



**Reigning in the Brahmaputra: Challenges to and
Opportunities of Inter-basin Cooperation**

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Sino-Indian River Sustainability Conundrum: A Legal View

Abstract

Indian and Chinese approaches pertaining to water related matters with neighboring states are a study in contrast. While Indian state behavior has been in line with a more treaty-based approach, the Chinese tend to be more unilateral (see Table 1 on Pgs. 12-14 analyzing the same). Additionally, the geographical situation herein gives the Chinese a natural advantage as the upper-riparian state. This report at the outset recognizes the immense ecological advantages of a joint river-basin mechanism for Tibet, India's northeast and Bangladesh. While the study keeps the ecological aspect in the foreground, from an Indian strategic perspective it realistically evaluates the various challenges for a possible reconciliation between the two contrasting approaches that the Dragon and the Elephant have adopted with regard to water related matters. Given China's aversion to multilateral systems in such affairs, in the section on 'India's Challenges and Opportunities' a long-view analysis is provided drawing on the work of strategic experts as to how best deal with water situation. This is done keeping in mind the political challenges that encompass territory, ecology, religion, economic development and most importantly the Tibet question. This matter certainly has new-found salience in the present day and age given China's latest 5 Year Plan (2021-2025) giving the go ahead for construction of hydropower projects on the lower reaches of the Yarlung Zangbo River, as the Brahmaputra is known in Tibet.

Keywords

Brahmaputra, Tibet, Prior Appropriation, Sustainability, Brahmaputra Commission

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A. Introduction: Setting the Stage

Amidst the never-ending din of Chinese and Indian wolf warrior spokespersons recent reports¹ have surfaced about China's next five – year plan (2021-2025) calling for greater development of hydropower on the Yarlung Tsangpo River. The Yarlung Tsangpo originates at the Angsi Glacier/Mansarovar region in Western Tibet and flows across Tibet to enter India where it becomes the Brahmaputra. The unruly Brahmaputra annually nourished by the monsoon continues its southwestern flow into Bangladesh, the lowest riparian state, where it takes on the name of Jamuna. It ultimately merges with the Padma (Ganges) before both the subcontinent's life-givers become anonymous parts of the Bay of Bengal. Such large-scale development projects, as has been reported in the Chinese press can result in harmful consequences for downstream neighbours as well as Tibet's ecology.

Given China's past deliberate linking of water disputes and the border question its easy to dismiss the latest report as just another lever within the negotiation framework for the eastern border we share with China. More so because these statements have been made at a particularly sensitive time given the impasse on the line of actual control (LAC) in Ladakh. While Indian negotiators can't dismiss the correlation between the border dispute and these latest utterances by Chinese officials, neither should they neglect the long developing narrative of Beijing's intentions to exploit the hydropower potential of the river just north of the Arunachal Pradesh border in Medog County, Nyingchi Prefecture to develop a gargantuan 38 Gigawatts of power. For the sake of comparison that is nearly twice the installed capacity of the famous Three Gorges Dam. In addition to such an imperial project, lower riparian India's second concern in this regard is China's plan to conduct an inter-basin transfer of waters from water rich regions such as Tibet to the water deficient north. While there are still no signs of such initiatives receiving official sanction, downstream states can't rule out the possibility of such projects being given a unilateral go ahead by Beijing without taking their interests into consideration. The photograph² below

¹ Patranobis, Sutirtho, and Rezaul Laskar. "China Defends Dam on Brahmaputra, India Hits Back." *Hindustan Times*, 4 Dec. 2020, www.hindustantimes.com/india-news/china-defends-dam-on-brahmaputra-india-hits-back/story-Z9fTogaquykrYVXhgxbfK.html.

² Krishnan, Ananth, and Kaushik Deka . "Bend It like Beijing." *India Today*, 13 Nov. 2015, www.indiatoday.in/magazine/the-big-story/story/20151123-bend-it-like-beijing-820842-2015-11-10.

illustrates completed, under construction and proposed hydropower projects. While the Zangmu dam was completed on as a run of the river project on the upper reaches of the river in 2014, it's the Motuo project that has alerted all observers, given its colossal scale.



