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Dispute Resolution Mechanisms: An Analysis of the Indus Waters Treaty

Waseem Ahmad Qureshi

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Dispute Resolution Mechanisms:
An Analysis of the Indus Waters Treaty

* Dr. Waseem Ahmad Qureshi

Abstract:

Since India and Pakistan's independence in 1947, both states have fought over the occupied territories of Kashmir to gain control of water supplies, which are strategically valuable. Even in recent times, the countries are facing constant threats from each other over several separate issues. India and Pakistan's water conflicts are long-standing and relate to Indian infrastructure on the western tributaries. Pakistan is of the view that India is robbing Pakistan's water supplies and building its water management capacity only as a political maneuver to gain political supremacy by practicing hydro-hegemony. On the other hand, India maintains that it is only constructing infrastructure within the scope of the Indus Waters Treaty (IWT), and the decreased water flows in Pakistan are due to climate change. Owing to Indian construction works on the western rivers and the Pakistani interest in safeguarding its water supplies, water disputes are routinely referred to the legal mechanism prescribed in the IWT. Recently, the tension over water conflicts between India and Pakistan has been soaring. India has threatened that it will scrap the IWT entirely. In response, Pakistan has stated that such a revocation of a bilaterally agreed treaty would be considered an act of war. This extraordinary intensity in political rigidity between Pakistan and India has a solution enshrined in the legal framework of the IWT to alleviate water disputes. This paper seeks to explore the legal framework of the dispute resolution mechanism under the IWT, and further investigates the weaknesses and strengths of the prescribed mechanism.

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Introduction

Owing to a global surge in population and water scarcity, water conflicts over freshwater resources are expected to increase in the future.¹ Within the next three decades the global population is estimated to grow at an alarming rate. In 1995, the world's population was estimated to be 5.7 billion people;² by the year 2025, owing to the surge in population, this number will reach 8 billion people.³ This means that the constant aggregate freshwater will be shared among an increased population and therefore global per capita water availability is destined to decline dramatically.⁴

In addition to the worldwide increase in population growth and the subsequent decline in per capita water supply, certain other contingent aspects also account for water scarcity in the world. For example, the rise in sea level has increased the salinity of groundwater, which has considerably diminished water supplies.⁵ Similarly, the melting of the glaciers and climate change are responsible for causing droughts and floods, which have also distressed water supplies.⁶ Consequently, owing to the boost in global population and water shortage, worldwide water disputes are expected to rise substantially in the near future.⁷

Water disputes can be traced back thousands of years.⁸ Water conflicts are encounters between nations because of disagreements over water resources, for example river basins.⁹ It is estimated that worldwide there are more than 250 river basins that share their waters with more than one nation.¹⁰

¹ See A K CHATURVEDI, *WATER: A SOURCE FOR FUTURE CONFLICTS* 70 (Vij Books India Pvt ed., 2013).

² Jeff Crisp et al., *Population and Human Relations: Year in Review 1995*, ENCYC. BRITANNICA (2017), <https://www.britannica.com/science/population-biology-and-anthropology-Year-In-Review-1995>.

³ Nat'l Intelligence Council, *Global Trends 2025: A Transformed World* 19 (Nov. 2008).

⁴ See CHATURVEDI, *supra* note 1, at 70.

⁵ ANTOANETA YOTOVA, *CLIMATE CHANGE, HUMAN SYSTEMS AND POLICY*: v. 2, at 6 (2nd vol. 2009).

⁶ MARTIN PARRY, *CHANGE, CLIMATE CHANGE 2007, IMPACTS, ADAPTATION AND VULNERABILITY* 187 (2007).

⁷ See CHATURVEDI, *supra* note 1, at 70.

⁸ For example, the war over water in Mesopotamian city of Iraq 4,500 years ago. See MANAS CHATTERJI, *CONFLICT AND PEACE IN SOUTH ASIA* 271 (B. M. Jain ed., 2008).

⁹ See V. J. JOHN, *WATER STRUGGLE* 4 (V. J. John ed., 2007).

¹⁰ More accurately, there are 263 river basins that cross international boundaries. See INES DOMBROWSKY, *CONFLICT, COOPERATION AND INSTITUTIONS IN INTERNATIONAL WATER MANAGEMENT* 3 (Jeroen C.J.M Van Den Bergh ed., 2007).

Almost 40 percent of the global population lives around these river basins,¹¹ and owing to their conflicting interests, at least 100 countries are close to water conflict.¹² More precisely, four sizable river basins are already facing water disputes,¹³ and another 17 are at great risk of water conflict.¹⁴ In the last 60 years, more than 40 water conflicts have been reported, largely in the regions of the Middle East.¹⁵

Scholars and influential people have predicted water wars over the race to capture water supplies. Within this context, Kofi Annan stated in 2002 that “fierce national competition over water resources has prompted fears that water issues contain the seeds of violent conflict.”¹⁶ Relatedly, the vice president of the World Bank, Ismail Serageldin, noted in 1995 that “[i]f the wars of this century were fought over oil, the wars of the next century will be fought over water.”¹⁷ Despite this global rise in the possibility of water wars and water conflicts,¹⁸ full-scale water wars have not come about because the dispute resolution mechanism resolves such conflicts.¹⁹ Therefore, this paper is an attempt to investigate the various dispute resolution mechanisms used in international and regional settings to placate water conflicts between nations.

Since India and Pakistan’s independence in 1947, both states have fought over the occupied territories of Kashmir to gain control of water supplies, which are strategically valuable.²⁰ Even in recent times, both countries have faced constant threats from each other over several separate issues.²¹ India

¹¹ G. TYLER MILLER, JR. & SCOTT SPOOLMAN, ENVIRONMENTAL SCIENCE 242 (Christopher Elgado et al. eds., 13th ed. 2010).

¹² KAZUO YAMAMOTO ET AL., SOUTHEAST ASIAN WATER ENVIRONMENT 5, 207 (K. Yamamoto et al. eds., 2013).

¹³ More particularly, Indus, Nile, Euphrates, Jordan, and others. See INT’L BUREAU OF THE PERMANENT COURT OF ARBITRATION, RESOLUTION OF INTERNATIONAL WATER DISPUTES 132-40 (5th vol. 2003) [hereinafter *WATER DISPUTES*].

¹⁴ EDITH BROWN WEISS, INTERNATIONAL LAW FOR A WATER-SCARCE WORLD 121 (Martinus Nijhoff Publishers 2013).

¹⁵ See *Id.* at 122.

¹⁶ NAYAN SHARMA, RIVER SYSTEM ANALYSIS AND MANAGEMENT 354 (Nayan Sharma ed., 2017).

¹⁷ VANDANA SHIVA, WATER WARS: PRIVATIZATION, POLLUTION, AND PROFIT, at ix (2016).

¹⁸ JULIAN CRIBB, THE COMING FAMINE: THE GLOBAL FOOD CRISIS AND WHAT WE CAN DO TO AVOID IT 22 (2010).

¹⁹ ORLIN NIKOLOV & SWATHI VEERAVALLI, IMPLICATIONS OF CLIMATE CHANGE AND DISASTERS ON MILITARY ACTIVITIES 140 (Orlin Nikolov & Swathi Veeravalli eds., 2017).

²⁰ RAVI KALIA, PAKISTAN’S POLITICAL LABYRINTHS: MILITARY, SOCIETY AND TERROR 7-8 (Ravi Kalia ed., 2016).

²¹ See generally DR. S K SHAH, INDIA AND ITS NEIGHBORS: RENEWED THREATS AND NEW DIRECTIONS (2017).

and Pakistan's water conflicts have their own long list against Indian infrastructure on the western tributaries.²² Pakistan is of the view that India is robbing Pakistan's water supplies and building its water management capacity only as a political maneuver to gain political supremacy by practicing hydro-hegemony.²³ On the other hand, India maintains that it is only constructing infrastructure within the scope of the Indus Waters Treaty ("IWT"), and the decreased water flows in Pakistan are due to climate change.²⁴ Owing to Indian construction works on the western rivers and the Pakistani interest in safeguarding its water supplies, water disputes are routinely referred to the legal mechanism prescribed in the IWT.²⁵

Recently, the tension over water conflicts between India and Pakistan has soared.²⁶ India has threatened that it will scrap the IWT entirely.²⁷ In response, Pakistan has stated that such a revocation of a bilaterally agreed treaty would be considered an act of war.²⁸ This extraordinary intensity in political rigidity between Pakistan and India has a solution enshrined in the legal framework of the IWT to alleviate water disputes.²⁹

This paper seeks to explore the legal framework of the dispute resolution mechanism under the IWT and further investigates the weaknesses and strengths of that mechanism. To maintain impartiality, the concerns of both nations with regard to the flaws in the dispute resolution mechanism will be explored and weighed in the equation of exploring the suitability of the IWT legal framework. Furthermore, to evaluate equitableness and to assess contemporary apparatuses, the ability of the IWT dispute resolution

²² See ZAFAR ADEEL & ROBERT G. WIRSING, *IMAGINING INDUSTAN* 198 (Zafar Adeel & Robert G. Wirsing eds., 2017).

²³ See generally Abdul Rauf Iqbal, *Hydro-Politics in India and its Impact on Pakistan*, ISSRA PAPERS (2014), http://webcache.googleusercontent.com/search?q=cache:v7wMqC6TDmwJ:www.ndu.edu.pk/issra/issra_pub/articles/issra-paper/ISSRA_Papers_Vol6_Issue1_2014/05-Hydro-Politics-in-India-Abdul-Rauf-Iqbal.pdf+&cd=1&hl=en&ct=clnk&gl=us.

²⁴ CHRISTIAN PARENTI, *TROPIC OF CHAOS: CLIMATE CHANGE AND THE NEW GEOGRAPHY OF VIOLENCE* 129 (2012) (e Change and the New Geography)

²⁵ See *infra* Kishenganga, *supra* note 94; Section 4.3.

²⁶ Iqbal, *supra* note 23, at 49-68.

²⁷ Khalid Chandio, *India Re-thinking Indus Water Treaty*, IPRI (Aug. 27, 2014), <http://www.ipripak.org/india-re-thinking-indus-water-treaty/>; see BHARAT VERMA, *INDIAN DEFENCE REVIEW* (Bhart Verma ed., 2008); see also *Revocation of Indus Waters Treaty Can Be Taken as an Act of War: Sartaj Aziz*, DAWN.COM (<https://www.dawn.com/news/1286437>) (last updated Sept. 27, 2016) [hereinafter Aziz].

²⁸ Aziz, *supra* note 27.

²⁹ See Indus Waters Treaty, India-Pak., art. IX, Sept. 19, 1960, I.U.C.N.

mechanism to keep up with emerging modern issues will be briefly compared with dispute resolution mechanisms in international law and other similar treaties.

This paper is divided into five sections, as summarized below.

Section 1 will explore the dispute resolution mechanism in general. This section is composed of two subsections. Section 1.1 will succinctly explore the juridical dispute resolution mechanism. To illustrate the benefits of the juridical dispute resolution mechanism, certain examples with reference to international water disputes among co-riparian states of international river basins will be set out within this section. For instance, cases of the Permanent Court of International Justice (“PCIJ”), the predecessor of the International Court of Justice (“ICJ”), and the Permanent Court of Arbitration (“PCoA”) will be briefly discussed within this subsection. Section 1.2 will generally examine nonjuridical dispute resolution techniques and procedures. In this subsection, notions of the fact-finding commission, mediation, and negotiation as nonjuridical dispute resolution mechanisms will be set out briefly.

