“INDUS WATERS TREATY, 1960- A LEGAL CONTROVERSY”

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Abstract

The Indus Waters Basin, divided between Pakistan and India, continues to be a source of tension between the two unaligned neighbors. As successful as the Indus Waters Treaty, 1960 has been in providing both Pakistan and India with a workable solution to the issue of the Indus waters, it is hard not to accept the legal dilemmas and restrictions that surround it. According to the United Nations, both Pakistan and India are facing acute water stress, making the issue all the more pressing for both countries. The "pause" on the dispute resolution mechanism of the Treaty by the World Bank, for almost six years, has caused irreparable damage to Pakistan. It is time that the way forward is sought, so that the Treaty is allowed to remain functional in all its aspects.

Keywords: Indus Waters Treaty, World Bank, Kishenganga, Ratle, Neutral Expert, Court of Arbitration, Pakistan, India

I) Introduction

South Asia, in particular Pakistan and India, have been mired in legal and political disputes since the partition of the Indian subcontinent in 1947. The desultory and hasty withdrawal of the British government from the subcontinent led to a number of issues remaining unaddressed and unresolved between the two nascent states.[1] Partition of the subcontinent had to be carried out in a record period of seventy-three days.[2] One issue which was neglected and remained unresolved was the fate of the Indus Waters Basin.

Pakistan and India are both agricultural countries. This means that it is in the interest of both the countries to have a reliable irrigation system in place to ensure the livelihood of millions across both borders. Despite this mutual interest, unabating hostility on both sides of the border, between the newly divided populations and the governments led to a dysfunctional and stagnant situation with regards to the waters of the Indus.[3]

Thirteen years after the partition of the Indian subcontinent, the Indus Waters Treaty, 1960 (the "Treaty") was signed, with the World Bank acting as a broker. The backdrop of this Treaty included more than a decade of hostility and mistrust between both countries amidst multiple other disputes that erupted following the creation of Pakistan and India.[4] However, in

[1] H. G. H., "The British Withdrawal from India", *The World Today*, Vol. 3, No. 3, March 1947, Pg. 120-124.

On 20 February an announcement was made regarding the British government's intentions to transfer power in India, the crucial passage of which was:

> "*His Majesty's Government desire to hand over their responsibility to authorities established by a constitution approved by all parties in India in accordance with the Cabinet Mission's Plan, but unfortunately there is at present no clear prospect that such a constitution and such authorities will emerge. The present state of uncertainty is fraught with danger and cannot be indefinitely prolonged. His Majesty's Government wish to make it clear that it is their definite intention to take the necessary steps to effect the transference of power into responsible Indian hands by a date not later than June.*"

There was no doubt amongst leaders of both the Muslim League and the Indian National Congress that more time than that which was being allocated to transfer power was needed to ensure not only a smooth transition to both states that would be created but also to prevent the loss of life that would ensue if adequate logistical and long-term policy dilemmas were not addressed prior to the partition.

[2] C. Ryan Perkins, "1947 Partition of India & Pakistan", The 1947 Partition Archive- Survivors and their Memories, retrieved from <https://exhibits.stanford.edu/1947-partition/about/1947-partition-of-india-pakistan>

[3] Henry Vincent Hodson, "The Great Divide: Britian-India-Pakistan", Hutchinson, 1969, Pg. 370.

Owing to the rising tensions on both sides of the border, an agreement known as the "Standstill Agreement" was concluded between Pakistan and India on December 10, 1947. This agreement was to maintain the status quo until March 31, 1948, giving both Pakistan and India time to formulate a more detailed plan regarding the distribution of the waters. However on April 1, 1948, India discontinued the delivery of water from the Ferozepur headworks to Dipalpur Canal, escalating the mounting tensions.

[4] Manjiri N. Kamat, Border Incidents, "Internal Disorder and the Nizam's Claim for an Independent Hyderabad," in Ernst, Waltrund and Pati, Biswamoy, eds., India's Princely States: People, Princes and Colonialism, London, 2007.

the interest of peace and economic development in South Asia, a Treaty was signed, which is now hailed as one of the most important and effective water-sharing arrangements ever made.[5]

The water of the Indus Basin was divided between Pakistan and India according to Articles II and III of the Treaty. According to Article II, India has been given the waters of the Eastern Rivers, which includes the Sutlej, Beas, and Ravi. According to Article III, Pakistan has been given the waters of the Western Rivers, which includes the Indus, Jhelum, and Chenab. With regards to the waters of the other country, both countries were "under an obligation to let flow"[6] the waters of the rivers designated to the neighboring country.

