When the Water is Not Under the Bridge

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In a lush and vibrant valley in the northernmost corners of India and Pakistan, an unassuming river flows through thick woods and fertile land. The river, known as the Kishanganga in India and the Neelam in Pakistan, sits along the Line of Control in the Kashmir region of India and Pakistan. This 245 kilometer-long river is a seat of much turmoil between India and Pakistan; countries which have historically experienced heightened political friction. Today, this tension is being exacerbated by the Kishanganga Hydro-Electric Plant (KHEP).

The KHEP is an $864 million power plant on the India-administered Jammu and Kashmir part of The Kishanganga River on which construction was started in 2007, with a completion date set for 2016. India’s proposal for the 330-megawatt hydroelectric plant required diverting water 23 kilometers away from The Kishanganga, a tributary of the Jhelum River, to the plant before returning the water into another tributary of the Jhelum at a lower elevation. At the time, Pakistan was also attempting to build a hydroelectric project on The Kishanganga — the Neelum-Jhelum Hydro-Electric Project (NJHEP). In early 2010, Pakistan began protesting the effect on the flow of The Kishanganga.

Out of concern that the KHEP would overburden The Kishanganga, and after bilateral negotiations failed, Pakistan filed a Request for Arbitration under the purview and framework of The 1960 Indus Waters Treaty (The IWT). The Indus Waters Kishenganga Arbitration was initiated in the Permanent Court of Arbitration (PCA) in May, 2010. Construction on the KHEP was halted in 2011, when the PCA issued an Order on Interim Measures after Pakistan applied for provisional measures. The Order prohibited any further construction on the KHEP that might have inhibited the restoration of the full flow of The Kishanganga to its natural channel. Two years later, in 2013, the PCA ruled that India could divert all the water, leaving only a certain amount to continue downstream from the dam for environmental flows.

The IWT is an agreement brokered by The World Bank (The Bank) that concluded ten years of negotiations between India and Pakistan. Since its ratification, India and Pakistan have

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2 Id.
3 Id.
5 Id.
7 Id.
8 Partial Award, supra note 4, para. 456.
not engaged in water wars, but have instead resolved disputes peaceably through the treaty.\textsuperscript{10} The IWT took a unique approach to water allocation, in that rather than designate ownership over water volumes it designates ownership of entire streams.\textsuperscript{11} In doing so, The IWT circumvented the issue of sovereignty over the lands through which the streams flow.\textsuperscript{12} In an even more controversial move, The IWT allowed India limited use of the western river waters for irrigation and unrestrained use for power generation, among other things. The IWT states in Article III(2):

\begin{quote}
(2) India shall be under an obligation to let flow all the waters of the Western Rivers, and shall not permit any interference with these waters, except for the following uses … in the case of each of the rivers, The Indus, The Jhelum and The Chenab, to the drainage basin thereof:
(a) Domestic Use;
(b) Non-Consumptive Use;
(c) Agricultural Use, as set out in Annexure C; and
(d) Generation of hydro-electric power, as set out in Annexure D.
\end{quote}

The IWT also lays out how issues arise under its purview and the process for their resolution: once an issue rises to the level of a “dispute” it is settled by a seven-member arbitral tribunal known as the “Court of Arbitration.”\textsuperscript{13}

The \textit{Indus Waters Kishenganga Arbitration} was the first dispute to arise under The IWT ever to be referred to a Court of Arbitration.\textsuperscript{14} The main issue claimed by Pakistan claimed was whether India’s planned KHEP breached its obligations to “let flow” the Western Rivers waters under The IWT Article III(2).\textsuperscript{15} Pakistan argued that the KHEP did not conform with Article III(2) because the power it generated would provide electricity to all of India’s northern grid, instead of “the drainage basin thereof.”\textsuperscript{16} The PCA disagreed, concluding that, “Article III(2) restrict[ed] what India may do with the waters … not with the products that may be generated from their use.”\textsuperscript{17}

Pakistan further argued that, per Part 3 paragraph 15(iii) of The IWT, India would be only be able to build a hydroelectric plant if “the then existing Agricultural Use or hydro-electric

\textsuperscript{11} Kumar, \textit{supra} note 1.
\textsuperscript{12} Partial Award, \textit{supra} note 4, para. 360.
\textsuperscript{13} Kumar, \textit{supra} note 1.
\textsuperscript{15} Partial Award, \textit{supra} note 4, para. 368.
\textsuperscript{16} Id.
\textsuperscript{17} Partial Award, \textit{supra} note 4, para. 369.
use by Pakistan on the former Tributary would not be adversely affected.”  

Pakistan then asserted that its own NJHEP pre-existed India’s KHEP, and thus India was precluded from building the KHEP.  

The PCA disagreed once more, concluding that the KHEP had “progressed to a stage of firm intention to proceed before the same point was reached with respect to the NJHEP.”  

The PCA also ruled that India did not hold an absolute right to divert the waters, and had to respect Pakistan’s right to a portion of the waters.  

Thus, in its February, 2013 Partial Award, the PCA allowed India to continue with the KHEP so long as it ensured a minimum downstream flow of water, to be determined in the Final Award.  

The Final Award came in December, 2013.  

