



Developing Environmental Law Champions

Strengthening the Capacity For Environmental and Climate Change Laws in Asia and the Pacific



Session 6: Transboundary Watercourses Law and Environment

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Part I: International Watercourse Law South Asian Experience

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Learning Outcomes

Session Topic

- Basic principles and norms of the International watercourses law
- The Ganges River treaty of Bangladesh and India
- Inadequacies in South Asian practice

Learning Methodology

- Presentation & discussion
- Group work & presentation
- Brainstorming



Water as a resource

- An integral part of world's ecosystems, a natural resource, and a social and economic good
- Consumption doubled over last 50 years
- Supply is diminishing both in quality and quantity
- Half the population, along with ecosystems, will suffer from acute shortage of freshwater by 2025



International Law: Standards and Practices

1997 Watercourse Convention

- This convention is already influential (in between 2000-07, SADC Revised protocol, Sava River Agreement, Lake Victoria Protocol, Zambezi Watercourse Commission, Volta Convention)
- It emphasized on the needs for sustainable use of international watercourses (IW) and its adequate protection, compliance entails addressing climate change issues



1997 Watercourse Convention

- Article 5: Adequate protection of watercourse
- Article 7: prevention of all harms
- Article 11-18: Procedural Obligations
- Article 20=27 environmental provisions including protection and preservation of the ecosystems of watercourses



Protection and Preservation

- Article 20- 27 collectively provide the basis of ecosystem approach
- Joint institutional arrangements for management, regulation of international watercourses
- Obligation to protect and preserve ecosystem of IW as an extension of equitable utilisation and participation
- Due diligence obligation to prevent new sources of pollution, and reduce and control existing sources



1992 UNECE Convention

- It provides for increased **region-wide co-operation**
- **Basin levels concrete measures** for improving water resources management
- Ask for **harmonized policies** covering relevant catchment areas.
- High procedural standards including **mandatory EIA and data sharing**



Mekong: CC Adaptation Initiative

- The Mekong River Commission in 2009 endorsed the CCAI
- It would run until 2025 for guiding **climate change adaptation** planning and implementation throughout the LMB
- Local demonstration sites to test methodologies, build capacity, start implementation and provide lessons learned

