



RESEARCH PAPER

Legal and Political Dimensions of Kishanganga Hydroelectric Project Issue

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ABSTRACT

Water is a one of the most important natural resource. Water has become a source of conflict between India and Pakistan due to the constant growth of population, hyper-urbanization, poor water management and climatic changes in the region. India has started the construction of several water storage and hydro power projects on Western Rivers after Indus Waters Treaty 1960. This mixed method exploratory research approach aims to explore hydro politics between Pakistan and India over the construction of Kishanganga hydroelectric project by India on Jhelum River and judgment of Intercontinental Court of Arbitration on this issue. Pakistan claimed this project a violation of the treaty as it failed to follow the criteria specified in Treaty. This study finds that Kishanganga hydroelectric project has challenged the reliability of the Indus Waters Treaty and water security of Pakistan. This study recommends that solution of this issue is must for peace and stability in the region.

KEYWORDS Court of Arbitration, Indus Water Treaty, Kishanganga, Neelum Jhelum River, Run-of-River

Introduction

Water is a crucial resource for the livelihood of people and development of economy. It is the basic human right (Qureshi, 2017). Water is expected to become a cause and weapon of wars in 21st century due to its importance, limited availability and trans-boundary distribution. Even if water wars have not been fought in recent past but water scarcity and uneven distribution of water resources may lead to water wars in future because lower riparian are facing multi challenges from the upper riparian states (Riffat, & Iftikhar, 2015). Among the large nation of the world, Pakistan (Indus basin) and Egypt (Nile basin) are the only two countries solely dependent on single basin (Faruqi, 2004). Pakistan largely depends on Indus River System for its water needs. IRS receives about 180 BCM of water from India (Khalid, 2010). Indus Rivers System (IRS) supplies water to the largest contiguous irrigation system (Qureshi, 2011).

Literature Review

United Nations has warned that Pakistan is among those countries of the world whose have serious threats due to shortage of water. Pakistan is a single Basin country while India is a multi-Basin country (Khan, June 13, 2016). India is building multi hydro projects on the Western Rivers and if it will complete its all water projects on Western Rivers, it may stop waters of Pakistan for months during Pakistan's critical period (dry season) (Khan et al., 2022). The Article-II of the Indus Water Treaty, 1960 (IWT) allotted whole Eastern Rivers (Ravi, Sutlej and Beas) to India for the unconstrained and complete water usage. Pakistan was only allowed to use water of Western Rivers for domestic use, non-consumptive use and specific agricultural usage. Pakistan was not allowed to interfere with the main Ravi and Sutlej Rivers and their tributaries before they finally entered in Pakistan. Article-III of the IWT allowed unhindered usage of all the waters of Western Rivers (Chenab,

Jhelum and Indus) to Pakistan. Article-III (1) does not permit India to intervention with Western Rivers. However, paragraph 5 of the Annexure C permitted India to use water of Chenab, Jhelum and Indus Rivers for domestic uses, non-consumptive uses (navigation, floating of timber or other property, flood protection, fishing, wild life or other like beneficial purpose) and certain limited agricultural usage. India has started the construction of a number of water storage and hydro power projects on the Western Rivers in the decade of 1990s which challenged the reliability of the IWT and water security of Pakistan. Pakistan blamed India that its hydro projects on the Western Rivers are a violation of the treaty as it failed to follow the criteria that was specified in Indus Waters Treaty. Pakistan is feared that water coming to it through Chenab and Jhelum River will be reduced by 40% by Indian hydro power projects in Indian Kashmir (Afzal, et al. 2020; Akhtar, 2019).

Research Methodology

The mode of this study is mixed method. The philosophy behind the selection of mixed method is that it uses both qualitative and quantitative methods of research. At first step, the detail of Kishanganga hydroelectric project is examined; later an overview of bilateral talks and decision of CoA is explained in this study. The exploratory research approach has been applied in this study. This exploratory research aims to unravel the connections between the water scarcity and hydro politics between Pakistan and India. This study relies on data collected through secondary sources.

