



Challenges to Indus Waters Treaty and Options for Pakistan

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Abstract

The Indus water treaty was signed on 19th September 1960 by India and Pakistan under the aegis of the World Bank. Bilateral principles regarding water apportionment between both states were ensured by the Treaty. As a result, waters of the eastern rivers; Sutlej, Beas and Ravi, were assigned exclusively to India, while Pakistan received exclusive water rights of the western rivers; the Indus, Jhelum and Chenab but India is allowed to irrigate some specific land in Indian occupied Jammu and Kashmir and to generate hydroelectric power through run-off-the river projects. Following the Uri incident, the Indian government and media are generating ideas to discard the Indus water treaty. This paper focuses on legal and international implications if India attempts to unilaterally revoke the Treaty.

Key Words: Indus Waters Treaty, Challenges, India, Pakistan, Options for Pakistan.

Introduction

Pakistan and India have long been entangled in diplomatic clashes over Jammu and Kashmir and have fought in four wars, but so far they have managed to maintain the Indus Water Treaty (IWT) which provides a mechanism to resolve disputes over water resources. According to Article II of the treaty, India has exclusive rights over the waters of the three eastern rivers (the Sutlej, Ravi, and Beas) and Article III establishes the right to unlimited use of all western river waters (Indus, Jhelum and Chenab) in Pakistan. Article III also states that India will be required to flow all the waters of western rivers and will not allow any interference with these waters, except for domestic use, non-consumption use, agricultural use (as indicated in Annex C) and hydroelectric power generation, as indicated in Annex D. The IWT is considered one of the greatest successes of water diplomacy in the world, since it survived the wars of 1971, 1965 and 1999 and several small border clashes between the two nations.

On September 18, 2016, a group of four terrorists carried out an attack on a military base in the town of Uri, 75 kilometers northwest of Srinagar, near the line of control. India as usual blamed Pakistan for manipulating and managing the attack through militants. Consequently, in the wake of the Uri incident, India launched a media campaign to punish Pakistan. India has been using offensive rhetoric against Pakistan indicating aggressive stance on diplomatic, economic and military fronts. It seems like an early salvo initiated by the Indian government on IWT. It has threatened that it would increase withdrawal of its water to the maximum levels from the rivers that flow to Pakistan through India and also considers the construction of dams on the River Jhelum which flows through Kashmir Valley before entering into Pakistan. On the other side, the former Foreign Minister, Mr. Yashwant Sinha suggested to the present government to end the IWT with Pakistan (Parvaiz, 2016). The former Union Water Resources Secretary and prominent leader of the Bhartiya Janta Party (BJP) Mr. Dhruv Vijai Singh also suggested the same formula to punish Pakistan (Desk, 2016). However, the Government of India officially has said very little on the issue so far. Even the World Bank, the guarantor of the Treaty, has not made any official statement yet.

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After the Uri attack in 2016, Mr. M. L. Sharma submitted a Public Interest Litigation (PIL) in the Indian Supreme Court on 25th September 2016 challenging the constitutional validity of the IWT as it was signed by the Indian Prime Minister who was not head of the state. The petitioner contended that the Treaty should have been signed by the President of India (PTI, 2017). However, the said Petition was rejected by the Indian Supreme Court on April 10, 2017. (Ibid)

Historical Background

Both Pakistan and India agreed on a formula of water apportionment called the Indus Waters Treaty (IWT) under the supervision of the World Bank as a mediator. General Ayub Khan and Mr. Jawaharlal Nehru, the then President of Pakistan and prime minister of India respectively, signed the Treaty in Karachi on September 19, 1960 (Chowdhury, 2006).

The conflict over the water apportionment of Indus between the two states started with the partition of the Sub-Continent in 1947. There were two possible situations faced by the newly established states. First, how to share and manage water issues and second, how to make a joint mechanism to ensure water supply to existing irrigation system (Miah, Rahman, Hamid, Mukherjee, & Verghese, 2004). Furthermore, headworks at Ferozpur and Madhopur on the rivers Sutlej and Ravi were also allocated to India whereas land to be irrigated was situated in Pakistan. Indian control over the tributaries and the waters of the Pakistani portion of the Basin was an alarming situation for irrigation in Pakistan. On the other hand, for the profitable development of the Basin, India was surely securing its own objectives. On April 1, 1948, India blocked water from every channel that flowed into Pakistan. As a result, Pakistan felt very exposed due to a conflict over the main source of water for its arable crops. (Iyer, 2003: 219-20).

