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In this Issue

Not Losing Advantage over India's Catch-22 on the Indus Treaty

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1. Introduction: The impasse over forum

India, Pakistan and the World Bank have reached an impasse over issues of the Kishenganga and Ratle hydropower power plants. Both countries met at Secretary-level talks held in the Bank's Washington D.C. offices last month. The Bank's vague statement at the end of the talks confirmed both countries' continued commitment to the preservation of the Treaty, but also disclosed that no concluding agreement had been reached.

There are two opposing points of view regarding the forum to resolve Pakistan's concerns regarding the design of two power plants. While Pakistan has moved to establish an International Court of Arbitration, India argues that the matters must be heard by a Neutral Expert and no other. The Treaty provides for these two forums, in cases of disputes that may arise between the two countries with respect to the design of any hydropower projects proposed by India on any of the Western Rivers of the Indus Basin.[i] Reports indicate India has refused four different options of forum presented by the Bank.[ii]

The determination of the Neutral Expert in the Baglihar difference (2007) and the Interim and Final Awards of the International Court of Arbitration in the Kishenganga arbitration (2013) have clarified the law in several areas of the Treaty. The cases cast new light on the manner in which the Treaty assigns dispute resolution responsibilities between the Neutral Expert and the International Court of Arbitration. This paper seeks to explain the current impasse in light of these decisions, and recommends tactical and strategy options for Pakistan to negotiate with.

The impasse over forum has persisted since July 2016, when Secretary-level talks between the two countries first elaborated on their differences regarding the design of the two dams. A nuanced understanding of the contours of this type of disagreement – given there has never been a forum dispute such as this in the previous experience of the Treaty – has been made difficult by the deterioration in bilateral relations following the armed attack on the Indian military headquarters in Uri on 18 September 2016. India accused Pakistan of masterminding the attack near the line of control, the fallout

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from which also resulted in the postponement of the SAARC meeting scheduled in Islamabad in October 2017. On 26 September, Prime Minister Narindra Modi commented "blood and water cannot flow together" while cancelling, for several months, scheduled meetings of the Indus Water Commission. Some reports indicated that India was even reconsidering their participation in the Treaty.

The technical nature of the Treaty has been at least one reason for its remarkable durability – it has survived two full-blown wars. It's inaccessibility to the non-expert has thus far meant that highly qualified "hydro diplomats" – specialists on either side who could be trusted to keep their heads cool – keep the Treaty working despite the vacillating politics of the day. However, events of last year have brought the Treaty directly into the cross-fire of incendiary trans-boundary political rhetoric. As a result, it is no longer sufficient to remain ignorant of the nuances of the Treaty. They are quiet rapidly being dragged into the broader Indo-Pak relationship.

2. Background to the Forum Dispute

2.1 The Indus Waters Treaty, 1960

At Partition, the Radcliff Award drew a political boundary over the largest contiguous gravity flow irrigation system in the world. Negotiations between the newly independent riparian States of India and Pakistan to determine their respective water rights eventually led to the signing of the Indus Waters Treaty in 1960. The Treaty is often said to have been negotiated with the "good offices" of the World Bank. This refers to the Bank's role in the negotiations between the two countries, and the eventual development assistance it lent to both once their rights over the surface waters of the Indus rivers system were settled through the Treaty. It is the only international water co-signed by a third party.[iii]

Rather than sharing the waters of the Indus river system, the Treaty divides the six rivers that comprise the system. Both parties have an obligation to regularly exchange data with respect to the flow and utilization of the waters, and each is required to appoint a Permanent Commissioner of Indus Waters. These Commissioners constitute the Permanent Indus Commission that serves as a regular channel of communication on matters related to the implementation of the Treaty.

All the waters of the Eastern rivers, Revi, Beas and Sutlej, "shall be available for the unrestricted use of India" (Article II(2)). Pakistan shall receive "unrestricted use" of the waters of Western Rivers, that India is "under obligation to let flow" under the provisions of Article III(2) subject to any domestic, non-consumptive, agricultural use or the generation of hydro-electric power, as set out in Annexure-D of the Treaty. India's admittedly vested right to construct power projects on the Western Rivers is therefore carefully scrutinized by Pakistan to ensure compliance with the limited exceptions.

