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The Indus Waters Kishenganga Arbitration (Pakistan v. India)

By Shashank Kumar

Photo courtesy of the Permanent Court of Arbitration

ASIL *Insights*, international law behind the headlines, informing the press, policy makers, and the public.

Introduction

A Partial Award was rendered in the *Indus Waters Kishenganga Arbitration* between Pakistan and India on February 18, 2013.[1] The inter-State dispute under the 1960 Indus Waters Treaty (IWT)[2] arises from India's proposal to build a 330 megawatt hydroelectric project on the Kishenganga River – a tributary of the Jhelum River in the India-administered part of Jammu and Kashmir. Upon crossing the Line of Control between India and Pakistan, the Kishenganga is rechristened the Neelum River in Pakistan-administered Kashmir, before finally joining the Jhelum. India's Kishenganga Hydro-Electric Project (KHEP) involves the diversion of water from the Kishenganga/Neelum River (the River), at a point in the Gurez Valley, through a network of tunnels to the powerhouse at a distance of 23 kilometers from the River, before emptying the water into another tributary of the Jhelum at a lower elevation (see Figs. 1 and 2).

Downstream, Pakistan has also sought to harvest the hydroelectric potential of the River by constructing the 969 megawatt Neelum-Jhelum hydroelectric project (NJHEP). The Jhelum is an important river within the over-burdened Indus river system, which irrigates large areas of India and Pakistan.[3] Concerned by the impact of the KHEP on its water supply, Pakistan filed a Request for Arbitration under the IWT in May 2010.

The Indus Waters Treaty

The 1960 IWT – an outcome of decade-long negotiations between India and Pakistan facilitated by the World Bank – sets out the rights and obligations of the Parties for the utilization of the Indus river system's water resources. In a rather unusual approach, the Treaty allocates entire streams, instead of water volumes.[4] India is permitted unrestricted use of the Eastern Rivers (the Sutlej, the Beas and the Ravi), while the Western rivers are

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allocated to Pakistan (the Indus, the Jhelum and the Chenab), subject to certain exceptions contained in the Treaty. By focusing on the Parties' rights to use the streams, the Treaty avoids addressing the controversial question of sovereignty over the disputed parts of Jammu and Kashmir through which the rivers flow.[5]

The Treaty also establishes the Permanent Indus Commission, comprising a commissioner from each State, for its implementation. Article IX provides for a multi-tiered dispute resolution process based upon a hierarchy of disputes. A "question" between the Parties relating to the interpretation or application of the IWT or the existence of certain facts, if unresolved by the Commission, gives rise to a "difference." Differences relating to technical matters listed in Part 1 of Annexure F may "be dealt with by a Neutral Expert."[6] If, however, a difference does not relate to the listed technical matters, or if the Neutral Expert considers appropriate, then a "dispute" arises. Such a dispute may be settled by formal negotiations, failing which, or if the Parties agree, it is to be resolved by a seven-member arbitral tribunal called the "Court of Arbitration."

The Dispute and Proceedings

This is the first time a dispute under the IWT has been referred to a Court of Arbitration. In its Request for Arbitration, Pakistan identified two questions: first, whether India's proposed inter-tributary transfer as part of the KHEP breached its obligations under the IWT, as interpreted and applied under international law (First Dispute); and, second, whether the IWT allowed India to deplete the reservoir level of a run-of-river plant below the "Dead Storage Level" in circumstances other than unforeseen emergencies (Second Dispute).[7]

To answer these, a Court of Arbitration was constituted on December 17, 2010.[8] In June 2011, Pakistan submitted an application for provisional measures, leading to an Order on Interim Measures by the Court on September 23, 2011.[9] Subsequently, the Court undertook two site visits and oral hearings on the merits were held at the Permanent Court of Arbitration in The Hague from August 20-31, 2012. The Partial Award of February 18, 2013 allowed India to proceed with the construction and operation of the KHEP, subject to certain operational constraints to be determined in the Final Award. While both Parties agreed that the awards should be published, Pakistan opposed the publication of the pleadings.

The Award

The First Dispute concerned the permissibility of India's KHEP and the inter-tributary transfer under the IWT. The IWT obliges India to "let flow" the waters of the Western Rivers, except for limited, enumerated uses. In the Court's view, these exceptions give India the right to utilize the Western Rivers in some ways, subject to its obligations under the IWT.

