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Water Beyond Borders Update

Developments on Transboundary water issues in South Asia

www.waterbeyondborders.net

Teesta is a river most people in India don't really pay much attention to. In the land of the sacred Ganga, the mighty Brahmaputra, the polluted Yamuna and the disputed Krishna and Cauvery, the Teesta River hardly finds mention in political discussions. All this changed in 2011, when Mamata Banerjee, the CM of West Bengal refused to be part of the Indian Delegation headed to Dhaka. It was seen a national embarrassment for India and threatened to jeopardize the already fragile Indo Bangladesh relations. For Bangladesh, it was no longer a 'big brother syndrome' but rather the 'big sister' (*Didi*) approach. The firebrand leader, Mamata Banerjee, refused to accept the draft agreement which she felt was unjust to West Bengal.

The *Mamata* episode was covered extensively by the media. However, very little discussion was on the actual implication of the proposed Teesta Agreement. Very few knew that the agreement was not just for River Teesta but for six other common rivers flowing into Bangladesh from India located in West Bengal, Tripura, Meghalaya and Manipur. Under the cover of Teesta, the fate of other rivers were also to be decided. Virtually no public discussion took place on how the water sharing formula was worked out: 40 % for Bangladesh, 40 % for India and 20 % for the river. Was it based on scientific study, need assessment, social surveys? The information existing in public domain does not reveal the basis on which this formula was worked out.

The limited discussions around the draft Teesta Agreement revealed the very limited public awareness and participation in transboundary water agreements. Without doubt, transboundary water issues have been a subject of discussion among water sector specialists ('hydrocrats'), foreign affair specialists, political scientists and international relation experts. These discussions have generally excluded the wider civil society, grassroots groups and local people. The press reports on transboundary water negations focus more on the political power dynamics or last minute news making events and not on the key environmental and social issues surrounding transboundary water relations. It was against this backdrop that the *Water Beyond Borders* initiative was launched in 2010 to create a common platform to collect, analyze and disseminate information with respect to transboundary water issues in South Asia. In addition, the aim of the initiative was also to track the transboundary water issues from the access rights perspective viz access to information, public participation and access to justice. It has been observed that the transboundary water treaties and agreements in the region are opaque with very limited or no scope for effective public involvement. Official information dissemination is virtually non-existent, and not much is known about what is happening during the various joint river commission meeting. It is with a view to deal with these issues and concerns that the Water Beyond Borders Initiative is launching the Water Beyond Borders update: a quarterly journal on key developments on transboundary water issues in the Indian Sub continent. The aim is not only to disseminate information with respect to the latest developments on transboundary water issues, but also to critically analyze some of the key policies, agreements and developments with respect to transboundary water issues. We plan to place the ecological health of the rivers, the livelihood concerns and the right of affected people at the centre of our discussion. It is our hope that enhanced understanding on the existing and proposed agreements will lead to greater public involvement and lead to agreements which are informed.

Ritwick Dutta

Coordinator, Water Beyond Borders Initiative

The Ministry of Water Resources announces the Hydro-meteorological Data Dissemination Policy, 2013

Taking forward the recommendations on access to information in the National Water Policy, 2012, the Ministry of Water Resources has finalized the Hydro-meteorological Data Dissemination Policy, 2013.

The Policy categorizes data relating to a) the Indus basin & other rivers and their tributaries discharging into Pakistan and b) Ganga-Brahmaputra-Meghna basin and other rivers and their tributaries discharging into Bangladesh/Myanmar as classified data. Data regarding all other rivers and tributaries are unclassified. The reservoir water level, live storage position, water quality, groundwater and meteorological data for all regions are also unclassified.

On the positive side, for the first time, it does allow access to classified data, albeit with certain conditions. On the other hand, the procedure for dissemination of classified data places wide discretionary powers

According to the Policy, all unclassified data are to be made available on the IndiaWRIS website, which can be downloaded by any web-registered user free of cost. For obtaining classified data, a request has to be made to relevant Central Water Commission (CWC) Chief Engineer stating the purpose for which the data is required. The data will be released, to the extent determined to be appropriate by the Classified Data Release Committee.

