

In-Depth Case Study of the Nile River Basin¹

This case study is one of a series that has been prepared as part of a Global Environment Facility (GEF) International Waters Governance project. The objective of these case studies includes providing insight into how various international waters agreements were negotiated and how well they are working. Each case study has been peer reviewed by one or more experts with direct knowledge of the agreement being analyzed.²

1. Background

1.1. Geographic Context

The Nile River Basin extends through ten countries and has two major tributaries, the White Nile and the Blue Nile. The White Nile begins at Lake Victoria and in the mountains of Burundi, Rwanda, and the Democratic Republic of Congo (“DRC”). The Blue Nile is composed of waters from Ethiopia, Eritrea, and Sudan. The Blue and White Nile meet at

Khartoum, Sudan, to form the main body of the Nile, which then flows through Egypt to empty into the Mediterranean Sea.



Figure 1: The Nile River Basin

The Nile basin drains approximately 3 million square kilometers of territory in ten riparian states: Ethiopia, Sudan, Egypt, Rwanda, Tanzania, Uganda, Burundi, DRC, Eritrea, and Kenya. Its catchment area encompasses 10% of Africa’s landmass.³ The basin’s climate ranges from tropical in the equatorial region of the Great Lakes area and the Ethiopian highlands to arid in Sudan and Egypt.

Upwards of 280 million people rely on the waters of the Nile, and population rates in the region are projected to soar.⁴ Much of this population relies

¹ For a detailed description of the provisions of the Nile Basin Initiative, please see the Report by White & Case. WHITE & CASE, UNDP-GEF INTERNATIONAL WATERS GOOD PRACTICES PROJECT, INTERNATIONAL WATERS: REVIEW OF LEGAL AND INSTITUTIONAL FRAMEWORKS 201 (2011), available at <http://governance-iwlearn.org>.

² The support and assistance of Stephen McCaffrey, Abdulkarim Seid, Emmanuel Olet, Moneen Nasmith, Maaria Curlier and Cody Denoon in helping to produce this paper is gratefully acknowledged.

³ U.N. ECONOMIC COMMISSION FOR AFRICA, ASSESSING REGIONAL INTEGRATION IN AFRICA, at 167-194, U.N. Sales No. E.04.II.K.3 (2004).

⁴ UN projections indicate that Egypt’s population will grow from 84.5 million in 2010 to 129.5 million in 2050. Ethiopia’s population is expected to grow from 84.9 million in 2010 to 173.8 million in 2050. U.N. DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS POPULATION DIVISION, World Population Prospects: The 2008 Revision, U.N. Doc. ESA/P/WP.210 (2009), available at

almost exclusively on the Nile as its sole source of freshwater. The Nile, for example, is essentially Egypt's only source of water.⁵ The vast majority of Egypt's rapidly expanding population lives in the Nile Valley and the agriculture sector, which constitutes a significant portion of the Egyptian economy, is heavily dependent on crops that require extensive irrigation. Ethiopia's population is growing at an even faster rate than Egypt's, requiring increased food production and more extensive use of the Nile waters for agricultural purposes.⁶

Based on measurements taken at Aswan at Lake Nasser in Egypt, the Nile's flow has diminished significantly over the last century.⁷ The Nile's flow is also highly seasonal—approximately 80% of its flow occurs from August to October.⁸

The Nile Basin is also thought to be particularly sensitive to the effects of climate change and prone to climate-induced water scarcity.⁹ These factors are especially notable in a river basin where many riparians are already considered “water scarce.”¹⁰ As of 1990, Burundi, Kenya, and Rwanda were already “water scarce,” and Egypt and Ethiopia are expected to join this category by 2025. Tanzania and Uganda are predicted to become “water scarce” by 2050.¹¹

Despite the limited amount of available water, many riparians, particularly Egypt and Ethiopia, have ambitious plans to use more water and develop hydroelectricity projects along the Nile. Egypt has also embarked on the New Valley Project¹² (also known as the Toshka project), designed to redirect 10% of its allotment from the Nile (approximately 4.94 billion cubic metres)¹³ to create a second Nile Valley and increase habitable land in Western Desert.¹⁴

In addition to water scarcity issues, Nile riparians are also facing degrading water quality. Runoff from upstream and downstream agriculture causes contamination from pesticides and fertilizers, and is particularly severe in the Nile Equatorial Lakes Region.¹⁵ This

http://www.un.org/esa/population/publications/wpp2008/wpp2008_highlights.pdf (last visited Dec 8, 2011).