As successful as the Treaty has been in providing both Pakistan and India with a workable solution to the issue of the Indus waters, it is hard not to accept certain legal dilemmas and restrictions that still encompass it. Since 1960, the Treaty has been invoked by both countries to ensure the compliance of the other.[7]

II) Kishenganga and Ratle Disputes

Kishenganga

India first formally informed Pakistan of its plan to build a reservoir dam with a hydroelectric plant on the Kishenganga site in June 1994. Pakistan objected to this initial proposal on several grounds, including the impermissible diversion of a river, its prejudicial effect on Pakistan's planned Neelum Jhelum Plant further downstream, the lack of complete information on the project, and the breach of several design parameters under the Treaty.

Several years later, in 1999, India informed Pakistan that the Kishenganga Storage Work was "likely to undergo some minor modifications," but provided no further details. In 2002, Pakistan discovered, through independent channels, that India was conducting exploratory work at the site and initiated discussions at the Permanent Indus Commission ("PIC") level. With little progress having been made, Pakistan notified the India Commissioner for Indus Waters ("ICIW") of the existence of a "dispute" in February 2006, the ripeness of which India contested.

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[5] The World Bank, "Fact Sheet: The Indus Waters Treaty 1960 and the Role of the World Bank," 11 June 2018.

> "Seen as one of the most successful international treaties, it has survived frequent tensions, including conflict, and has provided a framework for irrigation and hydropower development for more than half a century."

[6] Indus Waters Treaty 1960, Article II(2) & III(2).

[7] Alok Bansal, "Baglihar and Kishanganga: Problems of Trust", Institute of Peace and Conflict Studies, 13 June 2005, retrieved from <http://www.ipcs.org/comm_select.php?articleNo=1762>

Moreover, details of the new Run-of-River Kishenganga Hydroelectric Plant were not revealed by the ICIW until June 2006. In August 2006, Pakistan raised objections to various features of the new design under Annexure D of the Treaty, and India's proposed diversion of the Kishenganga River. India failed to provide any answer until May 2007, when it rejected all of Pakistan's objections. Following in-depth but ultimately fruitless discussions, the Commissioners failed to reach a consensus over the course of the following year. In March 2009, Pakistan announced that no further purpose would be served by additional discussions at the PIC level, and notified the ICIW and the Government of India that certain "disputes" had arisen. Pakistan sought the empanelment of a Court of Arbitration under Article IX of the Treaty. In its Request for Arbitration, Pakistan raised two threshold questions:

a. Whether India's proposed diversion of the Neelum River breached the Treaty;
b. Whether India was allowed to deplete the Kishenganga Hydroelectric Power Plant's reservoir below Dead Storage Level.

The remaining four questions about the design (freeboard; Pondage calculation and placement of power intakes; outlet design and placement; and the type and placement of the spillways) were set aside for subsequent resolution.

Ratle

The legal and technical Disputes over the Ratle Hydroelectric Power Plant largely parallel those regarding the Kishenganga. India first provided Pakistan with the technical information about the design and the hydrological data regarding Ratle, pursuant to Paragraph 9 of Annexure D of the Treaty, in August 2012. On November 26, 2012, as per Paragraph 10 of Annexure D, the Pakistan Commissioner for Indus Waters ("PCIW") responded that the design of the Plant does not conform to Annexure D of the Treaty and accordingly Pakistan objects to the design of the Plant.

Subsequently, and parallel to the discussion of the Kishenganga's design, Pakistan's objections to the Ratle's design were discussed in each of the 108th to 111th PIC Meetings held over a two-year period from March 2013 to February 2015. However, the parties failed to reach a resolution. Although the ICIW protested early on that the PCIW was "ready to reiterate . . . legal views" without providing technical arguments, the PCIW lodged specific objections to the Ratle design and framed Pakistan's objections in terms of the relevant Treaty provisions both at the 108th PIC Meeting and in subsequent communications.

