

## Tipaimukh Dam and international law

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**O**n June 21, Indian High Commissioner Pinak Ranjan Chakrabarty provoked a new debate by questioning the applicability of international law to the Tipaimukh Dam issue. According to him, there does not exist any international law that could prevent India from constructing the Tipaimukh Dam. His argument appears totally erroneous in view of the status of the 1996 Ganges Water Treaty between Bangladesh and India as well as the relevance of the applicable international customary laws.

According to Article 38 of the Statute of the International Court of Justice, bilateral or multilateral treaties are the primary expression of international law. The 1996 thirty-year Ganges Water Sharing Treaty was signed by the heads of states of Bangladesh and India and thus, according to the 1969 Vienna Convention on The Law of Treaties, it has the full backing of international law. Both Bangladesh and India are bound to abide by this treaty until 2026.

The 1996 treaty is the relevant law for assessing the validity of the proposed construction of Tipaimukh or any other structure on rivers shared between

Bangladesh and India. In addition to making provisions for the Ganges water-sharing, the treaty enshrines, in Article IX, a provision which runs as follows: "Guided by the principles of equity, fairness and no harm to either party both the governments agree to conclude water sharing Treaties/Agreements with regard to other common rivers."

As the International Laws Commission's Commentaries on the Draft of 1997 Watercourse Convention provides, pledges to apply the principle of equitable utilisation and no-harm essentially presupposes obligations of conducting prior consultation and conclusion of agreement with co-basin states before undertaking any planned measures on a shared river like the Barak.

Therefore, construction of the Tipaimukh Dam by India on the upstream of the Barak, which, after entering Bangladesh, continues to flow as Kushiara and Surma, will be illegal unless it is preceded by prior consensus with Bangladesh. As part of the Tipaimukh project, if India builds a barrage over the Barak River, the resulting disastrous consequences on Bangladesh will be a graver violation of the "no harm" principle acknowledged by both countries in the Ganges treaty.

Pinak Ranjan, on the same occasion, also dismissed the applicability of the 1997 UN Watercourse Convention by saying that it has not yet entered into force. His statement is partially true; in the absence of required number of ratifications by states for this Convention, it is not yet binding as an "international treaty law." However, there is every reason to argue that the Convention, being adopted by a vote of 103-3 in the UN General Assembly, is applicable as "evidence of international customary law" to Tipaimukh or any such project on shared rivers.

This Convention was drafted by the International Law Commission, which was constituted under Article 13(1) of the United Nations Charter. The draft law produced by this Commission represents either existing or emerging rules of international law (ILC Statute, Article 15); various verdicts of the International Court of Justice have already expressed such a view (for example, the 1997 ICJ verdict regarding the River Danube dispute between Hungary and Slovakia).

The 1997 Convention put heavy emphasis on comprehensive cooperation for equitable utilisation of any trans-boundary watercourse, no-harm to all the co-basin states, and adequate protection of the watercourse itself. Therefore, a project with the magnitude of impact upon the environment that may result from the operation of the Tipaimukh Dam cannot be constructed unilaterally by any basin state.

The 1997 Convention is supported by



Caused by water released from an overflowing dam.

sue each other about implementing obligations arising under the Convention in respect of trans-boundary wetlands, shared watercourses and coordinated conservation of wetland flora and fauna, and Article 3 of Biodiversity Convention provides that "states have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction."

Provisions for preventing and mitigating harm related with the utilisation of shared water systems are also found in other conventions, including the 1992 Framework Convention on Climate Change and the 1994 Convention on Desertification.

If India decides to ignore the above international rules and norms and undertakes the Tipaimukh project, it might prove disastrous for India itself. The sources of several large rivers, such as the Brahmaputra, are in China, which is reportedly considering undertaking construction of big dams on some of those rivers.

If India claims that there is no international law prohibiting Tipaimukh, then how will it oppose China's projects, which would cause serious damage to the environment and economy of India. Indian newspapers are already warning their government about this facet of the problem. For us, the question is: are we ready to devise the necessary strategies with a holistic vision of the problem?

