

The Indus Waters Treaty Arbitration

The Permanent Court of Arbitration rejected all of India's objections to its jurisdiction and found that it has competence to decide all questions relating to its competence and that the matters referred to arbitration by Pakistan concern a dispute or disputes within the meaning of Article IX(2) of the Indus Waters Treaty 1960 (IWT). The stage is now set for consideration of the merits of the matter relating to Pakistan's concerns about India's hydroelectric project's design and operation. India seems determined on a modification of the IWT which would not be easy to politically accomplish under it even while expressly within its contemplation. Cooperation between India and Pakistan in terms of the IWT seems most important so that the IWT could accommodate necessary changes/updates and relevant technological developments and address climate change since it came into force.

Keywords: *Indus Waters Treaty, India, Pakistan arbitration, competence.*

The Permanent Court of Arbitration has rendered an Award under the Indus Waters Treaty, 1960, and found that it has competence to decide all questions relating to its competence and that the matters referred to arbitration by Pakistan concern a dispute or disputes within the meaning of Article IX(2) of the Indus Waters Treaty 1960 (IWT). India did not participate in the arbitral proceedings and raised six objections to the jurisdiction of the Court of Arbitration.¹

India's Objections

In its first objection, India stated that the Court of Arbitration is not competent to decide its competence.² India argued that applicability of the principle of *kompetenz-kompetenz* follows a proper constitution of the Court of Arbitration.³ India further submitted that it was its sovereign right to accept the validity of the tribunal.⁴ Pakistan replied that India's objection is based on a flawed interpretation of Annexure G and the role of the Court of Arbitration under the IWT.⁵ Pakistan submitted that the Court of Arbitration is competent to decide on its own competence and that India cannot invoke sovereignty for avoiding the IWT's compulsory dispute settlement system.⁶ Pakistan explained that *kompetenz-*

¹*In the matter of an Arbitration before the Court of Arbitration Constituted in Accordance with the Indus Waters Treaty 1960 between Islamic Republic of Pakistan and the Republic of India*, Award of the Competence of the Court, Permanent Court of Arbitration, 6 July 2023 [hereafter the IWT Arbitral Award of 2023], at 50.

² *Ibid.*, at 54 *et seq.*

³ *Ibid.*

⁴ *Ibid.*, at 55.

⁵Response of Pakistan, Preliminary Phase on the Competence of the Court and the Operation of Article IX of the Indus Waters Treaty, Vol. I, at 94 *et seq.* [hereafter Response of Pakistan, Preliminary Phase].

⁶The IWT Arbitration of 2023, *supra* note 1, at 56.

1 *kompetenz* is a consequence of the validity of the constitution of the Court of
2 Arbitration⁷ and that both India and Pakistan entered into the IWT in the exercise of
3 their sovereignty.⁸ Pakistan further contended that the IWT, which provides for the
4 tribunal, is binding also on India and is required to be performed in good faith.⁹ The
5 Court of Arbitration made no distinction between objections concerning its
6 constitution and objections to its jurisdiction for the purposes of its inherent power
7 to interpret its constituent instrument,¹⁰ i.e. the IWT, and rejected India's first
8 objection.

9 India's second objection relates to a non-existence of "dispute" referable to
10 arbitration under Article IX(2) of the IWT. According to India, in the absence of
11 agreement of both the Commissioners, a "dispute" referable to arbitration arises
12 where a neutral expert determines that a "difference" is a "dispute".¹¹ Pakistan
13 replied that India's objection is based on its misreading of Article IX(2) of the
14 IWT.¹² Pakistan contended that a dispute has validly arisen under Article IX of the
15 IWT. Pakistan explained that unless a Commissioner has identified a "difference"
16 or requested the appointment of a neutral expert, a "dispute" has arisen under Article
17 IX(2) of the IWT.¹³ Pakistan noted that its interpretation finds support in the
18 reasoning of a prior arbitration between the parties and that India's interpretation
19 runs counter to the text and object and purpose of the IWT.¹⁴ Pakistan added that its
20 24 July 2015 request for the appointment of neutral expert was later revoked on 25
21 February 2017 and that India did not request for the appointment of a neutral expert
22 on 11 August 2016.¹⁵ The Court of Arbitration noted that the Commission may
23 direct any difference to a neutral expert or to a court of arbitration or settle the
24 difference in any other way as agreed by it.¹⁶ It further noted that Pakistan invited
25 India to join it in appointing a neutral expert to address those differences, India
26 declined, and Pakistan then legally revoked that invitation. The differences
27 therefore, the Court of Arbitration concluded, did not come within the jurisdiction
28 of a neutral expert and qualified as disputes that could be settled through a court of
29 arbitration.¹⁷

30 India's third objection stated that the Court of Arbitration is not competent
31 because the requirements of Article IX(3), (4) and (5) of the IWT were not met.
32 India said that the parties never agreed to refer the matter to arbitration and never
33 satisfied its procedural requirements.¹⁸ Pakistan submitted that the relevant and
34 applicable procedural requirements of the IWT have been met.¹⁹ Pakistan added that

⁷*Ibid.*

⁸*Ibid.*, at 57.

⁹*Ibid.*, at 57.

¹⁰*Ibid.*, at 58.

¹¹*Ibid.*, at 60.

¹²Response of Pakistan, Preliminary Phase, *supra* note 5, at 69 *et seq.*

¹³The IWT Arbitration of 2023, *supra* note 1, at 64.

