Sharing of Transboundry Water Resources

Lessons from the Indian Sub-continent

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Transboundary Water

- **Dual character of water (i) national waters – those that flow within it; and (ii) international waters – physical movement of water from territory of one state into another state.**

- **Movable part of a state's territory – can be considered as a part of mobile elements of nature e.g. clouds; winds; birds.**

- **It seems akin to the migratory birds. US Supreme Court [Missouri v. Holland, 252 U.S. 416]expressed view on their status:**

"Wild birds are not in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the state's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another state and in a week a thousand miles away...The subject-matter is only transitorily within the state and has no permanent habitat therein."

‘Managing’ Sovereignty

- **Principle of Absolute Territorial Sovereignty**: *A state can dispose freely of the waters actually flowing through its territory, but has no right to demand the continued free flow from other countries.*
- **Principle of Absolute Territorial Integrity:** *A state has the right to demand the continuation of the natural flow of waters coming from other countries, but may not for its part restrict the natural flow of waters flowing through its territory into other countries.*
- **Principle of a Community of Property in Water:** *No one state can dispose of the waters without the positive cooperation of the other states. For the rights are either vested in the collective body of riparian states or are divided proportionally, or any other kind of restriction on the free usage of the waters.*
- **Principle of Restricted Territorial Sovereignty and of Restricted Territorial Integrity**: *A restriction of the free usage of the waters not to the extent of the principle of a community in the waters (restricts the principle of absolute territorial sovereignty akin to the principle of absolute territorial integrity.*

Distinct Features - I

- **Reflects the global trend of cooperation over international rivers**
- **B*ilateral approach to ensure 'green borders'*: growth of a large number of bilateral treaties on sharing of waters of international rivers.**
- **<u>Multipurpose projects cover a wide range of issues</u>: allocation of waters, whether for general or specific use, specific projects, issues regarding irrigation, hydropower production, storage for flood control etc.**
- **Treaties do not fully incorporate the current international law thinking about equitable and sustainable use of international watercourses.**

Distinct Features - II

- **Treaties are a complex outcome of the hydro- politics of the South Asian region - fluctuating national positions over the interpretation of the applicable principles of international water law.**

- **Hallmark of the bargain for water allocation. Positions change on the basis of whether (i) the country is an upper riparian or a lower riparian; (ii) territorial sovereignty versus riparian rights; (iii) prior appropriation versus equitable utilization etc.**

- **Treaties are designed as *stand alone* instruments – "*Nothing contained in such a treaty was to be construed as in any way establishing a general principle of law or any precedent*"**

South Asia's Rivers and Treaties

- The Kosy Treaty Regime, 1954
- The Gandak Treaty Regime, 1959
- The Indus Treaty Regime, 1960
- The Ganges Treaty Regime, 1996
- The Mahakali Treaty Regime, 1996

Efforts at 'Green Borders'

- Conscious effort to avoid the rights in either treaty being replicated or claimed by the other country and allows the parties to revert to their fundamental legal postures in any future water disputes.
- The treaties introduce institutional arrangements to implement the agreements or to play advisory role in such implementation.
- The powers granted to the specific commissions could be divided into those that are legislative, administrative or judicial in nature.
- *Permanent Indus Commission* (India and Pakistan); *Mahakali and Gandak Commissions;* and the *Kosi Committee* (India and Nepal); the *Joint Rivers Commission* and the *Joint Committee related to the Ganges* (India and Bangladesh) are the main institutional frameworks provided for under the respective treaties.
- Treaties seek to address and manage the disagreements in a gradual manner. The disputes are o be resolved through negotiations between the parties. If the parties fail to resolve the dispute, the matter is either presented for political decision or arbitration.

Mahakali Treaty -I

- The Mahakali Treaty is an hisioric accord as it reaffirmed the two nations' determination to promote friendship and cooperation in sharing water resources of the Mahakali river, which is a boundary river between India and Nepal.
- The treaty deals with 3 projects related to water resources: the Sarada Barrage,Tanakpur barrage and the Pancheshwar multi purpose project.
- Basis of equal partnership to define their obligations and corresponding rights and duties thereto w.r.t the utilization of the waters of the rivers.
- The Mahakali river treaty is based on the principles of "equality,mutual benefit and no harm to either party ".

Mahakali Treaty - II

General principles:

- Along with the issues of water distribution, power generation and energy sharing, the treaty provides for prime consideration to the water requirements of Nepal.
- India and Nepal are entitled to draw their share of waters from Mahakali at the Tanakpur barrage.
- Maintaining the flow and level of water in the Mahakli river.

Specific principles:

- PMP willl be designed to produce the maximum total net benefit for both countries.
- Both the countries are working together in an integrated manner to develop and share water resources and Construction of PMP.
- India and Nepal both shall share the cost of the project.
- A portion of Nepal's share of energy will be sold to India.

Ganga Treaty - II

- The treaty of 1996 is an endeavor "to promote and strengthen India-Bangladesh relations of friendship and good neighbourness".

