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**DEFUSING HYDROELECTRIC BRINKMANSHIP: THE INDUS WATERS TREATY'S
ALTERNATE DISPUTE RESOLUTION PROVISIONS AND THEIR ROLE IN THE TENUOUS
PEACE BETWEEN INDIA AND PAKISTAN**

Thomas E. Robins*

I. INTRODUCTION

“Crop earnings decline every year and water shortages have affected fifty percent of our agricultural business. The problems with India can only be resolved with war.”¹

For saber-rattlers on both sides of the Kashmiri border, water rights have become part and parcel to the narrative of Indo-Pakistani tensions. Beginning with partition in 1947, three full-blown wars, numerous undeclared conflicts, and an active insurgency have led to hundreds of thousands of casualties in the ongoing dispute between India and Pakistan.² Since both countries completed the testing of nuclear fission weapons in 1998, the specter of nuclear conflict has cast an apocalyptic pall over the seemingly immutable regional conflict.³ At the center of the tension between the south Asian neighbors is the disputed region known as Kashmir.⁴ The mountainous region is home to a singularly unique history, a Muslim majority with separatist elements, and abundant natural resources. Arguably the most vital of these resources in one taken for granted in many parts of the world: freshwater.

In an age when political scientists predict the onset of “water wars”⁵ and debate rages about rapid climate change, water usage has become an essential element of international relations, especially between riparian states. Shortly after partition and the bloody war that followed, Indian and Pakistani leaders predicted the inevitable riparian conflicts between the rivals and set out to solve them. The eventual consequence was the

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¹ *Water Row Key to India-Pakistan Rivalry*, THE ECON. TIMES (July 15, 2010 9:59am) http://articles.economictimes.indiatimes.com/2010-07-15/news/27582484_1_water-shortages-water-row-india-and-pakistan (quoting Pakistani farmer Ghulam Sarwar).

² *India and Pakistan: The World's Most Dangerous Border*, THE ECONOMIST, May 19, 2011, available at <http://www.economist.com/node/18712525?zid=312&ah=da4ed4425e74339883d473adf5773841>.

³ Hamir K. Sahni, *The Politics of Water in South Asia: The Case of the Indus Waters Treaty*, 26 SAIS REV. 153, 156 (2006).

⁴ Kashmir is split between the administration of India and Pakistan. The Indian province encompassing this region is Jammu and Kashmir, often abbreviated to “J&K.” Pakistan-controlled Kashmir is divided between two administrative units: Azad Jammu and Kashmir and Gilgit-Balichistan.

⁵ For a relevant description of the water wars rationale, see Undala Z. Alam, *Questioning the water wars rationale: a case study of the Indus Waters Treaty*, 168 GEOGRAPHICAL J. 341 (2002). Alam, now a professor at Queen's University in Belfast, provides a fascinating dissection of the water wars rationale using the Indus Water Treaty as a foil. The classic water wars rationale is “built upon three principal building blocks – water scarcity, a wider conflict and bellicose public statements.” While the conflict over the Indus certainly provides all of these elements, Alam attacks the very premise of these building blocks as erroneous. Because the dispute over the Indus contains all of these elements and has not yet led to war, Alam posits that the entire water wars theory is theoretically questionable.

Indus Waters Treaty of 1960. The unique treaty was negotiated with the help of the World Bank.⁶ The Indus Waters Treaty (“IWT”) provides for the allocation of water from the Indus River’s many tributaries to both countries. The basic form of the agreement divides the “Eastern Rivers” which were allocated to India, and the “Western Rivers,” which were allocated to Pakistan.⁷

Central to the IWT’s efficacy and therefore to the uneasy peace between India and Pakistan is Article IX, which memorialized the process for the “settlement of differences and disputes.”⁸ Article IX includes provisions for mediation, negotiation, and arbitration.⁹ This article will analyze Article IX and the related Annexures through the lens of recent attempts at alternate dispute resolution, particularly the Neutral Expert determination process and arbitration. In the process, this article will explore the role alternate dispute resolution via the IWT plays in the larger scheme of Indo-Pakistani relations. In addition, the article will lodge some criticisms of Article IX procedures and point to issues that must be resolved in order to ensure the continued efficacy of the IWT.

II. THE INDUS WATERS TREATY OF 1960

The Indus Waters Treaty has been labeled a “model for future regional cooperation,”¹⁰ and lauded as the “only successful agreement”¹¹ to survive the intense rivalry between India and Pakistan. Crafted in the “spirit of goodwill and friendship,” but mostly due to an awareness by both nations that “attaining the most complete and satisfactory utilisation of the waters of the Indus system of rivers,”¹² was in their mutual interest, the IWT was a compromise to essentially split the Indus’ tributaries geographically.¹³

The division is more complicated, however. Some of the tributaries in question flow from India to Pakistan, and *vice versa*. Thus, the IWT’s Article IV includes clauses prohibiting either nation from altering “the flow in any channel to the prejudice of the uses on that channel by the other Party.”¹⁴ As one might imagine, most of the IWT conflicts between India and Pakistan have been Article IV disagreements. In anticipation of potential conflicts over engineering works (*i.e.* dams) the IWT also includes a disclosure provision. The parties are required to supply data on “relating to the work” as much as is feasible.¹⁵

⁶ The Indus Waters Treaty 1960 between the Government of India, the Government of Pakistan and the International Bank for Reconstruction and Development, Sept. 19, 1960, 419 U.N.T.S. 126 [hereinafter “Indus Waters Treaty”].

⁷ *Id.* at 130, 134.

⁸ *Id.* at art. IX.

⁹ *Id.*

¹⁰ Sahni, *supra* note 3, at 154 (quoting Stephen P. Cohen, *The US and South Asia*, 545 SEMINAR 6 (2005) available at <http://www.india-seminar.com/2005/545/545%20stephen%20p.%20cohen1.htm>).

¹¹ *Id.* at 156.

¹² Indus Waters Treaty, *supra* note 6, at 126.

¹³ *Id.*, at art. II, III, IV.

¹⁴ *Id.* at 136.

¹⁵ *Id.* at 146. This provision is in and of itself “widely viewed as a process for avoidance of disputes.” Salman M. A. Salman, *The Baglihar difference and its resolution process – a triumph for the Indus Waters Treaty?*, 10 WATER POLICY 105, 107 (2008).

In addition, the treaty created the Indus Waters Commission (“Commission”), which consists of a high-level hydrology expert from each country.¹⁶ The Commission is tasked with providing a conduit for communication about IWT issues between India and Pakistan, and serves as the initial forum for IWT disagreements.¹⁷ The vast majority of IWT questions are resolved at the Commission level. Over the years, the Commission has negotiated the size of agricultural land India is permitted to irrigate from the western tributaries (a twenty-two year process), the method by which flood warnings would be delivered to downstream Pakistan, India’s drainage systems, and numerous dam construction projects.¹⁸ In order to facilitate communication and negotiation, the Commission meets at least once per year, and submits an annual report to both parties.¹⁹ The Commission also meets at the request of either Commissioner.²⁰ As of 2007, the Commission had met ninety-nine times since the ratification of the IWT.²¹

The IWT is unique in a number of respects. First, the treaty deals specifically with a natural resource which forms in one nation and crosses internationally recognized (if not entirely demarcated) boundaries into another. While water treaties are by no means a modern phenomenon²², a treaty of this kind between two such hostile and diametrically opposed parties in the modern era is exceptional. Second, the treaty embodies a compromise on concepts of territoriality and sovereignty. By putting pen to paper on the IWT, both India and Pakistan agreed to a notion of limited territorial sovereignty, recognizing the possible effects of water use on the other party.²³ Third, as noted by Salman M. A. Salman, Fellow at the International Water Resources Association and former counsel with the Vice Presidency of the World Bank, the treaty is the “only international water treaty signed by a third party.”²⁴ Finally, the treaty is hinged on a dispute resolution mechanism including mediation and arbitration.²⁵ Without the availability of recourse to alternative dispute resolution, the treaty would be largely unenforceable.

