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ALTERNATIVE DISPUTE RESOLUTION





Riparian countries cooperating on water management are bound to face new issues that could potentially lead to conflict. It is therefore important to have built in mechanisms in their water sharing agreements that could lead to a peaceful resolution of issues as and when they arise.

River Basin Organizations across the world have found a number of different, but effective ways of dealing with resolution of disputes between them. This issue of the Blue Peace Bulletin examines some of them.

Introduction

At the historic UNSC debate on 'Water, Peace and Security' of November 2016, one important consensus reached was the necessity for strengthening trans-boundary watercourse agreements so as to enhance cooperation and contribute effectively to peace. This necessity cannot be overstated especially when a dwindling resource like water is paired with factors such as political relations between trans-boundary riparian countries, water sharing and water allocation, use of water for agriculture, construction of dams, to name a few. Such watercourse agreements therefore need to be solid and require detailed conflict resolution mechanisms to provide for the resolution of disputes arising from future issues.

Measuring cooperation between riparian countries and the efficacy of such cooperation can serve to better inform and advance regional peace and stability. In its 'Water Cooperation Quotient' (WCQ) 2017 edition, Strategic Foresight Group (SFG) uses a framework of different parameters to measure the level of cooperation between riparian countries such as agreement, exchange of data, water infrastructure, and political commitment. It is the very first exercise of its kind to measure the quality of trans-boundary cooperation on a global scale. One of the WCQ parameters stipulates for 'Alternative Dispute Resolution' (ADR) and defines it as "The riparian countries have a well-defined mechanism for resolving disputes, which could be either through a River Basin Organisation, to which they belong, or through reference to a specific third party. If the countries approach the International Court of Justice (ICJ) to complain against other riparian countries, it is not to be taken into account in this context."

In the context of trans-boundary water, ADR can provide creative means to address diverse issues which have the potential to turn into conflicts in the future between riparian countries. It emphasizes on joint problem solving using different processes to prevent the escalation of

conflicts by addressing the needs and interests of the parties to the conflict. ADR covers an entire gamut of approaches ranging from negotiation, mediation, arbitration, which aim to reach solutions peacefully and amicably.

Effective dispute resolution mechanism over shared water has the potential to bring adverse countries together and cooperate in a meaningful way. One of the examples cited at the UNSC debate of November 2016 was the Indus Water Treaty between India and Pakistan which has managed to survive wars and diplomatic clashes between the countries and has been able to fulfil the water obligations which was negotiated by the good offices of the World Bank.

This bulletin delves into the provisions of ADR mechanisms adopted by various RBO's in different continents and through various case studies of different RBO's, the efficacy of such ADR provisions are analysed. The manner in which such ADR mechanisms can effectively translate trans-boundary water cooperation between riparian countries in different political, historical and ecological contexts are also addressed.



Negotiations

Even though several riparian countries have conflict resolution mechanisms in place, they are not resorted to and invoked as most of these countries are battling sovereignty and border issues owing to colonial era treaties. The revision of such colonial era treaties which provide for water division or demarcation of borders are opposed by many countries. Additionally, from the prism of international law with regard to the African continent, there exists ambiguity with regard to the 'uti possidetis' principle which provides for the newly formed sovereign state to retain their borders which existed before such sovereign state's independence. The principle which was adopted by the Organization for the African Union (OAU) and subsequently by the African Union (AU) has run into several international law roadblocks as far as implementation is concerned.

Another problem is that several agreements provide for the settlement of disputes by the Court under OAU and if the dispute still remained unresolved, then to the International Court of Justice (ICJ). After the AU came into force in 2000, the Court under OAU was abolished and therefore all disputes began to come before the ICJ. Such long-drawn cases are bound to consume time and resources. The case of Guinea Bissau and Senegal deserves a mention in this context.

In 1978, the 'Convention Relating to the Status of River Gambia' was signed between Gambia, Senegal, Guinea, Guinea Bissau and which provided for the creation of 'The Organization for the Development of the Gambia River' (OMVG), an RBO to manage three trans-boundary rivers namely, Gambia, Corubal and Geba. Guinea Bissau and Senegal which were recently liberated colonies were unable to resolve their dispute through negotiations with regards to the maritime delimitation boundary between the two countries.

