice within the basin. Whilst the colonial era agreements were at odds with the notion of equity, the language of distributive justice has been incorporated in later agreements. Egypt and Sudan's reluctance, at least to date, to endorse the CFA and their insistence on the explicit mention of current uses within Article 14(b), might be seen as a blip in the move towards a clearer articulation of distributive justice within the Nile Basin. However, evidence of a positive shift towards the notion of distributive justice can be seen in the inclusion of the principle of equitable and utilisation within the NBI's vision, the CFA (Art. 4), and the DoPs (Art. IV). This trend no doubt enhances the potential 'compliance pull' of any cooperative arrangement that the Nile states enter into, and also demonstrates the inter-relationship and norm diffusion that takes place between cooperative arrangements created within different spaces and levels (Jacobs, 2012). One might even conjecture that recognition of the key substantive norms of equitable and reasonable utilisation and no significant harm within the DoPs, soon after entry into force of the UN Watercourses Convention, was more than a coincidence.

This might however be criticised as a subjective application of distributive justice to a controversial project and subject matter. Given that distributive justice concerns the sharing of the costs and benefits of a transboundary resource the full application of the notion of fairness can only be clearly and objectively determined once the terms of the DoPs are fully implemented, which will require further negotiations and agreements both on any benefit sharing arrangements, e.g. energy sharing, and on the filling and operating of the dam. Ethiopia is investing nearly US$ 5 billion dollars in the construction of the dam, with the expectation that in return it will gain from meeting its domestic electricity demand and earn hard currency from exporting energy (as opposed to agricultural products). As a matter of priority, Ethiopia also appears committed to selling electricity to Egypt and Sudan presumably at a reasonable price. Finding a fair price and agreeable level of electricity supply to be sold from GERD to both Sudan and Egypt is therefore an important factor to any mutual determination of distributive justice in the Blue Nile. However, the uncertainty over the economic and environmental impacts of the GERD on Sudan and Egypt (Tawfik, 2017), pose a key challenge to overcome in the pursuit of outcome that can be perceived as just to all.

Of course, the filling of the GERD may have a negative impact on Egypt. For example, Boehlert et al (2017) finds that as a result of rapid GERD filling, Egyptian hydropower and agricultural deliveries are expected to fall by 10.3 and 2.1 percent respectively during the first three years. Similarly, Kahsay et al (2017) finds that GERD filling may result in a 6 to 18 percent reduction of hydropower and 11 percent reduction in agricultural water supplies in Egypt. However, these figures are the worst case scenarios and can only happen if the filling period takes place 'during a sequence of dry years' and Sudan increases irrigation water supplies (ibid).

Most importantly, the two chapters in this volume that reflect the data and findings of two renowned groups of economists agree that the aforementioned potential impacts to Egypt are likely to be

negligible when their implications to the Egyptian GDP is taken into account. Boehlert et al, for example, estimate that the overall impact of such reductions during the filling period is equivalent to 0.13 percent of the Egyptian economy. This is primarily because the temporary reduction in Egyptian hydropower is negligible as Egyptian hydropower only represents 8 percent of the country's overall energy production.

The two economics studies in this volume further agree that after the GERD is filled it will have basin-wide economic benefits –through energy provision and revenue generation to Ethiopia and Sudan, improved water availability and hence agriculture deliveries to Egypt and Sudan (Kahsay et al, 2017).

This contradicts with what others have said about the impact of GERD. A 2013 'Cairo University Report' predicted 'reduction in the water share of Egypt [as a result of GERD] will result in abandoning huge areas of agricultural lands and scattering millions of families' (Egyptian Chronicles, 2013).

In contrast, the works of Boehlert et al (2017) and Kahsay et al (2017) conclude that the GERD will have a basin-wide economic benefits after filling. Kahsay et al went to the extent that:

> As the GERD enters its operation phase, the basin-wide gain in real GDP due to the GERD operation rises to about USD 2 billion, of which Ethiopia, Sudan and Egypt earn USD 1,474, 448 and 75 million respectively. Thus, the GERD enhances real GDP in all the Eastern Nile countries when it starts operating (p.18).

