

# THE KISHENGANGA HYDRO-ELECTRIC PROJECT ARBITRATION DISPUTE - PARTIAL AWARD (PAKISTAN V. INDIA): AN ANALYSIS

Aardraa Upadhyay\* & Mr. Tamojit Chatterjee\*

## Abstract

Arbitration has emerged as an effective form of dispute resolution. The medium of arbitration has proved to be a quick and practical settlement for cross-border disputes, especially in cases wherein the parties are from different socio-cultural and political backgrounds. This is mainly because of the presence of a neutral third party in the dispute resolution process and other considerations such as the requirement of expertise over the relevant subject matter etc. The foremost pillar of any arbitration process is the disputing party submitting themselves to the process and relying upon the fair judgement of the appointed arbitrating agency or individual. The partial award discussed presently arose out of the first ever arbitration proceeding under the Indus Water Treaty entered into between India and Pakistan, the two parties. The dispute comprises various intricate issues which have arisen out of the provisions of the Indus Water Treaty. The Treaty serves to lay down a comprehensive set of rules for the sharing of river waters between the two countries. This arbitration is of special significance as its outcome will purport to serve future disputes arising out of the Treaty especially in light of the socio-political relationship between the two parties. The partial award given by the Permanent Court of Arbitration with the erstwhile help of the World Bank has proved to be an elixir for future arbitration disputes of such nature. The varied challenges that are faced by states over water resources world-wide originate from a multitude of factors, including the perpetual rise in population, urbanization, environmental degradation, and industrialization which makes the nature of the dispute more composite in nature involving the participation of individuals, states and corporations. It is in light of such complexities that such disputes go beyond the traditional issues of water quantity, etc., and take on a graver form by focusing on issues of water quality, water rights, etc.,. This myriad web involving the participation of different actors and the wide ranging consequences of the same call for the development and the expansion of dispute settlement institutions. Thus, formal institutions of dispute settlement like the Permanent Court of Arbitration serve to dissect through the complexities and cull out the most reasonable solution to the dispute at hand. The Kishenganga Arbitration dispute deals with the construction of a Hydro Electric Project by India on the river Kishenganga. Due to its tributary being Jhelum, a water sharing treaty is present between Pakistan and India. It entails the erection of a 37m-high concrete dam in the Gurez Valley, which will divert the Kishenganga River via a 22km long tunnel south into Lake Wular passing through an underground power-house. The construction will result in the diversion of the water in Pakistan through a different route and is the root cause of the dispute. The main issue of the dispute centres on the diversion of water which will create a different route for entry in Pakistan. The first issue raised by the Court in the above matter deals with the permissibility of delivering waters to another tributary through the Kishenganga Hydro Electric Project ("KHEP"). The second issue deals with the contentious problem of reservoir depletion under the Treaty. The paper shall deal with the background of the case and the dispute settlement mechanism under Indus Water Treaty. After discussing the various facts and issues that arose in the dispute, an analysis of the interim order has been done by discussing the various technicalities and objections raised in the order in detail. The paper shall also deal with the effect of the partial award on future disputes of such nature.

## V. Introduction

The Kishenganga Arbitration Tribunal constituted under the 1960 Indus Waters Treaty rendered a partial award in February, 2013 over a dispute between India and Pakistan over the construction of the KHEP by the former on the

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\* Presently pursuing B.A., LL.B. (Hons.) as III Year Student of Hidayatullah National Law University, Raipur

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Kishenganga River. The tribunal in its award allowed India to go ahead with the diversion of the waters of the Kishenganga, a tributary of the Jhelum River, for the purpose of Hydro Electric Power Generation. The Court however restricted India from adopting the draw-down flushing technique for clearing sedimentation in the plant. The Court asked India to resort to other methods for flushing. This method of dispute resolution has long been used successfully in recognising rights and settling differences between countries when it comes to several cross border disputes. The Permanent Court of Arbitration which normally decides such disputes has once again proved its effectiveness by rendering the partial award which more or less goes on to settle the rights of the parties and give a clear indication of where the final result of the dispute is heading towards. The Court expects to be able to render its final award by the end of 2013 which would determine the minimum amount of water India would be required to release in the Kishenganga/Neelum River. The contents of the partial award will thus be analysed in detail in this paper.