⁵ 95% of the fresh water reaching Egypt originates outside the country, with 86% of the Nile originating in the Ethiopian Highlands. Gabriel Eckstein, *Water Scarcity, Conflict, and Security in a Climate Change World: Challenges and Opportunities for International Law and Policy*, 27 WIS. INT'L L.J. 409, 427 (2009).

⁶ Jutta Brunnée and Stephen J. Toope, *The Changing Nile Basin Regime: Does Law Matter?*, 43 HARV. INT'L L.J. 105, 118, 120 (2002).

⁷ *Id.* at 117.

⁸ *Id.* at 117.

⁹ Eckstein, *supra* note 5, at 427.

¹⁰ The nation's annual renewable freshwater is less than 1000 cubic meters per person per year.

¹¹ Brunnée and Toope, *supra* note 6, at 118.

¹² *Id.* at 128.

¹³ *Id.* at 128.

¹⁴ *Toshka Project - Mubarak Pumping Station / Sheikh Zayed Canal, Egypt*, <http://www.water-technology.net/projects/mubarak/> (last visited Mar. 29, 2011).

¹⁵ The recently inaugurated Lake Victoria Environmental Management Project under the LVBC is a key intervention in reversing environmental degradation.

problem is exacerbated by the Nile's seasonal pattern of flooding and receding. In addition, rapidly growing populations have led to an increase in residential and industrial waste that, due to improper treatment, has ended up in the Nile.

In short, current uses of Nile waters are unsustainable. Nevertheless, the demand for water continues to climb as the amount of available uncontaminated water is declining, and some go so far as to suggest that "[t]here is simply not enough water in the Nile to complete the irrigation plans of Ethiopia and Egypt, much less to satisfy the ambitions of all the Nile riparians."¹⁶

1.2. Political Context

Several historical bilateral and trilateral treaties dating from the colonial era that addressed water allocation in the Nile River continue to be politically relevant to contemporary negotiations. In an effort to protect their interests in Egypt, the British oversaw the signing of agreements affecting the use of the Nile River that tended to support Egypt's downstream water interests over those of other riparians. The 1902 Exchange of Notes between Ethiopia and Britain (on behalf of Sudan) prevented Ethiopia from developing any construction that would alter the flow of the Nile in exchange for British recognition of Ethiopian independence. Ethiopia later repudiated it in 1941.¹⁷ The 1929 Nile Waters Agreement between Sudan (then governed by Britain) and Egypt prioritized Egyptian water needs and gave Egypt the right to veto future hydroelectric projects in British colonies (which then included Kenya, Sudan, Tanganyika, and Uganda) along the Nile.¹⁸ While it is rejected by the other riparians because they were not party to it, Egypt uses the principle of state succession to argue that this treaty is still valid. Sudan and Egypt replaced the 1929 treaty with the *Agreement for the Full Utilization of the Nile Waters* in 1959, which essentially allocated the entire flow of the Nile at the Aswan Dam to the two states. Unsurprisingly, this has caused a certain amount of regional tension amongst the other riparians, who invoke the Nyerere Doctrine,¹⁹ and general principles of international water law to contest the 1959 Agreement and claim a share of Nile waters.²⁰

Regional tensions surrounding issues other than the Nile also exist and further complicate cooperation efforts. For example, Ethiopia and Egypt have a long history of distrust and Egypt and Sudan, as well as Eritrea and Ethiopia, have unresolved border disputes.²¹ In addition, many of the riparians have been wracked by internal conflicts and instabilities that make international relations more challenging. Sudan is perhaps the most dramatic

¹⁶ Brunnée and Toope, *supra* note 6, at 128.

¹⁷ *Id.* at 124

¹⁸ *Id.* at 124

¹⁹ The Nyerere Doctrine was named after Tanzanian president Joseph Nyerere, and gives treaties concluded during the colonial era two years to be renegotiated, after which time unresolved treaties would lapse. See Salman M.A. Salman (2011): The new state of South Sudan and the hydrogeopolitics of the Nile Basin, *Water International*, 36:2, 154-166 at 159.