Following up on previous exchanges and the discussion at the 108th PIC Meeting, the ICIW wrote to the PCIW on September 11, 2013, insisting that India was in compliance with the Treaty. After expressing satisfaction over certain agreements reached at the PIC Meeting (e.g., design flood), the ICIW addressed the remaining points of disagreement, including Pondage, and insisted that Ratle complied with the Treaty.

After presenting the ICIW with copies of Pakistan's technical specifications for an alternative design for Ratle and stressing that India had failed to provide technically substantiated replies following the PIC Meetings and epistolary exchanges, the PCIW submitted that "differences ha[d] arisen concerning the provision of excessive freeboard,

excessive Pondage, deep orifice spillways, and intakes, and the Commission ha[d] become unable to reach a resolution or settlement." This was rejected by the ICIW, who insisted that "the issue of Pondage may have been under discussion for last 10 years, however, now the guidelines by the third party/Neutral Expert in this regard are available to help achieve convergence." The ICIW stated that no "difference has arisen" because the "configuration of Ratle given by Pakistan's side needs to be examined and further discussed."

Creation of Disputes

After years of discussion and debate within the PIC, the Parties identified seven disagreements over various design features of Kishenganga and Ratle. In July 2015, Pakistan invited India to jointly appoint a Neutral Expert to address these issues, but India rejected the invitation the following month. In the meanwhile, on February 25, 2016, the PCIW observed that "[i]t has become apparent from the correspondence since July 24, 2015, that the issues over the Kishenganga and Ratle HEPs are substantial, if not predominantly legal in nature".

The PCIW, noting India's prior rejection of the invitation to appoint a Neutral Expert, accordingly provided formal notice to the ICIW of Pakistan's intention to seek the empanelment of a Court of Arbitration.

The ICIW rejected Pakistan's request for the empanelment of a Court. Although India insisted that the seven issues could only be taken to a Neutral Expert, it did not propose the appointment of a Neutral Expert to resolve them. In the face of India's intransigence, Pakistan proceeded to fulfill the requirements under the Treaty for the institution of arbitral proceedings and the appointment of a Court.

It was only on August 11, 2016, after the requirements of Article IX(4) of the Treaty had been satisfied and Pakistan's initiation of arbitration before a Court was imminent, that the ICIW for the first time acknowledged the need for the resolution of the seven points of disagreement. The ICIW in his letter of August 11, 2016, notified Pakistan "under paragraph 5(a) of Part 2 of Annexure F" of his "inten[t]" to seek the appointment of a Neutral Expert to decide the seven points of disagreement over the Kishenganga and Ratle HEPs."

III) Dispute Resolution Mechanism under the Treaty

The dispute resolution mechanism provided in the Treaty requires in-depth consideration owing to the convoluted nature of the same. Article IX of the Treaty, titled, "Settlement of Differences and Disputes," lays down the mechanism for resolving issues that arise between the two countries, regarding the waters of the Indus.

Article IX establishes a graduating structure for the settlement of disputes, centered initially on the PIC and then proceeding to third-party adjudication, in the event that the Commission and other forms of negotiation fail. It is based on three concepts: "questions", "differences" and "disputes."

Article IX draws distinctions among three types of issues: a "question," a "difference," and a "dispute."

Question

A "question" is anything that "*arises between the Parties concerning the interpretation or application of this Treaty or the existence of any fact which, if established, might constitute a breach of this Treaty* […]"[8] Thus, a question can be of either a legal or technical nature.

Difference

A "difference" is any "question" on which the PIC,[9] does not reach an agreement.[10] Under the Treaty, certain types of "differences" are capable of resolution by a Neutral Expert. Specifically, to refer a "difference" to a Neutral Expert for resolution, two requirements must be met: a subject matter requirement and a procedural requirement.[11]

As to the subject matter, a Permanent Indus Commissioner must be of the opinion that the "difference" falls within Part 1 of Annexure F of the Treaty. Annexure F provides a list of twenty-three enumerated questions that can be resolved by a Neutral Expert. Second, there is a procedural requirement that a Permanent Indus Commissioner must make a request that the

[8] Indus Waters Treaty 1960, Article IX(1).

[9] Salman M. A. Salman & Kishor Uprety, "Conflict and Cooperation on South Asia's International Rivers: A Legal Perspective", World Bank Publications, Business & Economics, 2002, Pg. 52-54.

