

The Indus Waters Treaty—Recurring Conflicts, Non-Participation and Parallel Proceedings in the *Kishenganga* and *Ratle* Disputes

Introduction

The Indus Waters Treaty 1960 signed by India, Pakistan, and the World Bank (Indus Treaty)—negotiated over almost a decade and described as a “bright spot” for its balanced approach to riparian interests,¹ is now the site of recurring conflicts over India’s development of hydro-electric plants on the “Western Rivers” (the *Indus*, *Jhelum*, and *Chenab*), the waters from which India is obliged to “let flow” except for “restricted” uses including hydro-electric power generation in a manner circumscribed by the Indus Treaty.²

In a recent development, two dispute settlement mechanisms under the Indus Treaty have (uniquely) progressed simultaneously, each upholding competence on overlapping issues with the possibility of inconsistent outcomes. That is significant, among others, for a fraying of the tautly balanced Indus Treaty could presage a larger shift in the fractious geopolitics that mark the subcontinent’s hydrological topography.³

The Indus Treaty’s Disputes Provision and Previous Practice

Foresighted for its time, and partly as a forerunner to the UN Watercourses Convention 1997 (to which India and Pakistan remain non-signatories), the layered disputes provision of the Indus Treaty (Article IX) provides for: i) a joint “Indus Commission” for initial examination concerning “interpretation or application”; ii) a “Neutral Expert” to deal with “difference(s)” on matters contained in “Part 1 of Annexure F” on technical determinations;

iii) an attempt at “negotiation” for any “dispute” to be “settled in accordance with” Article IX(3)-(5); and iv) a “Court of Arbitration,” i.e., a seven-member tribunal under “Annexure-G” to “resolve the dispute.”⁴

The first concrete use of the Indus Treaty’s dispute resolution process (outside of its joint commission meetings), in 2007, was a determination by a Neutral Expert of the differences over India’s design of the *Baglihar* hydroelectric plant on the *Chenab*—determining the permissible freeboard of India’s proposed dam.⁵

In the second dispute, in 2013, a Court of Arbitration rendered a (partial and then final) award on Pakistan’s claims against India’s diversion of a tributary of the *Jhelum* for the *Kishenganga* hydroelectric project and over minimum storage levels in the reservoirs of such “run-of-river” plants—finding that while India could divert water for the *Kishenganga* project, it would nevertheless have to maintain specified minimum storage in the reservoirs and release a minimum of nine cubic meters of water per second downriver into the *Jhelum* tributary (the *Neelum*) at all times.⁶

The Present (Parallel and Overlapping) Proceedings

In August 2016, following unresolved technical disagreements relating to the *Kishenganga* hydroelectric project and India’s then-newly announced *Rattle* hydroelectric project on the *Chenab* (the Disputed Projects), Pakistan invoked the Indus Treaty’s arbitral process via a Request for Arbitration (later amended on 28 July 2023, herein Pakistan’s RFA).⁷ Pakistan’s RFA outlined seven “disputes” relating to the Disputed Projects that related to design and permissibility of pondage levels, submerged power intakes, low-level sediment outlets, spillway designs, and permissible freeboard.⁸ It requested design changes and injunctions to India’s projects and asserted that “the principles established by this Court will apply . . . *erga omnes* to future Run-of-River Plants.”⁹

India refused to participate in the arbitral process, resulting in a default appointment procedure.¹⁰ Following a five-year pause (2016-22) imposed by the World Bank (to consider the situation and allow time for a settlement), a seven-member Court of Arbitration was formally constituted in January 2023, even as India outlined its objections to the “outright illegitimacy” of the Court of Arbitration via a letter to the World Bank dated 21 December 2022 (India’s Letter).¹¹

Parallel to Pakistan's invocation of arbitration, on September 6, 2016, India requested the appointment of a Neutral Expert under the Indus Treaty, citing the parties' unresolved disagreements in the joint commission regarding the design of the Disputed Projects.¹² Pakistan refused to participate in the appointment process, resulting in a default appointment procedure. Following the five-year pause, a Neutral Expert was appointed on October 13, 2022, almost simultaneously with the appointment of the Court of Arbitration.

The Decisions on (Overlapping) Jurisdictional Competences

On July 6, 2023, the Court of Arbitration issued an award upholding its competence, addressing the (six) objections outlined in India's Letter, notwithstanding India's continued non-participation.¹³ It reasoned that: i) India could not "pre-emptively appropriate for itself the power of interpreting" the Indus Treaty;¹⁴ ii) "a dispute did arise within the meaning of Article IX(2)(b)" and India's insistence on submitting "differences" before a Neutral Expert was counterproductive considering that interim and declaratory relief (claimed by Pakistan) remained outside the Neutral Expert's competence;¹⁵ iii) the requirements for invoking arbitration under Article IX(3)-(5) had been met, given that the parties' meeting in July 2016 was unproductive;¹⁶ iv) contrary to India's arguments, the Court of Arbitration was properly constituted;¹⁷ v) India's subsequent appointment of the Neutral Expert would have no impact as "Article IX(6), which gives priority to a neutral expert" when dealing with "differences" would not have "any effect in preventing the earlier-in-time application of the Articles IX(3), (4), or (5)" in relation to issues brought before the Court of Arbitration;¹⁸ and vi) only if a Neutral Expert had been appointed prior to the Court of Arbitration for issues that were the same would the Court of Arbitration been under "a duty to determine that it was not competent."¹⁹ Unsurprisingly, India's non-participation did not have a legal impact on jurisdiction.