Kishanganga Hydroelectric Project (KHEP)

The fourth water issue arisen between both countries after IWT and the first water issue between both riparian decided by International Court of Arbitration (ICA) is Kishanganga Hydroelectric Project (KHEP). India has built this project near Bunkot in its administrated Jammu & Kashmir on the major tributary of Jhelum River called Kaishanganaga which is known as Neelum River after it enters the territory of Pakistan's administrated Kashmir (Azad Kashmir). The Kishanganga project was started in 2007 and its first phase is completed in 2016. The largest tributary of Jhelum River is Kishanganga/Neelum River (Khalid, & Begum, 2013). The project is located 160 km upstream of Muzaffarabad the capital of Azad Kashmir. The KHEP is based on the diversion of water of Kishanganga/Neelum River through a long 22 km long tunnel to the Bonar Nallah which is another tributary of the Jhelum River (Akhtar, 2010). It envisages diversion of 58.4 cumecs of water to Bonar Nallah with in the Gurez valley leading to Wullar Lake and Jhelum River. The Neelum River enters in Azad Kashmir about 12.07 km from the line of control. The diversion of water of Kishanganga/Neelum River will change the its course by 100 km and will then join it through the Wullar Lake near the town of Bandipore in the Baramulla district of Indian Occupied Kashmir. The diversion will result that Kishanganga/Neelum and Jhelum Rivers will meet at Wullar Lake in Indian Occupied Kashmir rather than at Domail in Muzaffarabad where both rivers currently meet (Hussain, 2017). The original design of KHEP envisioned the building of gravity dam of 75.48-meter height and also reservoir of storage capacity of 0.18 MAF (Siddiqui, 2013).

The stored water of Kishanganga River was diverted through tunnel to Wullar Lake to generate 330 MW of electricity. The diverted water from the dam site of KHEP then flows through Wullar Lake into the Jhelum River and generates additional power at Lower Jhelum (105MW), Mahora (9MW), Uri (480MW) and Uri-II (240MW) hydroelectric power stations in administrated Jammu & Kashmir before it enters Azad Kashmir. Pakistan got information about the start of some physical activities at KHEP in 1988 and it became a point of serious concern for it because the project would have adverse downstream impacts on Pakistan's planned Neelum Jhelum Hydroelectric Project (NJHEP) of 969 MW on the Neelum River at Nauseri near Muzaffarabad in Azad Kashmir. However, India accepted in 1994 that it is going to construct KHEP as a storage project and formally submitted the details of the project to Pakistan. Pakistan raised the number of objections and claimed that IWT did not

allow the diversion of water from one tributary to another for creation of storage project (Mahmood, 2018). Pakistan initially objected the design and pondage size of the Kishanganga dam (Khan, 2017). Although Pakistan has also diverted water of Neelum River for its NJHEP to an underground powerhouse at Chatter Kalas and water is returned to the Jhelum River but it is not a storage project. Similarly, Pakistan, being a lower riparian is not bound about the diversion of river under the treaty as well as about diversion.

Failure of Bilateral Talks

The Pakistan government made efforts to resolve the KHEP issue with India through bilateral talks since 1994 to 2009 but failed. The issue was taken formally to the meetings of Permanent Indus Water Commission from May 2003 to November 2005 but no result. In 2006, Pakistan finally decided to take the matter to ICA because India continued insisting on its legal point of view. India however, intimated on 19th June 2006, that under paragraph 15A of Annexure E of the treaty, the Kishanganga storage along with hydroelectric project has been reviewed as a R-o-R plant. India also supplied the information to Pakistan as per Appendix II to Annexure D of the IWT about its revised design of KHEP. It was done by India to justify its diversion of water under the treaty but Pakistan was not satisfied with the revised design as well as India has not abandon the diversion of Kishanganga River. Pakistan again objected the diversion of water for the revised R -o-R plant on the grounds that Pakistan had existing agricultural uses and it had already planned NJHEP which will be adversely affected by KHEP. Pakistan stated that diversion of 58.4 cumecs of water for KHEP will result in diversion of the entire flow of Kishanganga/Neelum River for more than 6 months per year (Mahmood, 2018). Pakistan also claimed that hydropower generation ability of NJHEP would be reduced by 11% by KHEP (Shahzad, 2016). The diversion of Kishanganga River would also result in an ecological disaster in the river reach downstream of the plant. Pakistan also claimed that India was not allowed to distract water of Kishanganga/Neelum River in view of Article III, Article IV and paragraph 15 (iii) of Appendix D of the IWT (Siddiqui, 2103). Pakistan raised six objections regarding proposed revised design of the KHEP which related to structure of gate, altitude and magnitude, alteration plan, storage capacity, power intake and free board (Hussain, 2017).