There is little question that the IWT is a shining example of diplomatic tact and realism. The IWT foresees many of the disputes that have arisen over the Indus, including canal output, pollution, and water storage.²⁶ These provisions are interesting and invaluable to Indo-Pakistani relations, but can distract the legal reader from the most

¹⁶ *Id.*

¹⁷ *Id.* at 148.

¹⁸ N. A. Zawahri, *India, Pakistan and cooperation along the Indus River system*, 11 WATER POLICY 1, 10-12 (2009).

¹⁹ *Id.* at 8-9.

²⁰ *Id.* at 9.

²¹ *Id.*

²² See, e.g., James L. Wescoat, Jr., *Main Currents in Early Multilateral Water Treaties: A Historical-Geographic Perspective, 1648-1948*, 7 COLO. J. INT’L ENVTL. L. & POL’Y 39 (1996). In this article, Dr. Wescoat notes that the IWT is not the first multilateral treaty to involve the Indus. Russian agreements to navigate the waters of the Indus preceded colonial annexations by a decade.

²³ See, Erica J. Thorson, *Sharing Himalayan Glacial Meltwater: The Role of Territorial Sovereignty*, 19 DUKE J. COMP. & INT’L L. 487, 496-99 (2009). Professor Thorson provides a fascinating analysis of the evolution of sovereignty concepts in water-sharing agreements. She posits that limited territorial sovereignty is the paradigm of international water law, imposing a duty not to cause significant harm to the sovereign rights of other states while maintaining the right of territorial sovereignty.

²⁴ Salman, *supra* note 15, at 106.

²⁵ Indus Waters Treaty, *supra* note 6, at 150.

²⁶ See generally, Indus Waters Treaty, *supra* note 6.

salient facet of the IWT. Arguably the most important element of the tripartite treaty is Article IX: the dispute resolution provision.

A. *Article IX*

The underpinning of the entire IWT is the ability of both parties to resolve discord through negotiation, mediation, and arbitration. While much of the negotiation over Indus controversies occurs between the Commissioners, the recourse to alternate dispute resolution – Neutral Expert determination and arbitration – is necessary for parties to fully vindicate the legal rights granted by the IWT. In the context of the tinderbox that is Kashmir, the ability to resolve disputes, especially by a neutral and detached third-party or court, is absolutely essential. Article IX is especially important to Pakistan. As the lower riparian state, most of the water that flows to Pakistan begins in India, thus granting India a theoretical degree of control over Pakistan’s water supply.²⁷ Arguably, Pakistan would have little recourse in cases of Indian violation of the treaty without Article IX.

There are several stages of dispute resolution outlined in Article IX.²⁸ “Any question which arises between the Parties concerning the application” of the IWT, or the “existence of any fact” which might “constitute a breach” of the IWT are initially submitted to the Commission.²⁹ The Commission does not serve primarily as an adjudicatory step in resolving disputes; rather, the Commission’s duty is to attempt to resolve the “question by agreement.”³⁰ In the extraordinarily rare event that the Commission, consisting only of one Indian and one Pakistani official, is unable to bring the parties to an agreement, the “question” becomes either a “difference” or a “dispute.”³¹ Differences are decided by a “Neutral Expert,” and are generally technical questions best decided by a specialist.³² Disputes are resolved through arbitration and arise when the issue at hand falls outside the very specific jurisdiction of the Neutral Expert.³³ Generally speaking, disputes involve fundamental legal questions, including the award of financial compensation.³⁴

²⁷ See, e.g., Zawahri, *supra* note 18, at 5. Zawahri notes that as the upper riparian state, India can control Pakistan’s “only source of water and threaten sustainability of its agricultural sector.” In addition, in the event of a military conflict, India could release water stored behind dams to “submerge the oncoming Pakistani military and obstruct their entrance to Jammu-Kashmir.”

²⁸ Indus Waters Treaty, *supra* note 6, at 150-52.

²⁹ Indus Waters Treaty, *supra* note 6, at 150.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 150, 202-04. Part of the wisdom of the IWT is the utilization of experts to resolve technical questions.

³³ *Id.* at 150.

³⁴ Indus Waters Treaty, *supra* note 6, at 204, 218. The only exception to the general rule regarding the arbitration of financial disputes arises if the Commissioners agree that the Neutral Expert should determine the question, per Annexure F, part 1 (2).

1. The Neutral Expert Determination: Annexure F

Per Article IX, determination by a Neutral Expert is the second recourse for the parties, if the Commission is unable to come to an agreement.³⁵ Annexure F, which details the Neutral Expert determination process, lists twenty-three questions that may be resolved by the Neutral Expert, which will not be detailed here.³⁶ The list is expansive and largely inclusive of most disputes that might arise under the IWT. It is important to note that “differences” are submitted to a Neutral Expert by the Commission, and not directly by the parties.³⁷ In other words, the parties have a hand in selecting the expert and presenting their respective cases, but cannot submit what they deem to be differences directly to a Neutral Expert. The Commission holds the cards in invoking the recourse to the Neutral Expert.

The Neutral Expert is selected either “jointly by the Government of India and the Government of Pakistan,” or by the World Bank if the parties fail to agree on an Expert.³⁸ The Neutral Expert is to be a “highly qualified engineer.”³⁹ This appears to be the sole criterion for selection, although the World Bank’s involvement in the selection process helps to maintain the integrity of the candidate selection process. Likewise, the parties are incentivized to agree to an expert who is highly qualified, given the complexity of the issues within the Neutral Expert’s purview.⁴⁰

The process of resolving “differences” is described in Annexure F, Part 2.⁴¹ The Neutral expert is to “afford to each Party an adequate hearing,” and is bound in his subject-matter jurisdiction to the provisions of the IWT or a special agreement submitted by the Commission specifying the issues in dispute known as a *compromis*.⁴² Not surprisingly, the Neutral Expert is also vested with authority to rule on whether or not the difference in question falls within the twenty-three items that make up his or her jurisdiction.⁴³ Effectively, the IWT grants the Neutral Expert *kompetenz-kompetenz* to render decisions on his or her own authority to render decisions.⁴⁴ The Expert can also

³⁵ *Id.* at 150.

³⁶ *Id.* at 203-204.

³⁷ *Id.* at 150.

³⁸ *Id.* at 206.

³⁹ Indus Waters Treaty, *supra* note 6, at 206.

⁴⁰ *See id.* at 202-06. Some examples of the complex issues that fall under the Neutral Expert’s authority to determine include drainage basin boundary determinations (Annexure F, Part 1 (2)), the specifications of hydroelectric projects on irrigation channels (Annexure F, Part 1 (13)), and the specifications of Storage Works, or works “constructed for the purpose of impounding the waters of a stream” (Annexure F, Part 1 (14, 17, 19, *etc.*) Because of the technicalities involved, both parties are incentivized to agree to a qualified, eminent expert in order to avoid erroneous decisions.

⁴¹ *Id.* at 206-08.

⁴² *Id.* *See also id.* at 210 (defining *compromis* in the IWT context).

⁴³ *Id.* at 208.

⁴⁴ *See* THOMAS E. CARBONNEAU, *ARBITRATION LAW AND PRACTICE* 30-31 (6th ed. 2012) for an apt description of the doctrine of *kompetenz-kompetenz*. The *kompetenz-kompetenz* doctrine is most easily defined by its alternate name: “jurisdiction to rule on jurisdictional challenges.” In domestic arbitration agreements, an arbitration clause contains a *kompetenz-kompetenz* clause in order to avoid the necessity of a court determination as to whether the dispute in question is covered by the arbitration agreement. In terms of the IWT, *kompetenz-kompetenz* simply means that Neutral Expert does not have to seek outside authority as to whether the dispute falls within his or her mandate per Annexure F and that parties would likely fail if attempting to challenge a Neutral Expert determination for lack of jurisdiction.

deem the “difference” a “dispute,” which would require either further negotiation or arbitration.⁴⁵ These are the only substantial procedural provisions of Annexure F; much of the authority to detail the limits of the procedure is left to the Neutral Expert.

