The Indus Waters Treaty

Cory Combs

Pakistan's response to the present Indus Waters Treaty (IWT) controversy is guided by consideration of three questions: 1) Does the IWT adequately adhere to the key international watercourse management principles of the UN Watercourses Convention? 2) What lessons should be drawn from the 2005 Baglihar dispute regarding the IWT's continued efficacy? 3) What do the findings to the above imply for Pakistan's position regarding the IWT: should it be maintained, modified, or abrogated? This brief finds, on the basis of these considerations, that the IWT, while imperfect, embodies the principles and mechanisms most vital for resolution to present conflicts, including obligations of cooperation and transparency, equitable and reasonable participation, and precedent for adaption regarding dispute resolution. The importance of joint water management is increased by climate change and emerging extreme weather trends, as is reflected in the growing water stress that undergirds current political tensions. The IWT requires amendment to promote more active joint management, including a revision of governance principles. Yet, while domestic politics in both India and Pakistan inhibit cooperation, the IWT provides for it, and remains the best chance both states have for securing their water needs.

Origin and Key Mechanisms of the Indus Waters Treaty

The Indus Water Treaty (IWT) was signed between India and Pakistan in 1960, and co-signed by the World Bank. To address water needs following partition, the IWT divided the six rivers of the Indus river system between India and Pakistan, allocating control and "unrestricted use" of the Sutlej, the Beas and the Ravi to India, and of the Indus, the Jhelum and the Chenab to Pakistan. Annexures provide exceptions in which one state may utilize water resources under the control of the other state. The IWT is primarily the result of negotiations among engineers.

The IWT established the Permanent Indus Commission, a cooperation and information exchange mechanism. It furthermore established progressive procedures for dispute resolution: disagreements are first referred to the Commission as "questions"; failing resolution, they become "differences" to be examined by a Neutral Expert; and should they fall outside a specified domain over which the Neutral Expert has authority, they become "disputes," to be resolved by an a Court of Arbitration. The World Bank may designate neutral experts and other roles under certain conditions and when requested by either state.

Controversy and Domestic Rhetoric

Despite historical success, enabling cooperation and dispute resolution even during times of conflict, confidence in the IWT is threatened by increased water stress, as reflected in tensions over the divisions of shortages, water storage and its effect on downstream flows, and hydropower development. For Pakistan, the most controversial projects include India's Kishanganga and Ratle hydropower plants, for each of which Pakistan requested arbitration pursuant to the IWT. (Both were later approved.)

However, beyond the technical and legal challenges inherent in a complex river system and treaty, the IWT has also become a target of broader political rhetoric in the domestic politics of both Pakistan and India. Notably, the Modi administration has taken the radical step of calling for the abrogation of the treaty, which some analysts consider a reflection of nationalist politics.

IWT and the Key Principles of the UN Watercourses Convention

The UN Watercourses Convention (UNWC), adopted by the UN General Assembly in 1997, is a major framework convention on the governance of non-navigational uses of international watercourses, including water storage and hydropower development.

The UNWC codifies several key principles, reflecting the development of customary international water law and the leading expert opinions of the day in international law. These include:

- The principle of equitable and reasonable utilization
- The general obligation of watercourse states to cooperate
- The principle of equitable and reasonable participation
- The obligation not to cause significant harm

Neither Pakistan nor India have signed the UNWC; however, as the most authoritative statement on international watercourse management, it is the chief metric by which to judge the IWT. A brief history provides context for comparison and judgement.

The IWT was established 37 years before the UNWC. Furthermore, it was established 6 years before the 1966 Helsinki Rules on the Uses of Waters of International Rivers, which most importantly established the principle of reasonable and equitable utilization which is a cornerstone of the UNWC. The Helsinki Rules, and later the UNCW, affirmed a middle way between contradictory principles: first, absolute territorial sovereignty—the "Harmon Doctrine"—under which a state can in principle dispose of territorial waters with no regard for effects on other states; and second, absolute territorial integrity, under which a state is in principle guaranteed protection from harm by other states' uses of international waters. Pragmatism requires both reasonable and equitable use, at neither extreme.

The IWT preceded the establishment of the principle of equitable and reasonable utilization that is core to the UNWC, and furthermore, its allocation of river control for "unrestricted use" at first appears to align it with the Harmon Doctrine. However, the IWT's Annexures do reflect reasonable, if limited, allowances and conditions for utilization. The IWT occupies an middle area.

The IWT adheres well to the next two key principles. Article VII recognizes that the two states "have a common interest in the optimum development of the Rivers, and, to that end, they declare their intention to co-operate, by mutual agreement, to the fullest possible extent." Articles VI, VII and VIII on data exchange, commitment to cooperation, and prior notification via the Commission directly reflect the general obligation to cooperate. The IWT also functionally adheres to the principle of equitable and reasonable participation, most notably via the Commission.

Lastly, the obligation not to cause significant harm, while limited by the basis of "unrestricted use," is still appreciable in Article IV, which affirms commitments to minimize various harms.

The Baglihar Dispute: Evidence for the IWT's Continuing Value

In 2005, Pakistan submitted to the World Bank its claim of a "difference" with India regarding the design of the Baglihar hydropower project, under construction by India on the Chenab river. Annexure D allowed for India's construction of the dam on the Chenab, a river allocated to Pakistan, provided the dam met several stipulated conditions. The two states disagreed, though, on whether the design met four of these conditions: limitations on the project's capacity to raise the water level in the operating pool; limitations on maximum pondage; constraints on the spillway height; and constraints on the height of the turbines.