### **Background of the Case**

The Kishenganga arbitration dispute arises from the construction of a Hydro Electric Project by India on the Kishenganga river which is a tributary of the Jhelum (one of the western rivers allocated to Pakistan under the Indus Water Treaty). Before going into the nuances of the dispute, it would be appropriate to briefly discuss the Indus Water Treaty [*IWT*], a landmark document marking the efforts of years of negotiation between India and Pakistan on the basis of an intelligently drafted World Bank Proposal.<sup>336</sup> The IWT aims to “*attain the most complete and satisfactory utilisation of the waters of the Indus system of rivers*”. Given the very delicate socio-political scenario of the two countries, the Treaty aims to balance the interests of both the parties on the contentious issue of river water sharing. It accomplishes this aim by allocating the complete use of the western rivers i.e. the Indus, the Jhelum and the Chenab to Pakistan<sup>337</sup> and the complete use of the eastern rivers i.e. the Sutlej, the Beas and the Ravi to India.<sup>338</sup> The IWT is unique in this nature, as it defies the conventional mode of most water sharing agreements,<sup>339</sup> by allocating entire basins to the parties. This does give rise to certain problems as it leads to limiting the potential for co-operation between the two parties. However, the dispute resolution mechanism of the Treaty provides for an elaborate system of resolution of such disputes.<sup>340</sup>

### **The dispute settlement mechanism of the IWT**

The IWT envisages three levels of conflicts (Questions, Differences and Disputes) between the parties and provides corresponding resolution mechanisms for the same.<sup>341</sup> It is imperative to understand the nuances of the dispute resolution mechanism of the IWT to fully appreciate and understand the Kishenganga Arbitration Dispute. The Treaty initially charges the Permanent Indus Commission,<sup>342</sup> a body formed under the IWT consisting of two commissioners, one from each of the parties, with the task to resolve any “*question*” arising between the parties

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<sup>336</sup> Shapiro-Libai, Nitza, *Development of International River Basins: Regulation of Riparian Competition*, 45 I.J.L. (1969).

<sup>337</sup> Indus Waters Treaty 1960, between the Government of India, the Government of Pakistan and the International Bank for Reconstruction and Development, Pak.-India, art III, Sep. 19, 1960, 419 U.N.T.S. 126 [*IWT*].

<sup>338</sup> *Id.* At Article II.

<sup>339</sup> It is rather unusual to allocate entire streams instead of determining the respective volumes of water to be allocated based on the parties needs or uses, *e.g.* in accordance with the diverse factors listed in Article VI of the UN Convention on the Non-Navigational Use of Watercourses.

<sup>340</sup> *Supra* note 2, at Article IX.

<sup>341</sup> *Supra* note 2, at Article IX.

<sup>342</sup> *Supra* note 2, at Article VIII.

relating to any provision of the Treaty.<sup>343</sup> If the Commission fails to resolve the original “*question*” then such a question takes the form of a “*difference*”.<sup>344</sup> The differences pertaining to technical issues as defined in Annexure F Part I of the Treaty can be referred to a neutral expert. It is pertinent to note that the parties have once used this mode of resolution to resolve the issues surrounding the Baglihar Hydroelectric Plant.<sup>345</sup> If, however, the difference does not fall within the competency of a neutral expert or if the neutral expert informs the Commission that the difference should be treated as a “*dispute*”, the parties shall resolve the “*dispute*” in accordance with Articles IX(2)(b) – IX(5) of the IWT.

As soon as a dispute has been identified, the Commission is to forward all relevant facts to the two governments (Article IX(3)). Following receipt of the Commission’s report, or if one government determines that the preparation of the report is being unduly delayed, one government may invite the other to resolve the dispute by agreement (Article XI(4)).