All-in-all, the Neutral Expert determination embodied in Article IX closely resembles arbitration, but stops short of a traditional arbitral tribunal. Neither party has agreed specifically to allow the Neutral Expert to make a determination; rather, each party has agreed to delegate authority to the Commission. In delegating authority to the Commission, the parties agree to allow an expert with arbitrator-like authority to rule on the “difference.” Thus the Neutral Expert determination process departs from traditional arbitration by removing the choice to select Neutral Expert determination from the parties. That said, the Commission is not independent – one Commissioner hails from each respective party nation. There is little doubt, then, that the parties have some control over the decision to resort to Neutral Expert determination, despite a layer of formality. Neutral Expert determinations are binding in later proceedings, including those submitted to arbitration.⁴⁶

2. *Negotiation and Mediation: Article IX (3) and (4)*

As mentioned above, when a difference is beyond the scope of issues determinable by the Neutral Expert, the issue first goes to negotiation.⁴⁷ When a dispute arises by Neutral Expert determination, a report detailing the problem is submitted to both parties.⁴⁸ Following receipt of the report, or when it appears a report is delayed, the parties may seek to negotiate.⁴⁹ These negotiations may be aided by mediators “acceptable” to the parties.⁵⁰ If negotiation and mediation fail or are simply not amenable to either party, the dispute may be resolved via arbitration.⁵¹

3. *Arbitration: Annexure G*

Article IX, Section Five provides the method for resolving disputes via arbitration. Arbitration can function as a proceeding subsequent to a jurisdictional decision made by a Neutral Expert or as a stand-alone procedure via quasi-submission by the parties:

(5) A court of Arbitration shall be established to resolve the dispute in the manner provided by Annexure G1 (a) upon agreement between the Parties to do so; or (b) at the request of either Party, if, after negotiations have begun pursuant to Paragraph (4), in its opinion the dispute is not likely to be resolved by negotiation or mediation; or (c) at the request of either

⁴⁵ Indus Waters Treaty, *supra* note 6, at 152, 208.

⁴⁶ *Id.* at 208.

⁴⁷ *Id.* at 150-52.

⁴⁸ *Id.* at 152.

⁴⁹ *Id.*

⁵⁰ Indus Waters Treaty, *supra* note 6, at 152.

⁵¹ *Id.*

Party, if, after the expiry of one month following receipt by the other Government of the invitation referred to in Paragraph (4), that Party comes to the conclusion that the other Government is unduly delaying the negotiations.⁵²

Thus, arbitration occurs as a result of two different processes. Either the difference is deemed a dispute by a Neutral Expert, submitted to negotiation or mediation, and then requested by a party, or the parties simply agree to submit an outstanding dispute to arbitration.⁵³

The IWT provides a good deal of detail on the procedure for arbitration proceedings. The arbitral panel consists of seven arbitrators.⁵⁴ A total of four are appointed by the parties: two by each respective party.⁵⁵ The remaining three, including a Chairman, a “highly qualified” engineer, and an international law scholar, are selected from a pool of candidates known as the Standing Panel.⁵⁶ The Panel consists of four persons qualified for each of the three above categories, chosen by agreement between the parties.⁵⁷ A complex process for appointment ensues if the parties are unable to agree to a Standing Panel.⁵⁸ After the Panel is created, the parties may either agree to the designated Umpires or draw lots if unable to agree within thirty days of the beginning of arbitral proceedings.⁵⁹ The Court of Arbitration (“Court”), as it is referred to in the treaty, decides “all questions relating to its competence and shall determine its procedure,” unless the parties “otherwise agree.”⁶⁰ The members of the Court enjoy immunity, but may waive it.⁶¹ The Court may render interim decisions when time is of the essence to

⁵² *Id.*

⁵³ Indus Waters Treaty, *supra* note 6, at 152. The ability to submit disputes to arbitration independent of a Commission/Neutral Expert determination is an attractive option and may, in fact, render the first two steps in the traditional dispute resolution process under the IWT null and void. Then again, parties cannot submit disputes to arbitration *sans* negotiation without the approval of the other party.

⁵⁴ *Id.* at 212.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Indus Waters Treaty, *supra* note 6, at 214. If the parties are unable to agree, then the IWT calls for action on the part of actors listed in the Appendix to Annexure G. A veritable “who’s who” of international leaders and legal scholars are listed. Either the Secretary General of the United Nations or the President of the World Bank is tasked with the selection of the Chairman. The engineer is to be chosen either by the President of MIT or the Rector of the Imperial College of Science and Technology. Finally, the legal expert is to be chosen by the Chief Justice of the United States Supreme Court or the Lord Chief Justice of England. *Id.* at 222.

⁵⁹ *Id.* at 214.

⁶⁰ *Id.* at 216-18.

⁶¹ *Id.* at 220.

safeguard party concerns.⁶² Unlike the Neutral Expert, the Court may render awards including “financial compensation.”⁶³

Awards rendered and approved by four Court members are final and binding.⁶⁴ In addition, awards are to be accompanied by a “statement of reasons.”⁶⁵ The parties have three months to request a clarification or interpretation of the award.⁶⁶ Article IX also incorporates the legal concept of *functus officio*.⁶⁷ After clarification or interpretation, or if no request is made within three months, the Court “shall be deemed to have been dissolved.”⁶⁸

III. ATTEMPTS AT ALTERNATIVE DISPUTE RESOLUTION

A. *The Baglihar “Difference”*

Two thousand five (2005) marked the first occasion since the IWT’s inception that the Commission failed to resolve a disagreement between the parties and that the Article IX (2) resolution procedures for the settlement of differences and disputes were invoked.⁶⁹ On January 15, 2005, Pakistan approached the World Bank, claiming a “difference” has arisen regarding the Baglihar hydroelectric plant which India was in the process of constructing on the Chenab river.⁷⁰ While the Chenab is among the Western Rivers as defined by the IWT, and therefore allocated to Pakistan according to Article III, India may use the river for very specific purposes, including generating hydroelectric power.⁷¹ The Chenab flows south from the Indian controlled northern state of Jammu & Kashmir into eastern Pakistan’s Punjab province. The specific points of the difference are highly technical, including the measurements of gated spillways, peak discharge of

⁶² Indus Waters Treaty, *supra* note 6, at 220.

⁶³ Compare Indus Waters Treaty, *supra* note 6, at Annexure F, Part 1 (2) with Indus Waters Treaty, *supra* note 6, at Annexure G (23). The IWT’s provisions disallowing Neutral Experts from determining issues regarding “financial compensation” underscores the differences between the Neutral Expert determination and arbitration per the IWT. The purpose of the Neutral Expert, an engineer, is to interpret the technical provisions of the IWT and determine whether particular differences can be resolved by turning to the text of the IWT. The Court of Arbitration is meant to determine more fundamental questions at the very core of the IWT. Financial compensation intimates wrongdoing, causation, and harm, and therefore is not within the purview of an engineer to decide.

⁶⁴ Indus Waters Treaty, *supra* note 6, at 218.

⁶⁵ *Id.* at 218.

⁶⁶ *Id.* at 220.

⁶⁷ BLACK’S LAW DICTIONARY defines *functus officio* as follows: “without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.” BLACK’S LAW DICTIONARY 696 (8th ed. 2004). In the case of the IWT, after three months, *functus officio* acts as a bar to reviewability of the arbitral award, as the Court is dissolved. Indus Waters Treaty, *supra* note 6, at 220.

⁶⁸ Indus Waters Treaty, *supra* note 6, at 220.

