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Dividing shared waters: Exploring the legal dimensions of the India-Pakistan water conflict

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Abstract

Water is a basic condition for existence of life on earth. Scarcity of fresh water is one of the major sources of conflict all over the world because of the rise in global water demands. In South Asia by dint of its diversified topography, the rivers are not restricted to a particular country but flow across the countries transcending national boundaries, hence creating a problem over water sharing and became the root cause of social, economic and political conflicts among the nations of the region. In order to solve these conflicts and disputes some important water sharing arrangement treaties have been signed among the nations in the region. The most important water sharing arrangement treaty in the South Asia in this regard is the Indus Water Treaty between India and Pakistan, which was signed in 1960. This treaty has been internationally heralded as a success story and is often cited as an instance of successful and peaceful resolution of water dispute. This treaty has survived three wars and numerous border clashes. More recently, however, despite this history of cooperation, the IWT has been facing mounting criticism, along with calls to revoke, revise, or abandon the accord. The study is an attempt to analyse the political spectrums that are created by the IWT, which makes a significant impact on the lives of millions of people who live in both co-riparian states; and to examine the mechanism, conflicts and cooperation of the Indus Water Treaty. Is the Indus Water Treaty as relevant today as it was in 1960 or is it time to revisit the provisions of the treaty in light of the issues which have cropped up since 1960? What should be the future course on observance of the treaty? These are some of the questions sought to be answered via this paper.

Keywords: Water management, water politics, Indus water treaty, India, Pakistan, renegotiation

Introduction

It is predicted that future wars will be fought over water. How far this proposition stands true is debatable but the importance of water as an extremely important resource for the development of a country is undoubted. It is also true that shared water resources between countries, a resource which flows irrespective of territorial boundaries, has often been the subject of conflict between countries ^[1]. According to Gleick, there are six types of conflict areas emerging from water issues between States. They are: issue of control of water resources by State and non-State actors, use of water resources as a weapon (military tool), use of water resources as a political objective (Political tool), water resources as targets of violence by non-State actors (terrorism), water resources as targets of military actions by States (military target) and water dispute for economic and social development (development disputes) ^[2]. Given the importance of water countries having shared water resources and have often resorted to different form of arrangements, compromises, and treaties etc. to soothe the process of water sharing. India too has entered into a number of treaties with its neighbours-Pakistan, Bangladesh, China, Tibet and Nepal. India signed the Indus Water Treaty (IWT) with Pakistan in 1960 for division of waters of the Indus and its tributaries. This treaty has been internationally heralded as a success story and is often cited as an instance of successful and peaceful resolution of water dispute. But there is a body of opinion that the division of waters under the Treaty was unfair, and the unfairness alleged in India is the exact opposite of that alleged in Pakistan ^[3]. Though at the level of the governments an agreement has been reached on the matter public opinion seems to continue to be fuelled by nationalistic sentiments. The present allocation of the waters of the Indus basin is such that the lower riparian Pakistan gets 80% of the water while the upper riparian receives only 20%. Many Indians believe that this is an unfair settlement, which had been foolishly accepted by the Indian negotiators. On the other hand, the general claim prevailing in Pakistan is that the territory that has gone to India due to the Partition used only 10% of the waters of the Indus basin.

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Water dispute between India and Pakistan

The partition of British India in 1947 not only created new boundaries but also divided the hydro-recourses of the subcontinent and cut off the water ways. Since the flowing does not follow the political lines and dictations and flows across the boundaries, as a result division and sharing rights over flowing waters between newly created states (India and Pakistan) gave birth to conflicts at political level. Since independence, they have continuously been in a state of undeclared war with varying degree of uncompromising issues, especially over water. Although water is technically not a core issue between the two countries, but differences over the use of the river water is one of the core issues.

