



BOFAXE

On the International Law Governing China's and India's Dam-projects on the Brahmaputra River (Part 2)

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

Which Obligations do India and China Have?

In contrast to South American states, who have equally rejected the 1997 Watercourses Convention but seem to have found a way of effectively and cooperatively managing their shared freshwater resources through multilateral agreements (e.g. on the Guarani Aquifer and the Amazon) and framework programs (e.g. on the La Plata Basin), cooperation on the Brahmaputra is frighteningly under-institutionalized. The only agreement in force on the Brahmaputra is a Memorandum of Understanding between China and India, which – instead of regulating the utilization or dispute settlement – merely encompasses an obligation of both states to share hydrological data during the flood season.

However, even absent a formal treaty, the utilization of the Brahmaputra does not take place in a legal vacuum. In its 1997 Gabčíkovo-Nagymaros Project Case, the International Court of Justice (ICJ) held that riparian states have a “basic right to an equitable and reasonable sharing of the resources of an international watercourse” (para. 78). The principle of equitable and reasonable utilization, the duty not to cause significant transboundary harm and the general obligation to cooperate are established principles of customary international law (for an in-depth analysis of the customary international law status see e.g. here and here) and, thus, binding upon all states. According to the Commentary to Rule 10 of the 2004 Berlin Rules, “there appears to have never been any dissent” to these “universally applied” rules.

Despite voting against the adoption of the 1997 Watercourses Convention because of *inter alia* its lack of affirmation of territorial sovereignty, China has endorsed the primacy of the principle of equitable and reasonable utilization during its drafting process. Several bilateral treaties between China and neighboring countries encompass the principle of equitable and reasonable utilization as well as the obligation not to cause significant transboundary harm. Similarly, India concluded agreements in accordance with the abovementioned customary principles, for example with Pakistan, Nepal, and, most notably, with Bangladesh on the sharing of the Ganges waters. Further indicators of India's and China's commitment to the obligation not to cause significant transboundary harm are their support of the 1972 Stockholm Declaration of the UN Conference on Human Environment, which encompasses the obligation in Principle 21, as well as their accession to the 1992 Convention on Biological Diversity which, in Article 3, sets forth the duty not to cause harm to neighboring states. During the 1992 UN Conference on Environment and Development China stated that “no country should tap and exploit its natural resources to the detriment [...] of other countries” (p. 36). More recently, in July 2020, China held that the “utilization of cross-border water resources must take into account the combined interests of upstream and downstream countries.” Hence, neither China nor India could claim a position of persistent objectors in order to not be bound by the customary rules.

Problematically, absent any specific agreement or joint management body, the content of the customary obligations is difficult to be determined, since “*equitable and reasonable utilization*” as well as “*significant harm*” may be understood differently by the states. Accordingly, for both substantive principles to be implemented effectively, compliance with the procedural duty to cooperate is indispensable. Due to the mistrust between all three riparian states, the establishment of a cooperative water management and sharing regime for the Brahmaputra does not seem likely in the near future.

What can Bangladesh do?

Although China and India must adhere to the principle of equitable and reasonable utilization and the obligation not to cause significant transboundary harm in their utilization of the Brahmaputra, Bangladesh has limited options to enforce compliance. Absent any formal agreement on the Brahmaputra and ratification of the 1997 Watercourses Convention with its compulsory dispute settlement regime, voluntary dispute settlement determining the scope of the duties and enforcing compliance is highly unlikely.

What has been proposed is to “lend teeth” to the international water law regime by enforcing compliance through investment treaty arbitration. As Bangladesh has bilateral investment treaties with India and China, the assessment of this proposal for Bangladesh's case might be worthwhile.

The most effective way for Bangladesh to be heard may be to appeal to the international community to find more powerful advocates for its case. As legal action against China or India is rather futile, Bangladesh could call on the General Assembly to request an Advisory Opinion by the ICJ on the legal consequences of China's and India's damming of the Brahmaputra according to Article 96(1) UN Charter.

Ultimately, however, none of these measures is too promising, as the scope of any investment dispute on the matter will be limited, whereas a potential Advisory Opinion by the ICJ will not be binding. The only long-term solution is a trilateral treaty with the establishment of a formal body for its implementation – similar to the Indus Basin Organization or the Mekong River Commission. However, due to the disputes between the states, this will be a diplomatic mammoth task.