⁶⁹ Salman, *supra* note 15, at 116. The Indus Waters Commission has dealt with a number on conflicts in the past. This was the first occasion that either party had actively engaged to seek a Neutral Expert determination.

⁷⁰ Salman, *supra* note 15, at 108.

⁷¹ Indus Waters Treaty, *supra* note 6, at 134; Salman *supra* note 15, at 109.

design floods, and the sheer height of the dam.⁷² In essence, Pakistan raised concerns about a number of the technical aspects of the dam, alleging that the dam's construction was in violation of treaty provisions regarding hydroelectric dam design and dimensions.⁷³

The World Bank's role as a neutral third-party signatory was pivotal from the moment the difference was raised by Pakistan. As noted above, the World Bank's role in the Neutral Expert process is limited. The World Bank is tasked with selecting an Expert if the parties are unable to come to a compromise.⁷⁴ The selection of an Expert, a seemingly simple administrative procedure, was made difficult by some interpretive problems with Annexure F.⁷⁵ Annexure F permits the World Bank to make a selection, but only "after consultation" with the parties.⁷⁶ Naturally, the parties disagreed as to what kind of consultation was necessary.⁷⁷ With no IWT precedent to guide the World Bank as to what constituted sufficient consultation, the issue was finally resolved by looking to the International Centre for Settlement of Investment Disputes ("ICSID") procedures, which are in turn based on the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules.⁷⁸ After nearly five months, the parties agreed on one of the engineers selected by the World Bank, Professor Raymond Latiffe.⁷⁹

⁷² Executive Summary, Baglihar Hydroelectric Plant, Expert Determination on points of difference referred by the Government of Pakistan under the provisions of the Indus Waters Treaty, at 4 (Pak. v. Ind. 2007) <http://siteresources.worldbank.org/SOUTHASIAEXT/Resources/223546-1171996340255/BagliharSummary.pdf> [hereinafter Baglihar Expert Determination]. Neutral Expert Prof. Raymond Latiffe made six specific findings on the technical aspects of the Baglihar dam project. The particular points of dispute are highly important to the effective division of the Indus Waters and the livelihoods of thousands in both countries. That said, for the purposes of this article, the technical dimensions of the disputes will not be expounded upon beyond what is necessary for the legal reader to understand the basic conflict. According to the Expert Determination, the Baglihar Dam has an installed capacity of 450 MW and stands at over 144 m (472 ft.) in height, resulting in a crest elevation of 844.5 m asl (2770 ft.)

⁷³ Baglihar Expert Determination, *supra* note 72, at 4.

⁷⁴ Indus Waters Treaty, *supra* note 6, at 206.

⁷⁵ Salman, *supra* note 15, at 109.

⁷⁶ Indus Waters Treaty, *supra* note 6, at 206.

⁷⁷ Salman, *supra* note 15, at 109-10.

⁷⁸ *Id.* at 109. Specifically, the World Bank utilized a process that was nearly identical to the arbitrator appointment Article 6(3) of the original 1976 UNCITRAL Arbitration Rules, which is roughly equivalent to Article 8(2) of the revised 2010 UNCITRAL Arbitration Rules. *See* Arbitration Rules of the United Nations Commission on International Trade Law, G.A. Res. 31/98, at 7-8, U.N. Doc. A/RES/31/98 (Dec. 15, 1976) and UNCITRAL Arbitration Rules as Revised in 2010, G.A. Res. 65/22, at 8-9, U.N. Doc. A/RES/65/22 (Jan. 10, 2011) [hereinafter "UNCITRAL Arbitration Rules"]. The World Bank compiled a list of qualified engineers from around the world and ensured that there were no conflicts of interest (2(a)). The World Bank then sent the list to the parties, who communicated their preferences to the World Bank. (2(b)). The parties agreed to Prof. Latiffe's appointment per 2(c), rendering procedures such as 2(d), which would have required the World Bank to select the Neutral Expert unilaterally, null and void. Salman, *supra* note 15, at 109-110.

⁷⁹ Baglihar Expert Determination, *supra* note 72, at 4; Salman, *supra* note 15, at 110. Prof. Latiffe is a highly qualified Swiss engineer. He is a professor at the Swiss Federal Institute of Technology.

After the parties agreed that the Baglihar issue was, in fact, a “difference,”⁸⁰ and selected a Neutral Expert, the dispute resolution process finally began. Prof. Latiffe requested that the ICSID assume the “coordination of the process and logistical support.”⁸¹ Early in the process, it was agreed that the Determination would be based on the exchange of written materials.⁸² The process involved six party meetings, multiple submissions of information, and memorials.⁸³ Prof. Latiffe even visited the Baglihar dam itself in October 2005.⁸⁴

Prof. Latiffe rendered a decision in February 2007, almost two years after Pakistan first submitted the difference to the World Bank.⁸⁵ The decision called for some relatively minor changes to the Baglihar project, including reducing the height of the structure by 1.5 meters, but did not stop the project or require more water to flow to Pakistan.⁸⁶ Both sides declared some measure of victory, while Prof. Latiffe wrote that the “Authors of the Treaty” were the successful party in the resolution of the difference.⁸⁷ The *Times of India* called the decision a “vote of confidence for its Kashmir development projects.”⁸⁸ Indian sources reported that Pakistan claimed victory as well, noting that the Neutral Expert “acceded to most” of the issues Pakistan raised.⁸⁹ Neither party could admit that the decision simply called for some technical changes to the dam project.

The decision did not halt the project, nor did the decision simply allow the Indians to continue constructing a dam that was not in compliance with some technical IWT provisions. The practical consequences of the Neutral Expert determination were a two-year delay in realizing the project’s development, a decision that did almost nothing to alleviate Pakistan’s concern that India might use the dam to control the flow of the

⁸⁰ Salman, *supra* note 15, at 109. Technically, the first issue at hand was whether the issue was at the level of a “difference” in the IWT context. The World Bank had to make a conclusion about this matter before beginning the Neutral Expert selection process, which explains, in part, that an Expert was not selected until May 2005.

⁸¹ Baglihar Expert Determination, *supra* note 72, at 1. The ICSID is one of the five institutions comprising the “World Bank Group.” The ICSID “assists member countries in settling their investment disputes with private sector corporations or individuals of other states.” While both parties endorsed ICSID coordination, India is not a member to the ICSID convention, signed by 163 nations. Salman, *supra* note 15, at 109.

⁸² Baglihar Expert Determination, *supra* note 72, at 2.

⁸³ *Id.* at 2-3.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *See generally*, Baglihar Expert Determination, *supra* note 72. Prof. Latiffe determined that the “dam crest elevation” was not at the lowest possible point. As such, he concluded that the elevation should be reduced from 844.5 m to 843.0 m, simply meaning the structure should be reduced in height by 1.5 m. *Id.* at 15. This particular conclusion was the most often cited portion of the determination by Indian sources, which viewed this minor alteration determination to be indicative of the triviality of Pakistan’s claims. *See* Aasha Khosa, ‘We Deliberately Chose Not to Celebrate’, BUSINESS STANDARD (New Delhi), February 18, 2007, at 16.

⁸⁷ Baglihar Expert Determination, *supra* note 72, at 20.

⁸⁸ *Baglihar Cleared, India has its Way*, TIMES OF INDIA, Feb. 13, 2007, available at http://articles.timesofindia.indiatimes.com/2007-02-13/india/27881332_1_india-and-pakistan-baglihar-dam-indus-waters-treaty.

⁸⁹ Khosa, *supra* note 86, at 16.

Chenab River⁹⁰, and a stamp of approval on Indian hydroelectric projects affecting Pakistani downstream waters. If Pakistan's goal was indeed to stop the Baglihar project for fear of a loss of water volume downstream, then India was decidedly victorious. In any case, the Baglihar determination solved the long-standing conflict over the project and allowed both parties to move on with a measure of dignity. Most importantly, the "difference" was resolved peacefully.

