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CAN TREATY PRACTICE OUTLIVE THE TREATY? EQUITABLE UTILIZATION OF THE GANGES AFTER THE 1996 INDIA–BANGLADESH WATER-SHARING TREATY EXPIRES

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ABSTRACT

The 1996 Ganga/Ganges Water Sharing Treaty between India and Bangladesh expires on 12 December 2026 unless renewed by mutual consent. Discussion of its expiry has focused on diplomacy. This article asks a legal question: once the treaty ends, what framework governs dry-season sharing at the Farakka Barrage, and what weight does thirty years of treaty practice carry? Through doctrinal analysis of the treaty, the law of treaties, customary international watercourse law and international decisions, it argues that expiry ends the treaty's formula, guarantees and institutions, but not the customary duties of equitable and reasonable utilization, due diligence to prevent significant harm, and good-faith cooperation and consultation. Neither state can claim the treaty's numbers as a permanent entitlement. The implementation record nonetheless matters as evidence of established uses, operational constraints and each state's knowledge of the other's dependence, although the available record remains incomplete. The article develops a qualified burden of justification: a substantial unilateral departure from the established pattern, or an unexplained refusal to consider adjustment, requires evidence and genuine consultation sufficient to demonstrate continued compliance with customary law. This burden does not reverse the burden of proof, give existing uses priority or confer a veto on either state. The analysis identifies the legal floor for any successor agreement and offers lessons for other long-term water treaties approaching expiry.

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1. Introduction

1.1 Background and Legal Issue

On 12 December 2026 the 1996 Ganga/Ganges Water Sharing Treaty reaches the end of its thirty-year term.[3] Unless India and Bangladesh agree to renew it, the arrangement that has governed dry-season sharing at the Farakka Barrage since 1997 will lapse.[4] India built the barrage to divert water into the Hooghly and keep the port of Kolkata navigable, and West Bengal has its own drinking-water and industrial needs.[5] Downstream, reduced dry-season flows have been linked to salinity and to losses in farming and fisheries in south-west Bangladesh, although the causes of low flow are disputed.[6] Discussion has centred on renewal. This article asks a legal question instead: what governs the parties once the treaty ends?

Neither state is party to the 1997 UN Watercourses Convention, and India abstained when it was adopted.[7] Yet the end of a treaty does not affect obligations that bind a state independently of it,[8] and the International Court of Justice (ICJ) has applied the customary law of international watercourses to two states that are not parties to the Convention.[9]

[3] Treaty between the Government of the Republic of India and the Government of the People's Republic of Bangladesh on Sharing of the Ganga/Ganges Waters at Farakka (signed and entered into force 12 December 1996) (1997) 36 ILM 519 (1996 Treaty) art XII.

[4] Ministry of Water Resources (India), 'Water Treaty with Bangladesh' (Lok Sabha Unstarred Question No 2054, 10 March 2010).

[5] Salman M A Salman and Kishor Uprety, 'Hydro-Politics in South Asia: A Comparative Analysis of the Mahakali and the Ganges Treaties' (1999) 39 Natural Resources Journal 295, 302; 'Talks for Renewal of Ganga Water Treaty between India, Bangladesh Yet to Begin: Govt' *The Siasat Daily* (Hyderabad, 1 August 2025).

[6] M Monirul Qader Mirza, 'Diversion of the Ganges Water at Farakka and Its Effects on Salinity in Bangladesh' (1998) 22 Environmental Management 711; Animesh K Gain and Carlo Giupponi, 'Impact of the Farakka Dam on Thresholds of the Hydrologic Flow Regime in the Lower Ganges River Basin (Bangladesh)' (2014) 6 Water 2501, ss 3.2, 5.

[7] Convention on the Law of the Non-Navigational Uses of International Watercourses (adopted 21 May 1997, entered into force 17 August 2014) 2999 UNTS 77 (Watercourses Convention); UN General Assembly, Press Release GA/9248 (21 May 1997).

[8] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 43; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 179.

[9] *Dispute over the Status and Use of the Waters of the Silala (Chile v Bolivia)* (Judgment) [2022] ICJ Rep 614, paras 54, 95–97.

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1.2 Research Question and Thesis

This article asks: after the 1996 Ganga/Ganges Water Sharing Treaty expires on 12 December 2026, what legal framework governs the sharing of dry-season flows at Farakka, and what legal weight does thirty years of treaty practice carry within it?

It argues that expiry ends the treaty's formula, guarantees and institutions, but not the customary duties of equitable and reasonable utilization, due diligence to prevent significant transboundary harm, and good-faith cooperation and consultation. Neither party can claim the treaty's numbers as a permanent entitlement. Thirty years of jointly measured sharing do, however, provide evidence of both parties' established uses and of each party's knowledge of the other's dependence. The treaty's practice carries legal relevance without numerical permanence.

1.3 Contribution

Existing work assesses the treaty against the principles of international water law,[10] measures its implementation with differing results,[11] or asks, as a matter of policy, what will follow in 2026.[12] This article makes two contributions. First, it examines the legal relevance of a lapsed water-sharing treaty's implementation record under the customary law that governs after expiry. Second, it develops a qualified burden of justification: a substantial unilateral departure from the established pattern requires an adequate, evidenced and consulted justification, without which it is difficult to defend as equitable. The burden falls on whichever state proposes the change, and equally on a state that insists the old pattern must continue unchanged. It does not reverse the burden of proof, give existing uses priority or confer a veto on either state.[13]

[10] Noor Israth Jahan, 'Indo-Bangladesh Transboundary Water-Sharing of the Ganges and Teesta Rivers: Through the Lens of International Law and Practice' (2025) 5 Asian Journal of Law and Policy 47; MM Rahaman, 'Principles of Transboundary Water Resources Management and Ganges Treaties: An Analysis' (2009) 25 International Journal of Water Resources Development 159.

[11] Compare Kazi Saidur Rahman and others, 'A Critical Review of the Ganges Water Sharing Arrangement' (2019) 21 Water Policy 259 with Rahul M Lad and Ravindra G Jaybhaye, 'India and the Ganga Waters Treaty: Analysis of the Water Sharing Mechanism' (2024) 61 International Studies 185.

[12] Amit Ranjan, 'The Ganges Waters Treaty: What will Happen after 2026?' (ISAS Brief No 961, Institute of South Asian Studies, 12 September 2022).