Section 2 will briefly perceive the installed nature and type of dispute resolution mechanisms in international river basins. This section is further divided into three subsections. Section 2.1 will analyze the international water basin of the Euphrates. Section 2.2 will scrutinize the international river basins of the Nile, the Jordan, and other international river basins of considerable size and global effect. Section 3.2 will concisely explore the Indus Basin.

Section 3 will explore the multilayered dispute resolution mechanism under the IWT. This section is comprised of five subsections. Section 3.1 will explore the first available forum for dispute resolution under the IWT. Here, issues are questions of fact that are determined by the Permanent Indus Commission (“PIC”). Section 3.2 will define the second forum of dispute resolution under the IWT. At this stage of dispute resolution, differences between India and Pakistan over water conflicts are to be solved through a neutral expert.³⁰ Section 3.3 will examine the third stage of the dispute resolution mechanism under the IWT. At this stage, India and Pakistan water dispute is to be resolved through diplomatic talks and bilateral negotiations between India and Pakistan.³¹ Section 3.4 will briefly explore the Court of

³⁰ See Indus Water Treaty art. IX(2), *supra* note 29.

³¹ See Indus Water Treaty art. IX(3), *supra* note 29.

Arbitration as a last resort to settle disputes between India and Pakistan under dispute resolution mechanism of the IWT.

Section 4 of this paper will explore the efficacy of the IWT dispute resolution mechanism. Consequently, time span/time consumed at various stages of the resolution of certain water conflicts will be noted in the context of Indian projects over the western waters. This section has five subsections that will analyze the proficiency of the IWT dispute resolution mechanism during water disputes between India and Pakistan. Section 4.1 deals with the Salal project, Section 4.2 with the Tulbul Navigation project, Section 4.3 with the Baglihar project, Section 4.4 with the *Kishanganga* project, and Section 4.5 with the Chutak project.

After this, to recommend the effective use of the dispute resolution mechanism under the IWT, Section 5 will analyze Indian obligations under the IWT and explore the Indian and Pakistani arguments against the ineffectiveness of the dispute resolution mechanism. In order to build such a nexus between the inefficacy of the legal framework under the IWT and Indian obligations under the IWT, certain provisions of the IWT will be set out within this section. Furthermore, brief recommendations to speed up the existing framework to resolve water disputes will be proposed in this section.

1. Dispute Resolution Mechanisms

In contemporary times, water conflicts over water utilization and water apportionment have become more complex owing to emerging water scarcity and prevailing needs, especially owing to water's exceptional use in mass food production, power production, and other similar economic utilities.³² To cater for these evolving aspects of water conflicts, complex dispute resolution mechanisms have been devised.³³ Water conflicts in current times can be described in the following way: there are usually two or more states in conflict over international river basins or transboundary aquifers.³⁴ Typically, the conflict is over water apportionment, water navigation, water management projects, or border separation of international waters.³⁵ In most cases, the

³² WEISS, *supra* note 14, at 122-28.

³³ *See Id.*

³⁴ JOHN, *supra* note 9, at 4. More accurately, there are 263 river basins that cross international boundaries. *See* DOMBROWSKY, *supra* note 10, at 3.

³⁵ *See, e.g.*, European Commission of Danube Between Galatz and Braila, Advisory Opinion, 1927 PCIJ (ser. B) No. 14 (Dec. 8, 1927) [hereinafter Danube], http://www.worldcourts.com/pcij/eng/decisions/1927.12.08_danube.htm; Case relating to the

governing law is a bilaterally or multilaterally agreed treaty, and the prescribed mechanism for dispute resolution within these mechanisms should be followed in these cases.³⁶ In cases where there is no treaty, the international law of dispute resolution is appropriate to act as a legal framework.³⁷ In either case, disputes are typically referred to arbitration courts for mediation or required to be resolved by juridical and non-juridical dispute settlement procedures.³⁸

There are certain legal mechanisms available in international law that can peacefully resolve water conflicts between nations.³⁹ States can always individually resolve their conflicts using diplomatic negotiations to resolve the tensions.⁴⁰ This method is usually the first available recourse to placate international tensions.⁴¹ This forum includes approaches such as diplomatic negotiations, mediation, fact-finding commissions, and other similar intermediary techniques. This preliminary stage is nonbinding in nature.⁴² After exhausting this forum, if the dispute still remains unresolved, parties to a conflict have the option to refer the dispute to the available legal framework of juridical settlement. This method is binding in nature. This method includes arbitration and judicial dispute resolution by international courts and tribunals.⁴³ Several agreements choose to recourse to one or both kinds of dispute resolution mechanism. Parties to treaties agree to avail themselves of third party mediation or juridical settlement because water conflicts involve

Territorial Jurisdiction of the International Commission of the River Oder (U.K. v. Pol.), 1929 PCIJ (ser. A) No. 23 (Sept. 10, 1929) [hereinafter River Order], http://www.worldcourts.com/pcij/eng/decisions/1929.09.10_river_oder.htm; Diversion of Water from Meuse (Neth. V. Belg.), 1937 PCIJ (ser. A/B) No. 70 (June 28), http://www.worldcourts.com/pcij/eng/decisions/1937.06.28_meuse.htm; Frontier Dispute (Benin v. Niger), 2005 I.C.J. 90 (July 12), http://www.worldcourts.com/icj/eng/decisions/2005.07.12_frontier_dispute.htm; Certain Activities Carried Out by Nicaragua in the Border Area. Costa Rica v. Nicar., 2011 I.C.J.

³⁶ Danube, *supra* note 35.

³⁷ See WEISS, *supra* note 14, at 126–28.

³⁸ See generally WATER DISPUTES, *supra* note 13.

³⁹ For instance, dispute resolution through the PCA and the ICJ.

⁴⁰ See Indus Water Treaty art. IX, *supra* note 29; see also United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses art. 33, May 21, 1997, 36 I.L.M. 700 [hereinafter Convention]; WEISS, *supra* note 14, at 128.

⁴¹ See Indus Water Treaty art. IX, *supra* note 29; see also Convention, *supra* note 40; WEISS, *supra* note 14, at 128.

⁴² WEISS, *supra* note 14, at 128.

⁴³ See *Id.* at 128–56.

complex aspects of water utilization.⁴⁴ These water conflicts vary from polluting water supplies, diverting watercourses, and building water management infrastructure to other contingent aspects of protecting water interests.⁴⁵

Therefore, this section is divided into two subsections. Section 1.1 will succinctly explore the juridical dispute resolution mechanism. To illustrate the benefits of the juridical dispute resolution mechanism, certain examples with reference to international water disputes among co-riparian states of international river basins will be set out within this subsection. For instance, cases of the Permanent Court of International Justice (“P.C.I.J”), the predecessor of the I.C.J, the I.C.J., and the PCA will be briefly discussed within this subsection.

Section 1.2 will examine generally the non-juridical dispute resolution techniques and procedures. In this subsection, notions of fact-finding commissions, mediation, and negotiation as non-juridical dispute resolution mechanisms will be set out briefly.

1.1. Juridical Dispute Resolution Mechanisms

International law provides several venues to accommodate dispute resolution between states. Various international conventions and treaty laws have anticipated a need for a juridical and diplomatic legal mechanism to resolve international disputes.⁴⁶ In time, states have brought their issues to these forums to resolve their issues judicially.⁴⁷

1.1.1. Permanent Court of International Justice (P.C.I.J.) Cases

Up until the establishment of the I.C.J., the P.C.I.J. dealt with international disputes between states.⁴⁸ Both courts have adjudicated over

⁴⁴ Indus Water Treaty art. IX, *supra* note 29. *See also* Convention, *supra* note 40; WEISS, *supra* note 14, at 128.

⁴⁵ *See* WEISS, *supra* note 14, at 128–56.

⁴⁶ *See Id.* at 128–30.

⁴⁷ *See* Diversion of Water from Meuse (Neth. v. Belg.), 1937 P.C.I.J. (ser. A/B) No. 70 (June 28) [hereinafter Meuse]; *see also* Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.), Judgment, 2009 I.C.J. 213 (July 13) [hereinafter Dispute]; Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 14 (Apr. 20) [hereinafter Pulp Mills]; Rhine Chlorides Arbitration (Neth./Fr.), No. 2000-02, Award, Perm. Ct. Arb. (2004).

⁴⁸ ALEXANDER MIKABERIDZE, ATROCITIES, MASSACRES, AND WAR CRIMES 291 (Alexander Mikaberidze ed., vol. 1, 2013).

cases of water apportionment, water navigation, water demarcation, and interpretation of treaty laws among co-riparian states.⁴⁹

For instance, in 1927 the P.C.I.J. gave its advisory opinion to demarcate jurisdiction of the European Commission of the Danube, between Galatz and Braila about the navigation of watercourses.⁵⁰

In a very similar case, in 1929 the P.C.I.J. concluded its International Commission of the River Oder between Germany, Denmark, France, Great Britain, Sweden and Czechoslovakia and Poland, regarding the navigability of the river waters.⁵¹ This case was brought to interpret the scope of Articles 331, 241, and 343 of the Treaty of Versailles.⁵²

Similarly, in the case between Britain and Belgium, the P.C.I.J. decided the legitimacy of water navigation in 1934, this case is also known as the *Oscar Chin* case.⁵³ Further, the PCIJ adjudicated over the navigability of the River Meuse, between the Netherlands and Belgium, in 1937.⁵⁴ This case also required the PCIJ to assess the violation of a treaty between the Netherlands and Belgium that was agreed in 1863.⁵⁵ Both states contended that other party violated treaty law by diverting waterfalls and constructing water management infrastructure.⁵⁶ The court concluded that both parties could build as many canals as they wanted, so long as the inflow and outflow from the river stayed unchanged and their actions remained aligned with the principles laid down in the treaty.⁵⁷

All the aforementioned cases required juridical resolution of the navigability of international watercourses. Three cases required PCIJ to interpret mutually agreed treaties among co-riparian states to resolve water disputes.⁵⁸

⁴⁹ See *Di Meuse*, *supra* note 47; *Dispute*, *supra* note 47; *Pulp Mills*, *supra* note 47.

⁵⁰ *Danube*, *supra* note 35.

⁵¹ *River Order*, *supra* note 35.

⁵² *Id.*

⁵³ *Oscar Chinn (U.K. v. Belg.)*, Judgement, 1934 P.C.I.J. (ser. A/B) No. 63 (Dec. 12).

⁵⁴ *Meuse*, *supra* note 47, at 5.

⁵⁵ *Id.*

⁵⁶ *Id.* at 46.

⁵⁷ *Id.* at 18.

⁵⁸ See LAURENCE BOISSON DE CHAZOURNES, *FRESH WATER IN INTERNATIONAL LAW* 204–09 (Oxford Univ. Press 2015) (2013); WEISS, *supra* note 14, at 128–56.

1.1.2. International Court of Justice (ICJ)

Later, the ICJ took charge of providing a mechanism to settle international conflicts, and it also adjudicated in water conflicts between states.⁵⁹ In 1997, the ICJ ruled on the water conflict against the project of Gabčíkovo Nagymaros by interpreting the 1977 treaty between Hungary and Czechoslovakia.⁶⁰ Both states agreed to construct a joint project to manage waters and produce hydropower.⁶¹ Owing to internal pressure, Hungary declined to continue any works, and Czechoslovakia separately commenced its works to divert Danube river water flows under the project Variant C, against the interests of Hungary, and started to build two water management and hydropower production projects on the same waters.⁶² Subsequently, in 1977 Hungary sent notification of the termination of the 1977 treaty to Czechoslovakia.⁶³ To resolve the water conflict, both states agreed to a new agreement in 1993, under which both states agreed to submit their issue to the authority of the ICJ to resolve their conflict.⁶⁴ In 1997, the ICJ ruled that, while Hungary had notified of the termination of the 1977 treaty, it remained in force, and Czechoslovakia was not entitled to operate the Variant C project.⁶⁵

Similarly, in the *Kasikili/Sedudu Island* case in 1999 the ICJ adjudicated on the navigability of water flows.⁶⁶ In this case, the ICJ was required to interpret the boundaries prescribed within the bilaterally agreed treaty between Botswana and Namibia.⁶⁷ Likewise, in 2002 the ICJ ruled over the boundary demarcation in a bilateral agreement, in the case of *Cameroon v. Nigeria*.⁶⁸ In *Benin v. Niger*, the ICJ was asked in 1999 to demarcate

⁵⁹ CHAZOURNES, *supra* note 58.