¹⁴*Ibid.*, at 65.

¹⁵*Ibid.*

¹⁶*Ibid.*, at 79.

¹⁷*Ibid.*, at 85.

¹⁸*Ibid.*

¹⁹*Ibid.*, at 87.

1 the IWT does not require a joint report for arbitration to settle a dispute.²⁰ Relying
 2 on an ICJ judgment,²¹ Pakistan argued that recourse to negotiations is not
 3 mandatory²² and that it is the opinion of the requesting party which is required for
 4 recourse to arbitration.²³ Pakistan recalled that it informed India that the disputes are
 5 not likely to be resolved by further negotiations.²⁴ The Court of Arbitration noted
 6 that no agreement of the parties was required for referral of their dispute to
 7 arbitration.²⁵ Further, it stated that India’s participation in the negotiations was
 8 without waving its position of inadmissibility of the matter before arbitration.²⁶
 9 Finally, the Court of Arbitration noted that the fact that the parties did not change
 10 their position during negotiations does not mean that negotiations were not held.²⁷
 11 The Court of Arbitration therefore rejected India’s third objection.

12 By its fourth objection, India stated that, even if a dispute has arisen, the Court
 13 of Arbitration has not been constituted as per Annexure G to the IWT.²⁸ Pakistan
 14 replied that India’s position is legally and factually inaccurate.²⁹ Pakistan submitted
 15 that the Court of Arbitration has been properly constituted despite India’s refusal to
 16 participate in the constitution of the Court of Arbitration and to appoint its
 17 arbitrator.³⁰ Pakistan added that failure by India to appoint two arbitrators did not
 18 prevent the Court of Arbitration from being constituted and competent.³¹ In
 19 Pakistan’s view, any other interpretation of the IWT would be contrary to the text
 20 of the IWT and its object and purpose.³² The Court of Arbitration noted that India
 21 failed to appoint its arbitrators within 30 days of Pakistan’s request for arbitration.
 22 It added that it recognized India’s right to appoint two arbitrators up to seven days
 23 of an affirmative decision on its competence. The Court of Arbitration therefore
 24 rejected India’s fourth objection.³³

25 In its fifth objection, India claimed that the Court of Arbitration is not
 26 competent because the neutral expert is dealing with the question.³⁴ Pakistan termed
 27 that India’s objection is based on “assumptions”.³⁵ Pakistan countered that no
 28 neutral expert is dealing with any points of difference as it had been neither
 29 appointed nor identified when the proceedings of the Court of Arbitration
 30 commenced in August 2016.³⁶ According to Pakistan, a mere indication of intention

²⁰*Ibid.*

²¹*Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment [2008] ICJ Rep 177, para. 145

²²The IWT Arbitration of 2023, *supra* note 1, at 89.

²³*Ibid.*, at 90.

²⁴*Ibid.*, at 91.

²⁵*Ibid.*, at 95.

²⁶*Ibid.*, at 96.

²⁷*Ibid.*, at 97.

²⁸*Ibid.*, at 99.

²⁹Response of Pakistan, Preliminary Phase, *supra* note 5, at 89 *et seq.*

³⁰The IWT Arbitration of 2023, *supra* note 1, at 100.

³¹*Ibid.*

³²*Ibid.*

³³*Ibid.*, at 104.

³⁴*Ibid.*, at 106.

³⁵Response of Pakistan, Preliminary Phase, *supra* note 5, at 64 *et seq.*

³⁶The IWT Arbitration of 2023, *supra* note 1., at 108.

1 to request the appointment of a neutral expert is not enough.³⁷ Pakistan added that
 2 even if a neutral expert is appointed after constitution of a Court of Arbitration it
 3 would not prevent from continuing with arbitral proceedings.³⁸ The Court of
 4 Arbitration noted that India’s intention to request the appointment of a neutral
 5 expert³⁹ and that the World Bank thereafter appointed a neutral expert⁴⁰ was not
 6 conclusive that a neutral expert was “dealing with” the questions which are before
 7 the Court of Arbitration. The Court of Arbitration therefore rejected India’s fifth
 8 objection.⁴¹

9 India’s sixth and final objection stated that the Court of Arbitration is not
 10 necessary.⁴² Pakistan contended that the necessity for arbitration has arisen as it had
 11 met the prerequisites to establish a court of arbitration.⁴³ Pakistan explained that the
 12 necessity to establish a court of arbitration arises once a request to establish it has
 13 been filed and to determine the question of its competence.⁴⁴ Further, according to
 14 Pakistan, the necessity to establish a Court of Arbitration arose because its request
 15 for arbitration specifies questions which cannot be answered by a neutral expert.⁴⁵
 16 Pakistan finally added that the necessity to establish a Court of Arbitration has arisen
 17 even if it is not indispensable.⁴⁶ The Court of Arbitration found that the requirements
 18 of Article IX of the IWT have been met and therefore it is necessary.⁴⁷ It added that
 19 the Article IX does not require a substantive review of whether the Court of
 20 Arbitrations is needed⁴⁸ and, even if a neutral expert had been dealing with any
 21 difference, it would not bar the necessity of the Court of Arbitration unless the
 22 questions before it were the same as before the expert.⁴⁹ Further, according to the
 23 Court of Arbitration, the question of parallel proceeding is to be resolved by the
 24 respective bodies and not by a party. The Court of Arbitration therefore rejected
 25 India’s sixth objection.⁵⁰

28 **The Indus Water Treaty**

29
 30 The IWT stems from a common desire of India and Pakistan of “attaining a
 31 most complete and satisfactory utilization of the waters of the Indus system of
 32 rivers... and of making provision for the settlement, in a cooperative spirit, of all

³⁷*Ibid.*, at 109.