[13] *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14, para 164; Watercourses Convention (n 5) art 10(1); *Lake Lanoux Arbitration (France v Spain)* (1957) 12 RIAA 281.

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1.4 Existing Literature and the Gap

Scholars treat equitable and reasonable utilization as a central customary rule but divide on its relation to the harm rule. Bourne reads the 1997 Convention as making equitable utilization primary, with harm a factor in assessing equity;[14] Tanzi rejects any hierarchy, treating utilization, harm prevention and cooperation as operating together.[15] Zheng and Spijkers explain that existing uses have no automatic priority but must be weighed alongside other relevant factors;[16] existing uses may receive qualified, context-dependent preference, offered as guidance, not binding law.[17]Established use may remain relevant without conferring a fixed quantity, but this work does not determine the weight of a lapsed bilateral allocation.

Ganges-specific legal scholarship evaluates the successive bilateral arrangements against international water law. Islam compares the Ganges agreements, tracing the shift from longer-term arrangements to later memoranda;[18] Salman and Uprety compare the 1996 Ganges and Mahakali treaties' negotiation, allocation and implementation, and the cooperation each opens up;[19] Rahaman analyses the Ganges treaties against principles of transboundary water management.[20] These works supply the legal and historical foundation for assessing the 1996 arrangement, but concern the treaties' design and operation, not the consequences of expiry. Jahan's 2025 study applies water-law principles to the Ganges and Teesta arrangements and discusses post-Treaty strategies.[21]

Empirical work on the treaty's record is divided. Rahman and others, studying 1997–2016, found that Bangladesh did not receive its guaranteed share in 65 per cent of the critical dry periods. They also concluded that the treaty underestimated climate variability and abstraction upstream.[22] Lad and Jaybhaye, studying 2012–2021, found that sharing broadly followed the formula.[23] The difference partly reflects period and method, especially whether

[14] Charles B Bourne, 'The Primacy of the Principle of Equitable Utilization in the 1997 Watercourses Convention' (1997) 35 Canadian Yearbook of International Law 215.
[15] Attila M Tanzi, 'The Inter-relationship between No Harm, Equitable and Reasonable Utilisation and Cooperation under International Water Law' (2020) 20 International Environmental Agreements: Politics, Law and Economics 619, ss 2–4.
[16]Chenjun Zheng and Otto Spijkers, 'Priority of Uses in International Water Law' (2021) 13 Sustainability 1567, ss 1, 3.3.
[17]Zheng and Spijkers (n 14) ss 3.2, 4.1–4.2.
[18] M Rafiqul Islam, 'The Ganges Water Agreements: A Comparative Study' (1986) 7(3) BIISS Journal 287.
[19] Salman and Uprety (n 3).
[20]Rahaman (n 8).
[21]Jahan (n 8).
[22] Rahman and others (n 9) 259.
[23] Lad and Jaybhaye (n 9) 185.

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flows are measured at Farakka or downstream at Hardinge Bridge.[24] They link the fall in dry-season flows since 1975 to salinity, ecological change and pressure on irrigation in south-west Bangladesh.[25] The parties themselves have disagreed on whether low flows result from diversion or from low rainfall.[26] The evidence therefore shows that the record matters, but not what weight it should carry in law.

Policy writing has turned to the expiry itself and asks what will happen after 2026.[27] One study describes two decades of cooperation as taking place 'on India's terms'.[28] Commentators on both sides of the border have also suggested that, without renewal, no legal guarantee of any specific share would remain.[29] This writing treats the expiry as a problem of diplomacy. It does not ask what the law requires once the treaty ends.

Across these strands, one question appears not to have been examined: the legal relevance of a lapsed water-sharing treaty's implementation record under the customary law that governs after expiry. Legal studies assess the treaties while they are in force.[30] This article addresses that question. It treats the record as evidence, not as an entitlement, and asks how that evidence bears on the customary rules that bind both states after 12 December 2026.

1.5 Method, Scope and Structure

The method is doctrinal. The article analyses the treaty, the law of treaties, customary watercourse law and international decisions, together with the parties' records and official positions. It covers dry-season sharing at Farakka only. It states the position as of October 2026, when India had told its Parliament that renewal discussions had not begun and Bangladesh was seeking a new treaty with a guarantee clause.[31] Section 2 explains what expiry ends, Section 3 the customary floor, Sections 4 and 5 the practice record and the burden of justification, Section 6 objections from both states, and Section 7 concludes.

[24] Compare Rahman and others (n 9) 259 with Lad and Jaybhaye (n 9) 185; see 1996 Treaty (n 1) arts I, IV.
[25] Mirza (n 4) 711; Gain and Giupponi (n 4) ss 3.1, 4.2, 5.
[26] Gain and Giupponi (n 4) s 3.2; Salman and Uprety (n 3) s IV(B)(2).
[27] Ranjan (n 10).
[28] Kimberley Anh Thomas, 'The Ganges Water Treaty: 20 Years of Cooperation, on India's Terms' (2017) 19 Water Policy 724.
[29] 'Ganges Treaty Renewal: "Uncertainty" of Water Sharing' *The Daily Observer* (Dhaka, 1 September 2026).
[30] Salman and Uprety (n 3); Islam (n 16); Jahan (n 8); Rahaman (n 8).
[31] Ministry of External Affairs (India), 'Ganga Water Sharing Treaty' (Lok Sabha Unstarred Question No 2405, 13 February 2026); 'Bangladesh Seeks New Ganges Water-Sharing Treaty with Guarantee Clause' *The Business Standard* (Dhaka, 24 September 2026).