²⁰ *Id.*; See also the White & Case Report for a more detailed description of these agreements. WHITE & CASE, *supra* note 1, at 200.

²¹ Brunnée and Toope, *supra* note 6, at 129.

example, which, after decades of civil war, has recently split into two separate states.²²

²² See *supra* note 19 for a more detailed discussion of the implications of the new state of Southern Sudan and hydro-politics in the Nile Basin.

2. Negotiation of the Agreement

2.1. Development of the agreement

There is disagreement among the riparian states as to the applicability of the apportionment of water under the colonial-era treaties governing the Nile. This is the case because those treaties predominantly benefit the downstream states, Sudan and Egypt, without much benefit to the eight other upstream states.²³ The effect of these treaties is to freeze upstream projects to secure a continuous and undiminished flow of water to Sudan and Egypt. Egypt, and to a lesser extent Sudan, has adopted a view consistent with those treaties- that it has a “historical” and “natural” right to the full volume of the Nile and that upstream states may not disturb that right by impeding or otherwise affecting that flow.²⁴

In direct opposition to this view is the position of the Ethiopians, and to a lesser extent, the other riparian states. Ethiopia has argued in the past that it has a complete sovereign right to exploit the waters that flow within its territory. This including utilizing those waters in a manner that decreases the flow into Sudan and Egypt.²⁵ Most upstream riparians, however, emphasize their right to equitable and reasonable utilization of waters in accordance with international law.

As a result of the above geographic and political circumstances, relations in the Nile Basin have often been an example “of unremitting and open conflict, or at least incipient and barely camouflaged competition.”²⁶ It became clear that the only way to avoid violent conflict was for the riparians to enter into a new, binding agreement that provided a framework for cooperation and agreed water allocation.

2.2. Negotiation process

There is a long history of negotiations over allocation and development of the Nile’s water resources that, for a variety of reasons, are considered insufficient and in need of revision.²⁷ In light of this political and geographic context described above, many predicted that tensions over the waters of the Nile would lead to open violent conflict between riparians. However, as a result of decades of interaction and the involvement of external agents, the riparians were able to take the first steps towards cooperation and

²³ Bulto, T, ‘Between Ambivalence and Necessity in the Nile Basin: Occlusions on the Path towards a Basin-Wide Treaty’ 20(3) Colorado Journal of International Environmental Law and Policy (2009) 291-320, at 294.

²⁴ *Id.*, at 305.

²⁵ *Id.*, at 303-04.

²⁶ Brunnée and Toope, *supra* note 6, at 105.

²⁷ As most of these water agreements and treaties took place when the majority of the countries were under colonial rule they are perceived by some as a colonial imposition that needs to be reviewed. Furthermore, many of these agreements do not include any monitoring provisions, do not delineate specific allocations, and have no enforcement mechanism. More recent agreements have focused on cooperation in sharing the water resources and in promoting socio-economic development in the basin. Interview with Emmanuel Olet, Program Officer Water Resources Development, Nile Basin Initiative, (March 27, 2011) (on file with the author).

entered into the Nile Basin Initiative (“NBI”) in 1999. This agreement, to be described in greater detail below, was supposed to lead to the adoption of a permanent legal and institutional framework to govern the allocation of the Nile’s resources. Negotiations towards such an agreement did temporarily break down,²⁸ though a cooperative framework agreement has now been signed by several riparian states.

Description of process leading up to negotiation of the NBI

Beginning in the early 1980s, a series of overlapping initiatives were developed to consult on various technical issues arising in the Nile Basin.²⁹ With the support of the United Nations Development Program (“UNDP”), a series of hydrometeorological studies was undertaken in the early 1980s by Egypt, Sudan, Kenya, Tanzania, and Uganda.³⁰ Despite some setbacks, this led to the creation of a basin-wide management system for the Kagera River, which feeds Lake Victoria and is therefore a remote source of the Nile.³¹

Subsequently, UNDUGU (meaning “brotherhood” in Swahili) was formed in 1983 at Egypt’s behest. UNDUGU included all Nile riparians except Kenya and Ethiopia, which participated only as observers.³² The goal of UNDUGU was to foster economic, social, cultural, and technical ties, although individual riparians may have been motivated to participate for varying reasons. Some argued that while many of the riparians were interested in fostering “self-reliance and African inter-dependence,” for Egypt, UNDUGU was “an exercise in hegemonic influence.”³³