There are certain issues that are relevant from the perspective of trans-boundary rivers and access to information. On the positive side, for the first time, it does allow access to classified data, albeit with certain conditions. On the other hand, the procedure for dissemination of classified data places wide discretionary powers with the CWC Chief Engineer and the Classified Data Release Committee. The CWC Chief Engineer is vested with the responsibility of not only verifying the authenticity of the person requesting the classified data, but also examining the purpose for which the data is requested, and the minimum data required for that purpose. The recommendations of the CWC Chief Engineer is then to be placed before the Classified Data Release Committee – which comprises 2 Members of the CWC (including the CWC Chief Engineer), 2 Members from the Ministry of Water Resources and a Member from the Ministry of External Affairs. There is no indication in the policy on how this Committee examines the requests, and on what grounds the information requested can be denied. From our experience of the Right to Information Act, we have seen that government authorities tend to be highly evasive even when the grounds for refusing information are very limited. Leaving such discretionary powers could make the whole dissemination policy virtually ineffective.

The Policy also places unnecessary barriers to access. Any unclassified data is not only non-transferable, but also not allowed to be reproduced in any report/ publication/ Detailed Project

Report (DPR), etc. Only the result of analysis and inferences drawn from it can be published. Further, although it makes such data available to Indian non-commercial users free of cost, it places a heavy economic cost (Rs 75000 per site per annum) for any foreign user, including non-commercial users.

The Policy can be downloaded from the website of the Ministry of Water Resources

India – Nepal: A flood of concerns

Fourth Meeting of India-Nepal Joint Standing Technical Committee

The devastating floods of June, 2013 – the effects of which were felt both in Nepal and India – were a crucial discussion item in the Fourth Meeting of India-Nepal Joint Standing Technical Committee (JSTC) held on 12-13 September 2013 in Kathmandu. The Government of India assured Nepal that necessary flood protection works in the stretch of about 1,200 m length on the left side of the Mahakali River, downstream from the Sharda Barrage, would be completed before the monsoon of 2014. It was also agreed that the report prepared by the taskforce during 6-12 December 2011 on flood forecasting activities in the rivers flowing from Nepal to India would be reviewed by the experts of both the Governments, and concrete steps would be recommended jointly taking into consideration the applicable new technologies. This would be reviewed by the JSTC in its next meeting. In addition, the JSTC decided to form a bilateral mechanism to share information on the assessment and warning of imminent flood dangers and to work on long term planning for the protection of life and property in the area in future. The mechanism will be represented by the Division Chief, Water Induced Disaster Prevention Division No. 7, Dhangadhi from Nepal and a representative of Uttarakhand from India.

Key Discussions

JSTC decided to form a bilateral mechanism to share information on the assessment and warning of imminent flood dangers.

The Government of India is to send study teams to the Pancheshwar and Rupaligad dam sites in order to carry out necessary hydrological and geotechnical field studies.

The Sapta Kosi High Dam and Sun Kosi- Kamala diversion projects were discussed.

Regarding other aspects, the Minutes of the Meeting indicated that the Terms of Reference of the Pancheshwar Development Authority is in the process of being finalized. The Government of India is to send study teams to the Pancheshwar and Rupaligad dam sites in order to carry out necessary hydrological and geotechnical field studies.

The JSTC also discussed the Sapta Kosi High Dam and Sun Kosi- Kamala diversion projects and issues of flood forecasting and flood management measures. It was noted that the field investigation works in connection with the preparation of DPR has been halted due to local problems. While the dialog and open communication is a positive indicator, composition of these

channels of negotiation are entirely dominated by Government officials with no participation of members of the civil society.

The Mahakali Treaty

The Mahakali river forms the boundary between India and Nepal. The Mahakali Treaty was signed between India and Nepal in 1996 for the integrated development of the Mahakali river. The Pancheshwar Multipurpose Project is the keystone of the Mahakali Treaty. In addition, the Treaty also replaces the earlier understandings reached between India and Nepal concerning the utilization of the waters of the Mahakali River from the Sharada Barrage and the Tanakpur Barrage.

The Treaty assigns Nepal's share of the waters of the Mahakali river in the wet season (15 May – 15 October) and the dry season (16 October – 14 May). In addition, Nepal is entitled to receive a supply of 70 millions kilowatt-hour on a continuous basis annually from the Tanakpur power station.

India has an obligation to maintain a flow of not less than 350 cusecs downstream of the Sarada Barrage to maintain and preserve the eco-system.

The Pancheshwar Project is planned as an integrated project including two power stations of equal capacity on each side of the Mahakali river. The two power stations are to be operated in an integrated manner and the total energy generated is to be shared equally between the two countries. The cost of the Pancheshwar Project is to be borne by the parties in proportion to the benefits accruing to them.

