

The Indus Waters Kishenganga Arbitration

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Outline

- I. The World Bank's role
- II. The dispute settlement mechanism established by the the Indus Waters Treaty of 1960
- III. The Baglihar case on the Chenab river
- IV. The case concerning the Indus Waters Kishenganga arbitration

Section I

The World Bank's role



- In 1960, after 10 years of negotiations facilitated and mediated by the World Bank, India and Pakistan reached an agreement and signed the Indus Waters Treaty
- The Treaty is composed of 12 Articles, 8 Annexures, 9 Appendices and a Protocol
- The World Bank keeps a major role under the Treaty: dispute settlement mechanism

Indus Waters Treaty

- It does not cover China and Afghanistan (13% of the basin)
- Two tributaries of the Indus River flow down Afghanistan (Kabul and Kuram)
- The World Bank ensures that projects are being notified to Afghanistan

Section II

The dispute settlement mechanisms established by the 1960 Indus Waters Treaty



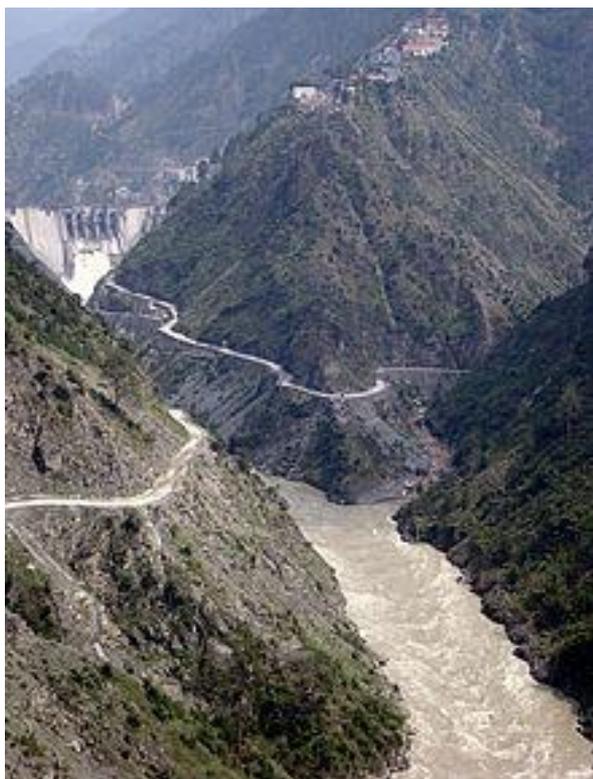
Article IX of the 1960 Indus Waters Treaty

- Any question which arises between the Parties concerning the interpretation or application of Indus Waters Treaty or the existence of any fact which, if established, might constitute a breach of this Treaty shall first be examined by the Permanent Indus Commission, which will endeavour to resolve the question by agreement
- If the Commission does not reach agreement, then a difference will be deemed to have arisen
- In this case, the difference will be dealt with by a Neutral Expert (annexure F) or by an arbitral Tribunal

- In both cases (expert or arbitral Tribunal), the Indus Waters Treaty requires the presence of a technical expert
- Annexure F: the Neutral Expert must be a highly qualified engineer
- Annexure G: a highly qualified engineer must be part of the arbitral Tribunal
- Importance of technical and scientific expertise in the dispute settlement
- The choice between the arbitral Tribunal and the Neutral Expert is not hierarchical

- Two Commissioners: high-ranking engineers competent in the field of hydrology and water-use
- Functions: study and report to the two governments on any problem relating to the development of the waters of the rivers. Undertake, once in every five years, an inspection on the works of the river
- Role in the exchange of information between the two countries on the foreseen projects: contributes in preventing differences
- The Commission's work was not interrupted by the armed conflicts that arose between the two countries

Section III



The Baglihar case on the Chenab river

Characteristics of the dispute

- The construction of the dam started in the 1990s (environ 990 megawatts)
- In 2005, the World Bank offered its services, first as facilitator and later as a participant in the talks between the two countries so as to reach a fair and equitable solution
- According to the Indus Waters Treaty, this river is attributed to Pakistan and India detains rights of usage of the waters (power generation)
- Pakistan claims that the construction of hydroelectric project violates the Indus Waters Treaty

- Pakistan appointed a Neutral Expert to solve the dispute (Decision of the Expert, 2007 – Technical aspects)
- Question of the maximum flow rate in the event of flooding: 16.500 cubic meters per second (effects of climate change)
- Characteristics of the spillway gates: must take into consideration the sedimentation, geology, and earthquake risks