However, they also stress that 'the distribution of the benefits is skewed with Ethiopia, Sudan and Egypt earning 74, 22 and 4 percent of the total basin-wide gain in real GDP, respectively' (ibid), a finding which may be justified on the basis of considerations of historical injustice as considered earlier and the significant financial investment made on the GERD by Ethiopia. Alternatively, such a disparity in benefit sharing may well need to be adjusted through appropriate trade-offs (Boehlert et al, Tawfik et al 2017).

The findings of the two economic chapters (of this volume) do need to be taken with caution as unequivocally conceded by the authors. Firstly, dam filling will only be fair if undertaken within the right hydraulic and climatic conditions (i.e. during wet and average rather than dry seasons) and within a short period of time (ibid). In contrast, a reasonable period of time (say 6-7 years) (Kahsay et al) will be required to mitigate adverse impacts of filling downstream. Secondly, after the reservoir is filled with water the dam operation should be coordinated with Sudanese and Egyptian dams, including the Aswan High Dam, to mitigate consequences and maximise benefits from the dam (Wheeler, 2017). These aspects of cooperation have been included in the DoPs (Art V), and as factors to be taken into account in the determination of distributive justice.

The potential for a fair solution to GERD as supported by the findings of the two groups of economists on the impacts of GERD after filling is broadly consistent with other major studies and reports on GERD such as the International, Non-partisan Eastern Nile Working Group report on GERD (MIT Report, 2014). The potential trade-offs to maximise benefits from GERD for all clearly exist (Boehlert et al).

A further area where a focus on distributive justice could be beneficial, as highlighted by Franck, is in relation to non-state actors. To date, much of the negotiations concerning distributive justice within the Nile have been conducted at a state-state level. The only reference to non-state actors within the treaty arrangements is contained in the CFA, which is not in force. There is, however, a growing trend to engage civil society actors in matters related to the management of the Nile Basin. An example of this can be seen in the establishment and support for the Nile Basin Discourse, a civil society network of over 850 members and partner organisations within the region (NBD, 2016). Another specific example relevant to the GERD might be the visit to the GERD by Egyptian and

Sudanese journalists (Tekle, 2016) which may help enhance mutual understanding of the costs and benefits of the project amongst the public of the Nile basin. As noted previously, human rights law, might provide a useful platform by which to advance the role of non-State actors in processes related to the GERD that are focused on the determination of distributive justice (Bulto, 2013).

The substance—process link

The importance of considering distributive justice alongside process (legitimacy) comes across clearly within a study of the Nile. Perceptions of a lack of legitimacy have constituted a major barrier to state compliance with early Nile treaties irrespective of whether or not these treaties are legally binding. Failure to include all basin states within the negotiation of those instruments has been the main reason for their poor 'compliance pull'.

More emphasis on the processes by which legal arrangements are adopted, alongside the growing political dynamics of transboundary water cooperation, or 'hydropolitics' (Zeitoun, *et al*. 2016), would be advantageous. In this regard, this paper has highlighted the central role that good faith plays when states are negotiating cooperative arrangements. Drawing upon the work of the ICJ and others, and taking into account hydro-politics, the developments in Blue Nile might help articulate what good faith requirements mean within a transboundary water context. The DoPs, for example, adopted good faith as one of its cardinal principles (Art. I), as a mode of exchange of data and information and facilitating joint studies among the three countries (Art. VII) and as a requirement of amicable dispute settlement (Art. X). But good faith has also been mentioned in the Declaration in relation to taking dam safety measures (Art. VIII) and can also be inferred from the commitment made to build confidence among the parties (Art. VI). A further area of research would therefore be to conduct empirical analyses of the negotiation processes related to Nile cooperative arrangements, with a view to developing key criteria for the interpretation of good faith in the negotiation of watercourse agreements.

The interrelationship between substance and process is also evident within the design of the cooperative arrangements. Drawing from the UN Watercourses Convention, the CFA contains the key procedural rules of the law relating to international watercourses. These procedural rules offer an important means by which to assess, and overtime, reassess issues of distributive justice within a basin. Some of these rules are contained within the DoPs, both implicitly and explicitly. There is, for instance, the due diligence requirement, 'to take all appropriate measures to prevent the causing of significant harm' (Art. III). As noted above this general requirement might imply a series of requirements upon states, that include conducting an environmental impact assessment and engaging with stakeholders.

