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Revisiting the Indus Waters Treaty: PCA Reasserts Competence

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Muddled in severe stress and conflict since the 1950s, the transboundary Indus basin is home to one of the longest rivers in Asia. Barraging disputes led to the signing of the [Indus Waters Treaty of 1960](#) (“IWT”) between Pakistan and India. Oft-cited as one of the most successful transboundary water-sharing mechanisms in the world, the IWT has resurfaced as the epicentre of an arbitration claim brought by Pakistan to the Permanent Court of Arbitration (“PCA”), with an [Award on Competence](#) having been rendered on July 6, 2023. This post examines this Award on Competence. It analyses the Tribunal’s jurisdictional decision, engages with the consequences of India’s non-appearance in the proceedings, and emphasises the need for hydro-diplomacy in resolving such conflicts while encouraging treaty adherence.

Background to the Dispute

The IWT divides the six main rivers of the Indus basin into Eastern and Western rivers: India is allowed to set up projects on the Eastern rivers (Ravi, Beas, and Sutlej) and Pakistan has the same rights for the Western rivers (Indus, Chenab, and Jhelum).

The Kishenganga and Ratle Hydropower Projects proposed by India are at the center of the arbitration proceedings. The former would lower the flow of water in the Kishenganga (which is called the Neelum when it crosses into Pakistani territory), making the Neelum-Jhelum Project in Pakistan less viable. This led to disputes between India and Pakistan, which were ultimately adjudicated before a PCA Tribunal in the Kishenganga Award on December 20, 2013 (“**2013 Kishenganga Award**”). The 2013 [Kishenganga Award](#) allowed India to continue its projects on the Kishenganga but prohibited India from using drawdown flushing to disperse sedimentation if it led to water levels in the dam fall below the dead storage capacity.

Pakistan had previously argued that the Kishenganga and Ratle Hydroelectric Projects were not in consonance with the provisions of Annexure D of the IWT dealing with “*the generation of hydroelectric power by India on the Western rivers.*” Para 15 (iii) of the same states:

“Where a Plant is located on a Tributary of The Jhelum on which Pakistan has any Agricultural use or hydro-electric use, the water released below the Plant may

be delivered, if necessary, into another Tributary but only to the extent that the then existing Agricultural Use or hydro-electric use by Pakistan on the former Tributary would not be adversely affected.”

Following ongoing disputes following the 2013 Kishenganga Award, in 2015, Pakistan requested the World Bank to appoint a **Neutral Expert** to determine procedures under which the two projects should operate, in line with the provisions of the IWT (the IWT allows either party to request the World Bank to appoint a Neutral Expert to resolve a “difference” between the two countries). India endorsed the request however Pakistan unilaterally retracted this request and proposed that the dispute be referred to arbitration, in 2016.

India formally objected to Pakistan’s unilateral application to the PCA for arbitration and called for modifications to the IWT under Article XII(3) of the IWT. India characterised the arbitration proceedings as “**illegally constructed.**” India declined to participate by not appearing, contesting the tribunal’s jurisdiction since a Neutral Expert was also examining the issue and the IWT’s prohibition of parallel proceedings. IWT establishes a “graded mechanism” of dispute settlement which operates at three levels: deliberation by Indus Commissioners (appointed on behalf of India and Pakistan respectively); secondly, deliberation by a Neutral Expert; thirdly, escalation to the PCA. (*Article IX, IWT*) Seemingly, Pakistan bypassed the graded mechanism and directly escalated the dispute to the third stage. In response to Pakistan’s Request for Arbitration, India requested the World Bank to appoint a Neutral Expert on October 4, 2016 (six weeks after Pakistan’s arbitration application had been filed).

On July 6, 2023, the PCA Tribunal ruled upon India’s objection to jurisdiction. The Tribunal held that it was competent to decide the proceedings initiated by Pakistan against India over the Kishenganga and Ratle Hydropower Projects.

The Consequences of India’s Non-Appearance for the Tribunal’s Competence

India had not expressly argued that its non-appearance, by itself, would defeat the Tribunal’s competence, and nor did the PCA Tribunal construe India’s non-appearance as a formal objection to its competence. The Tribunal held that non-appearance of a Party will not bar competence if the dispute otherwise meets the formal requirements stipulated under the governing instrument. As the IWT does not stipulate any consequences of non-appearance, the Tribunal held that India’s non-appearance in the proceedings did not undermine its competence to continue the proceedings, issue orders, or render binding decisions.

The PCA Tribunal’s reasoning relied on both historical precedents and India’s past acceptance of PCA Tribunal’s jurisdiction. A notable precedent on non-appearance was the International Court of Justice’s (“**ICJ**”) decision in *Nicaragua v. United States of America* (para 27-28), where the ICJ held that non-appearance of a Party in the proceedings would not affect the validity of its judgment, and the absent Party remains bound by the eventual judgment.

