

Beyond The Indus Waters Treaty: A Study of Pakistan's Transboundary Water Rights against India under Customary International Law

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Abstract

Pakistan and India share the Indus basin as co-riparian states. The Indus Waters Treaty, concluded over fifty years ago, does not incorporate certain challenges faced by Pakistan today. The customary international law, on the other hand, has developed principles that govern the Indus basin in light of contemporary challenges. This article looks at the customary international law regime that protects the rights of Pakistan as a lower riparian state vis a vis the Indus basin, even in the absence of a treaty. For this purpose, customary norms as accepted by nations across the world have been taken into account, as well as India's acceptance of those norms in its state practice. In the end, an evaluation is made of the possible avenues for Pakistan in this regard based solely on Customary international law.

Keywords: Indus Waters, Customary International Law, Treaty Law, Transboundary Water Law, Indus Basin, International Law

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Introduction

As ‘one of the most water-stressed countries in the world’,¹ Pakistan is rapidly approaching the water scarcity threshold.² Factors such as provincial rivalry over water apportionment,³ climate change,⁴ and increase in population⁵ have combined to aggravate the situation for Pakistan.⁶ Considered as the ‘lifeline’ of Pakistan,⁷ the Indus basin is, *inter alia*, a subject of conflict between India and Pakistan.⁸ The reason for this

¹ John Briscoe and Usman Qamar, *Pakistan's Water Economy Running Dry* (England: The World Bank and Oxford University Press, 2005), xiii.

² Asian Development Bank, *Asian Development Bank Outlook 2007* (paper, Asian Development Bank, Tokyo, 2007), 3; Asian Development Bank, *Asian Development Outlook 2013: Asia's Energy Challenge* (Philippines: Asian Development Bank, 2013), 208.

³ Amit Ranjan, “Inter-Provincial Water Sharing Conflicts in Pakistan,” *Pakistaniaat: A Journal of Pakistan Studies* 4, No. 2 (2012): 102-122 (102), <https://core.ac.uk/download/pdf/291839092.pdf>; Sindh in particular is facing drought and water scarcity, See Food Security Cluster Pakistan, *Sindh Drought Needs Assessment: The State of Agriculture, Livelihood, Food Security, Nutrition, Water and Sanitation in Drought Affected Communities in Sindh* (Food Security Cluster Pakistan, 2016), https://reliefweb.int/sites/reliefweb.int/files/resources/sdna_final_report_august_2016.pdf.

⁴ Jamal Shahid, “Pakistan Seventh among Countries Vulnerable to Climate Change,” *Dawn*, March 23, 2017, <https://www.dawn.com/news/1322267>.

⁵ Worldometer, “Pakistan Population,” April 30, 2017, <http://www.worldometers.info/world-population/pakistan-population/>.

⁶ Shaheen Akhtar, *Emerging Challenges to Indus Waters Treaty: Issues of Compliance and Transboundary Impacts of Indian Hydro Projects on the Western Rivers* (Institute of Regional Studies, 2010), 27, <http://irs.org.pk/f310.pdf>.

⁷ Ranjan, “Inter-Provincial Water Sharing Conflicts in Pakistan,” 102.

⁸ Ahmer Bilal Soofi, “Filling the Missing Gaps in the Indus Waters Treaty” (paper, Institute of Strategic Studies Islamabad, 2016), 1.

conflict being that Pakistan and India are co-riparian states,⁹ sharing the resources of the Indus basin,¹⁰ where Pakistan enjoys the status of a lower riparian state,¹¹ while India occupies the status of an upper riparian state.¹² As controller of the headworks¹³ of the Indus basin in India, it has the power of, or claims to have the power of¹⁴ controlling a large inflow of the water flowing from India into Pakistan.¹⁵ This has caused much apprehension on behalf of Pakistan *vis a vis* dependence on India for its water availability.¹⁶

Whereas all prior agreements failed to settle the dispute between India and Pakistan,¹⁷ the Indus Waters Treaty, 1960 (hereinafter IWT or the treaty), which was finally concluded with the intervention of the World Bank,¹⁸ withstood not just the test of time, but even three armed conflicts

⁹ Riparian states are states along which or across which a river flows, and because of that natural phenomenon, they become entitled to certain rights regardless of any agreement.

¹⁰ MapsofIndia, "Indus River Map," September 26, 2016, <http://www.mapsofindia.com/maps/rivers/indus.html>.

¹¹ An upper riparian or upstream state is the one through the land of which water flows in the lower riparian or downstream state's territory. The upstream riparian usually controls the headworks – small structures used to control the flow of water – of the rivers flowing into the downstream riparian states. Pakistan is a downstream riparian against India as the upstream riparian.

¹² Ibid.

¹³ Ibid.

¹⁴ "Blood and Water Cannot Flow Together: PM Modi at Indus Waters Treaty Meeting," *Indian Express*, September 27, 2016, <http://indianexpress.com/article/india/india-news-india/indus-water-treaty-blood-and-water-cant-flow-together-pm-modi-pakistan-uri-attack/>.

¹⁵ Abdul Rauf Iqbal, "Water Shortage in Pakistan – A Crisis around the Corner," *ISSRA Papers* 2, issue no. 2 (2010): 1-13, https://ndu.edu.pk/issra/issra_pub/articles/issra-paper/ISSRA_Papers_Vol2_IssueII_2010/01-Water-Shortage-in-Pakistan-Abdul-Rauf-Iqbal.pdf.

¹⁶ Dinesh Unnikrishnan, "Indus Waters Treaty: Pakistan Must Fear Modi's Water War More than Indian Military," *FirstPost*, September 26, 2016, <http://www.firstpost.com/world/indus-waters-treaty-pakistan-must-fear-narendra-modis-water-war-more-than-indian-military-3020234.html>.

¹⁷ Ibid.

¹⁸ Signed by President of Pakistan, Ayub Khan, and the Prime Minister of India, Jawaharlal Nehru; See Iqbal, "Water Shortage in Pakistan."

between India and Pakistan.¹⁹ The IWT was a major breakthrough at the time of its conclusion, but today, it cannot escape scrutiny for its rigidity in comparison to the rapidly developing customary international law (CIL).²⁰ Of late, the Indian government has once again started relying on water as a potential blackmailing tool to discourage Pakistan from raising and voicing its concerns regarding the curfew imposed on the Indian-Occupied Kashmir and the human rights atrocities committed therein. When statements such as ‘blood and water can’t flow together’ come from the Indian Prime Minister, Narendra S. Modi,²¹ Pakistan’s vulnerability becomes even more eminent. This statement raised grave concerns regarding the fate of the IWT.²² Although, both states continued to negotiate afterwards, an impasse seemed to occur regarding the situation.²³ Once again, the World Bank intervened to break the stalemate through its Vice President, Annette Dixon, who made a visit to India in April 2017, to encourage negotiations.²⁴ In light of these political developments creating uncertainty between Pakistan and India, and legal developments in CIL, the need to analyse the transboundary water rights of Pakistan beyond the IWT becomes imminent.

For brevity, the rights of Pakistan under the IWT and its relationship with CIL must be mentioned, before undertaking a detailed analysis of CIL applicable to the Indus basin independent of the IWT. Under the treaty, Pakistan has a right to the unrestricted use of western rivers; and unrestricted use of eastern rivers, once they cross the boundary delimiting

¹⁹ Raja Nazakat Ali, Faiz-ur-Rehman and Mahmood-ur-Rehman Wani, “Indus Waters Treaty between India and Pakistan: From Conciliation to Confrontation,” *Dialogue X* No. 2: 166-181 (166).

²⁰ Akhtar, *Emerging Challenges to Indus Waters Treaty*, 27.

²¹ Fahim Zaman and Syed Muhammad Abu Bakar, “Assessing India’s Water Threat,” *Dawn*, October 30, 2016, <https://www.dawn.com/news/1292901>.

²² Shafqat Kakakhel, “Implications of the latest Indian Moves on the Indus Water Treaty,” *Express Tribune*, November 23, 2016, <https://tribune.com.pk/story/1192920/implications-latest-indian-moves-indus-waters-treaty/>.

²³ Fawad Yousafzai, “Pak-India Water Talks Delayed,” *Nation*, April 13, 2017, <http://nation.com.pk/national/13-Apr-2017/pak-india-water-talks-delayed>.

