

Making sense of the Kishenganga final award

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“THE Indus Waters Treaty (IWT) was a great achievement of Pakistan and India and of the World Bank, and it remains so... and these proceedings are an illustration of its continuing vitality,” said Judge Stephen M Schwebel, chairman of the seven-member Court of Arbitration (CoA) in the Indus Waters Kishenganga Arbitration that delivered the final award on December 20, 2013.

The court, based at the Permanent Court of Arbitration, The Hague, has adjudicated upon the dispute concerning the Kishenganga Hydroelectric Project (KHEP) raised by Pakistan. It has conceded that the right of India to divert waters from the Kishenganga (called Neelum in Pakistan) for power generation is protected by the 1960 IWT. However, it added a caveat that this right is not absolute and India is under an obligation to maintain the minimum flow to be released downstream from the KHEP dam at 9 cumecs.

The court has not accepted India's argument for the usage of the drawdown technique for flushing sediment accumulated in the reservoir except in the case of “unforeseen emergency”. The award is a landmark for legal governance of shared trans-boundary water resources. The dispute has raised important questions on the relevance of the IWT; model of development adopted by building large dams and reservoirs for hydro-electric power with environmental consequences; application of international environmental obligations and adequacy of existing international courts; and tribunals to settle complex water disputes.

Indus Waters Treaty

Despite the history of animosity, trust deficit and inhospitable hydro-political climate, India and Pakistan remained engaged in the trans-boundary Indus Basin water-sharing cooperative framework through the IWT. The treaty regime has survived wars, shrill calls for abrogation, political instability and helped, to some extent, in containing water disagreements. It has also served as an important function of allocation of river waters as well as providing an inbuilt framework for the settlement of disputes. The Baglihar Dam case, referred to the neutral expert, was a testimony of its effectiveness and resilience.

The Kishenganga case marks the first instance in the history of the IWT when a CoA was constituted. The proceedings have arisen out of a dispute concerning the implementation of the treaty in relation to the construction and operation of the KHEP. The primary subject of the arbitration was the KHEP, currently under construction by India on the Kishenganga, a tributary of the Jhelum. The KHEP is designed to generate power by diverting water from a dam site on the Kishenganga (within Gurez Valley, an area of higher elevation) to the Bonar Nullah, another tributary of the Jhelum (lower in elevation and located near Wullar Lake) through a system of tunnels, with moving water powering turbines having a capacity of 330 MW.

The dispute

For the management of sedimentation in the reservoir, India intended to employ the technique of drawdown



The Kishenganga Hydroelectric Project is currently under construction by India on the Kishenganga, a tributary of the Jhelum. Tribune file photo



The Jhelum, known as Neelum in Pakistan, is the lifeline of the Valley.

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flushing that consists of drawing the water in the reservoir down to a level close to that of the riverbed by releasing water through low-level outlets in the dam. These were the issues raised by Pakistan. In view of the technical nature of the dispute, the court visited project sites at Neelum-Jhelum and Kishenganga. It highlights difficulties surrounding the technical nature of the disputes and perceived lack of expertise for the adjudication of such projects having environmental consequences. It heard the matter in 2012 and gave a partial award on February 18, 2013.

The partial award provided that India may divert water from the Kishenganga for power generation and deliver the water released below the power station into the Bonar Nullah. The issues of India's obligation to maintain a minimum flow of water in the Kishenganga; and usage of drawdown flushing to an

western rivers, except in the case of unforeseen emergency, is of general application.”

The moratorium issued in the award would be applicable to all future run-of-the-river projects to be carried out by India, sowing seeds of potential difference.

Permanent Indus Commission

The court analysed the data with regard to the impacts of a range of minimum flows to be discharged at the KHEP dam. It decided “a minimum flow criterion of 9 cumecs at KHEP is a relatively severe criterion with respect to environmental flow, but would nevertheless be sufficient to maintain the natural flows”. It has recognised that a degree of uncertainty is inherent in any attempt to predict environmental implications such as the flows in the Kishenganga. In its view, the appropriate mechanism for the reconsideration of minimum flow, exchange of data and monitoring of the parties' usage on tributaries of the Indus is the Permanent Indus Commission (PIC).

The ball is back into the court of the IWT mechanism of PIC. That brings under scanner the efficacy of the IWT in resolving disputes. The final verdict vindicates the obligation for peaceful settlement of disputes enshrined under the UN Charter. However, the growing number of disputes arising under the IWT underscores distrust between the parties.

Ironically, Pakistan's invoking of the IWT mechanism shows its inability to resolve bilateral disputes through negotiations and ineffectiveness of PIC that led the matter to highly expensive international arbitration proceedings even as both countries are facing extreme poverty.

It raises a question on the working of PIC to resolve disagreement. Some perceived challenges could arise due to the pressure of population and developmental needs as well as shrinking water availability in the

Indus Basin due to a host of factors including climate-induced changes. But it does not affect the utility and effectiveness of the IWT as it provides multiple methods to resolve issues.

It is time to use cutting-edge technologies and hardware such as remote sensing satellites and geographical information systems that play a vital role in the planning, construction and maintenance of such projects. It could help in jettisoning rumours, ignorance and emotions from taking hold in the absence of hard data.

Losing the vision

The fact that parties have turned, time and again, to the IWT mechanisms - and not the use of force - itself speaks volumes for the existing legal governance of Indus waters under the treaty. However, complaints by Pakistan that India is violating the IWT and its efforts to drag the matter to an international forum emanates from deeply entrenched distrust and compulsions of domestic politics. The IWT has withstood the test of time in showcasing the spirit of cooperation.

Many demand re-negotiation of the IWT, which they argue is the need of the hour (after working for 53 years) under changed circumstances. Still, considering the current realities, it is a remote possibility. It is hoped that wiser counsel will prevail to resolve water disputes in the larger interest of the teeming millions on either side.

In order to harness the huge hydro potential of shared water courses in the Indus Basin, both countries shall have to learn from world history and rise to the occasion to consider joint designing and implementation of projects that take a holistic hydrological view and maintain environmental integrity of the basin without compromising developmental needs.

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The edict

■ **The award** is a landmark for legal governance of shared trans-boundary water resources.

■ **India's right** to divert waters from the Kishenganga for power generation is protected by the 1960 Indus Waters Treaty. But it is under obligation to maintain the minimum flow to be released downstream from KHEP dam at 9 cumecs.

■ **Argument by India** regarding the use of the drawdown technique for flushing sediment accumulated in the reservoir has been rejected. It can be done only in the case of an emergency.

■ **The dispute** has raised important questions on the relevance of the Indus treaty; model of development by building large dams and reservoirs with environmental consequences; application of international environmental obligations; and adequacy of existing international courts to settle water disputes.