

Indus Water Treaty issues & the way forward

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Very recently, the Indus Water Treaty came into news when India initiated to modify the treaty. The Indus Water Treaty was signed in 1960 between India and Pakistan. For the last six decades, the bilateral treaty between India and Pakistan maintained stability in the region for water sharing. In recent years, there have been issues surrounding the treaty, including the current one. This raises certain pertinent questions surrounding what this treaty is about, the modification process under international law, the history of the treaty, the disputes that have arisen in the past regarding the same, and the possible way forward.

In simple terms, the Indus Water Treaty not only governs the water sharing of river Indus, but also its tributaries and major water sources of the river. Under the terms of the treaty, the Indus River and its tributaries are divided into three Eastern Rivers (the Ravi, Beas, and Sutlej), which are allocated to India for unrestricted use, and three Western Rivers (the Indus, Jhelum, and Chenab), which are allocated to Pakistan for unrestricted use, with some exceptions. The treaty also establishes a mechanism for resolving disputes and provides for cooperation between the two countries on developing hydroelectric power and implementing irrigating projects.

The law for modification of the Indus treaty is governed by the Vienna Convention on Law of the Treaties 1969. The treaty of 1969 is called the treaty for the treaties as the international community signed this treaty to codify the law of the treaties. This treaty was negotiated among many international players and finally was signed by more than 100 countries. Chapter V of the treaty, more specifically under Article 41 of the treaty, speaks about the modification of the treaty. It needs to be understood that amendment and modifications are two different concepts under international law. Modifications are basically changing the effect of the treaty which cannot be contrary to the objective of the treaty. For modification, 12 months' notice is important. If the other party does not agree with the modifications, either they can terminate the treaty or appear before dispute settlement bodies which seem to be the likely scenario in the present dispute.

Historically, in September 1951, the World Bank formally offered its good offices to solve the contentious issues of Indus Waters and proposed a comprehensive solution based on three 'essential principles: that the Indus Basin's water resources were sufficient to constitute all existing uses and to meet future needs that the water resources should be cooperatively developed and used in such a manner as to promote the economic development of the Indus Basin most effectively as a unit; and the problem of development and use of Indus Basin water resources should be solved on a functional and not a political plan, without relating to past negotiations and past claims.

However, the dispute settlement process was only initiated after forty-five years in 2005 by Pakistan to persuade the World Bank to appoint a Neutral Expert to address the differences regarding the Baglihar Hydropower Project. Initially, India was reluctant to cooperate with the relevant provisions of the Indus Water Treaty regarding the objections

raised by Pakistan on the Baglihar Project. Subsequently, it declared that it concurred with the appointment of a neutral expert and offered full cooperation and negotiated settlement of all differences under Article VIII of the Indus Water Treaty at the level of Permanent Indus Commissioners (PIC). The process under the treaty is to first appoint a neutral expert to ascertain whether a difference or dispute exists or not.

Pakistan again invoked Article IX of the Indus Water Treaty which deals with the Settlement of Differences in 2010 to resolve certain issues concerning the Kishenganga Hydropower Project. The Kishanganga dispute stems from the construction of a dam as planned by India on the Kishanganga River which is a tributary of Jhelum that is one of the Western Rivers allocated to Pakistan under the Indus Water Treaty. Thus, Pakistan accused India of aggravating stress on water resources by constructing dams because inter-tributary diversions are barred, and the water drawn from a given tributary must be returned to the same river regarding the design features of the proposed 330 MW hydroelectric project. The disputes were specific to the constitution of a Court of Arbitration. In the Kishanganga dispute, India pointed out that this procedure was not followed and questioned the admissibility of the dispute and the creation of the Court of Arbitration. The court comprised six members and was presided over by a chairman, Judge Stephen Schwoebel in this case. It is important to reiterate that the Court of Arbitration route is taken only when the issue does not pertain to technicalities and concerns a legal dispute over the interpretation of the IWT. In its Partial Award, which is final for the matters decided therein, the Court of Arbitration had unanimously decided that IWT expressly permits the transfer of water by India from one tributary of the Jhelum to another to generate hydro-electric power, subject to certain conditions, the restriction relates to where water may be used and is not violated by the use outside of the drainage basin of electricity generated from the water to avoid adversely affecting Pakistan's then existing agricultural and hydro-electric uses. The court thus observed that Pakistan retains the right to receive a minimum flow of water from India.

Going forward, from India's perspective, the settlement of this dispute is integral given the deteriorating relationship with Pakistan as well as the changing geopolitical dynamics with the rise of China, Russia's strategic convergence with China, the United States' indeterminate Indo-Pacific policy stance.

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