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recent state practices in different parts of the world. By the terms of 1992 Trans-boundary Watercourses Convention, adopted under the auspices of the UN Economic Union for Europe, there is no scope to undertake planned measures on shared rivers without conducting a comprehensive environmental impact assessment, providing full information to all the concerned basin states and ensuring that there are no serious harmful effects on the ecology as well as the riparian states.

In the last two decades, various countries in Africa (e.g. 1995 Zambezi River

Protocol, 1997 Lake Victoria Program), South East Asia (e.g. 1995 Mekong River Agreement), and South America (e.g. 2004 Program for the Pantanal and Upper Paraguay River) have emphasised basin-wide cooperation for ensuring sustainable utilisation and management of international watercourses.

The cooperation and no-harm principles are more emphatically endorsed in a number of international environmental instruments to which both Bangladesh and India are parties. Among them, Article 5 of the 1972 Ramsar Convention requires the contracting parties to con-

## Green beckoning: Combating climate change

It is one of the most alarming of man's assaults on natural endowments, and wanton exploitation of nature for development. In sensitive institutional behaviour along with policy flaws and loopholes in existing laws are stumbling blocks in conservation of our natural resources.

Md. SHAIKUL MASHREQUE

**C**LIMATE change has now become a much talked about issue. Devastating cyclones like Sidr and Aila and the recurring floods that hit the country are effects of climate change. In addition, environmental degradation as a fall-out of modernisation has become a matter of utmost concern. With the modernisation of agriculture, and economic expansion in Asian countries, there has been a tremendous rise in environment degradation including greenhouse gas emissions.

An environment expert commented: "One often hears the call to ban all harmful emissions and/or to use the power of governmental regulatory enforcement to punish all lawbreakers. Unfortunately, such 'ceases and desists' practices, which fall under the rubric 'command and control' have not always worked even in developed countries." We have also heard about international climate negotiations in several conferences like G-8, Copenhagen, Bonn Declaration, Kyoto Protocol, etc.

The G-8 leadership now recognises

the growing impact of global warming. EU is trying to find ways to solve climate crisis. The EU states have for some time understood the reality of the situation. Obama expressed his commitment to a "clean energy economy" to reduce global warming. The executive secretary of UNFCCC warned: "Climate change impacts will be overwhelmingly severe for Asia. They will exacerbate existing vulnerabilities and they have the potential to throw them back into the poverty trap."

The impact of climate change on agriculture, fisheries and bio-diversity is obviously damaging. The south-western region of Bangladesh has become prone to natural calamities. This is evidenced from two consecutive cyclones that ravaged many parts of the region. Sundarban was hard hit.

Most alarming is the rise of sea-water level due to rising temperature, which is melting the ice in the Himalayas and the North Pole. Coastal settlement patterns and infrastructures have been increasingly threatened by sea-level rise of over three feet on top of storm surges. Rising seas cause coastal flooding including loss of coastal land.



We cannot fight climate change without forests.

Realising that natural devastation stemming from climate change cannot be reversed the government opted for mitigation of sufferings and dislocation,

and enhancement of coping capacities of the coastal inhabitants. Crisis management is a two-fold mechanism -- mitigation and survival. As the finance

minister said: "We should aim to mitigate dislocation and build the capacity to adapt lives and livelihoods." A plan will be prepared to combat disasters due to climate change, and medium and long term strategies to prevent disasters will be reviewed.

The government is also working to maintain ecological balance and biodiversity in the Sundarbans. Production of environment friendly renewable energy technologies is under active consideration.

There is a plan to bring 20 percent of total land under afforestation programs by 2015 to attain self-sufficiency in forest resources.

The speakers at a national seminar on "Conserving land and water in Bangladesh: Lessons learned from cyclone Aila," held in Dhaka on June 17, spoke in favour of long term planning on sustainable basis to minimise cyclone devastation and its aftermath. The country representative of IUCN speaking on the occasion suggested a special design of embankment and planting of deep-rooted trees in the coastal belt and promoting salinity-resistant or tolerant crops.

We have heard slogans like clean air, greening the country, save rivers, protect bio-diversity thanks to the campaign for ecology friendly sustainable development all over the world. The government is making long-term plans for river recovery, checking pollution, massive afforestation and promotion of renewable energy.

