



## RIVER DIVERSION & ETHNIC CONTESTATION

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### ABSTRACT

The paper is written for the development of international water law & its principles. We also focused on the water based politics between the South-Asian countries like India, Nepal, Pakistan & Bangladesh. We also focused on the treaties made by India-Pakistan, India-Nepal, India-Bangladesh. Everything is described in detail. Specific attention is given to the main treaties & the disputes with the Indus & Ganges. In the Final Part, we reviewed the treaty experience & focused on the bilateralism & multilateralism of the country. And finally, we concluded by stressing the importance of cooperation through the treaty making process.

### Tran's boundary Water Conflicts in South Asia: Towards Water for Peace:

#### **River diversion & ethnic contestation:**

According to **Justice Oliver Wendell Holmes** "A river is more than an amenity; it is a treasure. It offers a necessity of life that must be rationed among those who have power over it." During the primitive era, the civilization were all nourished around rivers. For growing food and for domestic needs, this was the main reason to live on the bank of the rivers. In recent history sheared rivers have become sources of conflict, as well as catalyst for cooperation. This is the exact scenario about the South Asian sub-

continent and some vital rivers run through it and the three largest basins, those of the Indus, the Ganges, and the Brahmaputra affect not only the countries of the subcontinent but China as well. Freshwater is increasingly in short supply throughout the world and the main reason is population growth and the resulting competition for this scarce water gives rise to complex international problems as this states that share the water of international drainage basins seek to satisfy their pressing needs .The concerned states of that region are Bangladesh ,Bhutan ,India, Nepal and Pakistan ,the countries of the Himalayan block they occupy some twenty major rivers and the three of them being of the particular international legal importance ,namely the Indus ,the Ganges and the Brahmaputra. The dispute between India and Pakistan concerning the waters of the Indus Rivers have brought the parties to the brink of war at the outset, was eventually resolved by the Indus water treaty of 1960, which was breached only through the intervention of the World Bank and the financial aid of the other states. The lawyers for the parties disagreed strongly about the applicable principles of International law governing international water resources.<sup>1</sup>

The relations of India and Nepal are then discussed and then India and Nepal entered into small agreements, the results have not always been happy. Nepal,a small, land-

<sup>1</sup> See World Bank, World Development Report .2000/2001, Attacking Poverty (2000), at 4. The report defines poverty as living on less than \$1 a day, and indicates, under this definition, that 1.2 billion people worldwide live in poverty. About 2.8 billion people, alarmist half the world's population, live on less than \$2 a day; see id., at 3. All "\$" and "dollars" refer to US\$.



lock, and poor upstream state ,finds the development of its abundant water resources ,for economic if no other reasons ,dependent on the agreement with its larger neighbor downstream. Even when agreement is reached, as in the Mahakali treaty of 1996, implementation is hampered by differences of interpretation about its terms.

The relations of India and Bangladesh concerning the Ganges River emphasize the difficulties in discerning, the general principles of international law applicable to the waters of international drainage basins and applying them to the complex facts of a particular case.

### The South Asian Subcontinent

On the fact that water is a scarce resource, characterized by its special and seasonal variations with no substitutes international rivers have worldwide being a source of conflict as well as a catalyst for cooperation .The South Asian subcontinent includes Bangladesh, Bhutan, India and Pakistan .It is the one of the most densely populated parts of the world, and includes in large number of poor people. Nearly 1.3 billion people live in the countries of the subcontinents which represents more than twenty percent of the world population of more than six billion. The GNP per capita for the four countries (Bangladesh, India, Nepal and Pakistan) ranges between \$220 to \$ 470, placing them at the bottom of the list of poor countries of the world.<sup>2</sup>

The river systems of the Himalayan region can be divided into three sub regions .The Western Himalayan sub region includes the Indus system to which the Jhelum, Chenab ,Ravi, Beas and Sutlej rivers belong. The Central Himalayan sub region includes the Ganges system of which the Yamuna, Rāmgangā, Mahakali, Karnali, Gandaki and Kosi rivers are part. The Ganges basin is shared by India, Bangladesh, Nepal and China. The Easter sub Himalayan sub regions includes the Brahmaputra system to which the Teesta, Raidak and Manas rivers belong. The Brahmaputra system is shared by India, Bangladesh, Bhutan and China. Several other tributaries of those rivers also flow into more than one country, thus falling into the category of international rivers as well. Despite the large number of rivers, and the significant importance of water resources for the basic livelihood of its people, the South Asian subcontinent has not been successful in designing and establishing treaty regimes for several of its shared rivers. The Indus water treaty has been entered into between India and Pakistan, and a series of successive treaties on the Ganges River has been entered into between India and Bangladesh. Nepal and India have established treaty relations on three international rivers: the Kosi agreement (in connection with Kosi River), The Gandak agreement (in connection with the Gandaki River) and the Mahakali treaty (in connection with the Mahakali River).<sup>3</sup>

The United Nations Convention on the law of the non-navigational uses of International water courses (The UN Convention), which was adopted by the United Nations General

<sup>2</sup> See Frontline.

