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Indus Waters Treaty: A Legal Perspective

by Sumeet Kachwaha*

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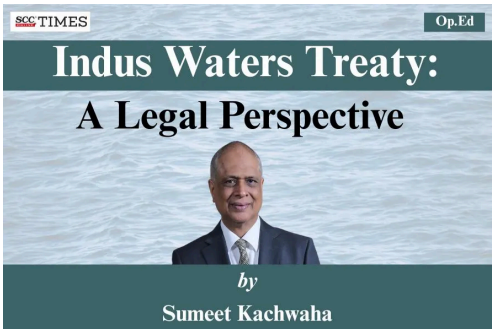


Introduction

The Indus Waters Treaty, 1960[1], has been in the news of late. Most discussions have revolved around India's decision to put the Treaty in abeyance following the Pahalgam terrorist attack. The disputes around the Treaty are however not new. For the past about 2 years, India has been calling upon Pakistan to discuss and agree to modifications to the Treaty in light of changed circumstances.

This article presents certain key facts, summarises the controversies and discusses the way forward.

The Indus Basin

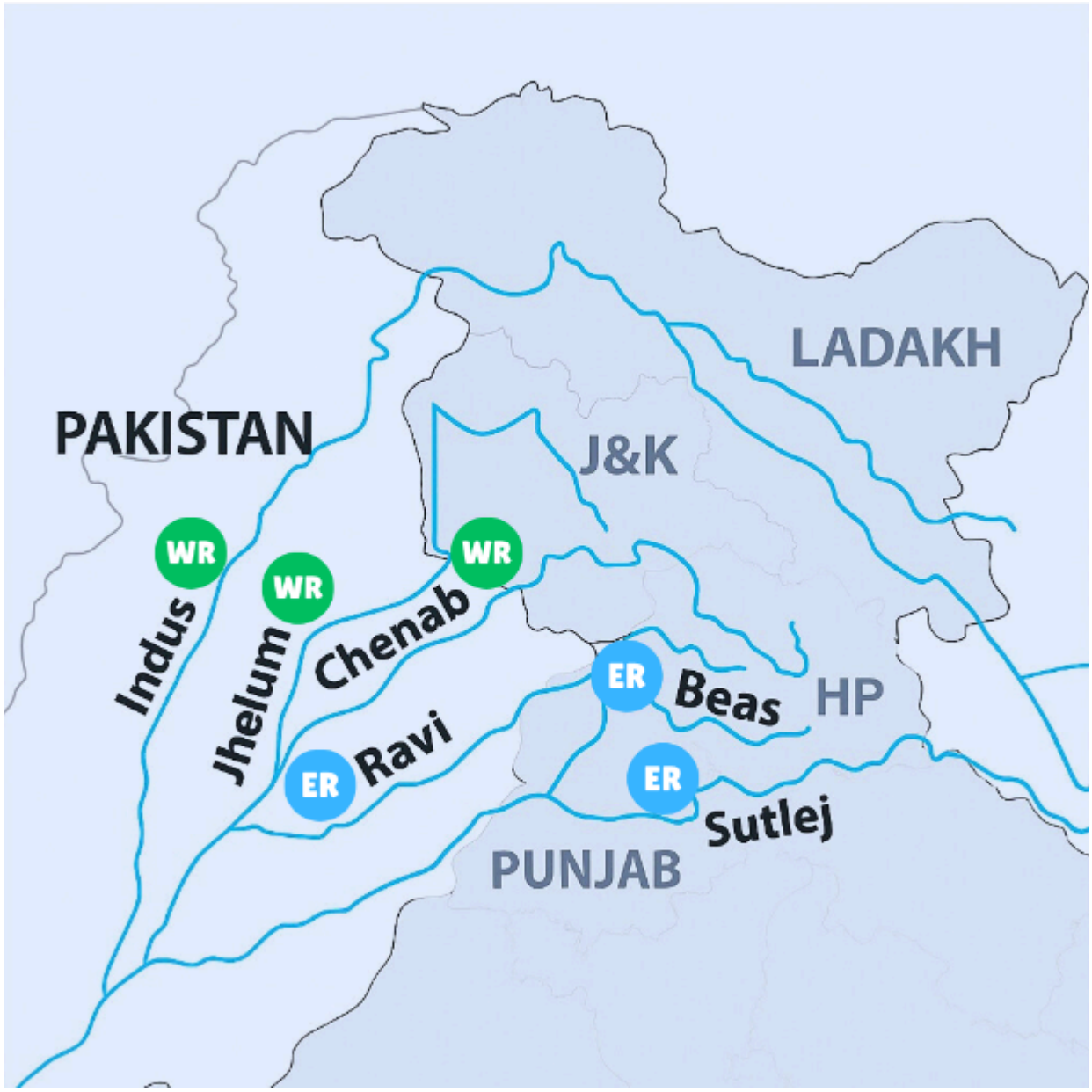
The Indus and its five tributaries (Jhelum, Chenab, Ravi, Beas and Sutlej) comprise one of the great river systems in the world. Its waters have cradled ancient civilisations and are steeped in history, religion and culture. The India-Pakistan partition drew a line across the Indus system, rendering sharing of its waters a vexed issue. After years of discussion the World Bank proposed and facilitated the Treaty.