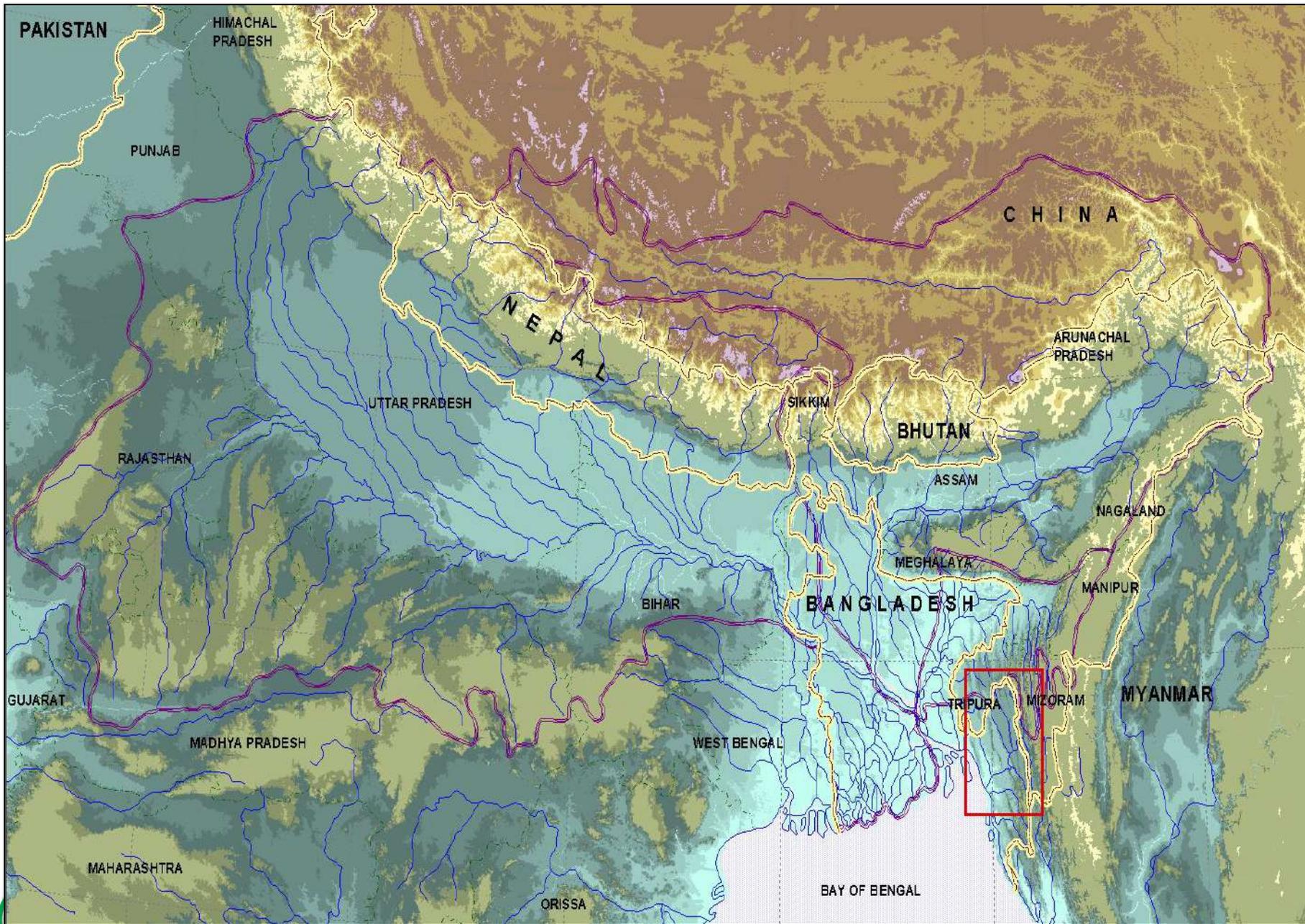


South Asian Practices

- The South Asian agreements are essentially bi-lateral, often project specific or confined to a particular part of a watercourse.
- These have failed to notice or reflect environmental provisions and
- provide no scopes for basin-wide management for adaptive measures



Bangla-Indo Rivers



India Bangladesh Issues

Basic loopholes:

- Short term and piece meal
- Failure is to address the issue of water diversion by India in upstream areas
- Accommodation of unilateral projects
- Complete disregard to environmental issues and
- Needs for basin-wide management



Inadequacies

Ignoring emerging principles: Bangladesh and India have failed

- to recognize environmental functions of the watercourses,
- ecological interdependence between politically divided parts of a river basin and
- consequent needs for Basin Wide or Other Joint Management Arrangements and to notice needs for adaptive management



Inadequacies (cont.)

Lacking in reflecting established principles:

- essential components of equitable utilization principle is disregarded. Protection of the watercourse ignored
- No-harm principle is narrowly understood, duty of prevention and remedial measures ignored
- Equitable participation and procedural principles (data sharing, prior consultation) not followed
- EIA requirements are also largely ignored



Strategic Options

- Much wider vision necessary for basin wide management for sustainable dev. and adequate protection
- Implementing obligations, regional data collection, monitoring,
- Establishing river basin organizations and dispute settlements
- Global instruments in particular the 1997 convention could be a framework instrument



Part II: Transboundary Water Law under the Nepal India Treaty

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Learning Outcomes

Session Topic

- Overview of Nepal India River Treaties
- Mahakali River Treaty 1996
- Inadequacies

Learning Methodology

- Presentation & discussion
- Group work & presentation
- Brainstorming



River Treaty Between Nepal and India

- Failed attempt of Regional Treaty/Water Commission among Bangladesh, India and Nepal for regulating Ganges river and its tributaries
- No progress on regulating Ganges, Brahmaputra and Meghna jointly by riparian countries
- Bilateral treaty between India and Bangladesh on Ganges River 1996 and India Nepal Treaty for Projects on Kosi River 1954/1966, Gandak (Narayani) River 1959/1964 and Border River on major stretches (Mahakali River) 1996 and Karnali Chisapani Storage Project; Sapta Koshi dam plus Budhi Gandaki Project 1991/1992.



River Treaty Between Nepal and India.

