

# The Columbia River Treaty in International Perspective

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# 1. Some History

- 1909 Boundary Waters Treaty (BWT) between the United States and Canada
- Established the International Joint Commission (IJC), a model joint management mechanism
- The BWT allows Canada and the United States to make “references” to the IJC concerning matters it should study and report on to the parties
- In 1944 the two countries asked the IJC to look into possibilities for developing the Columbia River Basin on a unified basis, without regard to the international boundary

# History (cont.)

- The IJC established the International Columbia River Engineering Board, which studied the matter for 15 years and submitted a report
- The Engineering Board's report indicated three possible alternative schemes for development of the Columbia to make possible "The maximum practicable utilization of the water resources of the Columbia River Basin."
- Neither tribes, other stakeholders nor ecological impacts were taken into account by this "engineering" study

# The Columbia and the Indus

- This is reminiscent of the 1960 Indus Waters Treaty between India and Pakistan
- It is known as an “engineer’s treaty” because it was negotiated by engineers from each country with the mediation of the World Bank
- The treaty doesn’t use the words “environment” or “ecosystem” – indeed, those terms had not yet come into general use in the 1950s, when the treaty was negotiated – as was the case with the CRT

# The Columbia and the Indus (cont.)

## *Indus Waters Kishenganga Arbitration (2013)*

- While the Indus Treaty doesn't mention the environment, in an important 2013 arbitral award under the treaty, the tribunal gave the agreement an evolutionary interpretation, requiring India to release certain environmental flows downstream of the Kishenganga dam at issue in the case

# The Columbia and the Indus (cont.)

- This could well happen with the CRT if there were ever a dispute between Canada and the United States that was submitted to arbitration –
- or even to the IJC, whose remit includes dispute settlement (BWT arts. 8-10), though its conclusions are in the nature of recommendations and thus non-binding

## 2. The CRT in Contemporary Perspective

- The CRT is well known internationally for its provisions on benefit-sharing
- The concept of benefit-sharing has been expanded greatly in an effort to stimulate cooperation between riparian states by showing how the many potential benefits from the development of international watercourses can be shared equitably

## 2. The CRT in Contemporary Perspective (cont.)

- The World Bank and its personnel have contributed significantly to this effort, identifying a “basket” of potential cooperative benefits that underpin the choice between conflict and cooperation, including:
  - Benefits of an ecological nature, accorded “to” the river by better management enabled by cooperation, which underpin all other kinds of benefits;
  - Benefits of an economic nature such as increased food and energy production to be realized “from” the river through efficient cooperative management and development of shared freshwater;

## 2. The CRT in Contemporary Perspective (cont.)

- The reduction of tensions, which are costs of a political nature, arising “because of” the river, which can be reduced through the cooperation generated by the sharing of different kinds of benefits; and
- Benefits of a variety of kinds “beyond” the river, catalyzed by cooperation between riparian states
- Any revision of the CRT should take these ideas into account

## 2. The CRT in Contemporary Perspective (cont.)

- Cooperation, and in particular, cooperative management, is necessary to make any benefit-sharing system work efficiently.
- To an outside observer, it appears that the two states, through their “entities,” are working more in parallel than genuinely together

## 2. The CRT in Contemporary Perspective (cont.)

- The CRT is impressive in many respects, but doesn't appear to be very flexible – an attribute that will increasingly be required
- Particularly because of the uncertainty wrought by climate change, it is imperative that a regime of adaptive management be incorporated in any revision of the treaty

### 3. Lessons from rivers and treaty regimes elsewhere in the world?

- First, the Senegal River, shared by Guinea, Mali, Mauritania and Senegal
  - Two treaties were concluded in 1972 on the use of the river and the establishment of a joint organization for the management and development of the river.
  - A 1978 treaty established the legal status of the common works to be constructed pursuant to the other two treaties