These objections were similar to those in the case of BHEP. These objections were discussed in the PIWC in July 2008 at Delhi. Pakistan contented that height of free board and the pondage envisaged in the KHEP will able India to store more water than the permissible storage. Similarly, the location of power tunnel and sluice spillway will allow India more control on waters than permissible in the treaty. India, on the other hand was not willing to accept the claim of Pakistan about existing agricultural uses from NJHEP. India justified the location of sluice spillway for sediment sluicing/flushing besides routing flood waters. Later on, India felt more assured when NE in case of BHEP allowed drawdown of water level below the dead storage level for sediment sluicing/flushing (Mahmood, 2018). Pakistan protested that Kishanganga project will withdraw 27 percent of river's natural flow which will cause destruction to its 133,000 hectares of irrigation in the Neelum valley.

Appointment of Court of Arbitration

India engaged Pakistan in correspondence and negotiations for years whole taking the KHEP to a stage of a fait accompli. Pakistan has originated proceedings against India under the provisions of IWT 1960, on May 17, 2010 and requested the WB for International Court of Arbitration ICA. The KHEP was the first example in the history of IWT that raised to CoA. The representative of India and Pakistan met in July 2010 in New Delhi and decided to refer the issue to CoA and finally CoA was constituted on 27 December, 2010 (Hussain, 2017). The Annexure G of the IWT 1960, lays down the composition and detailed procedure for the constitution of CoA. The seven members, CoA was headed by Judge Stephen Schwebel from USA (Aslam, 2013).

Specific Disputes Before the Court of Arbitration

Pakistan submitted following two disputes before CoA for arbitration of KHEP dispute.

First Dispute

India planned diversion of Kishanganga/Neelum River into the Bonar–Madmati Nallah through the KHEP. Pakistan asked the CoA to articulate whether or not the IWT allowed India to divert waters. Pakistan upraised objection that India has breached the IWT by transferring the water from one tributary to another tributary of Western Rivers. The Article III (2) of IWT has given control of Western Rivers to Pakistan. Pakistan claimed that Article III (2) of the treaty obliges ‘let flow’ all the waters of Chenab, Jhelum and Indus River without ‘any intrusion’. Pakistan also stated that Article IV (6) of the treaty also entails to sustain ‘natural channels’ of the Western Rivers. The issue of diversion was not a design issue.

Second Dispute

Indus Water Treaty did not allow India to deplete or bring the reservoir level of R-o-R plant below the DSL in at all situation excepting in the case of unexpected disaster. Pakistan separated question of drawdown of reservoir from location of the spillway. The second dispute before the CoA was not restricted to only the KHEP but it extends to any Indian scheduled R-o-R plant on Western Rivers in the future.

Main Arguments of the Parties on First Dispute

Pakistan accused the India has violated three principles. First India is not allowed to divert waters of the Kishanganga/Neelum River into the Bonar Nallah because it violate the general obligation to ‘let flow’ waters of the Western Rivers. Second, the requirement concerning to the allocated use of waters for hydro power generation. Third, compulsion to use the best endeavors to preserve the natural channels of these Rivers. Pakistan claimed that Article III (2) of the treaty confines India ‘let flow’ all the waters of Chenab, Jhelum and Indus River without ‘any intrusion before they go in Pakistan. India contended that the suggested diversion for the KHEP was not violation of the treaty as IWT’s all provisions must be interpreted in light of its object and purpose. India claimed that the preamble of the IWT which considers the ‘maximum and acceptable consumption of the waters’ thus it would use the complete potential for electricity generation of the upstream of the Kishanganga River. India also stated that KHEP would beneficial for NJHEP and other Pakistan’s downstream projects. Differing to Pakistan, India contended that Article III (2) of the treaty entitles it to use Western Rivers water to produce hydroelectric power, though subject to IWT’s Annexure D. Although Article III of the IWT not allow India to supply water from one tributary to other for generation of electricity but Pakistan accepted that there are concessions to the building of R-o-R plants but Annexure D of the treaty imposes some restrictions on their operation and design and para. 15 (iii) of the Annexure D describes that water must be delivered into the river beneath the plant the equivalent volume of water that is received in river upstairs the hydroelectric plant within a specified 24-hour period. Pakistan argued that diversion of Kishanganga River is incompatible with treaty’s para. 15 (iii) of Annexure D because it only permits supply of water released below a plant into another tributary but it does not allow permanent deviation of the whole waters for power generation which is not naturally rise from the course of the river. Pakistan also claimed that IWT allows only occasional diversion of waters of one tributary to another “if necessary” but it should not be large scale permanent diversion and doing so the “existing use” (agricultural or hydropower) by Pakistan on the previous stream must be protected. India argued that although Annexure E of the treaty did not permit inter tributary transfers on storage works but Annexure D on R-o-R plants did. India stated that Annexure D