²⁴ Anwar Iqbal, “WB Official in Delhi to Break Water Treaty Stalemate,” *Dawn*, April 28, 2017, <https://www.dawn.com/news/1329771/wb-official-in-delhi-to-break-water-treaty-stalemate>.

India from Pakistan.²⁵ The right of India to western rivers exercised for the construction of hydropower projects cannot be claimed absolutely, and is subject to the right of Pakistan to a minimum flow of water.²⁶ This minimum flow may vary for Pakistan in light of factors beyond the control of India and Pakistan, e.g. climate change. The IWT further gives Pakistan the right to exchange of data,²⁷ to be notified when the works by India may materially affect or interfere with the flow of water in Pakistan, and to be provided relevant data in this regard as well.²⁸ Pakistan is also entitled to peaceful means of dispute settlement, if any question, difference or dispute between the two states arises.²⁹ Furthermore, the IWT cannot be revoked unilaterally, either by, or against Pakistan.³⁰

However, despite the abovementioned rights granted to Pakistan under the IWT, the IWT has been criticized for being a sub-optimal treaty that gives a formula for river distribution, instead of equitable water sharing;³¹ that it has a non-hierarchical dispute resolution mechanism that often leads to stalemates in the dispute resolution process,³² and for failing to give a mechanism for the redressal of Pakistan's grievances. In the two disputes that did reach conclusion in case of the Baglihar Decision³³ and the

²⁵ The Indus Waters Treaty 1960 (India-Pakistan) (signed 19 September 2016, entered into force 12 January 1961) 6032 UNTS 125 (hereinafter IWT), art 2 and 3.

²⁶ Indus Waters Kishenganga Arbitration (Pakistan v India) (2013) ICGJ 478.

²⁷ IWT, art 6.

²⁸ IWT, art 7.

²⁹ IWT, art 9.

³⁰ IWT, art 12.

³¹ Sardar Muhammad Tariq, *Pakistan Water Security Dilemma – Approaches To Rejuvenating The Indus Water Treaty* (Margalla Papers, Special Edition, 2011), 47-66, https://www.ndu.edu.pk/issra/issra_pub/articles/margalla-paper/Margalla-Papers-SE-2011/03-Pakistan-Water-Security.pdf; and Undala Zafar Alam, "Water Rationality: Mediating the Indus Waters Treaty" (Thesis, University of Durham, 1998), xv.

³² Mian Ahmad Naeem Salik, "A New Round of Water Talks between Pakistan – India," (Brief, Institute of Strategic Studies, 2017), http://issi.org.pk/wp-content/uploads/2017/03/Final_IB_Ahmad_Salik_dated_28-03-2017.pdf; and Salman M.A. Salman, "The Baglihar Difference and Its Resolution Process – a Triumph for the Indus Waters Treaty," *Water Policy* 10, No. 2 (2008): 105–117 (105), <https://doi.org/10.2166/wp.2008.060b>.

³³ Raymond Lafitte, "Baglihar Hydroelectric Plant: Expert Determination – Executive Summary," World Bank, February 12, 2007,

Kishenganga Arbitration,³⁴ Pakistan was not able to succeed in its claim fully. This, compared to similar claims that India makes against China with respect to China's undue construction of dams,³⁵ raises a question that if Pakistan's concerns are so legitimate so as to be echoed by India itself, why is the IWT insufficient in addressing them?

It must not be forgotten that IWT does not waive the rights of Pakistan beyond the IWT.³⁶ Furthermore, the IWT does not lay down any principle of law or precedent for any party by virtue of its recognition of certain principles in the IWT.³⁷ Regarding the relationship between the IWT and CIL, the IWT can be, and has been, interpreted in light of CIL.³⁸ However, CIL can only be used to interpret the IWT before a neutral expert or an arbitrator, and not to supersede the IWT. Particularly, where a direct conflict arises in CIL and IWT, the IWT will ultimately prevail.³⁹ Pakistan's concerns regarding the IWT and its consistent frustration with respect to unresolved water disputes,⁴⁰ coupled with limitations inherent to the treaty and India's uncooperative response that has now escalated to threats of breaching the IWT, calls for an analysis of whether India can act as such. Did IWT not bind the parties? Would India be obligated under CIL more than it is already under the IWT to cooperate and ensure equitable sharing with Pakistan?

To determine the CIL, as applicable, the following steps have been taken into consideration, which were drafted after representatives from countries across the world undertook the process. Adoption of these

<http://siteresources.worldbank.org/SOUTHASIAEXT/Resources/223546-1171996340255/BagliharSummary.pdf>.

³⁴ Indus Waters Kishenganga Arbitration (Pakistan v India) (2013) ICGJ 478.

³⁵ Dipanjan Roy Chaudhury, "While Raising Indus, India Must Not Forget China," *Economic Times*, September 24, 2016, <http://economictimes.indiatimes.com/news/politics-and-nation/while-raising-indus-india-must-not-forget-china/articleshow/54490210.cms?prtpage=1>

³⁶ IWT, art 11 (1) and (2).

³⁷ Ibid; Soofi, "Filling the Missing Gaps in the Indus Water Treaty," 1.

³⁸ Lafitte, "Baglihar Hydroelectric Plant" and Indus Waters Kishenganga Arbitration (Pakistan v India) (2013) ICGJ 478.

³⁹ Indus Waters Kishenganga Arbitration (Pakistan v India) (2013) ICGJ 478.

⁴⁰ For example, see Salal Project, Wullar Barrage Project, and Kishenganga Projects challenged by Pakistan against India but to no avail.

instruments and repetition of principles within them is an indication of acceptance of these principles as CIL:

- The Helsinki Rules⁴¹ made by the International Law Association (ILA) as an attempt to codify the CIL on international watercourses;
- The Berlin Rules adopted by the ILA in 2004⁴² to inculcate the legal developments in a comprehensive document;
- The United Nations (UN) Watercourses Convention⁴³ that entered into force in 2014;⁴⁴ and
- The UN Economic Commission for Europe (UNECE), i.e. the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 1992 (hereinafter the UNECE Water Convention),⁴⁵ which was opened for accession to all UN member states in 2013,⁴⁶ including Pakistan and India.⁴⁷ However, both India and Pakistan have neither acceded to the UNECE Water Convention nor the UN Watercourses Convention.⁴⁸

⁴¹ Committee on the Uses of Waters of International Rivers, 'Helsinki Rules on Uses of Waters of International Rivers' in International Law Association Report of the Fifty-Second Conference (Helsinki 1966) (International Law Association, London 1967) (hereinafter Helsinki Rules).

⁴² Joseph W. Dellapenna, "The Customary International Law of Transboundary Fresh Waters," *Int. J. Global Environmental Issues* 1, No. 3/4 (2001): 264-305 (264, 269).

⁴³ UN Watercourses Convention, "Evolution of the UN Watercourses Convention," April 29, 2017, <http://www.unwatercoursesconvention.org/importance/evolution-of-the-un-watercourses-convention/>.

⁴⁴ Stephen McCaffrey, "Dr. Stephen McCaffrey: The Entry into Force of the 1997 Watercourses Convention," *International Water Law Project (Blog)*, April 29, 2014 <http://www.internationalwaterlaw.org/blog/2014/05/25/dr-stephen-mccaffrey-the-entry-into-force-of-the-1997-watercourses-convention/>.

⁴⁵ Convention on the Protection and Use of Transboundary Watercourses and International Lakes (adopted March 17, 1992, entered into force October 6, 1996) 1936 UNTS 269 (hereinafter UNECE Water Convention).

⁴⁶ UNECE Water Convention, art 25, para 3.

⁴⁷ Stephen McCaffrey, "Dr. Stephen McCaffrey."

⁴⁸ United Nations Treaty Collection, "Depositary, Convention on the Protection and Use of Transboundary Watercourses and International Lakes," accessed April 29, 2017, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-

The last thing considered is the state practice of India. Every principle elucidated in CIL is also binding on India, by virtue of its own state practice as well as its claims against other states that rely on the same principles, such as China, Nepal and Bhutan, the upper riparian states to a lower riparian India. Although CIL is applicable on India even without their acceptance of the same, the active application of said principles gives Pakistan the right to bring up the principle of estoppel in their cases. Applying the principle of estoppel,⁴⁹ whatever stance is taken by India against the lower riparian states, such as Pakistan and Bangladesh, would contribute to its implied acceptance of the same treatment by China, Bhutan and Nepal.⁵⁰ It is interesting to note that the claims India makes against China, regarding the construction of dams and diversion of waters that can cause appreciable harm, are both arguments that Pakistan has, time and again, propounded against India.⁵¹

The methodology adopted for this article was qualitative, owing to the fact that it focuses on existing CIL regime, and its applicability to Pakistan and India. The research conducted was also comparative because of the comparison between the CIL and its application in the Indian state practice.

