

The Indus Waters Treaty - Changed Ground Realities Necessitate A Review

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Introduction

The history of the Indus Waters Treaty (IWT) entered into by India and Pakistan is the tragic story of a water sharing agreement that began with hope, but continued in precipitating the disputes, as demonstrated by the events that followed. IWT was signed in 1960 by the two countries at the instance of the World Bank with the aim of achieving the optimum development and utilisation of the Indus waters. However, it failed miserably not only in accomplishing the objectives, but also in settling the disputes between the two for more than five decades since its inception. With China also claiming its rights in the basin, it is high time the Treaty is reviewed to include the aspects of modern technologies, environmental issues and equitable water allocation, lack of which is causing the continued bickering. Instead of waiting for the simmering hostile situation erupting to volcanic proportions, we should prevail on our neighbour to agree and review the Treaty provisions to ensure peaceful neighbourly relations.

Background of the Dispute

The Indus basin drains an area of about 1.2 million sq kms of which 13 per cent lies in Tibet and Afghanistan, 28 per cent in India and 59 per cent in Pakistan. It has an average annual yield of 207 billion cubic metres (BCM). Partition resulted in the division of the Indus basin between India and Pakistan in 1947, creating disputes on the sharing of the Indus waters. Continued negotiations between the two held under the auspices of the World Bank ultimately culminated in the signing of the IWT.¹ While the Bank brokered the Treaty, it was not a guarantor, but had certain responsibilities for its smooth functioning. The USA also played an important supporting role in closing the deal.²

The Treaty allocated, with some restrictions, all the waters of the western rivers (tributaries) – the Indus main, Jhelum and Chenab to Pakistan and the waters of the three eastern rivers (tributaries) – the Sutlej, Beas and Ravi to India. While Pakistan got 80 per cent of the Indus waters, India got only 20 per cent under this allocation. Though the Treaty had exhaustive provisions for its working including for a dispute resolution mechanism, it neither provided for future advancement in technologies and environment related requirements nor any general principle of law for the future. The lack of such provisions and misinterpretations of the clauses provided in the IWT became the root cause for many disputes that arose soon after the Treaty came into operation. Interestingly, while other similar international treaties executed elsewhere had a fixed period of validity, the IWT had no such fixed time frame and exit option.

Further, provision for getting the optimal benefits from the Indus waters was ignored in the agreement, since the storages permitted in the Indian projects were much less than the capacity available at the sites. Also, the aspect of inland navigation had also not been considered in the Treaty, even though these waterways were used for the purpose in the past. Hence, the Treaty failed to make the requisite provisions to ensure the optimum development and utilisation of the Indus waters, as declared in the Preamble of the IWT.

The Treaty brokered by the World Bank was hailed by interested groups as a model for international water sharing agreements since, as per their version, it employed the principle of reasonable and equitable usage of water between the upstream (India) and downstream (Pakistan) states with each getting three of the six tributaries of the river. Also, they claimed that it survived two wars and many warlike situations between the two countries because of its inbuilt resilience.

Biased Provisions in the Treaty

A perusal of the basis of water allocation in IWT would indicate that only six tributaries of the Indus system were accounted for allocation of the waters, while an important tributary, the Kabul river was excluded from consideration, thus permitting Pakistan unbridled use of its waters also. Further, a false impression has been created of apparently equal share distribution by equally dividing the six tributaries. In fact, the allotment should have been made on equitable basis according to the quantum of water carried by the rivers rather than equally dividing the tributaries. Parameters creating legal and equity rights in water sharing as per the then existing international practices should have been considered for water sharing such as - the existing cultivable area, population dependent on the river system, drainage area, length of the river beds etc in each of the co-basin states. If this basis was adopted while allocating the waters, India would have got more than 40 per cent of the Indus waters.³ Thus India was deprived of its legitimate share of the waters needed to meet the increasing demands of its farmers in Punjab, Haryana and Rajasthan situated within the Indus basin.

The claim that the Treaty could survive two wars and many war scares due to the inbuilt resilience in the agreement is also far from the truth. India had willingly accommodated many of the unreasonable demands of its neighbour, even at the risk of slowing down the infrastructure plans for the State of Jammu and Kashmir (J&K). But this spirit of accommodation has been taken as our weakness by Pakistan and encouraged it to make the Indian proposals a subject of endless debate, thereby impeding their implementation. Hence even after five decades, due to Pakistan's interference, India has been able to develop hardly 20 per cent of the hydropower potential of 8769 MW from its share in the western rivers.

If we delve deep into the principles of water allocation and other provisions of the Treaty, it would be clear that the real facts on the much hyped Treaty are concealed and lie buried under a mountain of rhetoric and the Treaty provisions are biased in favour of Pakistan. Our neighbour has been always objecting to the Indian projects in a language couched in non-constructive application of the provisions. The costly alternatives suggested by them ignored sound engineering economics and practices, and India has been pointing out all such anomalies. Hence, to claim that the Treaty has survived the tempests of history is a blasphemy; and to extol it as a model for principles of water sharing and utilisation is a sacrilege.