The Treaty declares that both countries have equal entitlement in the utilization of the waters of the Mahakali river, without prejudice to their respective existing consumptive uses. The Treaty also recognizes the right of communities living on both sides of the river to use upto 5% of the average annual flows at Pancheshwar

Both countries have an obligation to not use or obstruct or divert the waters of the Mahakali river adversely if it affects its flow, unless an agreement to that effect is arrived at between the parties.

The Treaty establishes the Mahakali River Commission for the implementation of the Treaty and resolution of differences. The Treaty mentions that the Commission will be guided by the principles of equality, mutual benefit and no harm. In the event that the Commission is not able to resolve the difference, it is to be referred for arbitration to a panel of three arbitrators.

The Treaty also provides for a periodic review every 10 years.

India – Bangladesh: Discussions on the Teesta agreement and Tipaimukh dam make no headway

The last meeting of the Indo-Bangladesh Joint Rivers Commission (JRC) meeting was held in New Delhi from March 17-20, 2010. The 38th Meeting of the JRC, scheduled to be held in June, 2013, was cancelled at the last moment. According to official sources, "Due to pressing domestic engagements, the Minister of Water Resources has to postpone his visit to Dhaka." However, it was expected that the 38th Meeting, even if it was held, would have been a disappointment, given the roadblock reached on the Teesta issue.

The Teesta treaty, which has been closely interlinked with the agreement on land boundary/exchange of enclaves, has been on the anvil for a while without any definitive outcome. The Government of West Bengal has remained inflexible about the claims of the North Bengal region over the waters of the Teesta.

The Bangladesh Foreign Minister, Dipu Moni's visit to Delhi in July, failed to arrive at any conclusive agreement on the Teesta agreement, and later, it was announced in the Bangladesh Parliament that "The deal is yet to be signed due to India's complexities in its internal politics. It is not possible to give a timeframe for the singing of the deal as it is a completely internal affair of India", and the visit of the Prime Minister of Bangladesh to finalise the two agreements later this year is unlikely to come through.

To further complicate matters, the political commitment has to be viewed in the context of the upcoming elections where these issues are highly sensitive and will be used, either way, as leverage points. With both Governments nearing the end of their respective tenures, this period is crucial to conclude the existing deals and negotiations, failing which, any ground gained thus far could be lost.

Interestingly, the draft interim agreement regarding the Teesta is the only formal agreement in South Asia which explicitly apportions a "share of the river" – 20% of the actual flows, as described in Annex I. In addition, the Statement of Principles of sharing the water during dry seasons in the draft Teesta treaty also require a minimum flow of 200 cusecs to be ensured for the "river ecosystem". Although there is neither any scientific basis to assess the adequacy of this provision, nor any mechanism for ensuring this, this could mark a significant step towards recognizing the legal status of the ecological needs in apportioning water resources.

The other contested issue is the construction of the Tipaimukh dam, proposed on the river Barak in Manipur, India. This dam has been a contentious issue since its inception in 1978. The dam is planned in an ecologically sensitive region. In addition, it will submerge a wide area of Manipur. Civil society groups and environmentalists have opposed the government's decision to build the Tipaimukh dam in Manipur. In addition, Bangladesh has voiced its concern on the adverse impact as a lower riparian.

"The second meeting of the sub-group on Tipaimukh Hydroelectric Project under the Indo-Bangladesh Joint Rivers Commission was held on 1 and 2 February, 2013. According to the joint press release, the Commission discussed the findings of the Institute of Water Modelling (IWM) and Center for Environmental and Geographic Information Services (CEGIS) engaged by Bangladesh to study, *inter alia*, the impacts on hydrology, morphology, salinity, probable hazards, fisheries, livelihood and the ecosystem. India has earlier handed over the Project Report (DPR) and Environmental Impact Assessment (EIA) Report to Bangladesh. In the course of this meeting, Bangladesh requested for some additional data and reports."

In India, the Central Electricity Authority gave the project its techno-economic clearance in July 2003, while the public investment board gave its approval in January 2006. The environment clearance was granted by the environment ministry in October 2008. However, The Forest Advisory Committee turned down a proposal for the diversion of 1,550 hectares of forest land required for the project in Mizoram in its meeting in July, 2013. It observed that "the project requires 24,329 hectares of forest land, which is more than one-fifth of the total 118,184 hectares of forest land diverted for execution of 497 hydel project in the entire country after the Forest Conservation Act came into force." It concluded that "The FAC after detailed deliberations concluded that requirement of forest land for the project is large and is disproportionate to its power generation capacity. Also very high ecological, environmental and social impact/cost of the diversion of the vast tract of forest land will far outweigh the benefits likely to accrue from the project. The FAC, therefore, strongly recommended that approval for diversion of the said forest land should not be accorded." In light of this development, the fate of the Tipaimukh dam is once again uncertain.