The structure of the Treaty

The six rivers comprising the Indus Basin were clubbed in two categories. The "Eastern Rivers" — Sutlej, Beas and Ravi fell to the share of India, except for certain permissible use which Pakistan was allowed. The waters of the "Western Rivers", comprising of the Indus, Jhelum and Chenab were allotted to Pakistan (again subject to certain permissible use by India).

India's permissible use of the Western Rivers is defined and includes "domestic" use (drinking, household, municipal and industrial purposes) and "non-consumptive" use

(navigation, fishing and agriculture). India is specifically allowed to use the waters of the Western Rivers for generation of hydroelectric power but storage of water or construction of storage works is regulated under Annexures D and E of the Treaty.



While the waters of the Eastern Rivers fell to India's share, a "transition period" of 10 years (extendable by 3 years) was envisaged during which India would limit its use and withdrawals of the waters of the Eastern Rivers and allow delivery of these waters to Pakistan as before. The transition period was to give Pakistan time to construct a network of irrigation canals, drawing the waters of the Western Rivers to areas, which would stand to lose their historic supplies from the Eastern Rivers.

To assist Pakistan in meeting the costs, a $900 million fund was envisaged, called the Indus Basin Development Fund. A group of countries[2] agreed to contribute specified sums into the fund. The World Bank would extend an $80 million loan to Pakistan. India was obliged to contribute £60.02 million (or $174 million) in 10 equal annual instalments into this fund.

A two-member Permanent Indus Commission was set up with each country nominating one member (who together would constitute the Commission). The Commission would serve as the channel for communication and assist in implementation of the Treaty, including as the first resort for resolving differences.

Dispute resolution mechanism under the Treaty

The Treaty envisages an elaborate dispute resolution mechanism. In the first instance, all issues are to be addressed by the Permanent Indus Commission. If the Commission is not able to agree, a "difference" would deem to have arisen. This triggers the next stage of resolution through a neutral expert. Either side's Commissioner may call for resolution through the neutral expert. The neutral expert is to be appointed by mutual agreement and if no agreement is arrived at, the World Bank makes the appointment.

Any issue of a technical nature is to be referred to a neutral expert whose decision will be final and binding on both parties. Annexure F to the Treaty sets out 22 types of technical questions which may be referred to a neutral expert. If the neutral expert informs the Permanent Indus Commission that in his opinion an issue referred to him is not within his jurisdiction, then a "dispute" shall deem to have arisen, which is to be resolved by a Court of Arbitration (CoA). Alternatively, the Permanent Indus Commission may directly deem it fit that a dispute has arisen which needs to be settled by a CoA. The CoA is however not an appellate body sitting over decisions rendered by the neutral expert.

The CoA is to comprise of seven arbitrators. Each party gets to appoint two arbitrators. The balance three are called "umpires" and comprise of an engineer; a person well versed in international law and the Chairman. The appointment of the umpires is through a rather complex process. To simplify, in the final analysis the World Bank nominates three persons who act as the appointing authority, with each appointing an umpire.

