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The Indus Waters Kishenganga Arbitration -Reviving the Indus Waters Treaty and Arbitration of Interstate Water Disputes

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On 20 December 2013, the final phase in the Indus Waters Kishenganga Arbitration was completed with the rendering of a Final Award by the seven-member Court of Arbitration (“Court”) tasked with resolving the latest water dispute between Pakistan and India.

The Court was constituted in 2010 following a Request for Arbitration submitted by Pakistan under its 1960 Indus Waters Treaty (“Treaty”) with India. This marks the first time the arbitration mechanism provided in the Treaty has been used, as previous disputes between the parties were resolved through negotiations or the appointment of a neutral expert. The Request for Arbitration concerned India’s construction of the Kishenganga Hydro-Electric Project (“KHEP”), which is designed to divert waters from a dam site on the Kishenganga/Neelum River in the Jammug and Kashmir region to another river of the Indus system. Pakistan requested the Court to determine whether this diversion breached India’s obligations under the Treaty, as well as whether India was permitted to deplete or bring the reservoir level of the KHEP below Dead Storage Level by using certain sediment control techniques in any circumstances except in the case of an unforeseen emergency.

The first decision of the Court was rendered in September 2011 following Pakistan’s request for interim measures. In its decision, the Court prohibited India from constructing any permanent works on or above the Kishenganga/Neelum riverbed at the dam site that may inhibit the restoration of the full flow of the river to its natural channel. In February 2013, the Court issued a Partial Award, finding that India was permitted under the Treaty to divert water for the purpose of power generation by the KHEP. This conclusion was based in large part on the Court’s interpretation of Article 15(iii) of the Treaty, which permits India to divert water “to the extent that the then existing Agricultural Use or hydro-electric use by Pakistan on the former Tributary would not be adversely affected”. The Court interpreted the “then existing” uses of Pakistan to be essentially its hydro-electric uses, and particularly the Neelum-Jhelum Hydro-Electric Project (“NJHEP”) in the Neelum Valley. The Court found that the KHEP preceded the NJHEP, and therefore that the NJHEP was not an “existing use” that India was required to take into account at the time the KHEP crystallized. India,

therefore, had priority in right with respect to the use of the waters of the Kishenganga/Neelum River for hydro-electric power generation.

At the same time, however, the Court found that India's right to divert the waters of the Kishenganga/Neelum was not absolute, since "the premise underlying Paragraph 15(iii)—that Pakistan's existing uses are to be taken into account in the operation of India's Plants—remains a guiding principle" (Partial Award, para. 436). In addition to the Treaty, the Court found that relevant principles of customary international law, including principles of international environmental law, also constrained India's right to divert the waters of the Kishenganga/Neelum River. Accordingly, the Court held that India was under an obligation to construct and operate the KHEP in such a way as to maintain a minimum flow of water in the Kishenganga/Neelum River, at a rate to be determined in a subsequent Final Award.

As for the second question submitted by Pakistan, the Court found that India could not employ sediment control techniques at the reservoir of the KHEP to an extent that would entail depletion of the reservoir below Dead Storage Level. In a later decision on India's Request for Clarification or Interpretation of this finding, the Court further clarified that the prohibition on the reduction below Dead Storage Level, except in the case of unforeseen emergency, is of general application.

In their submissions at the final stage of the proceedings, India proposed a minimum flow of 4.25 cumecs, while Pakistan argued that a minimum flow of 80 cumecs was required in order to avoid a significant loss in energy at the NJHEP. The Court noted in the Final Award that in deciding the rate of the minimum flow, it was required to "mitigate adverse effects to Pakistan's agricultural and hydro-electric uses throughout the operation of the KHEP, while preserving India's right to operate the KHEP and maintaining the priority it acquired from having crystallized prior to the NJHEP", and to give due regard to "the customary international law requirements of avoiding or mitigating trans-boundary harm and of reconciling economic development with the protection of the environment" (para. 87).