³⁸*Ibid.*

³⁹*Ibid.*, at 113.

⁴⁰*Ibid.*, at 116.

⁴¹*Ibid.*

⁴²*Ibid.*, at 117.

⁴³*Ibid.*, at 118–19.

⁴⁴*Ibid.*, at 119.

⁴⁵*Ibid.*, at 119–20.

⁴⁶*Ibid.*, at 122. Further, see Response of Pakistan, Preliminary Phase, *supra* note 5, at 74 *et seq.*

⁴⁷*Ibid.*, at 123.

⁴⁸*Ibid.*

⁴⁹*Ibid.*

⁵⁰*Ibid.*, at 127.

1 such questions”⁵¹ concerning its interpretation and application. While all the waters
 2 of the Sutlej, Beas and Ravi (Eastern) rivers have been made available to India,⁵²
 3 those of the Indus, Jhelum and Chenab (Western) rivers have been given to
 4 Pakistan.⁵³ The IWT has been characterised as “the world’s most generous water-
 5 sharing pact”⁵⁴ However, India can make a restricted use of the Western rivers for
 6 domestic use, non-consumptive use, agriculture use and generation of hydroelectric
 7 power.⁵⁵ The IWT has established a Commission comprising of one representative
 8 each from India and Pakistan to “make every effort to settle promptly, in accordance
 9 with the provisions of Article IX(1), any question arising thereunder.”⁵⁶ The IWT
 10 provides that any “question”⁵⁷ arising between the parties shall be “first”⁵⁸
 11 examined by the “Commission”.⁵⁹ A “question” unresolved by the commission is
 12 considered a “difference”⁶⁰ by the IWT and a “difference” may become a “dispute”
 13 ⁶¹ to be resolved by the Commission⁶² or a Court of Arbitration.⁶³ The importance
 14 of the IWT may be measured by the fact that the ILA used it “as context for its
 15 Helsinki Rules...”⁶⁴

18 India’s Non-Participation

19
 20 India’s non-participation involved the question of jurisdiction of the Court of
 21 Arbitration and whether a “dispute” under the IWT existed between Indian and
 22 Pakistan. Each will be discussed below.

⁵¹ Preamble to the IWT, (December 1960), online: <https://treaties.un.org/doc/Publication/UNTs/Volume%20419/volume-419-I-6032-English.pdf>.

⁵²Article II of the IWT.

⁵³Article III of the IWT. Further, see Memorial of Pakistan, First Phase on Merits, Vol. II, at 6 *et seq.*

⁵⁴Brahma Chellaney, “Rivers of Conflict between India and Pakistan” (2016), Nikkei Asian Review, <https://chellaney.net/2016/08/19/rivers-of-conflict-between-india-and-pakistan/> (accessed 20 November 2024).

⁵⁵Article III (2) of the IWT.

⁵⁶Article VIII (b) of the IWT.

⁵⁷Article IX (1) of the IWT.

⁵⁸Article IX (1) of the IWT.

⁵⁹Article IX (1) of the IWT.

⁶⁰Article IX (2) of the IWT.

⁶¹Article IX (2) (b) of the IWT.

⁶²Article IX (3) (4) of the IWT.

⁶³Article IX (5) of the IWT.

⁶⁴Mary Miner et al., “Water Sharing between India and Pakistan: A Critical Evaluation of the Indus Waters Treaty” (2009) 34 *Water International* 204, at 206. Further, see generally AA Michel, *The Indus Rivers: A Study of the Effects of Partition* (Yale 1967); N D Gulhati, *Indus Waters Treaty: An Exercise in International Mediation* (Allied Publishers 1973); A K Biswas, “Indus Waters Treaty: The Negotiating Process” (1992) 17 *Water International* 201; Salman MA Salman and Kishore Uprety, *Conflict and Cooperation on South Asia’s International Rivers* (World Bank 2002).

1 (a) *Jurisdiction*
2

3 On the issue of India’s non-participation in the arbitral proceedings, it may be
4 recalled that non-participation of a disputant cannot affect the validity of the
5 outcome of adjudicatory proceedings.⁶⁵ However, when a disputant fails to appear
6 before the adjudicatory body, the body, before making its finding on the merits of
7 the case, must establish its jurisdiction over the matter before it.⁶⁶ In the *Nuclear*
8 *Tests* case, France did not appear before the Court,⁶⁷ but the Court proceeded and
9 reached a conclusion.⁶⁸ In the *Ageing Sea Continental Shelf* case, Turkey failed to
10 appear before the Court and the Court reiterated that, “before finding upon the
11 merits, [it] must satisfy itself that it has jurisdiction.”⁶⁹ Later, Iran did not appear
12 before the Court and the Court had to take up “any preliminary question... which
13 might constitute a bar to any further examination of the merits...”⁷⁰ The Court
14 therefore consistently affirmed that a non-appearing party remains a party to the
15 proceedings.⁷¹ More recently, the South China Sea Arbitration held that “[d]espite
16 its non-appearance, China remains a Party to these proceedings...”⁷² It is therefore
17 difficult to contest the finding of the Court of Arbitration on India’s non-
18 participation before it. India’s stance therefore seems in contrast with its stance in
19 the Kishanganga Arbitration in which it participated while retaining objections to
20 its jurisdiction.⁷³

