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Kishenganga Arbitration and Viability of International Arbitration in Resolving State-to-State Disputes

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International arbitration has been widely recognized as an efficient process for resolving State-to-State disputes. Factors such as procedural flexibility and party autonomy, which contribute to general appeal of international arbitration, play out to render arbitration as the preferable option for settlement of complex disputes between States. More importantly, however, the success and broader acceptance of arbitration in resolving State-to-State disputes lie in providing carefully balanced solutions. Jerome A Cohen, an expert on East Asian law at the New York University, in a speech on South China Sea maritime disputes, summed up the benefits of resolving State-to-State disputes through international adjudication or arbitration in these words:

“Often, however, political leaders fear that an impartial tribunal might reject their blustery boasts that international law totally supports their nation’s position. To them the domestic and international political risks of a fair decision seem unacceptable. Yet a third-party decision need not result in an “all or nothing” conclusion. The kinds of issues that elude negotiated solutions between neighbors but are taken to impartial determination frequently yield not 100 percent victory for one side or the other but nuanced decisions that are in effect carefully-balanced compromises that reflect the complexity of the claims considered.” (Jerome A Cohen, *Lawfare or Warfare? Let Impartial Tribunals Cool Asia’s Maritime Disputes*, The Diplomat, 29 May 2014)

The recent arbitration between Pakistan and India, two rival South Asian states, over the Kishenganga Hydro-electric Project (“KHEP”) (being constructed in Jammu and Kashmir) is a good example of the approach outlined above. The Kishenganga arbitration has been discussed widely. Therefore, this post briefly highlights a few distinctive features of the Kishenganga arbitration proceedings and awards that support the acceptance and legitimacy of international arbitration as the mode for resolving State-to-State disputes.

By way of background, the Kishenganga arbitration related to the Indus Water Treaty (“the Treaty”), which was signed by Pakistan, India, and the World Bank, in 1960. The Treaty sets out the rights and obligations of India and Pakistan over the six rivers in the Indus basin. In brief, India has the right of unrestricted use on the Eastern Rivers (Sutlej, Ravi, and Beas) and Pakistan has the right of unrestricted use on the Western Rivers (Chenab, Jhelum, and Indus). However, the Treaty

allows India to use the Western Rivers in upstream areas under its control for, amongst other things, generation of hydro-electric power under limited circumstances. The Treaty has often been celebrated for providing a compromise that has weathered through three wars and various military mobilizations between India and Pakistan.

The Kishenganga arbitration related to design and construction of the KHEP in Jammu and Kashmir located on the Kishenganga/Neelum River (which is a tributary of the Jhelum, one of the Western Rivers). The KHEP is designed to generate power by diverting water from a dam site on the Kishenganga/Neelum River (an area of higher elevation) to another tributary of Jhelum at lower elevation located near Wular Lake through a system of tunnels, with the water powering turbines having a capacity of up to 330 megawatts.

After bilateral negotiations failed to resolve the dispute, Pakistan referred the matter to arbitration before a Court of Arbitration constituted under the Treaty (and supported by the Permanent Court of Arbitration), comprising of seven members, in May 2010. The essential differences between Pakistan and India, as the Court summarized, were two-fold: whether the planned diversion of water and other technical design features of the KHEP are in conformity with the provisions of the Treaty, and whether India was permitted under the Treaty to use of the technique of drawdown flushing for sediment control in Run-of-River Plants such as the KHEP in circumstances other than unforeseen emergencies.

Interim Measures

One the first steps in the arbitration was determination of Pakistan's request for interim measures. Pakistan requested the Court to issue an order for provisional measures, amongst other things, requiring India to cease work on the KHEP until the Court renders the award on merits in the proceedings.

The Treaty permits party to request interim measures necessary to safeguard its interests with respect to the matter in dispute, to avoid prejudice to the final solution of the dispute, or to avoid aggravation or extension of the dispute. In interpreting these terms, the Court found that the Treaty provisions function as *lex specialis* and did not import the requirement of urgency and irreparable injury as developed in the ICJ's case-law on provisional measures. The Court found merit in the proposition that interim measures are necessary to avoid prejudice to the final solution.