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2. The 1996 Treaty: Allocation, Duration and Legal Consequences of Expiry

2.1 How the Treaty Shares the Water

The water is shared at Farakka, where India's release to Bangladesh is measured, in ten-day periods from 1 January to 31 May.[32] Annexure I sets three bands. At 70,000 cusecs or less, each state takes half; between 70,000 and 75,000 cusecs, Bangladesh receives 35,000 cusecs and India the balance; at 75,000 cusecs or more, India receives 40,000 cusecs and Bangladesh the balance.[33] Each state is also guaranteed 35,000 cusecs in alternate ten-day periods between 11 March and 10 May, so the guarantee protects both.[34] Annexure II is only an indicative schedule based on average flows for 1949–1988, and the upper riparian promises only that 'every effort' will be made to protect those flows.[35] India may use no more than 200 cusecs between Farakka and the border.[36]

Four further provisions have distinct functions. If flow at Farakka falls below 50,000 cusecs, the governments must consult at once 'in accordance with the principles of equity, fair play and no harm to either party'; this happened in 1997, without an agreed adjustment.[37] 'For the period of this Treaty', India must release at least 90 per cent of Bangladesh's share if a review fails.[38] A Joint Committee records daily flows at Farakka and Hardinge Bridge and reports to both governments; differences go to the Joint Rivers Commission and then to the governments.[39] The sharing is reviewed every five years on 'principles of equity, fairness, and no harm to either party'.[40] Article IX uses similar words, but it concerns other common rivers, not the Ganges.[41]

2.2 Expiry Is Not Termination

The treaty remains in force 'for a period of thirty years' and is 'renewable on the basis of mutual consent'.[42] It therefore ends by its own terms, 'in conformity with the provisions of

[32] 1996 Treaty (n 1) arts I, II(i).
[33] 1996 Treaty (n 1) annexure I.
[34] 1996 Treaty (n 1) annexure I; Salman and Uprety (n 3) s IV(B)(1).
[35] 1996 Treaty (n 1) art II(ii), annexure II; Salman and Uprety (n 3) s IV(B)(1) n 124.
[36] 1996 Treaty (n 1) art III.
[37] 1996 Treaty (n 1) art II(iii); Salman and Uprety (n 3) s IV(B)(2).
[38] 1996 Treaty (n 1) art XI.
[39]1996 Treaty (n 1) arts IV–VII; Islam (n 16) 301.
[40] 1996 Treaty (n 1) art X.
[41] 1996 Treaty (n 1) art IX.
[42] 1996 Treaty (n 1) art XII.

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the treaty', without notice, breach or any other ground.[43] The ICJ has treated the Vienna Convention's rules on termination as, in many respects, customary.[44] The 1977 Agreement could also be extended 'by mutual agreement', yet it lapsed in 1982.[45]

2.3 What Lapses and What May Remain Relevant

Termination 'releases the parties from any obligation further to perform the treaty'.[46] The formula, both annexures, the 35,000-cusec guarantee, the emergency clause, the 90 per cent floor, the 200-cusec cap and the Joint Committee's mandate all lapse; no clause is drafted to survive.[47]

Three things may still matter. First, termination 'does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination'.[48] Second, the preamble cuts both ways. The treaty was made 'without affecting the rights and entitlements of either country other than those covered by this Treaty, or establishing any general principles of law or precedent'.[49] Neither state gave up its general-law rights, and the treaty's numbers set no precedent; the 1977 Agreement used almost the same words.[50] Third, the principles of equity and no harm may bind independently as custom (Section 3), and the treaty record may serve as evidence (Section 4).

2.4 The Earlier Gaps: 1975–1977 and 1988–1996

2.4.1 The Two Gaps in Practice

The parties have twice been without an agreement. A 41-day arrangement for 1975 expired on 31 May 1975, and none governed 1976 or 1977. India continued to operate the barrage, while Bangladesh protested and raised the matter at the UN General Assembly.[51] The 1977 Agreement then guaranteed Bangladesh at least 80 per cent of its scheduled

[43] VCLT (n 6) arts 42(2), 54(a), 65(1).
[44] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7, para 46.
[45] Agreement between the Government of the People's Republic of Bangladesh and the Government of the Republic of India on Sharing of the Ganges Waters at Farakka and on Augmenting its Flows (signed and entered into force 5 November 1977) 1066 UNTS 16 (1977 Agreement) art XV; Islam (n 16) 289–90.
[46] VCLT (n 6) art 70(1)(a).
[47] 1996 Treaty (n 1) arts II–VII, X–XI, annexures I–II.
[48] VCLT (n 6) art 70(1)(b).
[49] 1996 Treaty (n 1) preamble.
[50] 1977 Agreement (n 43) preamble.
[51] Salman and Uprety (n 3) 304–05; Islam (n 16) 288–89.

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share.[52]Memoranda of 1982 and 1985 dropped that guarantee, and after the 1985 memorandum expired on 31 May 1988 no agreement existed until December 1996.[53]

2.4.2 What the Gaps Can and Cannot Show

The parties' early positions have been described as resting on opposite theories: an upstream state's freedom over water within its territory, and a downstream state's claim to the river's natural flow.[54] Neither prevailed; each gap ended in a negotiated agreement. This history shows conduct, not law, because conduct counts as evidence of custom only when accompanied by a sense of legal obligation.[55] It is, however, the closest precedent for the position after 2026.

3. The Customary International Law Framework

This section sets out the rules that bind both states with or without a treaty. Customary law means rules that bind states because they follow a general practice accepted as law.[56]

3.1 Why the Rules Survive Expiry

The end of a treaty 'shall not in any way impair' a state's duty to meet obligations that bind it independently of the treaty.[57] Treaty and custom are separate sources of law, so a customary rule keeps its force even when a treaty states the same rule.[58]

3.2 Equitable and Reasonable Utilization

3.2.1 The Rule and Its Status

Every state through which an international river flows has a right to a fair and reasonable share of its waters, and no state may take more by denying the others their equal right.[59] The rule binds upstream and downstream states alike. The ICJ has applied it as custom between

[52]1977 Agreement (n 43) art II(ii).
[53]Salman and Uprety (n 3) 306, 310; Islam (n 16) 290, 305–06.
[54] Salman and Uprety (n 3) 304 n 44.
[55] ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (2018) UN Doc A/73/10 (ILC Custom Conclusions), Conclusions 2, 9.
[56]Statute of the International Court of Justice art 38(1)(b); ILC Custom Conclusions (n 53) Conclusion 2.
[57] VCLT (n 6) art 43.
[58]*Nicaragua* (n 6) paras 175, 179.
[59]Silala (n 7) para 97; Gabčíkovo-Nagymaros (n 42) para 78; Watercourses Convention (n 5) art 5(1).