The Court began by considering India's general obligations under Articles III and IV(6) of the IWT. Pakistan argued that, since the power generated by the KHEP would be supplied to the whole of India's northern electricity grid, the Project did not conform with Article III(2), restricting India's use of the Western Rivers to "the drainage basin thereof." The Court disagreed: though Article III(2) imposed a geographical restriction on India's use of the Western River waters, such a restriction did not extend to the products (such as electricity) generated from the use of these waters. Pakistan also argued that, by failing to adequately assess the environmental impact of the inter-tributary transfer, India breached its general obligation to "use its best endeavours to maintain the natural channels of the Rivers" under Article IV(6). Although noting that Article IV(6) was obligatory, the Court considered it of no direct relevance as it only required the preservation of the natural, unobstructed paths of the rivers, and not the volume or timing of the flow.[10]

Next, the Court turned to Pakistan's arguments under Annexure D of the IWT prescribing requirements for the design and operation of run-of-river plants. Pakistan contended that, first, Annexure D did not permit the permanent diversion of a tributary; second, even if such diversion was permitted, the KHEP did not qualify as a "Plant" under Paragraph 15(iii) of the Annexure; and, finally, even if the KHEP was a "Plant," it failed the test of necessity contained in Paragraph 15(iii).

The Court rejected all three arguments. It found that the plain text of Paragraph 15(iii) allowed inter-tributary transfers, provided that the diverting works complied with three conditions.[11] First, the work must be a run-of-river plant. The Court noted that the KHEP was designed and notified to Pakistan as a run-of-river plant as defined in Paragraph 2(g) of Annexure D.[12] Second, the plant must be "located on" a tributary of the Jhelum. Pakistan pointed out that the actual electricity generation was to take place at a distance of 23 kilometers from the Kishenganga. The Court however saw no reason for "disaggregating the elements" comprising the KHEP, designed to operate as an "integrated whole," and concluded that the condition was satisfied since the works that trapped the water were "located on" the Kishenganga – a tributary of the Jhelum.[13]

Finally, the Court noted that Paragraph 15(iii) required the diversion of water into another tributary to be "necessary" for generating hydroelectricity.[14] On the threshold for necessity, the Court considered "inapposite" the concepts of necessity developed in other branches of international law, such as international trade law, investment law and the law of State responsibility, adopting instead the plain meaning of "necessary" to describe action that was "required, needed or essential." Against this threshold, it found that the diversion was necessary for India to utilize the difference in elevation between the two tributaries in order to generate significant power.[15]

The Court next turned to the "essence" of the First Dispute: the requirement under Paragraph 15(iii) that any Indian inter-tributary run-of-river plant operate "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." Pakistan argued for an "ambulatory" interpretation of "then existing use" in Paragraph 15(iii), calling for a "dynamic assessment by India of the agricultural and hydro-electric uses of Pakistan whenever water is released by the KHEP." By contrast, India argued for a "static" approach, focusing on a "critical date," when India communicated to Pakistan its "firm intention" to proceed with a project, such that Pakistan's agricultural and hydroelectric uses must be "frozen" at the stage when design was finalized.[16]

In answering whether the NJHEP constituted "then existing use" by Pakistan, which restricted India's right under Paragraph 15(iii), the Court did not accept either interpretation in entirety. With respect to Pakistan's approach, it noted that the "overall structure" of Annexure D suggested that "the general permissibility of any new [ ] Plant's design is determined prior to the commencements of its construction."[17] It ultimately rejected Pakistan's interpretation because it would subject the viability of India's works to the "unilateral will and action of another party."[18]

With respect to India's approach, the Court considered that, in practice, it could be "very difficult to pinpoint" the exact moment at which a firm intention to proceed with a project crystallizes, keeping in mind the "continuum of design, financing, government approval, construction, completion and operation" associated with large infrastructure projects such as the KHEP. Instead, the Court proposed a "'critical period,' wherein a cumulation of facts – tender, financing secured, government approvals in place and construction underway – has achieved a level of certitude indicating that a project will proceed 'firmly' as proposed."[19] Applying this "critical period" approach to India's KHEP and Pakistan's

NJHEP, it found that the KHEP preceded the NJHEP such that the NJHEP did not constitute a "then existing use" by Pakistan. India was therefore permitted to effectuate an inter-tributary transfer under Paragraph 15(iii).[20]