> "*A Permanent Indus Commission consisting of two Commissioners (one appointed by India and another by Pakistan) was to establish and maintain cooperative arrangements for the implementation of the Indus Treaty. The commission was to promote cooperation between the parties in the development of the waters of the rivers, and in particular to study matters referred to it to help resolve questions concerning the interpretation or application of the Treaty, and to make tours of inspection. It may be noted that the Indus Commission was inspired by the International Joint Commission established by the United States and Canada. The Commissioner, unless either government decides to take up any particular directly with the other government, is the representative of his government for all matters arising out of the Treaty and serves as the regular channel of communication on all matters relating to the implementation of the Treaty.*"

[10] Indus Waters Treaty 1960, Article IX(2).

[11] Indus Waters Treaty 1960, Article IX(2)(a).

difference be dealt with by a Neutral Expert in accordance with Part 2 of Annexure F. This point has also been clarified by the tribunal in the Kishenganga arbitration.[12]

Dispute

Under Paragraph (2)(b) of Article IX, a "dispute" is defined as any difference that (1) "*does not come within the provisions of Paragraph (2)(a)*" or (2) that the Neutral Expert determines does not fall within the twenty-three enumerated technical questions in Part 1 of Annexure F.

A "dispute" is defined by default in two ways. First, a "dispute" exists whenever the requirement of Paragraph 2 (a) have not been satisfied, meaning either that a Commissioner has not opined that the disagreement falls within the technical issues listed in Part 1 of Annexure F or the Commission has not made an actual request to the appropriate authority to appoint a Neutral Expert in compliance with Paragraph 5(c) of Annexure F. If either of these requirements has not been fulfilled, then Paragraph 2(a), relating to the appointment of a Neutral Expert, does not apply and the difference "should be treated as a dispute;" a "dispute will be deemed to have arisen which shall be settled by a Court of Arbitration" in accordance with the provisions of Paragraphs (3), (4) and (5) of Article IX."[13] As the tribunal in Kishenganga explained,

> "*Only an actual request for the appointment of an expert would activate the neutral expert process and preclude such a difference from submission to a court of arbitration.*"[14]

Prior to such an actual request for the appointment of a Neutral Expert, any difference can be treated by either country as a dispute and be the basis for a request for the establishment of a Court of Arbitration in accordance with Paragraphs (3), (4) and (5) of Article IX. By definition, disputes are resolved exclusively by a Court of Arbitration, not a Neutral Expert, and can concern either technical or legal issues.

Second, a "dispute" can arise even after a Neutral Expert has been appointed. Paragraph 7 of Annexure F of the Treaty requires the Neutral Expert to decide, where both countries disagree, whether or not the difference falls within Part 1 of Annexure F, meaning that it is one of the technical questions listed therein. As the tribunal in Kishenganga stated, Paragraph 7

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[12] "Indus Waters Kishenganga Arbitration", Pakistan v India, Partial Award, Permanent Court of Arbitration [PCA], ICGJ 476 (PCA 2013), 18th February 2013, ¶ 480.

The tribunal in the Kishenganga arbitration clarified that the Commissioner must make an "actual request" to the appropriate authority for appointment of a Neutral Expert in compliance with Paragraph 5 (c) of Annexure F. Where a joint appointment by the Parties is not possible, the appropriate authority to which Paragraph 5(c) request must be directed is the World Bank.

[13] Indus Waters Treaty 1960, Article IX(2)(b).

[14] Indus Waters Kishenganga (Pakistan v India), Partial Award, ¶ 488.

"*direct*[s] *a neutral expert to evaluate his competence against the list of technical issues* […]." Furthermore, "*a neutral expert is competent only with respect to technical questions identified in Annexure F* […]."[15] If the Neutral Expert decides that any difference (or portion thereof) is not within the technical questions in Part 1 of Annexure F or is not within his competence, and informs the Indus Waters Commission that the difference should be treated as a dispute, "*then a dispute will be deemed to have arisen*" and it shall be settled in accordance with the Court of Arbitration process.[16]

IV) Competing Requests & Pause by the World Bank

We have seen how there is a demarcation between *differences* and *disputes* given in the Treaty and how differently they are dealt with. The issue that arises is how the process flows and whether the dispute resolution mechanism provided in the Treaty is sequential in nature or not, meaning whether the Neutral Expert has to be approached prior to the Court of Arbitration.