Water dispute between India and Pakistan owes its origin to the partition of the country with the division of Indus basin into two units. As a result of partition, the province of Punjab was divided between India (East Punjab) and Pakistan (West Punjab) and the province's irrigation system stood divided between the two countries. This division was

bound to result in future disputes as most of the head works were in India while the canals were in downstream Pakistan. To tide over the situation, temporary agreements were signed by East and West Punjab for water supply to Pakistan's canals. These agreements expired on 31, March 1948 and on 1st April 1948 water flow was stopped by East Punjab compelling Prime Minister Jawaharlal Nehru to personally intervene. This incident also highlighted the need for a permanent, stable arrangement ^[4]. To ride over the situation, Inter-Dominion Agreement was signed on 4th May 1948, outlining the need for cooperation between the two countries and continuance of bilateral talks. However, in the next three years, bilateral talks failed to resolve the river water conflict. Pakistan wanted to refer the dispute to the International Court of Justice but India refused. To add to this, the countries also started differing over the interpretation of the 1948 Agreement, further complicating the situation ^[5].



Map of the Indus River basin ^[6]

Map 1: Indus River Basin

Indus water treaty

Post failure of the bilateral talks, the rising tension between India and Pakistan motivated the World Bank to offer its "good offices" for resolution of water dispute. Mediation started in May 1952 in the Washington DC at World Bank headquarters. After prolonged talks, "The Indus Water Treaty 1960" was signed on 19th September 1960. The Treaty was signed by Prime Minister Jawaharlal Nehru on

behalf of India, President Mohammad Ayub Khan on behalf of Pakistan and W.A.B. Iliff on behalf of World Bank. Upon ratification on 12 January 1961, the treaty comprising of three parts—the Preamble, 12 Articles and Annexes A to H, entered into force retrospectively as of 1st April 1960 ^[7]. The Preamble to the treaty outlines the objective of the treaty as the necessity of 'fixing and delimiting in a spirit of goodwill and friendship, the rights and obligations of each in relation

to the other concerning the use of these waters'. Annexes A to H cover the following areas amidst other subject – agricultural use of certain tributaries of Ravi by Pakistan; agricultural use of the upper reaches of the western rivers by India; dispute resolution system; generation of hydroelectricity power and storage by India.

Water sharing arrangement

Water sharing arrangement under the treaty is relatively simple. Under the treaty three eastern rivers – the Ravi, the Beas, the Sutlej are given to India for exclusive use^[8] and the three western river – the Indus the Jhelum and the Chenab are given to Pakistan^[9].

Article II, Indus Water Treaty (IWT) provides that India shall exclusively use Ravi, Beas, Sutlej. It can dispose of their water as it wishes with the limitation on the amount of withdrawal during the transition period^[10]. Pakistan has to right to use waters of these rivers for domestic and the non – consumptive use, agricultural use as specified in Annexure B excluding hydroelectricity^[11]. Article III provides that India will “let flow” all the water of the western rivers and Pakistan shall receive “unrestricted use of all water of the western river” India has rights to use the water for limited purposes of domestic use, non – consumptive use,^[12] agricultural use set in Annexure C; hydroelectricity power generation as provided in Annexure D^[13]. Also, except as provided in Annexure D and E, India will not store water of or construct any storage works on the western rivers^[14].

Further, the treaty provides that any non-consumptive use made by each party should not materially change the flow in any channel to the prejudice of the other party^[15]. Also, each party has to maintain the natural channel of the rivers and will avoid, as far as practicable, any obstruction to the flow in the water channel likely to cause material damage to the other party^[16].

The treaty allowed for a transition period of 10-13 years. During this time period, Pakistan constructed dams and other structures to transfer 14 MAF of water from the western rivers to the parts previously irrigated by the eastern rivers. For this purpose, an Indus Development Fund^[17] was set up with a sum of a billion dollars with contributions from World Bank, Australia, Canada, Germany, New Zealand, UK, US and India^[18].

Principle of Cooperation

Articles VI and VII of the treaty lay down the principle of cooperation. Article VI provides for ‘exchange of data’. Regular exchange of data regarding the daily flow and use of water is provided for under the treaty. Article VII provides for future cooperation and recognises the “common interest” of both the parties in the “optimal development of rivers”. Both the States are to cooperate by mutual agreement, to the fullest extent possible. Article VII (2) further provides for specified cooperation and exchange of information regarding planned engineering works on any of the rivers.