The 1978 Convention provided for recourse before the ICJ if the parties are unable to settle their disputes through negotiation or by the OAU. Per the Summary of the ICJ decision in the 'Case concerning maritime delimitation between Guinea Bissau and Senegal', "On August 23, 1989, Guinea-Bissau instituted proceedings against Senegal in respect of a dispute concerning the





existence and validity of an arbitral award delivered by a tribunal consisting of three arbitrators and established pursuant to an Arbitration Agreement concluded by the two States in 1985." This arbitral award was primarily concerned with the question whether the Exchange of Letters between France and Portugal in 1960 had any legal standing between Guinea Bissau and Senegal.

In certain cases, when litigation proceedings are on-going, parties conduct parallel negotiations simply to explore if the dispute can be resolved quickly resulting in the saving of time and resources. As the ICJ rightly observed in one of its first maritime boundary cases (The Aegean Sea case of 1978),

"The jurisprudence of the Court provides various examples of cases in which negotiations and recourse to judicial settlement have been pursued *pari passu*. Several cases show that judicial proceedings may be discontinued when such negotiations result in the settlement of the dispute. Consequently, the fact that negotiations are being actively pursued during the present proceedings is not legally any obstacle to the exercise by the Court of its judicial function."

Guinea Bissau and Senegal reached a negotiated solution while their dispute was pending before the ICJ and the litigation was subsequently discontinued in November 1995. The ICJ did not reach a judgment on the merits of the case as Guinea Bissau and Senegal concluded their negotiations and signed an agreement in 1993 for the sharing of oil and gas, as well as the maritime boundary. An additional protocol relating to fishing was signed to this agreement in 1995 which led to the final shelving of the litigations before the ICJ.

Regional Framework Agreements

The River Rhine is interesting in two aspects. Firstly, after witnessing the devastating effects of the Second World War on the quality of the Rhine water, coupled with rapid industrialization along the banks of the Rhine and the resultant discharge of pollutants into the river, Switzerland which then had the presidency of the Salmon Commission exchanged diplomatic notes with Germany, France, Luxembourg and the Netherlands. This was the basis for the first meeting of the International Commission for the Protection of the Rhine (ICPR) against Pollution in July 1950. Thirteen years after its foundation, the ICPR was given a status under international law. In April 1963, the envoys of the German, French, Luxembourgian, Dutch and Swiss government signed the "Convention on the International Commission for the Protection of the Rhine against Pollution" in Berne.

Secondly, the Convention on the Protection of the Rhine River was signed in 1999 not only between the riparian countries but also with the 'European Community', thereby effectively recognizing it as a party to the Convention. The ICPR website states that "With the Maastricht Treaty of November 1993, environment and water protection were for the first time established as objectives of the European Union. The experience of the ICPR in international water protection served as an example, when river basin related European Union (EU) directives for environment and water protection were drafted. In December 2000, the EU Water Framework Directive (EUWFD) entered into force, continuing the approach of integrated water management which had proved successful along the Rhine. Its obligations are binding for all EU Member States. The objective of the Water Framework Directive is that, by 2015, all water bodies will achieve a good state."

The ICPR agreement provides that if any dispute arises between the parties, it may be resolved

through negotiation or any other means deemed fit by the parties. If the dispute cannot be resolved through such means, then there is a detailed arbitration clause provided in the annex to the agreement. However, none of the riparian countries has gone to dispute over the Rhine River after the adoption of the Convention in 1963. One reason for this could be attributed to the successive 'issue specific' treaties which were adopted by the riparian countries such as to prevent chemical pollution, chloride pollution and other critical issues and more recently, the EUWFD. From the treaties, it appears that the focus of the riparian countries began with the cleaning up of the river and converting the Rhine from 'Europe's sewer' to a clean river. Measures to tackle issues such as chloride pollution, chemical pollution were laid out in treaties. Thereafter, the ICPR was created to act as a forum to deliberate on water protection measures and exchange of data. The focus then shifted to the repopulation of salmon in the river. Gradually, a regional focus came about with the EUWFD.