Finally, Article IX(5) also provides for the establishment of a Court of Arbitration (regulated by Annexure G, IWT) upon agreement by the parties (Article IX(5)(a)). Upon request by either party if after one month that party determines that the other party is unduly delaying the negotiations (Article IX(5)(c)) or at the request of either party if negotiations pursuant to Article XI(4) appear unlikely to resolve the dispute (Article IX(5)(b)). It was with reference to this last provision (Article IX(5)(b)) that Pakistan submitted a request for arbitration on 17 May 2010 with respect to the Kishenganga Hydro-Electric Project.

### **The facts surrounding the dispute**

The dispute arises from the construction of the KHEP in the Baramulla district of the Indian province of Jammu and Kashmir. The project involves the erection of a 37 metre- high concrete dam in the Gurez Valley, which will divert the Kishenganga River, a tributary of the Jhelum, via a 22 kilometre long tunnel into the Wullar Lake, passing through an underground power house along the way. One of the contentious issues of the dispute centres on the diversion of waters of the Kishenganga River, which at present flows across the Line of Control to Pakistan where it becomes the Neelum. However, the said diversion will create a different route for the Kishenganga’s entry into Pakistan and such diversion will create problems for the proposed Neelum-Jhelum Hydroelectric Project [“*NJHP*”] as the Kishenganga will join Pakistan’s Jhelum River downstream of the *NJHP*.

### **ISSUES OF THE DISPUTE**

Pakistan invoked the jurisdiction of the Permanent Court of Arbitration on 17<sup>th</sup> May, 2011 on the basis of two counts of alleged violation by India of the IWT. First, Pakistan argued that that the proposed construction of the KHEP violates India’s obligation to ‘let flow’ the waters of the Kishenganga and other such western rivers according to the provisions laid down in the IWT.<sup>346</sup> India’s contention to the issue is based on the exception to the said provision, specifically Article II(2)(d) which states that India has ability to generate Hydro Electric power within the ambit of the provisions of Annexure D. Annexure D provides in relevant part “*...the works connected with a plant*

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<sup>343</sup> *Supra* note 2, at Article IX (1).

<sup>344</sup> *Supra* note 2, at Article IX (1).

<sup>345</sup> Indus Waters Kishenganga Arbitration (Pak. v. India) (Partial Award of Feb. 18, 2013), [http://www.pca-cpa.org/showfile.asp?fil\\_id=2101](http://www.pca-cpa.org/showfile.asp?fil_id=2101) (last visited June 3, 2013) [“*Partial Award*”].

<sup>346</sup> *Supra* note 2, at Article III(2).

*shall be so operated that...where a plant is located on a tributary of the Jhelum on which Pakistan has any agricultural use or hydroelectric use, the water released below the plant may be delivered, if necessary, into another tributary but only to the extent existing agricultural use or hydroelectric use by Pakistan on the former tributary would not be adversely affected.*<sup>347</sup> Pakistan thus had to prove to the Court that effect of the said diversion would affect its existing hydro-electric plans and agricultural use adversely. Thus, the Court had to look into the fact whether the NJHP would constitute an already existing project as envisaged by the provision.

Pakistan's second contention related to the permissibility of India to deplete the reservoir level of the run-of-river plant below dead storage level. Dead storage level, according to the Treaty, refers to the water level which corresponds to the portion of storage that is not used for operational purposes.<sup>348</sup> The depletion of a run-of-river plant below the dead storage level thus necessarily contemplates the complete discontinuation of the release of any water except for the purposes of sediment control. The Bagliharplant difference which was referred to a neutral expert considered a similar question in relation to the issue at hand.<sup>349</sup>