As the current impasse between Pakistan and India relates to the forum of settlement of issues under the Treaty, it is important to note the effect of the ruling of the International Court of Arbitration in the Interim Award of the Kishenganga Arbitration.

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2.2 Settlement of Differences and Disputes under the Treaty

Article IX of the Treaty provides for the Settlement of Differences and Disputes. Any question concerning the interpretation or application of the Treaty is first to be examined by the Commission. If the Commission cannot reach agreement, then the matter is referred to as a "difference". Any difference that either Commissioner finds to fall within the mandate of a Neutral Expert shall be dealt by so at the request of the Commissioner. Part 1 of Annexure F lays down a list of 23 questions within the mandate of the Neutral Expert. Questions outside this list "would have to be settled by a Court of Arbitration."

If the Neutral Expert informs the Commission that the matter falls outside its mandate and should be referred to as a "dispute", then the Treaty provides for the establishment of a Court of Arbitration, consisting of seven umpires, to resolve the dispute. The Treaty also allows either Party to establish the Court by invoking the procedure provided for in Articles IX (4) and (5). The proviso to Article IX (2) allows both parties to settle the dispute "in any other way agreed upon by the Commission."

The process of settlements of disputes and differences is not hieratical; a decision of the Neutral Expert cannot be appealed to the Court of Arbitration and vice-versa, and the Treaty states the decision of the Neutral Expert on all matters within his competence shall be final and binding on the parties. The precedential value of a determination of a Neutral Expert vis-à-vis award of the Court is not explicitly dealt with in the Treaty.

3. Precedential value in a determination by the Neutral Expert

The precedential value of a Neutral Expert's determination under the Treaty was interpreted by the International Court of Arbitration established in the Kishenganga Arbitration. The Court held "the effect of a neutral expert's determination is restricted to the elements of the design and operation of the specific hydro-electric plant considered by that expert," and that it "[did] not see in Annexure F any indication that the Parties intended a neutral expert's determination to have a general precedential value beyond the scope of the particular matter before him."[iv] In doing so, the Court immediately restricted the impacts of the determination of the Neutral Expert in the Baglihar matter to the "facts of the case," with no precedential value before the Court.

Regarding Baglihar, Pakistan had claimed the Baglihar plant did not conform to criteria (a), (c), (e) and (f) of paragraph 8 of Annexure D of the Treaty.[v] Crucially, Pakistan considered gated spillways in the design would allow India to control the flow of the Kishenganga River – a tributary of the Jhelum. Rejecting Pakistan's arguments, the Neutral Expert determined that the conditions of the site, including hydrology, sediment yield, topography, geology and seismicity, required a gate spillway. However, the Court of Arbitration in the Kishenganga Interim Award has now limited this determination – which had the potential of an "enormous catastrophe" [vi] to Pakistan if applicable to future dispute resolution – just to the facts of Baglihar with no precedential effect on any future projects India may plan on the Western River.

The precedential value of awards of the International Court of Arbitration is different from determinations of the Neutral Expert. In the Kishenganga Interim Award, the

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Court observed "the present decision, by contrast, is binding in respect of the general question presented in these proceedings."[vii]

4. Drawdown flushing not in accordance with the terms of the Treaty

In the Kishenganga arbitration, the Court was called to determine whether the Treaty permits drawdown flushing for sediment control at Indian Run-of-River Plants located on the Western Rivers. The Court considered this issue "ultimately legal in nature"[viii] and therefore applicable to future interpretations of the Treaty.

The Court held that "as currently envisaged by India, the issue of drawdown flushing at the [Kishenganga dam] would in all probability not comply with the flow restrictions of Paragraph 15" of Annexure D of the Treaty. It "identified at least one operative provision that prohibits the depletion of Dead Storage for drawdown flushing" and "[could] not accept that a category of 'maintenance purposes' nowhere specified in the Treaty can be invoked to free a party from restrictions that are explicitly laid down.."[ix] Recalling that "flushing is but one of a number of techniques available for sediment control",[x] the Court elaborated "that India's right to generate hydro-electric power on the Western Rivers can meaningfully be exercised without drawdown flushing extends beyond the specifics of the [Kishenganga dam] to other, future, Run-of-River Plants" (emphasis added)

The Kishenganga Award effectively blocks India from benefitting from the determination of the Neutral Expert in the Baghliar difference by restricting all future dam designs. The intransigent Indian position in the current impasse can therefore be seen as a desperate attempt to force issues regarding Kishenganga and Ratle to the Neutral Expert instead of a Court of Arbitration, as the forum of the Neutral Expert is the only place within the Treaty where India can expect a favorable outcome on the drawdown flushing design of its future dams.