Thus, the World Bank has a default role in appointing the neutral expert as well as constituting the CoA.

The Treaty makes it clear that the neutral expert prevails over the CoA. Article 9(6) of the Treaty provides that the provisions concerning constitution of the CoA "shall not apply to any difference while it is being dealt with by a neutral expert". In other words, the CoA should not be established if the neutral expert is appointed (or is to be appointed). Annexure F to the Treaty also makes it clear that the decision of the neutral expert "on all matters within his competence" shall be final and binding upon the parties and "upon any CoA". This is of some importance as the current disputes between India and Pakistan stand referred to both the CoA and the neutral expert and despite India's protest, the arbitration is proceeding while the neutral expert is also seized of the matter.

Origins of the disputes

The Indus Waters Treaty, 1960 has been around for about 65 years. Interestingly, no dispute arose (or escalated) during the first 45 years of the Treaty. Conversely, parties have been in constant dispute for the past two decades. All disputes pertain to various hydroelectric projects India planned on the Western Rivers.

The earliest dispute relates to the 900 MW Baglihar Power Project on the Chenab. Six design-related issues were raised by Pakistan and referred to a neutral expert in 2005. The expert issued his determination in 2007. He found India's design to be Treaty compliant but required some modifications. Soon thereafter, another dispute was raised by Pakistan relating to a 330 MW run-of-river[3] hydro plant on the Kishanganga River (a tributary of the Jhelum). The disputes relating to this project continue till date.

The Kishanganga Project was originally envisaged in 1994. Pakistan asked questions and raised objections. Exchange of information and discussions took place but to no avail. In 2006 India informed Pakistan that it had reconfigured the project leading to further discussions. The project envisaged a 35.48 meters high dam on the river. The water stored in the reservoir would be diverted through tunnels to another tributary of the Jhelum (called the Bonar Nala). The project would use the 666 meters drop in the elevation for generation of power.

Pakistan objected to the reconfigured plan as well and finally referred the matter to arbitration in 2010. In February 2013, the CoA rendered a unanimous award upholding India's right to divert the waters of the Kishanganga for power generation. At the same time India would be obliged to maintain a minimum flow of water in the river. The Court also ruled on the water levels to be maintained in the reservoir for the purpose of flushing sediments.

By a subsequent and final award of December 2013, the Court determined the minimum flow India was required to maintain (the same being 9 cumecs). The Tribunal calculated that the minimum flow obligation on India would result in an annual reduction of electricity generation by 5.7% (which it felt was acceptable).

The matter, however, did not rest there.

The current dispute

Soon after the CoA rendered the Kishanganga award, Pakistan raised what it considered to be unresolved disputes. In January 2014, Pakistan asserted that the Kishanganga award had left unresolved certain technical issues i.e. calculation of the pondage (the storage capacity of the reservoir, excluding waters not needed for operational purposes); the design pertaining to placement of power intakes and the design and height of sediment outlets and spillways.

Pakistan also raised the issue of another run-of-river plant called the Ratle Hydroelectric Plant set up by India on the Chenab. Pakistan said that India provided the design of the Ratle Hydroelectric Project in 2012, and the dispute was therefore not clubbed with the Kishanganga dispute.

In July 2015, Pakistan proposed that these fresh disputes be referred to a neutral expert. India, however, demurred stating that the matter be resolved through the party nominated Commissioners. In 2016, Pakistan changed course stating that its invitation to appoint a neutral expert had lapsed and that the issues concerning the Kishanganga and Ratle power plant are "substantially, if not predominantly, legal in nature" and be resolved through arbitration.[4] India disagreed stating that Pakistan was trying to camouflage design-related issues as legal ones. In August 2016, Pakistan escalated matters by serving India with a request for arbitration. India responded stating that taking technical design issues to the CoA, bypassing the neutral expert is contrary to the letter and intent of the Treaty.