### Interim Order

The Court had issued an order on interim measures on 23 September 2011 following Pakistan's application for restraining India from proceeding with the planned diversion of the Kishenganga until the time the Permanent Court of Arbitration decided on the legality of the KHEP. The Court recognising that some interim measures were necessary to "avoid prejudice to the final solution of the dispute" passed an order in favour of Pakistan by applying the standard laid down solution of the dispute".<sup>350</sup> In reaching this conclusion, the Court applied the standard laid down by paragraph 28 of Annexure G, IWT (which provides that interim measures are permissible to: safeguard the interests of the requesting party, to avoid prejudice to the final solution, or to avoid aggravation/extension of the dispute) instead of following India's invitation to apply the considerable jurisprudence of the International Court of Justice. In particular, India was ordered to hold the construction of permanent works "on or above the Kishenganga/Neelum riverbed at the Gurez site that may inhibit the restoration of the full flow of that river to its natural channel."<sup>351</sup> However, India was said to be free to continue with all other components of the project including the erection of temporary cofferdams and the construction of the dam's sub-surface foundations.<sup>352</sup>

### Analysis of the Award

#### G. First issue

The first issue raised by the Court in the matter deals with the permissibility of delivering waters to another tributary through the KHEP. It had to decide whether India is permitted under, the Treaty, to deliver the waters of the Kishenganga/Neelum river into another tributary in the course of the operation of the KHEP.

On considering the various issues of the dispute, India's general obligations under Articles III and IV (6) of the IWT have been considered. Pakistan contended that certain provisions of the Treaty restrict the use of western uses of the river regardless of the use of hydro-electric power generation. It invoked Article III of the Treaty which sets out

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<sup>347</sup> *Supra* note 2, at Annexure D, ¶15(iii).

<sup>348</sup> *Supra* note 2, at Annexure D, Article 2(a).

<sup>349</sup> Baglihar Hydroelectrical Plant, Executive Summary, <http://siteresources.worldbank.org/SOUTHASIAEXT/Resources/2235461171996340255/BagliharSummary.pdf> (last visited July 20, 2013).

<sup>350</sup> Indus Waters Kishenganga Arbitration (Pak. v. India) (Order on the Interim Measures Application of Pakistan dated June 6, 2011 of Sep. 23, 2011), [www.pca-cpa.org/showfile.asp?fil\\_id=1726](http://www.pca-cpa.org/showfile.asp?fil_id=1726) (last visited July 1, 2013).

<sup>351</sup> *Id.*, at ¶ 152.

<sup>352</sup> *Id.*, at ¶ 143.

both India's fundamental obligation to "let flow" the waters of the western rivers and its right to employ those waters, under certain conditions, for hydro-electric power generation and other uses. However, according to the Court, Article III (2) does not apply any geographic restriction on the use of electricity or any other product of the use of the waters. It restricts what India may do with the waters of the western rivers, and not with the products that may be generated from their use.<sup>353</sup>

Pakistan has also contended that India had breached its Article IV (6) obligation to assess adequately the environmental impact of the KHEP's inter-tributary transfer which invokes India's general obligation to "*use its best endeavours to maintain the natural channels of the rivers*" as stipulated in the Treaty. Pakistan asserted that the aforesaid diversion will significantly reduce the flow of the river and cause material environmental damage.

The Court has also considered Pakistan's arguments under Annexure D of the IWT which prescribes various requirements for the design and operation of run-of-river plants. The Court rejected the arguments made and allowed inter-tributary transfers, provided that the diverting works complied with three conditions; First, the work must be a run-of-river plant; Second, the plant must be "*located on*" a tributary of the Jhelum and finally; Third, the inter-tributary transfer must be within the terms laid down in Paragraph 15(iii)<sup>354</sup>. According to the terms of the Treaty, a run-of-river plant has been defined as a hydro-electric plant which develops power without live storage, an exception being pondage and surcharge storage. It also states that the volume of water stored for hydro-electric power generation is the defining characteristic of the run-of-river plant. The KHEP has also been designed and notified to Pakistan as a run-of-river plant.