21
22 (b) “Dispute”
23

24 The judicial understanding of the concept of dispute is no less fairly settled. In
25 response to the contention of the Russian Federation that there was no “dispute”, the
26 Court did not “consider that the words “matter”, “complaint”, “dispute” and “issue”
27 are used in Articles 11 to 16 in such a systematic way that requires that a narrower
28 interpretation than usual be given to the word “dispute””.⁷⁴ And, relevant to the
29 nature of the IWT, the Court found “that the content of the 1977 Treaty indicates
30 that it must be regarded as establishing a territorial régime...”⁷⁵ Hence, the IWT

⁶⁵*Military and Paramilitary Activities in und against Nicaragua (Nicaragua v. United States of America)*, [1986] I.C.J. Rep. 14 at 23–24.

⁶⁶*Fisheries Jurisdiction (United Kingdom v. Iceland)*, [1973] I.C.J. Rep. 3 at pp 7–8.

⁶⁷*Nuclear Tests (Australia v. France)*, [1974] I.C.J. Rep. 253 at 257.

⁶⁸*Id.*

⁶⁹*Aegean Sea Continental Shelf*, [1978] I.C.J. Rep. 3 at 7–8.

⁷⁰*United States Diplomatic and Consular Staff in Tehran*, [1980] I.C.J. Rep. 3 at 18.

⁷¹*The “Arctic Sunrise” case (Kingdom of the Netherlands v. Russian Federation, Provisional Measures*, [2013] International Tribunals for the Law of the Sea, Order of 22 November 2013, at 242.

⁷²*A Court of Arbitration Constituted Under Annex VII to the 1982 United Nations Convention on the Law of the Sea between the Republic of the Philippines and the People’s Republic of China, Award on Jurisdiction and Admissibility*, 29 October 2015, at 39.

⁷³ The IWT Arbitration of 2023, *supra* note 1, at 50. Further, see *infra* note 138.

⁷⁴*Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, [2011] I.C.J. Rep. 70 at 84.

⁷⁵*Gabčíkovo-Nagyymaros Project (Hungary/Slovakia)*, [1997] I.C.J. Rep. 7 at 71 (hereafter the *Gabčíkovo-Nagyymaros Project Case*).

1 continues to govern the Indus waters relationship between India and Pakistan. This
 2 “relationship is also determined by the rules of other relevant conventions to which
 3 the two States are party, by the rules of general international law and, in this
 4 particular case, by the rules of State responsibility...”⁷⁶ Clearly, the legal
 5 relationship founded between India and Pakistan by the IWT “is preserved.”⁷⁷ The
 6 Court underscored that “[w]hat is required in the present case by the rule *pacta sunt*
 7 *servanda*, as reflected in Article 26 of the Vienna Convention on the Law of Treaties,
 8 1969 (VCLT), is that the Parties find an agreed solution within the cooperative
 9 context of the Treaty.”⁷⁸ Later, the Court underscored it qua customary international
 10 law embodied in Article 26 of the VCLT⁷⁹ and which also applies to “procedural
 11 obligations which are essential to co-operation between States...”⁸⁰ Clearly, the
 12 finding of the Court of Arbitration on the existence of dispute does not appear to
 13 suffer from any legal infirmity.

16 Some Merits Issues

17
 18 The key issues of merits concerned the project’s design and water flow, the
 19 operation of the IWT, interpretation of the IWT and the suspension of the Permanent
 20 Indus Commission (PIC) talks. Each invites some discussion.

22 (a) *Project’s design and water flow*

23
 24 Since the Court of Arbitration has unanimously rejected each of India’s six
 25 objections to its competence, the stage is now set for consideration of the merits of
 26 the matter relating to Pakistan’s concerns about India’s hydroelectric project’s
 27 design and operation. While Pakistan believes that the designs of India’s project
 28 allow it more control over the waters and to the detriment of Pakistan, India
 29 considers that it is allowed to construct its projects in accordance with the
 30 contemporary scientific knowledge than the technology existed at the time of
 31 conclusion of the IWT. Accordingly, on 25 January 2023, India issued to Pakistan
 32 its “notification for modification”⁸¹ and followed its long-running disputes with
 33 Pakistan over the construction of its hydroelectric power projects over the Western
 34 rivers Chenab and Jhelum’s tributary Kishanganga (known as Neelam in Pakistan).
 35 Article XII(3) of the IWT provides for its modification.⁸² While India believes that

⁷⁶*Ibid.*, at 76.

⁷⁷*Ibid.*

⁷⁸*Ibid.*, at 78.

⁷⁹*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, [2010] I.C.J. Rep. 14 at 67.

⁸⁰*Id.*

⁸¹Rezaul H Laskar, ‘India Issues Notice to Pakistan to Modify Indus Waters Treaty’, (January 2023), online: <https://www.hindustantimes.com/india-news/india-issues-notice-to-pakistan-to-modify-indus-waters-treaty-101674839706437.html>.