Dispute Resolution Mechanism

Article IX of the treaty provides for dispute resolution. Conflicts between the parties can either be termed as questions, differences or disputes. The conflict in the first instance is a ‘question’ and is to be referred to the Permanent Indus Commission (PIC). If the PIC is unable to resolve the ‘question’, it becomes a ‘difference’. A

difference is referred to a neutral expert^[19]. The decision of the neutral expert is final and binding. Arbitration^[20] can be resorted to, if the difference does not fall within the purview of the neutral expert or the neutral expert rules that the ‘difference’ should be treated as a ‘dispute’.

Disputes arising under the treaty

Disputes under the treaty started arising when India started building a number of hydroelectricity projects on the western rivers^[21]. As mentioned earlier, Pakistan has the right of exclusive use of the water of western rivers subject to some limited rights of India. Under the Treaty, India has the right to generate hydroelectricity over the rivers subject to conditions specified under Annexure D^[22]. The right is a restricted right and India is prohibited from using the western rivers for hydroelectricity generation in a manner as to affect the quantity of water or interfere with the timing of flow. As discussed earlier, even the storage of water is not allowed except as provided in Annexes D and E^[23].

Annexes D and E provide the technical details for undertaking such projects. Most of these technical specifications are such which can allow for multiple viewpoints. Thus what may seem feasible for engineers representing India may not be the same for technical experts of Pakistan, making Pakistan come up with claims of treaty violation^[24]. This is the reason why majority of the objections raised by Pakistan have been technical in nature. Driving the point, Ramaswamy Iyer argues that it is the technical details which lead to confusion over the treaty provisions. He compares the IWT with Mahakali Treaty between India and Nepal or the Ganges Treaty between India and Bangladesh and concludes that the non-technical nature of the Mahakali and the Ganges Treaty makes it more effective. He refers to the IWT as a treaty not between two governments but between two set of engineers who are free to disagree over technical features contained in the annexures and appendices^[25]. We find support for this reasoning as most of the objection raised against Baglihar project were technical in nature such as height of gate, elevation of tunnel, level of intake tunnel, etc^[26].

Pakistan's complete dependency on the western rivers and apprehensions as a lower riparian also add to the process. The treaty provides that India provides all the details of project to Pakistan and Pakistan can object to any plan going against its treaty rights. This makes India position vulnerable and India has to meet Pakistanis disapproval before going ahead with any hydroelectricity generation plan^[27].

Indus Water Dispute and India-Pakistan Relations

Water issues in and between India and Pakistan are now literally the subject of a politicized science. No two countries in the world have so much in common as these. Both countries have similar cultural roots, linguistic similarities and shared economic system. However, since independence they have continuously been in a state of undeclared war with uncompromised issues, especially over water. The idea of sharing water is historically constructed, emotionally stimulating, and politically divisive. Though water is technically not a core issue between the two countries, differences over the use of water of the rivers is a core issue^[28]. In recent years, utilization of water has become an issue that is gaining prominence in the bilateral relationship between India and Pakistan. In 1960, both

governments agreed to sign the Indus Water Treaty, but public reaction to the treaty was very different. People in Pakistan criticised the loss of three eastern rivers to India, although Pakistan received a huge amount of financial aid in lieu of this loss even though this loss imposed heavy financial and ecological penalties upon Pakistan ^[29]. In 1964, opposition parties of the countries attacked on President Ayub Khan, and used the term as “selling” the historical rights of the country over the common rivers ^[30]. While in India, the public often criticised the loss of its three western rivers to Pakistan and the treaty makes it impossible for India to utilise the full power potentialities on three western rivers ^[31].

Media, academicians, and different groups of society and agricultural communities from both sides opposed the Indus Water Treaty. Even for opposition members of both the governments, the Indus Water Treaty is suspicious and unfair. The water experts from the both countries are also not happy with the treaty. This has eventually led to the politicisation of the water issue within both countries, and thereby, creating an immense pressure on respective governments.