The Court further turned to the question of whether inter-tributary transfer is necessary for any run of the river plant. Paragraph 15(iii) of the Treaty provides that "the water released below the plant may be delivered, if necessary, into another tributary." It is deduced from the Treaty that the material action for the use of the term necessity is the delivery of water.

The Court therefore, concluded that the relevant question for the interpretation of the term 'necessity' of paragraph 15(iii) is whether the delivery of water into another tributary is necessary to generate hydro-electric power. The Court finds that necessity is to be determined by reference to the purpose for which the water is to be delivered into another tributary which, in the case of the KHEP, is the generation of hydro-electric power.

According to the findings of the Court, no run-of-river plant operating without making use of the difference in elevation between the two tributaries of the Jhelum would begin to approach the power-generating capacity of the KHEP. Hence, diversion is necessary for any attempt to generate hydro-electric power on the scale contemplated by India, and Annexure D imposes no limit on the amount of electric power.

The Court next turned to the "*essence*" of the first dispute which enumerates the requirement under Paragraph 15(iii) that any Indian inter-tributary run-of-river plant can operate only till the extent of not jeopardising the interest of Pakistan. On that basis, Pakistan argued that an ambulatory interpretation of Paragraph 15(iii) of Annexure

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<sup>353</sup> Partial Award.

<sup>354</sup> *Supra* note 12.

D<sup>355</sup>which if adopted would create a sharp effect on the undertaking of any inter-tributary project on the Kishenganga/Neelum River, the practicability of which will depend on the whims and fancies of the other party. Hence, no project proponent, financing creditor or government agency will be forthcoming to invest in the project.

India, on the other hand argued on a static approach which emphasises on a tentative date. It stressed on the party's firm intention to proceed with the project. Hence, India argued that Pakistan's agricultural and hydro-electric uses must maintain a status quo at the stage when the various intricacies and designs of the project is finalised.

The Court did not find the aforesaid approaches to be satisfactory. It combined certain elements of both approaches for a sound interpretation. It emphasised on the object and the purpose of the Treaty which is to generate a balance on the rights of both the countries to use waters of the western rivers and hydro electricity generation. Accordingly, the Court needed to establish the critical period at which the KHEP crystallized and it needed to determine whether the NJHEP was an "*existing use*" that India needed to have taken into account at the time the KHEP crystallized. On determining the critical period approach, the Court left to the conclusion that the KHEP preceded the NJHEP, such that India's right to divert the waters of the Kishenganga/Neelum for power generation by the KHEP is been protected under the Treaty. The Court has further also concluded that the right of India to divert waters should not been absolute. The existing use of Pakistan needs to be taken into consideration for its agricultural and hydro-electric use.

The Court also found support in duty in contemporary customary international law requiring states to take "*environmental protection into consideration when planning and developing projects that may cause injury to a bordering State.*" The principle of sustainable development has been applied to large-scale construction projects, as recently certified in the *Pulp Mills*<sup>356</sup> case by the International Court of Justice, which states the importance under general international law for initiating an environmental impact assessment where there is a risk that the proposed industrial activity may have

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<sup>355</sup> Subject to the provisions of ¶17, the works connected with a plant shall be so operated that (a) the volume of water received in the river upstream of the plant, during any period of seven consecutive days, shall be delivered into the river below the plant during the same seven-day period, and (b) in any one period of 24 hours within that seven day period, the volume delivered into the river below the plant shall be not less than 30%,and not more than 130%, of the volume received in the river above the plant during the same 24-hour period: Provided however that:[...]

(iii) 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.