Decision of the Neutral Expert of 2007 – Technical aspects

- The spillway must regulate flows and prevent from flood danger
- The sediment high concentration and quantity increase the risks of turbine-erosion: specific rules for the construction of the Baglihar project

Decision of the Neutral Experts of 2007 – Legal aspects

- Interpretation of the Treaty in light of the principles of integration and effectiveness

- The rights and obligations established by the Indus Waters Treaty must be interpreted effectively
- The goals of the Indus Waters Treaty must be pursued in a spirit of cooperation and friendship
- The hydroelectric project must be conducted with the best practices in light of the Indus Waters Treaty

Procedural aspect of the 2007 Decision

- The International Centre for the Settlement of Investment Disputes (ICSID): coordinates the procedure and provides logistical support to the Parties and to the Neutral Expert
- The Neutral Expert first submitted a draft decision to the parties

Final Decision

- India can conduct the Chenab Project under certain conditions, i.e. characteristics of the spillway, river flow
- Control of sediment runoff was a key concern for the Neutral Expert in taking his Decision

Section IV

The case concerning the Indus Waters Kishenganga arbitration



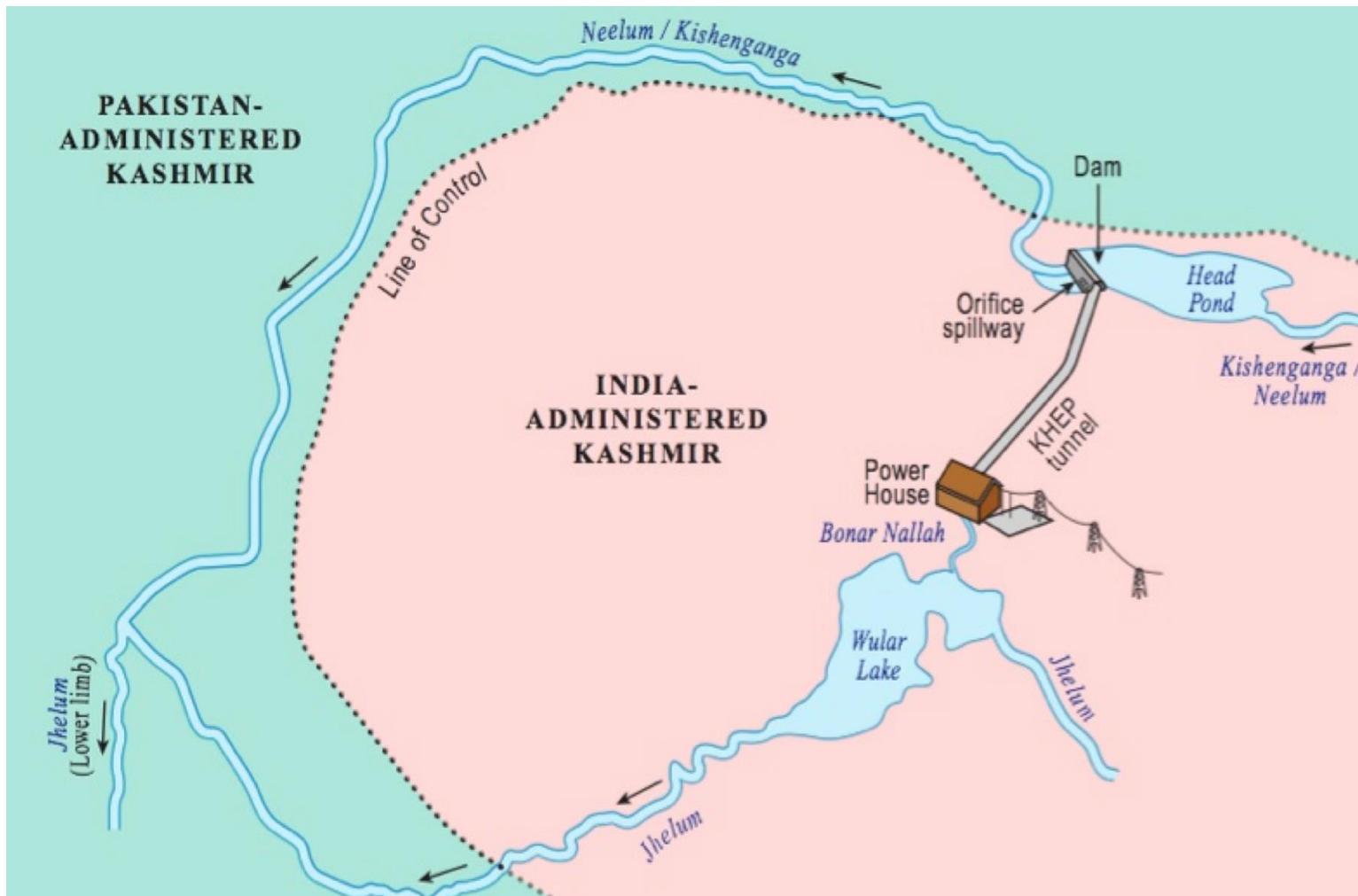
- Through a Request for Arbitration dated 17 May 2010, Pakistan initiated proceedings against India
- In its Request for Arbitration, Pakistan stated that the Parties had failed to resolve the “dispute” concerning the Kishenganga Hydro-Electric Project (the “KHEP”) conducted by India
- A Court of Arbitration of 7 members was established
- The Court issued 4 decisions between 2011 and 2013 :
 - 1) Order on the Interim Measures Application of Pakistan issued by the Court on 6 June 2011
 - 2) Partial Award issued by the Court on 18 February 2013