More explicitly, the DoPs contains a series of procedural requirements, such as the development of rules and guidelines for operating the GERD, informing downstream states of unforeseen or urgent circumstances, the establishment of 'an appropriate coordination mechanism, the exchange of data and information, and so on (DoPs, 2015, Arts. V and VII). The ultimate substantive objective of all these, in addition to ensuring reasonable use of Nile waters by the parties, is to ensure that the GERD contributes 'to economic development, promotion of transboundary cooperation and regional integration through generation of sustainable and reliable clean energy supply' (DoPs, Art II), which is key for fostering equity among the parties. Considering this as a central element of distributive justice may seem very broad and subjective; however, with closer cooperation and further studies on the subject, the project can promote and address the hopes and fears of all concerned.

While the design of the aforementioned instruments would suggest recognition of the importance of linking substance to process, exploring the nature of such a linkage necessitates further scholarly attention. To date, there has only been a general recognition of the correlation between substance and process. This has led some scholars to caution that elastic principles such as equity, may prove ineffective in the face of relative bargaining power, which in turn may disadvantage weaker states (Woodhouse and Zeitoun, 2008, p.103-119). This perceived blindness to bargaining power has been

used to criticise Franck's heavy reliance on distributive justice (Scobbie, 2002, p.924). While under explored, the observation was not lost on Franck, who recognised the role that 'an effective, credible, institutionalized, and legitimate interpreter' can play in providing an elastic rule within meaning within a particular case (Franck, 1990, p. 81). Others have suggested that the role of interpreter should go further than what was envisaged by Franck in order to encompass social processes and epistemic communities beyond inter-governmental platforms (Brunée and Toope, 2010, p. 52-3). Much work could be done to assess the extent to which existing treaty frameworks relating to international watercourse support such a broader process-based approach, and how those processes in turn affect interpretations of distributive justice – especially where power asymmetry influences cooperation between States. An effective regional or basin-wide approach to designing, interpreting and applying cooperative frameworks may well help mitigate, if not totally eliminate, the effects of power in-balance on equitable share of water resources. It is of note that Ethiopia, Sudan and Egypt jointly sponsored an international panel of experts to study of the downstream impacts of GERD (IPoE, 2013) and are currently undertaking a follow-up third party study involving two French firms (Salman, 2017b).

Conclusion

This paper has sought to explore the concept of fairness within the context of the law of international watercourses generally, the Nile basin, and within the Blue Nile context. Exploring the concept of fairness within such contexts has offered up some interesting insights that speak to the question of why states comply with their international commitments. The study has shown that much can be gained by looking at the law relating to international watercourses as a case study by which to examine what fairness might actually mean in practice. This may be in terms of the design of cooperative arrangements, the determinacy of commitments, the interrelationship between substantive norms and process, the process by which cooperative arrangements are negotiated, and the factors and interests that might be reconciled in the determination of equity. The case study has also shown the prospects and challenges of objectively determining the application of fairness 'on the ground'. It needs to be highlighted that the fairness principle is a framework the actual implementation of which relating to specific areas of law, subject matter or a particular project is contingent on continuous cooperation and progressive realisation of the fair deal by the parties concerned, based upon the cardinal principles of good faith, mutual respect and equality. Therefore, in addressing of distributive justice vis-à-vis the GERD it should be recognised that reaching agreement over every minute detail is not necessary nor advantageous. Rather, there is a need to —agree on certain principles and values that are perceived by the parties as substantively fair. However, the objective application and determination of fairness benefits from applying appropriate scientific studies that are crucial to fully appreciate the costs and benefits of an undertaking to all concerned and accordingly determine the distributive justice within a specific context. The inter-disciplinary approach to the fairness principle is therefore beneficial to foster benefit sharing and identify appropriate trade-offs on a controversial subject of resource sharing among states, including on share watercourses. Finally, it is shown that procedural fairness and distributive justice, as normative standards, constitute two sides of the same coin, which in turn, demands that both are taken considered together when analysing the merits of transboundary treaty frameworks.

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