The Inter Dominion Accord of 4th May 1948 was the first written document to apportion the waters of Indus Rivers System during the first year of partition. According to this Agreement, Pakistan would make an annual payment to India; in return, India would release sufficient water for irrigation in Pakistan. It was the temporary arrangement to meet immediate requirements and it was agreed by both the parties that the negotiation process would be followed for a permanent solution. The negotiation process was not conclusive as both the states were not willing to compromise on their respective positions. India claimed that diversion of water of the rivers within its territory was its legal right and Pakistan could never prevent her. On the other side, Pakistan demanded her historic water right which was not accepted by India. Consequently, Pakistan suggested that the dispute should be resolved through the International Court of Justice but India rejected this proposal by stating that such kind of issues required bilateral resolution (Iyar, 2003).

In the meantime, David Lilienthal (former Chairman of the Tennessee Valley Authority), paid a quick visit of the sub-continent and on his return at the United States, he presented his recommendations to solve the water dispute in an article titled 'Another "Koria" in the Making? That article was published in *Collier's* magazine (USA) on 4 August 1951. He suggested that both parties could be brought together on a unanimous agreement for the development of the Indus Basin as a single unit with the help of the World Bank (Lilienthal, 1951). The officials of the Bank warmly welcomed the idea given by David Lilienthal and subsequently; it was appreciated by both countries, and a technical committee of engineers was set up by the three stakeholders Pakistan, India and the World Bank, but unfortunately, both parties were reluctant to withdraw from their respective stances (Gulhati N. D., 1973). After almost two years of negotiations, the World Bank has been frustrated by the lack of any positive development. In 1954, stepping beyond its limited role, the Bank presented its own formula which apportioned the rivers instead of apportioning the waters and forced both countries to accept its plan for future development. According to the Bank's proposal, Eastern Rivers were given to India and the Western Rivers to Pakistan. A significant Indus Basin waters division has been appreciated in the Agreement, as the legal right, the three Western Rivers were given under the control of Pakistan and the same practice was revised for India over the three Eastern Rivers (Misra, 2010, p.134).

In 1960, since the ratification of the Treaty, there was no water dispute in the region. The Treaty has been proved as one of the most reliable and successful water-sharing endeavors in the world. To enlarge the uses of the Treaty, most analysts proposed that certain technical specifications need to be updated and must include climate change (Brebba C. A., 2013).

Can India Revoke the Treaty unilaterally?

The basic elements of this case are simple and straightforward as summarized below.