(para.15-iii) of the treaty does not forbid it from permanently diversion of Kishanganga River' water into other tributary because India realized such diversion in the mid-1950s and framers of the IWT aware that India would need such a possible project on Jhelum River or its tributary. India provided a proof of CWPC's letter dated May 16, 1960, which shows that India was intending the hydroelectric projects on the Kishanganga/Neelum River involving its water diversion (Hussain, 2017).

It was also a challenge before the CoA to interpret the meanings of the expression the 'the then existing use' because both countries interpreted differently. The question was whether the existing use be considered from (i) the time of completion of KHEP/NJHEP, or (ii) from the date of start of KHEP, or (iii) the date of firm commitment for the implementation of the respective projects. Pakistan argued that Annexure D's para. 15(iii) of IWT is related to protection of 'the then existing use' at a time when water is released from the plant and require the uses to be protected at the time of operation. Pakistan claimed that while planning R-o-R projects, India must consider the specific Pakistan's plans to build any project. India stated that Annexure D's para. 15 (iii) only shields Pakistan's 'then current use' downstream in term of power generation and agricultural uses which, it contended, not be on the Kishanganga River. India claimed that it requested Pakistan to provide information on the 'then existing uses' in 1994 when KHEP was conceived as storage project and again when it changed it to R-o-R plant but Pakistan provided a figure of the irrigated land but did not mention specific area. Similarly, India argued that rainfall and channels fed by other streams rather than Kishanganga/Neelum River is a main source for irrigation in Neelum valley. Pakistan stated that India had informed by it about NJHEP in December 1988 while India in 1990 submitted details of its KHEP as a storage project. Pakistan stated that India had later changed the KHEP from storage to run-of-river plant and informed Pakistan in 2006 about its modified design of the project. Pakistan was ahead of India in starting of its NJHEP because Pakistan had approved and prepared design of its NJHEP in 2005. India rejected this claim and insisted that in terms of hydroelectric uses it had started its project since 1960 while Pakistan did not intimate India about the NJHEP until 1989 and no work preparatory work in sight was found during the inspection tour of 2008 (Hussain, 2017; Mahmood, 2018).

The agricultural uses downstream of the KHEP depend on the flow of water from India and KHEP would interrupt the current agricultural uses in Azad Kashmir. The IWT accepts Pakistan priority on the tributaries of the Jhelum River with regard to hydroelectric and agricultural uses. Pakistan argued that diversion of the entire flow of the Kishanganga/Neelum River during the lean period and up to 58.4m³/s during the high flow season which will adversely affect the existing agricultural uses and power generation of NJHEP will suffer 13% reduction. The other hydroelectric power plants planned by Pakistan in future will also be affected by the diversion of waters for KHEP. India rejected it and claimed that overall impact on the power generation in the area will be positive because the water from KHEP will be released back to Jhelum River which will increase the power generation of Pakistan's planned Kohala Hydropower Project in its controlled Kashmir. (Mahmood, 2018).