The World Bank steps in

On 31-8-2016, the President of the World Bank confirmed receipt of Pakistan's request for arbitration. Soon thereafter, on 4-10-2016, India transmitted its request to the World Bank for appointment of a neutral expert. The World Bank was thus seized with two conflicting requests. On 18-10-2016, the World Bank wrote to the parties observing that the situation was "unprecedented". It first offered to provide third-party mediation (which did not result in any agreement). The Bank then proposed to set in motion both processes — the appointment of the CoA and selection of the neutral expert. However, on 12-12-2016, the World Bank notified the parties that it had decided to halt both processes, acknowledging that parallel processes create a "risk of contradictory outcome that could potentially endanger the Treaty".[5] It added that this was an opportunity for the two countries to resolve the issues in an amicable manner rather than pursuing concurrent process, "that could make the Treaty unworkable over time". It seems that no progress was made over the next five years and on 6-4-2022, the Bank wrote to the parties stating that it "continues to share the concerns of the parties that carrying out two appointments concurrently poses practical and legal risks", however, the lack of success in finding an acceptable solution "is also a risk to the Treaty itself" and accordingly it decided to resume both processes in parallel.[6] On 17-10-2022, the World Bank issued a press release to the effect that Mr Michel Lino had been appointed as the Neutral Expert and Prof. Sean Murphy as the Chairman of the CoA.[7] The Bank reiterated its previous concern that carrying out both processes concurrently pose practical and legal challenges. It however reposed its trust on the highly qualified experts and that they would engage in a "fair and careful consideration of their jurisdictional mandate". In short, the World Bank voiced its concerns on multiple occasions of two forums proceeding in parallel but finally put in motion both, in the hope that the decision-makers would do the right thing.

India's response was sharp. On 21-12-2022, it issued a detailed communication to the World Bank stating that the Treaty does not permit parallel proceedings before the neutral expert

and the CoA on the same issues and this creates the possibility of inconsistent and mutually repugnant decisions (a possibility highlighted by the World Bank itself).[8] India refused to recognise the existence or legitimacy of the CoA and said that on good faith it is participating in the neutral expert proceedings.

As a corollary, India has neither participated in the arbitration nor notified the arbitrators it is entitled to nominate under the Treaty.

Proceedings before the CoA

The CoA has appointed the Permanent Court of Arbitration (PCA) to act as the registry-cum-secretariat to facilitate the proceedings. The neutral expert has done likewise.

As a preliminary matter, on 8-2-2023, the CoA, through its Chairman reached out to the neutral expert asking if the expert was "open to the idea" of a coordinated process between him and the CoA.[9] India objected to any proposed coordination between the two forums. The neutral expert replied to the Chairman, CoA stating that having considered the views of the parties, at this time it is not desirable to adopt a coordinated process between the two bodies.

With this backdrop, the CoA thought it fit to examine its competence. As India had declined to participate, the CoA gathered India's objections to its jurisdiction as previously placed by it before the World Bank.

By an order dated 6-7-2023, the CoA declared that it was competent to decide the disputes referred to it. Inter alia it held that India's non-participation in the arbitration does not deprive it of its competence and that Pakistan had initiated arbitration prior to India's request to the World Bank for appointment of a neutral expert. At the same time, the CoA declared its intent to organise its future proceedings in phases, mindful of its general duty of mutual respect and comity of the parallel competence of the neutral expert. In the first phase, it would rule on the interpretation of the Treaty, specifically concerning the provisions relating to use of the Western Rivers by India for hydroelectric power.[10]

Proceedings before the neutral expert

The neutral expert held his first meeting in February 2023. In proceedings which followed, India submitted its memorial along with documents and in June 2024, a full delegation site visit took place. In the meanwhile, the neutral expert also decided to examine his competence and issued a detailed order dated 7-1-2025. He concluded that each point of difference referred by India for his determination fell within his competence and he would proceed to render his decision on merits. He acknowledged that incidental questions also arose before the CoA, including as to the interpretation of the Treaty and implication of past decisions rendered under the Treaty, and concluded that these determinations would not take away from his jurisdiction.