This issue became crucial in 2016, when Pakistan made a Request for Arbitration under Article IX(5) and Annexure G of the Treaty. Within a month, pursuant to Article IX(2)(a) and Annexure F of the Treaty, the ICIW in the PIC, submitted a request to Pakistan and India that they appoint a Neutral Expert to deal with these same matters.

The "Request for Arbitration" was transmitted to and received by India on August 19, 2016. That is the date on which the proceeding before the Court of Arbitration was instituted in accordance with paragraph 3 of Annexure G of the Treaty.

The "Request for Neutral Expert" was transmitted to and received by India and Pakistan on September 6, 2016. That is the date on which the proceeding before the Neutral Expert was instituted in accordance with paragraph 4 of Annexure F of the Treaty. It should be noted that this date comes after the submission of the Request for Arbitration by Pakistan.

The Bank's initial response to these two separate requests was to carry out its assigned role under both Annexure F (for a Neutral Expert) and Annexure G (for the Court of Arbitration) of the Treaty. However, after much back and forth in the selection of the candidates for the Neutral Expert and the Court of Arbitration, on December 12, 2016, the Bank's President wrote to Pakistan and stated,

> "[A]*fter much thought and deliberation, I have decided to pause the process of appointing the Chairman of the Court of Arbitration and the Neutral Expert. I take this step in the interest of preserving the Treaty and in order to provide a window to further explore whether India and Pakistan can agree on a way forward for resolving the*

[15] Indus Waters Kishenganga (Pakistan v India), Partial Award, ¶ 487.

[16] Indus Waters Treaty 1960, Article IX(2)(b). *See also*, Paragraph 7 of Annexure F.

matter relating to the two hydroelectric power plants, in a manner that is satisfactory to both countries."[17]

The dispute resolution mechanism of the Treaty remained "paused" for more than five years, which denied Pakistan access to redressal mechanisms under the Treaty. In the meanwhile India was allowed to complete and inaugurate the Kishenganga Hydroelectric Power Project.

In April 2022, the World Bank announced that, after consultation with both countries, it had decided to "*resume the two separate processes requested by India and Pakistan in relation to the Kishenganga and Ratle hydroelectric power plants.*"[18]

V) Conclusion

The following two issues have arisen and need clarity, regarding the interpretation of the Treaty:

a) Whether the dispute resolution mechanism provided in the Treaty is sequential in nature?

b) How should the Treaty operate and what procedure should be followed by the Parties when the Word Bank is faced with two competing requests, one for the empanelment of the Court and one for the appointment of the Neutral Expert, for the resolution of the same dispute?

a) Sequential Process

The point of contention between Pakistan and India remains as to whether the dispute resolution mechanism provided in the Treaty is sequential in nature, meaning whether one process needs to follow the other, or can a Request for a Court of Arbitration be made directly.

The structure set out in the Treaty indicates that there is no requirement that a "difference" be submitted to a Neutral Expert under Article IX(2)(a) before a party requests the establishment of the Court of Arbitration to settle the dispute under Article IX(5). This is clear not only because there is nothing in Article IX that makes submission to a Neutral Expert a mandatory precondition to going to a Court of Arbitration, but the clear words of Article

[17] Letter from Jim Yong Kim (World Bank President) to Mohammad Ishaq Dar (Minister for Finance, Revenue and Economic Affairs, Statistics and Privatization of Pakistan), dated December 12, 2016.

[18] The World Bank Group, "World Bank Resumes Processes Under the Indus Waters Treaty", April 6, 2022, retrieved from <https://www.worldbank.org/en/news/press-release/2022/04/06/world-bank-resumes-processes-under-indus-waters-treaty#:~:text=On%20December%2012%2C%202016%2C%20the,to%20seek%20an%20amicable%20resolution.>

IX(6) provide that Articles IX(3) - (5) shall not apply where a matter is being "dealt with" by a Neutral Expert after a request has been made. The necessary corollary of this is that any "difference" not being dealt with by a Neutral Expert at a particular point in time can be a "dispute" subject to the procedures set out in Articles IX(3) - (5), including submission to the Court of Arbitration.

Consideration of Article IX in the Kishenganga case

This conclusion is fortified by the consideration of similar issues by the Court of Arbitration in the first Kishenganga case. The Kishenganga Court examined Article IX in its Partial Award of February 18, 2013 ("the Partial Award"). A number of its observations are relevant here.