From Brahma Chellaney, strategic expert and first mover in the realm of writings on strategic water competition, we learn about the impact of such projects upon the Tibetan environment. He states, “the impact upon the ecology of Tibet is particularly important given that rivers originating on the Tibetan Plateau form eleven Asian mega deltas, which are home to mega cities like Tianjin, Shanghai, Guangzhou, Bangkok, Calcutta, Dhaka and Karachi. The Tibetan Plateau is called the *Third Pole* because it has the largest perennial ice mass on the planet after the Arctic and Antarctica. But whereas the water in the polar icecaps is all locked up, much of the water in Tibet is accessible. Yet today, the effects of human made environmental changes and global warming are more visible on the Tibetan plateau than on the polar ice caps.³” Chellaney further goes on to explain the central challenge facing Asia, particularly China and its neighbours with whom it shares Tibetan waters, “Given that the hydrological integrity and ecological well-being of the plateau’s major watersheds depend on sustainable anthropogenic practices, the central challenge in Asia is to establish institutionalised cooperative relationships among all riparian states that depend on streams originating there.⁴”

³ Chellaney, Brahma. *Water: Asia's New Battleground*. HarperCollins, 2019, Pg. 97

⁴ Chellaney, *Asia's New Battleground* , Pg. 97

An institutionalised cooperative relationship between riparian states on the Brahmaputra based upon principles put forth by the UN Convention on the Law of the Non-Navigational Uses of International Watercourses (1997)⁵ would be the most suitable end goal from the perspective of lower riparian India and Bangladesh. While the above aim is laudable, China has restrained from participating in the above convention on the ground that they encroach upon Chinese sovereignty. However where suitable Beijing has adopted certain principles from the aforementioned conventions in bilateral transboundary river agreements with other neighbours. Similar considerations, not to forget a territorial dispute over Arunachal Pradesh that China deems as South Tibet have informed Chinese reticence to step back from its continuous croaking of absolute sovereignty over its freshwater resources. Given the lack of any comprehensive bilateral or multilateral treaty between the two countries any agreement or understanding will be dictated by power politics. In order for India to gain leverage in this situation, it is however important to show to other international law respecting countries how Chinese behaviour deviates from past precedent as well as principles espoused by conventions. In order for this coalition building effort to be successful India will most importantly need to make common cause with Bangladesh, this may not prove easy given India's inability to achieve concord on hydro-affairs⁶.

Prior to showing China's selective applicability of as well as deviance from internationally accepted rules, its important to gain an understanding of the political and territorial dispute that stands to constrain any form of cooperation.

B. Political and Territorial Challenges

The Sino-Indian border dispute in the eastern sector (Arunachal Pradesh), the region through which the Brahmaputra/Yarlung Tsangpo flows into India, has colonial origins like other

⁵ United Nations, General Assembly, *Convention on the Law of the Non-Navigational Uses of International Watercourses 1997*. 1997.

⁶ Iyer, Ramaswamy. "India - China - Brahmaputra." *Economic and Political Weekly*, 50, No. 9, 28 Feb. 2015, www.epw.in/journal/2015/9/commentary/india-china-brahmaputra.html?destination=node/130696.

disputed areas along the 4000-kilometre border. The recent origins of the dispute lie in former Chinese premier Zhou Enlai's 1959 letter to Pandit Nehru refusing to accept the British negotiated McMahon Line (1914) which followed the principle of the high watershed on the crest of the high Himalayan range. In his letter Zhou Enlai stated, "The so-called McMahon Line was a product of the British policy of aggression against the Tibet region of China and aroused the great indignation of the Chinese people. It has never been recognised by the Chinese Central Government. Although, related documents were signed by a representative of the local authorities of the Tibet region of China, the Tibet local authorities were in fact dissatisfied with this unilaterally drawn line."⁷ These letters were written a decade into the establishment of communist China, when Mao was trying to consolidate China's position in Tibet.

A common trope of many Chinese territorial disputes is Beijing's push to regain control and influence in areas lost when China became weak during what is deemed in the *laobaixing's* (common persons) public psyche as the century of humiliation. Robert Kaplan writes in his work, *Asia's Cauldron*, "...One should not gloss over what happened to China in the past 150 years. Unless one is intimately aware of this Chinese historical experience, one cannot comprehend what motivates China today in the South China Sea."⁸ Similar motivations apply on the China – Indian frontier regions. Therefore, while the consideration that the actual catchment area of the Brahmaputra/Tsangpo basin (92,000 square kilometres) falls under Indian control in Arunachal Pradesh is certainly a factor aiding the Chinese calculus of reiterating their claim on the territory, the much larger motivation is Beijing's desire to re-assert control over Tibet as well as Tibetan Buddhism.

In the present day and age, Xi Jinping's Chinese Communist Party is planning a strategy to restore the age-old priest-patron/ Cho-Yon relationship between Lhasa and Beijing. To be able to accomplish this, one of the pieces of the jigsaw will be to gain the support or acquiescence of the

⁷ STOB DAN, PHUNCHOK. *GREAT GAME IN THE BUDDHIST HIMALAYAS: India and China's Quest for Strategic Dominance*. PENGUIN, 2019, Pg. 82.