Akin to the European regional framework on water, the South African Development Community (SADC) Revised Protocol of Shared Watercourses, 2000, explicitly lays down regulations for water governance amongst riparian countries which is binding on all its member states. Inter alia it provides for establishment of basin-wide institutions, exchange of data and even resolution of disputes between riparian countries. The Orange-Senqu River Commission (ORASECOM), Limpopo Watercourse Commission (LIMCOM) and several other southern African states have made provisions in their basin agreements for reference of disputes in accordance with this SADC protocol. This can be cited as an excellent example of bilateral or multilateral cooperation in a regional framework which provides for the resolution of disputes in southern African states on a uniform basis.

For instance, after the independence of Namibia in 1991, tensions with regard to the use of waters of the trans-boundary Orange River arose with South Africa. The Namibian constitution establishes the boundary between Namibia and South Africa along the middle of the Orange River. South Africa, on the other hand, claims the northern high-water mark as the boundary as was established between Britain and Germany in an 1890 treaty. In 2014, Namibia and South Africa created a working group to address this boundary dispute and discussions are also on-going to extend the mandate of ORASECOM to discuss boundary disputes within the framework of SADC and the African Union's Boundary Commission. Fulfilling its mandate under SADC, the Permanent Water Commission (PWC) established by ORASECOM has undertaken consultations between the two countries with regards to water sharing notwithstanding the existing boundary dispute. Currently, Namibia does not have its own infrastructure on the Orange River and is utilizing South Africa's infrastructure on the river sans any contribution towards costs. The two countries have used ORASECOM as a joint venue to negotiate the boundary crisis and prevent it from spilling into a military crisis.



Good Offices and Mediation

The Indus basin is a classic example of cooperation on the backdrop of perpetual simmering tensions between Pakistan and India. The Indus Water Treaty (IWT) was signed in 1960 after nine years of negotiations between India and Pakistan, with the help of the World Bank's good offices with regard to six major rivers. Under the treaty, Pakistan received exclusive use of waters from the Indus and its westward flowing tributaries of the Jhelum and Chenab, while the Ravi, Beas and Sutlej rivers were allocated for India's use. According to one report, "The World Bank rewarded both Pakistan and India with massive aid inflows to build storage and conveyance facilities to provide remedial water supplies for the flows that were supposedly lost to the other country."

Playing out its role of 'good offices', the World Bank had a tough task to get two antagonistic countries to cooperate on water and therefore decided it was best to simply divide the waters of the basin between India and Pakistan. Perhaps forecasting the likely tensions, the IWT provides for specific coordination mechanisms through the Indus Commission, with dispute resolution to pass in a synchronized step by step manner from the Indus Commission composed of Indian and Pakistani representatives and administers the IWT, to the governments of India and Pakistan, to a neutral expert, and then to a Court of Arbitration. As per 'Fact Sheet: The Indus Waters Treaty 1960 and the Role of the World Bank', "The Treaty sets out a mechanism for cooperation and information exchange between the two countries regarding their use of the rivers, known as the Permanent Indus Commission, which has a commissioner from each country. The Treaty also sets forth distinct procedures to handle issues which may arise: "questions" are handled by the Commission; "differences" are to be resolved by a Neutral Expert; and

"disputes" are to be referred to a seven-member arbitral tribunal called the "Court of Arbitration." As a signatory to the Treaty, the World Bank's role is limited and procedural. In particular, its role in relation to "differences" and "disputes" are limited to the designation of people to fulfill certain roles when requested by either or both of the parties."

The first and the only Court of Arbitration under the Treaty was set up in 2010 which pronounced its award in 2013. The award allowed India to continue its works on the Kishanganga and Ratle projects. Even during the height of conflict and diplomatic breakdown between the two countries, India being the upper riparian, has fulfilled its obligation of providing 43 million acre feet (MAF) each day to Pakistan. Similarly, Pakistan raises its concerns on India's projects on the Indus river either using the good offices or the World Bank or before the Permanent Court of Arbitration in the Hague. One of the first disagreements to test the working of the IWT's dispute resolution mechanisms arose in the 1970's when Pakistan opposed India's plans and designs to build the Salal hydropower project on the Chenab river. Negotiations immediately began at the governmental level and subsequently after discussing their respective concerns, India went ahead with the construction of the project. Another cause of concern was the Baglihar hydropower project on the Chenab River for which Pakistan initiated the arbitration clause for the first time in the treaty's history in 2005. A neutral expert was appointed by the World Bank who pronounced its binding verdict in 2007 and allowed the project to go ahead with design changes. Thus, the World Bank has been used by India and Pakistan as a communication mechanism to discuss and arbitrate several technical disputes which arise from water sharing agreements and it serves as an institutional testament to the perpetual military tension between the two countries.