1. The obligations of IWT do not permit any principal party to abrogate its stature. The termination date has not been mentioned in the Treaty, thus, such an abrogation can be a material breach. The modification in the Treaty can be made through mutual consent as treaties of this kind are state-specific instead of regime specific therefore; existence or modifications cannot possibly be unilateral. There is no exit provision; consequently, regime changes cannot influence its original structure. If India does not unilaterally follow the Treaty by providing explanations such as "revocation", "suspension", "withdrawal" or "cancellation", it means strictly that it has decided to interrupt the flow of water in Pakistan (Hasnain, 2016). In other words, what India will call "revocation or withdrawal"; Pakistan will refer to as a "violation". Political change cannot discontinue treaties because these are not regime specific, and obligations are set state-specific. Mutual trust is a must for implementation. Moreover, if an extraneous event becomes the cause of trust deterioration even then it cannot be a solid reason to revoke a treaty.
2. For mutual cooperation and exchange of data, both countries were required to set up a Permanent Indus Commission with a commissioner from both sides. The commission suggested the establishment of a mechanism for conflict resolution and consultation through a visit, exchange of data and inspection. The Commission is to discuss probable disagreements and support agreements for basin development. If there is a plan to undertake any construction work that affects the other party, it must be notified and data of that engineering work must be shared. In case of disagreement, a neutral expert as mediator/arbitrator is invited (Indus Waters Treaty, Article VIII, 1960). Otherwise, If there are no projects capable of creating some kind of conflict that the Commission has created to resolve, periodic annual inspections and information exchange will continue.
3. The option for mediation was placed in the Treaty and the World Bank was titled as an arbitrator. Therefore, Pakistan has the right to approach the mediator in case of dispute or controversy. Article IX with annexes F and G are arbitration clauses in the IWT incorporating comprehensive procedure for peaceful settlement of grievances from either side. As per the provision of the IWT, under Article IX, if India shows concerns that Pakistan is initiating a dispute, then the process given in Annexes F and G must be commenced by Pakistan and the Indian government cannot object on any ground even mistrust.
4. The Treaty does not allow any principal party to retreat from it unilaterally. For the termination of the Treaty, approval in writing, under Article 12(4) of the treaty, is required from both countries. In other words, to end the IWT, its termination must be ratified by both parties and there is no condition for one-sided "suspension" of the Treaty. It was not planned as an event or time-specific. Under International Water Law, an upstream state has no right to stop the water supplies to other riparian even if there was no IWT. In case, India as an upper riparian try to snatch Pakistan's water rights, a state practice would be set up which could serve as precedence under international law. It can furnish China with the logic to suspend the waters of the Brahmaputra River in the same manner.

Indian Objectives and its Consequences

The Indian Prime Minister Narendra Modi, in his anti-Pakistan rhetoric, is whipping up ideas to scrap IWT. Such aggressive actions would amount to irreparable economic loss to the lower riparian, Pakistan. These Indian approaches seem like 'hostile act' and possibly attract international criticism. Moreover, geographical locations of the rivers increase Indian capability to divert the water flowing into Pakistan. Bypassing the IWT, without prior information, the existing Indian government has designed many dams in Indian administered Jammu and Kashmir as a twofold arm. Through planned IWT violations, it is possible that India is going to establish a pretext to retaliate and undermine China Pakistan Economic Corridor (CPEC) as Chinese investment is planned in areas of Gilgit-Baltistan and Azad Jammu and Kashmir which mainly focuses on the development of river water infrastructure. Conspiracy against the Neelum-Jhelum hydropower project is a salient example of an Indian threat.

Trilateral concerns are involved in water issues in the region. If India tries to fuel its pretext, a possible reaction will be expected from Pakistan and China. The Indus River System makes a territorial triangle. The first part of this triangle is China, categorized as an upstream state to India and India is upstream to Pakistan.



Source: <https://www.mapsofindia.com/maps/rivers/indus.html>

A deep troubling development has been made by India as it claimed having undertaken a “surgical strike” inside Pakistan and is trumpeting the slogan to restrict water supply and sabotage the IWT. This Indian un-realistic approach is the indication for further hostile actions; moreover, these strategies help India to run away from the bilateral negotiation process (Varadarajan, 2016).

As far as international law is concerned, Article 2(4) of the UN Charter has been violated by Indian options as pointed out in IWT that water is Pakistan’s natural resource. To aim at natural resources of a nation, stopping or diverting them, is a serious disregard and direct violation of Article 2(4) of the UN Charter and international law. The aggrieved states that have hegemonic design can take action against such violations with force (Almeida, 2016).

In bad faith, India can use a reference to justify a breach of the IWT and other actions that it is a retaliation of some supposed aggressive steps taken by Pakistan. There is no joint or independent inquiry of any such accusation, as a threshold matter and there is no interest on India’s part in allowing one. India seems to contemplate, however, for argument’s sake, even assuming, such Indian claims were tenable but they would not justify the type of collateral retaliation, put simply, two wrongs would not make a right (War over Water, 2002).

Parallel obligations set by international law as well as the position of treaties like IWT are self-contained. International law/ obligations or other different treaties cannot be violated by the abrogation of any treaty or commitment because the UN Convention on International Watercourses protects all treaties which have already been signed. If India discards the law, it would still need to contemplate the political and economic effects as enumerated below: -

First, India needs to realize that the IWT is based on compromises and negotiations. If it is abrogated by India, in retaliation, Pakistan being a lower riparian, has legal rights on those waters and can claim the rivers that were allocated to India.