However, the Court accommodated elements of the dynamic approach by subjecting India's right to operate the KHEP to certain operational constraints. In doing so, it recognized that India's rights to divert water for the operation of the KHEP are "tempered" by Pakistan's right to a minimum flow of water for hydroelectric and agricultural uses. The Court observed that Paragraph 15 "delineates a number of operational constraints" for new works and seems to be "operational in character," such that the Treaty imposed a duty on India to ensure that a minimum flow of water reaches Pakistan at all times.[21]

The Court also found support for such a duty in "contemporary customary international law," which requires States to take "environmental protection into consideration when planning and developing Projects that may cause injury to a bordering State." Acknowledging that the IWT must be interpreted and applied in light of the "customary international principles for the protection of the environment in force today,"[22] the Court noted that general international law imposes a duty on States "to prevent, or at least mitigate" significant harm to the environment when pursuing large-scale construction activities.[23] Crucially, it recalled the International Court of Justice's observations that the "duties of due diligence, vigilance and prevention" imposed by the principle of sustainable development continue "once operations have started and … throughout the life of the project."[24] 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.[25]

Second Dispute

Although Pakistan framed the Second Dispute as relating to the permissibility of reservoir depletion in the abstract, the Court noted that Pakistan in essence took issue with the use of a sediment management technique called "drawdown flushing" by India at the KHEP and other future projects.[26] It clarified that while its findings could not reverse the Neutral Expert's 2007 Determination (permitting this technique for India's *Baglihar* project), or retrospectively affect any plant already in operation or under construction, they would apply to the KHEP and any future Indian run-of-river plants on the Western Rivers.[27]

India put forth two objections to the admissibility of the Second Dispute. First, it argued that except when the two Permanent Indus Commissioners were in agreement to pursue an alternative, the IWT required a Neutral Expert to initially determine whether a matter was a technical "difference" or a "dispute" to be referred to arbitration. With respect to Pakistan's claim, no such initial determination was made. Second, in India's view, the subject matter of the Second Dispute was objectively among the questions consigned to a Neutral Expert according to the list in Annexure F. The Court dismissed both objections. In its view, the text of Article IX(2)(a), as confirmed by its object and purpose, did not impose "an additional procedural hurdle" to access the arbitral process, and it was not open to India to assert at this late stage that the Second Dispute was a "difference" and not a "dispute." Moreover, even if the Second Dispute were a technical question listed in Part 1 of Annexure F, the IWT did not stipulate that *only* a Neutral Expert could consider such matters; a Court of Arbitration could consider any question, or the existence of any fact, including a technical one.[28]

Looking at the treaty context, the Court noted that several provisions strongly suggested that some limitation on India's use and depletion of dead storage – a consequence of drawdown flushing technique – was intended. Specifically, it identified a "decisive

prohibition" in the Treaty against the depletion of dead storage, except in unforeseen emergencies. Noting that both Parties agreed that sediment accumulation did not constitute an unforeseen emergency, the Court concluded that the text of the Treaty prohibited the depletion of dead storage for drawdown flushing.[29] Next, the Court juxtaposed its understanding of the limitations on the use of dead storage with another object of the Treaty: to allow India to harness the hydroelectric potential of the Western Rivers. Agreeing that "anything you build needs to work," it considered whether drawdown flushing was indispensable to the sustainable generation of hydroelectricity on the Western Rivers.[30] Based on the evidence, it concluded that India's right to utilize the Western Rivers could be "meaningfully exercised without drawdown flushing." In particular, the Court suggested the use of another technique called "sluicing" for sediment management.[31]

Conclusion

The Partial Award allows India to proceed with the construction of the KHEP, subject to ensuring a minimum downstream flow of water to be determined in the Final Award. It also prohibits India from using drawdown flushing for sediment control at the KHEP and any future run-of-river plant on the Western Rivers.

From a regional perspective, the cultural, historical and political contexts that accompany any dispute between India and Pakistan often prevent amicable and peaceful settlements. In the past, this has led to armed conflict, but more often it leads to a real neglect of the people directly affected by the stalemate. The Kishenganga dispute serves as a useful reminder of the potential of pacific dispute settlement in resolving complex disputes in tense settings. For India and Pakistan, the Award attempts to embody 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.