On January 7, 2025, the Neutral Expert issued an award, finding that India's seven "Points of Difference" on the Disputed Projects (concerning pondage, dead storage, freeboard, and spillway design) were within his competence.²⁰ Pakistan participated in the proceedings, arguing that India's "Points of Difference" were simply a "copy" of Pakistan's dispute, deliberately removed of "elements" requiring "legal or Treaty-based determination" yet requiring an interpretative exercise beyond the Neutral Expert's competence.²¹ In his decision, the Neutral Expert observed that: i) while Pakistan might wish to pursue its claims in a way that "set the rules of the game" for all of India's hydroelectric plants, that would not "deprive the Neutral Expert of competence over differences that fall within the scope of Part I of Annexure F" relating to the Disputed

Projects;²² ii) while the Neutral Expert's competence was limited to what Pakistan termed "technical" matters, those matters would necessarily need to be interpreted by a Neutral Expert;²³ iii) there would exist a difference in the legal consequences of a decision by the Neutral Expert and the Court of Arbitration;²⁴ and iv) there was no legal provision in the Indus Treaty that "would preclude parallel proceedings" even if it involved "address[ing] certain overlapping matters" and the Neutral Expert was under a mandate to "resolv[e] the differences" submitted by India with "reasonable expedition."²⁵

As it stands, both the Court of Arbitration and the Neutral Expert have upheld overlapping competences—uniquely instantiating parallel proceedings under a single treaty. The Court of Arbitration will likely issue a final award before the Neutral Expert, potentially resulting in inconsistent rulings. That is notwithstanding the Neutral Expert's observation that questions before the Court of Arbitration "are put at a higher level" and would not "go all the way to answering the Points of Difference" raised by India before the Neutral Expert.²⁶

A Complex Precedent and Unresolved Meta-Questions

The present dispute is a novel addition to examples of non-participation and parallel proceedings in international law. Notably, India has previously used non-participation at the International Court of Justice to emphasize jurisdictional objections (*Marshall Islands v. India* (2014); *Pakistan v. India* (1973))—stances that evolved into participation and settlement, respectively.²⁷ India's present non-participation may also impact fact-gathering/proof before the Court of Arbitration since only the Neutral Expert has had the opportunity to access the Disputed Projects in India.²⁸

It also spotlights the Indus Treaty's layered disputes provision, resembling sophisticated construction contracts where submitting differences to an "expert" or a "dispute resolution board" often precedes arbitration. However, unlike contract hierarchy, the Indus Treaty's (now apparent) heterarchical disputes framework leaves unresolved questions on parallel proceedings, including on applying *res judicata* and *lis pendens*.²⁹ While the present instance is distinguishable from the "MOX Plant" cases where, following parallel proceedings under different treaties, an UNCLOS Annex VII tribunal had provisionally suspended proceedings in favour of the European Court of Justice to maintain "mutual respect and comity that should exist between judicial institutions deciding on rights and obligations as between states,"³⁰—a possible outcome here (if comity prevails) might still be a finding on "technical" aspects by the Neutral Expert which the Court of Arbitration might accommodate via its broader findings.

More paradigmatically, the present dispute might present a turning point in the subcontinent's otherwise resilient water-sharing practices, held together via a patchwork of treaties and data-sharing memoranda of understanding that are now increasingly strained and/or on the cusp of expiry.³¹ For instance, on August 30, 2024, India communicated a request to Pakistan for modification/renegotiation of the Indus Treaty (Article XII(3)), while reportedly considering a unilateral termination.³² In another example, China is actively progressing the world's largest dam (on the *Yarlung Zangbo*) before it enters India (as the *Brahmaputra/Siang*), even as India considers a "counter-dam" to mitigate potential adverse effects.³³ In that light, the present dispute could be bigger than the sum of the individual issues being litigated.

About the Author: Manu Sanan is an attorney experienced in international disputes and the founder of *Sanan Law* (www.sanan.law), a specialist law office in New Delhi.

¹ Indus Waters Treaty 1960 between the Government of India, the Government of Pakistan and the International Bank for Reconstruction and Development, 419 U.N.T.S. 126 (hereinafter Indus Treaty); World Bank, *Fact Sheet: The Indus Waters Treaty 1960 and the Role of the World Bank* (June 11, 2018), <https://www.worldbank.org/en/region/sar/brief/fact-sheet-the-indus-waters-treaty-1960-and-the-world-bank>.