The question of which forum – Neutral Expert or Court of Arbitration – was to examine disputes and differences arising from the Treaty was also examined by the Court in the Kishenganga arbitration. The Court had been established by Pakistan referring its unresolved questions as to the design of the Kishenganga project in terms of Article X(4) of the Treaty. India had raised objections to the admissibility of the dispute before the Court, arguing, as it does now, that the Treaty requires all differences first be sent to a Neutral Expert who, only if he determines the matter referred to be outside his competence, may declare such differences disputes and refer them to the Court of Arbitration.

5. No Right to select a Neutral Expert

The Court held that the Treaty ensures the appointment of a Neutral Expert where a Party requests the appointment of the same and noted "it does not serve to impose – for its own sake – an additional procedural hurdle to access a court of arbitration."[xi] The Court further held that nothing in Treaty requires the 23 technical questions listed in Part I of Annexure F be decided by a Neutral Expert rather than a Court of Arbitration; and that a Neutral Expert can only be appointed when a Party so requests, and then too only if the Neutral Expert considers itself competent to hear the difference referred. In the opinion of the Court, recourse to the Neutral Expert was

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expressed throughout the Treaty in permissive – not mandatory – terms. Similarly, the Court could identify no provision in the Treaty that could bar a Court of Arbitration from considering technical questions, noting that one of the Court's umpires is required to be a "highly qualified engineer" and that "nothing would stop the parties from appointing engineers as their Party-appointed arbitrators or as the Chairman of the Court."[xii] The Court rejected India's argument that the matter *had* to be referred to a Neutral Expert first, and observed that India had "consistently maintained in the Commission that no difference [on questions relating to the design of the dam] between the Parties existed" and "cannot now assert that the … Dispute is, in fact, a difference after all."[xiii] India's tactic of denying that their dam designs are in violation of the Treaty ended up working against them.

With light thrown on various provisions of the Treaty by the Court of Arbitration in the Kishengage case, the futility of the Indian position can also be seen: its option to force Pakistan to appear before a Neutral Expert to settle questions related to Kishenganga and Ratle has been thwarted.

6. Understanding the Indian position

The current impasse dates to at least August 2016 when Pakistan formally requested India under the provisions of the Treaty to establish a Court of Arbitration to settle disputes on Kishenganga and Ratle. The Uri attack of September occurred before any Indian response to Pakistan's request. It wasn't until a week after the Uri attack, which India immediately blamed on Pakistan, that Prime Minister Modi made his *blood and water* statement about the Treaty. And it was as late as 4 October 2017 that India formally responded by requesting a Neutral Expert be appointed instead of a Court of Arbitration. It is unprecedented in Treaty history that both parties invoked the two adjudication forums in this parallel manner.

On 10 November, India criticized the World Bank "for its decision to favor Pakistan"[xiv] in relation to the establishment of the Court of Arbitration. It is important to note that the Bank has a limited role in relation to the Treaty, with the role being mostly procedural. Nevertheless, the Bank was now caught up in the Indo-Pak transboundary political rhetoric.

While accusations and denials were being traded about Uri on 15 November, at a political rally on the banks of the Ravi, Prime Minister Modi declared he would not let a drop of the waters of Ravi flow to Pakistan. The waters of the Ravi are already allocated to India under the Treaty, and elections for Indian Punjab's Assembly – in which the SAD-BJP alliance lagged behind a resurgent Congress Party – were on the horizon. Three weeks later, , instead of announcing the Neutral Expert and the Court of Arbitration, the President of the World Bank called for a "pause" in the Treaty proceedings as "both processes initiated by the respective countries . . . create[d] a risk of contradictory outcomes that could potentially endanger the Treaty."[xv]

On 8 March 2017, the Indian National Investigation Agency (NIA) released two "Pakistani" suspects it had captured after the Uri attack. It was on the basis of these arrests that India accused Pakistan of masterminding the attack. The NIA found that the boys, who were from Pakistani occupied Kashmir, had accidentally wandered across the borders and were not, in fact, involved in any terror activity. The same week,

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the Congress Party trounced the SAD-BJP alliance by swept the Punjab election and India announced that its Indus Waters Commissioner would resume Treaty talks with Pakistan.