⁶⁰ Gabčíkovo-Nagymaros Project (Hung. v. Slov.), Judgment, 1997 I.C.J. Rep. 7, 140, ¶ 67 (Sept. 25) [hereinafter Gabčíkovo-Nagymaros].

⁶¹ Gabčíkovo-Nagymaros, *supra* note 60, at 23.

⁶² *Id.* at 25.

⁶³ *Id.* at 27.

⁶⁴ *Id.*

⁶⁵ *Id.* at 239.

⁶⁶ Kasikili/Sedudu Island (Bots. V. Namib.), Judgment, 1999 I.C.J. Rep. 1045, 1184, ¶ 91 (Dec. 13) [hereinafter Kasikili].

⁶⁷ Kasikili, *supra* note 67, at 1045.

⁶⁸ Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nig.), Order, 2002 I.C.J. Rep. 303, 303, ¶ 1 (Oct. 10).

boundaries across the river waters of the Niger and Mekrou Rivers and the control of twenty-five islands between Benin and Niger.⁶⁹

Later, in 2011, ICJ settled the water dispute between Costa Rica and Nicaragua over the water pollution derangement of the San Juan river waters.⁷⁰ The Court ruled that both states must refrain from aggravating the conflict, and both states could only send their civilian personnel to protect the environment.⁷¹ Both nations had already experienced another case regarding the same river waters in the same court in 2005.⁷² In this case, Costa Rica claimed that Nicaragua had violated Article 4 of their 1858 treaty with respect to its navigation rights.⁷³ The Court in this case ruled that it was Nicaragua's obligation to notify Costa Rica and respect its customary right.⁷⁴

In 2010, the ICJ made an international ruling on the case of *Argentina v. Uruguay*, which is most commonly known as the *Pulp Mills* case.⁷⁵ In this case, Argentina was concerned with water pollution by Uruguay in the waters of the Uruguay River, and it claimed that Uruguay had violated their 1975 bilaterally agreement.⁷⁶ The court in that case maintained that Uruguay had indeed violated its procedural obligation to notify Argentina of its works over river waters, and established a general rule of international law that it is mandatory for states to prepare environmental impact assessment (EIA) reports for projects before commencing work.⁷⁷

1.1.3. Arbitration

Arbitration courts are also used to resolve water disputes between states, particularly because rulings through this forum are binding in nature.⁷⁸ The nature of water conflicts referred to a court of arbitration or tribunal varies

⁶⁹ Frontier Dispute, *supra* note 35, at 103, ¶ 17.

⁷⁰ Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Order, 2011 I.C.J. Rep. 6, 19, ¶ 55 (Mar. 8) [hereinafter *Costa Rica v. Nicar.* 2011].

⁷¹ *Id.* at 21, ¶ 62.

⁷² Dispute regarding Navigational and Related Rights (Costa Rica v. Nicar.), Order, 2005 I.C.J. (Nov. 29) [hereinafter *Costa Rica v. Nicar.* 2005].

⁷³ *Id.*

⁷⁴ I.C.J., *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua): Overview of the Case*, ICJ (Oct. 1, 2017), <http://www.icj-cij.org/en/case/133>.

⁷⁵ Pulp Mills, *supra* note 47.

⁷⁶ *Id.* at 25.

⁷⁷ *Id.* at 82.

⁷⁸ See CHAZOURNES, *supra* note 58, at 209–12.

from disputes over water navigation, diversion of watercourses, hydropower project legality, water management structures, and demarcation of boundaries to other similar water utilization disputes.⁷⁹ Among all referred cases in the PCA, most concern the demarcation of boundaries in international rivers.⁸⁰ Other disputes are chiefly about lower riparian states' concerns regarding upper riparian states' diversion of water flows.⁸¹ Only one or two arbitrations addressed the legality of hydropower production structures or assessments of environmental protection concerning the environment, floods, and soil corrosion.⁸²

Set out below are details about these water dispute cases in arbitration. One case of water dispute was referred to a British Commissioner in 1872; it was a case between Afghanistan and Persia over the water flows of the Helmand River Delta.⁸³ The same states were in dispute over the same waters again in 1905.⁸⁴ Another arbitration over water conflicts was disputed in 1888 between Costa Rica and Nicaragua over the waters of the San Juan River.⁸⁵ Then, in 1893, Russia and Britain sought arbitration over the Kushk river waters.⁸⁶ Other cases include *Venezuela v. Germany*, over the Faber River in 1903;⁸⁷ the *Gut Dam* case between Canada and the United States;⁸⁸ the 1925 *Tacna Arica* case between Chile and Peru;⁸⁹ the 1945 *Zarumilla River* case between Ecuador and Peru;⁹⁰ the 1957 *Lake Lanoux* case between Spain and France;⁹¹ the 1977 *Beagle Channel* case between Argentina and Chile;⁹² the

⁷⁹ See CHAZOURNES, *supra* note 58.

⁸⁰ See *Id.*

⁸¹ WEISS, *supra* note 14, at 133–34.

⁸² See *Id.* at 134–35.

⁸³ Helmand River Delta (Afg. v. Persia), General Goldsmid Award, 1872 P.I.C.J (Aug. 19).

⁸⁴ *Id.*

⁸⁵ San Juan River (Costa Rica v. Nicar.), President Grover Cleveland Award, 1888 P.I.C.J (Mar. 22).

⁸⁶ Kushk River (Gr. Brit.v. Russ.), Anglo-Russian Comm. Award, 1893 P.I.C.J (Sept. 3).

⁸⁷ Faber (Ger. v. Venez.), Henry M. Duffield Award, 1903 P.I.C.J (Feb. 13).

⁸⁸ Gut Dam Arbitration (Can. v. U.S.), Lake Ontario Claims Tribunal (1968).

⁸⁹ Tacna-Arica (Chile v. Peru), President Calvin Coolidge Award, 1925 P.I.C.J (Mar. 4).

⁹⁰ Zarumilla River (Peru v. Ecuador), Chancellery of Braz. Award, 1945 P.I.C.J (July 14).

⁹¹ Lake Lanoux (Spain v. Fr.), 24 I.L.R 101 (1957).

⁹² See Rep. Int'l Arbiral Awards, Dispute between Argentina and Chile concerning the Beagle Channel, U.N. Doc. (1977), http://legal.un.org/riaa/cases/vol_XXI/53-264.pdf.

2004 case between the Netherlands and France;⁹³ and the *Kishanganga project* case between of India and Pakistan,⁹⁴ over Indus river waters.⁹⁵

1.2. Nonjuridical Dispute Resolution Mechanisms

Nonjuridical dispute resolution methods are usually the first available recourses to placate international tensions. This forum includes approaches such as diplomatic negotiations, mediation, fact-finding commissions, and other similar intermediary techniques; this preliminary stage is nonbinding in nature.⁹⁶ This subsection will generally examine nonjuridical dispute resolution techniques and procedures. Within this scope, notions such as fact-finding commissions, mediation, and negotiation as nonjuridical dispute resolution mechanisms will be set out briefly.

1.2.1. Fact-Finding Commissions

Fact-finding commissions are formed by mutual agreement through conventions and treaties to establish disputed facts and pacify disagreements over facts or questions, which if established would violate treaty or laws.⁹⁷ The commissions comprise neutral members, or commissioners, from each party state, and in some cases a chairman.⁹⁸ These commissions are tasked to resolve water disputes at a preliminary stage by agreement.⁹⁹ Thus, these commissions act as dispute resolution mechanisms to resolve water conflicts between nations.¹⁰⁰ International organizations and treaty agreements between nations routinely form these commissions to resolve their disputes.¹⁰¹

⁹³ Rhine Chlorides Arbitration (Neth. v. Fr.), Case No. 2000-02 (Perm. Ct. Arb. 2004).

⁹⁴ Indus Waters Kishenganga Arbitration (Pak. v. India), Case No. 2011-01 (Perm. Ct. Arb. 2013) [hereinafter *Kishenganga*].

⁹⁵ CHAZOURNES, *supra* note 58, at 134–35.

⁹⁶ *Id.* at 209-12; *see also* WEISS, *supra* note 14, at 128.

⁹⁷ WEISS, *supra* note 14, at 135–36.

⁹⁸ *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law*, UNITED NATIONS HUM. RTS.: OFF. OF THE HIGH COMMISSIONER 17-21 (2015), http://www.ohchr.org/Documents/Publications/CoI_Guidance_and_Practice.pdf [hereinafter *Commissions on Inquiry*].

⁹⁹ WEISS, *supra* note 14, at 135–136.

¹⁰⁰ *Article 33*, UN WATERCOURSES CONVENTION: ONLINE USERS GUIDE, <http://www.unwatercoursesconvention.org/the-convention/part-vi-miscellaneous-provisions/article-33-settlement-of-disputes/33-1-7-fact-finding-and-inquiry/> (last visited Oct. 23, 2017).

¹⁰¹ WEISS, *supra* note 14, at 136-37.

For instance, the Bi-national International Joint Commission was formed to reconcile disputes between the United States and Canada through the Boundary Waters Treaty, 1909.¹⁰² In total, 51 disputes were referred to this commission regarding water disputes between the United States and Canada.¹⁰³ Similarly, the PIC was formed between India and Pakistan through the Indus Waters Treaty, 1960.¹⁰⁴ This commission comprises two commissioners, and India and Pakistan have one commissioner each on this commission.¹⁰⁵ Likewise, the United Nations Watercourses Convention (“UNWC”) also establishes a fact-finding commission to resolve disputes among parties.¹⁰⁶ This commission comprises one commissioner from each party to the UNWC, with one neutral chairman.¹⁰⁷

1.2.2. Mediation

Mediation is also used as a forum to resolve disputes between nations.¹⁰⁸ In this form of mechanism, a neutral person assumes responsibility for mediating or conciliating disputes between nations, upon the mutual agreement of the parties.¹⁰⁹ The scope of mediation is not restricted to establishing facts, but it can offer solutions regarding disputes where these proposed solutions are not necessarily binding in nature.¹¹⁰ The appointment of a neutral expert under the IWT is an example of a mediator to resolve water disputes between India and Pakistan. Under the IWT, the appointment of a neutral expert is a forum of dispute resolution.¹¹¹

1.2.3. Negotiations

The most general and most frequently used dispute resolution mechanism is through negotiations between conflicting states.¹¹² Negotiations, bilateral

¹⁰² See generally Boundary Waters Treaty art. VIII, U.S.-Gr. Brit., Jan. 11, 1909, 36 Stat. 2448.

¹⁰³ WEISS, *supra* note 14, at 136.

¹⁰⁴ See generally Indus Water Treaty, *supra* note 29.

¹⁰⁵ See Indus Water Treaty art. VIII & IX, *supra* note 29.

¹⁰⁶ Convention, *supra* note 40.

¹⁰⁷ See generally Convention, *supra* note 40.

¹⁰⁸ WEISS, *supra* note 14, at 139-42.

¹⁰⁹ *Id.*

¹¹⁰ See *Id.*

¹¹¹ Indus Water Treaty art. IX, annexure F, *supra* note 29.