⁸²The provision states: “The provisions of this Treaty may from time to time be modified by a duly ratified treaty concluded for that purpose between the two Governments.” For a recent comment, see Anwar Sadat, ‘India, Pakistan and modifying the Indus Waters Treaty’ (8 November 2024), online: <https://www.thehindu.com/opinion/op-ed/india-pakistan-and-modifying-the-indus-waters-treaty/article68841976.ece>.

1 its projects are of run-of-the-river nature and hence do not violate the reservoir
 2 provisions of the IWT, Pakistan alleges that the designs of the Indian dams constrict
 3 the flow of the rivers to Pakistan.⁸³ It is believed that a third-party dispute resolution
 4 “can undermine future cooperation”⁸⁴ on the Indus water sharing between India and
 5 Pakistan.

6 The Indus basin covers nearly 71 per cent of Pakistan’s “territory”.⁸⁵
 7 Therefore, Pakistan is heavily dependent on the Indus waters. However, for
 8 Pakistan, it is stated that “run-of-the-river dams arrest silt, depriving Pakistani fields
 9 of vital nutrients and lowering their productivity.”⁸⁶ Pakistan believes that, “[b]y
 10 demanding its revision, India is rendering the well-functioning Indus Waters Treaty
 11 dysfunctional.”⁸⁷ Pakistan believes that India “attempts to gain control over the
 12 three western rivers allocated to Pakistan [is] in violation of the IWT.”⁸⁸ It is claimed
 13 that “[c]utting water to Pakistan would result in widespread famine and
 14 drought...”⁸⁹ It is argued that “any intention to modify [the] IWT by India, may
 15 threaten Pakistan’s national security.”⁹⁰ In India’s view, Pakistan from time to time
 16 objected to India’s hydroelectric projects ever since it started building them in
 17 1970s.⁹¹ Pakistan’s persistent allegations of violations of the IWT are “entrenched
 18 distrust and compulsions of domestic politics”.⁹² Pakistan “has repeatedly used the
 19 Treaty provisions to block projects by India.”⁹³ It is argued that rather than “solving
 20 the issues around these projects in a constructive and cooperative manner, Pakistan’s
 21 objective was to kill the projects by rendering them unworkable.”⁹⁴

⁸³Further, see Memorial of Pakistan, First Phase on Merits, Vol. I, at 83 *et seq.*

⁸⁴Miner et al., *supra* note 59, at 211.

⁸⁵Khursheed Ahmad Wani and P Moorthy, “Indus Waters Treaty: AN Emerging Flashpoint between India and Pakistan” (2014) 67 Pakistan Horizon 41, at 48

⁸⁶John Joseph Vater, “The Indus Waters Treaty: Prospects for India-Pakistan Peace”, (June 2021), online: at 6, <https://www.isas.nus.edu.sg/papers/the-indus-waters-treaty-prospects-for-india-pakistan-peace/>.

⁸⁷Ali Tauqeer Sheikh, “India’s Myopic Bid to Renegotiate Indus Waters Treaty will Hurt all of South Asia”, (April 2023), online: <https://scroll.in/article/1046934/opinion-indias-myopic-bid-to-renegotiate-indus-water-treaty-will-hurt-all-of-south-asia>.

⁸⁸Institute of Policy Studies, “Indus Water Treaty Arbitration—Battle over Water Sharing”, (February 2023), online: <https://www.ips.org.pk/indus-water-treaty-arbitration-battle-over-water-sharing/>.

⁸⁹Evan D Gumas, “The Use of Water as a Weapon against Public Health in Palestine and Kashmir”, (May 2021), Online: https://research.library.fordham.edu/cgi/viewcontent.cgi?article=1051&context=international_senior.

⁹⁰Nazia Sheikh, “Indian Overture to Alter Indus Water Treaty”, (February 2023), online: <https://www.pakistantoday.com.pk/2023/02/19/indian-overture-to-alter-indus-water-treaty/>.

⁹¹Further, see Zubair Ahmad Dar, ‘Power Projects in Jammu and Kashmir: Controversy, Law and Justice (2011–2012), LIDS Working Paper, Harvard University, at 6.

⁹²Bharat H Desai, “Sixty Years of the Indus Waters Treaty in the Era of Climate Change: A Look Ahead in Hydro-Diplomacy and Treaty Law” (2021) 51 Environmental Policy and Law 175, at 179.

⁹³Pankaj Saran and P K Saxena, “The Indus Waters Treaty: Time to Move Ahead”, (June 2023), online: <https://www.natstrat.org/articledetail/publications/the-indus-waters-treaty-time-to-move-ahead-78.html#>.

⁹⁴Sushant Sareen, “Indus Waters Treaty: Opening the Water Front”, (January 2023), online: <https://www.orfonline.org/expert-speak/indus-waters-treaty>.