Placed in this context, it can be seen that the Indian Government used the Uri attack as a political distraction to prevent Pakistan from taking its challenges regarding Kishenganga and Ratle to the Court of Arbitration, as mandated by the Treaty. Ratcheting up the rhetoric on the Treaty – cancelling scheduled talks and calling the Bank biased – can also been seen as a failed attempt to rouse political support for the Punjab election.

Simply stated, Pakistan must see through the ruse of India's insistence that only a Neutral Expert can and should be appointed to determine differences related to the Kishenganga and Ratle projects. Pakistan's invocation of Treaty terms to establish an International Court of Arbitration rests on firm foundations. Drawdown flushing is against the terms of the Treaty.

In the current scenario, Pakistan must not be distracted from its negotiation position by Indian political strategy or the Bank's response to it. The World Bank already has considerable investments – and influence – in Pakistan, which should not be allowed to influence Pakistan's position. The Bank has a limited procedural role in the Treaty and by keeping that role limited in future bilateral talks, Pakistan can reduce the risk of the Bank employing its influence to determine the course or outcome of future decisions of the Commission.

References

[i] Identified in the Treaty as the Indus, Chenab and Jhelum rivers

[ii] "India rejects all four options presented by WB on dams issue" The Nation (26/09/2016) available at http://nation.com.pk/national/26-Sep-2017/india-rejects-all-4-options-presented-by-wb-on-dams-issue. The four options were (i) Expert Panel to be decided by the Parties along with Terms of Reference; (ii) merge the Neutral Expert into the Court of Arbitration with a person who qualifies to be a Neutral Expert; (iii) activate both forums and divide the work between the Neutral Expert and Court of Arbitration; and (iv) activate both forums and stagger their sequence by drawing lots.

[iii] Salman, M.A. Salman, "The Baglihar Difference and its resolution process - a triumph for the Indus Waters Treaty?", Water Policy 10 (2008) 105-107, at p. 111.

[iv] International Court of Arbitration in its Interim Award in the Kishenganga Arbitration (18 February 2013) at para 470, available at: https://www.pcacases.com/web/sendAttach/1681

[v] "Criterion (a) states that the works shall not be capable of raising artificially the water level in the operating pool above the full pondage level specified in the design. Pakistan alleged that the Baglihar plant did not meet this requirement. Criterion (c) requires the maximum pondage in the operating pool not to exceed twice the pondage required for firm power. In this connection, Pakistan claimed that the Baglihar pondage exceeded twice the pondage required for firm power. Criterion (e) states that if the conditions at the sight of the plant make a gated spillway necessary, the bottom level of the gates in normal closed position shall be located at the highest level consistent with sound and economical design. Pakistan claimed, with regard to this criterion, that the Baglihar plant design was not based on correct, rational and realistic estimates of maximum flood discharge at the site. Criterion (f) requires that the intakes for the turbines shall be located at the highest level consistent with satisfactory and economical construction and operation of the plant as a run-of-river plant. Pakistan considered that the intake for the turbines was not located at the highest level as this criterion mandates." – Salman, Ibid., at p. 111.

[vi] Ijaz Hussain, "Indus Waters Treaty: Political and Legal Dimensions" (Oxford University Press, Karachi, 2017), at p. 306.

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[vii] Kishenganga Interim Award, at para 470.
[viii] Kishenganga Interim Award, at para 495.
[ix] Kishenganga Interim Award, at para 515.
[x] Kishenganga Interim Award, at para 517.
[xi] Kishenganga Interim Award, at para 481.
[xii] Kishenganga Interim Award, at para 486.
[xiii] Kishenganga Interim Award, at para 481.
[xiv] "India slams World Bank decision on Indus Treaty", The Hindu (10/11/206) available at http://www.thehindu.com/news/India-slams-World-Bank-decision-on-Indus-Treaty/article16442829.ece
[xv] "World Bank pauses dam arbitration to 'protect Indus Waters Treaty'", Dawn (13/12/2017) available at https://www.dawn.com/news/1302087

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