It was Indian view that KHEP would not have a substantial antagonistic effect on the NJHEP. India claimed that less than 1% of the total volume of waters of Western Rivers would be diverted by KHEP and NJHEP would receive water in surplus of its release volume through the high flow period while during the lean period sufficient waters could be available for its operation from the numerous tributaries that flow into the Kishanganga/Neelum River between the KHEP and the NJHEP. Pakistan also claimed that India is breaching the Article IV (6) of the IWT which enforces the 'finest endeavors' compulsion on the both countries to preserve the natural channels. Pakistan pleaded that water would be diverted from their natural waterways due to KHEP and environmental ecology of the channel would also be damaged. India rejected the application of international environmental law principles to the explanation of Article IV (6) or the KHEP

dispute as a whole. It was also claimed by India that in 2000, Environmental Impact Assessment (EIA) reported that KHEP would not have any noteworthy adversarial ecological influence on Kishanganga/Neelum River as it would, at all times, release at least a minimum 'environmental flow' of 3.94cumecs at the site. Pakistan also presented that the power plant and the dam of KHEP are two separate components which must be sited in same catchment area under para. 15 (iii) but it was unfounded. Pakistan claimed that KHEP does not cover Annexure D's para. 15 (iii) of the treaty because only the KHEP's dam is situated on a stream of the Jhelum River but its plant is found 23 km away in separate catchment area. India claimed that Pakistan misinterpreted the term 'plant' which appropriately refers to the entire complex including the power plant and dam of the KHEP India rejected the Pakistan's petition for confining the uses of waters to drainage basin and claimed that Article III (2d) described the use of waters for hydroelectric production but not about the usage of it. India stated that supply of hydroelectric power outside the drainage basin where it is produced is not restricted by IWT (Hussain, 2017; Mahmood, 2018).

Main Arguments of the Parties on Second Dispute

Pakistan argued that IWT did not permits India to deplete or bring the reservoir level of KHEP or any R-o-R plant below the DSL in any situations except sudden disasters and particularly drawdown flushing. The main fear of Pakistan was sluice spillway below the DSL. Pakistan stated that sluice spillway below the DSL will enable India to drawdown the level of water below DSL and hence it can control the water flowing to Pakistan. Pakistan produced evidence that Annexure D para 8 (d) and Annexure D para 15 of the treaty references to "outlets below the DSL" and "sediment control" are not an approval to reduce the reservoir below the storage level. In Pakistan's view the restriction of sluice spillway in treaty cannot be sidestepped by labeling the function of sediment flushing of reservoir as "maintenance" activity and attempting to distinguish it from the "operation". There is no permission in the IWT to drawdown the water level below the dead storage level. India argued that location of the spillway will perform the function of flood routing and sediment sluicing/flushing. India justified its point on the grounds that NE in the case of BHEP had allowed the drawdown technique for sediment flushing. In Pakistan's view the present case differed from the BHEP as it is involved different hydroelectric plant on different river. Pakistan argued that NE agreed with Pakistan's view that the low level outlets will not perform the function of sediment flushing unless the water level was drawn down the dead storage level and neither the treaty allowed such an operation. However, NE allowed India to operate the sluice spillway for "maintenance" of reservoir. Pakistan asserted that NE exceeded his competence in deciding the question of the permissibility of drawdown flushing and it misinterpreted the treaty. India argued that second dispute is not in the jurisdiction of CoA but it would be decided by Neutral Expert. In Pakistan's view it was a fit case for consideration by CoA as it was not resolved by the commission over a long period and it was a dispute on the legal interpretation of a provision in the IWT rather than engineering design. India rejected Pakistan's reservations that the drawdown flushing would switch the Western River's waters by India. India defended sluice spillway of the KHEP on the grounds of an evolving state-of-the-art technology. India claimed that framers of the IWT were not aware of the quick progress in technology and therefore enshrined the "state-of-the-art" idea in IWT. However, Pakistan produced evidence that concept of drawdown flushing was well known in 1951 (Hussain, 2017).

A stay order was issued by CoA on 23 September 2011, over the KHEP and give direction to stop all kind of works associated to dam but India was allowed to continue diversion of tunnel to be used for the project (Raza, September 24, 2011).

Partial Award of the Court of Arbitration

The CoA announced its award on February 18, 2013 which was unanimous but partial. The CoA decided on the first dispute that KHEP is a R-o-R plant under the IWT, thus

India is not allowed divert water from the Kishanganga/Neelum River for the purpose of power generation. However, India was under obligation to construct and operate the KHEP in such a way to maintain a minimum flow of water in the Kishanganga/Neelum River, at a rate which would be determined by the Court in its Final Award. On the subject of second dispute, CoA decided that the IWT does not allow India to diminish the water level of the R-o-R plants on the Western Rivers below the DSL except in the case of unforeseen emergency. India may not engage in drawdown flushing at the reservoir of KHEP to an extent that would entitle the depletion of the reservoir below DSL. However, CoA clarified that the foregoing ruling did not apply to R-o-R plants that are in action or under creation on the date of issuance of partial award. The partial award is also not valid to other R-o-R plant cases which have been communicated by India under Annexure D of the treaty and Pakistan had not made any objections. It was also clarified in Final Award of the CoA (Hussain, 2017; Mahmood, 2018).