India's call for the renegotiation of the Indus Waters Treaty, 1960 and further events leading India to put the Treaty in abeyance

India has been participating in the proceedings before the neutral expert since November 2022. However, in January 2024, it wrote to Pakistan invoking Article 12(3) of the Treaty ("The provisions of this Treaty may from time to time be modified by a duly ratified treaty...."). India asked for renegotiation and modification of the Treaty.[11] India cited fundamental change in circumstances, including altered population demographics and a need to accelerate the development of clean energy, all of which require a reassessment of the obligations under the Treaty. In response, Pakistan conveyed its openness to hear and discuss India's concerns but there is nothing on record to indicate the progress (if any).

On 22-4-2025, a dreadful terrorist attack took place in Pahalgam (Kashmir) in which 26 Indians were singled out and killed in cold blood. The very next day, India declared that the Treaty will be "held in abeyance with immediate effect, until Pakistan credibly and irrevocably abjures its support for cross-border terrorism".[12] This was followed by a formal letter to Pakistan dated 24-4-2025 whereby India conveyed its decision that the Indus Waters Treaty, 1960 will be held in abeyance with immediate effect.[13] India stated that the obligation to honour a Treaty in good faith is fundamental to the Treaty, however, what it has seen is cross-border terrorism by Pakistan. Furthermore, Pakistan has refused to respond to India's request to enter into negotiations for modifications as envisaged under the Treaty and is thus in breach of the Treaty.

India thus conveyed two disparate reasons in support of its decision to put the Treaty in abeyance.

The CoA reconfirms its competence

India's declaration to put the Treaty in abeyance, became a trigger for the CoA to again examine its competence. This led to it issuing a supplemental award dated 27-6-2025.[14] The CoA noted the recent developments including India's call for renegotiation of the Treaty and the April 2025 terrorist attack in Pahalgam. It noted Pakistan's stated position — that it does not accept that the Treaty can be held in abeyance; that it condemns terrorism and that at no point of time it had refused to engage with India to discuss its concern.

The CoA found that it is competent to proceed with the arbitration notwithstanding India's decision to keep the Treaty in abeyance. It did so upon a consideration of customary international law to the effect that the Tribunal's jurisdiction would be determined in light of the situation as it existed when the proceedings were instituted. It held that any subsequent event or a party's unilateral action will not take away its jurisdiction.

The CoA issues an award on interpretation of the Treaty

On 8-8-2025, the CoA issued a partial award confined to interpretation of the Treaty provisions relating to India's ability to harness the Western Rivers for power generation.[15]

The Tribunal examined the Treaty negotiating history and concluded that the "central concern" Pakistan had was that India could (if it was so minded) manipulate and release virtually all the waters in the reservoir or withhold large volumes of water (thereby flooding or starving the rivers).

While the award considers various Treaty mandated constraints on India, it focusses mainly on three components of a dam structure as critical to address Pakistan's concern. These elements constitute means by which waters can be controlled or allowed to pass across the dam. In brief:

> First, the location of the outlets below the "dead storage" level. The lower part of the reservoir containing water which cannot be used for operational purposes is called the "dead storage". Low-level outlets in a reservoir are necessary to facilitate repairs and allow flushing of sediments.
>
> The Tribunal held that India must either design plants without low-level outlets, or if there is no other method to address the technical issues, the outlets should be of the "minimum size and located at the highest level" consistent with "sound and economical design and ... satisfactory operations".[16]
>
> Second, concerns the location of the spillways. Spillways are necessary to allow release of excess waters from the reservoir and safeguard the dam structure. The Tribunal held that if a gated spillway (i.e. where the water is controlled by gates) is necessary, the bottom level of the gates must be located at the highest level, again consistent with "sound and economical design and satisfactory construction and operation of the waters".
>
> Third, concerns location of the "intakes" for the turbines. Intakes are structures in the reservoir to take the water to the turbines. The positioning of the intakes is important. They need to be at a sweet spot — high enough to minimise sediments (which tends to settle) and yet not so high as to allow ingress of the floating debris.

The Treaty provides that the intakes for the turbines shall be located at the highest level, consistent with the satisfactory and economical construction and plant operation — "and with customary and accepted practice of design for the designated range of the plant's operation".

As can be imagined, all of this involves considerable subjectivity and inherently carries the seed for differences and disputes.