<sup>3</sup>Interactional Law Association, Report of the Forty-Seventh Conference.



Assembly on May 21, 1997, after more than twenty five years of preparatory work by the international law commission and extensive deliberations by the Sixth Committee of the General Assembly, has yet to enter into force and effect. On the other hand, regulation of the navigational uses of international watercourses predated the efforts of the institute of international law and international law association. The process commenced with the adoption of the act of the Congress of Vienna on June 9, 1815. In it non navigational uses such as irrigation, hydropower and industry were only in the early stage of development. The act of Congress of Vienna included, inter alia, ten articles on navigation on international rivers. Article 108 stated that the powers whose territories were separated or crossed by the same navigable river undertook to regulate by common agreement all that related to navigation of such rivers, and for that purpose they would name commissioners who would adopt the principles established in the pertinent articles of the act. Article 109 establish the principle of freedom of navigation on such a river, for all riparian, on a reciprocal basis. The Rest of the articles dealt with the issues such as system for collection of dues and regulation of tariff. On the South Asian subcontinent, international water law rules have been interpreted and used differently. The countries have, in their disputes and negotiations, often invoked the principle of equitable utilization as well as the obligation are not to cause significant harm, the concepts were understood by countries to include different sets of rights and obligations and were interpreted differently. The international norms and rules related to international water courses have had a

relatively paced evolution. Even now, the bulk of the rights and obligation that are applicable still eminent from customary international water law

### INDIA PAKISTAN TREATY

The conclusion in 1960 of the Indus water treaty between India and Pakistan was, no doubt a remarkable achievement. After a long period of negotiations carried out under the auspices and mediation of the World Bank, the Indus water treaty brought to an end the longstanding dispute between India and Pakistan on the use of waters of the Indus river system for irrigation and hydropower. The land is located in Northwest India and Pakistan and is one of the most important rivers in the world. The main river Indus is about 2,000 miles long. Its two principal tributaries from the West, the Kabul River and the Kura River, together are more than 700 miles long. The stalemate in negotiations was reversed by the visit of David Lilienthal, former Chairman of the Tennessee Valley Authority, and of the United States Atomic Energy Commission, to India and Pakistan in February 1951. Following his visit, Lilienthal wrote an article in which he made a series of recommendations pertaining to the Indus system of rivers. Among others, the recommendations included that the Indus Basin be treated, exploited, and developed as a single unit<sup>29</sup>; that financing be provided by India, Pakistan and the World Bank; and that the Indus be administered by an Indo-Pakistan mixed body or a multinational body.<sup>30</sup> In fact, Lilienthal's proposal was based on a return to a pre-partition premise for the Indus Basin irrigation system. At that time Mar. Lilienthal believed that the waters from the



basin were sufficient to support the needs of the two countries, a belief that would not be confirmed by later studies. In the meetings in Karachi in November 1952 and in Delhi in January 1953, the two countries could not agree on a common approach to developing the waters of the Indus system. The World Bank suggested that both countries prepare their own plans. The two countries' water use and allocation plans were submitted to the World Bank on October 6, 1953.<sup>34</sup> they differed significantly. According to the Indian plan, of the 119 million acre-feet (MAF) of total usable water, 29 MAF would be allocated to India and 90 MAF to Pakistan. But according to the Pakistan plan, which estimated 118 MAF of total usable water, 15.5 MAF would be allocated to India and 102.5 MAF to Pakistan. The World Bank on February 5, 1954,<sup>4</sup> was in principle endorsed, albeit with a few reservations.<sup>39</sup> In fact, India accepted the proposal on March 25, 1954, but Pakistan questioned the proposal's premise that there was enough surplus water in the Western Rivers to replace its irrigation uses on the Eastern Rivers. Pakistan contended that a system of link canals would not be adequate to meet all uses without including storage reservoirs in the replacement works. The Bank agreed to examine Pakistan's contention, and carried out its own independent studies to examine the issues in dispute and to prepare an adequate system of works to replace Pakistan's uses on the Eastern Rivers.<sup>40</sup> The studies confirmed that there was not enough surplus water in the Western Rivers, particularly in the critical crop periods, to replace Pakistan's uses and that storage reservoirs were