After much deliberation, the PCA set the minimum flow to be released at 9 cubic meters per second per customary international environmental law, and open to future reconsideration if necessary.  

At that time, both India and Pakistan seemed pleased with the decision, with each declaring itself victorious.  

The Kighenganga Arbitration re-solidified a once-celebrated treaty that had grown dusty with disuse.  

It seemed as if the parties would be able to resolve future disputes amicably within The IWT’s framework, but sadly such cooperation seems to have since disintegrated. As early as last fall, India and Pakistan were reportedly in talks with The Bank, as Pakistan once again opposes the construction of the KHEP.  

The two countries disagree over whether its technical specifications comply with The IWT, with India saying the project design is within the parameters and Pakistan saying that the project will disrupt water supplies.  

In addition, Pakistan claims to have evidence that India has violated both The IWT and the PCA’s ruling, and in 2016 asked The Bank to appoint a court of arbitration to review the designs for the KHEP.  

India rejected this proposition on the grounds that the questions were
technical in nature and should therefore be decided by a neutral expert.31 Pakistan disagreed, stating that an expert’s testimony was not binding and would place India under no obligation to comply with any recommendation; The Bank initially set both motions in process but has paused from taking further steps in either process since late 2016, with both parties refusing to withdraw their proposals.32 Last fall, The Bank urged the countries to agree to mediation.33

In early May of 2018, delegations from Pakistan and India traveled to Washington, D.C. to meet with The Bank and to argue their respective sides.34 On the heels of the inauguration of the KHEP on May 19th, 2018, Pakistan’s foreign office voiced concern, claiming that inauguration of the plant prior to the resolution of dispute is tantamount to a violation of The IWT.35 In late May, The Bank released a statement saying that “[s]everal procedural options for resolving the disagreement … were discussed. While an agreement on the way forward was not reached … the World Bank will continue to work with both countries to resolve the issues in an amicable manner and in line with the Treaty provisions.”36

The Bank has apparently since asked Pakistan to agree to a neutral expert, which has been met with much resistance.37 Former Minister for Water Resources, Syed Javed Ali Shah, who negotiated with The Bank, has expressed Pakistan’s concern that ceding to a neutral expert will set precedent and thus preclude its ability to call for arbitration by international courts in the future.38 Pakistan also appears to be very disappointed with The Bank, with The Express Tribune of Pakistan reporting that “sources said Pakistan is upset over [The Bank]’s ‘discriminatory attitude’” and “continuous support to India.”39 Pakistan also believes that The Bank prevented it

31 Id.
32 Fact Sheet, supra note 29.
38 Nasir Iqbal, supra note 37; Aamir Shah, Pakistan to take Kishanganga Dam dispute to International Court of Arbitration, ARAB NEWS (June 5, 2018, 16:06 PKT), http://www.arabnews.com/node/1316126/world.
from bringing the dispute to arbitration, did not stay the completion of the KHEP, and did not take into consideration the satellite images that Pakistan produced of the dam.\textsuperscript{40}

On June 4th, Pakistan’s Supreme Court directed the government to produce a comprehensive report on current water flows after the completion of the KHEP.\textsuperscript{41} Chief Justice Mian Saqib further announced that for the foreseeable future the Court’s priority would be the resolution of the water crisis by hearing claims on water scarcity and on lack of initiative to build dams.\textsuperscript{42} As far as India is concerned, it looks as if it is going to continue normal operation of the KHEP. To further complicate matters, China has decided to enter the fray, both in showing solidarity with Pakistan and in starting work on two massive dams on the river Indus at a $27 billion price tag.\textsuperscript{43} The combined Jammu and Kashmir hydro plants will not equal the capacity of even the smaller dam.\textsuperscript{44} The issue is highly contentious, with each side speaking ill of the other.\textsuperscript{45}

This is a rather complex situation, especially in regards to The Bank’s unique role in resolving the dispute. As the broker for The IWT, The Bank operates only in a limited and procedural role.\textsuperscript{46} Per The IWT, for “differences” and “disputes” The Bank only may designate who fulfills the roles requested by the parties; The IWT does not allow The Bank to give one procedure precedence over another.\textsuperscript{47} The countries must agree on one mechanism to address the issues before The Bank may facilitate any procedures.\textsuperscript{48} It is unclear what the future holds for the resolution of this dispute, but it will likely be controversial regardless of the outcome.

Ila Lauren Addanki is a rising 2L at William & Mary Law School where she is an Assistant Training Director of the Alternative Dispute Resolution Competition Team. She is the ABA Section of Dispute Resolution’s 2018 Summer Intern and the incoming 2018-2019 Law Student Liaison. Born in the U.S., Ila grew up in Europe and India, where she became very interested in the multifaceted, multicultural global issues we face today. Upon graduation, Ila looks forward to helping international corporate clients resolve their disputes through ADR.

\textsuperscript{40} Nasir Iqbal, supra note 37.
\textsuperscript{41} Nasir Iqbal, supra note 37.
\textsuperscript{42} Id.; Shah, supra note 38.
\textsuperscript{46} Fact Sheet, supra note 29.
\textsuperscript{47} Id.
\textsuperscript{48} Id.