It is not difficult to understand the changing tone of political relations between the two countries vis-à-vis water. It can be understood by revision of recent projects being executed by India on western rivers, which are severely criticised by Pakistan. The treaty has survived various external and internal threats which were related to the two countries political relationships ^[32], but recent years have marked strained relations vis-à-vis water and therefore the Indus Water Treaty has come under the strains, mainly due to construction of hydroelectric projects, including the Salal, Baglihar, Wullar Barrage, (Tulbul Navigation) the Kishanganga, the Nemo-Bazgo. Not all of them are sans disputes and are deemed as controversial projects ^[33].

On the other hand, Indian experts have expressed frustration over long delays in approval of these projects due to Pakistani objections, and about 27 projects on the western rivers have been questioned by Pakistan. Indian analysts and media are of the view that the provision of neutral experts should be the last option and not the recourse for each and every project that India proposes. The reference does cost time, money and efforts, in terms of delaying the projects, thereby increasing the cost of not only construction but also related expenditures in not making use of the hydro potential ^[34].

Moreover, Pakistan argued that India's line of action on the riparian issue hardly warrants a high degree of trust in good neighbourliness. In addition, the political mobilization on dam construction on the western rivers has stimulated anti-Indian sentiments among farmer associations, military consortium, politicians, and fundamentalist groups in Pakistan. From a security point of view, some strategic analysts in Pakistan are of the view that the Indian intentions are directed towards flooding Pakistan during tensions and that flood waters could destroy Pakistani defenses. Pakistan has also certain economic and defensive apprehension on the construction of projects, especially on Jhelum and Chenab River.

In 2008, after filing of the Baglihar project and subsequent reduction of the water flow in Pakistan, the project has drawn serious concerns and gained critical currency among the countries' political circles. With regard to Wullar Barrage, it has also incurred political and strategic voices

from Pakistan, as it fears that with the construction of the Wullar Barrage in Jammu & Kashmir, India could close the gate of Wullar Barrage during a warlike situation, enhancing the ability of Indian troops to enter Pakistan ^[35]. The project is also frequently criticized in farming communities.

The difficulties in interpretations of the treaty can be attributed to political motives rather than to differences over technical and engineering aspects of water management. Some non-state actors, especially radical extremist groups from two countries have their vested interests in the complex issue of water sharing and the treaty. Some are of the view that if the gap between water availability and requirements widens, terrorist operations and recruitment in the region will increase ^[36].

Given the present political atmosphere viz-a-viz water, it seems that water has gained a critical value within the two countries and none of the parties are ready to compromise. It seems that the temperament of the political systems, interests of nonstate actors and the regional political atmosphere determine the state of affairs of India-Pakistan conflict over water. Indo-Pak water relations can be well understood taking into consideration the statement of President Asif Ali Zardari in the Washington post. According to Asif Ali Zardari, “The water crisis in Pakistan is directly linked to relations with India. Its relations with India could prevent an environmental upheaval in South Asian region, but failure to do so could fuel the fires of discontent that may lead to extremism and terrorism” ^[37].

The Indus water dispute is overtly linked with Jammu and Kashmir, where the major rivers of disputed water originate. It is quite vividly expressed by the US Assistant Secretary of State, George McGhee, in his letter to David Lilienthal, in 1951.

“A settlement of the canal waters question would signify those basic reversals of policy by the governments of both India and Pakistan without which there can be no political rapprochement. Thus, the canal waters question is not only a functional problem, but also a political one linked to the Kashmir dispute” ^[38].

In 1960, it was hoped that the resolution of water dispute would pave the way for resolving the Kashmir dispute ^[39]. At the time of signing of the treaty, Jawaharlal Nehru the Indian Prime Minister, before coming to Pakistan expressed in the Indian parliament that he was ready to resolve any issue including Kashmir. Similar views and hopes were also expressed by Pakistani President Ayub Khan ^[40].

Hitherto, three wars have been fought between India and Pakistan over Kashmir, but the dispute still remains unresolved and problematic. Until and unless the Kashmir issue is settled, both countries will not be able to develop good relations in the future. If the countries came up with an agreement to settle the Kashmir dispute, nothing will prevent them from building good relationships.