Figures

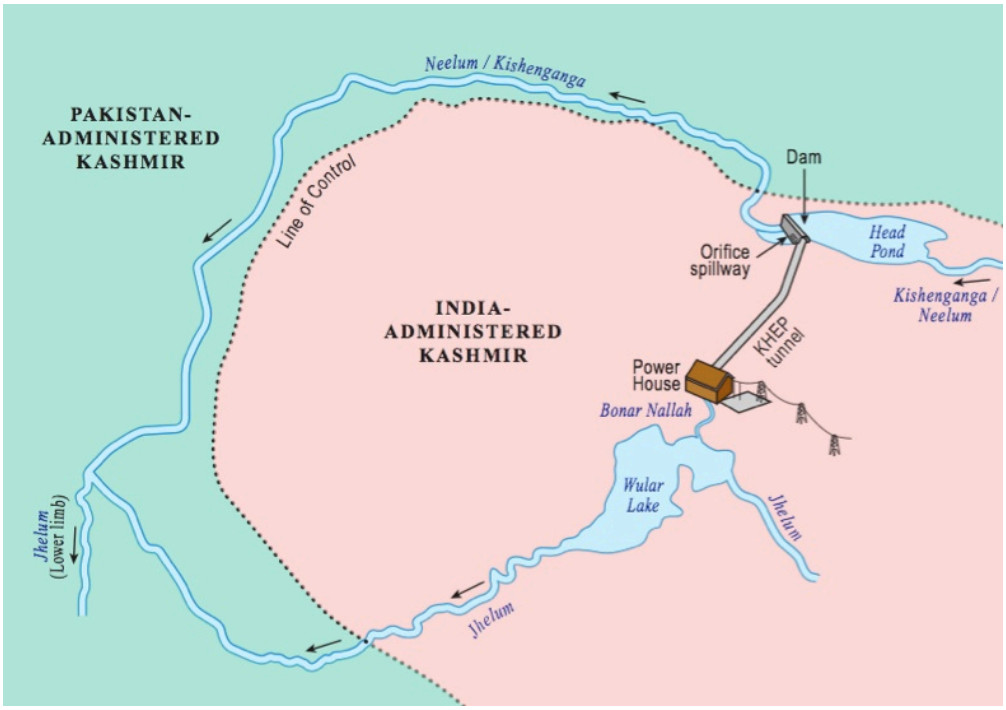

Fig. 1: The Kishenganga Hydroelectric Power Project (Source: Partial Award, p. 51, in turn citing Pakistan's Memorial, vol. 2, fig. 9)