⁸ Kaplan, Robert D. *Asia's Cauldron: The South China Sea and the End of a Stable Pacific*. Random House Kindle Edition, 2015, Kindle Location 405.

elders affiliated with the Tawang Monastery as it's a key node of influence in the realm of Tibetan Buddhism. It's understood that given the monastery's importance in Tibetan Buddhism, they are likely to have a degree of influence in the 14th Dalai Lama's succession process. Historically the Tawang monastery and the region's Monpas have adhered to the Gelug theocratic tradition of Tibetan Buddhism, who's most influential figure is the Dalai Lama. One of the reasons for China's discomfort vis-à-vis India's control of Arunachal Pradesh is the apprehension that the Dalai Lama may anoint a successor from Tawang⁹. "In a statement in March 2019, the Dalai Lama said, 'In future, in case you see two Dalai Lamas come, one from here, in a free country, one is chosen by Chinese, and then nobody will trust, nobody will respect the one chosen by China.' He would prefer Tawang to be his next birthplace for reasons of history and because it is considered South Tibet." The Chinese in order to strengthen their claim to Tawang have recently celebrated the Sixth Dalai Lama, who was a Monpa from Tawang. In addition to his ethnicity the Chinese highlight the fact that his becoming the leader of the faith was approved by the Qing Emperor¹⁰. Many of these celebrations in the form of museum exhibits and plays coincided with the Dalai Lama's visit to Tawang in 2017.

While the birth of the next Dalai Lama in Arunachal Pradesh would undoubtedly be detrimental for Sino-Indian relations it would also negatively affect China's efforts to further their control over the Tibetan Autonomous Region. Granted that China's vetoing of Asian Development Bank financing of Indian development projects in Arunachal Pradesh is one manifestation of Chinese concerns, they are for similar reasons concerned about India constructing hydropower projects in the region and enhancing control.¹¹

It is easy to see why a resolution of this matter would be entirely dependent on high-level politics and would be dictated by the relative strength of either country's negotiating positions.

⁹ Diplomat, K.S. Venkatachalam for The. "Why China Is Fuming Over the Dalai Lama's Visit to Tawang." – *The Diplomat*, The Diplomat, 4 Apr. 2017, thediplomat.com/2017/04/why-china-is-fuming-over-the-dalai-lamas-visit-to-tawang/.

¹⁰ Stobdan, *Great Game in the Buddhist Himalayas*, Pg. 15.

¹¹ Samaranayake, Nilanthi, et al. *Raging Waters: China, India, Bangladesh, and Brahmaputra River Politics*. Marine Corps University Press, 2018, Pg. 27.

Additionally, even before embarking on building a case about China not conforming to international conventions on transboundary rivers, we can conclude that any agreement on waters is inextricably linked with the complex questions of military, territorial and Buddhist affairs. Nevertheless, it is important for India to put forth an argument that buttresses its rights as a lower riparian state so that when the opportunity arises in the future the government already has well established grounds to negotiate, particularly in a language that the international legal and diplomatic community understands. Additionally, given the various sensitivities surrounding Tibet's ecology and their possible impact on downstream settlements it is important for India as a responsible regional stakeholder to continuously protest any disproportionate and unilateral Chinese behaviour in the region.

C. Understanding the International Water Law Regime

At the outset, in order for India to gain strategic leverage in its bid to reduce the strength of China's absolute sovereignty claim upon the use of Tibetan waters it needs to demonstrate its own compliance with international norms as well as ameliorate the relationship with Bangladesh in this regard. It subsequently needs to adopt an active strategy of illustrating cost liabilities upon corporations who invest in projects that can have significant harm downstream as well as bandwagon with similarly affected countries like those of the Lower Mekong Initiative protesting China's lack of coordination and transparency by demonstrating actual and potential negative consequences. Furthermore, Indian negotiators should study other bilateral and multilateral transboundary river frameworks into which China has entered, in order to understand whether or not China has applied the same universally accepted principles and if they have, then in what circumstances have they done so. Such a robust and broad-based effort will not only pressurise the Chinese to some extent but also invite international attention from governments and multilateral organisations alike. Be that as it may, prior to evaluating the possibilities and challenges of the aforementioned scheme of action it is first essential to understand the basis upon which this debate has been and will be conducted, i.e. customary international law, conventions as well as case-laws that have regulated state behaviour with regard to transboundary rivers.