The future course on observance of the treaty

The Indus Waters Treaty is hailed as a successful mechanism for conflict resolution ^[41]. It had worked well for more than half a century despite the difficult political relationship between India and Pakistan, and survived three wars between the two nations ^[42].

The Indus Water Treaty was entered in 1960. Today, after 58 years, dissatisfaction with the treaty is visible on both the sides. It is undoubted that for the treaty to remain operational for such a long time is itself indicative of the

success of the treaty. But it would not be wrong to revisit the working of the treaty, to analyse, as to how far it is able to fulfil its desired objectives today.

The Treaty was unique in the sense that rather being a water sharing treaty, it was a water partition treaty. The division of water under the treaty was as discussed earlier-very simple. Out of six rivers, three were allocated to India three to Pakistan. This division was unknown to any international custom. Rather, was reflective of the then prevailing tensions between the two countries. The initial proposal of the World Bank harped on joint development of the resources of the Indus Basin. Both, David E. Lilienthal (on whose idea World Bank took up the issue of mediating the Indus Water Treaty) and Eugene R. Black, the then President of World Bank were in favour of joint development of the basin.

Lilienthal stressed that

Her (Pakistan's) present use of water should be confirmed by India, provided she works together with India... in a joint use of this truly international river basin on an engineering basis.... This objective, however, cannot be achieved by the countries working separately; the river pays no attention to partition-the Indus, she 'just keeps rolling along' through Kashmir and India and Pakistan. The whole Indus system must be developed as a unit, as is the seven state TVA System back in the U.S. jointly financed (perhaps with the World Bank help) an Indus Engineering Corporation, with representation by technical men in India and Pakistan and the World Bank, can readily work out an operating scheme for storing water wherever dams can best store it, and for diverting and distributing water.

Even, Black in his letter to the Prime Ministers of both the countries voiced similar opinion on joint development of Indus basin. He wrote:

The Indus basin water resources are sufficient to continue all existing uses and meet the further needs of both countries for water from that source. The water resources of the Indus basin should be cooperatively developed and used in such a manner as most effectively to promote the economic development of the Indus basin as a unit.

One of the key principles of international water law is the principle of equitable utilisation of water. According to the principle, States should use the shared water resource in a "sustainable, equitable and reasonable" way with respect to the other States sharing the water. Equitable utilisation does not mean equal share. Both, the Helsinki Rules and the 1997 UN Convention, laying down the standard norms of international water law, contain provisions on the principle of equitable utilisation.

The Helsinki Rules under Chapter 2 of the Rules provides that each State is entitled to a reasonable and equitable share of the water of an international drainage system. An international drainage system is a geographic area extending over two or more States. The Rules under Article VI, go on to elaborate upon a number of parameters to be kept in mind to determine reasonable and equitable share. These include, geography of the basin, the hydrology of the basin, the climate affecting the basin, past utilisation of waters of the basin, economic and social needs of each Basin State, population dependent on the waters of the basin, availability of other resources etc. The principle stands reiterated under Article 5 of the UN Convention. Article 5 provides that Watercourse State shall participate in the use, development

and protection of an international watercourse in an equitable and reasonable manner. The convention too, under article 6 lists down a number of factors to be considered for equitable and reasonable utilisation of water.

If we look at the distribution of water under the IWT, this distribution cannot be said to be equitable and reasonable either under the Helsinki Rules or under the UN Convention. Why then was such a distribution accepted by both the countries? This was only because, any system providing for joint working/arrangement would have failed to see the light of the day. One of the chief strength of the treaty is that it chalked out a unique solution to address the needs of both the countries, rather than borrowing from international law or established practices. Given the, then existing political hostilities and the deep mistrust between the two countries, partition and individual handling of water resources by both countries was the only workable solution. This uniqueness has also turned out to be the weakness of the treaty, responsible for majority of the objections raised by Pakistan to India's hydroelectric power projects. Partition of the rivers made India and Pakistan stand at opposite corners. This coupled with Pakistan's extreme dependency on the Indus and position as the lower riparian State, makes Pakistan view India's each hydropower with antipathy. To add to India's trouble, it is vital for her to have hydropower projects.