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two non-parties to the 1997 Convention,[60] building on the 'community of interest' among riparian states recognised in 1929.[61]

3.2.2 How Equity Is Judged

The rule fixes no share in advance. It weighs factors such as geography and hydrology, each state's social and economic needs, the population that depends on the river, the effects of each use, existing and potential uses, conservation and the availability of alternatives.[62] No factor wins automatically; all are weighed together.[63] Equity is judged at a particular time, not fixed once and for all.[64] An existing use does not by itself create a right to a set volume: in *Silala* the downstream state disclaimed any 'acquired right' to the current flow.[65] Equitable use therefore protects a fair share, not a fixed quantity. This prevents either state from treating the 1996 numbers as permanent while requiring serious weight for established uses.

3.2.3 The Parties' Own Positions

Bangladesh co-sponsored the resolution adopting the 1997 Convention and voted for it. India abstained, objecting that Article 5 was not clearly drafted, that 'sustainable utilization' was undefined and that the dispute clause contained an element of compulsion.[66] Those objections concerned drafting and procedure rather than the principle of equitable use, which the 1996 Treaty itself reflects.[67]

3.3 Due Diligence and Significant Harm

Each state must take all appropriate measures to prevent its use of the river from causing significant harm to the other.[68] This is a duty of due diligence: an obligation of conduct, not of result.[69] It requires suitable rules and vigilance in applying them,[70] and an environmental

[60] *Silala* (n 7) paras 54, 97.
[61] Territorial Jurisdiction of the International Commission of the River Oder (1929) PCIJ Rep Series A No 23, 27; Gabčíkovo-Nagymaros (n 42) para 85.
[62] Watercourses Convention (n 5) art 6(1); *Silala* (n 7) para 95.
[63] Watercourses Convention (n 5) art 6(3); ILC, 'Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries' [2001] II(2) YBILC 148 (ILC Prevention Articles) 162, commentary to art 10, para (2).
[64] Silala (n 7) para 98; Gabčíkovo-Nagymaros (n 42) para 140.
[65] *Silala* (n 7) paras 67, 72, 75.
[66] GA/9248 (n 5) (statement of India); UNGA Verbatim Record (21 May 1997) UN Doc A/51/PV.99.
[67] 1996 Treaty (n 1) arts II(iii), X.
[68] Watercourses Convention (n 5) art 7(1); *Silala* (n 7) paras 97, 99; *Pulp Mills* (n 11) para 101; *Corfu Channel (United Kingdom v Albania)* (Merits) [1949] ICJ Rep 4, 22.
[69] Silala (n 7) para 83; ILC Prevention Articles (n 61) 154, commentary to art 3, para (7); Permanent Mission of India to the United Nations, Statement by Mr Narinder Singh, Sixth Committee, Agenda Item 162 (5 November 2001) (Statement of India).

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impact assessment where an activity risks significant cross-border harm.[71] The care required rises with the risk.[72] 'Significant' harm is more than detectable, but need not be serious or substantial.[73]

The rule is not a veto. If harm occurs despite proper care, the state causing it must consult and mitigate, with due regard for equitable use.[74] How the harm rule ranks against equitable use is debated, and upstream and downstream states took opposite views in 1997.[75] On either view, a downstream state cannot block every upstream change, and an upstream state cannot ignore foreseeable harm downstream.

3.4 Procedural Duties

Procedural duties complement the substantive rules.[76]

Duty	What it requires	Status in customary law
Cooperation	Continuing good-faith engagement over the shared river	Customary[77]
Notification	Timely notice, with available data, of a planned activity that risks significant harm	Customary at that threshold[78]
Consultation	A genuine exchange in which each state's interests are weighed	Customary, linked to notification[79]
Information on every planned measure	Sharing information on all measures, harmful or not	Not customary[80]

[70] *Pulp Mills* (n 11) para 197.
[71] *Pulp Mills* (n 11) para 204; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* (Judgment) [2015] ICJ Rep 665, para 104.
[72] ILC Prevention Articles (n 61) 154, commentary to art 3, para (11).
[73] ILC Prevention Articles (n 61) 152, commentary to art 2, para (4).
[74] Watercourses Convention (n 5) art 7(2); ILC Prevention Articles (n 61) 150, commentary to art 1, para (6).
[75] Bourne (n 12); GA/9248 (n 5) (statements of Turkey, Ethiopia, Israel and Spain).
[76] *Silala* (n 7) paras 100–01.
[77] Silala (n 7) paras 100–01; Obligations of States in respect of Climate Change (Advisory Opinion, 23 July 2025) ICJ General List No 187 (Climate Change Advisory Opinion) para 140.
[78] Silala (n 7) paras 114–18; Certain Activities (n 69) para 104.
[79] Certain Activities (n 69) para 104.
[80] *Silala* (n 7) paras 109–12.

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Consent	The other state's agreement before acting	Not required[81]

Consultation must be genuine, not a formality.[82] An upstream state need not obtain the other state's agreement, but it must consider that state's interests in good faith; if talks fail, it may proceed while still taking those interests into account.[83]

3.5 Climate Stress

The ICJ's 2025 advisory opinion confirmed that the customary duty of prevention applies to the climate system, that due diligence in that setting is 'stringent' and that the duty to cooperate is customary.[84] It creates no rule for the Ganges. Its narrow relevance is that lower and less predictable flows raise the risk, and so raise the care that both states must take. They do not oblige either state to deliver water that the river does not carry.[85]

3.6 Dispute Settlement

The treaty's dispute procedure lapses with it,[86] leaving the general duty to settle disputes peacefully by means the parties choose.[87] India's declaration accepting the ICJ's jurisdiction excludes disputes with Commonwealth members, which include Bangladesh, so no court has compulsory jurisdiction.[88]

4. The Treaty Practice Record: Deliveries, Uses, Dependence and Reliance

4.1 The Evidentiary Relevance of Treaty Practice

The expiry of the 1996 Ganges Water Sharing Treaty would end its prospective allocation obligations unless India and Bangladesh agree otherwise: Article XII provides for thirty years' duration and renewal by mutual consent, and Article XI limits the 90 per cent safeguard to 'the period of this Treaty'.[89] Mere continued implementation is not tacit

[81] *Lake Lanoux* (n 11).
[82] ILC Prevention Articles (n 61) 160–61, commentary to art 9, para (3), quoting Lake Lanoux (n 11).
[83] ILC Prevention Articles (n 61) 161, commentary to art 9, para (10).
[84] Climate Change Advisory Opinion (n 75) paras 134, 138, 140.
[85] ILC Prevention Articles (n 61) 154, commentary to art 3, paras (7), (11).
[86] 1996 Treaty (n 1) art VII.
[87] Charter of the United Nations art 33(1).
[88] India, Declaration Recognizing the Jurisdiction of the Court as Compulsory (27 September 2019) exclusion (2); *Aerial Incident of 10 August 1999 (Pakistan v India)* (Jurisdiction) [2000] ICJ Rep 12.
[89] 1996 Treaty (n 1) art XII.