The aforementioned UN Watercourses Convention that passed in 1997 and was recently ratified in 2014 has been the manifestation of efforts of international organisations both inter-governmental and non-governmental, over the span of nearly a century to capture in written form the norms governing the relations among States sharing freshwater resources. These efforts, in turn, built on State practice and the writings of scholars in the field¹². In particular, the International Law Association (ILA) developed Helsinki Rules (1966) have had a major impact upon the development of the law of international watercourses and reflect many principles that find expression in the UN convention. They had a large impact upon the UN General Assembly in December of 1970 recommending in Resolution 2669 (XXV), titled ‘Progressive development and codification of the rules of international law relating to international water courses’ that the International Law Commission (ILC) take up the study of this aspect of water law with a view to its progressive development and codification¹³. Following the UN General Assembly’s resolution and referral, it took twenty-seven years and the work of five of special rapporteurs (Richard D. Kearney, Stephen Schwebel, Jens Evensen, Stephen McCaffrey and Robert Rosenstock) as well as number of committee considerations in the mid-1990s for agreement on the final draft.

From the perspective of international adjudication, the principles enumerated by the adopted convention were well received. In the same year as its adoption, the International Court of Justice (ICJ) relied on the convention and the principle of equitable and reasonable utilisation and participation (enumerated in Article 5) in its judgment in the famous *Gabcikovo – Nagymaros Project case* which concerned the waters of the Danube with Hungary and Slovakia as opposing parties. Although the convention was adopted on the 21st of May, 1997 it didn’t receive the required thirty-five signatures for it to be ratified and enter into force until 2014. Notably, India abstained from voting, China on the other hand along with Burundi and Turkey voted against the convention. Although pre-existing regional mechanisms seem to be the primary reason for many countries being slow to ratify this convention, a substantial issue of law too has

¹² Chazournes, Laurence Boisson de, et al. *The UN Convention on the Law of the Non-Navigational Uses of International Watercourses: a Commentary*. Oxford University Press, 2018, Pg. 1.

¹³ Chazournes, et al, *The UN Convention on the Law of the Non-Navigational Uses of International Watercourses: a Commentary* Pg. 6.

contributed to nation-states' reluctance to ratify the convention This related to the relationship between Articles 5, 6 and 7. The following are the respective marginal notes to the Articles:

Article 5: Equitable and reasonable utilization and participation;

Article 6: Factors relevant to equitable and reasonable utilization;

Article 7: Obligation not to cause significant harm.

Along with the notification and dispute resolution procedure outlined in part III (Planned Measures) and part VI (Miscellaneous Provisions) respectively the aforementioned in Part II (General Principles) form the core of the convention. While the working group deliberating the ILC's draft articles approved the same convention by one hundred and three votes to three (twenty-seven abstentions), Articles 5, 6 and 7 were submitted to a separate vote, in which they were approved by only thirty-eight to three (twenty-seven abstentions)¹⁴.

The main bone of contention between participants was the relationship between Articles 5 and 6, on the one hand, and the 'no-harm principle' expressed in Article 7, on the other. Egypt and Italy proposed to subordinate Articles 5 and 6 to Article 7; this would mean that new or expanded utilisation would be possible only if it caused no substantial or significant harm to the existing uses of other watercourse states. China along with Turkey, Ethiopia and Romania suggested the reverse, to subordinate Article 7 to Article 5 and 6 wherein substantial harm to a transboundary state wouldn't become an overriding factor.

Understanding China's Selective Approach To Absolute Sovereignty

Such an approach from China stems from it following the principle of absolute territorial sovereignty qua transboundary rivers, this is contrasted with India's approach of the theory of restricted sovereignty when we compare the situation on the Brahmaputra with the existing Indus Waters Treaty (concluded between India and Pakistan in 1960)¹⁵. Chinese scholars often employ the customary international law doctrine of prior appropriation to bolster their argument. Liu Bin of the Chinese Ministry of Water Resources states, "The appropriation doctrine embodies respect

¹⁴ Chellaney, *Asia's New Battleground* , Pg. 87

¹⁵ Chellaney, *Asia's New Battleground* , Pg. 87

for the history of water development and usage. The application of this principle could consider more varied water interests more appropriately than the riparian priority principle. Moreover, it reflects the tradition of ancient China, where ‘first in time, first in right’ was applied as well. Finally, it should be relatively easy to issue water rights based on the prior appropriation system. Therefore, the appropriation doctrine should be adopted as the basic principle in China¹⁶.”