At the same time, there has been growing demands from the state of Jammu and Kashmir to scrap the treaty. It has been constantly protesting against the treaty for imposing restrictions on any development work sought to be carried on by the state. State of Jammu and Kashmir contends that the treaty was not entered into taking in consideration its requirements. Recently, a State Commission has recommended that the state should seek compensation for its losses from both India and Pakistan.

Abrogation of the treaty is an absurd proposition. Besides sending a wrong signal to India's other neighbours with whom India has entered into treaties to define water-sharing arrangements, the measure will also be not taken kindly of by the world community which has invested a substantial amount for financing the replacement work undertaken by Pakistan under the treaty arrangements. Also, even otherwise the treaty, Pakistan stands in the position of lower riparian state and is entitled to water rights under international water law. Even abrogation of the treaty, Pakistan has its rights secured under international law. Also, abrogation of the treaty will make alive the rights presently waived by Pakistan over the Eastern rivers. Hence, abrogation of the treaty does not seem to be sound proposition.

Though abrogation of the treaty is not an option, at the same time, there are legitimate concerns which need to be addressed. The treaty was entered into at a time when India-Pakistan relations were extremely poor. Post partition, there was deep suspicion between the two States. Any arrangement requiring day to day cooperation on the part of the two States would have failed to achieve its object. In such a situation the IWT provided for the best workable system. Under the then prevailing circumstances, it was not possible to opt for an equitable distribution and optimal utilisation of the Indus water resources in line with present international water law principles. However, a better solution can be searched for now. Both India and Pakistan can look for a renegotiation of the treaty in the light of

changed circumstances. Authority for renegotiation is derived from Article XII (3) of IWT, which provides that the provisions of this treaty can be modified by a duly ratified treaty concluded for the purpose between the two governments.

Both India and Pakistan can take the opportunity of renegotiation to address each other's legitimate claims and opt for a better and more workable system, preferable in conformity with the principle of equitable utilisation of water resources. Syed points out an example of joint initiative in the Tala Hydroelectric Project- jointly undertaken by India and Bhutan. Such initiatives can also be considered between India and Pakistan. This will also bring the law on par with existing international standards and will be in conformity of the International Court of Justice decision in the Gabčíkovo-Nagymaros case wherein the Court held that; modern development of international law has strengthened this principle (of the community of interest in a navigable river among all riparian States) for the non-navigational uses of international watercourse as well, as evidenced by the adoption of the Convention of 21 May 1997 on the Law of Non-Navigational uses of International Watercourses by the UN General Assembly...new norms and standards have been developed, set forth in a great number of instruments over the last two decades. Such norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past.

As discussed earlier, most of the disputes raised under the treaty are technical in nature. Hence, a re-negotiation of the treaty to have a more integrated system will be mutually beneficial to both the parties and is the need of the day.

Conclusion

At the bilateral level, the IWT has served an important moderating function in the hydropolitics between India and Pakistan. The IWT is lauded as one of the major achievements of the World Bank. The treaty has survived for a considerable time period despite the hostile relations between the two State parties. However, with time, issues have started cropping up. Reference of a dispute to and neutral expert or to arbitration cannot be counted as the failure of the treaty. Rather, it denotes that the treaty is properly functional and operative. However, present areas of constant friction and growing dissatisfaction over the treaty cannot be ignored for long. Rather, it should be used as an opportunity to better the law by re-negotiating a new deal in conformity with the technological and legal developments. The treaty is a product of its time and could be fruitfully modified and renegotiated to bring it more in line with contemporary international watercourse law, the Helsinki rules^[43], and emerging concerns with water quality, environmental sustainability, climate change, and principles of equitable sharing. As long as the two countries continue to be hostile and mutually suspicious, the imperfect IWT will have to be the medium for the conduct of hydropolitics between the two countries. But that renegotiation, if it ever happens, is going to be contingent on significant improvement in bilateral relations between India and Pakistan.

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