<sup>356</sup>Pulp Mills on the River Uruguay (*Argentina v. Uruguay*), (20 April 2010) ¶204, available at <http://www.icj-cij.org/docket/files/135/15877.pdf>

a significant adverse impact in a trans-boundary context, in particular, on a shared resources. Further, it has also been observed by the International Court of Justice that due diligence, and the duty of vigilance and prevention would not be considered to have been exercised, if the project is considered liable to affect the *regime* of the river or the quality of its waters and thus it will be assumed that the concerned party did not undertake an environmental impact assessment on the potential effects of such works. Finally, the International Court of Justice emphasized that such duties of due diligence, vigilance and prevention continue “*once operations have started and, where necessary, throughout the life of the project.*”

Similarly, the Court in the present dispute recalled the acknowledgement by the Tribunal in the *Iron Rhine* arbitration<sup>357</sup> of the “*principle of general international law*” that states have “*a duty to prevent, or at least mitigate*” significant harm to the environment when pursuing large-scale construction activities. As the *Iron Rhine* Tribunal determined, this principle “*applies not only in autonomous activities but also in activities undertaken in implementation of specific treaties*” It is established that principles of international environmental law must be taken into account even when interpreting treaties concluded before the development of that body of law.<sup>358</sup> The *Iron Rhine* Tribunal applied concepts of customary international environmental law to treaties dating back to the mid-nineteenth century, when principles of environmental protection were rarely if ever considered in international agreements and did not form any part of customary international law. It acknowledged that India recognized this continuous duty by committing to ensure a minimum downstream flow of water. However, the information presently at its disposal did not allow the Court to objectively fix the exact rate of the minimum downstream flow, and it requested the parties to provide the relevant information to fix this rate in its final award.

The above arbitration case seems to be a very complex endeavour. The various technicalities and intricacies of the case highlight the exceptional work done by the Court. A very commendable aspect of the case is the equilibrium struck by the Court by respecting the rights of both the parties. The Court has exercised immense patience in deciding the question of territorial sovereignty of the rivers purely on the basis of IWT, thus paving the way for future disputes between the two countries to be resolved amicably. The critical period approach adopted by the Court in resolving the issue clearly lays down a path that can be followed in several such river sharing disputes wherein the time period as envisaged by such disputes are always too vague to be resolved with clarity. The ingenuity of the Court in coming up with an approach that is well rounded in nature is truly commendable and is a clear reflection of the emergence of international arbitration as an effective means of dispute resolution between countries despite the socio-political and cultural problems that exist between them. The Court has thus, struck a very positive chord with its approach by ensuring that the rights of both parties are not adversely affected by the outcome of the award yet ensuring that India’s right to the use of the western rivers is not unduly restricted by a narrow interpretation of the Treaty. However, the Court required a precise rate of the minimum flow of the river in order to determine the stability and predictability of the availability of water for both the parties.

#### *The Second Issue*

The second issue deals with the contentious problem of reservoir depletion under the Treaty. The parties disagreed as to whether India within the terms of the Treaty could periodically lower the level of the water at the aforesaid

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<sup>357</sup> Arbitration Regarding the Iron Rhine (“*Ijzeren Rijn*”) Railway (*Belg. v. Neth.*), Award, 24 May 2005, PCA Award Series (2007), ¶159.