Instead of providing the far reaching relief requested by Pakistan, the Court carefully examined the aspects of the construction of the KHEP that would be necessary to safeguard the Court's ability to render an effective award. The Court found that "*the construction of the permanent dam which India proposes to emplace in and on the Kishenganga/Neelum riverbed falls squarely within the category of works that create a significant risk of "prejudice to the final solution."*" (see paragraph [146] of the Order on Interim Measures). In the circumstances, the Court allowed India to build sub-surface foundations of the dam, but ruled that India shall not construct any permanent works on or above the riverbed that may inhibit the restoration of the full flow of Kishenganga/Neelum River to its natural channel.

The Order on the Interim Measures is significant because the Court, while imposing substantial restrictions on India, did not restrain it completely from engaging in construction works on the KHEP. Further, the Court's approach, given the specific requirement of necessity in the Indus Water Treaty, contrasted with the criteria of urgency and irreparable injury for provision of interim

measures in cases before the International Court of Justice.

The Partial Award and Clarification

The Court issued the Partial Award on merits in February 2013. In the Partial Award, the Court dismissed Pakistan's objection on inter-tributary transfer of water and ruled that the planned diversion of water between two tributaries in the KHEP was consistent with the terms of the Treaty. The Court also found that India was required to ensure a minimum flow of water downstream on the KHEP at all times in view of Pakistan's then existing agricultural and hydro-electrical needs and environment considerations. Significantly, the Court interpreted the Treaty, which was executed in 1960, in view of the contemporary customary international principles for protection of the environment and noted that the KHEP must be "*planned, built and operated with environmental sustainability in mind*". The Court's approach to interpret the Treaty in view of contemporary norms of environmental sustainability is indeed a positive development.

The Court also held in the Partial Award that the Treaty bars India from periodically depleting the reservoirs at the KHEP below the dead-storage level (defined as that portion of the storage not used for operational purposes) for drawdown flushing for sediment control. While reviewing the history of negotiations of the Treaty, the Court found that the limits on storage of water by India were crucial to the bargain between India and Pakistan in the Treaty. The Court also noted that India can use other methods, even though not optimal, such as sediment sluicing for clearing the sediment. In the Decision on India's Request for Clarification or Interpretation, the Court held that prohibition on the reduction below dead storage level of the water in the reservoirs of run-of-river plants on the Western Rivers, except in the case of unforeseen emergency, is of general application and would, thus, apply to future projects.

In the final stretch of the arbitration, the Court held in the Final Award issued in December 2013 that India must maintain a minimum flow of 9 cumecs into the Kishenganga/Neelum River below the KHEP at all times. In reaching this conclusion, the Court again looked at the effect on the downstream environment and the effective operation of the KHEP. The Court further permitted either country to seek reconsideration of the minimum flow requirement after 7 years of the diversion of water from the Kishenganga/Neelum River for power generation by the KHEP.

Acceptance of the Court's Decision

Both India and Pakistan have claimed victory over the Court's decision. Commentators on the India side have lauded the Court's permission to construct and operate hydro-power projects on the Western Rivers. However, at the same time, the Court's decision limits India's ability to flush sediments through draining water downstream of the KHEP. Bearing in mind Pakistan's suspicion of India's ability to manipulate the water flows in the Western Rivers, commentators on the Pakistan side have unsurprisingly taken the limits on water flows as a significant victory in Pakistan's favour.

There are several distinctive features that went towards the balanced determination in the Kishenganga arbitration. The delegations of the Court conducted two site visits during the course of the proceedings, which enhanced the Court's familiarity with the project in dispute. The panel also included an esteemed engineer and hydrologist, Professor Howard S. Wheater, which would no doubt have enhanced the Court's ability to process the technical information with clarity.

In the end, the Court provided a balanced ‘win-win’ solution rather than “all or nothing” outcome, which enhances the legitimacy and acceptance of international arbitration for resolution of State-to-State disputes. In this manner, the Kishenganga arbitration demonstrates the viability of international arbitration in resolving State-to-State disputes. International arbitration can provide a more nuanced and carefully-balanced solutions (which is also intended in well-negotiated treaties in the first place), rather than declaring a victor and a loser. In this way, international arbitration can offer a viable forum for resolution of State-to-State disputes.

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