The Court decided that para. 15 (iii) of Annexure D permits India to transfer water from one tributary of the Jhelum river to another for the generation of hydroelectricity power. The Court was convinced by India's proof of CWPC's letter dated May 16, 1960, which shows that India was planning the hydroelectric projects on the Kishanganga/Neelum River which involved the inter-tributary diversion of water. The CoA observed that Article III (2) of the IWT restricts India to use waters of Western Rivers to the drainage basins of those rivers but not with the products (hydroelectricity) generated by these waters. Similarly, IWT does not impose a geographic restraint on the usage of electricity or any other product generated from the waters of Western Rivers.

The CoA examined that the Article IV (6) of the treaty obligate the parties to sustain the natural flow of the rivers but this provision does not involve the volume and timing of the flow of the water in these waterways. The CoA did not consider the KHEP to be an obstruction foreseen by Article IV (6). The Court was convinced by India's proof of CWPC's letter dated May 16, 1960, which shows that India was considering the hydroelectric projects on Kishanganga/Neelum River involving inter-tributary diversion of water. The Court was convinced that KHEP met all the conditions for inter-tributary transfer as follows: (a) It is R-o-R plant (b) Although, at KHEP, the generation of electricity was to take place 23 km from Kishanganga/Neelum River but KHEP should be considered as situated on the Kishanganga/Neelum River under the 'special meaning' of Article 31(4) of the Vienna Convention on the Law of Treaties. The CoA decided on the central question of the first dispute that Pakistan's unobstructed precise use of Western Rivers water and India to generate hydroelectricity power. The Court also fixed the critical period when the both countries not only planned the KHEP and NJHEP but also undertook concrete measures to recognize them. It concluded that KHEP reached this period during 2004-06 and the NJHEP during 2007-08. The Court accepted that under para 15 (iii) of Annexure D of IWT, India has the right to divert inter-tributary water for its R-o-R projects but it would not harmfully affect Pakistan's existing and agricultural uses. The CoA also accepted that under customary international environmental law, Pakistan entitled to obtain a least flow of water from India in the Kishanganga/Neelum River bed at all times. The CoA failed to fix the precise minimum volume of water flow because both parties did not provide the sufficient data, so it decided to defer the issue to the Final Award. The Court requested India to provide data about the impact of minimum flows at the KHEP on power generation at the KHEP and ecological fear from the dam location to the Line of Control. The Court also requested Pakistan to provide data about the impact of lowest flows in Neelum River on electricity generation of NJHEP and ecological concerns at project site and downstream of the Line of Control (Hussain, 2017).

As regard the substance of the second dispute, which linked to the depletion of the reservoir below the DSL at KHEP and generally any future R-o-R plant concerned the court was of the view that the best design and operation of a hydroelectric plant is that which is essentially be achieved under the provisions of treaty. The process of sedimentation in the

reservoirs of KHEP briefly reviewed by CoA and various approaches were considered for control of sediment, including drawdown flushing. The court viewed that various clauses of the IWT read together (Para. 14 Annexure D, para. 18, 19 Annexure E) in a logical manner make it clear that primary objective of IWT is to bound the Indian water storage but not volume of the dead storage. Consequently, the CoA ruled that India is entitled to include dead storage of any capacity in design of any R-o-R plant or dam and depletion of dead storage is prohibited under the treaty except for unforeseen emergency. The distinction made by India between operation and maintenance to defend its drawdown flushing was rejected by the court on the grounds that IWT does not specify a category of 'maintenance purpose'. The court noticed that IWT permitted low level outlets but it put limitations on its size and these should be at its highest level, if the intention was to permit drawdown flushing. The court made sure that it did not prejudice India's rights already covered by the IWT. The court also examined whether it is possible to have sustainable hydroelectric power generation without drawdown flushing. The court noticed that there are variety of techniques available for sediment control including drawdown flushing and hydroelectric power generation is possible without flushing (Mahmood, 2018).