The Right to Share the Indus Basin

The first and foremost right of Pakistan *vis a vis* the Indus basin under CIL is the entitlement to share the basin with India as an equal, with or without the IWT, or any other agreement. This is evidenced through Article 3 of

5&chapter=27&clang=_en; and United Nations Treaty Collection, "Depository, Convention on the Law of the Non-Navigational Uses of International Watercourses," accessed April 29, 2017, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XXVII-12&chapter=27&clang=_en.

⁴⁹ The ICJ has upheld the principle of *venire contra factum proprium non valet*, i.e. where a party adopts a conduct contrary to the right it claims, that party is precluded from claiming such a right; *Case Concerning The Temple of Preah Vihear (Cambodia v Thailand)* (Merits) [1962] ICJ Rep 6, 40.

⁵⁰ Dipanjan Roy Chaudhury, "While Raising Indus, India Must Not Forget China," *Economic Times*, September 24, 2016, <http://economictimes.indiatimes.com/news/politics-and-nation/while-raising-indus-india-must-not-forget-china/articleshow/54490210.cms>.

⁵¹ Soofi, "Filling the Missing Gaps in the Indus Waters Treaty," 1.

the Watercourses Convention which states that, watercourse states⁵² who are not parties to a water-sharing agreement would, nonetheless, be entitled to the rights under the convention.⁵³ Article 10, paragraph 1 of the Berlin Rules also acknowledges the right of basin states, i.e. Pakistan and India, to participate in the management of a shared basin.⁵⁴ In the Lake Lanoux arbitration,⁵⁵ it was held that there is no precondition that there must be an agreement for the states to use shared watercourses; no state can veto the right of another state to international watercourses.⁵⁶ The ICJ also held that the principle of community of interests,⁵⁷ which gave equality to all riparian states. It was a principle recognized by international law.⁵⁸ Therefore, just by virtue of being a lower riparian state, even in the absence of an agreement, Pakistan has certain rights against India in the Indus basin, and *vice versa*; and these rights may not be curtailed at the whim of either state.

1.1. India's State Practice

Akin to the principles of international law applicable to sharing of transboundary waters, the public trust doctrine is a part of the law of the land in India.⁵⁹ It is based on the principle that certain natural resources such as sea, water, forests etc. cannot be subjected to private ownership. Being a gift of nature, these should be available to everyone without

⁵² States sharing an international watercourse; See Convention on the Law of Non-Navigational Uses of International Watercourses (adopted 8 July 1997, entered into force 18 August 2014) UNGA Res 51/229 (hereinafter Watercourses Convention), art 2 (c).

⁵³ Watercourses Convention, art 3 (6).

⁵⁴ Committee on the Uses of Waters of International Rivers, 'Berlin Rules on Water Resources' in International Law Association Fourth Report of the Seventy-First Conference (Berlin 2004) (International Law Association, London 2004) (hereinafter Berlin Rules), art 10.

⁵⁵ Lake Lanoux Arbitration (France v Spain (1957) 12 RIAA 281.

⁵⁶ Report of the International Law Commission on the Works at its 46th session. UN Doc A/49/783 (2 May- 22 July, 1994).

⁵⁷ Having a common legal rights over rivers; See Case Concerning the Gabčíkovo Nagymaros Project (Hungary v Slovakia) (Merits) [1997] ICJ Rep 7.

⁵⁸ Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Merits) [1997] ICJ Rep 7, para 85.

⁵⁹ M.C. Mehta v Kamal Nath 1 SCC 388 (1997).

discrimination.⁶⁰ The same principle was upheld in the Krishna Water Disputes Tribunal,⁶¹ when the tribunal held that running water among states was *res communis*,⁶² and had to be fairly managed, not considered fixed property as belonging to any one state.⁶³ The Supreme Court of India also upheld this principle by observing that waters passing through more than one state could not be called into the ownership of any one state, so as to deprive the other states of their equitable shares.⁶⁴

Another indication of this is the Treaty between His Majesty's Government of Nepal and the Government of India concerning the Integrated Development of the Mahakali Barrage including Sarada Barrage, Tanakpur Barrage and Pancheshwar Project, 1996 (hereinafter the Mahakali Treaty), in effect between India and Nepal.⁶⁵ India, as a lower riparian state against Nepal, has acknowledged the rights of both states to 'equal entitlement' of the Mahakali river in Article 3 of the Mahakali Treaty.⁶⁶ The same situation applies to Pakistan against India where Pakistan is a lower riparian and demands equal entitlement to the Indus basin.

The Treaty between the Government of the People's Republic of Bangladesh and the Government of India on Sharing of the Ganga/Ganges Waters at Farakka, 1996, (hereinafter the Ganges Treaty) is also in effect

⁶⁰ M.C. Mehta v Kamal Nath 1 SCC 388 (1997).

⁶¹ Krishna Water Disputes Tribunal, *Report of the Krishna Water Disputes Tribunal*, report (GoI, 2010).

⁶² Common heritage of mankind, not subject to private ownership or sovereignty of anyone.

⁶³ Narmada Water Dispute Tribunal, *Report of Narmada Water Dispute Tribunal* (GoI, 1979); Krishna Water Disputes Tribunal, *Report of the Krishna Water Disputes Tribunal* (GoI, 2010).

⁶⁴ Re: Cauvery Water Disputes Tribunal v Respondent AIR 1992 SC 522 (1992), para 16.

⁶⁵ The Treaty between His Majesty's Government of Nepal and the Government of India Concerning the Integrated Development of the Mahakali River including Sarada Barrage, Tanakpur Barrage and Pancheshwar Project (Nepal- India) (adopted 12 February 1996) (1996) 36 ILM 531 (hereinafter Mahakali Treaty).

⁶⁶ Both the Parties agree that they have equal entitlement in the utilization of the waters of the Mahakali River without prejudice to their respective existing consumptive uses of the waters of the Mahakali River; See Mahakali Treaty, art 3.

between India and Bangladesh.⁶⁷ The Ganges Treaty was concluded to share ‘by mutual agreement the waters of international rivers’ that flowed through India and Bangladesh.⁶⁸ The desire for ‘optimum utilization of water resources’ was expressed in the Preamble, along with the recognition of ‘rights and entitlements of either country.’⁶⁹ The Ganges Treaty also mandates that every effort would be made by the upper riparian India to protect the flows of water at Farraka with respect to the provisions of the treaty.⁷⁰ India, therefore, has assented to CIL of sharing a watercourse with Pakistan, by virtue of its own state practice.

The Right to Equitable and Reasonable Utilization of Indus Basin

Once established that Pakistan is entitled, under CIL, to share the Indus basin with India, the next question arises as to the extent of this entitlement. The right of Pakistan to use the Indus basin, under CIL, will be adjudged on the touchstone of the principle of equitable and reasonable utilization. The right to utilize the resources of a watercourse in an equitable and reasonable manner was referred to as the ‘basic right’ of a state with shared watercourses in *Hungary v Slovakia*.⁷¹ The principle has been confirmed as a part of CIL in the *Pulp Mills case*⁷² and *Costa Rica v Nicaragua*.⁷³

The right to equitable and reasonable utilization of the Indus basin by co-riparian states is also supported by Article 5 of the Watercourses Convention, providing that states sharing a watercourse are to use that watercourse within their territories in an equitable and reasonable manner.⁷⁴ The international watercourse is to be used in a manner to obtain optimal and sustainable utilization, considering the interests of all the watercourse

⁶⁷ Agreement on Sharing of the Ganges Waters at Farraka and on augmenting its flows (signed 5 November 1977) 16210 UNTS 15 (hereinafter Ganges Treaty).

⁶⁸ Ganges Treaty, pr.

⁶⁹ Ibid.

⁷⁰ Ganges Treaty, art 2 (ii).