The Baglihar dispute was a critical test of the IWT's dispute resolution mechanism, both as a significant technical challenge and as the first invocation of the Neutral Expert. Complicating the dispute resolution process, Baglihar was already under consideration by the Permanent Indus Commission as a "question" when Pakistan approached the World Bank with its claim of a "difference" for resolution by a Neutral Expert. While the IWT did not provide for these circumstances, an apparent oversight, the several provisions regarding the World Bank's proper roles, commitments to transparency among all three parties in all stages, and commitment to equitable participation in the process enabled adaptation, and resulted in a process agreed to by all.

Lack of precedent for what "consultation" among parties during the appointment of a Neutral Expert entailed, in particular, led the parties to lean on precedent from the International Centre for Settlement of Investment Disputes. While not guaranteed to work—India could have opposed the measure—the flexibility to make joint decisions and the long-standing precedent of consultation enabled negotiation of and commitment to a fair process.

The engineer appointed Neutral Expert issued a decision in early 2007, interpreting the IWT's conditions in light of contemporary technical standards and norms, matching the intentions of the engineers who originally negotiated the terms with due consideration for technological advances. Remarkably, both Pakistan and India responded positively to the results. Salman Salman, Lead Counsel for the World Bank, described Pakistan as viewing the matter as primarily legal in nature, and India as viewing the matter as primarily technical. That both states perceived the decision as a definitive and acceptable resolution testifies to the merit of the process. The Baglihar dispute demonstrated the adaptability and strength of IWT procedures, and Baglihar's precedent bolsters the IWT dispute resolution mechanism.

Conclusion: Necessary Modifications to the IWT

While the IWT has proven one of the world's most durable international water treaties, and has precedent for adaptation, the IWT has increasingly evident flaws which must be addressed. First, as the UNDP report "Development Advocate Pakistan" states, the IWT "fails to address two issues: the division of shortages in dry years between India and Pakistan, when flows are almost half as compared to wet years, and the cumulative impact of storages on the flows of the River Chenab into Pakistan."

The IWT's method of river allocation arose only after water flow allocation, which could address the first issue, was rejected by both parties in the 1950s. Amendment of the treaty to divide flows, and hence also shortages, would be valuable. However, politics have not grown less contentious since negotiations in the 1950s; only mutual agreement to revisit this once-rejected method would enable progress. The same lesson applies when considering abrogation of the IWT: while its river allocation is insufficient to deal with current needs, a new treaty would still be required to ameliorate the situation. Decision-makers must be confident that a new treaty is possible before ending the IWT. Until that certainty is secured, the IWT is not obsolete.

Second, in light of recent politics, critics argue that the IWT is increasingly inefficient as a means of dispute resolution.

The IWT, though, has remained remarkably aloof from political trends across its history—it has succeeded *despite* politics. It was forged by engineers around technical needs, with limited roles even for lawyers. Its Neutral Experts are required to be eminent engineers. A Court of Arbitration is to be led by expert and politically removed authorities: either the President of MIT or the Rector of the Imperial College of Science and Technology; the UN Secretary-General or World Bank President; and the U.S. Chief Justice or English Lord Chief Justice. Any more political institution would sacrifice objectivity, technical sufficiency, and amenability to both parties—in short, any meaningful efficiency. Only an equally apolitical institution could replace the IWT.

Despite political rhetoric, the real underlying catalysts of conflict are climate change and emerging extreme weather patterns, which exacerbate water shortages and risks of water storage. Integrated basin management—lacking in the IWT—is now imperative. The principle of reasonable and equitable utilization must be bolstered. The IWT thus needs amendment. But amendment, even if more politically difficult than abrogation, is by far the best chance to meet India's and Pakistan's vital needs.

References

Bozdar, Babar Khan, "Violation of Indus Water Treaty?". Pakistan Observer. http://pakobserver.net/violation-of-indus-water-treaty/

Salman, Salman M. A., "The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspectives on International Water Law". Water Resources Development, Vol. 23, No. 4, 625-640. December 2007.

Siddiqui, Shawahiq, "UN Watercourses Convention is good for South Asia". The Third Pole. August 18, 2014. https://www.thethirdpole.net/2014/08/18/un-watercourses-convention-is-good-for-south-asia/

"Survival of India-Pakistan Indus water treaty appears 'weak': UN report." Hindustan Times. February 2, 2017. https://www.hindustantimes.com/world-news/indus-treaty-great-example-of-conflict-resolution-but-its-survival-appears-weak-says-undp/story-oA3y53x4ijaKkeo0cPJ7lJ.html

The United Nations, "Convention of the Law of the Non-Navigational Uses of International Watercourses". April 11. 1997. http://www.un.org/law/cod/watere.htm

The World Bank, "Fact Sheet: the Indus Waters Treaty 1960 and the World Bank". August 1, 2017. http://www.worldbank.org/en/region/sar/brief/fact-sheet-the-indus-waters-treaty-1960-and-the-world-bank

The World Bank, "Indus Waters Treaty—Articles and Annexures". February 12, 2007. http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/SOUTHASIAEXT/0,,contentMDK:20320047~pagePK:146736~piPK:583444~theSitePK:223547,00.html