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A Partial Award has been issued in the Indus Waters Kishenganga Arbitration (Pakistan v. India)

Nudrat Piracha (Samdani & Qureshi) · Friday, March 22nd, 2013

On 19 September 1960, Government of the Republic of India and Government of the Islamic Republic of Pakistan (the “Parties”) signed the Indus Waters Treaty 1960 (the “Treaty”). A dispute dating back to 1988 arose between the Parties in relation to construction of a hydro-electric project (the “KHEP”) by India on Kishenganga/Neelum River, a tributary of Jhelum River. KHEP is designed to generate power by diverting water from a dam site on Kishenganga/Neelum (within Gurez valley, an area of higher elevation) to Bonar Nallah, another tributary of Jhelum (lower in elevation and closely located to Wular Lake) through a system of tunnels, with water powering turbines having a capacity of 330 megawatts.

On May 17, 2010, Pakistan instituted arbitral proceedings against India under Paragraph 2(b) of Annexure G to the Treaty. The Court of Arbitration consisted of seven members, namely; Judge Stephen M. Schwebel (Chairman), Sir Franklin Berman KCMG QC, Professor Howard S. Wheeler FEng, Professor Lucius Caflisch, Professor Jan Paulsson, Judge Bruno Simma, H.E. Judge Peter Tomka (the “Court”). The Permanent Court of Arbitration was to act as Secretariat to the Court.

Two main disputes raised under the Treaty were (a) legality of the construction and operation of an Indian hydro-electric project located in India-administered Jammu and Kashmir (b) permissibility under the Treaty of depletion of reservoirs of certain Indian hydro-electric plants below “Dead Storage Level”.

In relation to issue (a) Pakistan challenged permissibility of the planned diversion by KHEP of the waters of Kishenganga/Neelum into Bonar Nallah on the ground that such diversion would adversely affect, firstly, operation of Neelum-Jhelum Hydro-Electric Project (the “NJHEP”) being built by Pakistan on Kishenganga/Neelum downstream of KHEP and, secondly, the agriculture and environment downstream and that this was not permissible within terms of the Treaty. As regards issue (b) Pakistan argued that India was not permitted under terms of the Treaty to deplete or bring reservoir level of “run-of-river” hydro-electric plants below a level identified as “Dead Storage Level” as this would give India broad control over the flow of the river waters allocated to Pakistan under the Treaty. India while openly declaring its intention to deplete reservoirs for purposes of flushing sediment out of KHEP’s reservoir argued that the same was permissible under terms of the Treaty and that both the design and planned mode of operation of KHEP were fully in conformity with the Treaty.

In June 2011 Pakistan submitted an application for provisional measures, requesting that: (i) India

should cease work on KHEP until such time as the Court renders its award on merits; (ii) India should inform the Court and Pakistan of any actual or imminent developments or steps in relation to Kishenganga project that may have a significant adverse effect upon restoring *status quo ante* or that may in any other way seriously jeopardize Pakistan's rights and interests under the Treaty; (iii) Any steps that India has taken or may take in respect of KHEP are taken at its own risk and without prejudice to the possibility that the Court may in its decision on merits order that works must not be continued or must be modified or dismantled; and (iv) Such further relief as the Court considers to be necessary.

On September 23, 2011, the Court issued an *Order on Interim Measures* holding that while India could continue with the works on Kishenganga project, with the exception of the sub-surface foundations of the dam elaborated in paragraph 151(iv) of the decision on Provisional Measures and that India shall not proceed with the construction of any permanent works on or above the Kishenganga/Neelum riverbed at the Gurez site that may inhibit restoration of the full flow of that river to its natural channel. It was also held that India may utilize the temporary diversion tunnel it is said to have completed at the Gurez site, and may construct and complete temporary cofferdams to permit the operation of the temporary diversion tunnel, such tunnel being provisionally determined to constitute a "temporary by-pass" within the meaning of Article I(15)(b) as it relates to Article III(2) of the Treaty. However, Pakistan and India were required to arrange for periodic joint inspections of the dam site at Gurez in order to monitor the construction of the aforesaid temporary by-passes. The Parties were also required under this Order to submit, by no later than December 19, 2011, a joint report setting forth the areas of agreement and any points of disagreement that may arise between the Parties concerning the implementation of this Order.

On August 31, 2012, the Court concluded a two-week hearing on the merits and on February 18, 2013, rendered a Partial Award (available [here](#)). In its Partial Award, which is final with respect to the matters decided therein, without appeal and binding on the Parties, the Court unanimously decided:

1. KHEP constitutes a Run-of-River Plant under the Treaty, and India may accordingly divert water from the Kishenganga/Neelum River for power generation by KHEP in the manner envisaged. However, when operating KHEP, India is under an obligation to maintain a minimum flow of water in the Kishenganga/Neelum River, at a rate to be determined by the Court in a Final Award.
2. Except in the case of an unforeseen emergency, the Treaty does not permit India's reduction below "Dead Storage Level" of the water level in the reservoirs of Run-of-River Plants located on the rivers allocated to Pakistan under the Treaty. This ruling does not apply to Plants already in operation or under construction (whose designs have been communicated by India and not objected to by Pakistan).

The Final Award shall determine the minimum flow of water India would be required to release in the Kishenganga/Neelum River in accordance with the Terms of the Treaty by the end of 2013.

It is apparent from the Court's decision that India's right to diversion of water has been accepted by the Court with the rider that it is subject to the right of Pakistan to receive a minimum flow of water from India. Pakistan's argument that NJHEP was a then-existing hydro power use has not

been accepted. While not accepting NJHEP as a then-existing hydro power use, the Tribunal has asked Pakistan to provide to the Court data concerning impacts of a range of minimum flows at the KHEP dam in order for the Court to decide upon a just minimum flow volume. Pakistan had anticipated a reduction of 13% annually in average energy projection at NJHEP if a diversion was allowed at Nauseri (from where water is diverted to NJHEP's power station).

This decision has been interpreted by Pakistani authorities as a check on India's violations of the Treaty who intend to build 150 dams of different sizes on the Western rivers and as authoritatively having determined the rights of the Parties. However, in view of the Partial Award it is not immediately apparent what shall become of the requirements of any future projects that Pakistan wishes to undertake once this minimum level has been settled by the Court. In light of the Court's decision it appears that the complex process provided in the Treaty would have to be undertaken every time there is a similar violation to identify the existing use and minimum requirement for Pakistan based upon the guidelines given by the Court in accordance with the provisions of the Treaty. It is pertinent to point out that the Partial Award makes no express mention of any partially completed dams with regards issue (a).

In accordance with the Partial Award it may be observed that the other plants, construction of which is already completed, in operation and those under construction, the designs of which Pakistan failed to raise objection to, shall not be covered by the impact of this Award, so far as the issue of reduction below "Dead Storage Level" is concerned.

In its analysis, the Court emphasized at the outset that its Partial Award does not have any bearing on any territorial claims or rights of the Parties over Jammu and Kashmir. The Court's findings pertain solely to the Parties' rights and obligations with respect to the *use* of waters of the Indus system of rivers, including with respect to use of the waters of those portions of the rivers that flow through disputed territory.

While there are looming concerns as to the possibility of the implementation of the Partial Award, Pakistan feels optimistic that India, as a member of the international community, will undertake efforts not to violate the Award, and that this decision will provide future guidelines for both countries.

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