⁷¹ Case Concerning the Gabčíkovo-Nagymaros Project (*Hungary v Slovakia*) (Merits) [1997] ICJ Rep 7, 54.

⁷² Case Concerning Pulp Mills on the River Uruguay (*Argentina v Uruguay*) (Merits) [2010] ICJ Rep 14.

⁷³ Certain Activities Carried out by Nicaragua in the Border Area (*Costa Rica v Nicaragua*) (Merits) [2015] ICJ Rep 1.

⁷⁴ Watercourses Convention, art 5 (1).

states concerned and the protection of the watercourse itself.⁷⁵ This provision is akin to Article 4 of the Helsinki Rules.⁷⁶ As the cornerstone of the Watercourses Convention,⁷⁷ the equitable and reasonable utilization principle creates reciprocal obligations not to deprive the co-riparian states of their rights to a shared watercourse.⁷⁸ The purpose of this principle is for each co-riparian to derive maximum benefit from the watercourse while suffering minimum detriment.⁷⁹ Hence, Pakistan and India are both entitled to use the western and eastern rivers, under CIL, that flow through their territory. This utilization is however, to be limited by taking into consideration the interests of the other, and protection of the Indus basin itself.

It should be noted that equitable does not necessarily mean equal in proportion.⁸⁰ Hence, Pakistan's entitlement to approximately 80% of the Indus basin resources⁸¹ may not be diminished necessarily due to the equitable and reasonable use of principle.⁸² However, Pakistan would have to prove that its 80% share is equitable and reasonable in light of the factors accepted by CIL.

1.1. India's State Practice

India has, in its state practice, accepted the CIL principle of equitable and reasonable utilization. The Indian National Water Mission, 2011 aims at,

⁷⁵ Watercourses Convention, art 5 (1).

⁷⁶ Salman, "The United Nations Watercourses Convention Ten Years Later," 1; and Helsinki Rules art 4 and 5.

⁷⁷ UN Watercourses Convention, "User's Guide Fact Sheet Series Number 4: Equitable and Reasonable Utilisation," April 29, 2017, <http://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-4-Equitable-and-Reasonable-Utilisation.pdf>.

⁷⁸ Ibid.

⁷⁹ Helsinki Rules 1966.

⁸⁰ UN Watercourses Convention, "User's Guide Fact Sheet Series: Number 4."

⁸¹ Juliet Perry, "Troubled Waters: Can India and Pakistan Bridge Differences Over River Pact?" *CNN*, accessed on April 4, 2017, <http://edition.cnn.com/2017/03/20/asia/india-pakistan-indus-river-water-talks/>; Mian Ahmad Naeem Salik, "A New Round of Water Talks Between Pakistan – India," (brief, Institute of Strategic Studies, 2017), http://issi.org.pk/wp-content/uploads/2017/03/Final_IB_Ahmad_Salik_dated_28-03-2017.pdf.

⁸² Natalie A. Nax, "Looking to the Future: The Indus Waters Treaty and Climate Change" (Master's thesis, University of Oregon, 2016).

inter alia, promoting ‘equitable distribution’ ‘across and within states’ of India.⁸³ In the Krishna Water Disputes Tribunal, in 2016,⁸⁴ the tribunal, considering the distribution of water among three drought-prone states, held that it was impossible to satisfy all the demands of each state fully. Rather, there needed to be equitable distribution of waters among the states.⁸⁵

The principle of equitable and reasonable utilization was also upheld in the Krishna Water Disputes Tribunal Report, 2010.⁸⁶ The tribunal called it the ‘best way’ to distribute the water of an inter-state river.⁸⁷ Indian tribunals have, in particular, considered the Helsinki Rules and the Watercourses Convention while deciding the question of equitable and reasonable utilization, showing a reliance on the factors established in them.⁸⁸ This shows India’s approach in case two water-stressed riparian states (such as Pakistan and India) share a common watercourse; the principle of equitable distribution of waters would apply.

The Narmada Water Dispute Tribunal, in its 1979 report,⁸⁹ considered the equitable apportionment doctrine as one that granted a fair share of waters to all co-riparian states along an inter-state river. However, what would amount to a fair share would be subject to circumstances of the case, including economic and social needs of the riparian states *vis a vis* their use of waters, distribution of waters among the riparian states in a way that would satisfy the maximum needs, and by distributing the waters in such a manner that maximum benefit would be caused to each riparian state with minimum detriment to each.

The River Boards Act, 1956 sets up a board that would, *inter alia*,⁹⁰ advise the government on matters regarding ‘conservation, control and optimum utilisation of water resources.’⁹¹ This provision on ‘optimum

⁸³ National Water Mission 2011 (Ind).

⁸⁴ Krishna Water Disputes Tribunal, Report of the Krishna Water Disputes Tribunal.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Narmada Water Dispute Tribunal, *Report of Narmada Water Dispute Tribunal*, report (GoI, 1979); and Krishna Water Disputes Tribunal, *Report of the Krishna Water Disputes Tribunal*.

⁸⁹ Narmada Water Dispute Tribunal, Report of Narmada Water Dispute Tribunal.

⁹⁰ River Boards Act 1956 (Ind), s 13.

⁹¹ River Boards Act 1956 (Ind), s 13 (1)(a)(i).

utilisation' also shows India's willingness to develop and use the watercourses to the maximum benefit.

Furthermore, the Supreme Court of India has also supported this view. In establishing the criteria for adjudging equitable and reasonable utilization, the Supreme Court of India held that⁹² the doctrine of equitable distribution would determine the 'fair share' of water attributable to each state sharing the common river. The court also held that there was no rigid formula for determining the equitable distribution, rather each river would have its own peculiarities to be considered for determining the same.⁹³ Hence, Indian state practice supports the CIL view that deriving of maximum benefit by one riparian state should not result in detriment to the other. Rather, such detriment should be minimized for both states, and the benefit maximized for both as well. Therefore, Pakistan and India are to share the Indus basin in such a manner as would grant maximum benefit and minimum detriment to both. This is a more difficult feat to be achieved when the competing parties are two sovereign states, and not components of one sovereign state. However, the legal right in itself stands accepted in state practice. It is this realization that Pakistan and India must work towards in harmony and with a goodwill towards each other, which is also a right of transboundary states against one another, as discussed ahead as the 'right to cooperation'.

The Right to be Protected from Significant Harm

It has been discussed that India's extensive plans for the development of hydropower projects is a cause of concern for Pakistan as they impact the flow of water of the Indus basin.⁹⁴ These projects also have negative implications for the environment and ecology of the Indus basin, and especially for the water that flows into Pakistan.⁹⁵

Under CIL, there is an obligation upon states to undertake all appropriate measures, and exercise due diligence, to prevent the causing of significant harm upon other states, while utilizing international watercourses (also referred to as the no harm rule or the prevention rule).⁹⁶

⁹² State of A.P. v State of Maharashtra 5 SCC (civ) 385 (2013).

⁹³ Ibid.

⁹⁴ Akhtar, *Emerging Challenges to Indus Waters Treaty*, 27.

⁹⁵ Nadeem Shafiq Malik, *The Indus Waters Treaty 1960- Text and Analysis* (Fiction House, Lahore 2015).

⁹⁶ Watercourses Convention, art 7 (1).

If significant harm is caused, then the state whose use causes such harm, will take all appropriate measures to eliminate or mitigate the harm. If appropriate, compensation may also be made for the harm caused.⁹⁷

The obligation not to cause significant harm is well imbedded in CIL. It has also been incorporated in the Declaration of the United Nations (UN) Conference on the Human Environment, 1972 (hereinafter the Stockholm Declaration),⁹⁸ the Rio Declaration on Environment and Development, 1992 (hereinafter the Rio Declaration)⁹⁹ and the UN General Assembly (UNGA) Resolution on Cooperation between States in the Field of Environment, 1972.¹⁰⁰ Hence, Pakistan and India have reciprocal obligations to one another to avoid causing harm to each other's waters knowingly or negligently. International precedence on the subject has elaborated this principle in detail as well.