Second, The Shimla Agreement sets a guiding principle between these two parties. If India oversteps the IWT, it will be a clear violation of these guiding principles. A breach of the Shimla Agreement is expected to be a costlier deal for India instead of Pakistan. A possible chain of reactions is likely to continue as tit-for-tat. Consequently, withdrawal from security agreements and operational arrangements will remain options for both states. Both states have nuclear capabilities; any misperception will lead to a worse situation that will have directly or indirectly a significant threat to international peace and security (Chellaney, 2013, p.132).

Third, aside from Pakistan’s reaction, at the global and regional levels, India has a number of agreements, treaties, and accords that will need to be carefully re-considered on its reputational cost. India’s egotistical deal

with its obligations regarding International Law will have harmful consequences on the concerns of the global community.

Fourth, any act like scraping the Treaty would be against the international standing and also against the Indian interest. To a great extent, it would lead to anxiety among those states which have water-sharing treaties with India such as Myanmar, Nepal and Bangladesh. Uttam Sinha also disagreed with those who are demanding to scrap the Treaty and argue that India can use the flow of Western Rivers as weapon acting within the Treaty by using the water for storage of up to 3.6 MAF. Presently, in order to undermine and to create problems for Pakistan, India does not have enough water storage capability. Presently, India is trying to raise the design of its dam which will take time.

Fifth, India can establish another dimension to create a hurdle for Pakistan if it wants to divert the position of rivers but due to geographical reasons, India cannot take the water out of Kashmir and it is also impossible to divert the existing position of areas.

Sixth, the World Bank will come up with the dispute if a unilateral withdrawal from the Treaty takes place. It will also lead to violence and create further apprehensions among the people of Pakistan. The media should generate debate for possible solutions. Presently, silence over the conflicting situation by the principal parties, whether the World Bank or the Indian Government, shows that the Treaty is safe.

Finally, as mentioned in the Treaty, India has become a middle riparian state for two out of the six rivers. The Chinese province Tibet is a starting point of the two rivers, the Indus and the Sutlej. In order to manage water issues, there is no treaty between India and China. It is perceived by India that China has indicated diversion of waters flowing towards India if it decides to act against Pakistan. All three countries could face possible huge damage and flooding. Moreover, such treaties continue to exist not just because of confidence and concern but they serve up the interest of all nations concerned (Khalid, 2004).

Options for Pakistan

In early 2016, the Pathankot Airbase attack set the tone for Pakistan and India relations. The scheduled foreign secretary-level talks did not take place and India used the incident to stall other scheduled engagements as well. In the aftermath of the Uri attack in September 2016, India maintained its tradition of domestically and internationally blaming Pakistan without having conducted any investigations while Pakistan's version of the event received limited acceptability at international forums. This situation can also be viewed in the context of a set pattern in Indian behavior. Whenever there is any high-level summit, conference or meeting that India is involved in state-sponsored terrorism (Kashmir) or internal turmoil it starts a blame game to bring Pakistan under the international spotlight and puts Islamabad on the defensive. It is almost certain that starting from the Mumbai attacks, Pathankot Airbase and Uri Garrison attack all are stage-managed incidents and have the backing of Indian government and intelligence agencies especially RAW. Outright rejection of Pakistan's proposals of a joint investigation of these incidents confirms this argument. In fact, India desires to castigate Pakistan and continue its bashing covertly and overtly with the assistance of its allies', hostile intelligence agencies and sponsored NGOs. To continue with this policy, Indian think tanks and some officials have started a discussion on revoking the IWT without realizing its domestic, regional and international implications. However, if India embarks upon such a misadventure then following options are available for Pakistan;

