

Why does World Bank want to broker Indus water talks between India and Pakistan

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The implementation of the Indus Water Treaty (IWT) has acquired new momentum owing to political, legal and economic developments in India and Pakistan. Two influential issues govern the future of this Treaty in ensuring its sustainable implementation and a role for the World Bank.

First, let us see World Bank's role. David E Lilienthal, the head of the Tennessee Valley Authority visited the Indus region on an invitation by Prime Minister [Jawaharlal Nehru](#) in August 1951. He recommended the World Bank to facilitate negotiation of the Indus Water Basin to which both countries agreed.

The World Bank offered its good offices and mediation in 1952. Collective efforts on the part of India and Pakistan led to the IWT in 1960. The Permanent Indus Commission (PIC) was established the same year. During the 1960s, although the World Bank participation continued, it was the Commission which dealt with differences between the two parties. The Bank was signatory to several provisions, responsible for the operation of the Indus Basin Development Fund, including the sharing of canal waters during the transition period under Annex H as well as its role of conflict resolution under Annex F and G. Commission meetings between 1960 to 1966 did not mention the Bank even once; the Commission implemented the Treaty and managed the Indus River. Subsequently, the Bank effectively withdrew in 1970 leaving both parties to rely on the Commission for smooth Treaty implementation.

The IWT has been in force for decades without any provision for suspension or termination, nor withdrawal. It is silent on denunciation — meaning, it cannot be unilaterally denounced, except if India and Pakistan intend to admit such a suggestion—as well as withdrawal, and in fact aims at establishing a perpetual water-sharing regime. Because it deals with sharing international river waters, it is expected to indefinitely remain in force.

India's usage of the assigned rivers are one-fifth of the total flow of the Indus Basin, while Pakistan's usage is four-fifths.

The implementation history of the Treaty shows that Pakistan has been using the argument that because it is a downstream riparian state, it must have unrestricted access to water by the upstream riparian state, that is India. This means that India can be asked to explain its actions, thereby putting her in a defensive position. The water discourse in Pakistan is increasingly projected as a flashpoint, where the political-military class successfully employs its resources. The people are increasingly beginning to believe that Pakistan is being deprived of its legitimate right to water.

But this does not take into account, India's legitimate rights, or the expectations of the people of Jammu & Kashmir to rightfully use its resources.

The IWT envisages a specific and limited role for the World Bank. The Treaty allows for the provision of a Neutral Expert to deal with differences in case of disagreement between India and Pakistan, which means that there is no place for the Bank's interventionist or self-assumed mediatory role. In fact, the Bank's role is immaterial or ceremonial in any potential arbitration.

The Treaty Annex says that the Bank's President can nominate a person to draw lots to facilitate arbitration umpires when India or Pakistan fail to agree.

That is why, in the present context, the Bank's attempt to both appoint a Neutral Expert (on India's request to arbitrate differences with Pakistan), as well as a Court of Arbitration (on Pakistan's request to arbitrate differences with India), can certainly attract a certain abuse of its role.

A quick reading of Article IX in the Treaty makes it amply clear that parallel and simultaneous processes of jurisdiction for settlement of differences and disputes between parties is legally untenable.

I believe that the World Bank's decision to "pause", in December 2016, or "lift the pause" of its earlier decision is a clear indication that the Bank wants to get actively involved in implementing the Treaty. This uncalled-for role of the World Bank cannot serve the long-term interest of both parties, except vested interests emanating from constituencies in both nations as well as the World Bank.

This uncalled-for notification of the World Bank is against the spirit of international law, principles, general and specific treaty interpretations, principles of customary international law and settled understanding of State practices in international law.

The Bank had a role before 1970 during the transition period of operations. Even during the 1960s, differences were effectively and amicably dealt by the Indus Waters Commission. Only the wise leadership of both countries can properly settle differences bilaterally without giving the World Bank any leeway in the implementation process.

Secondly, can and should the Indus Waters Treaty be denounced, terminated, or its implementation suspended or renegotiated? These options are available under international law and even specifically mentioned in the IWT itself.

Both countries can withdraw from the IWT any time and cease to abide by its terms, on the grounds of fundamental change of circumstance. Now, it is clear that these fundamental changes have, indeed, taken place, but the truth is that it is almost impossible to exercise such an option.

A third option is to suspend the fulfilment of obligations. However, this would deprive another's right to equitable share and may even lead to the labelling of a State intentionally committing a wrongful act. It may create further problems, and even prevent Treaty resumption. On the other hand, both parties may continue their Treaty relationship even when it is suspended, allowing them both to renegotiate it.

Can India or Pakistan invoke the principle of "impossibility of performance" under IWT? Certainly, this is a principle that is admissible in international law, but on the ground there seems to be limited scope that is established and uncontested. Indian courts as well as courts in other countries will probably not be inclined in favour. It is also likely that states will take counter-measures in this situation.

The point is that the fate of the Indus Waters Treaty cannot be secured if cross-border terrorism continues or one party takes more than its share of the waters or threatens for uncalled-for dispute mechanisms or denies the legitimate expectations of people of Jammu and Kashmir in asking for its share of water. All this under the garb of moral righteousness and preservation of the Treaty's mere sanctity.

Article 12(3) expressly provides the possibility for the Treaty to be modified from time to time. Hence, the time has come for both parties to initiate a modification of the Treaty's articles and ensure only bilateral processes without third party intervention.

The revision of the Treaty in good faith will usher in a new era of bilateral relations and take into account changes in fundamental circumstances. The competition for water in the Indus Waters Basin is much more today than in the 1950s. Therefore, claims and counterclaims only magnify tension on both sides. The dependency of both parties has increased, so even on technical, resource-allocation and utilisation grounds, the time is now ripe for Treaty renegotiation. Despite the disinclination to do so in certain sections in India and Pakistan to do so, the renegotiation of the political, economic and social interests of the Indus Water Regime must begin soon.

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