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extension. Under Article 43 of the VCLT, the lapse of treaty-specific commitments does not extinguish obligations binding independently of the Treaty.[90]

The question is how implementation informs those independent obligations. An evidentiary reference point is proposed: observed deliveries, established uses, operational constraints and foreseeable consequences. Article 6 of the UN Watercourses Convention supplies the relevant considerations, including dependent populations' needs, existing and potential uses, cross-border effects, conservation and alternatives.[91]

4.1.1 Factual Relevance Distinguished from Interpretive Agreement

Factual relevance is not interpretive agreement. Article 31(3)(b) of the VCLT concerns practice establishing the parties' agreement on interpretation, which repeated implementation does not necessarily show.[92] The argument here needs no such agreement: measurements and operational experience may illuminate circumstances without preserving an allocation or creating a customary entitlement.

4.2 Reconstructing the historical reference point

4.2.1 The Negotiated Allocation and Its Conditional Character

The negotiated allocation is the bargain accepted for the Treaty's duration: Article II(i) makes Annexure I's formula operative, while Annexure II illustrates it with historical average availability.[93] Annexure II assumes actual availability matches average 1949–1988 flows, so its scheduled quantities are not unconditional delivery requirements.[94] Claims based on that schedule must separate illustration from formula.

The Treaty also anticipated adaptation: emergency consultation below 50,000 cusecs, recognition of a shared interest in augmenting dry-season flows, and periodic review.[95] It cannot therefore be read as settling equity for all future conditions.

[90] VCLT (n 6) art 43.
[91] Watercourses Convention (n 5) arts 5–6.
[92] VCLT (n 6) art 31(3)(b); ILC, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries' (2018) UN Doc A/73/10, Conclusions 4, 10(2).
[93] 1996 Treaty (n 1) art II(i), annexures I–II.
[94] 1996 Treaty (n 1) art II(ii), annexure II, introductory sentence.
[95] 1996 Treaty (n 1) arts II(iii), VIII and X.

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4.2.2 Observed Delivery: Sources and Findings for 1997–2016

Rahman, Islam, Navera and Ludwig's study covers 1997–2016, not the whole treaty period; its ten-day flow records came from WARPO and BWDB, and its sharing information from WARPO reports (1997–2007) and JRC Bangladesh's website (2008–2016).[96] Publication through one state's institutions does not establish bilateral acceptance of every measurement.

Average post-Treaty availability at Farakka matched indicative availability, yet individual years saw repeated exceptionally low ten-day flows.[97] Bangladesh, the authors report, did not receive its guaranteed share in 65 per cent of critical dry periods analysed.[98] They recommend removing the alternating minimum-guarantee condition rather than preserving existing protections.[99] This supports examining timing, variability and design, not adopting historical figures as the allocation.

4.2.3 Measurement Locations and the Provisional Reference Point

Measurement locations must be separated: Article I places the agreed release at Farakka, while Article III separately regulates reductions within the identified downstream reach.[100]A claim that Bangladesh did not receive its share must specify the comparison: treaty entitlement and release at Farakka, or expected and observed availability at Hardinge Bridge. These are distinct factual and legal questions; a downstream deficit warrants investigation, not itself a finding of cause or responsibility.

The reference point should preserve ten-day variation, exceptional events, uncertainty and disputed observations. It identifies what requires explanation, not a rule that a historical average must continue. Because the principal dataset ends in 2016, the reference point remains provisional and should be updated with compatible post-2016 records where available.[101]

4.3 Joint administration and the limits of inference

The Treaty established machinery for generating shared operational knowledge: Article IV created an equally constituted Joint Committee and observation teams covering flows below

[96]Rahman and others (n 9) section 'Quantitative analysis of the 1996 Ganges Water Sharing Treaty', subsection 'Data'.
[97]Rahman and others (n 9) subsection 'Analysis of historical flows at Farakka', figure 2.
[98]Rahman and others (n 9) abstract.
[99]Rahman and others (n 9) abstract.
[100] 1996 Treaty (n 1) arts I and III.
[101]Rahman and others (n 9) subsection 'Data'. Their post-Treaty dataset ends in 2016.

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Farakka Barrage, in the Feeder Canal, at the Navigation Lock and at Hardinge Bridge.[102] Articles VI and VII required data and yearly reports to go to both governments and provided for examining and escalating implementation difficulties.[103]

4.3.1 Procedure, Performance and the Limits of Inferring Acceptance

These provisions establish agreed measurement and bilateral examination, not that every report was submitted or every observation accepted. Engagement and receipt of water do not show acceptance of an interpretation or of adequacy. Legal acceptance cannot be inferred merely from repeated conduct: the VCLT's requirement of agreement on interpretation is more demanding than proof of implementation.[104] Jointly accepted records best show shared understanding; a unilateral complaint shows only notice of a concern.

4.4 Existing uses and competing needs

Existing use is the clearest doctrinal link between implementation and equitable utilization. Article 6(1)(e) of the Watercourses Convention covers existing and potential uses, and Article 6(3) requires all relevant factors to be assessed together.[105] The ILC commentary likewise treats equitable utilization as a contextual inquiry, not a fixed hierarchy.[106] Duration does not settle need, efficiency or alternatives.

Zheng and Spijkers reject absolute historical entitlement but argue that established uses may receive context-dependent preferential weight.[107] Alternative water sources and alternative means of meeting the need may qualify that reliance.[108] Their guidance is persuasive, not binding.