1 Water is not without giving India some leverage over Pakistan as the Indus
 2 system rivers that originate in the Himalayas pass through India and before entering
 3 Pakistan. And it was not without and before stoppage of water by India flowing
 4 across Pakistan on 1 April 1948 that the IWT was signed on 19 September 1960.⁹⁵
 5 India's relations with Pakistan have been anything but good for decades. Both
 6 countries have witnessed a troubled past and an acrimonious present mainly over
 7 the issues of terrorism and self-determination raised by them, respectively, relative
 8 to a geographical reality.⁹⁶ It is argued that the spirit of the IWT would require
 9 "rethinking the use of terrorism as an instrument of state policy."⁹⁷

10
 11 (b) *The IWT operation*
 12

13 The IWT does not expressly provide for its suspension. The VCLT, which
 14 greatly reflects customary international law, contemplates treaty suspension by
 15 provision or consent⁹⁸, impliedly by conclusion of a new treaty,⁹⁹ as a consequence
 16 of its breach,¹⁰⁰ and for a fundamental change of circumstances.¹⁰¹ India has not yet
 17 expressly or clearly claimed that Pakistan has violated a provision essential to the
 18 accomplishment of the object or purpose of the IWT while Pakistan has alleged that
 19 India has failed to fulfil its IWT obligation with respect to information-sharing.¹⁰²
 20 No express provision in the IWT seems applicable in the event of its breach. An
 21 unforeseen terrorism may hardly be claimed as a fundamental change of
 22 circumstance unless it is proved that it constituted an essential basis of the consent
 23 of the parties to the IWT, which India has not yet expressly or clearly claimed.
 24 Lauterpacht held the view that the doctrine *rebus sic stantibus* is "not a talisman for
 25 revising treaties..."¹⁰³ The ICJ has equated a fundamental change to "a radical
 26 transformation"¹⁰⁴ and "of the extent of the obligations still to be performed".¹⁰⁵
 27 Later, the Court stated that "the stability of treaty relations requires that the plea of
 28 fundamental change of circumstances be applied only in exceptional cases."¹⁰⁶
 29 Fitzmaurice was quite realistic when he noted that "in international life,

⁹⁵Further, see Ijaz Hussain, *Indus Waters Treaty: Political and Legal Dimensions* (Oxford: Oxford University Press, 2018) Chapter 2.

⁹⁶Further, see more recently Amit Ranjan, "Indus Waters Treaty Negotiations: Geopolitics, Disputes and Cooperation" (2024) 45 South Asia Research 1, 13 *et seq.*

⁹⁷ Brahma Chellaney, "South Asia's Looming Water War", (February 2023), online: <https://www.project-syndicate.org/commentary/india-pakistan-indus-waters-treaty-renegotiation-by-brahma-chellaney-2023-02>.

⁹⁸VCLT, Article 57. This provision does not in principle foreclose the possibility of an implicit provision for suspension. See Olivier Corten and Pierre Klein, *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford: Oxford University Press, 2011), vol. II, 1285.

⁹⁹*Id.*, Article 59.

¹⁰⁰*Id.*, Article 60. Further, see Bruno Simma and Christian Tams, *The Vienna Convention on the Law of Treaties: A Commentary* (London: Oxford University Press, 2011) 1351.

¹⁰¹*Id.*, Article 62(3).

¹⁰² Further, see Memorial of Pakistan, First Phase on Merits, Vol. I, at 169 *et seq.*

¹⁰³ Hersch Lauterpacht, *The Development of International Law by the International Court* (Cambridge: Grotius Society, 1982) at 85.

¹⁰⁴ *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, [1973] I.C.J. Rep. 49 at 63.

¹⁰⁵ *Ibid.*, at 65.

¹⁰⁶ *Gabčíkovo-Nagymaros*, *supra* note 75, at 64.

1 circumstances *are* constantly changing. But these changes are not, generally
 2 speaking, of a kind that can or should affect the continued operation of treaties.¹⁰⁷
 3 Further, the International Law Commission (ILC) and the International Court of
 4 Justice (ICJ) in the 1997 *Gabčíkovo-Nagymaros Case*¹⁰⁸ clarify that suspension of
 5 the operation of a treaty and suspension of performance of obligations are not the
 6 same as a countermeasure for an internationally wrongful act.¹⁰⁹ In other words, it
 7 is the applicable international law which is determinative of wrongfulness: the
 8 United Nations Security Council Resolution 1373, adopted expressly under Chapter
 9 VII of the UN Charter.¹¹⁰ Any terrorist acts instructed, directed or controlled by
 10 Pakistan would also be attributable to Pakistan.¹¹¹ Non-conformity of a Pakistan's
 11 act with its international obligation may be constitutive of its breach of that
 12 obligation.¹¹² India's suspension of the PIC¹¹³ talks is evidently till terror comes to
 13 an end and is therefore taken apparently or presumably as a countermeasure against
 14 Pakistan's breach of its international obligations, including those apparently or
 15 presumably arising under the Security Council Resolution 1373.¹¹⁴ If India's
 16 suspension of the PIC talks is a countermeasure, then it is permitted to only induce
 17 Pakistan to comply with its international obligations and without prejudice to India's
 18 obligations to compensate Pakistan for any material loss caused,¹¹⁵ to refrain from
 19 the threat or use of force for the protection of fundamental human rights of a
 20 humanitarian character prohibiting reprisals, under peremptory norms of general
 21 international law,¹¹⁶ under any dispute settlement procedures applicable between
 22 India and Pakistan,¹¹⁷ including under the IWT, to respect the inviolability of
 23 diplomatic or consular agents, premises, archives and documents of Pakistan,¹¹⁸ to
 24 fulfil any obligation embodied in the IWT to which India would be subject under
 25 international law independently of the IWT,¹¹⁹ without prejudice to any applicable

¹⁰⁷Second Report on the Law of Treaties by Gerald G Fitzmaurice, Special Rapporteur, A/CN.4/107, Yearbook of International Law Commission (1957), vol. II, at 56–7 (italics in the original).