Observations of the FAC for the Tipaimukh Project in its Meeting held on 11-12 July, 2013

The Forest Advisory Committee is a statutory committee formed under the Forest (Conservation) Act, 1980. Any proposal for diversion of forest land for non forest purposes must be placed before the FAC for appraisal. The FAC, which is headed by the Director General of Forests, has non officials, and includes NGO representatives as members. The FAC is an advisory body and the there are very few instances where the FAC's advice is rejected.

Some important observations made in the minutes of the FAC meeting which recommended the rejection of the Tipaimukh project are:

- The forest land required for this one project (24,329 hectares) is more than one-fifth of the total forest land diverted in the entire country for 497 hydel projects since the FC Act came into force (1,18,184 hectares)

- The forest land required for the project is more than 100 times the average rate of diversion forest land for the hydel projects for which approval under the FC Act has been accorded by the MoEF so far

- The Project will require 16 hectares of forest land per megawatt. This is much higher than the average per megawatt requirement of forest land for existing hydel projects in the country

- The forest land required for this single project is almost two-thirds of the average annual rate of diversion of forest land for non-forest purposes in the 32.5 years of the existence of the FC Act

- The project will impact critically important forest and wildlife habitat, which is home to several endangered species and no compensatory measures would help in mitigating the adverse impact caused by the project.

- The project would involve large scale displacement of 12 villages of 557 families, comprising a largely tribal population. The employment opportunities created by the project is not commensurate with the loss of land and natural resources which are generally the main source of livelihood of the tribal population of the state

Conclusion:

"The requirement of forest land for the project is large and is disproportionate to its power generation capacity. Also very high ecological, environmental and social impact/cost of the diversion of the vast tract of forest land will far outweigh the benefits likely to accrue from the project. The FAC therefore strongly recommend that approval for diversion of the said forest land should not be accorded."

"in case the user agency desires, they may explore feasibility to construct smaller dams involving diversion of smaller forest area commensurate with their power generation capacity"

India – China : Smoke and Mirrors

The India-China dialog is marked with a cloak-and-dagger secrecy, characterized by mutual accusation and the lack of strong institutions for cooperation.

The existing arrangement with China is limited to sharing hydrological information through two separate Memorandums of Understanding regarding sharing hydrological information (Water Level, Discharge and Rainfall) in flood season (1 June to 15 October) on the Brahmaputra (Yaluzangbu in China) and the Satluj (Langquin Zangbu in China). These have been extended and renewed from time to time. During the visit of Chinese Premier Li Keqiang to India from May 19-22, 2013, a separate Memorandum of Understanding was also signed between the India's Ministry of Water Resources and China's National Development and Reform Commission for cooperation in the field of ensuring water efficient irrigation. The latest MoU signed between India and China in October, 2013 only achieved in increasing the period of sharing hydrological data from June to October to May to October for flood management. The clause that refers to development of the transboundary rivers only states that the two countries would "exchange views on other issues of mutual interest." This only a modest progress along the lines of the "assurances" of China that have thus far only been verbal. However, this still does not amount to any clearly spelt out obligation of China to share information about Chinese projects on shared rivers.

China is also reported to have identified 39 projects on tributaries of the Brahmaputra, including seven on the main river. India's proposal for establishing a joint water commission with China for better transparency about these projects were firmly rebuffed by China, leaving room for uncertainty and doubt in the status of development projects on the river. As the upstream riparian, and in the absence of any legally binding commitment under any international, regional or bilateral agreement, China enjoys an obvious advantage. Official statements in India take notice of the fact that the recently released 'Outline of the 12th Five Year Plan for National Economic and Social Development of the People's Republic of China' indicates that three dam projects on the main stream of the Brahmaputra River in Tibet Autonomous Region have been approved for implementation by the Chinese Authorities. In response to India's concern as a downstream riparian state, China has assured India that the projects were run-off-the-river projects that would not affect the flow of the river. However, this does little to assuage the concerns of India, which, in return, has expressed in no uncertain terms that it would like to develop hydro projects in the North-east. At a high-level hydro task force meeting, the Centre indicated the need to fast-track and ensure that all clearances for the hydro projects on the Brahmaputra are given to the 25 projects totalling over 11,000 MW as a matter of "utmost priority" in view of their "strategic nature" to establish the lower riparian right of India and create a strong bargaining position to detract China from building mega hydel projects on the upper reaches of the river.