¹¹² See WEISS, *supra* note 14, at 142.

talks, and diplomatic negotiations are employed by all countries to resolve their conflicts in a peaceful and cost-effective manner through mutual agreement.¹¹³

Various conventions and treaties have made it obligatory for conflicting states to first exhaust the dispute resolution mechanism of negotiations before resorting to other forums of the dispute resolution framework. For instance, Article 33 of the UNWC makes it obligatory for parties to resort to negotiations if one party wishes to solve the conflict through bilateral talks, only if conflicting states have not already agreed to resolve their issue by other means of the dispute resolution mechanism.¹¹⁴ Likewise, Article IX of the IWT makes it obligatory to exhaust the forum of negotiations as a dispute resolution mechanism to resolve a conflict through mutual agreement before resorting to the Court of Arbitration or a neutral expert.¹¹⁵

2. Dispute Resolution Mechanism in International River Basins

There are nearly 100 water conflicts over water apportionment, water utilization, water navigation, and water management of international river basins shared by two or more co-riparian states.¹¹⁶ Generally, lower riparian states are keen to safeguard their water rights from water poaching by upper riparian states.¹¹⁷ However, for the scope of this section, only the governing laws and agreements of certain international river basins will be explored to determine existing dispute resolution mechanisms in certain international rivers basins. Stephen McCaffrey has noted that international water basins and their water disputes can be categorized into three types of sceneries.¹¹⁸ These settings include: (a) water disputes, where there is no mutual agreement between nations to share international watercourses; (b) circumstances where there is a mutually agreed treaty; and (c) situations where there is an agreed treaty among co-riparian states, but it is not functional in the current setting.¹¹⁹

¹¹³ CHAZOURNES, *supra* note 58, at 216-17.

¹¹⁴ Convention, *supra* note 40, at 713-14.

¹¹⁵ Indus Waters Treaty, *supra* note 29, at 150-52.

¹¹⁶ See WEISS, *supra* note 14, at 121-22.

¹¹⁷ ADEEL & WIRSING, *supra* note 22, at 198.

¹¹⁸ Stephen C. McCaffrey, *Water Disputes Defined: Characteristics and Trends for Resolving Them*, in RESOLUTION OF INTERNATIONAL WATER DISPUTES 49, 53 (The Int'l Bureau of the Permanent Court of Arbitration ed., 2003).

¹¹⁹ McCaffrey, *supra* note 118, at 53.

By analyzing current political relations among states, McCaffrey has categorized several river basins into these classes.¹²⁰ Through this analysis of classification, the governing dispute resolution mechanism is determined.¹²¹ This section of the paper comprises three subsections. Section 2.1 will analyze the international water basin of the Euphrates. Section 2.2 will scrutinize the international river basins of the Nile, the Jordan, and other international basins of considerable size and global effect. Section 2.3 will explore the Indus River Basin.

2.1. Euphrates River Basin

Stephen McCaffrey's categories can be used to see the current status of international river basins. For instance, in the river basin of the Euphrates, it can be seen that there are several treaties that describe the legal framework of this basin, but there is no multilateral, holistic treaty that governs the principles of water apportionment in the basin among all co-riparian states.¹²² Furthermore, he adds, owing to the Turkish hegemonic race to capture water supplies and given the uncertain security situation in lower riparian states, such as Syria and Iraq, water apportionment cooperation is unlikely.¹²³

2.2. Jordan, Nile, and Other River Basins

Similarly, McCaffrey has noted the status of other river basins with regard to their governing legal framework.¹²⁴ The international watercourse basin of the Nile and Jordan Rivers, sharing watercourses with Lebanon, Israel, Jordan, Palestine, Egypt, Sudan, and Ethiopia, are seen as international river basins with no holistic legal framework for water apportionment.¹²⁵ Several bilaterally agreed treaties have narrowed down the scope of water sharing in these regions and basins.¹²⁶

Relatedly, he notes that in the international river basins of the Amudarya, the Danube, the Rhine, the Rio Grande, and the Syrdarya, the existing legal framework is no longer functional. He adds that the international river basins

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *See Id.* at 54–55.

¹²³ *See Id.*

¹²⁴ *See Id.* at 52.

¹²⁵ *See Id.* at 55–60.

¹²⁶ *See Id.*

of the Flathead, the Ganges, the Mekong, the Skagit, and the Indus Rivers have functional legal frameworks.¹²⁷

2.3. Indus River Basin

The Indus River Basin is shared primarily by India and Pakistan.¹²⁸ India is an upper riparian state to Pakistan.¹²⁹ Both countries have agreed to the IWT,¹³⁰ which is still functional after more than half a century.¹³¹ The IWT is considered a landmark success story in the field of water-sharing agreements across the globe, as both hostile nations agreed to equitably resolve their water disputes, and the treaty has survived several wars between the states.¹³²

Since India and Pakistan's independence in 1947, both states have fought over the occupied territories of Kashmir to gain control of water supplies, which are strategically valuable.¹³³ Even in recent times, both countries have faced constant threats from each side over several separate issues.¹³⁴ Many water conflicts are disputes relating to Indian infrastructure on the western tributaries.¹³⁵ The western rivers were allocated, under the IWT, for the unrestricted use of Pakistan, while the eastern rivers were allocated for the unrestricted use of India.¹³⁶ Pakistan is of the view that India is robbing Pakistani supplies and building its water-management capacity only as a political maneuver to gain political supremacy by practicing hydro-hegemony.¹³⁷ On the other hand, India maintains that it is only constructing infrastructure within the scope of the IWT, and the decreased water flows in

¹²⁷ See *Id.* at 74–84.

¹²⁸ Afghanistan and China also share the Indus Basin with Pakistan and India, however they share a relatively smaller geographical area. See ADEEL & WIRSING, *supra* note 22, at 6.

¹²⁹ See ADEEL & WIRSING, *supra* note 22, at 198.

¹³⁰ Indus Water Treaty, *supra* note 29

¹³¹ See McCaffrey, *supra* note 115, at 78–80.

¹³² BRAHMA CHELLANEY, WATER: ASIA'S NEW BATTLEGROUND 278 (Geo. Univ. Press 2013).

¹³³ KALIA, *supra* note 20, at 8.

¹³⁴ See generally SHAH, *supra* note 21.

¹³⁵ See generally ADEEL & WIRSING, *supra* note 22.

¹³⁶ See Indus Waters Treaty, *supra* note 29, at 130–36.

¹³⁷ See generally Iqbal, *supra* note 23.

Pakistan are due to climate change.¹³⁸ Therefore, water disputes are routinely referred to the legal mechanism prescribed in the IWT.¹³⁹

For these reasons, both states are still facing certain challenges. Within the parameters prescribed in the IWT, India believes that Pakistan has no basis to object to its construction works, obtain stay orders, and delay the construction works.¹⁴⁰ And, through these delays in construction works the actual and opportunity costs of projects are borne by the Indian state, which is injuring Indian interests and economy.¹⁴¹ On the other side, Pakistan maintains that the dispute-resolution mechanism is very slow, and by the time the case reaches the highest forum either the project has been completed, or it has incurred so much cost that it cannot be held back.¹⁴² And, even if the court sides with Pakistan, all it does is make slight changes to a few designs of Indian projects.¹⁴³

The Indian state is exasperated with Pakistan's frequent objections and feels that the IWT is an impediment to its interests.¹⁴⁴ Therefore, India has threatened that it will scrap the IWT entirely.¹⁴⁵ In response, Pakistan has stated that a revocation of a bilaterally-agreed treaty would be considered an act of war.¹⁴⁶ To communicate state interests with regard to water disputes, the PIC has been tasked with communicating with each state.¹⁴⁷ This extraordinary intensity in political rigidity between Pakistan and India has an enshrined legal framework to alleviate water disputes.¹⁴⁸ The IWT is an anvil to mold sustainability in the region, where both states know that other water is intrinsic, and therefore the other party will not let go of its legal and innate rights.¹⁴⁹

¹³⁸ PARENTI, *supra* note 24, at 129.

¹³⁹ See Kishenganga, *supra* note 94.

¹⁴⁰ See generally Rizwan Ullah Kokab & Adnan Nawaz, *Indus Water Treaty: Need for Review*, 2 ASIAN J. OF SOC. SCI. & HUMAN (2013).

¹⁴¹ Kokab & Nawaz, *supra* note 140, at 213–14 (2013), see also MUHAMMAD ADEEL, *INDUS WATER TREATY AND THE CASE FOR HYDRO-HEGEMONY* 4 (2016); Iqbal, *supra* note 23.

¹⁴² Kokab & Nawaz, *supra* note 140, at 212–13.

¹⁴³ See ADEEL & WIRSING, *supra* note 22, at 4; see also Kokab & Nawaz, *supra* note 140, at 213–14; Kishenganga, *supra* note 94.

¹⁴⁴ Chandio, *supra* note 27.

¹⁴⁵ *Id.* See also VERMA, *supra* note 27; Aziz, *supra* note 27.

¹⁴⁶ Aziz, *supra* note 27.

¹⁴⁷ *Id.* See also Indus Waters Treaty, *supra* note 29.

¹⁴⁸ Indus Waters Treaty, *supra* note 29.

¹⁴⁹ See McCaffrey, *supra* note 115, at 78–80.

This paper seeks to explore the legal framework of dispute resolution under the IWT, and further investigates the weaknesses and strengths of the prescribed mechanism. To maintain impartiality, the concerns of both nations with regard to flaws in the dispute resolution mechanism of the IWT will be explored and weighed in the equation of exploring the suitability of the IWT legal framework. Furthermore, to evaluate equitableness and to assess contemporary apparatuses, the IWT dispute resolution mechanism's ability to keep up with emerging modern issues will be briefly compared with international law and other similar treaties.

3. The Dispute Resolution Mechanism of the IWT

This section will explore the multilayered dispute resolution mechanism under the IWT. This section comprises five subsections. Section 3.1 will explore the first available forum for dispute resolution under the IWT. Here, issues are questions of fact that are determined by the PIC. Section 3.2 will set out the second forum of dispute resolution under the IWT. At this stage of dispute resolution, differences between India and Pakistan over water conflicts are to be solved through a neutral expert. Section 3.3 will examine the third stage of the dispute resolution mechanism under the IWT. At this stage, India and Pakistan's water dispute is to be resolved through diplomatic talks and bilateral negotiations between India and Pakistan. Section 3.4 will briefly explore the Court of Arbitration as a last resort to settle a dispute between India and Pakistan under the dispute resolution mechanism of the IWT. Finally, Section 3.5 will define the dispute resolution mechanism comprehensively, to conclude this section.