- No principle and standard followed in line with 1992 UN ECE Conv. on the Prot. & Use of Transboundary Watercourses and Int. Lakes; 1997 UN Conv. on Non- navigational uses of International Watercourses; OECD Recommendations concerning the Management and Protection of Transboundary Rivers and Protocol on Shared Water Resources in SADC 2002.
- Also not in line with 1995 Mekong Agreement; 1994 Conv. On Coop. for the Prot. & Sustainable Use of the River Danube; 1997 Convention on the Protection of the Rhine; 1999 Nile Basin Initiatives and Yamuna Waters MOU 1994 among riparian States of India.
- No uniform standard and principle followed from treaty to treaty



Treaty concerning the Integrated Development of the Mahakali Barrage including Sharda Barrage, Tanakpur Barrage and PMP 1996

- Purpose: cooperation in development of water resources and to enter into a treaty on the basis of equal partnership in regard to the waters of Mahakali River and its utilization
- Regulate three projects: Sharda Agreement 1920 and Tanakpur Barrage MOU 1991 and 1992 and PMP
 - Sharda Barrage: Nepal shall get 1,000 cusec in wet season (May 15 – Oct. 15) 150 cusec in dry season (Oct. 16 – May 14) and entitled to get 1,000 cu sec from Tanakpur Barrage if Sharda becomes non functional. However, down stream river eco system must be preserved maintaining not less than 350 cusec.
 - Tanakpur Barrage: Nepal to get 1,000 cusec during wet season and 300 cu sec during dry season in lieu of about 2.9 hectare land, and also get a power of 70 million kw hrs. and construction of 132 KV transmission line and additional water and power upon augmentation by storage project



Treaty concerning the Integrated Development of the Mahakali Barrage including Sharda Barrage, Tanakpur Barrage and PMP 1996

PMP: to be constructed on a boundary stretch

Art. 3:

- equal entitlement to utilize the water without prejudice to their respective existing consumptive uses;
- DPR within six months;
- maximum total net benefits for power generation, irrigation use and flood control;
- Integrated project in two sides;
- Cost of the PMP in proportion to benefits and joint financing including Pancheshwar Development Authority to be negotiated within one year and construction of PMP within eight years from the date of Agreement;
- A portion of power to be sold to India

Art 6: PMP by new Agreement



Treaty concerning the Integrated Development of the Mahakali Barrage including Sharda Barrage, Tanakpur Barrage and PMP1996

Other provision under 1996 Treaty:

- Art. 4: 350 cusec for Dodhara – Chandani
- Art. 5: prime consideration of Nepal's needs
- Art. 7: natural flow subject to community uses upto five percent at Pancheshwar (reasonable uses not exceeding 200 cusec under 1996 Ganges Treaty)
- Art. 8: Survey, planning, developing, using any tributaries without adversely affecting the flow
- Art. 9: Mahakali River Commission
- Art. 10: Project specific joint entities including for PMP
- Art. 11: Arbitration
- Art. 12: 75 years from June 5, 1997 and may be reviewed in ten years or earlier



Loopholes and Inadequacies

- Projects under Kosi and Gandak are completely under Nepalese territory and 2.9 hectares of Nepalese land used for Tanakpur project in India
- Legitimized the Tanakpur barrage with some enhanced benefit to Nepal
- Unlimited benefits to India
- Flood control and weak provisions of natural flow for eco- system preservation
- Kosi for 199 years, Gandak without duration and Mahakali 75 years are incompatible with duration of 1996 Ganges Treaty
- No equitable and reasonable use principle applied and pollution control and climate change provision contained
- Existing consumptive uses is confusing and harms Nepal's future need of water. India claimed additional flow of 201 cusec to maintain lower or second auxiliary Sharda project in the name of existing consumptive uses which derailed DPR



Loopholes and Inadequacies

- Art. 11(4) of M.Treaty: venue, administrative support, remuneration and expenses of arbitration are left to regulate by letter of notes and such notes may allow alternative to arbitration. So risk of political settlement than legal settlement may exist.
- PMP is unnecessarily delayed
- Nepal loses factually and legally
- Regional initiative between Bangladesh, India and Nepal in augmentation, sharing and power and environment remains in academic research only and prospects of Ganges, Brahmaputra and Meghna river system is outside the formal discussion
- Data collection, information sharing and consultation provisions are ignored



Strategic Option

- Regional transboundary river water treaty among riparian countries should be adopted in line with above stated 1997 and 1992 Conventions, and Mekong River Agreement 1995 and Yamuna MOU 1994.
- Regional river water commission and dispute settlement tribunal should be established
- Environmental consideration should get prioritized attention while dealing with augmentation, sharing and power generation and existing and potential uses, both factors should be properly considered
- PMP should be launched without delay by effectively implementing the 1996 Mahakali Treaty and provisions Art.11 regarding arbitration and “respective existing consumptive use” of Art. 3 should be amended with explicit provision on giving prime consideration to the need of upstream Nepal in the utilization of Mahakali river water.