1. The geographical location and strong provisions of the Indus Water Treaty weaken Indian capacity to revoke it. Pakistan can use its inherent right to self-defence if India has the option to breach Article 2(4). In good faith, Pakistan will pay particular attention to deter India through legal and diplomatic efforts. Nevertheless, as a last resort, it would be forced to use the right of "necessary countermeasure" complying under the law of self-defense. Pakistan can remove any headwork, dams, or other diversionary installations in Indian-held Kashmir that illegally restrict the flow of Western Rivers into its territory.
2. With exploding its populations, Pakistan foresees itself as a water-scarce country. The existing government has given attention to how to deal with this crisis. Actions on war footing must be taken to fulfill the water requirement and dams need to be built on an urgent basis. Since the building of the Tarbela dam in 1976, no major dam has been constructed. The water storage capacity of Pakistan is retained in the shape of Mangla and Terbela Dams. These are the main reservoirs in the Indus Basin which

have the capacity to store 14MAF of the 145 MAF for 30 days while the international standard is 120 days (Malik, 2011: 36).

3. There are certain flaws existed because of poor management of current water resources. Due to global warming, Pakistan, at the same time, has become susceptible to long spells of drought, extreme floods, and increasing natural disasters compounded by changing precipitation patterns. Pakistan is included, as German Watch's Climate Risk Index mentioned, among the ten countries that have been affected by extreme weather events. (Kreft, Eckstein, & Melchior, 2017) In order to protect and regulate groundwater and the development of a mechanism to build water storage, Pakistan must come up with strong water policy.
4. Pakistan should initiate an active diplomatic and academic campaign to present its point of view on such sensitive and complex issues while highlighting the exaggerations being propagated by the Indian government and think tanks.
5. Pakistan should also make earnest efforts to engage friendly countries to support Pakistan by presenting unbiased and neutral views on the subject and its related international obligations.
6. Pakistan has condemned acts of terrorism in all its manifestations and has been engaged in eradicating this menace for more than a decade along with the support of the international community. Projection of Pakistan's image for its efforts against terrorism at all forums i.e. diplomatic, political and academic needs greater emphasis. Strategic studies institutes and think tanks such as Center for International Strategic Studies (CISS), The Pakistan Institute of International Affairs Karachi, Strategic Studies Institute Islamabad (SSII), PILDAT and Islamabad Policy Research Institute (IPRI) are to be encouraged to hold international seminars/conferences to project the efforts of Pakistan against terrorism and highlight the inadequacies of biased / incorrect representation of Pakistan in various international reports.
7. All the urban centers and almost all canal command areas are under observation as the water table is falling at an alarming rate. The efforts to deal with water crisis had been started since 1960 as one MAF were pumped out by 20,000 tube wells, currently, similar measures are being taken to pump out 50-55 MAF through one million tube wells while 40-45 MAF is recharged (Malik, 2011). All individuals are free to install any number of tube wells of any capacity to pump out water. In order to manage groundwater, no efforts were made for a regulatory framework. The quantity of groundwater has been depleted as well as Industrial and municipal waste is also contaminating the water.

Conclusion

Indian media-generated huge debate on the current issues with Pakistan; the Treaty is safe for the time being as indicated by major parties whether the World Bank or the Indian government. It is worth mentioning that IWT provides a necessary mechanism for the establishment of the institution of Permanent Indus Waters Commission which is required for negotiations, exchange of information and conflict resolution. When the Commission fails to resolve any issue, it is referred to as the leadership of both countries. Even then if the issue is pushed to a dead end, there is an arbitration clause in the Treaty. Accordingly, either a neutral expert is appointed or it is placed before the forum of arbitration. However, India can increase the use of waters along with building more water reservoirs in Indian held Kashmir as a double-edged weapon. While such an act of violating the Treaty would be labeled as hostile and aggressive action it would attract international criticism.

At the same time, coordinating between multiple actors is the best option to sort out water-related issues. It is really that water is being operated at many scales and many levels. It has become the concern of farmers, citizens, local and provincial governments because it has legal, economic, and social ramifications. Unfortunately, there is no single solution, because so many levels of water discourse and so many players are involved in it. In the water management sector, there is little innovative thinking for managing the chaos. The government does not allow the private sector into water-related issues. As compared to power, water is generally low on the agenda as dams are being constructed for the purpose of power generation but issues need to be put on the mainstream.

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