Holistically, the dispute resolution mechanism of the IWT is enshrined under Article IX of the IWT, which prescribes a multilayered dispute resolution mechanism to resolve water conflicts between India and Pakistan.¹⁵⁰

3.1. Stage One: The Permanent Indus Commission (PIC)

Article IX(1) of the IWT reads as follows: "Any question which arises between the Parties concerning the interpretation or application of this Treaty or the existence of any fact which, if established, might constitute a breach of this Treaty shall first be examined by the Commission, which will endeavor

¹⁵⁰ Indus Waters Treaty, *supra* note 29, art. IX, at 150–52.

to resolve the question by agreement.”¹⁵¹ At stage one, if any question is raised by either party regarding the interpretation of the IWT or any fact that, if established, may violate the IWT, then this question will be dealt with by the PIC.¹⁵² At this stage, the PIC will try to resolve the question by agreement.¹⁵³

The PIC is formed by and derives its powers and obligations from Article VIII of the IWT.¹⁵⁴ Under this provision, Pakistan and India each nominate a highly qualified engineer in the area of hydrology and water utilization as a commissioner.¹⁵⁵ Both commissioners are representatives of their respective governments and are responsible for meeting obligations under Article VIII of the IWT.¹⁵⁶ For example, all communication regarding the IWT should be managed through the commissioner.¹⁵⁷ These commissioners are responsible for exchanging relevant data, notices, and other duties assigned by their states.¹⁵⁸ Together, both commissioners form the PIC.¹⁵⁹ This commission is responsible for settling any raised question of interpretation or fact that, if established, might violate a provision of the IWT.¹⁶⁰ Furthermore, either commissioner can request the other to inspect the relevant rivers and its projects.¹⁶¹ They are obliged under the IWT to conduct a meeting together at least once a year, and are given certain immunities to be able to work effectively.¹⁶² Furthermore, each commissioner is obliged to submit their report to their respective government annually, and also can submit timely reports with regard to their own assessment.¹⁶³ In addition, the commissioners themselves determine all of their procedures.¹⁶⁴

¹⁵¹ Indus Waters Treaty art. IX(1), *supra* note 29, at 150.

¹⁵² *Id.*

¹⁵³ Indus Waters Treaty art. VIII, *supra* note 29, at 146.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Indus Waters Treaty art. VIII(1)(b)(3), *supra* note 29, at 146.

¹⁶⁰ Indus Waters Treaty art. VIII, *supra* note 29, at 148.

¹⁶¹ Indus Waters Treaty art. VIII(1)(b)(4), *supra* note 29, at 148.

¹⁶² Indus Waters Treaty art. VIII(1)(b)(5), *supra* note 29, at 148.

¹⁶³ Indus Waters Treaty art. VIII(1)(b)(8), *supra* note 29, at 150.

¹⁶⁴ Indus Waters Treaty art. VIII(1)(b)(10), *supra* note 29, at 150.

If the question is not resolved by the first available forum of the PIC, then the question will be solved through the higher forum of stage two.¹⁶⁵

3.2. Stage Two: Neutral Expert

For the second stage, Article IX(2) of the IWT reads as follows:

If the Commission does not reach agreement on any of the questions mentioned in Paragraph (1), then a difference will be deemed to have arisen, which shall be dealt with as follows: (a) Any difference which, in the opinion of either Commissioner, falls within the provisions of Part I of Annexure F shall, at the request of either Commissioner, be dealt with by a Neutral Expert in accordance with the provisions of Part 2 of Annexure F.¹⁶⁶

Under this provision, if the PIC does not resolve the question of fact that may have constituted a breach of the IWT, and the PIC has failed to reach an agreement, then a “difference” has arisen between India and Pakistan. At this stage, the difference is to be solved through a neutral expert.¹⁶⁷

When a difference has arisen, upon the notification of any commissioner from the PIC a highly qualified engineer is to be appointed as a neutral expert within a month, by the mutual agreement of both governments of India and Pakistan.¹⁶⁸ If the governments fail to agree on the appointment of a neutral expert, then it is the responsibility of the World Bank to appoint a neutral expert.¹⁶⁹ Furthermore, the term of appointment of the neutral expert is also fixed.¹⁷⁰ During the transition period, the World Bank will appoint the neutral expert, and following this period, both governments will appoint a new neutral expert together.¹⁷¹ When a difference has arisen, after two weeks a commissioner will notify the relevant authority to appoint a neutral expert, and send a copy to the other commissioner.¹⁷² The neutral expert can only determine any procedure to solve difference after hearing both sides,

¹⁶⁵ Indus Waters Treaty art. IX(2), *supra* note 29, at 150.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Indus Waters Treaty art. IX(5), *supra* note 29, at 152.

¹⁶⁹ Indus Waters Treaty, *supra* note 29, at 150, 202.

¹⁷⁰ Indus Waters Treaty Annexure F, *supra* note 29, at 206.

¹⁷¹ Indus Waters Treaty Annexure F(4), *supra* note 29, at 206.

¹⁷² Indus Waters Treaty Annexure F(5), *supra* note 29, at 206.

adequately.¹⁷³ Furthermore, the issue of financial compensation for the neutral is enumerated to avoid prejudice.¹⁷⁴

The Neutral Expert is employed to determine whether part of the difference, no part of the difference, or all-inclusive differences fall within the category of the dispute.¹⁷⁵ The decision of a Neutral Expert is binding in nature; it is even binding on the Court of Arbitration.¹⁷⁶ However, if any conflicting issue is out of the scope of competency of the Neutral Expert, it will be dealt with at the later stages of dispute resolution mechanism under the IWT.¹⁷⁷

In other words, if the neutral expert fails to resolve the difference, then the conflict will reach the third available forum to resolve the issue.¹⁷⁸

3.3. Stage Three: Negotiations

For the third stage, Article IX(2)(b) of the IWT reads as follows:

If the difference does not come within the provisions of Paragraph (2) (a), or if a Neutral Expert, in accordance with the provisions of Paragraph 7 of Annexure F, has informed the Commission that, in his opinion, the difference, or a part thereof, should be treated as a dispute, then a dispute will be deemed to have arisen which shall be settled in accordance with the provisions of Paragraphs (3), (4)[,] and (5)[] [p]rovided that, at the discretion of the Commission, any difference may either be dealt with by a Neutral Expert in accordance with the provisions of Part 2 of Annexure F or be deemed to be a dispute to be settled in accordance with the provisions of Paragraphs (3), (4) and (5), or may be settled in any other way agreed upon by the Commission.¹⁷⁹

At this third stage, the difference has not yet resolved and the Neutral Expert communicates to the PIC that a “dispute” has arisen between India and Pakistan.¹⁸⁰ However, it is pertinent to note that, at this stage, it is the PIC’s discretion to choose whether the conflict is resolved through a Neutral Expert,

¹⁷³ Indus Waters Treaty Annexure F, *supra* note 29, at 206.

¹⁷⁴ *Id.* at 208–10.

¹⁷⁵ *Id.* at 202.

¹⁷⁶ *Id.* at 208.

¹⁷⁷ *Id.*

¹⁷⁸ *See generally* Indus Water Treaty art. IX, *supra* note 29.

¹⁷⁹ Indus Water Treaty art. IX(2)(b), *supra* note 29, at 150.

¹⁸⁰ Indus Water Treaty art. IX, *supra* note 29.

by bilateral diplomatic talks, or through arbitration.¹⁸¹ Article IX(3) and (4) of the IWT reads as follows:

As soon as a dispute to be settled in accordance with this and the succeeding paragraphs of this Article has arisen, the Commission shall, at the request of either Commissioner, report the fact to the two Governments, as early as practicable, stating in its report the points on which the Commission is in agreement and the issues in dispute, the views of each Commissioner on these issues and his reasons therefor.

[] Either Government may, following receipt of the report referred to in Paragraph (3), or if it comes to the conclusion that this report is being unduly delayed in the Commission, invite the other Government to resolve the dispute by agreement. In doing so it shall state the names of its negotiators and their readiness to meet with the negotiators to be appointed by the other Government at a time and place to be indicated by the other Government. To assist in these negotiations, the two Governments may agree to enlist the services of one or more mediators acceptable to them.¹⁸²

Thus, as soon as the PIC has received notification of a dispute, it is then the duty of the commissioners of the PIC to communicate to both governments about the agreements of the issue, if any, and to report the dispute that has arisen, coupled with the reasoning of each commissioner.¹⁸³ At this stage, the forum to resolve the dispute is through governmental “diplomatic negotiations.”¹⁸⁴ To obtain resolution through negotiations, each government can appoint negotiators and fix a date and time to proceed with bilateral talks.¹⁸⁵ To provide further support for these bilateral talks, both states can use mediation to reconcile water disputes, and can appoint mediators through mutual agreement.¹⁸⁶

3.4. Stage Four: Arbitration

If the dispute is not resolved through mediation or negotiations by diplomatic talks, then the dispute can be referred for arbitration.¹⁸⁷ Article IX(5) and(6) of the IWT reads as follows:

¹⁸¹ See generally, *Id.*

¹⁸² Indus Water Treaty art. IX(3)-(4), *supra* note 29, at 150-52.

¹⁸³ Indus Water Treaty arts. VIII & IX, *supra* note 29.

¹⁸⁴ Indus Water Treaty art. IX, *supra* note 29.

¹⁸⁵ Indus Waters Treaty art. IX(4), *supra* note 29, at 152.

¹⁸⁶ See generally *Id.*

¹⁸⁷ Indus Waters Treaty art. IX, *supra* note 29.

5) A court of Arbitration shall be established to resolve the dispute in the manner provided by Annexure G

a) upon agreement between the Parties to do so; or^[188]

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 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.

6) The provisions of Paragraphs (3), (4) and (5) shall not apply to any difference while it is being dealt with by a Neutral Expert.¹⁸⁸

Under this provision, both parties can refer the water dispute for arbitration if the negotiations or mediation have failed to resolve the water conflict.¹⁸⁹ Even at the request of one party, a dispute can be referred for arbitration if the negotiations have failed to resolve the dispute.¹⁹⁰ More specifically, the case can be referred for arbitration where one party after the completion of a one-month notification considers that the negotiations between the parties have been unduly delayed.¹⁹¹

When under Article IX, a need for a Court of Arbitration (“CoA”) arises, and both states must carry out a special agreement to establish it and lay down its procedures and its composition at the request of either party.¹⁹² If the parties do not agree to the composition of the CoA, then the CoA will comprise of seven members.¹⁹³ Each state appoints two arbitrators, and the remaining three arbitrators will be umpires appointed by a lengthy procedure provided in Annexure G of the Indus Water Treaty that requires a panel or governmental agreement of both parties.¹⁹⁴ Any decision reached by the court majority will be held binding on both parties regarding the resolution of the referred dispute.¹⁹⁵ To reach this decision, unless otherwise agreed by both

¹⁸⁸ Indus Waters Treaty art. IX(5)-(6), *supra* note 29, at 152.

¹⁸⁹ Indus Waters Treaty art. IX(5), *supra* note 29, at 152.

¹⁹⁰ *Id.*

¹⁹¹ Indus Waters Treaty art. IX(5)(c), *supra* note 29, at 152

¹⁹² Indus Waters Treaty Annexure G(2)(a), *supra* note 29, at 210.

¹⁹³ Indus Waters Treaty Annexure G(4), *supra* note 29, at 212.

¹⁹⁴ *See* Indus Waters Treaty Annexure G(4)-(7), *supra* note 29, at 212-14.

¹⁹⁵ Indus Waters Treaty Annexure G, *supra* note 29.

parties, the CoA can rely on the IWT, the international convention to which both India and Pakistan are parties and customary international law.¹⁹⁶

3.5. Reflection

To conclude, the mechanism of dispute resolution in the IWT involves several stages, including a permanent commission, the Neutral Expert, diplomatic negotiations, and international arbitration. Basically, the IWT has a four-layer dispute resolution mechanism, where each layer encompasses a forum to settle the dispute peacefully.¹⁹⁷ At the first stage, a permanent commission under the IWT resolves any question of fact that if established could violate the provisions of the IWT.¹⁹⁸ The difference of interests and objections of a party are termed as a “question” in the first stage, which is to be resolved by the PIC.¹⁹⁹ If the commission fails to resolve the question raised, then a “difference” has arisen and the parties are in the second issue resolution forum; the “difference” between India and Pakistan under the IWT is resolved by mediation, through a neutral expert, which is the second forum to resolve an issue. In the third stage, if the neutral expert fails to resolve the “difference,” then a “dispute” has arisen between these two states, which must be resolved by diplomatic negotiations between both parties, by mediation, or by the CA at the discretion of the commission.²⁰⁰ This means that, if the dispute is not resolved by governmental negotiations or mediation, the fourth and last stage in the dispute resolution mechanism under the IWT is to resolve a water dispute between India and Pakistan through the CA.²⁰¹ Stage four is the highest available forum under the IWT to resolve water conflicts between India and Pakistan.²⁰² The CA can rely on the IWT, international conventions to which both India and Pakistan are parties, and customary international law.²⁰³

Furthermore, the immersion of international law in the CA makes it a platform that encompasses emerging issues, while accommodating

¹⁹⁶ Indus Waters Treaty Annexure G(29), *supra* note 29, at 220.

