

BOFAXE

On the International Law Governing China's and India's Dam-projects on the Brahmaputra River (Part 1)

WHERE TWO ARE FIGHTING ... ANOTHER ONE BITES THE DUST

Disputes between riparian states over their shared freshwater resources are as old as time and China and India have long been engaged in a race to exploit the Brahmaputra. The Brahmaputra (also known as *Yarlung Tsangpo* in Tibet or *Jamuna* in Bangladesh) is the water richest river in the Himalaya and passes through China, India, and Bangladesh before flowing into the Bay of Bengal. China has already built more than a dozen dams on the Brahmaputra, with the biggest of them, the Zangmu Hydropower Station, having reached full capacity in spring 2020. Similarly, India has installed over 150 dams on the Brahmaputra since 1997.

Late last year, several networks (e.g. here, here and here) reported that China was planning yet another mega hydropower station on the Brahmaputra in Tibet's Medog country as a part of its 14th Five-Year Plan. Although speculations about such a project have been circulating for years, the recent reports sparked outrage and fear in India and Bangladesh. In response, India considers building a dam on the Brahmaputra itself to mitigate the negative impacts China's hydropower station might have. The "losing party" in this tug-of-war is Bangladesh. While China repeatedly asserted that the interests of downstream states are taken into consideration, its actions on *inter alia* the Mekong River suggest otherwise.

This blog will indicate the reasons why these newest proposals sparked international controversy. Subsequently, it will turn to the question of whether China and India have international obligations *vis-à-vis* Bangladesh regarding the utilization of the Brahmaputra.

Why is Damming the Brahmaputra a Ground for Concern?

A first ground for concern is the risk that damming the Brahmaputra escalates the border dispute between China and India over the Indian-administered Arunachal Pradesh region, through which the Brahmaputra runs. China expanded its military presence and infrastructure construction in disputed areas of the Himalayas in recent years and the new hydropower station is said to be planned in Medog country, a region next to Arunachal Pradesh. China on the other hand fears India tightening its control over Arunachal Pradesh by installing dams in the region.

A second ground for concern is China's increasing 'hydro-hegemony', which leaves downstream riparian states fearing China's ability to control the amount of water that arrives downstream and thus "turn off Asia's tap". Moreover, China and India consider diverting the river to accommodate the needs of their water-scarce regions. As much of the Brahmaputra's waters come from Indian tributaries, India is not entirely dependent on a steady water flow from China. By far the most vulnerable to upstream river projects is Bangladesh. According to the UN Food and Agriculture Organization, Bangladesh's dependency ratio on cross-boundary water flows is 91%, the Brahmaputra contributing nearly 70% of its annual river flow. China's Dams on the Mekong River are leading by bad example, as they worsened droughts in downstream countries and, at the same time, worsened flooding in the monsoon season.

A third ground for concern are the negative environmental impacts of hydropower stations for downstream riparian states. Hydropower stations affect the nutrient content, sediment, and quality of the water, alter ecosystems and disrupt fish migration (see e. g. here and here).

Between the Harmon Doctrine and Territorial Integrity: Transboundary Watercourses under International Water Law

Shortly after the first media reports on the new mega-hydropower project, a spokesperson for the Chinese Foreign Ministry claimed that "hydropower development in the lower reaches of Yarlung Zangbo river is China's legitimate right". On January 20th, 2021, a spokesperson for the Indian government said that any attempt of China to set up a hydropower station on the Brahmaputra river will constitute "an encroachment on the entitled rights of lower riparian states like India and Bangladesh [...]".

Both statements perfectly portray the diverging interests of upstream and downstream riparian states of a shared watercourse resulting from their different levels of control over the watercourse. Uppermost riparian states, such as China, naturally claim what has come to be known as the '*Harmon Doctrine*' (named after US Attorney General Harmon who applied the idea to a dispute between the US and Mexico over the polluting of the Rio Grande in 1895). According to the *Harmon Doctrine*, riparian states have absolute territorial sovereignty over the watercourse, including the right to utilize the waters regardless of the consequences for other riparian states. Downstream riparian states, such as India and Bangladesh, claim a right to territorial integrity, which in turn prohibits upstream riparian states to alter the flow of an international watercourse (see e. g. here). Neither the Harmon Doctrine nor the concept of an unlimited claim of territorial integrity prevailed in international water law.

Nowadays, both interests are balanced through the (conventional) imposition of some limitations on a state's sovereign right to utilize its natural resources. In this regard, the most important international treaties are the 1991 Convention on Environmental Impact Assessment in a Transboundary Context, the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, and the 1997 Convention on the Non-Navigational Uses of International Watercourses (1997 Watercourses Convention). The 1997 Watercourses Convention provides for international cooperation through *inter alia* the principles of equitable and reasonable utilization (Article 5) and the duty not to cause significant transboundary harm (Article 7) and establishes a compulsory dispute settlement regime with a fact-finding Commission (Article 33). Unfortunately, neither China nor India and Bangladesh have acceded to any of these Conventions (cf. here, here, and here)