The Case of India, China and a 'Probable' Damming of Brahamaputra: An International Law Perspective

Videh Upadhyay*

Is China dam constructing a dam on the Brahmaputra which will dry its waters in Assam? This is a question that has hogged a lot of media space over the last six-seven years at least in India. There has been alarm raised by the Chief Ministers of Assam, there has of course been denial by China and the Government of India has also sought to allay fears saying that the alarm is unwarranted. What is even more amazing than the sometimes yes and sometimes no kind of responses to the question is the fact these responses are essential guided by popular media reports alone. In the face of all of the above there has been no attempt by China to even notify let alone consult India on the construction of Dam on the Brahamaputra. Put mildly, this makes a mockery of international law on the subject.

The Chief Minister of Assam has pointed out in the past to the concern of the sea like river running dry if the work on the dam upstream on the river in China continues. This is what lawyers call transboundary environmental damage. This comes from the notion in International jurisprudence that States should not permit the use of their territory to damage the environment of others. This is not an age where the Nation-states had an absolute or permanent sovereignty over natural resources. (A notion recognized in several past General Assembly Resolutions and notably in a series of them in 1974.) Today even a Director General of Law and Treaty Department of Ministry of Foreign Affairs of China recognizes that "the principle of permanent sovereignty over natural resources is balanced with environmental concerns indicating a shifting emphasis from an absolute right to use and dispose, to a relative duty to protect" (Xue Hanquin in her book *Transboundary Damage in International Law*, Cambridge University Press, 2003) She is right as the duty to protect in the context of international rivers has find specific expression in the Convention on the Law of the Non-Navigational Uses of International Watercourses adopted by UN General Assembly in 1997. Under the UN Watercourses Convention the obligation not to cause significant harm is provided as a general principle under Article 7. More significantly, and precisely for the situation emerging now, Article 12 of the Watercourses Convention obliges States to provide "timely notification" accompanied by "available technical data and information , including the results of environment impact assessment in order to enable the notified States to evaluate the possible effects of the planned measures'. It is difficult to conceive what sort of contingency plan the Government of Assam can think of now without China providing information and data from its project. No wonder the Ministry of External Affairs, Government of India is also left with only scanning media reports to know more about the Project. To be sure, China is not technically obliged to provide this information under the said Article 12 - it being actually one of the only three States that opposed the adoption of the UN Water Courses Convention in 1997. (India, of course, also abstained at that time but that is another story.)

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The position specifically on the UN Watercourses Convention notwithstanding, it is too late in the day for any State to do what it wants to do with no concern for the downstream States. Legal instruments like the Helsinki Rules adopted by the International Law Association on the uses of international rivers provide a list of factors "to be considered when determining a reasonable and equitable share in the beneficial use of the waters of an international drainage basin." Apart from the geography, the hydrology of the basin and the climate affecting the basin 'the economic and the social needs of each basin state' is required to be considered. In addition to all of the above the notion that that states should not permit the use of their territory to cause injury or damage the environment of others is also backed by an array of legal principles of International law. The includes the notion of relative sovereignty (or even referred to interestingly as 'pooling in sovereignty')as opposed to absolute sovereignty, the principle of ancient origin that 'Use your own property so as not to harm that of another', and the principle of 'good neighbourliness' as found in several international instruments. No surprises thus that there are two key legal principles described as the 'cornerstone of international environmental law' that mandates that States have "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." (These words being in Principle 2 of Rio Declaration on Environment and Development, 1992 which was borrowed from similar words in Principle 21 of the Stockholm Declaration on the Human Environment, 1972.) If there is a clear problem in China acceding to the Watercourses Convention principles as discussed above, most scholars of International law also agree that despite their pervasive use in environmental instruments, 'principle 21/2 (of Stockholm and Rio Declarations) provides little practical guidance to states in their activities, and requires further elucidation and elaboration.'

International laws may be too soft and with too many holes for a country like China to be bothered about them but they do not take away from the fact that China's alleged conduct on going ahead with the Dam without notifying India is unsustainable in the light of the principles of International law. India needs to take that as the singular basis on which it has to move forward in engaging with China on the issue.