In the Partial Award, the Kishenganga Court dealt with India's objection that one of the "disputes" submitted by Pakistan ("the Second Dispute") should first have been referred to a Neutral Expert.[19] The failure to do so was said by India to prevent a "dispute" from arising, such that Pakistan had failed to follow the procedure set out in Article IX of the Treaty. Consideration of the Second Dispute by the Kishenganga Court was therefore premature and the matter inadmissible.

Further, said India, the Second Dispute was a technical question that fell within Part 1 of Annexure F, as such, it should be classified as a "difference" and resolved by the Neutral Expert alone.[20] The Kishenganga Court rejected both of India's objections to the admissibility of the Second Dispute.

In dealing with India's first objection, the Kishenganga Court first set out in broad terms its conception of Article IX:

> "*Under Article IX, certain technical differences between the Parties, identified in a defined list in Annexure F of the Treaty, may be referred to a neutral expert, who must be a highly qualified engineer. In general, such technical questions relate either to the application of the Treaty to particular factual circumstances or to the compliance of individual projects with the terms of the Treaty. A matter may also become a 'dispute' as defined in Article IX, in which case it may be referred to a court of arbitration, unless it is resolved at the inter-governmental level. Once appointed or constituted, neutral experts and courts of arbitration are both empowered to decide upon their own*

[19] The Second Dispute was "[w]hether under the Treaty, India may deplete or bring the reservoir level of a run-of river Plant below Dead Storage Level in any circumstances except in case of unforeseen emergency", Partial Award, ¶ 263.

[20] Indus Waters Kishenganga (Pakistan v India), Partial Award, ¶ 272.

competence, the former pursuant to Paragraph 7 of Annexure F and the latter pursuant to Paragraph 16 of Annexure G."[21]

The Kishenganga Court then considered how Article IX functioned in practice. It first rejected India's submission that reference of the Second Dispute to the Neutral Expert was mandatory:

"*In the Court's view, the conjunction within Article IX(2)(a) of both references manifests the Parties' intention for the Commissioners to exercise a dual role under that Article, both as the initiators of the neutral expert process and a part of a mechanism that requires recourse to a neutral expert in certain circumstances. Article IX(2)(a) thus requires that a difference be referred to a neutral expert if either Commissioner believes that it relates to one of the identified technical matters and prefers that it be resolved by a neutral expert. This requirement only becomes effective, however, if a request for the appointment of a neutral expert is actually made. It is insufficient for a Commissioner merely to express the view that a difference would, at some point, be an appropriate matter for a neutral expert.*"[22]

Put another way, the Kishenganga Court held that reference of a "difference" to a Neutral Expert was not a mandatory precondition to seisen of a Court of Arbitration within the meaning of Article IX(5). A previous request by a Commissioner is required to preclude the Court of Arbitration. Were the matter otherwise then, as the Court noted, "a Commissioner could express the view that a difference fell within Annexure F, thereby unequivocally foreclosing access to a court of arbitration, and yet decline to request a neutral expert to resolve the difference."[23] The result was that:

"*Article IX(2)(a) ensures the appointment of a neutral expert where a Party actually requests the appointment of the same. It does not serve to impose – for its own sake – an additional procedural hurdle to access to a court of arbitration.*"[24]

A fair reading of Article IX of the Treaty combined with the previous determinations by the Kishenganga Court clearly indicates that Pakistan was and is not required to refer any issue – whether legal or technical – to a Neutral Expert prior to submitting the Request for Arbitration and thus instituting the proceeding before the Court of Arbitration. What this also means is that the dispute resolution mechanism provided in the Treaty is not sequential in nature, rather it is dependent on the nature of the issue being determined between the parties.

What is more relevant to the existing situation between Pakistan and India, and what needs to be the focus of any conversation between the two countries, is the date at which the two countries made their respective requests for the Court of Arbitration and the Neutral Expert. Under international law, nothing occurring after the seisen of an international court or tribunal (such as the Court of Arbitration) can affect the jurisdiction of that court or tribunal.

[21] Indus Waters Kishenganga (Pakistan v India), Partial Award, ¶ 474.

[22] Indus Waters Kishenganga (Pakistan v India), Partial Award, ¶ 478 (emphasis added).

[23] Indus Waters Kishenganga (Pakistan v India), Partial Award, ¶ 479.