Despite the arguable domination by Egypt, UNDUGU’s lasting impact was to provide a forum for information sharing. “UNDUGU served as an institutional locus for sharing expertise” and allowed for the riparians to become “accustomed to treating the Nile as a whole, not as less than the sum of its national parts.”³⁴

In December 1992, following a series of consultations with Nile basin countries, the ministries responsible for water affairs met in Kampala to approve the establishment of TECCONILE (Technical Cooperation Committee for the Promotion of the Development and Environmental Protection of the Nile Basin). TECCONILE aimed to contribute in the development of the Nile Basin in an integrated and sustainable manner through basin-wide cooperation and the determination of equitable sharing of its waters. Its objectives were to develop infrastructure, techniques and build capacity for the management of water resources and to formulate national master plans and integrate them into a Nile Basin Action Plan.

²⁸ *Nile nations stand firm in water row*, Guardian News (June 27, 2010), www.guardian.co.uk/environment/2010/jun/27/nile-water-pact.

²⁹ Brunnée and Toope, *supra* note 6, at 132.

³⁰ *Id.* at 132.

³¹ The Kagera River originates in Burundi and forms part of the borders between Burundi and Tanzania, Rwanda and Tanzania, Burundi and Rwanda, and Tanzania and Uganda, before emptying into Lake Victoria.

³² Brunnée and Toope, *supra* note 6, at 133.

³³ *Id.* at 133.

³⁴ *Id.* at 133.

TECCONILE became operational on 1 January 1993 with the signing of the Agreement by Ministers from Egypt, Sudan, Rwanda, Tanzania, Uganda and Zaire. Ethiopia and Kenya again refused to join as full members.³⁵ These two riparians objected to TECCONILE because its framework did not address the fundamental issue of equitable water apportionment. In addition, Egypt was again perceived to dominate.³⁶

Nevertheless, as part of the meetings of TECCONILE, the Nile River Basin Action Plan (“Action Plan”) was created. All of the Nile Basin states were involved in the creation of this plan, which was formerly adopted by the Council of Ministers for Water Affairs of all the Nile Basin (“Nile-Com”) states in February 1995. The majority of the Action Plan was devoted to a series of development projects, however, the Action Plan envisioned “the establishment of a basin-wide, multidisciplinary framework for legal and institutional arrangements.”³⁷ Few of the provisions of the Action Plan were implemented, in part because of resource constraints, but also because of the riparians’ continued competitive behavior towards one another.³⁸ However, TECCONILE made significant contributions to Nile-related data and information, country capacity in technical monitoring, and, through the 2002 Nile Conferences and development of NILE-HYCOS, encouraged riparian cooperation.³⁹

In addition to the TECCONILE meetings, other meetings fostered cooperation between the Nile riparians. A series of additional, informal meetings were held, that were collectively known as the “2002 Nile Conferences,” and began in 1993 in Aswan, Egypt, and continued on a yearly basis in various basin states until 2002, at which time they continued as the Nile Basin Development Forum.⁴⁰

The 2002 Nile Conferences were based on the theme of “comprehensive cooperation” and were typically structured as sessions on individual topics of urgency, though with time also reserved for open discussion. Although the 2002 Nile Conferences were supposed to be largely technical in nature, the issues discussed often ranged into legal and normative topics.⁴¹ The 2002 Nile Conferences were supported by the Canadian International Development Agency (“CIDA”), as well as the UNDP and the World Meteorological Organization.⁴²

All the Nile basin states sent participants to the 2002 Nile Conferences, and the informal structure of the conferences meant that none of these participants held any particular status during the sessions. Notably, all the participants sat together, presented papers, and participated in the discussion and in the drafting of any joint statements on behalf of

³⁵ *Id.* at 133-34.

³⁶ *Id.* at 134.

³⁷ TECCONILE, *Nile River Basin Action Plan Executive Summary*, at vii (1995).

³⁸ Brunnée and Toope, *supra* note 6, at 134-35.

³⁹ Olet, *supra* note 27.