- It highlights the need and importance to "find a solution to the long term problem of augmenting the flows of Ganga.

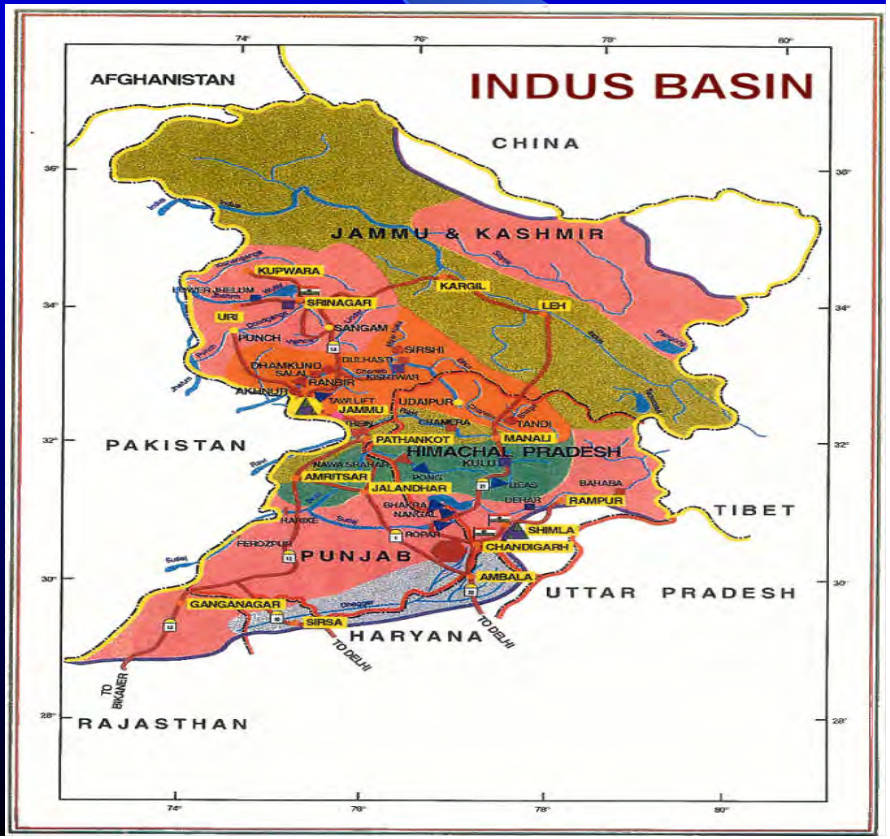
Ganga Treaty - II

General principles:

- Objective of "making the optimum utilization of the water resources of the region in the fields of the flood management, irrigation, river basin development and generation of hydro power for the mutual benefit of the people of the two countries.
- It drastically affects the interests of the Calcutta port which needs 6,000 cusecs of water through Bhagirathi canal to stop the siltation of the navigable channels and to reduce the salinity of the Hoogly river.
- The Treaty is a step towards the direction of good neighborly relation between India and Bangladesh.

Indus Waters Treaty - I

- Indus and tributaries. The **Indus Waters Treaty** is a water-sharing treaty between the India and Pakistan. The treaty was signed in Karachi on 19 September 1960 by the then Indian Prime Minister Jawaharlal Nehru and the then President of Pakistan Field Marshal Ayub Khan. The World Bank is a signatory as a third party.



Indus Waters Treaty – I

General Principles

- *The primary objective of the treaty 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 the treaty attempts to deal with the issue of water allocation and the flow of water. The 8 annexures are quite elaborate and deal with issues that are technical in nature.*
- **India** received the waters of three eastern rivers - the Ravi, the Beas and Sutlej were allocated to India subject to a duty during a transition period of 10 years to supply a certain quantum of river to Pakistan while Pakistan was carrying out the necessary construction works on the western rivers to replace its eastern sources.
- **Pakistan** received the flow of the western rivers –the Indus, the Chenab and the Jhelum subject to the right of India to use some of the water for irrigation, the generation of hydro electric power and the designated purposes before before the river crossed into Pakistan.

Resolving Water Sharing Disputes

- Mahakali Treaty: It provides for a tribunal composed of 3 arbitrators to conduct all arbitration. The modus operandi of arbitration is that it shall be determined by the arbitration tribunal and the decision of the majority of arbitrators shall be considered to be the decision of the tribunal.

- Ganga Treaty: It is guided by the principles of equality, mutual benefit and no harm to either of the parties. Difference/dispute to be referred to Indo-Bangladesh Joint Rivers Commission. If dispute remains unresolved, the two Governments to resolve it by mutual discussion.

- Indus Treaty: Provides for Permanent Indus Commission. Inability of the Commission to reach agreement on any 'difference' to be referred to a Neutral Expert to be designated by the World Bank.

  - 'Difference' concerning Baglihar Hydro Project was the first issue. NE Raymond Lafitte gave determination on 12 Feb. 2007.