3) Decision on India's Request for Clarification or Interpretation, 20 December 2013

4) Final Award, 20 December 2013

Characteristics of the KHEP Project:

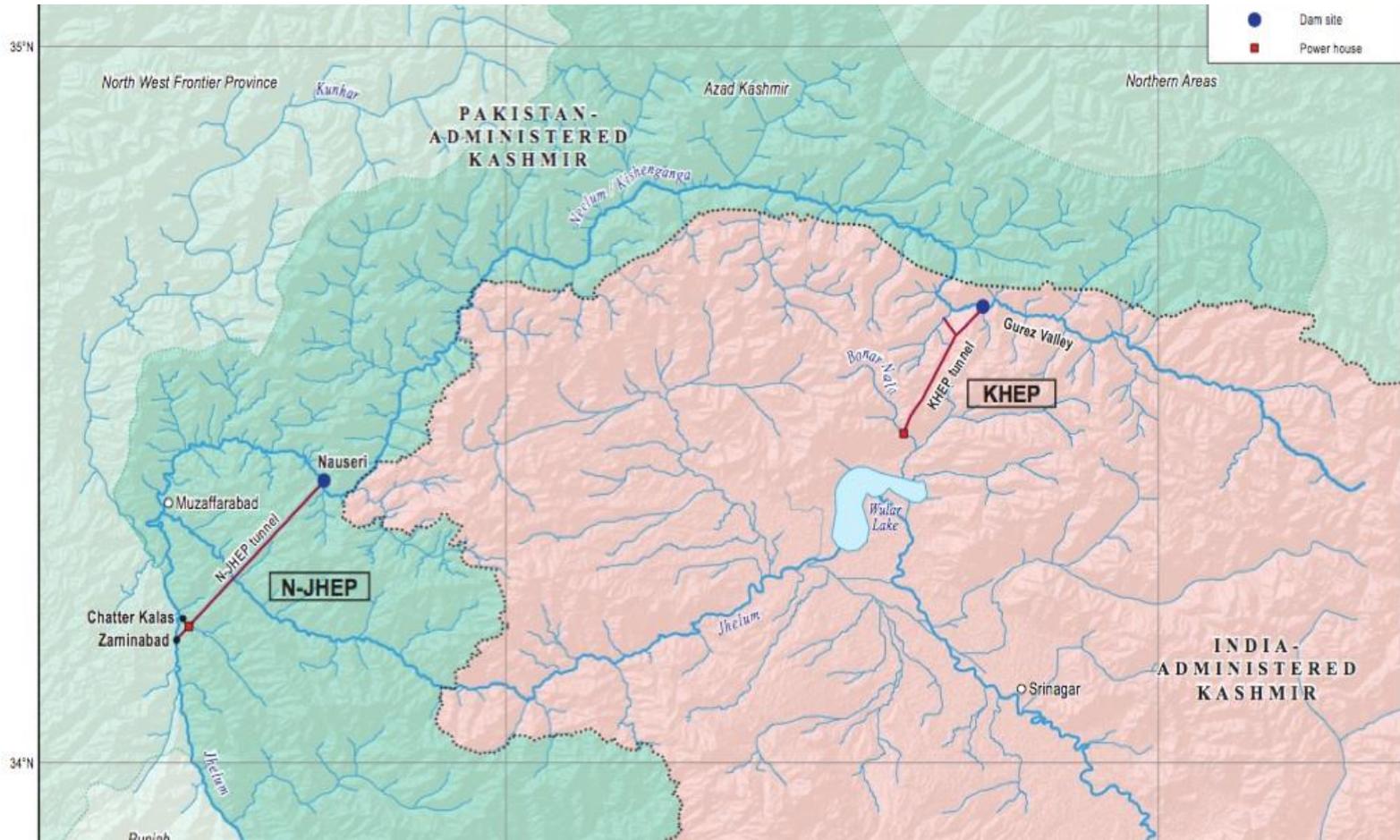
- Situated in Kashmir
- India proposed a diversion of the river Kishenganga (Neelum) into another tributary in order to produce hydroelectric power
- Water storage capacity = 220.000 million cubic meters of water
- About 330 megawatts of electricity