B. *The Kishenganga "Dispute"*

In Pakistan's second attempt to resolve a hydroelectric power issue, the issue was raised earlier – with a clear eye toward halting the project altogether. Pakistan requested arbitration on May 17, 2010, while the Kishenganga dam was still under construction.⁹¹ As in the request for a Neutral Expert determination, this marked the first occasion in the IWT's fifty-year history that either Party has requested arbitration.⁹² Pakistan raised two central questions:

a. Whether India's proposed diversion of the river Kishenganga (Neelum) into another Tributary, i.e. the Bonar Madmati Nallah, being one central element of the Kishenganga Project, breaches India's legal obligations owed to Pakistan under the Treaty, as interpreted and applied in accordance with international law, including India's obligations under Article III(2) (let flow all the waters of the Western rivers and not permit any interference with those waters) and Article IV(6) (maintenance of natural channels)?

b. Whether under the Treaty, India may deplete or bring the reservoir level of a run-of river Plant below Dead Storage Level (DSL) in any circumstances except in the case of an unforeseen emergency?⁹³

In May and June, the parties each selected two arbitrators.⁹⁴ To complete the Court, three additional arbitrators, or "Umpires," had to be selected from the Standing Panel according to the procedures set out in Annexure F (7).⁹⁵ The parties could not

⁹⁰ See Salman, *supra* note 15, at 114; Baglihar Expert Determination, *supra* note 72, at 10. Pakistan believed that India's construction of a gated spillway would allow for control of the Chenab's flow. Prof. Latiffe did not comment on that concern but relied on the IWT to determine that such a gated spillway was necessary for the dam's operation. Pakistan was justified in being concerned over India's control over the Chenab. Filling the reservoir behind the Baglihar dam apparently resulted in a significant water loss on the Pakistani side of the border: Pakistan lost a total of two million acre-feet of water, adversely affecting the wheat crop. See Kaiser Bengali, *Water Management Under Constraints: The Need for Paradigm Shift, in RUNNING ON EMPTY: PAKISTAN'S WATER CRISIS* 45, 48 (Michael Kugelman & Robert M. Hathaway, eds., 2009) [hereinafter "RUNNING ON EMPTY"].

⁹¹ *In re The Indus Waters Kishenganga Arbitration (Pak. v. India)*, Interim Order, (Perm. Ct. Arb. 2011), available at http://www.pca-cpa.org/showfile.asp?fil_id=1726, at 2 [hereinafter "Kishenganga Interim Order"].

⁹² *Id.* at 37.

⁹³ *Id.* at 2 (citing Pakistan's Request for Arbitration, 4).

⁹⁴ *Id.* at 2.

⁹⁵ *Id.* at 3.

agree, and thus the selections were made by the Secretary-General of the United Nations, the Lord Chief Justice of the England and Wales, and the Rector of the Imperial College, London, respectively.⁹⁶ This process was complete in December 2010.⁹⁷ The Permanent Court of Arbitration (PCA) was selected to act as Secretariat.⁹⁸

The Court's first meeting took place in January 2011.⁹⁹ The Pakistani delegation immediately raised two procedural issues. Given the context of the dispute, Pakistan sought recognition on the part of India that any continued efforts to construct the Kishenganga dam would be at India's own risk.¹⁰⁰ In addition, Pakistan warned that it would seek "provisional measures" per Annexure G (28), amounting to an injunction on continued construction at the dam site.¹⁰¹ Pakistan noted that sunk costs and the difficulty of removing dam structures might cause the Court to fashion a decision not wholly equitable to Pakistan.¹⁰²

Communications were traded for several months, until August, 2011. On August 25-27, the Court held an interim measures hearing.¹⁰³ Pakistan specifically requested four types of relief at the hearing: (1) that India should cease work on the Kishenganga dam until the Court rendered an award (2) that India should inform Pakistan and the Court of any developments on the Kishenganga that might alter the status quo (3) that India should recognize that any additional steps in the Kishenganga construction process were taken at India's own risk, leaving the possibility open that the Court could order the works modified or dismantled and (4) any further relief deemed necessary.¹⁰⁴ India predictably argued that the "circumstances of the case" were not "such to justify ordering interim measures" per Annexure G (28).¹⁰⁵

The Court noted that provisional measures were an "extraordinary recourse" per the IWT, but ruled that provisional measures were necessary to "avoid prejudice . . . to the final solution" of the dispute.¹⁰⁶ Pakistan was only partly successful in halting

⁹⁶ Kishenganga Interim Order, *supra* note 91, at 2. *See also* text, *supra* note 58 (describing the Panel selections by each listed participant).

⁹⁷ Kishenganga Interim Order, *supra* note 91, at 4.

⁹⁸ *Id.* The Meetings of the Court occurred at the PCA's premises at the Peace Palace, the Hague, the Netherlands.

⁹⁹ *Id.* at 7.

¹⁰⁰ *Id.* at 42. Pakistan was insistent that India accept the "proceed at your own risk" principle embodied by the International Court of Justice (ICJ) case *Passage Through the Great Belt* (Finland v. Denmark), ICJ Reports 1991. In that case, it was for "Denmark, which is informed of the nature of Finland's claim, to consider the impact which a judgment upholding it could have on the implementation of the Great Belt project, and to decide whether or to what extent it should accordingly delay or modify that project." The Court dispensed with Pakistan's insistence by noting that counsel for India had already stated in "unequivocal terms" that India was operating under the "proceed at your own risk" principle of international law. *See also id.* at 40-43 (demonstrating the Court's reluctance to rely on ICJ precedent).

¹⁰¹ Kishenganga Interim Order, *supra* note 91, at 7-8.

¹⁰² *Id.* at 6-7. Specifically, Pakistani counsel was concerned that "a State might find it more difficult to abandon" a project after "major investments of capital and resources have been made." Pakistan also alleged that if work were to continue on the dam, the possibility of the Court "effectively upholding Pakistan's rights if it upholds Pakistan's claim" would be significantly reduced. *Id.* at 29 (*citing* Interim Measures Hearing Transcript 61:20-62:20).

¹⁰³ *Id.* at 9.

¹⁰⁴ *Id.* at 13.

¹⁰⁵ *Id.*

¹⁰⁶ Kishenganga Interim Order, *supra* note 91, at 42.

construction at Kishenganga. The Court ruled that temporarily enjoining some of the dam works, including the powerhouse facility and bypass tunnels, were not necessary to avoid prejudice to the award.¹⁰⁷ The Court did, however, halt the construction of the dam itself, because the dam would “eventually enable India to exercise a certain degree of control over the volume of water” reaching Pakistan.¹⁰⁸

In the Interim Order, the Court noted that it would strive to render a final decision within six months of hearing on the merits.¹⁰⁹ The Court came close to meeting its own optimistic deadline. The hearing on the merits of the case was held on August 20-31, 2012. A *partial* award was rendered by the Court on February 18, 2013.¹¹⁰ As to the first dispute, the Court found that India was permitted to divert the waters of the Kishenganga in order to create hydroelectric energy, limited only by the minimum flow maintenance to be set in the *final* award.¹¹¹ With regard to the second dispute, the Court held that India could not deplete the reservoir below dead storage level.¹¹² Without delving into the specifics of each issue, the practical result was that India was successful on the first issue and Pakistan on the second. Much like the Baglihar difference, both sides claimed victory.¹¹³ Nevertheless, the decision allows India to complete construction on the Kishenganga dam.¹¹⁴ Thus, Pakistan’s attempt to halt construction altogether failed. A final award, complete with a finding as to the appropriate minimum flow level through the Kishenganga dam, will be rendered “no later than the end of 2013.”¹¹⁵

IV. ANALYSIS

The IWT’s Neutral Expert determination and arbitration provisions have been employed only once respectively. The rarity with which Neutral Expert determination and arbitration have been invoked may be a testament to the Indus Waters Commission and the negotiation and mediation provisions contained in the early paragraphs of Article IX. Conversely, politics and increasing hostilities in the region may provide a more apt alternative explanation. Either way, Article IX’s alternative dispute resolution provisions

¹⁰⁷ *Id.* at 44-46.