⁴⁰ NILE BASIN INITIATIVE, *Nile Basin Development Forum, 17-19 November 2008*, NILEBASIN.ORG, http://www.nilebasin.org/NBDF2008/doc/conference_program_ver3.pdf, 2.

⁴¹ Brunnée and Toope, *supra* note 6, at 136.

⁴² *Id.* at n.186.

the conference participants. The lack of formality was thought to foster direct and open discussions that might not have occurred had the 2002 Nile Conferences been structured as formal negotiation sessions.⁴³ The series also provided a forum for discussing sub-regional organizations within the Nile Basin. Given the tensions between the riparians and the geographic breadth of the Nile Basin, more local arrangements could provide additional forums for cooperation.⁴⁴

Development of the NBI

Third party involvement, particularly the World Bank and the UNDP was critical in the development of the NBI. The Nile states did not have the resources to implement the Nile River Basin Action Plan, and thus looked to international organizations for support.⁴⁵ Nile-Com first requested the World Bank's assistance to coordinate donor involvement and establish a Consultative Group to raise financing for cooperative projects in the Nile Basin.⁴⁶ UNDP and CIDA also agreed to play lead roles in developing Nile Basin cooperation.⁴⁷

As mentioned above, few of the provisions of the Action Plan were implemented as originally intended. Thus, the World Bank, UNDP, and CIDA reviewed the Action Plan and recommended consultations with Nile countries, further review of the Action Plan by an International Advisory Group ("IAG"), refinement of a proposed priority portfolio, presentation of findings to Nile-Com, definition of projects, and a process leading to the International Consortium for Cooperation on the Nile (a donor consortium).⁴⁸

As a result of the above review process, and with further negotiation, the Action Plan was superseded by a new program, the Nile River Basin Strategic Action Program.⁴⁹ With TECCONILE having reached the end of its implementation term, the riparian ministers in charge of water affairs agreed to expand TECCONILE's mandate with a new transitional institutional mechanism, and launched the NBI in 1999.

⁴³ *Id.* at 135.

⁴⁴ *Id.* at 136.

⁴⁵ Christina M. Carroll, *Past and Future Legal Frameworks of the Nile River Basin*, 12 GEO. INT'L ENVTL. L. REV. 297, (1999).

⁴⁶ The World Bank and the NBI, available at

http://www.nilebasin.org/newsite/index.php?option=com_content&view=article&id=71%3Aabout-the-nbi&catid=34%3Anbi-background-facts&Itemid=74&lang=en (last checked May 23, 2012).

⁴⁷ Carroll, *supra* note 45, at 298.

⁴⁸ *Id.* at 298-99.

⁴⁹ Olet, *supra* note 27.

Description of substance of negotiations/resolving points of contention

As part of its review, IAG concluded that the necessary elements for Nile cooperation were a shared vision, transition from planning to action on the ground, proactive facilitation, simultaneous promotion of country and inter-country dimensions, and trust and confidence building. One of the key issues, therefore, was how to develop a shared vision among riparians used to competing with one another for the Nile. In this regard, the work of the World Bank's Senior Water Advisor for the Africa Region World Bank was important in facilitating the development of the NBI.

This water advisor developed a framework with "the potential to move from national agendas that are unilateral, to national agendas that incorporate significant cooperation, and converge upon a shared cooperative agenda."⁵⁰ It was proposed to achieve this shift by having the parties to the negotiation concentrate on the widest possible range of potential benefits achievable under cooperation.⁵¹ Thus, rather than focusing only on the divisive issue of allocating water rights, the parties would instead negotiate the sharing of baskets of benefits derived from cooperation.⁵²