Partial Award of the Kishenganga Dispute

Preeta Dhar*

The Kishenganga dispute arises out of the Indus Water Treaty between India and Pakistan, which has been in effect since 1960. The treaty, finalized after 10 years of negotiations with the assistance of the World Bank, stood in good stead for decades. However, disputes started emerging with increasing demands on water resources. The first dispute – regarding the Baglihar hydropower project on the Chenab – was settled under the Treaty by a Neutral Expert. The Kishenganga dispute marks the first instance where a court of arbitration was constituted under the Treaty.

The Kishenganga Hydro-Electric Project (KHEP) on the Kishengangariver in India-administered Jammu and Kashmir was initially conceived as a Storage Work, and subsequently, in 2006, finalized as a Run-of-River hydro-electric Plant. The project involved diverting the water of the Kishengangariver through a 24-kilometre tunnel for power production, after which it would be released back to the Jhelum stream through the Wullar Lake. On the other hand, the Neelum-Jheelum Hydro-Electric Project (NJHEP) was conceived 158 kilometres downstream of the KHEP in Pakistan-administered Jammu and Kashmir. The operation of the KHEP would result in a shortfall of about 21 percent of River Neelum's inflow and affect the power-generating capacity of the NJHEP.

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The arbitration proceedings were initiated by Pakistan on 17 May, 2010 after failing to resolve the dispute.

Panel

The Panel constituted 7 arbitrators – Pakistan appointed Judge Bruno Simma (a Judge of the International Court of Justice from Germany) and Professor Jan Paulsson (the co-head of the international arbitration and public international law groups of Freshfields Bruckhaus Deringer LLP from Sweden). India appointed Judge Peter Tomka (a Judge of the International Court of Justice from Slovakia, currently serving as its President) and Professor Lucius Caflisch (a Swiss professor at the Institute of International Studies at Geneva and a Member of the United Nations International Law Commission). Since there was no standing panel of umpires, for the remaining 3 Members, the Secretary-General of the United Nations appointed Judge Stephen M. Schwebel (a retired Judge of the International Court of Justice from the USA) as the Chairperson,[1] the Lord Chief Justice of England and Wales appointed Sir Franklin Berman KCMG QC (a British barrister and a member of the Permanent Court of Arbitration) and the Rector of Imperial College London appointed Professor Howard S. Wheater FREng (from the UK) in accordance with the provisions of the Treaty.

Summary of the Partial Award

There were two major issues in the case –

a) Permissibility of diversion of the water of the Kishenganga

Pakistan contended that India has a primary obligation to "let flow" the waters of the Western Rivers (including those of the Jhelum and its tributaries), and the exceptions to this obligation should be read narrowly – that is, the use should be restricted to within the drainage basin of the Jhelum. However, the Panel accepted India's argument that such a reading of the Article would destroy India's right to build and operate any hydro-electric project on the Western Rivers, which

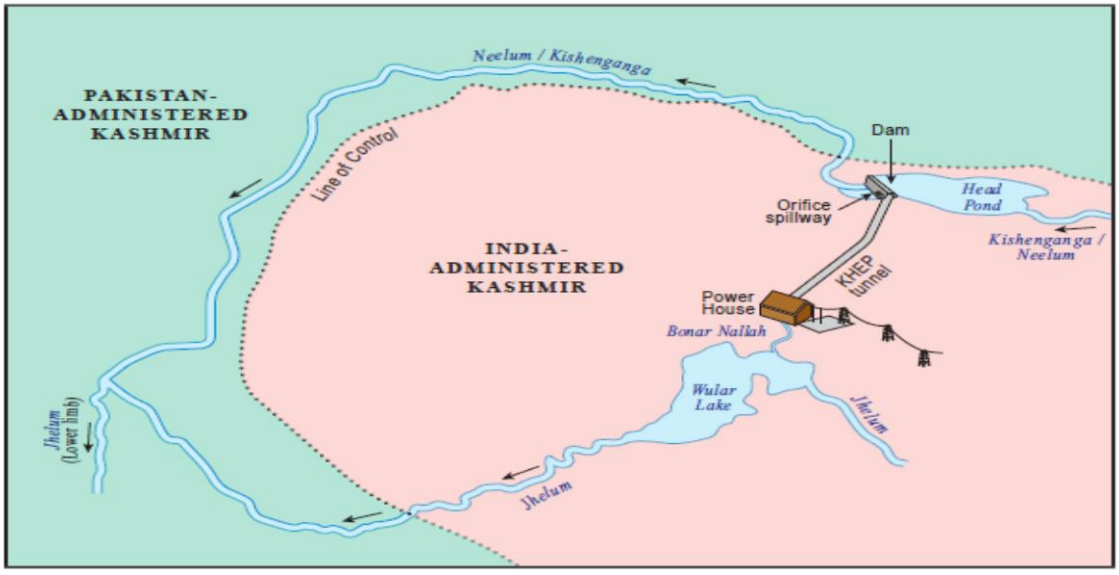
[1] Incidentally, Judge Schwebel was also on the Panel that decided on the Gabcikovo-Nagymaros dispute, the only decision by the International Court of Justice on transboundary river projects