¹⁰⁸*Gabčíkovo-Nagymaros Project Case*, *supra* note 75.

¹⁰⁹International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, Chapter II, Article 49 *et seq.* and the *Gabčíkovo-Nagymaros Project Case*, *supra* note 70, at 39 and 65.

¹¹⁰United Nations Security Council Resolution 1373 (28 September 2001).

¹¹¹International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, Article 8.

¹¹²*Id.*, Article 12.

¹¹³Article VIII of the IWT.

¹¹⁴International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, Article 49 and its preceding commentary.

¹¹⁵*Id.*, Article 27.

¹¹⁶See in particular Articles 53 and 64 of the VCLT; International Law Commission, Third Report on peremptory norms of general international law (*jus cogens*), 12 February 2018.

¹¹⁷Further, see *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, [1972] I.C.J. Rep. 46.

¹¹⁸International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, Articles 27 and 50.

¹¹⁹VCLT, Article 43.

1 international customary law¹²⁰ and qua the 1997 Watercourse Convention¹²¹ and
 2 the *Gabčíkovo-Nagyymaros* ICJ Judgment,¹²² equitable and reasonable use of waters
 3 by India and no significant harm to Pakistan to the extent that it is reflective of
 4 customary international law.¹²³ It is in this light that it would be appropriate to
 5 briefly address the question of the legality of and/or justification(s) for the
 6 appointment of a Neutral Expert and the establishment of a Court of Arbitration.

7
 8 (c) *The IWT interpretation*
 9

10 Contrary to India’s consistent position, that a prior appointment of a Neutral
 11 Expert bars a subsequent establishment of a Court of Arbitration and pending
 12 disposal of the matter by the Neutral Expert, the Court of Arbitration pointed out
 13 that there is no such bar unless the question to be considered by the tribunal is the
 14 same as before the Neutral Expert. As in the *Kishanganga* Arbitration,¹²⁴ parties’
 15 arguments bring to the fore the importance of treaty interpretation.¹²⁵ While India’s
 16 position that the “[t]reaty does not provide for parallel proceedings on the same set
 17 of issues”¹²⁶ is understandable as a matter of law and while on facts the Court of
 18 Arbitration did not find it to be the case, that India “cannot remain a permanent
 19 victim of Pak sponsored terrorism and yet live with a treaty which the Indian public
 20 regards as unfair and inequitable”¹²⁷ takes the matter to a different plane and invites
 21 some reflection on the legality of and/or justification for its suspension of the PIC
 22 talks upon serving a notice¹²⁸ on Pakistan and until India and Pakistan “meet and
 23 discuss renegotiation of the Indus Waters Treaty”.¹²⁹
 24
 25

¹²⁰*Id.*, Article 34–38.

¹²¹Convention on the Law of the Non-navigational Uses of International Watercourses, 1997,
https://legal.un.org/ilc/texts/instruments/english/conventions/8_3_1997.pdf.

¹²²*Gabčíkovo-Nagyymaros Project Case*, *supra* note 75.

¹²³See, in particular, Stephen C McCaffrey, “Convention on the Law of the Non-navigational
 Uses of International Watercourses”, (2008), online: https://legal.un.org/avl/pdf/ha/clnuiw/clnuiw_e.pdf.

¹²⁴John R Cook, “*In re* Indus Waters Kishenganga Arbitration (Pakistan v. India), Final Award”
 (2014) 108 *American Journal of International Law* 308, 314.

¹²⁵See Articles 31 and 32 of the VLCT, which reflect customary international law. Further, see
 Memorial of Pakistan, First Phase on Merits, Vol. I, at 209 *et seq.*

¹²⁶“Matters Pertaining to the Indus Waters Treaty”, (July 2023), online: <https://www.mea.gov.in/press-releases.htm?dtl/36761/Matters+pertaining+to+the+Indus+Waters+Treaty>.

¹²⁷Arvind Gupta, “Time to Reconsider 1960 Pact”, (September 2020), online: <https://www.vfindia.org/article/2020/september/19/the-indus-water-treaty-60-precariously-poised>.

¹²⁸Suhasini Haider and Kallol Bhattacharjee, “India sends notice to Pakistan to amend 1960
 Indus Waters Treaty” (27 January 2024), online: <https://www.thehindu.com/news/national/india-notifies-pakistan-on-modification-of-indus-waters-treaty/article66438780.ece>.

¹²⁹Suhasini Haider and Jacob Koshy, “No more Indus Commission meetings till Treaty
 negotiated” (18 September 2024), online: <https://www.thehindu.com/news/national/india-serves-notice-to-pakistan-seeking-review-of-indus-water-treaty/article6865577.ece>.