In the context of the Nile, this meant the riparians would have to move away from the issue of allocating percentages of the flow of the Nile among states, and realize that cooperating could create a larger pool of benefits from which all the riparians could share. For example, hydroelectric projects could be built upstream in countries like Ethiopia that would generate new power to share amongst upstream and downstream countries. However, several other points of contention existed. First, as mentioned above, Ethiopia had long been skeptical of Egypt's dominance over meetings of Nile Basin countries. Historically, Ethiopia was excluded from treaties concerning the Nile and wanted clear recognition of its rights. In particular, Ethiopia initially viewed the concept of prior notification as an affront to its sovereignty. This rule is a general rule of international law that governs the conduct of states in relation to international watercourses. It requires that a riparian provide other riparians with advance notice of any new use or change in existing uses of the Nile, together with relevant technical information, and also obliges riparians to consult with one another about any new use or change in existing uses. As an upstream riparian who has not made use of much of the Nile, Ethiopia balked at the idea of having to notify and consult with countries like Sudan and Egypt before using water from the portion of the Nile that flows through Ethiopian territory. Ethiopia also pointed to the fact that Egypt had never given notice of its planned projects, even though it later pointed to them as existing uses that could not be harmed by Ethiopia's new uses. Ethiopia eventually agreed to accept the rule of prior notification, partly because they were accorded sufficient recognition and respect through the NBI process. In addition, as part of the negotiation process, Ethiopian officials were made to understand that prior notification is a well-established, fundamental principle of international law.

⁵⁰ Claudia Sadoff and David Grey, *Cooperation on International Rivers: A Continuum for Securing and Sharing Benefits*, 30 WATER INT'L 4, 1 (2005).

⁵¹ Sadoff and Grey, *supra* note 50, at 2.

⁵² *Id.* at 3.

Another issue of contention was where to locate the NBI headquarters, the award of which would create jobs and funnel resources into the host country. Although the NBI's headquarters were ultimately located in Entebbe, Uganda, other NBI-related offices were spread out in various riparians. For example, the Eastern Technical Regional Office is based in Addis Ababa, Ethiopia, and the Coordination Unit for projects in the Nile Equatorial Region is based in Kigali, Rwanda.

The major stumbling block, however, was and has continued to be the question of water security and existing treaties, to be discussed in more detail below. In short, Egypt and Sudan still cling to the conviction that their national security depends on guaranteeing current flow levels, and insist on maintaining their rights acquired through the 1959 Nile Agreement. Although the NBI was entered into despite the failure to resolve this issue, water security has thus far proven to be the obstacle to moving beyond the transitional NBI to a permanent agreement.

3. The NBI

3.1. Overview⁵³

In February 1999, the water ministers of nine of the Nile riparians (Eritrea participated as an observer) agreed to replace TECCONILE with the NBI. The primary purpose of the NBI is to seek “to develop the river in a cooperative manner, share substantial socioeconomic benefits, and promote regional peace and security.”⁵⁴ One of its primary goals is to negotiate a “cooperative framework agreement” that would supersede past bilateral treaties and provide for sharing of the Nile’s resources.

While such a cooperative agreement is being negotiated, the Strategic Action Program (“SAP”) was developed to allow the NBI to develop Nile Basin water resources. The SAP achieves this objective through the Shared Vision Program (“SVP”) and investment in various activities at the sub-basin level. To date, the SVP has numerous projects, most of which are largely complete, and include such activities as training water professionals in sustainable water management, increasing participation among various stakeholders, and facilitating the development of regional power markets.⁵⁵

The NBI is financed by the Nile riparians through the collection of annual dues of \$35,000 from each country. Substantial financing is also provided by the international donors, primarily the World Bank, UNDP, and CIDA.

The NBI does not have a specific dispute resolution mechanism. All major decisions are made by Nile-Com.

All Nile projects, SVP or otherwise, involve data sharing in some shape or form. In addition, an interim data sharing agreement has been discussed, and was endorsed by the Nile-COM.⁵⁶ No formal real-time data sharing mechanism exists under current agreements.

⁵³ For a more detailed description of the provisions of the NBI, see the White and Case report. WHITE & CASE, *supra* note 1, at 201-209.

⁵⁴ NILE BASIN INITIATIVE, *About the NBI*, NILEBASIN.ORG, <http://www.nilebasin.org/> (last visited Dec 12, 2011).

⁵⁵ *Id.* at *Achievements todate*.

⁵⁶ Interview with Abdulkarim Seid, Lead Specialist, WRPM-NBI, (January 20, 2011) (on file with the author).