Using the loopholes in the Treaty, Pakistan has succeeded in stalling and delaying Indian projects planned on

the western rivers. Initially, India did agree to many of the demands of her neighbour just to maintain good relations. For example, it agreed to close the sluices of the Salal project as demanded by Pakistan, knowing fully well that such an action would shorten the project life due to heavy silting of the reservoir. The construction activities for Wular (Tulbul) project, a scheme to facilitate cheap inland water transport to the apple growers of interior J&K were also stopped as our neighbour wanted more discussions on the subject. The project has come to a dead stop as Pakistan continues to make it a subject of endless debate and is still to accept the proposals made by India.

Baglihar Project and the Dispute Resolution by World Bank

The Baglihar project, upstream of the Salal project across the Chenab was the next to come under attack from Pakistan. Though India gave all the details sought by Pakistan that country continued with its allegations of India flouting the Treaty provisions. Many meetings and discussions at the level of Permanent Indus Commissioners and even at Secretary level later, Pakistan unilaterally took up the matter with the World Bank charging India with the flouting of IWT and seeking an appointment of a Neutral Expert to examine the issues. The construction of the project got delayed and costs got escalated due to this. On the basis of written and oral presentations made by the two countries, the Neutral Expert permitted India to go ahead with the project after carrying out some minor modifications.

Pakistan was unhappy with the decisions of the Neutral Expert for allowing India to complete the Baglihar project. In the meanwhile, due to mismanagement of its water resources, many parts were experiencing water scarcity in that country. The government was being criticised for giving preferential treatment to north Punjab areas by depriving water to other states and for its failure to build and maintain adequate storages to meet the shortages. To divert public attention, Islamabad attempted to hoist the Indus waters issue in the framework of the Composite Dialogue Process in the international forum. From past experience, Pakistan had learnt that by accusing India of impeding the Indus flows with projects in violation of the IWT provisions, it could get the sympathy not only from its people but also from the international community. Though there was the provision in IWT for a mechanism, the Permanent Indus Commission, to settle recurring disputes between the two countries, our neighbour knew that raising the issue in a different forum would be a politically safe move to get public support and thwart Indian attempts in taking up projects on the western rivers.

As this approach did not succeed, Pakistan resorted to initiate a media war blaming India for causing hardship to its farmers. It hoped that such an accusation on the upper riparian, India, would get them the support of India-baiters who would jump into the fray to tarnish India's image using, information, disinformation and even information derived from questionable sources. Always being ready to oblige our neighbour, these critics vilified India for harassing Pakistan for using the monsoon river flow to fill the then approved Baglihar project reservoir, thereby causing water scarcity downstream. India clarified that the reservoir filling was done within the period stipulated as permitted in the Treaty to enable the commissioning of the already delayed project. Otherwise, it would have to wait for one more year for the scheduled period of filling, thereby causing further delay of one more year in getting the project benefits. Also, water downstream was not in short supply as per flow records and even one of their ministers had lamented then about the water being wasted by the farmers.

Pakistan continued to make a hue and cry alleging that India had blocked water through various dams on the western rivers for its hydroelectric power generation, thereby causing reduction in flows downstream. However, India continued to clarify in all meetings that IWT had permitted unrestricted power generation on these rivers as per the criteria specified in the Treaty and information on all projects were supplied to Pakistan. Still India was not able to even take up many of these projects due to the objections raised by Pakistan.

Kishanganga Project and Intervention by International Court of Arbitration

After failing in its attempt to stall the Baglihar project, Pakistan now turned to accuse India of violating the Treaty provisions in taking up the construction of the Kishanganga Hydro Project (KHP) in the Jhelum basin. The project envisages construction of a run-of-the-river project across the Kishanganga river, a tributary of the Jhelum. The ponded waters would be diverted through a tunnel and powerhouse again to the main Jhelum river and in the process would generate 330 MW of power using a drop of 297 metres. As the diverted water from the Jhelum would return back to the main river, India ensured that Pak's share of Jhelum would remain unaffected.

The project details were furnished to Islamabad during the nineties as per treaty provisions. As expected, our neighbour protested insisting that the Indian project affected their existing interests downstream and also their proposed Neelum Jhelum project downstream of the KHP. Instead of giving details of their uses, Pakistan continued to harp on Treaty violations by India to attract World Bank intervention. In 2010, it instituted arbitral proceedings against India requesting the World Bank that a Court of Arbitration (CoA) be set up to determine the permissibility of India constructing the KHP by diverting Jhelum waters. Since our neighbour had failed to get the support of a technical Neutral Expert on Baglihar project, it presumed that legal experts of the Arbitration Court would decide favourably on technical matters of KHP.

Pakistan had raised two techno-legal issues; first, regarding the violation of the Treaty by India proposing the inter tributary diversion of the flows thereby causing a reduction in the Jhelum flows; second, questioning whether India could draw down the water level to flush out sediments. India asserted that it had every right to transfer waters between the tributaries of the Jhelum so long it did not reduce the flows in the Jhelum. It also pointed out that desilting by flushing is an essential part of any project built across rivers carrying heavy silt load during monsoons.