The general approach the Tribunal took was that India's use of the Western Rivers for generation of power is an exception to the rule, that it is to "let flow" these waters to Pakistan. Being an exception, it must be strictly construed. Accordingly, it held that the Treaty requirements for project designing are to prevail over the "ideal or best practices" (rather than seeing if in the first instance they can be harmonised). Further, the Treaty contains extensive provisions to "enable Pakistan to satisfy itself that the design" conforms with the Treaty restrictions.[17] Expanding this, the Tribunal held that India must, at an early

stage, convey the particulars of the design to Pakistan relating inter alia to the outlet works, the spillways and the intakes. India must explain why the positioning of the various components is necessary and amongst the various engineering options available, the design meets the requirements of the Treaty. India must then give sufficient time to Pakistan to respond with its views as to whether the design is compliant with the Treaty and for India to then modify its design in the face of "valid concerns" from Pakistan.

Ultimately, the burden lies on India to establish that its design is Treaty compliant.

Comments on the Indus Waters Treaty, 1960 and its interpretation by the CoA

The Indus Waters Treaty, 1960 does put certain designing constraints on India. At the same time, it leaves considerable room for engineering judgment. The CoA's interpretation flags Pakistan's concerns as having an all-prevailing impact but does little to clarify where the lines get crossed. The CoA's approach flows from what it considers were Pakistan's concern at the time of Treaty negotiation, viz. that India should not be able to "weaponise" the Treaty and cause harm to Pakistan. A Treaty premised on "a spirit of goodwill and friendship"[18] should not be approached as if one party (India) would do its worst and the other party (Pakistan) would never misuse its powers.

Under the circumstances, Pakistan can easily challenge and question each and every project India plans on the Western Rivers. The back and forth consultation, followed by dispute resolution processes can result in inordinate delays and have severe socio-economic implications for India. Pakistan on the other hand has nothing to lose and can keep the Damocles sword hanging on India without facing any adverse consequence. The Kishanganga Award (of 2013) did flag this holding:

> *420*. … Given the significant rights enjoyed by India as the upstream riparian under customary international law, as well as the natural advantages enjoyed by the upstream riparian, the Court recognises, … that India might not have entered into the Treaty at all had it not been accorded significant rights to the use of those waters to develop hydro-electric power on the Western Rivers.[19]

The stakes are significant. As per information furnished by Pakistan before the CoA, India has 44 power plants under construction on the Western Rivers and further 105 at the planning stage, involving in all a total installed capacity of 20,339.4 MW.[20] Given the Treaty constraints, the glacial speed with which the consultation and resolution process has worked itself out in the past and the onus cast on India to satisfy Pakistan on largely subjective matters, these projects face an uncertain future.

It would seem that the balance strived for under the Treaty to encourage India to agree to its generous terms would not work for India and India has good reason to call for its renegotiation.

Legal context

India has taken a nuanced stance. It has not repudiated the Treaty. It has put it "in abeyance", which is essentially an interim measure. Pakistan has opposed India's right to put the Treaty in abeyance. It has stated that it condemns terrorism and is open to hear India's concerns for renegotiation of the Treaty.

The Indus Waters Treaty, 1960 contains no provision enabling a party to terminate or to put the Treaty in abeyance (it only contains a provision for modification of the same by another duly ratified treaty). India's right to put the Treaty in abeyance (and the requisite threshold) is thus to be seen under customary international law. This takes one to the Vienna Convention on the Law of Treaties, 1969[21] (VCLT) which is the lead source for interpretation of treaties. The VCLT expressly states that it is not retrospective (and will therefore not apply to the prior in time Indus Waters Treaty, 1960). Moreover, India is not a signatory to the VCLT (Pakistan is but has not ratified it). Thus, the VCLT would not apply proprio vigore. Even so, the VCLT is often resorted to as providing guidance to the relevant customary international law. The VCLT contains provisions for "suspending" a treaty. It contemplates "material breach" and "fundamental change in circumstances", which were not foreseen, and which constituted an essential basis for the consent of the parties, as grounds for suspending a treaty. India has specifically invoked "fundamental changes in the circumstances" when it called for renegotiation of the Treaty and taken Pakistan's lack of response as a breach of the Treaty. India has also cited lack of good faith and "sustained cross-border terrorism" by Pakistan as constituting a breach. India has thus placed its right to put the Treaty in abeyance on the twin grounds of breach and a fundamental change in circumstances. This prima facie takes India's actions within the four corners of customary international law.