¹⁹⁷ See generally Indus Waters Treaty art. IX, *supra* note 29.

¹⁹⁸ Indus Waters Treaty art. IX(1), *supra* note 29, at 150.

¹⁹⁹ *Id.*

²⁰⁰ Indus Waters Treaty art. XI, *supra* note 29.

²⁰¹ *Id.*

²⁰² Indus Waters Treaty art. IX(5), *supra* note 29.

²⁰³ See Indus Waters Treaty Annexure (G), *supra* note 29.

developing water apportionment principles and rules. For instance, in the *Kishenganga* case, the PCA relied on the case law of the *Pulp Mills* case.²⁰⁴

Furthermore, the multilayered dispute resolution mechanism of the IWT is in congruity with international laws and universally acclaimed rules. For example, Article 33 of the UNWC also allows parties to use several stages of forums to resolve their disputes. Article 33 of the UNWC offers a range of dispute resolution mechanisms, which involves bilateral agreements, negotiations, mediation, conciliation, and obligatory fact-finding joint commissions.²⁰⁵ However, both India and Pakistan have reservations about the UNWC, most specifically with the binding and compulsory nature of Article 33.²⁰⁶

The multilayered dispute resolution under the IWT is a reflection of acceptable forums and techniques of international law and globally practiced customs. Examples of these techniques and customs under the IWT include: the role of a neutral expert for mediation, the obligation of the PIC as a permanent joint fact-finding commission, the involvement of mediation and negotiations as diplomatic negotiations and mediation, and the establishment of the CA;²⁰⁷ all are widely used dispute resolution mechanisms to placate water conflicts around the world.

It is pertinent to note that the dispute resolution mechanism under the IWT employs undertakes both juridical and non-juridical techniques to settle differences and disputes between India and Pakistan. By allowing a four-layer legal dispute resolution framework, the IWT encompasses almost all binding and nonbinding legal procedures to settle water conflicts,²⁰⁸ except for the dispute resolution forum of the ICJ because the IWT deliberately does not accommodate the ICJ as a legal forum to settle disputes. Apart from this, the IWT gives substantial consideration to bilateral agreements and diplomatic negotiations as nonbinding forums to settle disputes,²⁰⁹ and affords arbitration and neutral experts binding authority in settling disputes.²¹⁰

²⁰⁴ See *Kishenganga*, *supra* note 94.

²⁰⁵ Convention, *supra* note 40.

²⁰⁶ Hamid Sarfaraz, *Revisiting the 1960 Indus Waters Treaty*, 38:2 WATER INT'L 204, 211 (2013).

²⁰⁷ Indus Waters Treaty art. IX, *supra* note 29.

²⁰⁸ Article IX of the IWT offers dispute resolution mechanism through arbitration, a neutral expert, negotiation and the Commission. Indus Waters Treaty art. XI, *supra* note 29. In this equation, arbitration and neutral expert decisions are binding within the scope of the IWT, and resolutions of negotiations and the Commission as dispute resolution mechanisms are nonbinding in nature. *Id.*

²⁰⁹ Indus Waters Treaty, *supra* note 29, at art. VII, IX.

²¹⁰ Indus Waters Treaty, *supra* note 29, at art. IX, and Annexures D, E.

4. Efficacy of the IWT Dispute Resolution Mechanism²¹¹

India and Pakistan have routinely maintained that the IWT dispute resolution mechanism is an impediment to justice.²¹² On the one hand, India argues that Pakistan's frequent objections to every Indian project raise the costs of these projects, by delaying their construction processes.²¹³ On the other hand, Pakistan maintains that India does not inform Pakistan of the commencement of Indian hydraulic construction projects on the western waters, which is in violation of IWT.²¹⁴ Pakistan adds that, whenever an issue has been raised in dispute resolution forums under the IWT, India has repeatedly pressed Pakistan toward bilateral talks, as a delaying tactic to complete its construction works of projects, so that major issues remain unresolved after the completion of a project.²¹⁵ This is mainly because adjudications tend to hold back the raised issues if the project has incurred so much cost or is completed.²¹⁶

For these reasons, this section explores the efficacy of the dispute resolution mechanism under the IWT. Consequently, time spent consumed at specific stages of the dispute resolution will be noted in the context of certain water conflicts over Indian projects on western waters. This section has five subsections that will analyze the proficiency of the IWT dispute resolution mechanism during the water disputes between India and Pakistan. Section 4.1 deals with the Salal project, Section 4.2 with the Tulbul Navigation project, Section 4.3 with the Baglihar project, Section 4.4 with the *Kishenganga* project, and Section 4.5 with the *Chutak* project.

²¹¹ See Asif Baig Mirza, *Performances of Dispute Resolution Mechanism of the Indus Waters Treaty*, PILDAT, (Sept. 2013)

http://www.pildat.org/Publications/publication/FP/PerformanceofDisputeResolutionMechanismoftheIndusWatersTreaty_BackgroundPaper.pdf.

²¹² Kokab & Nawaz, *supra* note 140, at 213-14; see also Iqbal, *supra* note 23, at 110.

²¹³ Kokab & Nawaz, *supra* note 140, at 213-14.

²¹⁴ Indus Waters Treaty, *supra* note 29, at art. IX, Annexure D at ¶ 9, and Annexure E at ¶ 12. India is obliged to inform Pakistan of the commencement of any construction works over the western waters at least six months before any works starts. *Id.*

²¹⁵ *Indus Water Dispute Going to Arbitration Again*, THE THIRD POLE (July 18, 2016), <https://www.thethirdpole.net/2016/07/18/indus-water-dispute-going-to-arbitrators-again/> [hereinafter *The Third Pole*].

²¹⁶ See *Kishenganga*, *supra* note 94.

4.1. Salal Dam Project

Under the IWT, Pakistan raised its first objection to an Indian project in July 1970,²¹⁷ after the design of the Salal hydropower production project was shared with Pakistan in April 1970.²¹⁸ This project was planned for the Chenab River,²¹⁹ which is a western river.²²⁰ Western rivers are allocated for the unrestricted use of Pakistan.²²¹ The Pakistani issues were not resolved through the PIC. In 1974, the PIC communicated its incapability to resolve the matter. The conflict “was taken to the governmental level in 1975,” and through bilateral diplomatic talks of negotiations between India and Pakistan the issue was resolved in 1978, when India agreed to make the necessary changes in the design of the Salal project.²²² It is interesting to note that the dispute resolution mechanism in its very first case took eight years, 1970–1978, to resolve the conflict.

4.2. Tulbul Navigation Project/Wullar Barrage

The Tulbul Navigation project—Pakistan prefers to refer to it as the Wullar Barrage—was designed over the western Jhelum River and was the subject of Pakistan’s second reservation.²²³ Under the IWT, India is obliged to inform Pakistan of any construction work over the western waters.²²⁴ However, India commenced its construction of the Tulbul Navigation Project in 1984 without sharing its designs or plans and without even informing Pakistan of the commencement of any construction works.²²⁵ The relevant reports were shared with Pakistan in 1986, after governmental pressure.²²⁶

²¹⁷ MOONIS AHMAR, *THE CHALLENGE OF CONFIDENCE-BUILDING MEASURES IN SOUTH ASIA* 396 (2001).

²¹⁸ AHMAR, *supra* note 217, at 396.

²¹⁹ *Id.*

²²⁰ Indus Waters Treaty, *supra* note 29, at art. III.

²²¹ *Id.*

²²² Mirza, *supra* note 211, at 14.

²²³ RAJPAL BUDANIA, *INDIA’S NATIONAL SECURITY DILEMMA: THE PAKISTAN FACTOR & INDIA’S POLICY RESPONSE* 185 (Indus Pub., 2001).

²²⁴ Indus Waters Treaty, *supra* note 29, at art. VII and annexures D and E.

²²⁵ Ashok Swain, *Water Insecurity in the Indus Basin: The Costs of Noncooperation*, in *IMAGINING INDUSTAN: OVERCOMING WATER INSECURITY IN THE INDUS BASIN* 37, 40 (Zafar Adeel & Reobert Wirsing eds., 2016).

²²⁶ *See* Mirza, *supra* note 211, at 14.

Temporarily, India stayed its construction works on this project in 1987.²²⁷ However, sources believe that India has resumed its construction works, and the works at this site are proceeding at full pace.²²⁸ The PIC failed to resolve this issue and the negotiation between the two states over this project has consumed more than 16 rounds of bilateral talks.²²⁹ Pakistan has maintained that commencement of this project without informing Pakistan is a direct violation of the IWT²³⁰ and adds that the project will decrease water flows of the Jhelum River in Kharif season, when water is needed most, and exceeds the storage capacity allowed under the IWT.²³¹ To this date, the water conflict over this project between India and Pakistan remains unresolved by the dispute resolution mechanism, which has now consumed a good 32 years.²³²

4.3. Baglihar Dam Project

The designs of this project were shared with Pakistan in 1992, and Pakistan raised its objections to this project in the same year.²³³ The PIC took 12 years and in 2004 concluded that it could not resolve this dispute.²³⁴ Then, at a later stage, governmental negotiations and diplomatic bilateral talks after two rounds of talks also failed and decided to pursue the matter at a later stage through a neutral expert in 2005.²³⁵ Within two more years, the neutral expert gave its conclusion, and the issue was resolved in 2007.²³⁶ It is interesting to note here that the neutral expert did allow certain changes in the design of the Baglihar Dam but went against the explicit provisioned assertions of the

²²⁷ Swain, *supra* note 225, at 41.

²²⁸ *India Rejects Pakistan Objections, Work on Tulbul Navigation Project in Full Swing*, NORTHLINES, Oct. 7, 2016.

²²⁹ Mirza, *supra* note 211, at 15.

²³⁰ Epilogue Press, 3(11) EPILOGUE, 35 (2009); *see also*, RONGXING GUO, TERRITORIAL DISPUTES & RESOURCE MANAGEMENT, 143 (Nova Pub., 2006); Indus Waters Treaty, *supra* note 29, at art. I para. 11, art. III para. 4, and art. VIII para. H.

²³¹ Mirza, *supra* note 211, at 15.

²³² *See Id.* at 14–15.

²³³ *Id.* at 15.

²³⁴ *Id.*

²³⁵ ROBERT G. WIRSING, ET AL., INTERNATIONAL CONFLICT OVER WATER RESOURCES IN HIMALAYAN ASIA 98 (Palgrave Macmillan, 2012).

²³⁶ Kanti Bajpal, *India's Regional Disputes*, in SHAPING THE EMERGING WORLD: INDIA AND THE MULTILATERAL ORDER 115, 120 (Waheguru Pal Sing Sidhu, Pratap Bhanu Mehta & Bruce Jones eds. 2013).

IWT.²³⁷ For instance, the neutral expert maintained that through the Baglihar Dam India could maintain a water level below the dead storage level for the maintenance of the project,²³⁸ whereas the IWT explicitly states that “dead storage shall not be depleted except in an unforeseen emergency. If so, it will be refilled in accordance of the conditions of its initial fillings.”²³⁹

Experts such as IWT commissioners have noted that by repeatedly pressing Pakistan toward bilateral talks, India has used delaying tactics to complete the construction works of its projects so that major issues remain redundant after the completion of the project.²⁴⁰ This is mainly because adjudications tend to hold back the raised issues if the project has incurred so much cost or has been completed.²⁴¹ The dispute resolution mechanism of the IWT took 15 years to resolve this issue, and still an interpretation of a major clause remained unresolved.