It is heartening to note that action has been taken to recover the rivers. There are reports that illegal structures built

along the banks of Buriganga, Turag and Sitalakha have been knocked down. The DCs of Dhaka, Narayanganj, Gazipur and Munshiganj have been asked by the High Court (HC) to "take measures to protect the rivers under their jurisdiction." Some land created by encroachment on the riverbanks has been recovered; now the rivers must be demarcated.

The massive destruction of trees in a coastal area like Sitakunda is mind-boggling. This mindless destruction by influential people should not go unchallenged; otherwise there is the possibility of annihilation of the green enclosure that protects the coastal dwellings from devastation by tidal bores breaking coastal embankments. Already, a celebrated civil society like YAPSA, which has been advocating for public policy for the ship breaking industry, has risen to the occasion, protesting against the indiscriminate felling of trees in Sitakunda.

This episode is an eye opener. It is one of the most alarming of man's assaults on natural endowments, and wanton exploitation of nature for development. In sensitive institutional behaviour along with policy flaws and loopholes in existing laws are stumbling blocks in conservation of our natural resources. The dominant actors may be in a position to manage and manipulate things in their favour, but things should not be treated only from the legal point of view. The question is moral rather than legal.

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## Jacko meets Elvis



The chubby man replies: "Ah sold a billion."

The thin man twitches nervously. He thinks about moving on but then looks again at the word "king" in neon letters. He decides to fight for it. Making stabbing motions with his gloved hand, he launches into an argument. "You need more than album sales, you need the full rock star package. That's what I had. I was totally eccentric and lived in a big mansion filled with bizarre mementos. And I was as famous for my hot moves as my singing. Now that's a rock star." He does a quick moonwalk on the pavement to demonstrate.

Elvis (for it is he) replies: "You're a mime?"

The other man is furious. "I am not a mime."

"That 'danc' is jes' lesson one, normal walking, for any mime. And that white face. Ah jes' thought..."

"I am the total rock star package," the thin one repeats.

Elvis puts down his watering can. "Ah had all that stuff too. Mah mansion was called Graceland. And mah dancing was so hot they weren't allowed to show mah hips on TV. So ah think ah'll jes' keep mah title if you don't mind."

The thin man looks aggrieved. "But I'm the king of pop. I sold hundreds of millions of albums."