4.4.1 Reciprocal Substantiation and the Absence of Inherent Priority

The analysis must apply reciprocally. Bangladesh should substantiate the uses supported by dry-season flows, their sensitivity to timing and volume, and realistic substitutes; India, the operational requirements, dependent users and alternatives supporting diversion. Farakka's

[102] 1996 Treaty (n 1) art IV.
[103] 1996 Treaty (n 1) arts VI–VII.
[104] VCLT (n 6) art 31(3)(b).
[105] Watercourses Convention (n 5) arts 6(1)(e) and 6(3).
[106] ILC, 'Draft Articles on the Law of the Non-Navigational Uses of International Watercourses, with Commentaries' [1994] II(2) YBILC 89 (ILC Watercourses Articles), commentary to art 6.
[107] Zheng and Spijkers (n 14) ss 3.2, 4.2.
[108] Zheng and Spijkers (n 14) s 4.1; Watercourses Convention (n 5) art 6(1)(g).

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historical navigation purpose identifies a relevant interest, not a current quantitative requirement or superior legal weight.[109]

Article 10 gives no use of a shared river automatic priority over another, absent agreement or custom; where uses compete, particular attention must be given to people's needs.[110] Navigation is not excluded merely because the Convention concerns non-navigation uses: Article 1(2) addresses situations where navigation affects, or is affected by, other uses,[111] and the ILC commentary recognizes that navigation and other uses may be inseparable in practice.[112] India's navigation interests may thus be weighed, without inherent priority.

4.5 Environmental evidence and demonstrated dependence

4.5.1 Scientific Evidence of Flow Alteration and Its Limits

Scientific findings inform consequences but do not determine equitable allocation. Gain and Giupponi compare pre-Farakka discharge (1934–1974) with post-Farakka conditions (1975–2005), finding substantial alterations in dry-season means and minimum flows.[113] They also discuss freshwater availability in the Gorai–Madhumati system and its salinity and ecological consequences.[114]

The study does not reconstruct thirty years of post-1996 performance, and its statistical ecological thresholds are not legal minimum-release requirements. It calls for further investigation of physical ecosystem effects and interacting climatic and human influences.[115]

4.5.2 Longstanding Dependence and Treaty-Induced Reliance

Longstanding dependence must be distinguished from Treaty-induced reliance. Gain and Giupponi trace the Ganges–Kobadak irrigation project to 1954, decades before 1996.[116] Such dependence remains relevant as an existing use but is not Treaty-induced merely because it continued under the Treaty.

[109]Rahman and others (n 9) subsection 'Farakka Barrage and dispute over water extraction'.
[110] Watercourses Convention (n 5) art 10(1)–(2).
[111] Watercourses Convention (n 5) art 1(2).
[112]ILC Watercourses Articles (n 104) commentary to art 1, para (4); Zheng and Spijkers (n 14) s 3.1.
[113]Gain and Giupponi (n 4) ss 3.1, 4.2.
[114]Gain and Giupponi (n 4) s 5.
[115]Gain and Giupponi (n 4) s 6.
[116]Gain and Giupponi (n 4) s 5.

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A stronger reliance claim requires evidence of a specific decision or investment, its link to expected deliveries, adjustment costs and the other state's knowledge; neither state gains weight from bare assertion.

4.5.3 Environmental Insufficiency and Openness to Correction

The historical pattern may also have been environmentally insufficient or economically inefficient; equitable utilization's concern with sustainable benefits, conservation and alternatives permits scrutiny of continuity itself.[117] The reference point must remain open to correction, illuminating dependence without implying that past conditions be reproduced.

4.6 From Historical Evidence to Reasoned Adjustment

The reference-point approach concerns the quality of assessment, not preservation of the status quo. Dependence and adjustment costs should be weighed alongside changed hydrology, potential uses, efficiency and alternatives.[118]

4.6.1 Cooperation, Consultation and the Absence of a Downstream Veto

Tanzi's integrated account of equitable utilization, harm prevention and cooperation reinforces the need to assess substance and procedure together.[119] Consultation does not make an inequitable use lawful, agreement does not replace examination of environmental protection, and disagreement alone does not make an operation unlawful.

India's operation of Farakka makes its operational information especially relevant to barrage changes; Bangladesh must substantiate claimed consequences and feasible alternatives. The Convention's information and consultation provisions offer a useful framework without importing all their procedures into customary law.[120] Unsuccessful consultation creates no downstream veto: the ILC commentary rejects agreement as a universal precondition to use while recognizing consultation's importance.[121]

4.6.2 The Treaty's Own Limits: Preamble and Article 70 VCLT

The Treaty's own preamble disclaims establishing 'any general principles of law or precedent'.[122] That weighs against turning performance into a permanent allocation rule,

[117] Watercourses Convention (n 5) arts 5(1), 6(1)(f)–(g) and 6(3); Zheng and Spijkers (n 14) s 4.1.
[118] Watercourses Convention (n 5) arts 6(1)(a)–(g) and 6(3).
[119] Tanzi (n 13) ss 2–4.
[120] Watercourses Convention (n 5) arts 6(2), 8–9, 11–12 and 17(2).
[121] ILC Watercourses Articles (n 104) commentary to art 3, paras (17)–(18).
[122] 1996 Treaty (n 1) preamble, art XII.

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though not against later factual assessment. Nor does Article 70(1)(b) of the VCLT preserve future releases: protecting specified consequences of prior execution is no general guarantee of continued performance.[123]

5. A Qualified Burden of Justification

5.1 Historical practice and proposed framework

Historical practice may establish dependence and consequences, but not a perpetual allocation. A substantial departure from it, or an unexplained refusal to consider adjustment, does not itself breach customary law; it requires evidence and genuine consultation sufficient to show continued compliance with equitable utilization, due diligence and procedural good faith. The proposed framework examines the evidence and reasons for continuity or change, without a freestanding duty to publish reasons or a presumption that past operations were equitable.

Existing uses may carry contextual weight, but alternatives and changed circumstances qualify it.[124] Neither historical receipt nor upstream control displaces each riparian's equivalent right to equitable and reasonable utilization.[125]

5.2 Legal foundations and procedural triggers

Silala recognizes that each watercourse has its own features. Article 6 of the Watercourses Convention lists the relevant factors, including dependent populations, effects, existing and potential uses, environmental protection and alternatives.[126] Historical records inform these factors but supply no fixed weights.