### 3. Lessons from rivers and treaty regimes elsewhere in the world? (cont.)

- The 1978 treaty: joint ownership by the parties of the two dams constructed pursuant to the other treaties, a hydroelectric dam at Manantali in Mali, and a saltwater intrusion barrier near the mouth of the river, at Diama
- This scheme developed problems, due to the prevention of the annual floods, which eliminated the flood-recession agriculture that had been practiced along the lower reaches of the river, where it forms the border between Mauritania and Senegal. Most of the farmers moved to cities, causing problems there

### 3. Lessons from rivers and treaty regimes elsewhere in the world? (cont.)

- The system also resulted in the near stagnation of the lower reaches of the river, making it a breeding ground for malarial mosquitos and other water-borne diseases, and destroying native fish stocks
- These problems were addressed in the Senegal Water Charter, adopted in 2002
- The Charter is a thoroughly modern instrument that supplements and updates the other treaties – something that would theoretically be possible for the CRT.
- Among other things, the Charter provides that the dams be operated so as to guarantee an annual artificial flood, to mimic natural conditions in order to address the problems just mentioned

### 3. Lessons from rivers and treaty regimes elsewhere in the world? (cont.)

- What happens when riparian states fail to come together is well illustrated by the situation on the Blue Nile, which rises in Ethiopia, joins the White Nile at Khartoum, and provides some 60% of the water reaching Egypt
- Egypt has historically opposed any development of the Nile by upstream states, on either the Blue or the White Nile, except Sudan, with which Egypt has a 1959 treaty

### 3. Lessons from rivers and treaty regimes elsewhere in the world? (cont.)

- Egypt has repeatedly threatened Ethiopia about damming the Blue Nile,
- to the point that during the presidency of Mohamed Morsi, he and his cabinet discussed the bombing of the modestly-named “Grand Ethiopian Renaissance Dam” (GERD), not realizing that a mic in the room was on
- Egypt’s concern regarding this project may be understandable, since it will be the largest dam in Africa, at 1,800 m long, 155 m high and with a total volume of 74,000 million m<sup>3</sup>

### 3. Lessons from rivers and treaty regimes elsewhere in the world? (cont.)

- Now, construction of the 6,000-megawatt dam is nearly complete; it is scheduled to open in July
- It is situated about 15 km (9 mi.) upstream of the border with Sudan.
- Egypt's reflexive objection to this – or any other – dam on the Nile may be moderated somewhat by the fact that it will produce considerable quantities of cheap power, which Egypt needs

### 3. Lessons from rivers and treaty regimes elsewhere in the world? (cont.)

- In 2013, two instruments were adopted:
  - The “Agreement on Declaration of Principles on the GERD” (DoP) and
  - the so-called “Khartoum Document”
- These instruments set forth general principles governing the operation and maintenance of the dam
- A knowledgeable observer has stated that as a result of the DoP, “The playing fields have clearly been levelled for the first time in the history of the Nile Basin.”

### 3. Lessons from rivers and treaty regimes elsewhere in the world? (cont.)

- The Khartoum Document confirmed “the sincere and full commitment of the three countries to adhere to the Agreement on Declaration of Principles (DoP),” putting an end to rumors that Egypt would withdraw from the DoP

## 4. Universal principles of international water law

- There are principles of customary international law that are binding on all states and that provide a normative framework for the use and management of international watercourses
- These principles are reflected in a treaty open to all states, called the U.N. Convention on the Law of the Non-Navigational Uses of International Watercourses
- The convention is generally regarded as a codification of the basic principles of customary international law on shared freshwater resources

## 4. Universal principles of international water law (cont.)

- If or to the extent that the U.S. and Canada fail to adequately regulate their relations concerning the Columbia by treaty, the gaps will be filled by the principles expressed in the U.N. Convention

# 5. Conclusions

- The CRT needs revising (even more than NAFTA!)
- Any revision should take into account newly-recognized forms of benefits and should provide for adaptive management
- Hopefully the parties will make any such revision in an orderly and comprehensive way
- If they don't, or if one of them terminates the treaty, principles of customary international law will take over, governing the relations between the two countries on the Columbia River

Thank you!