As per Lei Xie and Shaofeng Jia’s account of China’s trans-boundary rivers Beijing further locates its sovereignty argument in principle 21 of the 1972 Stockholm Declaration which prescribes, “that states have the sovereign right to exploit their own resources...”, this corresponds to principle 2 of the Rio Declaration 1992¹⁷. Such a reading of the provision is contradictory given that the latter half of the same principle conditions the sovereign right to exploit resources provided 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.¹⁸”

Economic interests over water resource management in the case of China represent a primary concern. In the case of the Tsangpo/Brahmaputra River, China’s interests in developing sources of power for Tibet and water deficiency in its northern parts certainly trump a commitment to any principles of no-harm and collaboration. However, China by concluding trans-boundary river agreements with other nations such as Russia on the River Amur and Kazakhstan on the rivers Irtysh and Ili among other agreements with border nations has engaged in selective cooperation. It’s understood by some experts that China’s use of the sovereignty right is principled strategy, which facilitates its self-interests or functions as a bargaining chip for better conditions for itself.¹⁹ For instance, “China’s participation in water related environmental

¹⁶ Bin, Liu. “Water Rights In China .” *International Working Conference On Water Rights: Institutional Options for Improving Water Allocation*, 2003, citeeex.ist.psu.edu/viewdoc/download?doi=10.1.1.195.3157&rep=rep1&type=pdf, Pg. 9

¹⁷ Xie, Lei, and Shaofeng Jia. *China's International Transboundary Rivers: Politics, Security and Diplomacy of Shared... Water Resources*. Routledge, 2019, Pg. 46.

¹⁸ “Rio Declaration on Environment and Development 1992.” 2, SiSU [Http://Www.jus.uio.no/Sisu](http://www.jus.uio.no/Sisu) (This Copy), 1 Jan. 1992, www.jus.uio.no/lm/environmental.development.rio.declaration.1992/2.html.

¹⁹ Xie and Jia, *China's International Transboundary Rivers*, Pg. 48.

agreements it has shown a somewhat more cooperative attitude than that shown on the protection of natural resources. It has participated in a number of water related environmental agreements, the main ones being the Convention on Wetlands of International Importance (Ramsar Convention) and the Convention on Biological Diversity.”

Further, China to demonstrate compliance with principles espoused by the UN Watercourses convention selectively abides by ‘Article 9: Regular exchange of data and information’. During the Doklam crisis in 2017 the Chinese side stopped supplying India with the agreed to hydrological data that helps India prepare for flood management. Similarly, to demonstrate compliance with ‘Article 12: Notification concerning planned measures with possible adverse effects’, “China’s Ministry of Foreign Affairs stipulates that new trans-boundary river projects must undergo a thorough trans-boundary environmental impact assessments (TEIAs), with consideration of the interests of both downstream and upstream riparian countries.” Whatever be the initial intent of such a policy Shaofeng Jia and Lei Xie state, “such measures can serve to provide additional means of legitimizing the central authorities’ decisions. In practice, the EIA is not well implemented and raises claims of procedural injustice.²⁰”

The above analysis indicates that China’s interpretation of adopting and abiding by global water norms particularly the no-harm principle is largely incumbent upon the same suiting its domestic economic and political needs. It has concluded reciprocal framework agreements with a number of its border states. Below is a table²¹ that comprehensively illustrates the above:

Table 1

	Rule	Characteristic	Examples (By Year)
1.	Equitable and Reasonable Use	China’s treaties include this rule, but it is often accompanied by language emphasizing its reciprocal character such as ‘fair,’	China-Mongolia Agreement on the Protection and Utilization of Transboundary Waters (1994)

²⁰ XIE and JIA, *CHINA’S INTERNATIONAL TRANSBOUNDARY RIVERS*, Pg. 51-52.

²¹ DEVLAEINCK, David J. “ The Legal Principle of Reciprocity and China’s Water Treaty Practice Lecturer, School of Law, Chongqing University” *Chinese Journal of Environmental Law* , vol. 2, 2018, pp. 195–222, Pg. 212.