In the Trail Smelter arbitration, the duty upon states to prevent transboundary harm under CIL was acknowledged. Canada, being responsible for causing harm to the US, was held liable for damages.¹⁰¹ This is in line with the CIL principle that for breach of an international obligation, a state must make reparation to the other.¹⁰² Similarly, an obligation also arises from failure to act or to reasonably prevent any conduct which causes such injury to another state.¹⁰³

It was also held in the Iron Rhine arbitration that the duty to prevent or mitigate harm is a part of CIL, and does not only extend to general state actions but is applicable on actions taken in subsequence of treaties as well.¹⁰⁴

Pakistan and India are 'thus obliged to use all means' at their disposal so as to avoid activities within their jurisdiction 'causing

⁹⁷ Watercourses Convention, art 7 (2).

⁹⁸ Declaration of the United Nations Conference on the Human Environment, UN Doc A/Conf.48/14 (16 June 1972), pr. 21.

⁹⁹ The Rio Declaration on Environment and Development, UN Doc A/Conf.151/26 (14 June 1992), pr. 14.

¹⁰⁰ UNGA Res 2995 (XXVII) (15 December 1972).

¹⁰¹ UNGA Res 2995 (XXVII) (15 December 1972).

¹⁰² Case Concerning the Factory at Chorzow (Germany v Poland) (Merits) PCIJ Rep Series A No 17.

¹⁰³ Corfu Channel Case (United Kingdom v Albania) (Merits) [1949] ICJ Rep 4, 22; Trail Smelter Arbitration (United States v Canada) (1941) 3 RAA 1905.

¹⁰⁴ Iron Rhine Arbitration (Belgium v Netherlands) (2005) ICGJ 373, para 59.

significant damage to the environment of another state'¹⁰⁵ under international law.¹⁰⁶ This principle of *sic utere tuo ut alienum non laedas*¹⁰⁷ can be found in inter-state relationships in international law, whereby a state 'must not permit the use of its territory for purposes injurious to the interest of other states in a manner contrary to international law.'¹⁰⁸ In the Corfu Channel case,¹⁰⁹ the ICJ held that every state is under an 'obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states.'¹¹⁰ The ICJ in *Costa Rica v Nicaragua* also confirmed the no harm principle as part of CIL in 2015.¹¹¹

Hence, in light of the abovementioned jurisprudence, not only is India obligated to prevent the causing of significant harm to Pakistan, but if it does in fact cause such a harm, then reparation to Pakistan may have to be made as well.

¹⁰⁵ Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay) (Merits) [2010] ICJ Rep 14, 101.

¹⁰⁶ Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, 242.

¹⁰⁷ Use your own property in such a way that you do not injure other people / one must so use his own as not to do injury to another.

¹⁰⁸ *Iron Rhine Arbitration (Belgium v Netherlands)* (2005) ICGJ 373; ILC, Survey of International Law in Relation to the Work of Codification of the International Law Commission: Preparatory work within the purview of article 18, paragraph 1, of the International Law Commission – Memorandum submitted by the Secretary General (1949) UN Doc A/CN.4/1/Rev.1; *Trail Smelter Arbitration (United States v Canada)* (1941) 3 RAA 1905.

¹⁰⁹ Corfu Channel Case (United Kingdom v Albania) (Merits) [1949] ICJ Rep 4, 22.

¹¹⁰ Ibid.

¹¹¹ Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua) (Merits) [2015] ICJ Rep 1, para 174.

1.2. India's State Practice

The prevention doctrine has also been accepted by India in its state practice. The Krishna Water Disputes Tribunal,¹¹² applied the prevention of significant harm doctrine, and held that a state will be liable to another state for the injury caused to such co-riparian state by virtue of depriving them of their equitable share of waters.¹¹³ The Krishna Water Disputes Tribunal also held that imbalances have to be mitigated, and it must be ensured that lower riparian states are not prejudiced by the acts of the upstream riparian states.¹¹⁴

The Ganges Treaty acknowledges that the co-riparian states of a transboundary watercourse have rights and entitlements to the watercourse, but it also acknowledges the principles of 'equity, fair play and no harm to either party' for the purposes of consultations in Article 3 (iii).¹¹⁵ Furthermore, India has voiced concerns against China with respect to the artificial dam that collapsed in Tibet, causing damage along river Siang.¹¹⁶ India also had reservations against China for the lack of sharing of data regarding flooding, which had a major impact on India in 2000. Due to a landslide on a tributary of the Brahmaputra, thirty Indian nationals died and fifty thousand were left homeless.¹¹⁷

The High Court of Allahabad held in *Hanuman Prasad v Mendwa*¹¹⁸ that the use of a stream by a riparian state must not 'interfere with the equal common right of his neighbours'. The acts of a riparian should not prejudice the rights of another, regardless of whether they are upstream riparian

¹¹² Krishna Water Disputes Tribunal, Report of the Krishna Water Disputes Tribunal.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ In the event flow at Farakka falls below 50,000 cusecs in any 10-day period, the two Governments will enter into immediate consultations to make adjustments on an emergency basis, in accordance with the principles of equity, fair play and no harm to either party; *See* Ganges Treaty art 3 (iii).

¹¹⁶ "Why India is Worried about China's Dam Projects on the Brahmaputra River," *Economic Times*, October 5, 2016, <http://economictimes.indiatimes.com/news/politics-and-nation/why-india-is-worried-about-chinas-dam-projects-on-the-brahmaputra-river/articleshow/54691589.cms>.

¹¹⁷ Nilanthi Samaranayake, Satu Limaye, and Joel Wuthnow, "Water Resource Competition in the Brahmaputra River Basin: China, India, and Bangladesh," (paper, CAN, 2016) https://www.cna.org/cna_files/pdf/CNA-Brahmaputra-Study-2016.pdf.

¹¹⁸ *Hanuman Prasad v Mendwa* AIR 1935 All 836 (1935).

states, or downstream riparian states.¹¹⁹ This shows India's implied acceptance to Pakistan's right of being protected from harm by virtue of India's acts along the Indus basin.

Right to Cooperation

It is common for sovereign states worldwide to use water as a weapon for their political goals, e.g. targeting water reservoirs during military operations.¹²⁰ Historically, India and Pakistan have also used political tactics in the course of their water-sharing relations.¹²¹ With Kashmir as a sensitive issue for both, India and Pakistan,¹²² and the recent wave of terrorism causing tension between them,¹²³ the agenda of the protection of Indus basin with mutual cooperation often takes the backseat.¹²⁴ This is against the international law's principle of cooperation that generally governs the environment, and watercourses, in particular.

The duty to cooperate for the management of international watercourses is an integral part of CIL. McCaffrey calls the duty to cooperate a 'portmanteau' or an 'umbrella term', for it is a basic principle underlying international water law.¹²⁵ However, this duty is not supported by institutional structures and, so far, has not been stringently applied.¹²⁶

The duty to cooperate is reflected in Article 8 of the Watercourses Convention, which lays down the general obligation upon states to cooperate for optimal utilization and adequate protection of an international watercourse.¹²⁷ Establishment of commissions and joint mechanisms etc.

¹¹⁹ *Hanuman Prasad v Mendwa* AIR 1935 All 836 (1935).

¹²⁰ Preety Bhogal and Katarzyna Kaszubska, "The Case against Weaponising Water," (ORF Issue Brief, 2017), <http://www.orfonline.org/research/the-case-against-weaponising-water/>.

¹²¹ *Ibid.*

¹²² Bashir A. Malik, *Indus Waters Treaty in Retrospect* (India: Brite Books, 2005).

¹²³ Muhammad Amir Rana and Safdar Sial, "Pakistan," in *Asian Transnational Security Challenges: Emerging Trends, Regional Visions* eds., Croline Ziemke-Dickens and Julian Droogan (Council for Asian transnational Threat Research, 2010); and Ijaz Hussain, *Political and Legal Dimensions: Indus Waters Treaty* (Oxford, Oxford University Press, 2017).

¹²⁴ Ijaz Hussain, *Political and Legal Dimensions*.

¹²⁵ Stephen McCaffrey, *The Law of International Watercourses* (Oxford, Oxford University Press, 2001), 381-396.

¹²⁶ Berlin Rules 2004.