Before the Kishenganga dispute, PCA tribunals have also addressed the issue of non-appearance in cases like *The Republic of the Philippines v. The People’s Republic of China*, and *The Kingdom of the Netherlands v. The Russian Federation* where tribunals reaffirmed that a Party’s non-appearance would not undermine their competence to proceed with a case.

Drawing from the 2013 Kishenganga Award (discussed on the Blog [here](#)), and noting India's previous participation in PCA proceedings and its acceptance of the PCA's jurisdiction, the PCA Tribunal upheld its competence to adjudicate the dispute. In the previously decided 2013 Kishenganga Award, a key fact was that despite initially objecting to the PCA's competence, India had appointed two arbitrators and participated in the proceedings to present its objections.

Reasons underlying the Tribunal's Competence

India submitted that the IWT dispute settlement provision (Article IX), when read with Annexures F and G, provides for a “*graded dispute resolution mechanism*” that precludes unilateral recourse to a court of arbitration except where the Parties have exhausted the first stages of resolution. Article IX(1) of the IWT provides that any question/dispute surrounding the IWT shall “***first be examined by the Commission, which will endeavour to resolve the question by agreement.***”

India contended that the Permanent Indus Commission under Article VIII should first examine the matter, such that India could not be compelled to participate in proceedings before a PCA Tribunal. In 2016, Pakistan asked the World Bank (which facilitated the negotiations preceding the Indus Water Treaty) to facilitate an ad-hoc Court of Arbitration to investigate its concerns about the designs of the two hydroelectric power projects. India asked for the appointment of a Neutral Expert for the same purpose. The World Bank also removed its embargo of non-interference and appointed a Neutral Expert, though this may have potentially led to chaos with two parallel proceedings on the same dispute.

The PCA Tribunal, while deciding on its competence under Article IX(4) stated that the usage of the word “*may*” makes recourse to negotiations discretionary and inter-State negotiations (including with the good offices of mediators) may be pursued, but there is no requirement to do so, as long as the exercise of such discretion is not arbitrary or abusive. The PCA Tribunal also concluded Article IX did not place any condition regarding the veracity and outcome of the proceedings.

Analytically, the case of *Georgia v. Russia* offers insight on the idea of tiered resolutions. Georgia accused Russia of violating the Convention on the Elimination of All Forms of Racial Discrimination (“**CERD**”) during a conflict. Russia objected to the International Court of Justice's jurisdiction, arguing that there was no dispute under CERD at the time and that Georgia had not attempted negotiation as required by Article 22 of CERD. The ICJ rejected the first objection but upheld the second, emphasizing the mandatory nature of negotiation attempts as a precondition for its jurisdiction.

In the case at hand, ultimately, Annexure G of the IWT is a “*wider and very robust principle of international dispute settlement: that a tribunal is competent to determine its own competence.*” (Para 143, PCA Award on Competence) Thus, purely relying on *kompetenz-kompetenz*, the IWT allows PCA Tribunal ample powers to rule on its own jurisdiction.

Carving the Scope of Hydro-Diplomacy

Extending *pacta sunt servanda* to the IWT, there is an implied obligation to abide by treaty terms.

The *Gabčíkovo-Nagymaros* case involved a dispute between Hungary and Slovakia over a joint waterworks project on the Danube. Despite noncompliance by both Parties during the legal proceedings, the ICJ upheld the validity of the 1977 Treaty between Hungary and Czechoslovakia (the predecessor of Slovakia). The ICJ's decision stressed the importance of respecting international agreements and fulfilling treaty obligations, providing guidance for the future implementation of the project. This is a cautionary tale underscoring the importance of respecting the IWT and seeking cooperative solutions through continued dialogue to manage shared water resources effectively. Noncompliance by either Party should not automatically warrant treaty termination but should instead prompt a reinforced commitment to uphold the treaty's terms and find amicable solutions to potential disputes. The dispute between *Argentina and Uruguay* over the construction of pulp mills on the River Uruguay highlighted the importance of cooperation in managing shared water resources. The ICJ emphasized that “*close and continuous co-operation between the riparian States*” is vital for protecting the River Uruguay, which can only be achieved through fulfilling obligations such as informing each other of plans and engaging in negotiations.

Former Canadian Prime Minister Jean Chretien also emphasized the *advantages of co-operation*, when acting as the co-chair of a meeting held in Toronto regarding the ‘water wars’ in the Middle East.

Conclusion

The IWT dispute is not the first instance of contention. Over the years, the two countries have been at loggerheads on various fronts, including *territorial disputes* and trade conflicts such as the removal of *Pakistan's Most Favoured Nation status*.

While Pakistan has expressed an inclination towards mediation, India emphasized its desire to renegotiate Article XII(3) of the IWT. Amidst these complex dynamics, it is imperative for both India and Pakistan to engage in constructive dialogue, reassess their policy frameworks, and find mutually acceptable solutions to ensure stability and cooperation in the region.

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