is specifically provided as an exception to the "let flow" obligation in Article III(2). Further, the Panel upheld that the term "use" was in reference to the use of the watersfor the generation hydro-electric power, not the use of products generated from the use – in this case, electricity, which could be transmitted to outside the drainage basin of the Jelum.On a technical assessment, it was held that the KHEP can be a permissible project under the Treaty because it is a Run-of- River Plant located on a tributary of the Jhelum, and the diversion of the river water was "necessary" for the purpose for which the diversion was envisioned as required nder Paragraph 15(iii) of the treaty.

Permissibility of the drawdown flushing

The second issue pertains to the drawdown flushing of the reservoir, which would result in reducing the level of water below the Dead Storage Level. For Pakistan, this would imply variations in the rate, timing and flow of the river below the dam – placing the control of these with India. India, on the other hand, contended that this was necessary for sediment management and for achieving maximal longevity of the hydro-electric project, and that the Treaty was purposely drafted with a flexible state-of-the-art principle to take full advantage of advances in technical knowledge, including sediment control. The Neutral Expert in the *Baglihar* dispute accepted a similar argument made by India. This Panel, however, categorically stated that the *Baglihar*dispute had no precedential value and held that the Treaty does not permit reduction below Dead Storage Level of the water level except for unforeseen emergencies. Accordingly, India cannot employ drawdown flushing at the reservoir of the Kishenganga Hydro-Electric Plant to an extent that would entail depletion of the reservoir below Dead Storage Level.

It was therefore held that the Kishenganga is a permissible project under the Treaty. However, India has an obligation to construct and operate the KHEP in such a way as to maintain a minimum flow of water in the Kishenganga/ Neelum River at a rate to be determined by the Court in a Final Award.



Themes

The Award discusses certain concepts which are extremely relevant for understanding the impact and implications of hydro-electric projects in the trans-boundary water context. Although it is primarily a matter of treaty interpretation, the interpretation of body of independent international law experts throws light on the possible jurisprudence on these issues.

a) Necessity

The decision had an interesting opportunity to examine the scope of "necessity", which was one of the requirements for the diversion of the natural course of the river. Since no specific purpose is identified in the Treaty against which necessity could be evaluated, the Panel observed that necessity is to be determined by reference to the purpose for which the water is to be delivered into another tributary – in the case of the KHEP, the generation of hydro-electric power. It was categorical in stating that the requirement should be read in light of the normal use of the term - that is "required, needed or essential for a particular purpose", and not import the concepts of necessity developed in international trade law, investment law and other special areas.

However, the Court clarified that this does not leave "necessity" to be determined unilaterally, and potential downstream harm has to be factored in in the analysis of necessity. The balancing of the two concerns remains a subjective matter.

b) Existing use

The Treaty requires that any upstream Project should not adversely affect the "*then existing* Agricultural Use or hydro-electric use" downstream. Pakistan contended that it should refer to the use existing at the time of the water's release into the other tributary - throughout the operational life of a Run-of-River Plant. On the other hand, India contends that the phrase is to be interpreted to mean the date when India communicates to Pakistan its "firm intention" to proceed with a project. In the case of the KHEP, India submits that the cut-off date was—at the latest—June 1994 when the finalized KHEP design (as a Storage Work) was provided to Pakistan.

The Award pertinently observed that neither of these two approaches was acceptable. Pakistan's approach would result in India being required to yield whenever Pakistan seeks to use the waters – this would render any upstream hydroelectric project, existing or proposed, unviable. On the other hand, placing reliance only on communication of a firm intention does not guarantee that the actual project will be completed within the projected time period, or ever – freezing any other activity indefinitely.