necessary to meet the shortages. At this juncture, the Bank issued an aide memoire on May 21, 1956 that modified its original proposal and included storage dams in the system of replacement works.<sup>41</sup> Pakistan accepted the modified proposal in 1958, but India disputed the need for storage dams and insisted that its liability should be limited to the original Bank proposal. Recognizing the impossibility of resolving the dispute without additional financing for the huge cost of replacement works, and the fact that neither India nor Pakistan were in a position to bear the costs of the replacement works, the Bank decided to mobilize funds from bilateral donors. At this point, the issue pending in the dispute was practically resolved.<sup>42</sup> The Governments of India and Pakistan desired the most complete and satisfactory utilization of the waters of the Indus system of rivers. The primary objective was to fix and delimit the rights and obligations of each country's use of the waters in relation to the other. With its preamble, followed by 12 articles and eight annexures (including appendices), the Indus Treaty attempts comprehensively to deal with the issues of water allocation and the flow of water. Crafted by technicians and engineers rather than lawyers and diplomats, the Indus Treaty, is complex and prolix, despite its apparent brevity. The complexity was perhaps inevitable, but some articles are of unusual length. The Commission comprises the two commissioners who are the representatives of their governments, the decision on a matter can only be taken by agreement. There is no voting involved as the two commissioners have to agree or disagree in regard to a particular matter after discussion. The two Commissioners are assisted by their advisers. There is no

<sup>4</sup> See Article 8 and 9 of the Convention



restriction on the number of advisers required to assist a Commissioner in a meeting. No participation by the public at any phase of the decision-making is envisaged in the Treaty. The Treaty also does not provide for any contact of the Commission as a body with governmental authorities, agencies or departments of member countries at the national, regional or local level. The parties were to endeavour to put together a Standing Panel of Umpires, from whom the selections might be made. The constitution and procedure of the Court of Arbitration were spelled out in an Annexure to the Treaty.<sup>77</sup> It is noteworthy that the applicable law includes the Treaty, and for purposes of the interpretation and application of the Treaty, and in order, (i) the international conventions establishing the rules explicitly recognized by India and Pakistan, and (ii) the customary international law.

#### CONCLUSION

The Indus Treaty is an excellent example of the settlement of riparian issues and one of the few examples of a successful settlement of a major international river basin conflict. Also it is the first dispute regarding water use in which an international organization played a successful mediating, role in resolution. Even if it was far from an optimum economic solution and failed to cover vital drainage issues, the Treaty is regarded as a major achievement as it has been able to divide the Indus and its tributaries unambiguously between the riparian's. The fact that there were six rivers in the system offered the simple solution of the three Western Rivers (the Indus, Jhelum and Chenab) being reserved for consumptive use by Pakistan, and the three Eastern Rivers

(the Ravi, Beas and Sutlej), being reserved for consumptive use by India. The Treaty's originality has contributed importantly to its success. The allocation of the waters of the three rivers to India and three to Pakistan is in the nature of a territorial division. Since the Treaty was signed, the two parties have not had to deal jointly with water administration other than to enforce the Treaty's terms and iron out some practical difficulties. The Treaty has also set an optimistic tone. The Treaty, in accordance with Article 12, was deemed to have entered into force retroactively on April 1, 1960. This was, it should be emphasized, not only prior to the date of exchange of instruments of ratification (which occurred on January 12, 1961), but prior to the date of the execution of the Treaty. This element should indeed be noted because it is a practice rarely found in conventional international law. The solution proposed in the Indus Treaty recognizes the notion of compensation. In 1947, India had claimed an amount of Rest. 150,000,000 from Pakistan to compensate for the loss of water due to the canals built under the British rule.<sup>13</sup> A year later, India accepted the principle of payment of compensation in favour of Pakistan for the deviation of water in the Indian Territory. Finally the Treaty provides for a financial contribution of India, for the development of the Indus Basin, which was essentially meant to be for carrying out works in Pakistan territory.

#### INDIA-NEPAL TREATIES

Various agreements had been signed in the twentieth century between India and Nepal: This include **THE SARADA AGREEMENT (1920)** on the Mahakali River



- Out of the annual flow of approximately 650 cumees of water during dry season and 13 in the wet season, which could be further increased to 28.34 cumees if water was available.
- Formed the basis of the Sarada barrage built to irrigate United Provinces .