¹⁰⁸ *Id.* at 46.

¹⁰⁹ *Id.* at 44.

¹¹⁰ *In re* The Indus Waters Kishenganga Arbitration (Pak. v. India), Partial Award, (Perm. Ct. Arb. 2013) http://www.pca-cpa.org/showfile.asp?fil_id=2101, at 202 [hereinafter “Kishenganga Partial Award”].

¹¹¹ *Id.* at 201.

¹¹² Dead level storage is the minimum water level permissible in a reservoir according to the terms of the IWT. *See* Indus Waters Treaty, *supra* note 6, at 170, 174. Dead storage levels are relevant to a procedure known as drawdown flushing which removes sediment from the bottom of a reservoir by reducing the water level (below dead level), and then allowing the natural flow of the river to remove the sediment. Pakistan essentially argued that drawdown flushing would allow India to exercise control over the flow of water into Pakistan. This is because the procedure might involve a disruption in water flow while the reservoir is re-filled after the procedure is complete. The Court agreed, and held that alternative procedures would allow India to remove sediment and reduce the risk of a water cut-off. Kishenganga Partial Award, *supra* note 110, at 190-200.

¹¹³ *See* Ashfaq Bokhari, *Kishanganga Verdict a Tilt in India’s Favour*, DAWN.COM (Feb. 25, 2013), <http://dawn.com/2013/02/25/kishanganga-verdict-a-tilt-in-indias-favour/>.

¹¹⁴ Kishenganga Partial Award, *supra* note 110, at 201.

¹¹⁵ *Id.* at 174.

have become a vital component of the IWT. But a number of potential problems with Article IX alternative dispute resolutions are demonstrated by the descriptions of those processes above. First, the enforceability of the awards rendered by either Neutral Experts or the Court of Arbitration may give rise to problems in the future. Second, the timeliness of the decisions rendered threatens to undermine the efficacy of those awards. Third, Pakistan's recent turn toward Article IX provisions may indicate the wave of the future – constant and cyclical (and potentially meritless) claims raised as dilatory tactics, largely to appeal to a political base. These issues must be addressed in order to maintain the integrity of the dispute resolution process and the continuing validity of the IWT generally.

A. *Enforceability*

Both India and Pakistan have vowed to abide by the decision rendered by Prof. Latiffe in the Baglihar difference,¹¹⁶ despite some indication that Pakistan might move for arbitration on the issue.¹¹⁷ India affirmed its intention to “fully and wholly abide by any decision taken by the Court of Arbitration” on the Kishenganga dispute, citing the “sanctity” of the IWT and India's intention to “build confidence and trust” with Pakistan.¹¹⁸ The IWT does not provide much in the way of explanation for the enforcement of Neutral Expert determinations or arbitral awards. Per Annexure G, Neutral Expert determinations are “final and binding.”¹¹⁹ The same language is used to describe arbitral awards.¹²⁰ No further means of enforcement or language to explain any possible consequences can be found in the IWT.

That Pakistan threatened arbitration on the Baglihar difference and raised questions about the feasibility of the Court's award regarding Kishenganga should raise serious concerns about the enforceability of the alternative dispute resolution provisions of Article IX. Pseudo-appeals to the Court after unfavorable results at the Neutral Expert level would eviscerate the process of dispute resolution. The resort to arbitration is not technically an appeal from a Neutral Expert decision – Article IX is not “hierarchical.”¹²¹ In fact, Neutral Expert decisions are binding on the Court of Arbitration, per Annexure F, Part 2 (11). But the provision itself indicates that the same basic issue in a different form might be raised in arbitration. “If any question . . . which is not within the competence” of the Neutral Expert is raised during the course of the determination, then that question must be decided either through negotiation/mediation or by arbitration.¹²² Thus a party could simply raise an issue of financial compensation, automatically entitling that party

¹¹⁶ Salman, *supra* note 15, at 115.

¹¹⁷ See *Baglihar: Pak Won't Move for Arbitration*, THE TIMES OF INDIA, Feb 22, 2007, available at http://articles.timesofindia.indiatimes.com/2007-02-22/pakistan/27872220_1_neutral-expert-baglihar-dam-raymond-lafitte.

¹¹⁸ Kishenganga Interim Order, *supra* note 91, at 38 (quoting Mr. Dhruv Vijay Singh). Mr. Singh is the Secretary to the government, Ministry of Water Resources, and the designated Agent for India during the course of the Kishenganga arbitration.

¹¹⁹ Indus Waters Treaty, *supra* note 6, at 208.

¹²⁰ *Id.* at 218.

¹²¹ Salman, *supra* note 15, at 107.

¹²² Indus Waters Treaty, *supra* note 6, at 208.

to a separate proceeding.¹²³ Such a proceeding could essentially become a re-hearing of the issues already raised in a different format, depending in part on whether both proceedings would continue simultaneously.

In addition, Pakistan's concern about the efficacy of the Court's potential award was a reasonable one. At the hearing on the merits, the Pakistani representatives noted that the construction of such a large project was not "an easily reversible" process, and requested notification if India took steps that would have an "adverse effect" on Pakistani interests.¹²⁴ The question remains as to whether a Court award requiring the dismantling of the dam would have been honored. India, for its part, openly "expressed skepticism that the physical dismantling of the dam could ever be necessary."¹²⁵ In reality, a decision calling for dismantling the dam would likely have been impractical, specifically because the dam was already well underway. The sheer economic realities may have affected the Court's decision – India would likely be hard-pressed to simply scrap the project, which is expected to cost the country more than \$670 million (US).¹²⁶ Pakistan's enforceability concerns are now largely irrelevant, except with respect to the Court's finding on minimum flow. The result of an award in Pakistan's favor, which could result in significant financial loss on India's part, however, has yet to be seen. The concern will likely persist in future Article IX proceedings.

Enforcement of Neutral Expert determinations and arbitral awards is vital to the protection of both parties, but absolutely essential to Pakistan as the lower riparian state. The result of a favorable decision for Pakistan that could not be enforced would be disastrous. Pakistan's concern that India will someday "turn off the tap," might then trump a half-century-old treaty obligation, and lead to unilateral and ill-advised actions.¹²⁷ The threat of conflict over water may, in fact, be the concern keeping both parties in line. That said, if one party perceives the resort to Article IX as a losing proposition, one wonders how long the IWT can maintain the balance.

For now, specificity in the enforcement regime is not needed, as both parties have acquiesced to the authority of the Neutral Expert and the Court. Perhaps the foundation of treaty-based arbitration, much like domestic counterparts, is the freedom to contract. By analogy, the parties agreed to resolve disputes via the IWT and Article IX in 1960, and to abide by the decisions of the Commission, Neutral Experts, and Courts of Arbitration. Nonetheless, without a body of law or an organization to mete out compensation in the case of a breach, and with such high stakes, the future of the enforceability of IWT dispute resolution decisions is seriously in question. Enforcement of Neutral Expert determinations and arbitral awards is largely up to the parties. Currently, the answer to the potential for enforceability problems is the will of both parties to maintain peace and the pattern of riparian cooperation.

¹²³ A "claim to financial compensation" is one of the specifically enumerated exceptions to the jurisdiction of the Neutral Expert. *Id.* at 209.

¹²⁴ Kishenganga Partial Award, *supra* note 110, at 15.

¹²⁵ *Id.* at 19.