<sup>358</sup>*Id.*

run-of-river plant on the western rivers for controlling sediment flow through a process of draw-down flushing. The issue is of primeval importance to both parties as the process of drawdown flushing of the reservoir necessarily affects the rate and timing of the flow below the dam, Pakistan particularly raised objections to the process of sedimentation that was used by India for this purpose. In addition, the Treaty in recognising this right had laid down the principle of India to 'let flow' and 'non-interference' with the western rivers. India however had differing views on the same, relying on the premise that, draw-down flushing would greatly enhance the process of sedimentation. The tribunal's decision would not only affect the KHEP project but would also affect all other run of the river plants that might have been built in the future. India as one of its contentions had objected to the admissibility of this particular issue itself on the basis that the neutral expert in the Baglihardam dispute had already decided on such grounds and thus this issue had already been effectively resolved. However, the Court found otherwise and on commenting on the requirement of the Treaty to refer such technical matters to a neutral expert, the tribunal found in Pakistan's favour stating that the Indus Treaty never mandated the requirement to refer a dispute to a neutral expert as a first step and a dispute could always be referred to for arbitration if so desired. Moreover, the tribunal found that the issue had substantial questions of law that were not merely technical in nature and squarely fell under the jurisdiction of the tribunal and also that no dispute could be brought before a court of arbitration could be rendered inadmissible due to technical questions.<sup>359</sup> In order to understand the crux of the dispute, it is important to understand the concept that the Treaty envisages. The primary objective of the Treaty is to strictly limit and minimise the instance of storage of water of the western rivers by India and eastern rivers by Pakistan as this would ultimately defeat the entire purpose of the Treaty; that of allowing the parties to use the water of the rivers effectively. Commenting on the Treaty, the Court observed that it strived to strike a considerable balance by allowing India the hydro-electric use of such waters of the western rivers without forsaking Pakistan's right over them for its own use by limiting the possibility of water storage on the upstream reaches of those rivers having an unduly disruptive effect on the rivers flowing into Pakistan.<sup>360</sup> The only exception to the restriction on storage is limited to the provision of dead storage in the design of any run-of-the-river plant or any such plant. This approach of the Treaty clearly outlines the contours of the *Principle of Equitable Utilisation of River Water*. Keeping this in view, the parties had widely divergent contentions on the issue. While Pakistan characterised this prohibition as construing to prohibiting the use of techniques like draw-down flushing, India contended that the exception of dead storage would also imply an express authorisation to design the dam in the most effective manner for sediment control. The Court came to the conclusion that India has a right to the effective generation of hydro-electricity and acknowledged that Pakistan's objections to India would render the plant ineffective. However the Court also acknowledged that the system of draw-down flushing would affect the downstream flow of the river water, thus effectively encroaching on Pakistan's right to effectively use the water. It thus tried to strike the middle path by allowing India to store water for sediment control as long as it did not employ such techniques that would render negatively on Pakistan's right to the effective use of the water. The Court thus suggested that sluicing be used as method for such sediment control in order to preserve India's right to use the western rivers for their hydro-electric needs. The Court thus laid down a general principle for all such run-of-the-river plants that India can effectively construct on the western rivers, wherein the Court did not really apply the 'best practices' principle in resolving the dispute but rather, in its own words, provided for an optimal design and operation of hydroelectric plant within the ambit of the Treaty. The

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<sup>359</sup>Indus Waters Kishenganga Arbitration (*Pak. v. India*) (Partial Award of Feb. 18, 2013), [http://www.pca-cpa.org/showfile.asp?fil\\_id=2101](http://www.pca-cpa.org/showfile.asp?fil_id=2101) (last visited June 3, 2013).

<sup>360</sup> *Id.*

Court, through this award has thus, effectively struck a very fine balance of maintaining Pakistan's right to the waters of the western rivers, on the one hand and India's right to the limited use of the western rivers in the form of hydroelectric generation, on the other hand.

### **Effect of the Partial Award on Future Disputes**

The award by the Hague-based Court of Arbitration to divert only a minimum flow of water from the Neelum/Kishenganga River for power generation has proved to be a green signal for India.

The Court has clarified that the decision of the aforesaid dispute will neither impact the existing projects nor those under implementation. The effect shall only be binding on future disputes of such nature. The intention of the Court has been to set precedence for the future disputes.

The '*partial award*' given in the dispute, has prohibited the use of drawdown flushing in the upcoming KHEP and all other projects to be set up in future. The verdict will have a wide ranging effect as all the other projects subsequent to it shall have to be redesigned and reconstructed to manage the massive sedimentation load that kills power dams and reservoirs. The award also discussed about the reservoir depletion below a Dead Storage Level ("*DSL*") by India wherein it held that the IWT does not permit reservoir depletion below a dead storage level an exception being unforeseen emergencies. The Court also held that accumulation of sediment in a reservoir will not constitute to be an unforeseen emergency. Hence, India has been barred from employing the technique of draw-down flushing at the reservoir of KHEP to an extent that would entail depletion of the reservoir below DSL. Major rivers in Jammu and Kashmir and their tributaries have massively silted flows and Chenab, the major power house of the state, has sediment load as a major crisis. The award shall provide effective relief to such disruptions. It is to be noted that the use of sluicing had already been permitted for the *Baglihar*<sup>361</sup> project by the World Bank with certain changes. However, an effective de-silting system needs to be developed for an effective and long term utilisation and to avoid huge costs.