		‘equitable’ and ‘rational.’	<p>Article 2 and 4</p> <p>China-Russia Treaty of Good Neighbourliness (2001), art 19</p> <p>China-Kazakhstan Agreement on Cooperation in the Use and Protection of Transboundary Rivers (2001) Article 4</p> <p>China-Kazakhstan Joint Declaration on Further Deepening Comprehensive Strategic Partnership (2013) Section 3, Paragraph 3</p>
2.	Due Diligence Obligation Not to Cause Significant Harm	Often included in China’s water treaties, but in different forms. Some focus on harms that flow downstream, limiting its reciprocal application, whereas others take a more reciprocal approach.	<p>Focus on Harms that Flow Downstream</p> <p>China-Kazakhstan Agreement on Cooperation in the Use and Protection of Trans-boundary Rivers (2001) Article 3</p> <p>Reciprocal Approach to Harm</p> <p>China-Mongolia Agreement on the Protection and Utilization of Trans-boundary Waters (1994) Article 4</p> <p>China-Russia Agreement on Management and Protection of Trans-boundary Waters (2008) Article 7</p>
3.	Information Sharing	Many of China’s treaties include provisions on information sharing, involving a reciprocal exchange of information or information for some form of payment. Others only require China to provide information.	<p>Reciprocal Exchange</p> <p>China-Mongolia Agreement on the Protection and Utilization of Transboundary Waters (1994) Article 3</p> <p>China-Kazakhstan Agreement on Cooperation in the Use and</p>

			<p>Protection of Transboundary Rivers (2001) Article 6</p> <p>China-India MoU on the Sharing of Hydrological Information on the Yarlung-Tsangpo/ Brahmaputra River during the Flood Season (2002)</p> <p>Provision of Information by China</p> <p>China-Mekong River Commission Agreement on Provision of Hydrological Information (2002)</p> <p>China-India MoU on the Provision of Hydrological Data on the Langqen Zangbo/Sutlej during the Flood Season (2005)</p> <p>China-Bangladesh Joint Statement (2010)</p>
4.	Prior Notification	Some of China's treaties recognize this duty, involving a reciprocal right to notify and be notified	<p>China-North Korea Protocol on the Borderline (1964) Article 17</p> <p>China-Vietnam Provisional Agreement on Border Affairs (2009)</p>
5.	Dispute Settlement	China does not consent to mandatory dispute settlement mechanisms but prefers to settle disputes via consultation, a reciprocal process of exchange resulting in compromise.	<p>China-Mongolia Agreement on the Protection and Utilization of Trans-boundary Waters (1994)</p> <p>China-Kazakhstan Agreement on Cooperation in the Use and Protection of Trans-boundary Rivers (2001)</p>
6.	Joint Mechanisms	Four joint bodies have been identified on China's trans-	China-Kazakhstan Commission on the Use and Protection of

		boundary waters that may act as a hub for states to conduct such reciprocal cooperation.	<p>Trans-boundary Rivers</p> <p>China-Kazakhstan Commission on Cooperation in the Field of Environmental Protection</p> <p>China-Russia Joint Commission on the Reasonable Utilization and Protection of Trans-boundary Waters</p> <p>China-Mongolia Joint Commission on Trans-boundary Waters</p>
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India's Challenges and Opportunities

The undefined nature of the Sino-Indian frontier restricts water policy coordination to occasional sharing of hydrological information. As we observed around the time of the Doklam standoff, such coordination too falls victim to our uncertain ties. Given its precarious nature, a safety valve for the relationship in the form of a dispute resolution mechanism or a comprehensive water basin management authority is unavailable. In 2018 it was reported that the Siang (Brahmaputra as it enters Arunachal Pradesh) had mysteriously turned black when entering India. The article went on to state that China's upstream tunneling, damming and mining activities possibly caused such environmental contamination²². While such an incident didn't cause public uproar nor was there a publicly known exchange between the two governments, it is entirely possible that in different circumstances such an incident could have led to greater ramifications between the two countries. The existence of a cooperative institutional mechanism that has a basin wide sustainable development mandate would not only have holistically addressed such a dispute, but would also prevent the same from arising in the future. There is an urgent need for such an

²² Chellaney, Brahma. "Water Shortages Could Trigger Asia Conflicts." *Nikkei Asia*, Nikkei Asia, 30 Dec. 2017, asia.nikkei.com/Politics/Water-shortages-could-trigger-Asia-conflicts.

authority based upon principles developed by the international legal community that are present in the UN Watercourses Convention for the long-term benefit of the people of China, India and Bangladesh, as well as the larger population indirectly affected by Tibetan ecology that impacts rainfall patterns.