[24] Indus Waters Kishenganga (Pakistan v India), Partial Award, ¶ 481.

Thus, the fact that Pakistan's Request for Arbitration was made earlier in time is of relevance here. The logic behind this position was described by the International Court of Justice in the Croatian Genocide case:

> "*It is easy to see why this rule exists.* […] *If at the date of filing of an application all the conditions necessary for the Court to have jurisdiction were fulfilled, it would be unacceptable for that jurisdiction to cease to exist as the result of a subsequent event. In the first place, the result could be an unwarranted difference in treatment between different applicants or even with respect to the same applicant, depending on the degree of rapidity with which the Court was able to examine the cases brought before it. Further, a respondent could deliberately place itself beyond the jurisdiction of the Court by bringing about an event or act, after filing of an application, as a result of which the conditions for the jurisdiction of the Court were no longer satisfied – for example, by denouncing the treaty containing the compromissory clause. That is why the removal, after an application has been filed, of an element on which the Court's jurisdiction is dependent does not and cannot have any retroactive effect. What is at stake is legal certainty, respect for the principle of equality and the right of a State which has properly seised the Court to see its claims decided, when it has taken all the necessary precautions to submit the act instituting proceedings in time.*"[25]

This reasoning applies to objections to admissibility: "[t]he critical date for determining the admissibility of an application is the date on which it is filed."[26] In the *Lockerbie* case, the United Kingdom objected to Libya's claims on the basis that, after they had been filed, intervening resolutions of the UN Security Council rendered these claims inadmissible. The International Court of Justice disagreed:

> "*The date, 3 March 1992, on which Libya filed its Application, is in fact the only relevant date for determining the admissibility of the Application. Security Council resolutions 748 (1992) and 883 (1993) cannot be taken into consideration in this regard since they were adopted at a later date. […] In light of the foregoing, the Court concludes that the objection to admissibility derived by the United Kingdom from Security Council resolutions 748 (1992) and 883 (1993) must be rejected, and that Libya's application is admissible.*"[27]

b) *Competing Requests*

The dispute resolution mechanism provided in the Treaty is silent on the treatment of two simultaneous requests for the settlement of the same dispute through two different fora.

The preamble to the Treaty, to which the World Bank is also a signatory, provides "for the settlement, in a cooperative spirit" of all questions that may arise regarding the

[25] Croatian Genocide [2008] ICJ Rep 412, ¶ 80.

[26] Border and Transborder Armed Actions (Nicaragua v Honduras), Preliminary Objections [1988] ICJ Rep 69, ¶ 43.

[27] Lockerbie [1998] ICJ Rep 9, ¶¶ 44–45.

interpretation or application of the Treaty. The question of how the dispute resolution mechanism of the Treaty will function in this unique situation is a matter of Treaty interpretation and hence, can only be decided by a Court of Arbitration.

The Treaty provides for a seven-member Court of Arbitration, consisting of two Party-appointed arbitrators from each state and three "Umpires."[28] Under the Treaty, if the Parties are unable to agree either on the selection of the Umpires or on the selection of appointing authorities to select the Umpires, and if one of the Parties then fails to participate in the drawing of lots to designate the appointing authorities, the President of the World Bank is mandated to appoint a person to draw lots to select from amongst the appointing authorities identified in the Appendix to Annexure G of the Treaty.

Moreover, Paragraph 11 of Annexure G of the Treaty specifically provides that the Court of Arbitration can operate with five members. Paragraph 11 provides

> "*Unless the Parties otherwise agree, the Court shall be competent to transact business only when all the three umpires and at least two arbitrators are present.*"

Thus, India's failure to appoint its arbitrators to the Court of Arbitration should not block the empanelment and/or functioning of the Court. Once Pakistan had initiated the process of the empanelment of a Court of Arbitration in 2016 and appointed its arbitrators, it has the right to secure the appointment of a five-member Court of Arbitration even if India refuses to take any action. Relying on Paragraph 11 of Annexure G of the Treaty, the process for the empanelment of the Court of Arbitration can continue without the involvement of India.

Furthermore, the Bank had previously urged Pakistan to accept the appointment of a Neutral Expert and to leave it up to the Neutral Expert to decide whether the questions raised by Pakistan and India fall within his jurisdiction. This would, in essence, have the Court of Arbitration act as an appellate body, a role that it does not enjoy. International treaties rarely mandate a sequential two-step dispute resolution process and the Treaty does not provide one.