The Court approached this task in two stages. First, it addressed the effects that the KHEP may have on Pakistan's agricultural and hydro-electric uses and on the downstream environment in the Kishenganga/Neelum River. While the Court noted that Pakistan's agricultural uses were relevant to the continuing operation of the KHEP in conformity with Paragraph 15(iii) of the Treaty, and therefore to the fixing of minimum flows, Pakistan had failed to submit any estimations or evidence on current or anticipated agricultural uses of the River waters and the Court therefore proceeded to determine the minimum flow on the basis of hydro-electric and environmental factors alone. With regard to Pakistan's hydro-electric uses, the Court noted that "the NJHEP would be affected by any prescribed minimum flow" (para. 96).

With regard to the downstream environment, the Court noted that "there is no single 'correct' approach to such environmental assessments" (para. 99) and acknowledged that "the environmental sensitivity that Pakistan urges in these proceedings does not match Pakistan's own historical practices" (para. 101). Nonetheless, the Court favored Pakistan's environmental assessment, which constituted "a holistic assessment of the interaction of a range of environmental Indicators" (para. 97). On the basis of this

assessment, the Court concluded that “an approach that takes exclusive account of environmental considerations...would suggest an environmental flow of some 12 cumecs” (para. 104).

At the second stage of the analysis, the Court attempted to balance these effects of the KHEP with the priority accorded in the Partial Award to India’s right to operate it effectively, finding that “India should have access to at least half of the average flow at the KHEP site during the driest months” (para. 109). This right, the Court further found, was satisfied by a minimum flow of 9 cumecs, which would maintain the natural flow regime in the most severe conditions. As in the Partial Award, in addition to India’s priority in right with respect to the use of the waters of the Kishenganga/Neelum River under the Treaty, an additional factor that the Court considered in fixing the rate of the minimum flow at 9 cumecs was customary international environmental law. Its application of this law, however, was somewhat more qualified in the Final Award.

The Court noted that its use of customary international law was limited by Paragraph 29 of Annexure G to the Treaty, which provides that “...the law to be applied by the Court shall be this Treaty and, whenever necessary for its interpretation or application, but only to the extent necessary for that purpose, the following in the order in which they are listed: (a) International conventions establishing rules which are expressly recognized by the Parties. (b) Customary international law”. While in the Partial Award the Court emphasized that it was “incumbent upon [it] to interpret and apply this 1960 Treaty in light of the customary international principles for the protection of the environment in force today”, in the Final Award the Court qualified this duty by noting that “if customary international law were applied not to circumscribe, but to negate rights expressly granted in the Treaty, this would no longer be ‘*interpretation or application*’ of the Treaty but the substitution of customary law *in place* of the Treaty” (para. 112, emphasis in the original).

The Court also proceeded to distinguish the *Iron Rhine Arbitration*, on which it relied in the Partial Award for the notion that “principles of international environmental law must be taken into account even when (unlike the present case) interpreting treaties concluded before the development of that body of law” (Partial Award, para. 452). The Court noted that unlike the treaty at issue in *Iron Rhine*, the Treaty in this case “expressly limits the extent to which the Court may have recourse to, and apply, sources of law beyond the Treaty itself” (para. 111). Finally, in justifying the less than ideal, from an environmental perspective, minimum flow of 9 cumecs, the Court considered that its authority “extends only to mitigating significant harm”, and that it “[did] not consider it appropriate, and certainly not ‘necessary,’ for it to adopt a precautionary approach and assume the role of policymaker in determining the balance between acceptable environmental change and other priorities, or to permit environmental considerations to override the balance of other rights and obligations expressly identified in the Treaty” (para. 112).