- The Kishenganga River crosses the Line of Control in the Kashmir region, which is divided between India and Pakistan and the river flows in the area administered by Pakistan

History of the conflict

- The project started in the 1980s
- In 1988, the Pakistani Commissioner of the Permanent Commission became aware of the KHEP project and asked for the interruption of the works
- In 1989, the Indian Commissioner asked for information on the hydroelectric project of Pakistan on the Neelum River (“NJHEP project”)



- In the 1990s and 2000s, India and Pakistan exchanged information about the two projects through the Commission
- The dispute was not solved through negotiations
- Pakistan requested the appointment of an arbitral Tribunal in 2010

Arguments of the Parties before the Court

- Pakistan : the KHEP Project seeks the diversion of the totality of the downstream Kishenganga River Waters and would cause a 6-months flow reduction (water deprivation for the downstream communities)
- India submits that the tributary streams will feed the downstream river

- According to the Indus Waters Treaty, “India shall be under an obligation to let flow all the waters of the Western Rivers, and shall not permit any interference with these waters, except for the following uses: (...) Generation of hydro-electric power”
- Pakistan shall have the unrestricted use of all waters originating from sources other than the Eastern Rivers which are delivered by Pakistan, and India shall not make use of these waters

Partial Award (18 February 2013)

- India has the right to proceed with the construction of the Project, subject to maintaining Pakistan's right to receive a minimum flow of water under both the Treaty and international law
- The Indus Water Treaty must be interpreted in the light of contemporary principles of international environmental law (same principle followed than in the Gabcikovo-Nagymaros case)

- “It is established that principles of international environmental law must be taken into account even when (unlike the present case) interpreting treaties concluded before the development of that body of law” (par. 452)
- “It is therefore incumbent upon this Court to interpret and apply this 1960 Treaty in light of the customary international principles for the protection of the environment in force today” (par. 452)

- The Tribunal Recalls the fundamental principles of international environmental law: sustainable development principle (par. 449), obligation to conduct an environmental impact assessment (par. 450), principle of prevention (par. 450)
- India has the customary obligation not to cause environmental harm to another State

- India must respect Pakistan's rights to use Kishenganga waters for agriculture purposes and to generate hydro-electric power
- Because the Court did not have sufficient element at that stage, the quantity of water that constitutes the minimum flow will only be determined in the final award of 21 December 2013
- The additional scientific information necessary to fix this amount were to be submitted to the Court on the 19 June 2013 at the latest, that is 120 days after the Partial Award was issued

Final Award (20 December 2013)

- The Court fixes the minimum flow to be released downstream from the KHEP dam at 9 cumecs. It is twice bigger than what the Ministry of Environment and Forests of India had asked
- Beginning 7 years after the diversion of water from the Kishenganga/Neelum River for power generation by the KHEP, either Party may seek reconsideration of the minimum flow through the Permanent Indus Commission or the other mechanisms of the Treaty

Lessons learned from the arbitration

- Importance of scientific evidence and technical experts' advice for dispute settlement
- Analysis of the diverse technical options to control sediment disposal and discharge in hydraulic systems
- Arbitral Tribunals are competent to solve technical questions, such as those related to the risks of sedimentation in a dam
- Mechanism of reconsideration of the minimum flow

Final remarks

- ➔ The 1960 Indus Waters Treaty is the result of the World Bank's mediation from 1950 to 1960
- ➔ Principle of environmental minimum flow
- ➔ Role of the Indus Water Commission to ensure the exchange of information between the Parties

Thanks!

Platform for International Water Law

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