

TERMINATION OF THE INDUS WATERS TREATY 1960- AN OPTION FOR INDIA?

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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. Now that the Court of Arbitration has been empanelled, India threatens to terminate the Treaty if Pakistan does not agree to amend it.

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

I) INTRODUCTION

Amid the perpetual political tension between India and Pakistan, the Indus Waters Treaty 1960 (“IWT”) is perhaps the only international instrument which has proactively engaged both the countries in bilateral relationship. In fact, the Treaty has been the most significant confidence building measure between India and Pakistan since 1960. Despite multiple wars and hostilities between the two countries, the treaty remained undisturbed and survived for more than five decades since its conclusion.

Recently, India intimated Pakistan that it would unilaterally revoke the IWT if Pakistan did not agree to enter into negotiations to amend the historic water sharing agreement. This assertion came as a result of the establishment of the Court of Arbitration and its proceedings in the Hague. To understand India’s contention, it is important to understand the dispute resolution mechanism of the Treaty and background to the dispute.

II) DISPUTE RESOLUTION MECHANISM

The dispute resolution process is laid out in Article IX of the Treaty. Article IX establishes a graduating structure for the settlement of disputes, centered initially on the Permanent Indus Commission 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”. A *difference* is dealt with by a Neutral Expert and a *dispute* is brought before the Court of Arbitration.

Since there is a demarcation between *differences* and *disputes* given in the Treaty, they are dealt with differently. 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.

III) BACKGROUND TO THE DISPUTE

The 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 Indian Commissioner in the Permanent Indus Commission 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 19 August 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 6 September 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 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 12 December 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 matter relating to the two hydroelectric power plants, in a manner that is satisfactory to both countries.”¹

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 Kishanganga Hydroelectric Power Project.

In April 2022, the World Bank announced that, *“[i]n the absence of a mutually agreeable solution between the two Parties, the Bank is obliged to find a way forward from amongst the options available to it so as to fulfill its responsibilities under the Treaty. In arriving at this decision, the Bank has carefully considered the Parties’ views. Both Parties have expressed a strong preference for the Bank to respect Treaty-mandated processes and not seek external input.”²* Thus, 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.”³*

¹ 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 12 December 2016.

² Letter from Sandie Okoro (Senior Vice President and Group General Counsel) to Mr. P. Kumar (Secretary, Department of Water Resources, River, India) and Khalid Jawed Khan (Attorney General for Pakistan) dated 31 March 2022.

³ The World Bank Group, “World Bank Resumes Processes Under the Indus Waters Treaty”, 6 April 2022, retrieved from <[IPRI](https://www.worldbank.org/en/news/press-release/2022/04/06/world-bank-resumes-processes-under-indus-waters-treaty#:~:text=On%20December%202016%20the.to%20seek%20an%20amicable%20resolution.>></p>
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The proceedings before the Court of Arbitration began on 27 January 2023, in the Hague, but were boycotted by India. On 25 January 2023, India sent a notice to Pakistan, asking it to agree to modify the Treaty, brokered by the World Bank, to bar third parties from intervening in disputes. India also blamed Pakistan, and now the World Bank, for sabotaging the Treaty, and instituting the concurrent proceedings. India threatened to unilaterally revoke the Treaty if its demands were not met.

IV) TERMINATION OF THE INDUS WATERS TREATY

This brings us to the question of the revocation of the IWT and whether India's threat of unilateral termination holds any weight. Article XII of the Treaty deals with termination and modification of the IWT and states:

“(3) The provisions of this Treaty may from time to time be modified by a duly ratified treaty concluded for that purpose between the two Governments.

(4) The provisions of this Treaty, or the provisions of this Treaty as modified under the provisions of Paragraph (3), shall continue in force until terminated by a duly ratified treaty concluded for that purpose between the two Governments.”

A plain reading of this Article makes it clear that the IWT can only be terminated by another treaty that has to be signed by both parties. The IWT does not provide for any procedure that allows either India or Pakistan to unilaterally revoke the Treaty. The IWT, in its existing form, is of an indefinite duration and will continue to be legally binding until such time as another treaty, terminating the IWT, is drafted, signed and ratified by Pakistan and India.

Moreover, the Vienna Convention on the Law of The Vienna Convention on Law of Treaties 1969 (“VCLT”) provides for the termination or withdrawal from a treaty under international law. Article 54 of VCLT states that the termination of the treaty or the withdrawal of a party from the treaty may take place either in accordance with the provisions of the particular treaty or, at any time, by the consent of all parties after the consultation with the other contracting states. Further Article 56 of the VCLT provides for the ‘Denunciation of or withdrawal from a treaty containing no provisions regarding termination, denunciation or withdrawal’. Article 56, Para 1 states that a treaty which contains no provision regarding its termination and which does not provide for the denunciation or withdrawal is not subject to denunciation or withdrawal unless it is established that the parties intended to admit the possibility of denunciation or withdrawal or a right of denunciation or withdrawal may be implied by the nature of the treaty. Article 56 of the VCLT is inapplicable in the present situation because the IWT does provide for termination by following a particular procedure. In this case Article 54 is applicable, which particularly states that termination will happen in accordance with the provisions contained in the treaty.

In other words, a termination treaty has to be drafted by both states and then ratified by Pakistan and India, to bring the IWT to an end. It would be correct to assert that the IWT is

not regime-specific, but rather state-specific. It will not expire with regime change. It is binding on both the states equally and offers no exit provision. Therefore, so far as the question of IWT is concerned, neither India nor Pakistan can unilaterally revoke it unless it consults with the other party and obtains its consent in the form of an agreement in writing regarding the termination of the treaty.

The obligation to consult and obtain consent of the other parties to the treaty has its origin in the 1871 London Declaration which states that,

“it is an essential principle of the Law of the Nations that no power can liberate itself from the engagement of the treaty, nor modify the stipulation thereof, unless with the consent of the contracting parties by means of an amicable arrangement.”

It is generally believed that a treaty is intended to be of perpetual duration and incapable of unilateral termination, unless, expressly or by implication, it contains a right of unilateral termination or some other provisions for its coming to an end.

In light of the above, it can be successfully argued that the IWT cannot be terminated unilaterally by any party. If any party does so, it would lead to the violation of the principle of *Pacta Sunt Servanda*, meaning “agreements must be kept”, which is a well-accepted customary principle of international law. Therefore, unilaterally terminating it would result in breach and so it would entail the State responsibility of the party which has unilaterally withdrawn from the Treaty. Now, so far as the question of consent of the other party regarding the withdrawal from the treaty is concerned, it is clear that Pakistan has expressly objected to any such move of India regarding the unilateral revocation of the IWT.

In the event that India unilaterally claims to have terminated the IWT, and refuses to abide by it, the effect of that will be that the Treaty will remain valid but India would have violated the Treaty.

Legally, this would give Pakistan recourse to the Court of Arbitration, as provided in Article IX and Annexure G of the IWT. The entire dispute resolution mechanism will have to be followed to bring India to task for violating the Treaty.

However, such a unilateral action by India will have consequences that go beyond the legal realm and will have to be dealt with politically as well.