The Kishenganga Court reaffirmed that the Neutral Expert does not have to precede the Court of Arbitration. During the Kishenganga arbitration, India argued that the Treaty requires a Neutral Expert to make the initial determination of whether a matter arising between the Parties is a technical difference that he/she can resolve or a dispute to be referred to a Court. The Court dismissed India's arguments and stated that:

> "[...]*the purpose of Article IX is to provide for the settlement, "in a cooperative spirit," of differences and disputes through the various specified procedures. In keeping with that goal, Article IX(2)(a) ensures the appointment of a neutral expert where a Party actually requests the appointment of the same. It does not serve to impose—for its own sake—an additional procedural hurdle to access to a court of arbitration.*"[29]

> "[...] *nothing in the Treaty requires that a technical question listed in Part 1 of Annexure F be decided by a neutral expert rather than a court of arbitration—except*

[28] Indus Waters Treaty 1960, Annexure G (Article IX (5)) 4(b).

[29] Indus Waters Kishenganga (Pakistan v India), Partial Award, ¶ 481.

where a Party so requests (and then only if the neutral expert considers himself competent)."[30]

"[...] *recourse to a neutral expert is expressed throughout the Treaty in permissive—not mandatory—terms. Paragraph 1 of Annexure F, which sets forth the questions for which a neutral expert is competent, states that a "Commissioner may . . . refer to a Neutral Expert any of the following questions." But nowhere does the Treaty stipulate that only a neutral expert may consider such matters. Instead, Paragraph 2 of Annexure F expressly limits the competence of a neutral expert over technical questions that are joined with a claim for financial compensation, while Paragraph 13 requires that any matter not within his competence that may arise from a neutral expert's decision be resolved as a dispute under Article IX. It is therefore apparent that the Treaty contemplates that technical matters can be dealt with by mechanisms other than that of the neutral expert.*"[31]

Since the resolution of this issue requires the interpretation of the Treaty, it necessitates the empanelment of a Court of Arbitration. Only a Court of Arbitration can provide the appropriate direction on the way out of the procedural dichotomy that the Parties are currently faced with.

It is imperative that this deadlock between the two countries is resolved and the Treaty is allowed to function in all its aspects. The Treaty is an important legal document, not just for Pakistan and India but also for the international community. It is an unprecedented exercise in diplomatic and legal history, examining the complex collaborations between two States that are hostile to each other, for ineradicable reasons deep in their history.

While cooperating over the Indus Waters Basin, the relationship between Pakistan and India has played an important role in the development of the international law of non-navigational uses of transboundary watercourses. In addition, a major international organization, the World Bank, has established a pattern of collaboration between the two States that has survived unabating hostilities, including wars, and continues to be adaptable through many crises.

VI) Recommendations

The recent announcement by the World Bank of lifting the pause on the dispute resolution mechanism of the Treaty and continuing with the simultaneous processes could result in a complicated legal dilemma. This will especially be the case if the processes from the Neutral Expert and the Court of Arbitration result in conflicting outcomes.

[30] Indus Waters Kishenganga (Pakistan v India), Partial Award, ¶ 484.

[31] Indus Waters Kishenganga (Pakistan v India), Partial Award, ¶ 484.

In light of the history and discussion above, it is recommended that Pakistan should remain steadfast in its request for the appointment of a Court of Arbitration. Having taken that position for the past several years, deviating from it now could be detrimental from a strategic lens. Moreover, from a legal point of view, the Court of Arbitration offers the following advantage over a Neutral Expert:

1. The prevalent procedural issue of how the Treaty will operate when faced with two competing requests for the resolution of the same issue, is a legal question, involving the interpretation of the dispute resolution clause of the Treaty and so can only be resolved by a Court of Arbitration.
2. The question of the proper interpretation of "Pondage" within the meaning of paragraph 8(c) of Annexure D is a legal and technical question within the competence of both a Neutral Expert and the Court of Arbitration. That said, the legal aspects of the question pose difficult questions of treaty interpretation that will require the interpreter to consider the interaction of multiple provisions of Annexure D in light of principles of treaty interpretation and international law.
3. The Court of Arbitration – which will include at least two international lawyers – will be in a far better position to answer this question than the Neutral Expert, who is a single engineer.