¹²⁶ See NHPC Limited (A government of India Enterprise), *Welcome to Kishenganga Project*, http://www.nhpcindia.com/Projects/English/Scripts/Prj_Features.aspx?Vid=19. The projected construction cost of the Kishenganga dam is Rs. 36,420,400,000 which amounts to roughly \$676,000,000 US.

¹²⁷ Kishenganga Interim Order, *supra* note 91, at 31.

B. Timeliness

The resolution of the Baglihar difference took a total of more than two years.¹²⁸ Pakistan requested arbitration regarding the Kishenganga dispute in May 2010.¹²⁹ The Court took nearly two and one-half years to render an initial award.¹³⁰ If the Court's self-imposed deadline is met, the Kishenganga dispute will have taken nearly three and one-half years to resolve.¹³¹ Admittedly, the issues are both technical and of serious import. At stake is the livelihood of people on both sides of the Kashmiri border. The very purpose of arbitration, however, is the efficient and cost-effective resolution of conflicts; decisions that take more than three years defeat the purpose of arbitration and alternative dispute resolution.

A decision taking three years can have devastating effects on both parties. India loses the potential benefit of hydroelectric power on an ailing power grid, and costs associated with the construction delay.¹³² Pakistan suffers uncertainty amidst pressure to take the fight to India.¹³³ Both sides experience political pressure to take a hard line given the political sensitivity of Kashmir. While lengthy and thorough proceedings may produce more even-handed results, more efficient proceedings and quicker results will defuse tension and allow each party to move on. Perhaps most importantly in terms of arbitration procedure, the current lengthiness of Article IX alternate dispute resolution procedures favors a party seeking to employ dilatory tactics.

The problem is easily solved. Both Neutral Experts and Courts of Arbitration have the authority to set guidelines and procedural rules.¹³⁴ Rules can be established to speed up the proceedings in two distinct fashions. One the one hand, the arbitral court or the Neutral Expert can establish a strict deadline by which to render a decision. One the other hand, rules must be established to simultaneously encourage party cooperation with that timeline. For guidance on these provisions, experts and arbitrators would likely turn to internationally accepted arbitral rules, much like the World Bank did in the case of the Baglihar difference.

¹²⁸ Baglihar Expert Determination, *supra* note 72, at 1-3.

¹²⁹ Kishenganga Interim Order, *supra* note 91, at 2.

¹³⁰ Kishenganga Partial Award, *supra* note 110, at 202.

¹³¹ *Id.*

¹³² Kishenganga Interim Order, *supra* note 91, at 27. India claims that Jammu and Kashmir is “seriously short of power” and that it would bear “enormous financial costs” through the delay of the project. No specifics were cited in the Interim Order, but there is little question that delay on a project of this magnitude will incur costs. The Court, however, dispensed with this concern in the Interim Order, positing that the dam component of the project would only account for a “fraction of the overall construction costs.” *Id.* at 46.

¹³³ Even challenging the Kishenganga project was not enough for some in Pakistan. Pakistan faced criticism from a conservative political party, the Pakistan Muslim League-Nawaz (PML-N), over the government's alleged lack of “seriousness” in challenging the Kishenganga project, which the PML-N called a matter of “life and death” for Pakistan. *See Govt Not Serious in Contesting Kishanganga at PCA: PML-N*, PAKTRIBUNE (Feb. 23, 2013), <http://paktribune.com/news/Govt-not-serious-in-contesting-Kishanganga-at-PCA-PML-N-257658.html>.

¹³⁴ *See* Indus Waters Treaty, *supra* note 6, at 206-08, for the Neutral Expert's ability to determine the procedure for the determination; Indus Waters Treaty, *supra* note 6, at 216 for the provisions regarding the Court of Arbitration's powers to set the “programme [sic] for submission” and “determine the time and place” of subsequent meetings.

UNCITRAL and the International Chamber of Commerce (“ICC”) publish rules that may help to produce more expedient results. Article 25 of UNCITRAL’s arbitration rules allows no more than forty-five days for the communication of “written statements.”¹³⁵ Incorporating a rule with a strict time limit for each party to state their claim or defense would prevent scenarios in which parties seek to tack on claims with each successive response. An Article 25 rule would also prevent parties from delaying their responses unnecessarily. The exchange of statement in the Kishenganga interim measures arbitration took the better part of seven months – far too long.¹³⁶ Article 26 provides that a party seeking interim measures may be liable for any money damages cause by those measures if the arbitrator(s) later determines that the measures should not have been granted.¹³⁷ This rule effectively deters parties from frivolous attempts to seek interim measures. Additionally, Article 30 mandates termination of the proceedings if the claimant fails to communicate an appropriate statement of the claim and continuation of the hearing in the absence of the respondent if the respondent fails to answer the claim.¹³⁸ Arbitration may continue if a party fails to appear to present their case.¹³⁹ If a party refuses to produce evidence of their position, the arbitrator may simply render a decision on the evidence submitted.¹⁴⁰

The ICC’s Arbitration Rules share many common rules with UNCITRAL. In addition, the ICC Rules provide more guidance in the decision as to costs. Article 37(5) specifically allows the arbitrator to consider the “extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.”¹⁴¹ The ICC rules are also more specific with regard to timelines. According to Article 30, the arbitrator(s) must render a decision within six months of the signing of the Terms of Reference, which amounts to the beginning of the arbitral hearing(s).¹⁴²

Incorporating rules like those employed by UNCITRAL and the ICC would help to speed up the Neutral Expert determination or the arbitral tribunal by encouraging responsible party behavior. Stricter timelines could also be established, which would avoid delays in awards. Assessing costs to a party seeking to delay the proceedings would be an effective method of deterring dilatory tactics. While the IWT makes no reference to punishing parties for dilatory tactics, both Annexures F and G allow the respective Neutral Expert or Court of Arbitration discretion in making awards.¹⁴³

Given previous reliance on ICSID/UNCITRAL rules for guidance in Article IX proceedings, it is likely that future Neutral Experts and Courts of Arbitration will look to accepted sources of arbitral rules to fill in the gaps in the IWT’s alternate dispute resolution provisions. This is both natural and necessary. Outstanding disputes over such issues of national import to both India and Pakistan simply cannot take two years to

¹³⁵ UNCITRAL Arbitration Rules, *supra* note 78, at 17.

¹³⁶ Kishenganga Interim Order, *supra* note 91, at 7-9.

¹³⁷ UNCITRAL Arbitration Rules, *supra* note 78, at 18.

¹³⁸ *Id.* at 21.

¹³⁹ UNCITRAL Arbitration Rules, *supra* note 78, at 21.

¹⁴⁰ *Id.*

¹⁴¹ International Chamber of Commerce [ICC], *Arbitration and ADR Rules*, at 40, (2012), available at <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Rules-of-arbitration/Download-ICC-Rules-of-Arbitration/ICC-Rules-of-Arbitration-in-several-languages/>.

¹⁴² *Id.* at 35.

¹⁴³ See Indus Waters Treaty, *supra* note 6, at Annexure F, Part 2 (10) and Annexure G (26).

decide. Political pressures and economic realities command speedier decisions. Determinations and awards must be timely rendered in order to maintain the effectiveness of the IWT.