5.2.1 Procedural Triggers: Planned Measures, Notification and Environmental Assessment

Silala rejected an asserted customary duty to exchange information on every planned measure merely affecting the watercourse, identifying notification and consultation duties for activities risking significant harm to another riparian.[127] A change in release volume does not by itself trigger them; its duration and likely consequences matter.

[123] VCLT (n 6) art 70(1)(a)–(b).
[124] Zheng and Spijkers (n 14) ss 3.2, 4.1–4.2.
[125] *Silala* (n 7).
[126] *Silala* (n 7); Watercourses Convention (n 5) arts 6(1) and 6(3).
[127] *Silala* (n 7).

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That rule does not exhaust cooperation: Silala also recalls consultation in a spirit of cooperation on equitable utilization, which the Convention distinguishes from formal planned-measures procedures.[128] Its scope must be established, not assumed.

Pulp Mills recognizes a general international-law requirement of environmental assessment where a proposed industrial activity risks significant adverse transboundary impact.[129] For changes in dam operation, this turns on the change and its risk, not every modification. The Convention's rule on explaining changes illustrates reciprocity, but its procedures cannot simply be treated as custom.[130]

5.3 Justification, Evidence and the Burden of Proof

Reasoned assessment is not litigation proof. In Pulp Mills the Court required parties to establish the facts they asserted and rejected reversing the burden through precaution.[131] Uncertainty therefore does not require India to prove harm impossible, nor does asserted need establish equity.

Corfu Channel permits greater reliance on inference where exclusive territorial control obstructs direct proof, while rejecting automatic burden-shifting.[132] At Farakka, the inquiry must identify the information actually controlled and the evidence supporting an inference; control of the barrage alone establishes neither wrongdoing nor diligence.

5.4 Application, uncertainty and continuing review

5.4.1 Natural Scarcity, Increased Diversion and Realistic Alternatives

If downstream flow falls because natural supply falls, the assessment turns on evidence of scarcity and how it is shared; if supply is broadly unchanged but more water is withdrawn, on the claimed benefits, dependent needs, alternatives and downstream effects.

Both continuity and change require scrutiny: a release pattern protecting dependence may be infeasible or inefficient, and a proposal meeting important needs may impose avoidable downstream costs. Alternatives must be realistic and of comparable value.[133] Where

[128] *Silala* (n 7); Watercourses Convention (n 5) arts 6(2), 8 and 11–18.
[129] *Pulp Mills* (n 11).
[130] Watercourses Convention (n 5) arts 15 and 18(1)–(2).
[131] *Pulp Mills* (n 11) para 162.
[132] Corfu Channel (n 66) 18.
[133] Watercourses Convention (n 5) arts 6(1)(a)–(g) and 6(3); Zheng and Spijkers (n 14) s 4.1

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consultation is legally required, it should permit counterproposals, not require acceptance of either state's preferred outcome.[134]

5.4.2 Continuing Monitoring and Review

Justification should not stop at implementation. Pulp Mills required environmental effects to be monitored, where necessary, throughout the project's life.[135] A new Farakka arrangement would compare predictions with observations and reconsider operations if significant divergences appear; the response depends on the applicable rules, solid evidence and available measures.

5.4.3 Disputed Evidence and Implementation Arrangements

Where evidence remains disputed, consultation should identify points of agreement, contested assumptions and information capable of narrowing disagreement. The Convention's treatment of data and requests for additional information is a useful model, not an unlimited disclosure entitlement.[136] Further measurements or an agreed review date are implementation arrangements, not automatic remedies.

5.5 Consequences and limits

Inadequate justification may show breach of a procedural obligation, leave a claim unsupported or add evidence of inequitable use; these consequences are separate. Pulp Mills treats procedure and substance as linked, but breach of one does not entail breach of the other.[137]

The framework revives no expired guarantee. If substantive unfairness is found, explanation alone cannot cure it: operations must comply with the applicable rule. A procedural breach alone calls for a remedy addressing its effects, not automatic restoration of past deliveries.[138]

6. Objections and Responses

This section tests the argument against six objections. Some would be raised from an upstream perspective, others from a downstream one.

[134] Watercourses Convention (n 5) art 17(1)–(2); *Silala* (n 7).
[135] *Pulp Mills* (n 11).
[136] Watercourses Convention (n 5) art 9(1)–(3).
[137] *Pulp Mills* (n 11).
[138] *Pulp Mills* (n 11).

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6.1 The Customary Status of These Rules

Objection: India is not bound by the 1997 Convention, and a treaty binds only states that consent to it.[139]

Response:The argument rests on custom, not on the Convention. Equitable use is widely accepted as customary, although its precise application and the weighting of relevant factors remain contested,[140] and a state escapes a customary rule only as a persistent objector, by an objection that is clearly expressed, made known to other states and maintained.[141]Its own statements are consistent with this position: on the Brahmaputra, India describes itself as 'a lower riparian state with established user rights', and it has accepted that preventing cross-border harm is a duty of due diligence.[142]

6.2 No Use Has Inherent Priority

Objection: No use of a river 'enjoys inherent priority over other uses',[143] and international law has never given the first user a permanent right.[144] Protecting Bangladesh's established uses might give them priority by the back door.

Response: The burden of justification gives no use priority. It asks only that a large one-sided change be explained, supported with data and discussed first. Existing uses are one factor among many, but a weighty one,[145] and the same reasoning protects established diversion to the Hooghly. A well-supported new use can still prevail (Section 4.4).

6.3 Climate-Driven Scarcity

Objection: Flows at Farakka depend on rainfall, snowmelt and upstream use that India does not control. India cannot release water that does not reach the barrage.[146]

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[139] Watercourses Convention (n 5); VCLT (n 6) art 34.
[140]Silala (n 7) paras 54, 97; Zheng and Spijkers (n 14) s 1; Stephen McCaffrey, 'The UN Convention on the Law of the Non-Navigational Uses of International Watercourses: Prospects and Pitfalls' in Salman M A Salman and Laurence Boisson de Chazournes (eds), International Watercourses: Enhancing Cooperation and Managing Conflict (World Bank Technical Paper No 414, World Bank 1998) 17, 26–27.
[141]ILC Custom Conclusions (n 53) Conclusion 15(2).
[142]GA/9248 (n 5); 'India Urges China to Safeguard Brahmaputra Interests, Protests New Counties in Ladakh' All India Radio News (New Delhi, 3 January 2025); Statement of India (n 67).
[143] Watercourses Convention (n 5) art 10(1).
[144]Zheng and Spijkers (n 14) s 3.2.
[145]Watercourses Convention (n 5) art 6(1)(e), (3); Zheng and Spijkers (n 14) s 4.2; International Law Association, Helsinki Rules on the Uses of the Waters of International Rivers (1966) art VIII(1), in ILA, Report of the Fifty-Second Conference (Helsinki 1966) 484.
[146] Rahman and others (n 9) 259; Salman and Uprety (n 3) s IV(B)(2).