Diplomatic Channels

A treaty often referred to for arbitration for the settlement of boundary disputes arising from the flow of rivers and water allocation is the US-Mexico Water Treaty of 1944 governing four trans-boundary rivers namely Colorado, Tijuana, Rio Grande and Yaqui between the arid border region of USA and Mexico. This treaty endured the test of time, it has successfully provided for the settlement of disputes related to water, boundaries and the cooperative management of such issues arising therefrom notwithstanding the checkered history shared between the two countries. Towards the end of the Second World War, USA and Mexico decided to cooperate on the Colorado and Rio Grande rivers solely with regard to sanitation issues which arose during the war. The treaty of 1944 provided for the creation of the International Boundary and Water Commission (IBWC) whose jurisdiction is limited only to territorial boundary and water issues, which supersedes all other agreements of the two riparian countries. A unique feature of the treaty is that it provides for water allocation, an otherwise contentious issue between riparian countries. Differences between the two countries, if not resolved by the Commissioners, are to be resolved through 'diplomatic channels'. Such 'diplomatic channels' in practice have resulted in 'Minutes' which are akin to 'arbitral awards' having enforceability.

The 1944 treaty inter alia includes a provision which allows a deficit to occur in one cycle in the event of extraordinary drought or serious accident to Mexico's hydraulic systems. In 1995, in response to urgent drought-like conditions on the Mexican side of the Rio Grande, the IBWC along with the Texas governor's consent, negotiated Minute 293 an emergency water loan to Mexico to meet local water needs. Conversely, the US has also requested water from Mexico under Minutes negotiated by the IBWC. The border region between US and Mexico which is extremely arid and dry, experiences frequent and recurring droughts for long periods of time which was making it increasingly difficult for the riparian countries to



fulfil their water allocation obligations under the treaty. To tackle this, the IBWC led government to government negotiations in 2001 which culminated in Minute 307 wherein the overnments of the two countries agreed to work together to identify measures of cooperation on drought management. This Minute effectively expanded the mandate of the IBWC which was previously limited to water allocation, to include drought management and sustainable development of the basin. The dynamic nature of IBWC to resolve bilateral disputes and promote cooperation has resulted in the success of the management of water resources between USA and Mexico.

River Basin Organization (RBO)

In 1989, a local conflict erupted between herders and pastoralists in Senegal and Mauritania over the Senegal river. Both countries deployed troops along their border and severed all diplomatic ties between them, except for the L'Organisation pour la Mise en Valeur du Fleuve Sénégal/ Organization for the Development of the Senegal River (OMVS), an RBO created in 1972, whose members include Guinea, Mali as well as Senegal and Mauritania, for the shared management of the Senegal River. The OMVS served as a platform for the countries to communicate with each other. Technically speaking, the OMVS does not have conflict resolution mechanisms as a part of its 1972 agreement since the RBO was primarily established with the objective of securing economic gains through the construction of jointly owned and jointly managed dams. This has not in any way impeded OMVS from acting as a base of cooperation between the four riparian countries and providing a platform for dialogue which has thereby aided the countries in resolving any outstanding disputes.

The Niger River basin has sturdy conflict resolution mechanisms in place notwithstanding the fact that it is shared by nine riparian countries. These countries came together in 1980 to establish the Niger Basin Authority (NBA) for the joint coordination of the Niger River at the international level. One of the main objectives for the establishment of the NBA was the joint coordination with regard to the construction of hydropower projects and dams along the Niger River.