The above award highlights a very positive picture for dispute resolutions between the two countries. The judgement has proved to be an epitome of amicability and immense cooperation and tolerance between the two countries. When seen from a regional perspective, the cultural, historical and political contexts that supplement any dispute between India and Pakistan often prevent amicable and peaceful settlements.<sup>362</sup> In the past, this has led to armed conflict and revolutions, but most often it has led to sheer disregard of the people directly affected by the stalemate.<sup>363</sup> The Kishenganga dispute serves as a valuable reminder of the potential of pacific dispute settlement in resolving thorny disputes in tense situations. For India and Pakistan, the award attempts to exemplify the co-operative spirit that underlies the IWT and to strike a fine balance between the competing rights of the two states. More broadly, the award represents an interpretive approach towards technical treaties informed by contemporary international law principles relating to environmental protection and sustainable development.

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<sup>361</sup> *Supra* note 14.

<sup>362</sup> See generally, David Bloomfield, Yash Ghai & Ben Reilly, *Analysing Deep-Rooted Conflict, Democracy and Deep-Rooted Conflict: Options for Negotiators*, [http://www.idea.int/publications/democracy\\_and\\_deep\\_rooted\\_conflict/upload/ddrc\\_full\\_en.pdf](http://www.idea.int/publications/democracy_and_deep_rooted_conflict/upload/ddrc_full_en.pdf) (last visited Sept. 30, 2013)

<sup>363</sup> *Id.*

## Conclusion

The lacunae in effective legal principles coupled with the unique nature of each case when it comes to inter-country river water disputes have carved out the need for effective dispute resolution mechanisms for determining the rights of parties. With bilateral treaties proving to be effective in such cases, the question boils down to adequate safeguards in place for dispute resolution. India alone faces a multitude of issues with its neighbouring countries when it comes to river water sharing; the construction of the hydro-electric plant on the *Yarlun-Zangbo* River (the Brahmaputra) in the Autonomous Tibet region; the joint project by Nepal and India known as the *Sapta-Kosi* High Dam Multipurpose Project and *Sun Kosi Storage-cum-Diversion Scheme* or; the river water sharing with Bangladesh especially the *Farakka* Dam issue on the sharing of the waters of the river Ganges. India has several such disputes which have an overall bearing on its development. It is with these instances in mind that one needs to appreciate the effectiveness of the IWT. Its dispute resolution mechanism has so far proved to be more than sufficient in meeting the requirement of both the parties, especially keeping in mind the contentious political background between the two countries. Whether it be the Indus- Baglihar Dispute which was taken care of by a neutral expert as provided for in the Treaty or the Kishenganga Dispute's partial award, alternate methods of dispute resolution has proved to be the way forward. In the light of recent trends in the world, disputes concerning rivers are no longer restricted to dam and diversion matters or water quantity issues alone for example; the *Gabcikovo-Nagyymaros* case, the dispute between Namibia and Botswana over their borders across the *Chobe* River etc. Disputes now deal with water quality issues and other such problems for example The Rhine River which is shared by France, Germany, Luxembourg and the Netherlands is one such instance where detailed attention has been paid to the environment which gave rise to the *Rhine Iron* Case. Thus, the need for settlement institutions is not restricted to the ICJ alone as such water disputes do not necessarily have to arise between two states. It can also arise between states and private actors. Hence, the strengthening of institutions likes the Permanent Court of Arbitration, the ICSID, and national courts are required. The rendering of the Kishenganga partial award by the PCA clearly goes on to exemplify that regardless of the high stakes involved in the dispute, the political background of the aggrieved parties, the Court has carved out a well-balanced solution setting a precedential example for other such river water disputes to follow.