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Response: This is correct, and due diligence does not guarantee a result. But scarcity changes what equity requires; it does not remove the law. The parties have long shared scarcity, splitting low flows equally and, in 1985, sharing the 'burden' of exceptionally low flows.[147] In a dry year, the burden asks for evidence of the shortfall, a fair sharing of the loss and consultation (Section 5.4.1).

6.4 Needs and Sovereignty

Objection: The barrage serves the port of Kolkata, West Bengal's drinking-water and industrial needs and wider development.[148] Political leaders in Bihar argue that the treaty has caused siltation and floods upstream, and want any new agreement to rest on Bihar's needs up to 2050.[149] The barrage lies in India and is operated by India.

Response: These interests are legitimate, and equitable use weighs them: needs, dependent populations and alternatives are all factors,[150] and siltation and floods are 'harmful conditions' that states must address.[151] But sovereignty over a barrage is exercised within international law. Neither an upstream claim of absolute sovereignty over the water in its territory nor a downstream claim to the river's natural flow is accepted in international law,[152] and the community of interest among riparian states excludes 'any preferential privilege' for one of them.[153] India's needs therefore enter the balance openly, as Bangladesh's do.

6.5 'Freezing the Treaty'

Objection: The parties chose a thirty-year term, release from further performance on expiry and no precedent. Preserving the numbers would rewrite that bargain.[154]

Response: The argument preserves no numbers. The formula is tied to the flow available, equity is judged at a given time, the parties revised their arrangements repeatedly, and a

[147] 1996 Treaty (n 1) annexure I; Islam (n 16) section headed 'The Sharing of the Low Flows of the Ganges at Farakka'; ILC Prevention Articles (n 61) 154, commentary to art 3, para (7).
[148] Salman and Uprety (n 3) 302; 'Talks for Renewal of Ganga Water Treaty' (n 3).
[149] 'JD(U)'s Sanjay Jha Flags Bihar's Water Concerns, Opposes Renewal of Ganga Water Treaty with B'desh' *ThePrint* (Patna, 10 September 2026); 'Farakka Water Treaty Not in India's, Bihar's Interest: Sanjay Jha' *UNI* (Buxar, 5 September 2026).
[150] Watercourses Convention (n 5) art 6(1)(b), (c), (g).
[151] Watercourses Convention (n 5) art 27.
[152] McCaffrey (n 140) 23 n 9; Salman and Uprety (n 3) 304 n 44.
[153] River Oder (n 59) 27; Silala (n 7) paras 96–97.
[154] 1996 Treaty (n 1) art XII, preamble; VCLT (n 6) art 70(1)(a).

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justified, consulted change is lawful without the other state's consent.[155] The target is arbitrary departure, not lawful adaptation.

6.6 Objection from Bangladesh: Insufficient Security for Downstream Shares

Objection: Bangladesh seeks a guarantee clause, as in the 1977 Agreement. A duty to explain gives little security in a dry season.[156]

Response: Only a treaty can fix a volume; custom protects a fair share.[157] The procedural duties are nonetheless real, a state planning an activity that risks significant harm must assess it, notify the other state and consult before acting.[158] Whether to add a guarantee is for the negotiators (Section 7.2).

7. Conclusion and Implications for Successor Agreements

This article asked what legal framework governs dry-season sharing at Farakka once the 1996 Treaty expires, and what weight its thirty-year practice carries. Several conclusions emerge.

Expiry ends the treaty's own obligations, and neither state can claim its numbers as a permanent entitlement (Section 2.3). It does not leave a legal vacuum. Customary law continues to require equitable and reasonable use, due diligence and good-faith cooperation, notification and consultation, and both states have relied on these principles (Sections 3 and 6.1). Thirty years of practice sit within that framework as evidence of each side's uses and dependence, although the record is mixed and shows what needs explaining rather than what must continue (Section 4). A substantial one-sided change, or a refusal of any change, therefore needs evidence and genuine consultation. The treaty's practice carries legal relevance without numerical permanence.

Renewal is for the parties alone.[159] Bangladesh seeks a guarantee, while voices in India, especially in Bihar, seek a fresh assessment of upstream needs.[160] Any successor agreement should contain an updated, jointly agreed hydrological baseline; clear rules for very low flows; regular, preferably real-time, exchange of data; attention to flows and salinity downstream and to siltation and floods upstream; prior notification and consultation before

[155] 1996 Treaty (n 1) annexure I, art X; *Silala* (n 7) para 98; *Lake Lanoux* (n 11).
[156] 'Bangladesh Seeks New Ganges Water-Sharing Treaty' (n 29); 1977 Agreement (n 43) art II(ii).
[157] *Silala* (n 7) paras 67, 72, 75.
[158] Silala (n 7) paras 114–18; Certain Activities (n 69) para 104.
[159] 1996 Treaty (n 1) art XII.
[160] 'Bangladesh Seeks New Ganges Water-Sharing Treaty' (n 29); 'JD(U)'s Sanjay Jha Flags Bihar's Water Concerns' (n 149).

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major operating changes; a review clause that responds to climate change; and a graduated, non-compulsory path for disputes, such as joint fact-finding.[161]

The expiry of a water treaty need not create a legal vacuum. It ends the numbers the parties chose, but not the rules they share, and it leaves a record that both must take seriously. That lesson extends to long-term water treaties nearing expiry in a changing climate.

[161]1996 Treaty (n 1) arts II(iii), IV–VII, X; Watercourses Convention (n 5) arts 9(1), 20, 27, 33(3)–(4); Islam (n 16) section headed 'The Sharing of the Low Flows of the Ganges at Farakka'; Silala (n 7) paras 114–18.

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