Even though India abstained from voting on the UN Convention on the Law of the Non-Navigational Uses of International Watercourses (1997), its state practice in the case of the 1960 Indus Water Treaty as well as the more recent Kishenganga Adjudication (2013) at the Permanent Court of Arbitration buttress India's case as a responsible upper riparian state. The late Ramaswamy R. Iyer, former secretary in the Ministry of Water Resources, Government of India and author of numerous books on Indian Waters defended India's decision of not ratifying the UN Watercourses Convention when it came into force in 2014 by stating, "Even if India had voted for the Convention, it would not have a significant effect. The Convention is in such general terms that – under the broad principle of "equitable sharing", which no country can object to – a good deal of negotiation will be necessary in each case. Generally speaking, customary international law requires prior notification of intention to intervene in a river, plus provision of information, consultation with downstream countries, due regard for their concerns and refraining from causing harm or injury to the co-riparian. This was so under the Helsinki Rules (1966). It continues to be so under the 1997 UN Convention. In fact, these principles underlie the 1960 Indus Waters Treaty between India and Pakistan, which predates the Helsinki Rules.²³" While India is seen to have responsibly applied the doctrine of restricted sovereignty with regard to its waters in the north, there is still much to be desired when it comes to our water relationship with Bangladesh.

Mr. Iyer has stated that with India's ambitions to dam the Subansiri and Dibang tributaries as well as divert waters under the river-linking project, Bangladesh has the same concerns that India has when it comes to China's plans for the Yarlung Tsangpo i.e. damming and water diversion²⁴. Moreover, Bangladesh has a 91.33% dependency on water coming in from external sources,

²³ Walker, Beth. "China and India Ignore UN Watercourses Convention." *China Dialogue*, 14 May 2020, chinadialogue.net/en/climate/7229-china-and-india-ignore-un-watercourses-convention/.

²⁴ Iyer, *India-China-Brahmaputra*.

majority from India whereas India only has a 33.4% dependency²⁵. Any effort to create an integrated basin management mechanism would be rendered more tractable if India could make common cause with Bangladesh. This is indeed a tall order, given that the Teesta Accords now sit on the back burner of Bangladesh – India ties. Interestingly, according to a recent newspaper report²⁶ China with its increasing presence in India’s strategic neighbourhood has advanced a loan of one billion dollars for the purposes of a water management project on the Teesta river. Although, these are significant developments, money doesn’t change geography and a joint India – Bangladesh approach to China on this matter would be far more effective than separate approaches.

From an Indian perspective, in order to serve our own interests as well as the Brahmaputra’s basins 625 million people it is essential that a broad based cooperative mechanism is developed. A Brahmaputra Commission along the lines of the Mekong River Commission is required to regulate the region’s hydropolitics as well as other long term environmental considerations. The Mekong River Commission (MRC) at present stands to be a model mechanism for effective data-sharing between the four member states, Cambodia, Thailand, Laos and Vietnam. The Procedures for Data and Information Exchange and Sharing (PDIES) in accordance with the Mekong Agreement is responsible for the implementation of updating and exchange of necessary data and information for planning, development and monitoring purposes among member nations.²⁷ A potential Brahmaputra Commission should aspire to go one step ahead of the MRC by creating an obligation for all infrastructure investors in the region to abide by sustainable development guidelines. Provisions should be drawn up for foreign or domestic investment in projects to safeguard against the same causing significant harm to riparian neighbours. The investment treaty should provide for the offender against invoking a defence of *force majeure*

²⁵ Chellaney, *Water: Asia’s New Battleground*, Pg. 171.

²⁶ Team, WION Web. “Now, China Gives Loan to Bangladesh for Teesta River Project.” *WION*, WION, 19 Aug. 2020, www.wionews.com/india-news/now-china-gives-loan-to-bangladesh-for-teesta-river-project-321534.

²⁷ (MRC), Mekong River Commission. “MRC Statement on the Occasion of PDIES 15th Anniversary ‘MRC Is Indispensable for the Mekong.’” *Mekong River Commission (MRC)*, www.mrcmekong.org/news-and-events/news/mrc-statement-on-the-occasion-of-pdies-15th-anniversary-mrc-is-indispensable-for-the-mekong/.

under general international law, as it would be the offender who would have caused or induced the situation in question.²⁸

Moving on, the commission admitted China and Myanmar as dialogue partners in 1996 and while China does share hydrological data with the commission it has not sought full membership even though it's the upper riparian on the river, largely due to the concern that doing so would impose restrictions on its upstream (on Mekong and Salween) dam building plans²⁹. However, the advantage of a multilateral setup such as the MRC is that it has bolstered each individual nation's negotiating position vis a vis China and additionally it has allowed nations like the United States to give it support. Although the middle kingdom far prefers a bilateral consultative method of negotiation, such a situation does make China mindful of its relations with lower Mekong countries even if its willing to listen to them only to a limited extent. India being a far larger country than MRC countries brings more weight. Importantly from the perspective of internal policy coherence, Modi's Bharatiya Janata Party (BJP) has brought about political consolidation in India's north-eastern states. Furthermore, by next year, after the West Bengal state elections, we will be able to gauge the new state government's attitudes on the Teesta accords, given that they have not seen the light of day due to political considerations. The electoral importance of the Teesta accords undoubtedly impacts any form of cooperation with Bangladesh.