Final Award of the Court of Arbitration

India made a request to the court on 20 May, 2013 to clarify or interpret para. B1 of its partial award related to the second dispute which barred India from drawdown flushing below the DSL or the depletion of the reservoir below the DSL at the KHEP and generally any future R-o-R projects. India made this request by virtue of para. 27 of Annexure G of IWT which is follows: At the request of Pakistan or India, made within three months of the date of the award, CoA reassemble to explain or interpret its award.

The CoA gave its final decision 20 December, 2013 in which it reaffirmed its earlier ruling in which it barred India from drawdown flushing below the DSL and made clear that ban is not "site specific" but general. The Court also decided that India should have access to at least half of the average flow at the KHEP site during the driest months of the year and also it fixed the minimum flow at 9 cumecs as sufficient to keep the natural flows during the dry months. The court admitted that minimum flow will mitigate antagonistic effects on the agriculture and hydroelectric usage of Pakistan as a result of the operation of KHEP. It also admitted that such approach was somewhat severe in environmental terms but defended it as a proper balance between the ecological needs and India's right to generate electricity. The Court admitted that the distraction of water by the KHEP would somewhat reduce the downstream generation of hydroelectric power especially the NJHEP. The Court mentioned in its 43 pages' decision that Pakistan did not provided any data regarding the agricultural uses depended on Kishanganga/Neelum River (Hussain, 2017). Although the decision of CoA is binding on both countries and cannot be appealed but the Court accepted that due to changing climate conditions, the determination of minimum flow was open to reexamination through Permanent Indus Commission and the procedure provided in IWT, if it deemed it necessary, 7 years after the first diversion of waters from the Kishanganga/Neelum River (Parsai, December 21, 2013).

Did Pakistan Win or Lose the KHEP Case?

The government of Pakistan and media described the stay order of CoA on 23 September, 2011 against the construction of KHEP as a 'rare victory'. The seven members court unanimously ruled against India as India will not be permitted to make any enduring mechanism on or above the Kishanganga/Neelum river bed at the Gurez location that may alter the natural flow of the river (Trimizi, September 25, 2011). However, it was clear in stay order that India was permitted to utilize the impermanent diversion of tunnel. The Court also allowed India to provisionally dry out the river bed of the Kishanganga/Neelum River.

The Indian government, public and media claimed the CoA partial award as it victory. The Indian Ministry of External Affairs described the award as a reaffirmation of the validity of India's position. The former Indian bureaucrat, A. K. Bajaj who was closely associated with the KHEP case called the award as the correct interpretation of the relevant provisions of the IWT. Similarly, the leading newspapers of India such as the *Indian Express* and *The Hindu* portrayed the partial award as favorable to India (Bokhari, 2013). Although, the CoA allowed India to build the KHEP but it had de facto ruled that the BHEP decision was wrong and should not be applied to future projects. It was a victory for Pakistan as the court has accepted the claim of Pakistan (The Hindu, February 22, 2013). On the other side the Pakistan's opposition and the officials dealing with the NJHEP considered the partial award as a defeat for Pakistan and criticized the government of Pakistan for the debacle and the facts to be presented before the nation (Wasim, February 27, 2013). the CEO of the NJHEP Company. General (R) Zubair Ahmad, claimed that the CoA partial award would reduce electricity generation by 10 % annually (Mustafa, February 20, 2013).

The CoA announced its final decision 20 December, 2013 and both the parties claimed their victory. The senior Indian legal counsel who represented India in the KHEP case termed the final award as an absolute victory of India. Similarly, Pakistan's federal minister for water and power Khawaja Asif also called the final award of the Court a 'big victory' for Pakistan (The Express Tribune, December 21, 2013). The Indian Ministry of External Affairs called the Final Award of the CoA as a winning position of India because the quantum of 9 cumecs of natural flow of water was to be preserved in the Kishanganga/Neelum River at all times is far lesser than the 90-100 cumecs of natural flow that Pakistan demanded (Parsai, December 21, 2013). Different analysts of Pakistan also called the final award a defeat for Pakistan. The government of Pakistan and its legal team in KHEP case was criticized by them for this failure (Mustafa, December 22, 2013; Mustafa, December 23, 2013). Water experts criticized the Pakistan's Indus Water Commissioner for unprofessional attitude that damaged Pakistan's case. Kamal Majidullah, the advisor on water and power to former Pakistan's Prime Minister Yousaf Raza Gilani said "people who called this a victory are those people who had earlier claimed the Baglihar dam to be a victory as well, and later was a disaster" (Bhutta, December 22, 2013).