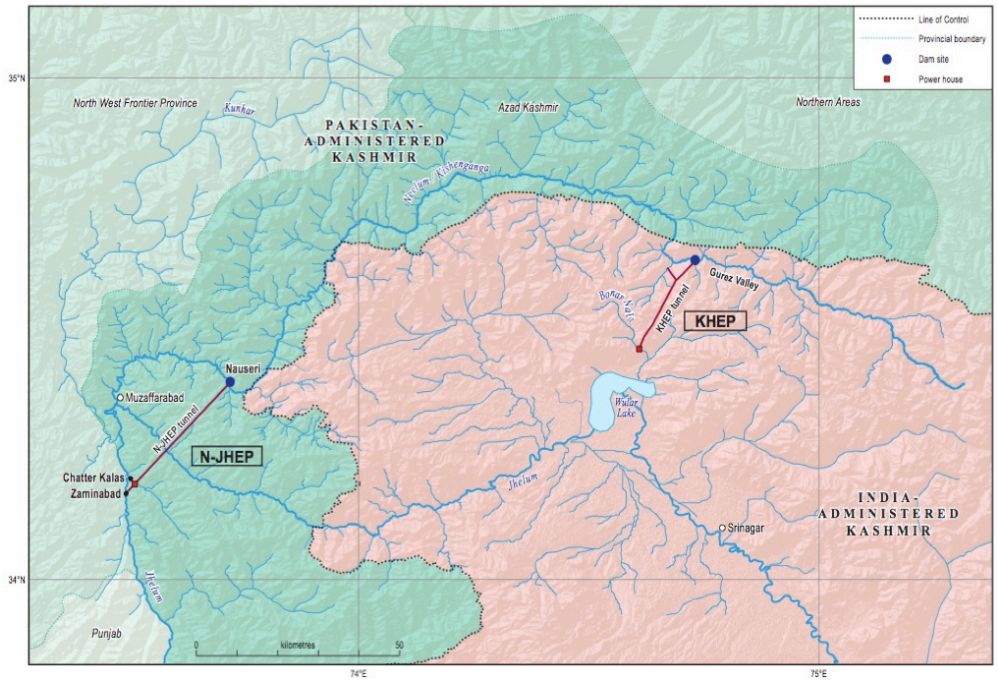

Fig. 2: The Kishenganga and Neelum-Jhelum Hydroelectric Power Projects (Source: Partial Award, p. 53, in turn citing Pakistan's Memorial, vol. 2, fig. 3)

About the Author:

Shashank Kumar is a Visiting Faculty of International Law at National Law University, Jodhpur (India). He can be reached at shashank.kumar[at]aya.yale.edu. The views expressed in this *Insight* are personal.

Endnotes:

[1] Indus Waters Kishenganga Arbitration (Pak. v. India) (Partial Award of Feb. 18, 2013), *available at* http://www.pca-cpa.org/showfile.asp?fil_id=2101 (last visited Mar. 1, 2013) [hereinafter Partial Award].

[2] Indus Waters Treaty 1960 between the Government of India, the Government of Pakistan and the International Bank for Reconstruction and Development, Pak.-India, Sep. 19, 1960, 419 U.N.T.S. 126 [hereinafter IWT]. The Treaty was signed by India, Pakistan and the World Bank on September 19, 1960, and entered into force on January 12, 1961, upon the exchange of instruments of ratification, with retroactive effect from April 1, 1960.

[3] *See, e.g., South Asia's Water: Unquenchable Thirst*, The Economist, Nov. 19, 2011, http://www.economist.com/node/21538687.

[4] Ariel Dinar, Shlomi Dinar, Stephen McCaffrey & Daene McKinney, Bridges Over Water: Understanding Transboundary Water Conflict, Negotiation and Cooperation 166-67 (2007) (noting that the IWT is "remarkable in that rather than apportioning the water in each of the six rivers in the Indus system as between the parties, it assigns the entire flow of three of the rivers to each of them").

[5] Partial Award, *supra* note 1, para. 360 (noting that "the Treaty focuses on the right of each Party to the *use* of some of the waters of the Indus system of rivers without going into the question of sovereignty over the territory of Jammu and Kashmir through which some of those rivers transit" (emphasis in original)).

[6] This process, under Art. IX(2)(a), has been used once before when Pakistan raised points of difference relating to the construction of the Baglihar hydroelectric project by India. The process led to an "Expert Determination" by Professor Raymond Lafitte, a civil engineer and professor at the Swiss Federal Institute of Technology in Lausanne, issued on 12 February 2007. *See* Expert Determination on Points of Difference Referred by the Government of Pakistan under the Provisions of the Indus Waters Treaty (Executive Summary of Feb. 12, 2007), *available at* http://siteresources.worldbank.org/SOUTHASIAEXT/Resources/223546-

1171996340255/BagliharSummary.pdf.

[7] Partial Award, *supra* note 1, para. 5. Run-of-River projects are power plants with limited or no water storage in a reservoir. Dead storage level is the level below which water may not be withdrawn for consumptive uses.

[8] The Court comprised of Sir Franklin Berman, Prof. Howard S. Wheater, Prof. Lucius Caflisch, Prof. Jan Paulsson, Judge Bruno Simma and H.E. Judge Peter Tomka, with the Permanent Court of Arbitration acting as the secretariat.

[9] Indus Waters Kishenganga Arbitration (Pak. v. India) (Order on the Interim Measures Application of Pakistan dated June 6, 2011 of Sep. 23, 2011), *available at* www.pca-cpa.org/showfile.asp?fil_id=1726 (last visited Mar. 1, 2013). The Order prohibited India from constructing permanent works at the site which would inhibit the restoration of the full flow of the Kishenganga to its natural channel. For a detailed analysis of the Order, see Yoshifumi Tanaka, *Note on the Interim Measures in the* Indus Waters Kishenganga *Arbitration*, 11(3) Law & Prac. Int'l. Cts. & Tribunals 555 (2012).

[10] Partial Award, *supra* note 1, paras. 368-375.