In furtherance of this objective, the NBA adopted the 'Sustainable Development Action Plan' which would require all the riparian countries to put forth their respective national or bilateral or multilateral plans for the construction of a dam or a hydropower project. This plan would then be discussed at the basin level by all nine riparian countries so that each is offered a chance to put forth their concerns regarding the project.

Multiple projects on the river are being supported and financed by the international community including the World Bank. Here, it is pertinent to note that many projects have been stalled because riparian countries raised objections to the project and the Executive Secretariat, a position created by the Water Charter, provides for the peaceful resolution of disputes in good faith. The NBA regularly hosts meetings between riparian countries to iron out such differences arising out of project implementations, for instance, it hosted negotiations with regards to the Taoussa dam and Kandadji dam in order to promote amicable resolution of disputes with regard to these projects.

The International Commission for the Protection of the Danube River (ICPDR), which is the largest international RBO in Europe comprising 14 riparian countries, is a sterling example of resilient conflict resolution mechanism. The Danube River Protection Convention which was signed in 1994 and came into force in 1998, gives the parties to the convention the option for negotiation or any other means deemed fit by the parties. However, if the dispute cannot be resolved within a reasonable period of time, the parties are required to submit the dispute for compulsory decision either to the ICJ or for private arbitration. Additionally, one of the sticking points with regard to the Danube River has concerned navigation and power generation. Such concerns are raised and discussed at the ICPDR which serves as a forum for all the riparian countries for hashing out such concerns at the initial stage itself. A mention of the Danube River necessitates a mention of the Gabčíkovo–Nagymaros Dams dispute between Hungary and Slovakia. Both countries had agreed for the construction of waterworks on the Danube River and in 1997 under the Budapest Declaration, Hungary decided to suspend such works citing environmental concerns. The two countries found themselves before the ICJ in May 1997 for the resolution of this dispute, of which the adjudications continued for over a decade thereafter. However, this has in no way affected the participation of Hungary and Slovakia in the ICPDR.

Recommendations

• The importance of RBOs

There is no one way of resolving disputes between riparian countries with regards to trans-boundary water. Several variables such as mediation, good offices, arbitration and other options are provided in the treaties and conventions as dispute resolution mechanisms. The only constant is the existence of an RBO which can be utilized by the riparian countries as a launchpad to communicate and discuss issues arising out of trans-boundary waters. The creation of a RBO almost always ipso facto provides for the resolution of disputes which may arise between riparian countries by way of treaty or convention. Such treaties provide for creative

ways to resolve disputes amicably and peaceably vide its provisions for 'Alternative Dispute Resolution'. It is significant to note that the language used in conventions, treaties and agreements governing shared watercourses are amorphous and loose-ended with regard to the ADR clauses. There are always options provided to the parties to such bilateral or multilateral arrangements to take recourse to either one of the options. Such options typically range from initially giving the parties recourse to negotiation or arbitration with or without the help of third parties to settle the disputes. If this fails, then the option is provided to refer the dispute to the ICJ for adjudication.

• International legal doctrines

Boundaries existing in most parts of the world, especially Africa, were created by despotic regimes during colonial administration. Such boundaries were inherited by the newly formed sovereign countries in the African context who applied the 'uti possidetis' principle thereby inheriting all the erstwhile boundaries. Colonial era treaties on territorial and maritime boundaries occupy a chunk of the disputes especially in the African continent. The application on the legal principles of 'clean slate' and 'uti possidetis' has faced inconsistent application by the ICJ and the African Union.

Therefore, clarity on the application of international legal doctrines to colonial boundary and maritime treaties via legal debates and discussions can help settle the matter. There is a necessity to review maritime boundaries in particular to put an end to continued hostilities so that riparian countries can benefit from the accruing rights arising out of such water resources.

• Re-look at old treaties

When conventions and treaties on trans-boundary waters were drafted, the existing political climate played a key role. However, several such treaties need to be re-looked at in terms of new developments such as climate change, population growth, development and research of new technology related to water and also the altered political relations. For instance, the US-Mexico water treaty agreement served well for its time on the topic of water allocation. With the key terms of the relatively new North American Free Trade Agreement (NAFTA) agreement on water pricing, USA and Mexico will need to revisit their water sharing agreement so as to avoid any potential conflict on the subject.



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