¹²⁷ Watercourses Convention, art 8 (1).

can be developed for this purpose by agreement of co-riparian states.¹²⁸ There is also an obligation upon states under the Watercourses Convention to enter into consultations regarding the management¹²⁹ of international watercourses.¹³⁰ Relying on its own precedence,¹³¹ the ICJ held in the Pulp Mills case that the basic principle that governs the performance of legal obligations is that every state must perform its obligations in good faith.¹³² This principle of good faith governs the mechanism for cooperation under international law.¹³³ The duty to cooperate was also expressed in *Hungary v Slovakia*, albeit, in the context of Danube.¹³⁴

The UNGA Resolution on Cooperation in the Field of Environment Concerning Natural Resources Shared by Two or More States, 1973, also laid down that, realizing the importance of establishing international standards for conservation and harmonious exploitation of natural resources, cooperation between states is essential.¹³⁵ The UNGA Resolution on Cooperation between States in the Field of Environment, 1972, also emphasized on the importance of bilateral and multilateral cooperation between states to preserve the environment.¹³⁶

¹²⁸ Watercourses Convention, art 8 (2).

¹²⁹ For the purposes of this article, 'management' refers, in particular, to: (a) Planning the sustainable development of an international watercourse and providing for the implementation of any plans adopted; and (b) Otherwise promoting the rational and optimal utilization, protection and control of the watercourse; See Watercourses Convention, art 24 (2).

¹³⁰ Watercourses Convention, art 24.

¹³¹ *Nuclear Tests Case (New Zealand v France) (Judgment)* [1974] ICJ Rep 457; *Case Concerning Border and Transborder Armed Actions (Nicaragua v Honduras) (Judgment)* [1988] ICJ Rep 69, 105.

¹³² *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay) (Merits)* [2010] ICJ Rep 14, 145.

¹³³ *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay) (Merits)* [2010] ICJ Rep 14, 145.

¹³⁴ *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Merits)* [1997] ICJ Rep 7.

¹³⁵ UNGA Res 3129 (XXVIII) (13 December 1973).

¹³⁶ UNGA Res 2995 (XXVII) (15 December 1972).

This duty is also reflected in the Berlin Rules, Article 11,¹³⁷ the New Delhi Declaration,¹³⁸ the Rio Declaration¹³⁹ and the Stockholm Declaration.¹⁴⁰ However, as mentioned above, this duty only creates general obligations under CIL and there is no institutional implementation for it.¹⁴¹ Hence, Pakistan and India are under an obligation to cooperate in good faith with respect to management and protection of the Indus basin.

India's State Practice

The National Water Policy of India, 2002, provides in section 21.1 that water-sharing among states would be done with respect to the water resources availability and needs within the river basin. Guidelines that would emerge in subsequence of the policy would take into consideration water short states even outside the basin to facilitate future agreements amongst basin states.¹⁴² Two things need to be noted; first, that the section provides for taking into consideration the total needs of the river basin, not parts of it; secondly, the principle of co-operation is thus again emphasized by implying need for future agreements amongst basin states in India.¹⁴³

Article 9 of the Ganges Treaty supports the principle of cooperation by mandating that India and Bangladesh would conclude water-sharing treaties with respect to their other common rivers, 'guided by the principles of equity, fairness and no harm to either party.'¹⁴⁴ The India National Water

¹³⁷ Basin States shall cooperate in good faith in the management of waters of an international drainage basin for the mutual benefit of the participating States; See Berlin Rules.

¹³⁸ International Law Association, "New Delhi Declaration of Principles of International Law Relating to Sustainable Development in 70th Conference" (International Law Association, New Delhi, 2002), pr. 3.1.

¹³⁹ The Rio Declaration on Environment and Development, UN Doc A/Conf.151/26 (14 June 1992).

¹⁴⁰ Declaration of the United Nations Conference on the Human Environment, UN Doc A/Conf.48/14 (16 June 1972), pr. 24.

¹⁴¹ Berlin Rules.

¹⁴² National Water Mission 2011 (Ind), para 3.18.

¹⁴³ Ibid.

¹⁴⁴ Guided by the principles of equity, fairness and no harm to either party, both the Governments agree to conclude water sharing Treaties/Agreements with regard to other common rivers; See Ganges Treaty, art 9.

Mission 2011, in particular, deals with the Indus basin, with hopes for ‘international cooperation towards a more optimum use of the basin.’¹⁴⁵

Right to Regular Exchange of Data and Information

The obligation upon states to exchange data and information is also a part of CIL. As per Article 8 of the Watercourses Convention, the watercourse states are obliged to exchange data and information on a regular basis on the conditions of the watercourse, the quality of the water, related forecasts and other hydrogeological,¹⁴⁶ ecological,¹⁴⁷ hydrological¹⁴⁸ and meteorological¹⁴⁹ factors.¹⁵⁰ It is also inculcated in the Helsinki Rules,¹⁵¹ the Berlin Rules¹⁵² and the UNGA Resolution on Cooperation in the Field of Environment Concerning Natural Resources Shared by Two or More States, 1973.¹⁵³

1.3. India's State Practice

The importance of making environmental assessments for proposed works along the river basins is reflected in the Indian state practice. A notification dated 14 November, 2006, by the Ministry of Environment and Forests, India,¹⁵⁴ pertaining to EIA was passed. Vide this notification, the central government of India mandated that environmental clearance would be needed for the construction of new projects or expansion or modernization

¹⁴⁵ National Water Mission 2011 (Ind), Para. 3.18(a).

¹⁴⁶ Hydrogeology is the science that pertains to occurrence and distribution of groundwater.

¹⁴⁷ Ecology is the science that pertains to the relationship between living things and their environments.

¹⁴⁸ Hydrological means the impact of water on earth, the underlying rocks and on the atmosphere.

¹⁴⁹ Meteorology is the study of atmospheric occurrences, focusing on weather processes and forecasting.

¹⁵⁰ Watercourses Convention, art 9 (1).

¹⁵¹ Helsinki Rules, art 29.

¹⁵² Berlin Rules, art 56.

¹⁵³ UNGA Res 3129 (XXVIII) (13 December 1973).

¹⁵⁴ *Environment Impact Assessment (EIA) Notification*, Gazette of India, 14 September 2006 (2006).

of existing projects pertaining to, *inter alia*, river valley projects.¹⁵⁵ Furthermore, the Guidelines for Environmental Monitoring of Water Resource Projects, 1998, issued by the Central Water Commission, India also state that ‘*water resources development should be planned in such a manner that it leads to enhancement in the quality of environment rather than its degradation.*’¹⁵⁶ The Guidelines for Environmental Impact Assessment of River Valley Projects, 1985, issued by the Ministry of Environment and Forests lay down the framework for assessing impacts of planned projects along river valleys.¹⁵⁷

The duty to share information with co-riparian states is reflected in the Indian state practice *vis a vis* its relationship with Bhutan. India is a downstream state as against an upstream Bhutan.¹⁵⁸ India has devised with Bhutan a Comprehensive Scheme for Establishment of Hydro-meteorological and Flood Forecasting Network on rivers Common to India and Bhutan.¹⁵⁹ Several hydro-meteorological stations are located in Bhutan, funded by India that share data with India for the purpose of flood forecasting.¹⁶⁰ Furthermore, India’s relationship with China also indicates its acceptance of the CIL principle mandating sharing of data regarding shared watercourses. China and India have had bilateral agreements regarding sharing of hydrological data, especially in the flood season.¹⁶¹

Right to Notification and Consultation

Articles 11 to 19 of the Watercourses Convention pertain to the obligation on states to exchange information, and negotiations and carry out

¹⁵⁵ *Environment Impact Assessment (EIA) Notification*, Gazette of India, 14 September 2006 (2006), Schedule, Item 1(c).

¹⁵⁶ Guidelines for Environmental Monitoring of Water Resource Projects 1998 (Ind), Foreword.

¹⁵⁷ Guidelines for Environmental Impact Assessment of River Valley Projects 1985 (Ind).

¹⁵⁸ Yeshey Dorji, *Water: Securing Bhutan's Future* (New Delhi, Asian Development Bank 2016).

¹⁵⁹ Wrmin.nic.in “Indo-Bhutan Cooperation. Ministry of Water Resources, River Development and Ganga Rejuvenation, Government of India,” May 5, 2017, <http://wrmin.nic.in/forms/list.aspx?lid=350&Id=4>.

¹⁶⁰ Wrmin.nic.in, “Indo-Bhutan Cooperation.”