4.4. Kishanganga Dam Project

In the case of the Kishanganga Dam, India again did not inform Pakistan of the commencement of construction works, nor did it share any designs or planning. Pakistan objected to this project in 1988,²⁴² while India formally shared its relevant information in 1994.²⁴³ India successfully transformed this project’s purpose from a storage facility to a run-of-the-river power production unit in 2006.²⁴⁴ In 2010, Pakistan determined that the PIC had been unsuccessful in resolving tensions over this project.²⁴⁵ The case was referred to the PCoA, which took between two and three years to conclude the case.²⁴⁶ The dispute resolution mechanism of the IWT took 19 years to resolve this case.²⁴⁷ Pakistan still has pending objections to this project, and the World Bank to this date is currently deciding between Indian demands to

²³⁷ See WIRSING, ET AL., *supra* note 235, at 98.

²³⁸ RAYMOND LAFITTE, BALIHAR HYDROELECTRIC PLANT: EXPERT DETERMINATION 13 (2007).

²³⁹ Indus Waters Treaty, *supra* note 29, at annexure E, para. 18.

²⁴⁰ The Third Pole, *supra* note 215.

²⁴¹ See also Adeel, *supra* note 120, at 4; Kokab & Nawaz, *supra* note 140, at 213-14; Kishangan *supra* note 94.

²⁴² Mirza, *supra* note 211, at 15.

²⁴³ CHAZOURNES, *supra* note 58, at 417.

²⁴⁴ Mirza, *supra* note 211, at 15.

²⁴⁵ Mirza, *supra* note 211, at 15.

²⁴⁶ Kishangan, *supra* note 94.

²⁴⁷ See Mirza, *supra* note 211, at 15.

install a neutral expert and Pakistan's request to establish a CoA to resolve the water conflicts of India and Pakistan over the Kishanganga and Ratle projects.²⁴⁸

4.5. Chutak Project

Once again, in 2004 India started construction works on this project without informing Pakistan and without sharing its plan and designs.²⁴⁹ After frequent objections, India shared its information with Pakistan in 2007.²⁵⁰ Through several PIC meetings, this issue was resolved in 2010.²⁵¹ The dispute resolution mechanism took less time to resolve this issue—only two years.

It is noted through the discussion in this section that Pakistan is currently facing two major problems against the dispute resolution mechanism. The first issue is that India commences its construction works without informing Pakistan, which delays the possibility to raise issues in a timely manner. By the time Pakistan is formally informed of the design and plans of project on the western rivers, India has substantially completed its works and has incurred so much cost that the projects cannot be held back.²⁵² This practice is against the obligation under the IWT,²⁵³ where India is obliged to share data regarding any planned works over the western rivers as soon as possible, which is noted as six months before any commencement of construction works under the IWT.²⁵⁴ The second issue is that the dispute resolution mechanism itself is a very slow legal framework under the IWT, which can take more than a decade to resolve an issue. Experts have noted that these reasons delay justice, while delays in providing information on designs and plans from the Indian side adversely affect Pakistani interests and defeat the purpose of any dispute resolution mechanism.²⁵⁵

²⁴⁸ Mubarak Zeb Khan, *India Asked to Stop Work on Kishanganga & Ratle Projects*, DAWN (Jan. 21, 2017), <https://www.dawn.com/news/1309767>.

²⁴⁹ Mirza, *supra* note 211, at 15.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² Adeel, *supra* note 141, at 4; *see also* SHARAD JAIN ET AL., *HYDROLOGY AND WATER RESOURCES OF INDIA* 940 (2007); Kokab & Nawaz, *supra* note 140, at 13-14; Kishanganga, *supra* note 94.

²⁵³ Indus Waters Treaty, *supra* note 29.

²⁵⁴ *Id.*

²⁵⁵ Mirza, *supra* note 211.

5. Compliance with the Dispute Resolution Mechanism of the IWT

To recommend the effective use of the dispute resolution mechanism under the IWT, this section analyzes Indian obligations under the IWT and explores Indian and Pakistani arguments that the dispute resolution mechanism is ineffective. In order to build such a nexus, the inefficacy of the legal framework under the IWT, Indian obligations under the IWT and certain provisions of the IWT will be set out within this section. Furthermore, brief recommendations to make the existing framework more effective at resolving disputes will be briefly proposed in this section.

The IWT explicitly obliges India to communicate relevant information with Pakistan in a timely manner.²⁵⁶ Article VII(2) of the IWT reads as follows:

If either Party plans to construct any engineering work which would cause interference with the waters of any of the Rivers and which, in its opinion, would affect the other Party materially, it shall notify the other Party of its plans and shall supply such data relating to the work as may be available and as would enable the other Party to inform itself of the nature, magnitude and effect of the work. If a work would cause interference with the waters of any of the Rivers but would not, in the opinion of the Party planning it, affect the other Party materially, nevertheless the Party planning the work shall, on request, supply the other Party with such data regarding the nature, magnitude and effect, if any, of the work as may be available.²⁵⁷

Similarly, Annexure D, Paragraph 9, of the IWT states as follows:

To enable Pakistan to satisfy itself that the design of a Plant conforms to the criteria mentioned in Paragraph 8, India shall, at least six months in advance of the beginning of construction of river works connected with the Plant, communicate to Pakistan, in writing, the information specified in Appendix II to this Annexure. If any such information is not available or is not pertinent to the design of the Plant or to the conditions at the site, it will be so stated.²⁵⁸

Likewise, Annexure E, Paragraph 12, provides a similar statement regarding the construction works of storage facilities, which obliges India to share data at least six months before their commencement.²⁵⁹

²⁵⁶ Indus Waters Treaty, *supra* note 29.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at Annexure D.

²⁵⁹ *Id.* at Annexure E.

As mandated under the IWT, if India does not violate this bilaterally agreed treaty and shares relevant information of designs and plans of construction works with Pakistan at least six months before their commencement, the dispute resolution mechanism can resolve water conflicts quickly between India and Pakistan²⁶⁰ Conversely, India deliberately starts construction works on the western rivers without informing Pakistan, so that Pakistan cannot raise timely objections, and when the objections reach the highest available forum the resolution cannot go against Indian interests since destruction of a project after its completion is never pursued, as hydro management power projects are built at very high prices.²⁶¹

On the other hand, India argues that Pakistan's frequent objections to every Indian project raise the costs of these projects by delaying their construction processes.²⁶² However, this Indian concern can be easily resolved if the designs of Indian projects are shared in a timely manner with Pakistan, so that any difference or dispute is resolved even before the commencement of a project.

Both India and Pakistan are obliged to follow prescribed principles and obligations under the IWT, which is a bilaterally agreed treaty between both sovereign states.²⁶³ To a large extent, water conflicts between India and Pakistan involve interpretation of treaty in the context of designs of Indian projects on the western waters, which are objected to by Pakistani authorities to ensure that their water supplies are not constricted within the true spirit of the IWT.²⁶⁴

India argues that Pakistan only desires to increase the construction costs of Indian projects by levying stay orders, and consequently delaying construction works.²⁶⁵ On the other hand, Pakistan argues that India is robbing Pakistan's water supplies by constructing water management infrastructure over the western waters, and the designs of these projects are in

²⁶⁰ See *Id.* at Annexures D-E (noting the Indian obligation to share data at least six months before commencement of construction works).

²⁶¹ Mirza, *supra* note 211; see also Kishanganga, *supra* note 94.

²⁶² Kokab & Nawaz, *supra* note 140, at 13-14; see also Adeel, *supra* note 241; Jain, *supra* note 259; Iqbal, *supra* note 23.

²⁶³ See generally Indus Waters Treaty, *supra* note 29.

²⁶⁴ See MICHAEL GILLAN & ROBERT LAMBERT, INDIA AND THE AGE OF CRISIS: THE LOCAL POLITICS OF GLOBAL ECONOMIC AND ECOLOGICAL FRAGILITY 94-6 (2015); see generally ADEEL & WIRSING, *supra* note 22, at 98.

²⁶⁵ Kokab & Nawaz, *supra* note 140, at 213-14; see also Adeel, *supra* note 141, at 4; Adeel & Wirsing, *supra* note 22, at 98.

clear violation of the IWT.²⁶⁶ Pakistan adds that India does not share concerned information in a timely manner about the designs and plans of the construction works, which is a blatant violation of the IWT, so Pakistan cannot effectively acquire resolution against illegitimate projects.²⁶⁷ India further uses the delaying tactic of bilateral talks, where negotiations go on for years over a single issue.²⁶⁸

For these reasons, it is noted that these governmental tactics have adversely affected the dispute resolution mechanism of the IWT, since the resolution of a dispute under the IWT can take as long as nearly two decades to resolve a single issue. After such a long span of time, usually the Indian construction works have been completed or nearly so.²⁶⁹

The PIC and governmental negotiations, as dispute resolution mechanisms,²⁷⁰ are cost-effective and therefore very much desirable.²⁷¹ Nonetheless, these forums should not take decades to conclude their resolution of any difference or dispute. Both forums should communicate their ability or inability in less than two years. After that, the dispute should be resolved or referred to the higher dispute resolution forums of neutral expert and CoA, but only if information regarding water management projects is shared in a timely manner with Pakistan, that is, at least six months before commencement of any project;²⁷² only then can the dispute resolution mechanism be made more effective.

Within this context, by understanding the nexus between the violation of the IWT and the inefficacy of dispute resolution mechanism, CoA in the *Kishanganga project* case established that India is obliged to exchange relevant information in a timely manner.²⁷³ More specifically, the court held that, in general, India should share the designs and plans of its construction works over the western rivers at least six months prior to the commencement of any construction works.²⁷⁴ In this sense, Pakistan would be satisfied with

²⁶⁶ PARENTI, *supra* note 24, at 129; Iqbal, *supra* note 23.

²⁶⁷ Iqbal, *supra* note 23.

²⁶⁸ The Third Pole, *supra* note 215.

²⁶⁹ See also Adeel, *supra* note 141, at 4; Jain, *supra* note 259, at 940; Kokab & Nawaz, *supra* 140, at 213–14; Kishanganga, *supra* note 94.

²⁷⁰ Indus Water Treaty, *supra* note 29, at art. IX.

²⁷¹ MIRZA, *supra* note 211.

²⁷² For the Indian obligation to share data at least six months before commencement of construction works, see Indus Water Treaty, *supra* note 29, at art. VII, and Annexures D & E.

²⁷³ Kishanganga, *supra* note 94.

²⁷⁴ *Id.*

the compliance of these projects with the IWT, and would be better able to raise objections and subsequently acquire their resolutions in a timely and effective manner.²⁷⁵

Conclusion

There are certain legal mechanisms available in international law that can peacefully resolve water conflicts between nations.²⁷⁶ There is always an option for states to personally resolve their conflicts with diplomatic negotiations to resolve the tensions.²⁷⁷ This method is usually the first available recourse to placate international tensions.²⁷⁸ This forum includes approaches such as diplomatic negotiations, mediation, fact-finding commissions, and other similar intermediary techniques;²⁷⁹ this preliminary stage is nonbinding.²⁸⁰ There is a long list of water conflicts between India and Pakistan regarding Indian infrastructure on the western tributaries.²⁸¹ Pakistan is of the view that India is robbing Pakistan's water supplies and building its water management capacity only as a political maneuver to gain political supremacy by practicing hydro-hegemony.²⁸² On the other hand, India maintains that it is only constructing infrastructure within the scope of the IWT, and the decreased water flows in Pakistan are due to climate change.²⁸³ Therefore, water disputes are routinely referred to the legal mechanism prescribed in the IWT.²⁸⁴

For these reasons, both states are still facing certain challenges. Within the parameters inscribed in the IWT, India believes that Pakistan has no basis for objecting to its construction works, to obtain stay orders, and to delay the

²⁷⁵ *Id.*

²⁷⁶ For instance, dispute resolution through the Permanent Court of Arbitration (PCoA) and the International Court of Justice (ICJ).