² Indus Treaty, arts. I(7), III(2), and Annexure-D.

³ Markedly, the original Indus Treaty negotiations were spurred by India's *Bhakra* dam (1954) on the *Sutlej* (an *Indus* tributary) amid fears of drought in Pakistan and near-readiness for war. See, Mohammad Athar and Mona Bhan, *The Indus Water Treaty* (August 2024), <https://internationalviewpoint.org/spip.php?article8651>.

⁴ Indus Treaty, art. IX.

⁵ Baglihar Hydroelectric Plant (*Pakistan v. India*), Neutral Expert Determination on Points of Difference Regarding the Baglihar Hydroelectric Plant Referred by the Government of Pakistan under the Provisions of the Indus Waters Treaty (Feb. 12, 2007). Note: the "Freeboard" is defined as the vertical distance from the top of the dam to the surface of the water in the reservoir.

⁶ Indus Waters Kishenganga Arbitration (*Pakistan v. India*), Partial Award (Feb. 18, 2013); Indus Waters Kishenganga Arbitration (*Pakistan v. India*), PCA Case No. 2011-01, Decision on India's Request for Clarification or Interpretation dated 20 May 2013 (Dec. 20, 2013).

⁷ *Pakistan v. India* (PCA Case No. 2023-01) Pakistan's Request for Arbitration (Aug. 19, 2016); *Pakistan v. India* (PCA Case No. 2023-01) Pakistan's Amended Request for Arbitration (July 28, 2023).

⁸ *Pakistan v. India* (PCA Case No. 2023-01) Pakistan's Request for Arbitration (Aug. 19, 2016) ¶¶ 5, 9.

⁹ *Id.*

¹⁰ *Pakistan v. India* (PCA Case No. 2023-01) Award on the Competence of the Court (July 6, 2023) ¶¶ 13-23 (hereinafter +Arbitration Court Competence Award).

¹¹ Letter from India (Ministry of Jal Shakti) to the World Bank (President), the Neutral Expert, and the Attorney General of Pakistan (Dec. 21, 2022).

-
- ¹² *Pakistan v. India* (Neutral Expert Proceedings) Decision on Certain Issues Pertaining to the Competence of the Neutral Expert (Jan. 7, 2025) ¶ 13 (“Neutral Expert Competence Decision”).
- ¹³ Arbitration Court Competence Award.
- ¹⁴ *Id.* ¶ 152.
- ¹⁵ *Id.* ¶¶ 199-213.
- ¹⁶ *Id.* ¶¶ 224-246.
- ¹⁷ *Id.* ¶¶ 252-266.
- ¹⁸ *Id.* ¶¶ 291-293.
- ¹⁹ *Id.* ¶¶ 305-310.
- ²⁰ Neutral Expert Competence Decision
- ²¹ *Id.* ¶¶ 372-383.
- ²² *Id.* ¶ 556.
- ²³ *Id.* ¶ 540.
- ²⁴ *Id.* ¶ 562.
- ²⁵ *Id.* ¶¶ 547, 565-568.
- ²⁶ *Id.* ¶ 563(e).
- ²⁷ Trial of Pakistani Prisoners of War, *Pakistan v. India* (Order of Dec. 15, 1973) I.C.J. Rep. 1973, 347; Obligations concerning Nuclear Disarmament, *Marshall Islands v. India* (Jurisdiction and Admissibility Judgment) I.C.J. Rep. 2016, 255; See, Shashank P. Kumar, *The Marshall Islands’ Case against India’s Nuclear Weapons Program at the ICJ*, EJIL TALK! (June 27, 2014).
- ²⁸ *Pakistan v. India* (PCA Case No. 2023-01) Procedural Order No. 10 (Feb. 3, 2024); Press Release, *Pakistan v. India* (PCA Case No. 2023-01) (May 8, 2024).
- ²⁹ Laurence Boisson de Chazournes, *Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach* 28 EJIL 13 (2017).
- ³⁰ MOX Plant Case, *Ireland v. United Kingdom* (PCA Case no. 2002-01) Order no. 3 Suspension (June 24, 2003) ¶ 28.
- ³¹ For example, the “India-Bangladesh (Sharing of the Ganga/Ganges Waters at Farakka) Treaty 1996” expires in 2026.
- ³² Shubhajit Roy, *Review, modify Indus Waters Treaty, India tells Pak, looks to renegotiate*, INDIAN EXPRESS (Sept. 19, 2024), <https://indianexpress.com/article/india/indus-waters-treaty-india-tells-pak-looks-to-renegotiate-9575019>.
- ³³ Yashraj Sharma, *Dam for a dam: India, China edge towards a Himalayan Water War*, AL JAZEERA (Jan. 24, 2025), <https://www.aljazeera.com/features/2025/1/24/dam-for-a-dam-india-china-edge-towards-a-himalayan-water-war>.