4. Implementation and Monitoring

4.1. Steps taken by parties to implement Agreement

The NBI has been fully operational and many of the SVP and sub-regional projects are complete or will be completed by 2012. The NBI, however, has legal status as an institution only in Uganda where it is headquartered, Rwanda, where the NELSAP is headquartered, and in Ethiopia, where ENSAP is headquartered.⁵⁷ In addition, for the last ten years, the riparians have been attempting to negotiate a comprehensive cooperative framework without success. A Nile Cooperative Framework Agreement has been negotiated and signed, by six of the eleven riparians.⁵⁸

4.2. Operational Management

The Nile-Com is the highest decision-making body of the NBI. The Technical Advisory Committee (“Nile-TAC”) renders technical advice and provides assistance to Nile-Com. The Nile Basin Initiative Secretariat (“Nile-SEC”) renders administrative advice to Nile- TAC and Nile-Com.

⁵⁷ Olet, *supra* note 27.

⁵⁸ Patrick Rutagwera. *Burundi Signs the Nile Cooperative Framework Agreement*, NILEBASIN.ORG, http://www.nilebasin.org/newsite/index.php?option=com_content&view=article&id=70%3Aburundi-signs-the-nile-cooperative-framework-agreement-pdf&catid=40%3Alatest-news&Itemid=84&lang=en. (last visited Dec. 12 2011).

5. Assessing the NBI

As discussed previously, the NBI allowed for the development of a number of projects that have been successfully implemented. However, the NBI was not intended to be a permanent institution and was only meant to exist until a permanent Cooperative Framework could exist. Because negotiating this framework has stretched on for more than a decade, the NBI has been in existence for longer than might have been expected.⁵⁹ This has had implications for the perceived strength of the NBI. A consultant hired to assess the effectiveness of the NBI also noted that prolonged negotiations of the Cooperative Framework has led to those within the NBI suffering from “deepened ‘transition thinking’” and to a high turnover of Nile-Com members.⁶⁰

With respect to funding, the riparian contributions are often late and are far below the level needed to fund the NBI. This is in part due to the fact that country funding is intended not for financing core secretariat functions, but for specific objectives. In addition, the NBI lacks a dispute resolution mechanism, as decisions are to be made by consensus, or data sharing provisions that would allow for real-time information sharing.

⁵⁹ This being said, it ought to also be noted that the NBI was never implemented with a specific time frame in mind. Olet, *supra* note 27.

⁶⁰ Report on file.

6. Moving Beyond the NBI

The riparians have met on numerous occasions during the 10-year period and have drafted a Cooperative Framework (“CFA”). Despite the opposition of Sudan and Egypt, five riparians, Ethiopia, Uganda, Tanzania, Rwanda, and Kenya, signed the agreement in May 2010. The agreement gave the other Nile Basin riparians, Burundi, DRC, Egypt, Sudan, and Eritrea, one year to sign the pact,⁶¹ which Burundi did in February 2011. Egypt and Sudan reacted by calling for a freezing of their own NBI activities until the “legal ramifications” of the signed agreement can be resolved.⁶²

The draft agreement will create a Nile River Basin Commission to replace the NBI.⁶³ The CFA does not, however, provide any concrete figures with respect to water allocation – it is instead meant to refer to equitable sharing implicitly through its all of its mechanisms.⁶⁴ It also does not include a formal mechanism for resolving disputes and does not contemplate a mechanism for data exchange. Rather the CFA lays out a series of principles that would be binding on all signatories. These include cooperation, equitable and reasonable utilization of water, doing no significant harm to other riparians, and regularly exchanging data and information.

The primary issue that has prevented the universal adoption of the CFA is that of “water security,” as articulated in CFA Article 14. In Article 14, the draft CFA provides that:

...Nile Basin states recognize the vital importance of water security to each of them. The States also recognize that cooperative management and development of the waters of the Nile River System will facilitate achievement of water security and other benefits. Nile Basin states therefore agree, in the spirit of cooperation:

(a) to work together to ensure that all States achieve and sustain water security.⁶⁵

The current draft of the CFA has set aside 14b and empowered the new Nile River Basin Commission to resolve the matter within six months of its establishment. In an original draft of the CFA, Article 14b provided that states agreed “not to significantly affect the

⁶¹ *Nile nations stand firm in water row*, *supra* note 28.

⁶² *Id.*

⁶³ Gabriel Eckstein, *Accord or Discord on the Nile? Part II*, International Water Law Project Blog (Jul. 26, 2010, 3:55 PM), <http://www.internationalwaterlaw.org/blog/?p=271> [hereinafter *Accord or Discord*].