²⁷⁷ See Indus Waters Treaty, *supra* note 29, at art. IX; Convention, *supra* note 40, at Art. 33; WEISS, *supra* note 14 at 128.

²⁷⁸ See Indus Waters Treaty, *supra* note 29, at art. IX; Convention, *supra* note 40, at Art. 33; WEISS, *supra* note 14 at 128.

²⁷⁹ WEISS, *supra* note 14 at 128

²⁸⁰ See generally S. K. SHAH, INDIA & ITS NEIGHBORS: RENEWED & NEW DIRECTIONS (VIJ BOOKS, 2017).

²⁸¹ See generally Adeel & Wirsing, *supra* note 22.

²⁸² PARENTI, *supra* note 24; see also Iqbal, *supra* note 23.

²⁸³ PARENTI, *supra* note 24.

²⁸⁴ See generally Kishanganga, *supra* note 94.

construction works.²⁸⁵ Through these delays, the actual and opportunity costs of projects are borne by the Indian state, which is injuring Indian interests and economy.²⁸⁶ On the other side, Pakistan maintains that the dispute resolution mechanism is very slow, and by the time the case reaches the highest forum, either the project is completed or it has incurred so much cost that it cannot be held back.²⁸⁷ In addition, even if the court sides with issues raised by Pakistan, all it does is make slight changes to a few designs of Indian projects.²⁸⁸

The Indian state is exasperated with Pakistan's frequent objections and feels that the IWT is an impediment to its interests.²⁸⁹ Therefore, India has threatened that it will scrap the IWT entirely.²⁹⁰ In response, Pakistan has stated that such a revocation of a bilaterally-agreed treaty would be considered an act of war.²⁹¹ To communicate state interests with regard to water disputes, the PIC is tasked with communicating with each state.²⁹² This extraordinary intensity in political rigidity between Pakistan and India has an enshrined legal framework to alleviate water disputations.²⁹³

To conclude, the mechanism of dispute resolution in the IWT involves several stages, which includes a permanent commission, a neutral expert, diplomatic negotiations, and international arbitration.²⁹⁴ The IWT has a four-layer dispute resolution mechanism, where each layer encompasses a forum to settle the dispute peacefully.²⁹⁵ At the first stage, a permanent commission under the IWT resolves any question of fact that, if established, could violate the provisions of the IWT.²⁹⁶ The difference of interests and objections of a

²⁸⁵ *See Id.*

²⁸⁶ Kokab & Nawaz, *supra* note 140, at 213-14; *see also* Adeel, *supra* note 141, at 4; Jain et al., *supra* note 259, at 940.

²⁸⁷ Kokab & Nawaz, *supra* note 140, at 213-14; *see also* Adeel, *supra* note 141, at 4; Jain et al., *supra* note 259, at 940.

²⁸⁸ Kokab & Nawaz, *supra* note 140, at 213-14; *see also* Adeel, *supra* note 141, at 4; Jain et al., *supra* note 259, at 940.

²⁸⁹ Kokab & Nawaz, *supra* note 140, at 213-14; *see also* Adeel, *supra* note 141, at 4; Jain et al., *supra* note 259, at 940.

²⁹⁰ Chandio, *supra* note 27; *see also* Verma, *supra* note 27; Aziz, *supra* note 27.

²⁹¹ Aziz, *supra* note 27.

²⁹² *Id.*; Indus Waters Treaty, *supra* note 29, at 150-52.

²⁹³ Indus Waters Treaty, *supra* note 29, at 150-52.

²⁹⁴ *Id.*

²⁹⁵ *See Id.*

²⁹⁶ *See Id.*

party are termed a “question” at the first stage, which is to be resolved by the PIC.²⁹⁷ If the commission fails to resolve the raised question, then a “difference” has arisen, and the difference between India and Pakistan under the IWT is to be determined by mediation, through a neutral expert, which is the second forum to resolve the issue.²⁹⁸ In the third stage, if the neutral expert fails to resolve the difference, then a dispute has arisen between these two states, and now the dispute is to be resolved by diplomatic negotiations between the parties to the IWT, by mediation, or by the Court of Arbitration (CoA), at the discretion of the PIC.²⁹⁹ This means that, if the dispute is not resolved by governmental negotiations or mediation, the fourth, and last, stage in the dispute resolution mechanism under the IWT is to resolve water disputes through the CoA.³⁰⁰ Stage four is the highest available forum under the IWT to resolve water conflicts between India and Pakistan.³⁰¹ The CoA can rely on the IWT, international conventions to which both India and Pakistan are parties and customary international law.³⁰²

This immersion of international law in the CoA is a platform to encompass emerging contemporary needs and issues, while accommodating developing water apportionment principles and rules. For instance, in the *Kishanganga* case, the PCoA relied on the case law of the *Pulp Mills* case.³⁰³

Alongside this, the multilayered dispute resolution of the IWT is in accordance with international laws and universally acclaimed rules. For example, Article 33 of the UNWC also allows parties to use several stages of forums to resolve their disputes.³⁰⁴ Article 33 of the UNWC offers a range of dispute resolution mechanisms, which involve bilateral agreement, negotiations, mediation, conciliation, and obligatory fact-finding joint commissions.³⁰⁵ However, both India and Pakistan have concerns with the UNWC, most specifically with the binding and compulsory nature of Article 33.³⁰⁶

²⁹⁷ *See Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *See Id.*

³⁰² *Id.* at 210-22.

³⁰³ *Kishanganga*, *supra* note 94.

³⁰⁴ Convention, *supra* note 40, at 713-14.

³⁰⁵ *Id.*

³⁰⁶ Hamid Sarfraz, *Revisiting the 1960 Indus Waters Treaty*, 38 WATER INT'L 204, 211 (2013).

Moreover, the multilayered dispute resolution under the IWT reflects acceptable forums and techniques of international law and globally practiced customs. For example, under the IWT, the role of a neutral expert for mediation, the obligation of the PIC as a permanent joint fact-finding commission, the involvement of mediation and negotiations as diplomatic negotiations and mediation, and the establishment of the CoA,³⁰⁷ are all reflections of widely used dispute resolution mechanisms for water conflicts around the world.

It is pertinent to note that the dispute-resolution mechanism under the IWT undertakes both juridical and non-judicial techniques to settle differences and disputes between India and Pakistan. By allowing a four-layer legal dispute-resolution framework,³⁰⁸ the IWT encompasses almost all binding and nonbinding legal procedures to settle water conflicts,³⁰⁹ except for the dispute resolution forum of the ICJ since the IWT deliberately does not accommodate ICJ as a legal forum to settle disputes.³¹⁰ Apart from this, the IWT gives substantial consideration to bilateral agreements and diplomatic negotiations as a nonbinding forum to settle disputes³¹¹ and it allows arbitration and the neutral expert as binding procedures to resolve water disputes between India and Pakistan.³¹²

It is noted through the discussion in this paper that Pakistan is currently facing two major problems with the dispute resolution-mechanism. The first issue is that India commences its construction works without informing Pakistan, which delays the possibility to raise issues in a timely manner.³¹³ By the time Pakistan is formally informed of the design and plans of the project on the western rivers, India has substantially completed its works and has incurred so much cost that hydraulic projects cannot be held back.³¹⁴ This practice is against the obligation under the IWT,³¹⁵ where India is obligated to share data regarding any planned works on the western rivers as soon as

³⁰⁷ See Indus Waters Treaty, *supra* note 29, at 146-52, 170-202.

³⁰⁸ See *Id.* at 150-52.

³⁰⁹ For example, the negotiation and Commission procedures are nonbinding and the neutral expert and Court of Arbitration procedures are binding in nature as mechanisms of dispute resolution. See Indus Waters Treaty, *supra* note 29, at 150-52.

³¹⁰ See *Id.*

³¹¹ See *Id.*

³¹² *Id.*

³¹³ MIRZA, *supra* note 211, at 16.

³¹⁴ Kishanganga, *supra* note 94.

³¹⁵ Indus Waters Treaty, *supra* note 29, at 144-45, 170-86, 186-202.

possible.³¹⁶ The second issue is that the dispute-resolution mechanism itself is a very slow framework, which can take more than a decade to resolve a single issue. Experts have noted that these reasons delay justice, and the delay in the provision of information on designs and plans from the Indian side adversely affects Pakistani interests. This defeats the purpose of any dispute-resolution mechanism.³¹⁷

As obligated under the IWT,³¹⁸ if India does not violate this bilaterally-agreed treaty and share relevant information of designs and planning of construction works with Pakistan in a timely manner at least six months before the commencement of construction works,³¹⁹ the dispute-resolution mechanism can quickly resolve water conflicts between India and Pakistan.

India argues that Pakistan only desires to increase the construction costs of Indian projects by levying stay orders, which consequently delay construction works.³²⁰ However, this Indian concern can be easily resolved if the designs of Indian projects are shared in a timely manner with Pakistan, so that any difference or dispute can be resolved even before the commencement of a project. Furthermore, Pakistan argues that India is robbing Pakistan's water supplies by constructing water-management infrastructure on the western waters, even though the designs of these projects are in clear violation of the IWT.³²¹ Pakistan adds that India does not share concerned information in a timely manner on the designs and plans of construction works, which is in blatant violation of the IWT, so that Pakistan cannot effectively acquire resolution against illegitimate projects.³²² India further uses the delaying tactic of bilateral talks, where negotiations go on for years over a single issue.³²³

For these reasons, it can be determined that these governmental tactics have adversely affected the dispute-resolution mechanism of the IWT, since

³¹⁶ IWT establishes that India is obliged to inform Pakistan of any relevant construction works at least six months before its commencement. See Indus Waters Treaty, *supra* note 29, at 144-45, 170-86, 186-202.

³¹⁷ See MIRZA, *supra* note 211.

³¹⁸ For the Indian obligation to share data at least six months before commencement of construction works, see Indus Waters Treaty, *supra* note 29, at 144-45, 170-86, 186-202.

³¹⁹ *Id.*

³²⁰ Kokab & Nawaz, *supra* note 140, at 213-14; see also ADEEL, *supra* note 121; JAIN ET. AL., *supra* note 259; Iqbal, *supra* note 23.

³²¹ PARENTI, *supra* note 24; see also Iqbal, *supra* note 23.

³²² PARENTI, *supra* note 24; see also Iqbal, *supra* note 23.

³²³ The Third Pole, *supra* note 215.

the resolution of a dispute under the IWT can take as long as nearly two decades. After such a long span of time, the Indian construction works are usually completed or nearly so.³²⁴

To hasten the dispute-resolution mechanism, the forums of bilateral talks and negotiations, and PIC should not take decades to conclude their resolution of any difference or dispute. Both forums should communicate their ability or inability in less than two years. After that, the dispute should be resolved or referred to the higher dispute-resolution forums of the neutral expert or the CoA.

³²⁴ See ADEEL, *supra* note 141, at 5; see also JAIN ET. AL., *supra* note 259, at 940; Kokab & Nawaz, *supra* note 140, at 213–14; Kishenganga, *supra* note 94.

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