¹⁶¹ Nilanthi Samaranayake, Satu Limaye, and Joel Wuthnow, “Water Resource Competition in the Brahmaputra River Basin: China, India, and Bangladesh” (paper, CNA, 2016), https://www.cna.org/cna_files/pdf/CNA-Brahmaputra-Study-2016.pdf.

consultations¹⁶² regarding the possible effects of planned measures on the condition of an international watercourse,¹⁶³ and the procedure to be followed thereof.¹⁶⁴ The same is also inculcated in the Berlin Rules.¹⁶⁵

It was observed in the Lake Lanoux arbitration¹⁶⁶ that no prior agreement needs to exist between states for negotiations to be carried out between co-riparian states *vis a vis* planned measures.¹⁶⁷ Furthermore, in the 2015 case of *Costa Rica v Nicaragua*, the ICJ held that if an EIA confirms that significant risks are involved, then the state planning the said activity is required to notify and consult with the other potentially affected state in the spirit of good faith in accordance with due diligence obligation.¹⁶⁸ Appropriate measures are to be taken, where necessary, to mitigate or avoid the risk.¹⁶⁹ The obligation to notify or consult does not exist where there is no likelihood of significant transboundary harm.¹⁷⁰ Therefore, the duty to exchange EIA reports is only effective where there is a risk of transboundary harm, and not in all circumstances. Hence, India need not to notify Pakistan for all the planned measures along the Indus basin, so long as they do not adversely affect the interests of Pakistan.

Right to Protection, Preservation and Management of the Indus Basin

It is one of the grievances of Pakistan that the construction of hydropower projects adversely impacts the ecology of the Indus basin, particularly the waters flowing in Pakistan.¹⁷¹ These concerns are further aggravated in light of India's dam failure history. With nine of its dams collapsed, the

¹⁶² Watercourses Convention, art 17.

¹⁶³ Watercourses Convention, art 11.

¹⁶⁴ Watercourses Convention, art 12-18.

¹⁶⁵ Berlin Rules, art 56-57.

¹⁶⁶ Lake Lanoux Arbitration (*France v Spain* (1957) 12 RIAA 281.

¹⁶⁷ Lake Lanoux Arbitration (*France v Spain* (1957) 12 RIAA 281, para 11 and 1065.

¹⁶⁸ *Certain Activities carried out by Nicaragua in the Border Area* (Costa Rica v Nicaragua) (Merits) [2015] ICJ Rep 1, 104.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Certain Activities Carried out by Nicaragua in the Border Area* (Costa Rica v Nicaragua) (Merits) [2015] ICJ Rep 1, 107.

¹⁷¹ Nadeem Shafiq Malik, *The Indus Waters Treaty, 1960- Text and Analysis* (Lahore: Fiction House, 2016)

transboundary impact of these collapses¹⁷² is also a subject of concern for Pakistan.¹⁷³

An obligation corresponding to this concern, under CIL, is that of preventing and controlling pollution to protect the ecosystems of international watercourses.¹⁷⁴ Articles 20 to 23 of the Watercourses Convention enlist the obligations upon states to protect and preserve the ecosystems of waters,¹⁷⁵ including by protecting the marine environment,¹⁷⁶ and by preventing introduction of new or alien species into the international watercourse that may adversely harm the other watercourse state.¹⁷⁷ The Watercourses Convention imposes a due diligence standard on watercourse states.¹⁷⁸

The Helsinki Rules, Articles 9 to 11, lay down the obligation upon states to prevent new forms of pollution and increase in existing pollution that may cause injury to a co-riparian state.¹⁷⁹ The Berlin Rules also incorporate extensive provisions on the protection of 'aquatic environments', in Articles 22 to 28.¹⁸⁰ Furthermore, in the Nuclear

¹⁷² Dam construction, as well as dam failures in India have had serious environmental consequences; See Latha Anantha, *Planning for Dam Decommissioning as an Environmental Priority*, report (River Research Centre, 2013), 1.

¹⁷³ Arshad H. Abbasi, "Indus Waters Treaty between Pakistan and India" (paper, Pakistan Institute of Legislative Development and Transparency, 2012) 11, http://www.pildat.org/publications/publication/FP/IndusWaterTreatybetweenPakistanAndIndia_PakIndiaDialogueIII.pdf.

¹⁷⁴ Ariel Dinar et al., *Bridges over Water: Understanding Transboundary Water Conflict, Negotiation and Cooperation* (United States: World Scientific, 2013), 66, <https://doi.org/10.1142/6184>.

¹⁷⁵ Watercourses Convention, art 20.

¹⁷⁶ Watercourses Convention, art 23.

¹⁷⁷ Watercourses Convention, art 22.

¹⁷⁸ Salman M. A. Salman, "The United Nations Watercourses Convention Ten Years Later: Why Has Its Entry into Force Proven Difficult?" *Water International* 32, No.1 (2007).

¹⁷⁹ Helsinki Rules, art 10.

¹⁸⁰ Berlin Rules, art 20-28.

Weapons case,¹⁸¹ the ICJ held that the duty to protect environment of other states was a part of CIL.¹⁸²

Therefore, the obligation to protect, preserve and manage the Indus basin lies upon both, Pakistan and India. In particular, harm that may impact the other state is to be avoided, as under CIL. The Trail Smelter arbitration tribunal held that damage caused by one state to the environment of another gave rise to a legal claim.¹⁸³ In protecting states from the harm that other states may cause, the principle that a state cannot use its territory to cause injury to another state was propounded.¹⁸⁴ Hence, absence of the protection of the Indus basin, a legal claim under CIL can be substantiated by Pakistan.

1.4.India's State Practice

India has not only shown willingness to protect and preserve its watercourses, but also gave them legal status in a landmark judgment of the High Court of Uttarkhand. India granted legal personality to the river Ganges and Yamuna.¹⁸⁵ The court held that the rivers Ganges and Yamuna, and their tributaries and streams, would have the status of a legal person, with rights and duties.¹⁸⁶ The rivers, therefore, have a right to be preserved and conserved. The government of India was cast with the obligation of upholding this status of the rivers, and promoting their health and well-being.¹⁸⁷ This decision might have been inspired by New Zealand, the first state to grant its river Whanganui the status of a legal person.¹⁸⁸ This was done to protect the river as well, and to protect it from the traditional claims of ownership and management.¹⁸⁹

¹⁸¹ Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, 241.

¹⁸² Ibid.

¹⁸³ Trail Smelter Arbitration (United States v Canada) (1941) 3 RAA 1905.

¹⁸⁴ Trail Smelter Arbitration (United States v Canada) (1941) 3 RAA 1905.

¹⁸⁵ Mohd. Saleem v State of Uttarkand 2017 SCC Utt. 367 (2017).

¹⁸⁶ Mohd. Saleem v State of Uttarkand 2017 SCC Utt. 367 (2017), para 19.

¹⁸⁷ Mohd. Saleem v State of Uttarkand 2017 SCC Utt. 367 (2017), para 20.

¹⁸⁸ Eleanor Ainge Roy, "New Zealand River Granted Same Legal Rights as Human Being," *Guardian*, March 16, 2017, <https://www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legal-rights-as-human-being>.

¹⁸⁹ Ibid.

Furthermore, the Water (Prevention and Control of Pollution) Act, 1974, (hereinafter the Water Act) was enacted by the Indian Parliament to prevent and control water pollution and to maintain or restore the wholesomeness of water.¹⁹⁰ Section 24 of the Water Act prohibits, *inter alia*, the causing of pollutants, poisonous substances or noxious matters to enter into any stream or sewer or well,¹⁹¹ and causing of any other matter that may impede the proper flow of water of the stream, leading in subsequence to aggravation of pollution.¹⁹²

In the case of *Vellore Citizens Welfare Forum v Union of India*,¹⁹³ the Supreme Court of India applied the precautionary principle, i.e. the principle to prevent and attack causes of environmental degradation. The Supreme Court held that the same a part of law of the land. The principle of polluter-pays was also accepted in this case, i.e. the one who causes damage to the environment must pay for its reversal.¹⁹⁴ The principle of polluter pays was also applied by the Supreme Court in *M.C. Mehta v Union of India*¹⁹⁵ where, because of pollution caused in the river, an order for payment of damages was made.¹⁹⁶

The abovementioned judgments and the Water Act are a manifestation of India's implied acceptance of the prohibition of environmental damage to watercourses. In fact, the granting of legal personality to rivers Ganges and Yamuna goes a step further than this, and creates rights of the rivers in themselves, as opposed to rights of states in the rivers. This corresponds to the spirit of the Berlin Rules, where special focus is laid on environmental considerations with respect to watercourses,¹⁹⁷ and an acceptance of the right of the Indus basin to be protected and preserved.