After hearing the arguments from both the parties, the Arbitration Court, gave its interim award⁴ in February, 2013, permitting India to proceed with KHP on two conditions - when operating the project, India has to maintain a minimum flow in the river, and India should not operate the reservoir below the dead storage level even for flushing out the deposited silt. The quantum of the minimum flow would be given in the final verdict after the parties furnished additional information on issues sought by the CoA. The final verdict of the Court given on 21 December 2013 further confirmed the verdict.

Pakistan was desperate. Hence it initiated a media war⁵ blaming India for choking its agriculture by construction of storages on the western rivers violating the Treaty provisions. It succeeded again in roping in India detractors who were ready to ignite the incendiary hydropolitics in the subcontinent. These cynics, making a special study of the Indian projects on the Chenab river, floated the concept of 'manipulable storage' and indicated that India had planned 1700 million cubic metres (mcm) of manipulable storage capacity in its projects on the Chenab river alone. They warned that with this storage India could withhold 40 days of river flow during lean season and deprive the lower riparian its much needed water. However, the assumptions made while computing the estimate were found to be questionable and the results derived there from were highly exaggerated. For example, the 'manipulable storage' estimated in the 390 MW Dulhasti project in the Chenab using the same logic is 95 mcm, whereas the gross storage actually provided in the project is only about 9 mcm – one tenth of the computed value! Further, the presumption that India would first deplete all its storage to refill the reservoirs with lean season flows to spite Pakistan does not stand to reason since it ignored the substantial revenue loss of millions of dollars India would suffer by shutting down power generation just for harassing Pakistan!

Though India was happy that the Court upheld its right to divert the water within the same basin, it could not accept the restrictions put forth on reservoir operations which shortened the life of the project due to heavy silting and the directions on minimum flows which affected the economics of project operation. It was evident that CoA had gone beyond the IWT provisions, choosing to apply recent environmental laws to include the aspects of minimum flows in a river, but ignoring the present day international practices for desilting reservoirs by lowering water levels below the dead storage level. Hence, the Court's final decision was tilted in favour of Pakistan. The Indian projects planned or under construction would prove uneconomical because of the ruling now given by the Court which would make the projects uneconomical.

Chinese Projects in the Upper Indus Basin

In the meanwhile, China has also staked its rights on the Indus waters by constructing the Zada Gorge project in Upper Sutlej. It has also reportedly constructed a project at Senge Ali in the Upper Indus river.⁶ This situation was not anticipated while signing the IWT in 1960. These projects would drastically reduce the river flows downstream upsetting the working of the Treaty. However, China is not concerned with it as it is not a party to the Treaty. If the river flows downstream get affected, Pakistan and its sympathisers would still blame India and continue their vituperative attacks.

Needed a Review of the Treaty

The disenchantment with the Treaty is growing in India due to the biased allocations of the waters, and with global warming altering weather patterns; fresh water availability is also being affected in the basin. The recent decision of the Arbitration Court arming Pakistan with additional powers to object to our projects has further enhanced the possibilities of conflicts at a future date.

The root cause for any conflict is the scarcity of the resource as per studies carried out by David Zhang⁷, based on the data of more than 8000 wars that took place in the past, and in this case water is the scarce resource. However, war is certainly not the only option for India to settle water disputes when other options are available.

The operation of the IWT during the last five decades has revealed that it has only perpetuated the Indus dispute. It could survive the flash points all these years only because India acquiesced to the unreasonable demands of its neighbour. A review of the Treaty is, therefore, essential considering its inequity in water allocation and inherent ambiguity in the clauses giving undue benefits to Pakistan. It is time for us to insist for the review of the Treaty. If Islamabad does not cooperate, India should revoke article 62 of the Vienna Convention on the Law of Treaties, 1969, which permits terminating or withdrawing from the Treaty due to fundamental change of circumstances.⁸ The circumstances have changed with China entering the scene. India should not allow Pakistan to sabotage its projects any further, using the provisions of an outdated Treaty supported by the verdict of the Court of Arbitration.

Endnotes

1. Indus Waters Treaty, 1960.
2. The United States and the Negotiation of the Indus Waters Treaty- Dr. David R Stone-journal of the United Service Institution of India, Vol.CXL.No. 579, January-March, 2010.
3. Water Project Series – Settlement of International and interstate water disputes in India- BR Chouhan,1992 (Indian Law Institute).
4. PCA Press Release- Indus Waters Kishanganga Arbitration (India vs. Pakistan), The Hague, February 19, 2013.
5. India's water war against Pakistan- Ahmed Quraishi-Hilal (English)- September, 2013.
6. Empires of the Indus- Alice Albinia- John Murray-Hachette India.
7. David Zhang- Proceedings of the National Academy of Sciences, USA, December, 2007.
8. UN-Vienna Convention on the Law of Treaties, 1969.

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