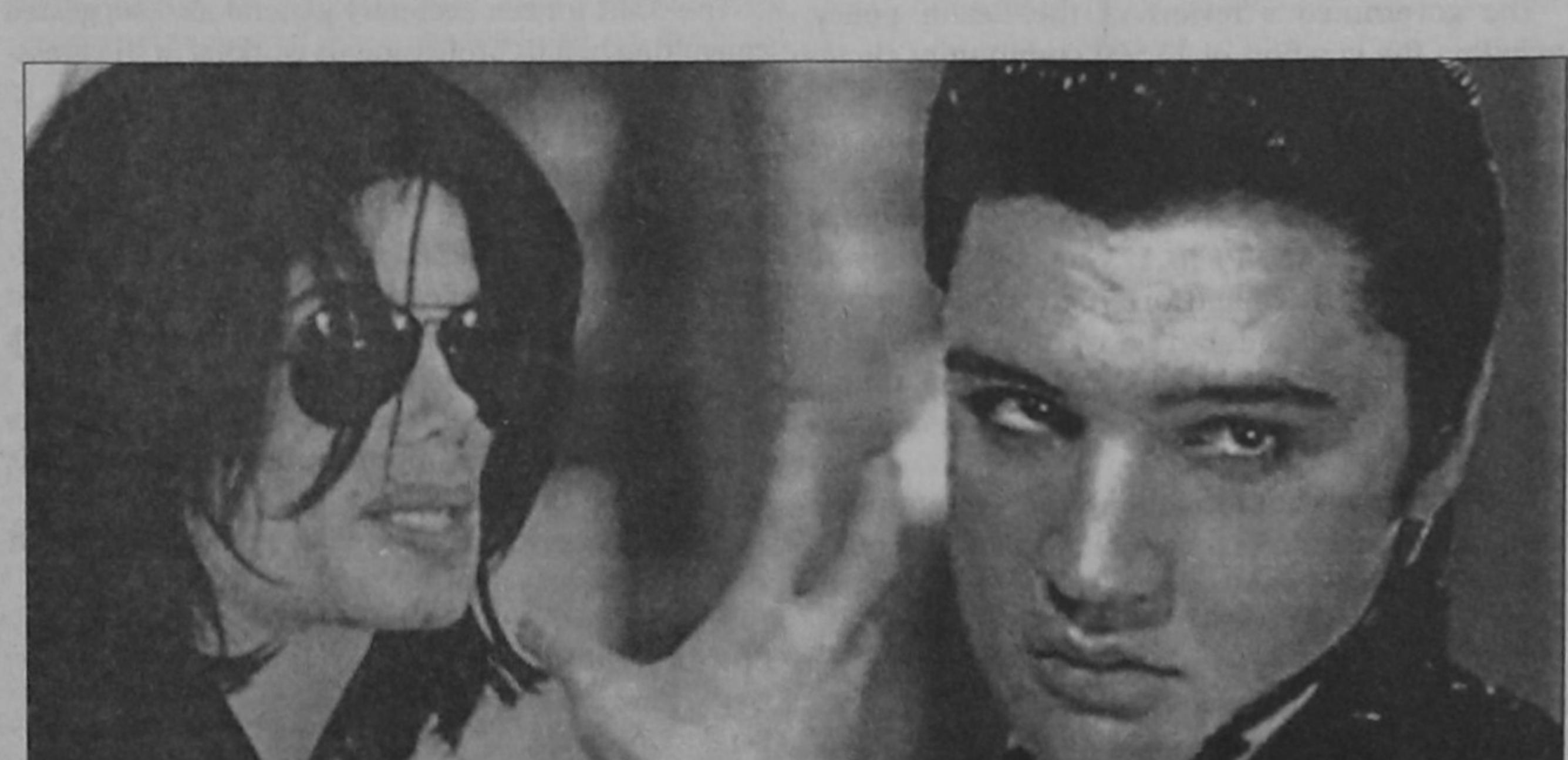
and he isn't giving up without a fight. "The mansion and the cool moves were just the start. The main thing is that you gotta be baaad, know what I'm saying? I always talked about moral values, but wasted my fortune on junk. I was worth a billion dollars and ended up owing people money. Ah spent four million dollars just on statuettes."

Elvis, 42, replies: "Ah did 'xactly the same thing. Wasted a huge fortune on junk. Maybe me and you is twins."

The newcomer, 50, is clearly taken aback. "I'm sure I was badder than you," he insists, although he is starting to sound unsure of himself. "I was addicted to drugs. My favourite was Demerol. When I died, first they said it was a heart attack, and then they said it was probably Demerol."

Elvis scratches his head. "Now that's weird. Ah was also addicted to drugs. When Ah died, they said it was a heart attack, and then they blamed Demerol. Ah died jus' before startin' a new concert series."

"So did I," says the thin man. "But I'm telling you, there was no way you were as bad as I was. I got in trouble over my interest in underage fans. Now



that's really baaaad."

Elvis shakes his head. "Sorry, mistah, you ain't badder than me. Ah also liked the young ones. Ask a 14-year-old gal called Priscilla. Check out mah biographies."

The King tilts his head to one side and looks puzzled. "But there's one thing ah'm suspicious of. Pop stars are usually good lookin. I hope you don't

mind me saying this, but you are one mighty weird-looking fella."

The thin man nods sadly. "Yeah. I used to be young and fresh-faced and nice-looking. But I lost my looks as I got older. It was my own fault."

Elvis nods. "Same story with me. Ah had ever' thing in life when ah was alive, 'cept for one thing: a buddy."

The newcomer agrees. "Me too. Wanna drink?"

"Sure."

"Can we get Demerol round here?"

Elvis puts his arm around the thin man's shoulders. "Buddy, we're in heaven now. You don't need it."

If you still can't guess who the other king is then visit our columnist at [www.vittachi.com](http://www.vittachi.com).