C. *The Danger of Chronic and Cyclical Claims*

In both the case of Baglihar difference and the Kishenganga dispute, Pakistan initiated the alternate dispute resolution process. After political posturing, Pakistan disavowed arbitration on a number of additional controversial Indian hydroelectric dam projects.¹⁴⁴ India's Wullar Lake project, however, is still under intense Pakistani scrutiny, and may result in the implementation of Article IX provisions for alternative dispute resolution.¹⁴⁵ Pakistan's recent turn to solving water disputes via Neutral Expert determination and arbitration is partly due to an underdog mentality which stretches to the top levels of government. Pakistan's Indus Water Commissioner claimed as recently as 2008 that India would "make Pakistan a barren land" through the construction of dams on the western rivers.¹⁴⁶ Pakistan has developed a clear position in line with that rhetoric: to oppose vehemently Indian attempts to dam western rivers. India, in turn, has resorted to attacking Pakistan's credibility. In the hearings on the Kishenganga Interim Orders, India argued that Pakistan was "playing victim" and that the evidence introduced was "'inaccurate, emotion-laden, and inflammatory.'"¹⁴⁷

While Pakistan has legitimate concerns about water usage and shortages¹⁴⁸, and has only invoked expert determination and arbitration once each respectively, the Islamic Republic runs the risk of filling the role of the spoiler. As mentioned above, Article IX's procedures, if maintaining their current length and thoroughness, favor the party interested in halting development. Pakistan must tread carefully in raising claims, and

¹⁴⁴ *Baglihar: Pak Won't Move for Arbitration*, TIMES OF INDIA, Feb. 22, 2007, available at http://articles.timesofindia.indiatimes.com/2007-02-22/pakistan/27872220_1_neutral-expert-baglihar-dam-raymond-lafitte.

¹⁴⁵ Masood Hussain, *Militants Force Suspension of Lake Project in North Kashmir*, TIMES OF INDIA, Aug. 31, 2012, http://articles.economictimes.indiatimes.com/2012-08-31/news/33521497_1_lake-project-power-projects-wullar-lake. The Wullar Lake project has been underway and in dispute since 1987. The project is intended to improve the navigability of the Jhelum River. Militants recently raided the worksite, threatening workers and damaging equipment.

¹⁴⁶ *India Would Make Pak Barren by 2014, Says Pak Official*, THE ECONOMIC TIMES (Mumbai), Nov. 24, 2008, http://articles.economictimes.indiatimes.com/2008-11-24/news/27709329_1_baglihar-dam-indus-waters-treaty-pakistan-water.

¹⁴⁷ Kishenganga Interim Order, *supra* note 91, at 36.

¹⁴⁸ Pakistan's water management policy is highly contentious both domestically and among international scholars. While many argue that Pakistan must abandon its technocentric, province-based, and largely corrupt water management approach, others claim that Pakistan's system of irrigation canals and dams is a model for transforming arid expanses into fertile farmland. *Compare* Bengali, *supra* note 90 at 45, 46 with Shams Ul Mulk, *Pakistan's Water Economy, the Indus River System and its Development Infrastructure, and the Relentless Struggle for Sustainability*, in *RUNNING ON EMPTY* *supra* note 90, at 64, 66. All commentators agree that Pakistan faces a serious water shortage that will only worsen in the coming years. Pakistan is predicted to become "water scarce" by 2035, a term meaning the country will have less than 1,000 m³ of water available per capita. Currently, Pakistan's water availability is 1,500 m³ per capita, putting it dead last in a comparison with 26 other Asian nations. Michael Kugleman, *Introduction*, in *RUNNING ON EMPTY*, *supra* note 90, at 5.

refrain from doing so for sheer political capital among radicals.¹⁴⁹ Although it may seem that Pakistan has nothing to lose but water rights in seeking arbitration, an uptick in claims may have a serious chilling effect on the dialogue encouraged by the IWT, and India's willingness to participate in not just Article IX procedures like Neutral Expert determination and arbitration, but Commission negotiation as well.

If India senses, as some commentators have, that the IWT has simply become a tool to delay the production of much-needed power in Kashmir, New Delhi may begin to reconsider its commitment to the IWT's provisions.¹⁵⁰ But if Pakistan must tread carefully in raising claims, India must simultaneously maintain its commitment to the IWT. Attacking Pakistani credibility, as Indian representatives did during the course of the Kishenganga interim measures hearing, only serves to escalate the Indus discourse.¹⁵¹ Such statements lend to Pakistani fears that India is not acting in good faith. In addition, India must refrain from threatening openly to abrogate the treaty. Indian officials warned of a unilateral withdrawal after Pakistani-based militants attacked the Indian Parliament in 2001.¹⁵²

If the number of serious issues with dam construction is actually as high as Pakistan intimates, the IWT's model of riparian cooperation may have already failed. It is more likely that Pakistan is responding to political pressures and serious shortcomings in water management. In order to function appropriately, and maintain legitimacy, Article IX's Neutral Expert determination and arbitration provisions should be reserved for resolving conflicts that cannot conceivably be settled through negotiation and mediation.

V. CONCLUSION

The IWT is representative of a problem not easily defined or solved. Were it the case that the waters of the Indus could simply be divided equally by treaty, Article IX would be unnecessary. But that is not the case. The conflict between upper riparian states and lower riparian states is immutable, natural, and constant. It is a consequence of the

¹⁴⁹ Among those radical groups is Jammāt-ud-Dawāa, "a charity seen as a front for Lashkar-e-Taiba, blamed for the Mumbai attacks," which resulted in some 164 dead and 308 wounded, according to Indian officials. A Jammāt representative was quoted as saying that "only *jihad* can help get water released to Pakistan, so people should rise up." *Water Row Key to India-Pakistan Rivalry*, ECON. TIMES (Mumbai), July 15, 2010, http://articles.economictimes.indiatimes.com/2010-07-15/news/27582484_1_water-shortages-water-row-india-and-pakistan. Lashkar-e-Taiba is a United States State Department designated foreign terrorist organization (FTO). See U.S. DEPT. OF STATE, BUREAU OF COUNTERTERRORISM, DESIGNATED FOREIGN TERRORIST ORGANIZATIONS.

¹⁵⁰ See, e.g., Editorial, *Stalling Kishenganga*, BUS. STANDARD (New Delhi), Oct. 5, 2009 at 13, available at 2009 WLNR 1956970; Editorial, *Futile Water Wars*, BUS. STANDARD (New Delhi), June 7, 2010, at 11, available at 2010 WLNR 11568689.

¹⁵¹ India raised another particularly contentious issue: India alleged that Pakistan could not invoke the IWT to challenge projects that might have an effect on Pakistan-administered Kashmir because the territory "is not legally a part of Pakistan." Kishenganga Partial Award, *supra* note 110, at 132. India went on to charge that Pakistan invoked the IWT to "support its claims in the territory of Pakistan-administered Jammu and Kashmir and to dispute India's claims in the same territory." *Id.* Perhaps as a signal that the Court took this allegation seriously, it was the first issue discussed (out of turn) in the partial award. See *id.* at 134. The Court wisely dispensed with this contention by expressly denying that the award would have any effect on the sovereignty of Kashmir. *Id.*

¹⁵² Alam, *supra* note 5, at 349.

complicated relationship between water-sharing nations that diplomatic creatures such as the IWT exist, and it is through their dispute resolution mechanisms that they succeed or fail.

Article IX procedures for negotiation and mediation, particularly at the Commission level, have been used throughout the history of the IWT to solve minor water-sharing problems. It is due in large part to Article IX that the IWT has survived the Kashmiri conflict, the nuclearization of India and Pakistan, and one of the most contentious rivalries in the modern era. India's push for hydroelectric power in Kashmir has provoked Pakistan to seek relief through Article IX's Neutral Expert and arbitration provisions. In the case of the Baglihar difference and the Kishenganga dispute, Pakistan brought to an international forum the fear that India might control the flow of water into Pakistan.

Negotiation, mediation, Neutral Expert determination, and arbitration have thus far staved off a water war between India and Pakistan. Should the IWT remain effective at defusing hydroelectric brinkmanship between the parties, that paradigm will remain, and the radicals who call for war will be silenced. Questions about award enforcement, a decided lack of timeliness in arbitral decisions, and the potential for repeated or frivolous requests for arbitration, however, threaten to undermine the efficacy of Article IX, the IWT, and a tenuous peace based in part on the ability of both India and Pakistan to utilize the waters of the Indus. The continued relevance of the IWT depends fundamentally on Article IX's effectiveness in resolving the recent spate of controversies involving Indian hydroelectric dam projects.