The two final issues dealt with by the Court concerned review mechanisms and monitoring. The Court considered it important not to permit the doctrine of *res judicata* to “extend the life of this Award into circumstances in which its reasoning no longer accords with reality along the Kishenganga/Neelum” (para. 118). Therefore,

the Court held that “the KHEP should be completed in such a fashion as to accommodate possible future variations in the minimum flow requirement” and that “if, beginning seven years after the diversion of the Kishenganga/Neelum through the KHEP, either Party considers that reconsideration of the Court’s determination of the minimum flow is necessary, it will be entitled to seek such reconsideration through the Permanent Indus Commission and the mechanisms of the Treaty” (para. 119). In so doing, the Court both allowed for the possibility of environmental or other future developments that would justify a reconsideration of the minimum flow, and strengthened the authority of the mechanisms provided in the Treaty to undertake such reconsideration. Finally, the Court rejected Pakistan’s request to establish a monitoring regime to permit the Court to evaluate India’s compliance with the minimum flow fixed in the Final Award. The Court noted that such a mechanism already existed under the Treaty in the form of the Permanent Indus Commission, thereby further reinforcing its authority.

While the final rate of minimum flow fixed in the Final Award might well be criticized from a strictly environmental perspective, the Court nonetheless succeeded in reaching an effective compromise between the parties’ extremely divergent positions while maintaining the viability of the Treaty and not entirely forsaking environmental considerations. It also appears that both Pakistan and India have accepted the decision, each declaring itself as the victor. Amidst growing criticism that the Treaty has become outdated and ineffective, the Kishenganga Arbitration arguably establishes the Treaty’s continuous relevance to the shared Indus basin and will hopefully encourage the parties to cooperate within the framework of the Treaty so as to avoid such disputes from arising in the future. Moreover, the successful resolution of this dispute may also revive the international arbitration procedure set out in great detail in the Treaty, but never before used, and reinforce arbitration as an effective dispute resolution mechanism in other interstate disputes concerning shared water resources.

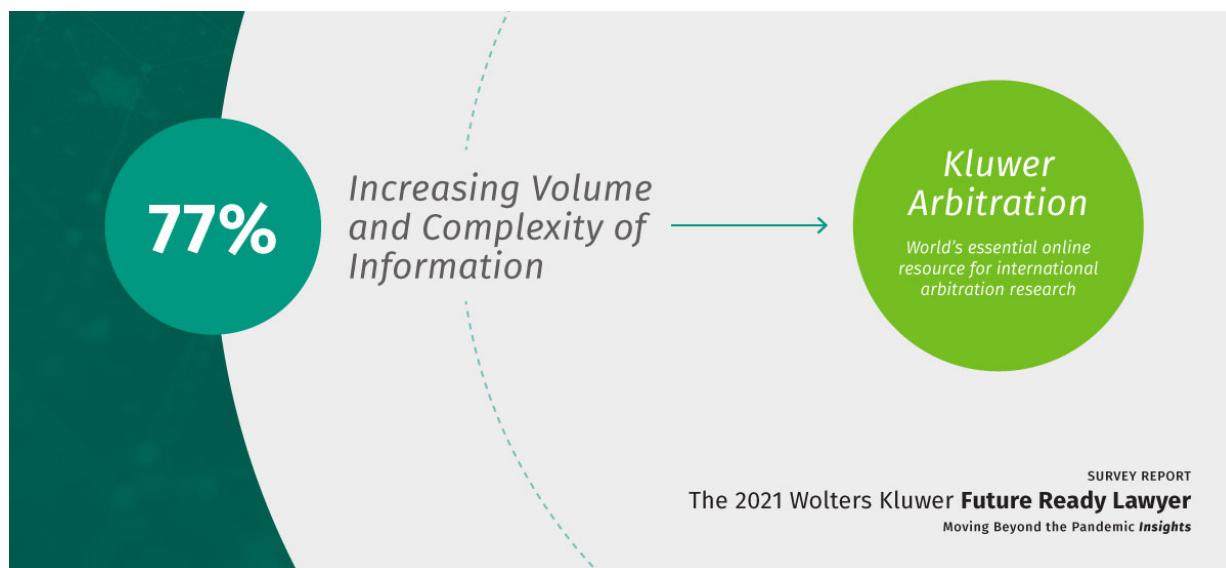
* *The documents of the Kishenganga Arbitration are available [here](#).*

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