While a multilateral approach to the Brahmaputra basin is most desired, India needs to protect its lower riparian position from unilateral Chinese behavior. Firstly, the government must incessantly object to China's continuous exhortations that its upstream dams such as the Zangmu (completed in 2014) are run of the river (RoR) with no storage, diversion and do no harm. Far from being environmentally benign, RoR dams are perhaps among the most destructive human interventions in nature. There are two features of RoR projects that make them dangerous, firstly, there is a break in the river between the point of diversion to the turbines and the point of return of the waters to the river, and the break can be very long, upwards of 10 km in many cases, even 100 km in some cases; and there would be a series of such breaks in the river in the event of a

²⁸ Chazournes, et al, *The UN Convention on the Law of the Non-Navigational Uses of International Watercourses: a Commentary* Pg. 468.

²⁹ Samaranayake et al. *Raging Waters* Pg. 33

cascade of projects. Second, in such projects the turbines operate intermittently in accordance with the market demand for electricity, which means that the waters are held back in pondage and released when the turbines need to operate, resulting in huge diurnal variations — from 0% to 400% in a day — in downstream flows. There is one case in which the river is dry for 20 hours in the day and in the remaining four hours there is an eight-metre water wall rushing down the river. No aquatic life or riparian population can cope with that order of diurnal variation. An RoR hydroelectric project spells death for the river.³⁰

Additionally, we must protect ourselves from self-harm, there is a view that India must quickly build dams in order to consolidate its ‘prior use’ water rights to pre-empt Chinese projects. Experts deem such an approach suicidal, China is hardly likely to pay much heed to this legal argument, and we in the process would do ourselves immense hydrological, ecological and other kinds of harm.³¹ On this point, the Indian approach must also learn from Prime Minister Nehru’s thoughts on the matter. In 1961, in one of his exchanges with Pakistan’s President Ayub Khan, Pt. Nehru with regard to the shared waters of the Ganges (with what was then East Pakistan) stated, “One more matter to which I must refer, is the distinction you still seem to make between the rights of upper and lower riparians, which implies that the lower riparian can proceed unilaterally with projects, while the upper riparian should not be free to do so. If this was to be so, it would enable the lower riparian to create, unilaterally, historic rights in its favor and go on inflating them at its discretion thereby completely blocking all development and uses of the upper riparian. We cannot, obviously, accept this point of view.”³²

D. Conclusion

Barring a fortuitous turn in political approaches, it is highly unlikely that India and China will make substantial progress on improving our current state of relations in the near future. Therefore, the outlook for the formation of a prospective Brahmaputra Commission certainly looks weak. In addition to the Sino-Indian dynamic as has been illustrated in this paper India needs to mend fences with Bangladesh to make progress in this regard. From analysing Chinese

³⁰ Iyer, *India-China-Brahmaputra*.

³¹ Iyer, *India-China-Brahmaputra*.

³² Chazournes, et al, *The UN Convention on the Law of the Non-Navigational Uses of International Watercourses: a Commentary* Pg. 116.

state behaviour it is evident that they prefer bilateral agreements where disputes are resolved consultatively, such arrangements suit the Chinese approach given that they are often the powerful party in one on one situations with their neighbour. Furthermore, it was concluded that China only commits to global arrangements when it serves their interests. In order to weaken China's negotiating position vis-à-vis their absolute sovereignty stand India must grasp the opportunity presented by the prevailing global mood. They should bandwagon with other countries who've been affected by unilateral Chinese behaviour and demonstrate collective commitment to international norms, such as the UN Convention on Watercourses, 1997.

Lastly and most importantly is the fate of the Tibetan community, and what such infrastructure plans portend for their faith, culture and history. China's planned gargantuan projects are bound to have drastic ecological effects not only on lower riparian countries but also to Tibetans, whose earthly paradise, blessed by Padmasambhava (8th century sage who helped establish Buddhism in Tibet), lies in the borderland between Tibet and India. This is the same area around the great bend where plans of building the 38 GW dam in Medog Country have been chalked out. This Pemako – beyul region is integral to the beliefs and practices of Tibetan Buddhism. In the present day and age it is likely that Beijing's desire to meet the Tibet Autonomous Region's energy needs via big hydroengineering projects may outweigh the spiritual importance of the region.

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