The path ahead

The technical issues (challenge to the design of the Kishanganga Plant) will be decided by the neutral expert in due course. As the Treaty provides, this decision will be binding on the parties and on the CoA.

The larger issue of India treating the Treaty to be in abeyance and its implications may escalate into further disputes depending on how India asserts its rights vis-à-vis the six rivers.

Currently, passions run high (on both sides), and it is not possible to sift political rhetoric from ground reality. The Prime Minister of India has stated in Parliament that India has begun desilting exercises in the existing dams (which may or may not be within the four corners of the Treaty).[22] The Government has also declared its intent to create new channels of water to various Indian States (again, no details are on record).

At the same time, India has not repudiated the Treaty or disowned any fundamental feature thereof.

Going forward, Pakistan may categorise any action by India as a breach and invoke the dispute resolution mechanism under the Treaty. India is likely to disregard any such move and will insist on its right to first renegotiate the Treaty. Any fresh dispute will require the World Bank to take sides (which may not happen immediately).

Pakistan may alternatively approach the International Court of Justice under Article 36 of the Statute of the International Court of Justice[23], raising a dispute under customary international law. This would, however, be a dilemma for Pakistan, as it would mean that it accepts the abeyance of the Treaty by India.

It would seem that this has all the ingredients for ground breaking international law and the developments would be keenly watched by jurists, international lawyers and policymakers.

***Advocate and Partner, Kachwaha & Partners. Author can be reached at: skachwaha@kaplegal.com.**

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1. Indus Waters Treaty, 1960.
2. Australia, Canada, Germany, New Zealand, UK and USA.
3. A plant which generates hydroelectric power largely using the natural flow of a river and with limited storage capacity.
4. *Islamic Republic of Pakistan* v. *Republic of India*, 2023 SCC OnLine PCA 1.
5. World Bank Group, World Bank Declares Pause to Protect Indus Waters Treaty (worldbank.org, 12-12-2016).
6. World Bank Group, World Bank Resumes Processes under the Indus Waters Treaty (worldbank.org, 6-4-2022).
7. World Bank Group, World Bank Makes Appointments under the Indus Waters Treaty (worldbank.org, 17-10-2022).
8. *Islamic Republic of Pakistan case*, 2023 SCC OnLine PCA 1.
9. *Islamic Republic of Pakistan case*, 2023 SCC OnLine PCA 1.
10. *Islamic Republic of Pakistan case*, 2023 SCC OnLine PCA 1.
11. "India Issues Second Notice to Pakistan for '64-Year-Old' Indus Waters Treaty", *The Express Tribune* (tribune.com.pk, 19-9-2024).
12. Statement By Foreign Secretary on the Decision of the Cabinet Committee on Security (CCS) (23-4-2025).

13. *Islamic Republic of Pakistan* v. *Republic of India*, 2025 SCC OnLine PCA 1.

14. *Islamic Republic of Pakistan case*, 2025 SCC OnLine PCA 1.

15. The Award is titled: Award on Issues of General Interpretation of the Indus Waters Treaty in *Islamic Republic of Pakistan* v. *Republic of India*, 2025 SCC OnLine PCA 2.

16. Indus Waters Treaty, 1960, Annex. D, Para 8(*d*) (treaties.un.org).

17. Indus Waters Treaty, 1960, Annex. D, Para 8(*d*) (treaties.un.org).

18. Indus Waters Treaty, 1960, Annex. D, Para 8(*d*) (treaties.un.org).

19. *Islamic Republic of Pakistan* v. *Republic of India*, 2013 SCC OnLine PCA 2.

20. *Islamic Republic of Pakistan case*, 2025 SCC OnLine PCA 2.

21. Vienna Convention on the Law of Treaties, 1969.

22. "Indus Waters Treaty Inked by Nehru Bars India from Desilting Dams: PM Modi", *Times of India* (timesofindia.indiatimes.com, 30-7-2025).

23. Statute of the International Court of Justice, Art. 36.

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