**THE KOSI PROJECT AGREEMENT (1954)**

- Nepal is allowed to withdraw water from Kosi and its tributaries for irrigation and other purpose.
- With the "Kosi sell-out" furor in Nepal, the Kosi agreement was revised in 1966.
- Recently, the two countries have agreed to jointly investigate the Kosi multipurpose project which includes the High-dam in upstream Nepal near Barakshatra, the details of which are to be prepared under the Indo-Nepal Mahakali Treaty.

**THE GANDAK AGREEMENT (1959)**

- This agreement allowed India to build a barrage on the Gandak at its own cost at the India-Nepal border, near bhaisalotal village.

**THE MAHAKALI INTEGRATED TREATY (1996)**

- Signed between India and Nepal in 1996, the Mahakali –Integrated Treaty looks at the integrated development of the Mahakali River, including the Sarada barrage, Tanakpur barrage and Pancheshwar project, and tries to develop principle of sharing cost and benefits, and recognizes Nepal's prior water ride.

**INDIA BANGLADESH AND THE GANGA TREATY**

The Ganga treaty is the only water sharing treaty in South Asia signed on 12th December 1996. The treaty addresses the issue of water allocation between India and Bangladesh which post Farrakhan ,had strained relations between the two countries.

- If the Ganga has more than 75,000 cusecs of water, India can divert 40,000 cusec into the Hooghly and allow the rest to flow to Bangladesh
- The treaty guarantees Bangladesh and minimum of 35,000 cusecs in lean season
- Both sides have also agreed to enter into treaty or agreement regarding other common rivers

**CONFLICTS OF APPROACHES TO WATER**

In trying to understand the various actors and their approaches on the issue of Trans boundary water, it is important to recognize at the outset that there are plurality of actors in the water sector-the state which includes governments, bureaucracy and the state missionary

- State/strategic approach: The state or the government departments have long been the major actors when it came to water issues. With regard to Trans Boundary Rivers, the State approach has been one of the strategic and centralized control.
- Market/economic growth approach: The market approach is based on the understanding that given the problems that nation states have had in sharing their water resources, the mechanisms for governance of water must been left to the market and the



economic instruments. It includes wide range of actors who argue for water markets, privatization of water, tradable water rights, and accounting for the economic, value of water/public private partnership.

- Alternative approach/water as social group and basic human right: Water is essential for life, livelihood and survival the combination of safe drinking water and hygienic sanitation facilities is a pre-condition for health, to success and fight against poverty, hunger, child deaths and gender inequality; protection of the rights of the displaced people and their culture that is caused by environment and ecological concepts.<sup>5</sup>

#### GENERAL CONCLUSION

- Despite the culture and geographical similarities among the countries of the south Asian sub-continent, each of its shared rivers faced its own kinds of problems, and has generated the system of rules of management adapted to manage such problems. The Mahakali treaty even includes the provision for allocating water for preserving the ecosystem. The treaties has all been entered into the past 50 years, starting with the 1950's and ending in 1990's.
- The Indus water treaty between India and Pakistan, for instance, expressly provided that nothing contain in the treaty must to be construed as in anyway establish the general principle of law or any president
- A similar provision is included in the preamble to the 1977 Ganges agreement between India and Bangladesh, and was again reiterated in the preamble to the 1996 Ganges treaty between those countries.

Bilateralism can be justified because negotiations are simpler more often than necessary it has been used as a shield to avoid opposing co-alition and preserving bargaining power. This perception gives the negotiator a particular charge. The discrepancy in the political situations and choices of the countries of the South Asian sub-continent the parties attempt through the treaties, to develop water resources for common economic growth, to fix and limit rights of use by the parties, and to confirm amounts of water to be used by the parties on the sheared rivers. The administrative powers includes supervision of construction and administration of relative rights under the treaties.

**Future Prospects:** Any country in conflict owes its vitality to its ability to strike a balance between its aspirations and what it can realistically achieve. SAARC can facilitate the process of negotiations on several political issues, either water related or not. Indeed although the charter of the SAARC does not include specific reference to cooperation over sheared water resources, it does not stress the need for the joint action and enhanced the cooperation among the respective political and economic systems of its members. And although treaties and other legal instruments over international rivers will not, by themselves, solve all the problems in such rivers, it is equally true that there can be no resolution of water disputes and conflicts without them. Such instruments are indeed the only means for translating cooperative political will into applicable and enforceable action.

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<sup>5</sup> C. K. Sharma, A Treatise on Water Resources