⁶⁴ Olet, *supra* note 27.

⁶⁵ Dereje Zeleke Mekonnen, *The Nile Basin Cooperative Framework Agreement Negotiations and the Adoption of a ‘Water Security’ Paradigm: Flight Into Obscurity or a Logical Cul-de-Sac?*, 21 EUR. J. INT’L L. 421, 428 (2010).

water security of any other Nile Basin State.”⁶⁶ Arguably, if adopted, this provision could be used to hold states responsible for violating the provision and thus limit states’ water withdrawals.⁶⁷ By contrast, Egypt and Sudan have insisted that states agree under Article 14b “not to adversely affect the water security and current uses and rights of any other Nile Basin State.”⁶⁸ This language attempts to redefine water security in relation to current uses and withdrawals. As Egypt’s current uses are based on the disputed historical treaties, other riparians have objected to this redrafting because it would perpetuate the historical arrangements that they have already rejected.

As a result of this disagreement, deadlock emerged, prompting the signing of the CFA without 14b and despite the objections of Egypt and Sudan. It is unclear how this will be resolved or what the effect of CFA will be if Egypt and Sudan continue to hold out. While Egypt and Sudan recently indicated interest in further negotiations over the CFA, it is unclear to what extent, if any, their positions on water allocations have changed.⁶⁹ Nevertheless, there is a case for starting the process of cooperative sharing of the Nile’s resources with the view of eventually obtaining full participation.⁷⁰

⁶⁶ *Accord or Discord*, *supra* note 63.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Metwali Salem, *Egypt and Sudan seek new Nile agreement with upstream nations*, Al-Masry Al-Youm (Mar. 29, 2011), <http://www.almasryalyoum.com/en/print/379327>.

⁷⁰ Olet, *supra* note 27.

7. Concluding Remarks - Explaining the Impasse

Given the cooperative spirit that engendered the NBI, many wonder why the negotiation of the CFA was so slow after a decade of attempts. Many possible reasons for this shortcoming have been suggested. For example, some contend that the NBI did little to address the fundamental schism over the options regarding rights and obligations that differ between upstream and downstream riparians. In addition, little seems to have been done about certain riparians' problematic water use, including such unsustainable practices as the development of new settlements in the desert, farming of water-intensive crops, or storing water in reservoirs with high evaporation rates.

Instead, attempts were made to bridge this gap by including the concept of "water security" in the draft CFA. As recent events make clear, however, the inclusion of this language does not seem to have resolved the issue. Egypt and Sudan seem to think that "water security" supports their view that water allocations set out in colonial-era treaties should be maintained.⁷¹ The other riparians have argued that "water security" supports their view of a more equal division of the Nile's waters.

Another point that has been raised is that the process of negotiating the NBI and the CFA has not been particularly inclusive. For the most part, only the government officials of the riparians and representatives from the World Bank, UNDP and/or CIDA have been in attendance. Few additional stakeholders have been allowed to participate in the negotiations - opportunities for public involvement are not substantial. Even after the CFA was signed by multiple countries (with significant press coverage of the signing) the text of the agreement itself was initially difficult, if not impossible, to find.⁷² In addition, because of their closed nature, the negotiations have had limited input from various professional resources, including international water lawyers and others with experience in drafting cooperative transboundary water agreements.⁷³

The reasons for this exclusion of the public are unknown. However, as Gabriel Eckstein has pointed out, "agreements forged behind closed doors, even those that merely give the appearance of secrecy, often falter because of the lack of public support." In addition, without ongoing public commentary, parties can become overly entrenched in positions that may not be reflective of the opinions of the people on whose behalf the agreement is being negotiated. At a minimum, there is a strong case to be made that the CFA should be released publicly now that it has been signed by some states.

⁷¹ Mekonnen, *supra* note 65, at 430-31.

⁷² *Accord or Discord*, *supra* note 63.

⁷³ This being said, the negotiation of the CFA followed standard principles based on those of the UN Convention on the Non-Navigable Use of Water Resources, and negotiators, many of whom were legal experts of international repute, often engaged an international lawyer to facilitate and guide the deliberations. Olet, *supra* note 27.