¹⁹⁰ The Water (Prevention and Control of Pollution) Act 1974 (Ind), pr.

¹⁹¹ The Water (Prevention and Control of Pollution) Act 1974 (Ind), s 24 (1)(a).

¹⁹² The Water (Prevention and Control of Pollution) Act 1974 (Ind), s 24 (1)(b).

¹⁹³ *Vellore Citizens Welfare Forum v Union of India* 5 SCC 647 (1996).

¹⁹⁴ *Ibid.*

¹⁹⁵ *M.C. Mehta v Union of India* 8 SCC 462 (1996).

¹⁹⁶ *Ibid.*

¹⁹⁷ Berlin Rules.

Right to Peaceful Settlement of Disputes

The Watercourses Convention,¹⁹⁸ the Helsinki Rules¹⁹⁹ and the Berlin Rules²⁰⁰ lay down mechanisms for peaceful settlement of disputes. This is in consonance with Article 2 (3) of the UN Charter, 1945, whereby states are under an obligation to settle their disputes ‘by peaceful means.’²⁰¹ The ICJ in the Fisheries Jurisdiction case²⁰² held that negotiations are the ‘most appropriate method’ of dispute resolution, and are obligatory upon parties, corresponding to the principles of the UN Charter.²⁰³

As per the ICJ, in the North Sea Continental Shelf cases, there is an obligation upon the parties negotiating to conduct themselves in a manner that makes the negotiations ‘meaningful.’²⁰⁴ If either party insists upon their own positions without contemplating any modification of it, the negotiations are not meaningful, the court elaborated.²⁰⁵ This makes it obligatory upon India and Pakistan, under CIL, to not only conduct negotiations and consultations, but to do so in a meaningful manner when a dispute arises.

1.7 India’s State Practice

The Mahakali treaty has provisions on arbitration²⁰⁶ and negotiations via the Mahakali River Commission.²⁰⁷ The Inter-State River Disputes Act, 1956, also provides for peaceful settlement of disputes *vis a vis* inter-state

¹⁹⁸ Watercourses Convention, art 33.

¹⁹⁹ Helsinki Rules, art 26 – 37.

²⁰⁰ Berlin Rules, art 72- 73.

²⁰¹ Charter of the United Nations (signed 24 October 1945, adopted 17 December 1963, entered into force 31 August 1965) 1 UNTS 16.

²⁰² Fisheries Jurisdiction case (United Kingdom of Great Britain and Northern Ireland v Iceland) (Advisory Opinion) [1973] ICJ Rep 3.

²⁰³ Ibid.

²⁰⁴ Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay) (Merits) [2010] ICJ Rep 14; North Sea Continental Shelf Cases (Federal Republic of Germany v Netherlands) (Judgment) [1969] ICJ Rep 3, 47.

²⁰⁵ North Sea Continental Shelf Cases (Federal Republic of Germany v Netherlands) (Judgment) [1969] ICJ Rep 3, 47.

²⁰⁶ Mahakali Treaty, art 11, para 2.

²⁰⁷ Mahakali Treaty, art 9.

rivers in India.²⁰⁸ If a dispute arises or is likely to arise, the state government may request the central government to refer the water dispute to a tribunal for adjudication.²⁰⁹ The establishment of tribunals for resolving disputes that may ‘prejudicially’ affect the interests of states in a river or river valley²¹⁰ show the inculcation of the principle in India that disputes should be resolved peacefully.

Way Forward

In light of the foregoing discussion, Pakistan can claim against India, even in the absence of the IWT, the right to share the Indus basin in an equitable and reasonable manner; the right to cooperate with Pakistan; the right to enter into negotiations and consultations in case of a dispute, and to resolve the dispute peacefully; the right to not be affected adversely by India’s projects in its national territory; the right to be provided with information and EIA reports where there is possibility of harm to Pakistan due to planned projects; the right to be notified in case such projects are planned which may cause harm to Pakistan; and the right to protect the environment that is shared by Pakistan and India, including the Indus Basin.

However, even though international law provides a strong set of rights to the states sharing a basin, its weakness lies in its implementation mechanisms. This absence of mandatory dispute resolution mechanism owes partly to the reluctance of India and Pakistan to ratify the UNECE Water Convention and the Watercourses Convention, both of which entail dispute resolution mechanisms.²¹¹ At most, customary international law imposes an obligation upon states to enter into negotiations, which must be “meaningful.”²¹² However, there is no mechanism for ensuring the compliance of international law *strictu sensu* in such cases in the absence of actual consent of states. Jurisdiction of judicial forums such as, the

²⁰⁸ Inter-State River Disputes Act 1956 (Ind), s 2 (c).

²⁰⁹ Inter-State River Disputes Act 1956 (Ind), s 3.

²¹⁰ Ibid.

²¹¹ UN Watercourses Convention, “The Relationship with the UNECE Water Convention,” April 29, 2017, <http://www.unwatercoursesconvention.org/importance/the-relationship-with-the-unece-water-convention/>.

²¹² Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay) (Merits) [2010] ICJ Rep 14; North Sea Continental Shelf Cases (Federal Republic of Germany v Netherlands) (Judgment) [1969] ICJ Rep 3, 47.

International Court of Justice²¹³ and other judicial and quasi-judicial forums, are subject to the consent of the States agreeing to approach or establish the same.²¹⁴ Therefore, if any dispute arises in the absence of IWT, then Pakistan and India would have no recourse but to rely on their diplomatic skillset to negotiate a truce or refer the matter to an impartial forum with mutual consent.

This is where the strength of IWT comes in. Albeit, it has come under stringent criticism for being outdated in terms of the legal principles and norms that it codifies, its ironclad Article 12(4) that demands that the treaty may only be terminated through another duly ratified treaty by both states,²¹⁵ which has reduced India's threats of termination to mere noise. Even the oft-critiqued dispute resolution mechanism provided under the IWT, which is multi-tiered and hence, takes decades before yielding any result; it nonetheless keeps the doors open for Pakistan to approach an impartial legal forum should the initial negotiations eventually fail.²¹⁶ In the absence of IWT, then the implementation of the rights of CIL for Pakistan, would be a lot more difficult that it already is under the present mechanism.

²¹³ Even though Pakistan and India have both ratified the Statute to the International Court of Justice, the reservations of India on Article 38 to the Statute (pertaining to jurisdiction) would exclude Pakistan's right to approach the same for violation of any international legal obligations under customary international law.

²¹⁴ The previous disputes that have been referred to Permanent Court of Arbitration and the World Bank *vis a vis* the Indus Basin were referred under the mechanism provided in Article 8, 9 and Annex G of the IWT.

²¹⁵ Whereas Article 12(3) of the IWT provides that the treaty may only be amended through another treaty.

²¹⁶ See Article 8, 9 and Annex G of the IWT.

The best way forward for both Pakistan and India would be to mutually resolve the persisting issues between them, and to ratify a new treaty which inculcates the present legal principles and a speedier dispute resolution mechanism along with a more effective cooperation mechanism. Alternatively, the IWT could be amended by both states to make it more relevant and up to date with the present norms and developments in international law. Until that can be achieved however, the hope for Pakistan lies in the interpretation of IWT in light of CIL and inculcation of said principles of the same by the judicial body adjudicating the claims between the two states.²¹⁷ ■

²¹⁷ This approach was confirmed in the Baglihar Difference by Neutral Expert, Prof. Raymond Lafitte, as well as the Permanent Court of Arbitration in its Kishenganga Award. See Raymond Lafitte, “Baglihar Hydroelectric Plant: Expert Determination – Executive Summary,” World Bank, February 12, 2007, <http://siteresources.worldbank.org/SOUTHASIAEXT/Resources/223546-1171996340255/BagliharSummary.pdf>; *Indus Waters Kishenganga Arbitration (Pakistan v India)* (2013) ICGJ 478; *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Merits) [2010] ICJ Rep 14; *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (Merits) [2015] ICJ Rep 1; *Iron Rhine Arbitration (Belgium v Netherlands)* (2005) ICGJ 373.