The Panel sought to balance the two by looking at the "critical period", factoring in the continuum of design, financing, government approval, construction, completion and operation. The interpretative task of the Court is therefore to assess the critical period at which the project is crystalized, and then examining if a competing project is an "existing use" at that point of time. In this case, the Court held that the KHEP preceded the NJHEP, and that India's right to divert the waters of the Kishenganga/Neelum for power generation by the KHEP is protected under the Treaty.

c) Environmental impact

The Award is extremely interesting from the point of view of international environmental law. Interestingly, in its submissions, India objected to importing principles of international environmental law in the interpretation of the Treaty in the first place. Not dismissing environmental considerations altogether, India claimed that the KHEP meets all requirements of Indian environmental law. The question is, if this is adequate.

The Award, citing the decision of the International Court of Justice in *Gabcikovo–Nagymaros*, categorically held that a treaty, at any point in time, must be interpreted in light of the customary international principles for the protection of the environment in force at present. It even invoked Principle 21 of the 1972 Stockholm Declaration regarding the responsibility of nations to avoid transboundary harm. Notably, it quoted the decision of the International Court of Justice in the *Pulp Mills* case which states that in cases of industrial activities which have a significant adverse impact in a transboundary context, the duties of due diligence, vigilance and prevention continue "once operations have started and, where necessary, throughout the life of the project." This is significant because it lays down very clearly a continuous responsibility, which can be effective only with the co-operation of both Parties.

This Award is remarkable, because it enunciates in very specific terms the need to maintain ecological flows within a river system. India has also guaranteed that an "environmental flow will continue throughout the year." However, a close examination of the arguments of the Parties also reveals several shortcomings in the process by which this can be ensured.

In Pakistan's view, India failed to use its best endeavours when it neither carried out an adequate Environmental Impact Assessment (EIA), nor shared with Pakistan information on the anticipated impact of its project, despite Pakistan's requests for such information. According to India's submissions, Pakistan refused to provide the information that would have permitted an

environmental assessment covering the entire region. India has further submitted that the EIA carried out by Pakistan fails to consider the cumulative environmental effects of the NJHEP (and four other dams that Pakistan proposes to build). While the veracity of these claims is neither proven nor confirmed, it does indicate a shortcoming and an acute need for institutionalized trans-boundary co-operation.

The Court has unequivocally stated that the maintenance of a minimum flow downstream of the KHEP is required in response to considerations of environmental protection – the precise rate of the minimum flow will be fixed is to be determined by the Final Award. However, it does acknowledge that environmental conditions and competing uses are not static. It will be interesting to see how it arrives at a balance between the need for predictability of availability of water for water projects and providing for evolving/dynamic environmental requirements to capture the sensitivity of the river system.

Concluding remarks

The Award very pertinently notes that hydro projects involves consideration of not only technical factors, but also hydrologic, geologic, social, economic, environmental and regulatory considerations. The discussion now should focus on how these concerns can be integrated in the dialog of trans-boundary water resources.

The Indus Waters Treaty is essentially a technical document drafted more than 50 years ago, when concepts like Environmental Impact Assessment (EIA) or "environmental flows" were hardly recognized. However, by applying Principle 21 of the 1972 Stockholm Declaration and the *Pulp Mills* case regarding the responsibility of nations to avoid transboundary harm, it includes hydropower projects within the category of industrial activities which may have a significant adverse impact in a transboundary context. This implies that the duties of due diligence, vigilance and prevention would apply and continue "once operations have started and, where necessary, throughout the life of the project." This Award also enunciates in very specific terms the need to maintain ecological flows within a river system.

Both the conditions involve a continuous responsibility which can be effective only with the co-operation of both Parties. However, the submissions of both India and Pakistan regarding the EIA component clearly demonstrate the absence of any transboundary mechanism to address such concerns. Ideally, the minimum ecological flows need to be viewed not only downstream of the project, but throughout course of the river. It remains to be seen if the Final Award will spell out a legal recognition of environmental flows and appropriate mechanisms to ensure that.

A good point of reference may be the letter of the World Bank dated 8 November, 1951, in the context of the Indus Water Treaty which stated that "[t]he water resources of the Indus basin should be co-operatively developed and used in such a manner as most effectively to promote the economic development of the Indus Basin as a unit." Looking at the entire river basin as a unit provides room for incorporating social, economic, environmental and regulatory considerations.

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