

# KISHANGANGA & RATTLE PROJECTS

## Deliberating on IWT's Dispute Resolution Mechanism & The Way Forward

### Policy Brief

The brief is largely based on the proceedings of an interactive roundtable session titled, “Kishanganga & Rattle Projects: Deliberating on IWT's Dispute Resolution Mechanism & the Way Forward” on April 5, 2017, organized by Institute of Policy Studies (IPS). The session was addressed by Mr. Ashfaq Mahmood, Water and Energy Expert & Former Secretary Water & Power, Ms. Shamila Mahmood, International Law and Development Expert, and Mirza Hamid Hassan, Former Secretary Water & Power.

#### **The Context**

The Indus Waters Treaty (IWT) signed in 1960s, facilitated by World Bank (WB), aided India and Pakistan in avoiding a major conflict on the waters of Indus Basin. Permanent Indus Commission (PIC) was established under the Treaty to settle the differences between the two parties as any issues emerges. Article IX of the treaty envisages that if the differences are not settled at the level of commissioner, either party can request the World Bank (WB) for the appointment of Neutral Expert (NE) or can request for the establishment of Court of Arbitration (CoA).<sup>1</sup> Initially, the treaty worked successfully and the dispute on Salal Dam was settled bilaterally. But later on, India started construction of dams on Western Rivers disregarding the provisions of IWT, ignoring the objections by Pakistan.

The Cases Baglihar Dam/Hydropower project (900MW) and the Kishanganga project (330 MW) couldn't be resolved bilaterally and were taken to the

NE and PCA respectively. Baglihar project was approved in 1996, and when the matter was referred to the NE in 2005, the first phase of project (450 MW) was already completed by then. NE provided its determination in 2007<sup>2</sup>, whereas India launched the second phase of the project within that duration and completed it in 2008; Pakistan lost the case at NE. Similarly, India launched the Kishanganga project of 330 MW in 2007 despite Pakistan's objections and the matter was taken to the PCA by Pakistan after failing at the forum of NE.<sup>3</sup> The final verdict came in 2013. The court determined that “India shall release a minimum flow of 9 cumecs into the Kishanganga/Neelum River below the KHEP at all times. However, the Court also decided that either India or Pakistan may seek reconsideration of this decision through the Permanent Indus Commission and the mechanisms of the Indus Waters Treaty after a period of seven years from the first diversion of water from

<sup>1</sup> The treaty is available at: <http://siteresources.worldbank.org/INTSOUTHASIA/Resources/223497-1105737253588/IndusWatersTreaty1960.pdf>

<sup>2</sup> “The neutral expert ruled in India's favor that the dam could have 32.56 million cubic meters of pondage (the dam's water storage capacity), an amount lower than India's design of 37.50, but far greater than the 6.22 advocated by Pakistan.” For details see, “2007: Neutral expert gives his judgment on Baglihar Dam,” Dawn, July 2, 2011, accessed, May 9, 2017, <https://www.dawn.com/news/640989>

<sup>3</sup> Hussain Ahmad Siddiqui, “Troubled Water,” The News International, November 21, 2016 accessed, April 10, 2017, <https://www.thenews.com.pk/magazine/money-matters/166376-Troubled-water>

the Kishanganga/Neelum River.”<sup>4</sup> The court didn’t stop India from construction of project but it reversed the Neutral Expert’s verdict on Baghlihar that allowed India to build any project with more than ‘limit live storage’ capacity which was against the provisions of IWT. Now, with the Kishanganga verdict, PCA barred India from building more live storage than allowed in IWT.<sup>5</sup>

### Current Status and the Challenges

In 2016, Pakistan decided to take the issue of Ratle power project of 850 MW (with three times higher storage capacity than Baghlihar) and Kishanganga (again) to the PCA after failing to convince India at PIC. Later, objecting to the request made by Pakistan for PCA, India requested for the appointment of the Neutral Expert. Initially, World Bank decided to move the two process simultaneously, but later on, paused the arbitration on both forums, on India’s objection that both the process couldn’t move simultaneously.

The Commission wasn’t able to move forward on Kishanganga and Ratle project and when both the parties admitted that they couldn’t reach agreement bilaterally and requested to invoke dispute resolution mechanism. WB was supposed to facilitate the dispute resolution as envisaged by the treaty instead of pausing the process. Halting the process would benefit India, as it would give India time to commence construction on Ratle. This puts a question on the neutrality of the World Bank and gives the impression that it is taking side with India to allow the later enough time to start construction.