There were two disputes under consideration by the CoA. The first dispute was whether the KHEP is a R-o-R plant and India is entitled to divert Kishanganga/Neelum River for power generation, the CoA allowed India to go ahead with diversion. It was an obviously marked a defeat for Pakistan. Pakistan failed to take serious steps for construction of the NJHEP earlier than KHEP and claimed priority for its project. Pakistan also suffered a loss of minimum flow of water in the final award as it failed to furnish any data on the current or projected agricultural water usage from the Kishanganga/Neelum River. Pakistan was interested to get favour in this matter on the basis of hydroelectric and ecological factors. The opinion of different water experts was that if Pakistan furnish the required data to CoA relating to environment, hydroelectric and agriculture uses, it could secure more flow of water in the Final Award of CoA.

Asif Baig Mirza, former Pakistan's Indus Waters Commissioner justified this laps on the grounds that there were no agricultural current uses based on Kishanganga/ Neelum River and not chance of developing it in the near future. He claimed that the award on first dispute was not totally defeat for Pakistan. The award partially safeguards Pakistan's interests. The award of CoA was a compromise (Mustafa, December 29, 2013). The water experts criticized the government of Pakistan and its legal time that if agricultural uses does not exist and not likely to develop in future, why did the Pakistan delegation mention them in the first place.

The CoA decision about 2nd dispute of KHEP was in favour of Pakistan. The second dispute, namely whether India could deplete or bring the reservoirs of R-o-R below the DSL in any circumstances except in an unforeseen emergency. It was a major victory of Pakistan

as India was expecting that Neutral Expert 's decision of Baglihar assumed the status of a precedent and that it would build dams on the Western Rivers on the pattern of BHEP but the CoA rejected the Indian argument in present case. Pakistan was unhappy about the decision of BHEP and claimed that NE had decided the Baglihar case outside the IWT framework. The Court accepted the claim of Pakistan. RamaswamyIyer, the leading Indian writer on water issues and former Secretary of Water Resources in India accepted that second dispute was more important than first dispute for Pakistan because it wanted to appeal the Baglihar's decision of Neutral Expert but could not do so for lack of provision in the IWT. Pakistan focused on second dispute of KHEP to make an indirect appeal against drawdown flushing and it succeeded. John Briscoe also argued that the CoA has restored the Treaty to its original shape. Pakistan's main objection related to the installation of low level spillway was decided by the Court in Pakistan's favour which was the real measure of Pakistan's victory.

Conclusion

The IWT majorly aimed to resist any water conflict and to maintain good bilateral relations over water management of the Indus River. Since the end of the last century the treaty has been subjected to several violations. The abrupt increase in energy demands and persistent economic growth are triggering diverse challenges in this regard. In reality, water is technically not a cause of conflict between two states, but the real issue is the difference over its use. The situation for Pakistan is strategically more complicated because Pakistan is the lower riparian country to its antagonist India and 78% of Pakistan's water supply is from therein. The treaty has allowed India to harness the Western River Waters for its run-of-river projects. However, many of India's projects under this provision are perceived by Pakistan as a violation of the treaty and a threat to its economic wellbeing since any cross-border impediment in the regular flow of the Western rivers can devastate our agricultural sector. The Kishanganga Hydroelectric Project was the first water issue between both countries, decided by Court of Arbitration because it was not resolved through bilateral talks. Pakistan made objections to the diversion of water of Kishanganga/Neelum River, location of the sluice spillway and position of the reservoir level below the DSL in any situations except unpredicted disaster. Pakistan's main objection related to the installation of low level spillway was decided by the Final Award of the CoA in Pakistan's favour. India has completed the Kishanganga Stage-I in 2016 and is working on Kishanganga Stage-II. Pakistan has requested WB to decide the faulty design of the project through ICA while India is again concerned to resolve the issue through Neutral Expert. WB refused to decide the issue at two different forums. The solution of KHEP issue is essential for water security in Pakistan.

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