1 (d) *Suspension of the PIC Talks*
2

3 The PIC under the IWT is required to meet at least once every year.¹³⁰ The PIC
4 last met on 30 and 31 May 2022.¹³¹ The PIC is to first examine and endeavour to
5 resolve by agreement between the parties¹³² any question of interpretation or
6 application of the IWT and the existence of any fact which, if established, would
7 constitute a breach of the IWT. A difference is deemed to have arisen between the
8 parties¹³³ which shall be dealt with by a Neutral Expert at the request of either
9 commissioner¹³⁴ and which shall be treated as a dispute if not within the provision
10 on Neutral Expert¹³⁵ and shall be settled by Fact-finding by the PIC,¹³⁶ direct
11 negotiations between India and Pakistan,¹³⁷ mediation between India and
12 Pakistan,¹³⁸ and a court of arbitration upon agreement between India and Pakistan
13 or at the request of India or Pakistan.¹³⁹ We recall that the issue between the Neutral
14 Expert and the Court of Arbitration was found by the Court of Arbitration to be
15 different and not the same and that there seems therefore nothing in the IWT that
16 precludes the appointment of a Neutral Expert and the establishment of a Court of
17 Arbitration.¹⁴⁰ On the other hand, India held its 6th meeting of the Steering
18 Committee on matters related to the IWT on 17 April 2023 and “took stock of the
19 on-going modification process of the Indus Waters Treaty.”¹⁴¹ It thus seems clear
20 that India is determined on a modification of the IWT which would not be easy to
21 politically accomplish under it even while expressly within its contemplation.¹⁴²
22
23
24

¹³⁰Art. VIII:5 of the IWT.

¹³¹“118th Meeting of the India-Pakistan Permanent Indus Commission”, (May 2022), online: <https://www.mea.gov.in/press-releases.htm?dtl/35375/118th+meeting+of+the+IndiaPakistan+Permanent+Indus+Commission>.

¹³²Article IX:1 of the IWT.

¹³³Article IX:2 of the IWT.

¹³⁴Article IX:2:a of the IWT.

¹³⁵Article IX:2:b of the IWT.

¹³⁶Article IX:3 of the IWT.

¹³⁷Article IX:4 of the IWT.

¹³⁸Article IX:5 of the IWT.

¹³⁹*Id.*

¹⁴⁰IWT Arbitral Award of 2023, *supra* note 1, at 309.

¹⁴¹“6th Meeting of the Steering Committee on Matters Related to the Indus Waters Treaty” (April 2023), online: <https://www.mea.gov.in/press-releases.htm?dtl/36495/6th+meeting+of+the+steering+committee+on+matters+related+to+the+indus+waters+treaty>.

¹⁴²The IWT states in Article XII(3): “The provisions of this Treaty may from time to time be modified by a duly ratified treaty concluded for that purpose between the two Governments.”

1 **Conclusion**
2

3 It is not that the IWT was never tested before by India and Pakistan for the
4 settlement of their disputes.¹⁴³ While India’s non-participation in the Court of
5 Arbitration has not changed its status relative to Pakistan,¹⁴⁴ it is the Neutral Expert,
6 not India, which first pointed out that the IWT uses the technology of 1950s.¹⁴⁵ It is
7 therefore not unreasonable to suppose that the Indus waters sharing would become
8 more challenging in future¹⁴⁶ and that the IWT would have to become more
9 cooperative.¹⁴⁷ India and Pakistan would be called upon to devise necessary means
10 consistent with the IWT¹⁴⁸ whose unilateral modification or denunciation is hardly
11 practicable.¹⁴⁹ This however is not to undermine the importance of considerations
12 that suggest revision of the IWT¹⁵⁰ following an appropriate reassessment of its
13 suitability.¹⁵¹ Among the many suggestions to this end,¹⁵² cooperation between
14 India and Pakistan in terms of the IWT seems indispensable so that it could
15 accommodate necessary changes and relevant technological developments and
16 address climate change since it came into force.
17
18

¹⁴³See *In the Matter of the Indus Waters Kishanganga Arbitration between The Islamic Republic of Pakistan and The Republic of India, Final Award, Permanent Court of Arbitration*, 20 December 2013; Salman M A Salman, “The Baglihar difference and its resolution process – a triumph for the Indus Waters Treaty?” (2008) 10 *Water Policy* 105.

¹⁴⁴Shafqat Kakakhel, “Indus Waters Treaty under Threat: Part I” (March 2023), online: https://sdpi.org/indus-waters-treaty-under-threat-part---i-/news_detail.

¹⁴⁵Further, see Dar, *supra* note 91, at 6.

¹⁴⁶Further, see Miner et al., *supra* note 64, at 214; V G Hegde (2018), ‘National and international legal aspects of river water sharing: The South Asian experience’ in I. Ahmed (ed), *South Asian Rivers: Framework for Cooperation* (Springer 2018).

¹⁴⁷Further, see Dar, *supra* note 91, at 6.

¹⁴⁸Further, see Miner et al., *supra* note 64, at 213.

¹⁴⁹Further, see Anurag Jyoti and Raj Kamal Kapur, “Analysing the Indus Waters Treaty 1960: Beyond the Hype, Hoopla and the Hyperbole” (2023) *USI Occasional Paper*, at 9.

¹⁵⁰Further, see Tahira Mumtaz, Fatima Bilal and Sobia Younas, “Indus Waters Treaty and Water Scarcity in India: Implications for Pakistan” (2023) 11 *Journal of South Asian Studies* 11, at 17.

¹⁵¹Further, see S K Singh, “India’s Approach to Indus Waters Treaty: National Security Perspective”, (January 2024), online: <https://cenjows.in/indias-approach-to-indus-water-treaty-national-security-perspective/>.

¹⁵²See, for instance, Khursheed Ahmad Wani and P Moorthy, “Indus Waters Treaty: An Emerging Flashpoint between India and Pakistan” (2014) 67 *Pakistan Horizon* 41, at 59.