India has been dishonoring its commitment to the Treaty, whereas Pakistan hasn’t been proactive. India has always raised objections in any project in disputed territory claiming that it requires NOC, and unfortunately India’s version has always been supported by the World Bank, but when Pakistan raises similar questions over some Indian project, one of the responses it always gets is that the project will not affect Pakistan. This however is incorrect because such projects do affect Pakistan because it is a lower riparian country.

Pakistan’s biggest deficiency vis-a-vis water issues with India, has been inappropriate strategizing. It didn’t move promptly to cover up its past failings and did not lobby its own narrative effectively at international level. India has delayed settlement of issues at the PIC as a strategy, while continuing with the construction of contentious projects to make the projects reach a stage of *fait accompli*. whereas Pakistan has not been proactive to move ahead by invoking international arbitration to deny India the time for construction. Pakistan could have challenged the decision of neutral expert, because he went beyond his mandate. In case of Kishanganga Arbitration, after the decision of lowering of the water below the dead storage, Pakistan should have moved to reach out to international opinion makers to make its point of view understood. As far as the IWC is concerned, there has been lack of expertise at technical, legal and political level and apart from day to day management, it has failed to effectively resolve contentious issues.

### The Way Forward

In order to break out of the current impasse and encounter the challenges, following are some short, medium and long-term recommendations:

1. Pakistan should exert pressure on World Bank to act according to its mandate and fulfil the legal obligation of resolving the matter without any delay. Short of filing a case against WB for not fulfilling its duty which raises questions on the neutrality of the world body, a protest can be lodged with the World Bank itself on the subject.
2. The forum of United Nations can also be engaged to highlight India’s non-compliance to international commitment.
3. A request can be made to move another Court of Arbitration by tabling the issue of non-compliance by India. Article 7(2)<sup>1</sup> of the treaty, binds India to share the designs of the projects at planning stage. Annexure D in the treaty sets parameters of the hydroelectric plants; Annexure E of the treaty deals with the storage works. These also provide certain

<sup>4</sup> “Indus Waters Kishanganga Arbitration (Pakistan V. India) Court of Arbitration Renders its Final Award in the First Arbitration under the Indus Waters Treaty 1960,” *PCA Press Release*, December 21, 2013, accessed, April 11, 2017, <https://pcacases.com/web/sendAttach/1683>

<sup>5</sup> John Briscoe, “Winning the battle but losing the war,” *The Hindu*, February 22, 2013, accessed, April 10, 2017, <http://www.thehindu.com/opinion/lead/winning-the-battle-but-losing-the-war/article4439676.ece>



time frame. And now there is also determination of PCA on the minimum flow, which is binding on both parties.

4. Some experts are of the view that India's domestic mechanism can also be moved as India has domestic laws calling for honoring of international arbitration determination by the Indian government. However, given the hostile relations between the two countries, it does not really appear as an available option.
5. Indus Water treaty should not be looked in isolation. It can be taken along with other international agreements. The areas, where IWT is silent, it can be read along with customary international laws. For example for the compliance of environmental effects/ climate change can be interpreted in the wake of Paris Agreement as India has signed the later. A lot of technological and scientific developments have taken place since 1960, the time when the Treaty was signed. So the new factors like environmental affects and climate impact need to be factored in while pursuing Pakistan case.
6. Pakistan's Indus Waters Commission has so far been dealing with the issues under IWT, but not necessarily in a desired manner. Considering the multifaceted challenges emanating out of India's repeated moves, the capacity of the Commission needs to be enhanced. The Commission's Chair and top officials should be person very well-versed in

hydrological and related issues, the new dimensions arising out of the climate and environmental debates and should be assisted by able teams of technical and legal professionals. Targeted and intensive research-based input is need to analyze the issues that arise, and present our case in a strengthened manner. For this purpose, closer liaison with research organizations and experts concerned, may be of help.

7. A strong lobbying is required on relevant forums to get our narrative understood. The world needs to know that India does not honor its commitments; it disregards the determinations under international arbitration. It would have ramifications as no country wants to be called as an offender. There is a need to enhance research and resultantly the capacity on water issues. Quality and message oriented research and media input needs to be produced and disseminated around the world to project the Pakistani narrative on the subject.

A comprehensive strategy is needed to overcome the current and emerging challenges vis-à-vis Pakistan's water issues with India and the development of human resource at domestic level, is the prerequisite. The prompt and timely response is key to counter Indian designs of denying Pakistan its share of water in Indus Basin.