[11] Partial Award, *supra* note 1, para. 378-380 (specifically, the Court relied on the following language used in Para. 15(iii): "where a Plant is located on a Tributary of the Jhelum …, the water released below the Plant may be delivered … into another Tributary").

[12] Partial Award, *supra* note 1, para. 383.

[13] Partial Award, *supra* note 1, paras. 384-387.

[14] Partial Award, *supra* note 1, paras. 390-396 (although the text of Para. 15(iii) does not explicitly indicate "necessary for what," the Court relied upon the drafting history of the provision to conclude that "necessity is to be determined by reference to the purpose for which the water is to be delivered into another tributary; in the case the KHEP, this purpose is the generation of hydro-electric power").

[15] Partial Award, *supra* note 1, paras. 397-398 (noting that since the Treaty confers upon India the "right to the use of the waters for the purpose of generating hydro-electricity in conformity with Annexure D," "it must be taken to be a right that can meaningfully be exercised." The Court was careful in pointing out that this interpretation did not "reduce necessity to a mere test of what is desirable, nor does it become a self-judging matter for India alone to evaluate," and that it could "imagine situations in which the benefits of including the diversion of water within the scheme of a Run-of-River Plant would be so marginal that such a diversion could not fairly be termed 'necessary'").

[16] Partial Award, *supra* note 1, paras. 425, 426.

[17] Partial Award, *supra* note 1, paras. 415-417.

[18] Partial Award, *supra* note 1, paras. 422-424.

[19] Partial Award, *supra* note 1, paras. 428-429.

[20] Partial Award, *supra* note 1, paras. 434-435, 437-444. Although para. 15(iii) mentions Pakistan's agricultural and hydro-electric uses, the Court found that agricultural uses in the Neelum Valley were met by the tributary stream that feed the river, and not the main Kishenganga river itself. *Id.*, para. 434. Mindful that the "critical period" approach could lead to a "race to design, construct and operate a hydro-electric plant," the Court suggested that "strict and timely adherence to the anticipated process for the resolution of differences and disputes would likely preclude such a race from occurring, as the dispute settlement mechanism would be triggered prior to the expenditure of immense resources for the construction of a Plant." *Id.*,para. 444.

[21] Partial Award, *supra* note 1, paras. 402-405, 415, 445-446.

[22] Partial Award, *supra* note 1, para. 452.

[23] Partial Award, *supra* note 1, para. 451 (referring to the Arbitration Regarding the Iron Rhine ("*Ijzeren Rijn*") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands, (Award of May 24, 2005), para. 59).

[24] Partial Award, *supra* note 1, paras. 448-450 (citing Pulp Mills on the River Uruguay (Arg. v. Uru.), 2010 I.C.J. 14, 83-84 (April 20)).

[25] Partial Award, *supra* note 1, paras. 453-463. India committed to ensuring a minimum flow 3.94 m3/s at all times. *Id.*, para. 453. The Court provided a detailed list of the information to be supplied by the Parties, and the timeline for their submissions, expressing hope to issue the award in 2013. *Id.*, paras. 458-463.

[26] Explaining the process of sediment management, the Court observed that hydroelectric power projects relying upon the storage of water in a reservoir are prone to sedimentation as the sediments carried in the flowing river are deposited in still waters of the reservoir. Flushing is a process by which sediment deposits in the reservoir are eroded and expelled by the flow of water through the reservoir by drawing the water level down to the reservoir bottom (below the dead storage level), thereby restoring the natural flow velocity of the river. Apart from affecting the rate and timing of the downstream flow, sediment-laden waters released by flushing can have significant environmental impact downstream. Partial Award, *supra* note 1, paras. 467, 495-502.

[27] Partial Award, *supra* note 1, paras. 468-470, 523.

[28] Partial Award, *supra* note 1, paras. 479-491.

[29] The Court found the "decisive prohibition" on depletion below the dead storage in Paragraph 14 of Annexure D, incorporating by reference Paragraph 19 of Annexure E. The Court also found support for this conclusion in the definition of "Dead Storage" in Annex D. Partial Award, *supra* note 1, paras. 505-508, 513-515.

[30] Partial Award, *supra* note 1, paras. 509, 516.

[31] Partial Award, *supra* note 1, paras. 516-522. Sluicing allows the incoming sediment-laden water to pass freely through the reservoir during peak sediment loads, thus minimizing the retention of silt-laden water. *Id.*, para. 501.