



Baglihar and Kishenganga systemic interpretation issues and response to Court's Question (a)

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Hearing for the First Phase on the Merits

Indus Waters Treaty Arbitration (Pakistan v. India)

PCA Case No. 2023-01

10 July 2024, The Hague



The context and practical importance of the Court's Question (a)



Question (a)

Procedural Order No. 6, paragraph 35(a)

“(a). To what extent and on what basis are the decisions of past dispute resolution bodies established pursuant to Article IX of the Treaty concerning (i) competence, (ii) matters of fact, (iii) the interpretation of the Treaty, or (iv) the application of the Treaty in particular factual circumstances, binding or otherwise controlling with respect to (a) the Parties, (b) the present proceedings before the Court, (c) the present proceedings before the Neutral Expert, and (d) future proceedings before a court of arbitration or a neutral expert? Insofar as such decisions are binding or otherwise controlling, what—if any—exceptions or limitations may limit their binding/controlling effect?”

The Award on Competence features decisions on (i) interpretation (blue) and (ii) application of the Treaty in particular circumstances (red)



VI. DECISION

“318. For the above reasons, the Court of Arbitration unanimously:

- A. FINDS that India’s non-appearance in these proceedings does not deprive the Court of Arbitration of competence.
- B. FINDS that the Court of Arbitration has competence, in accordance with Paragraph 16 of Annexure G to the Indus Waters Treaty 1960, to decide all questions relating to its competence.
- C. FINDS that the matters referred to arbitration in Pakistan’s Request for Arbitration concern a dispute or disputes within the meaning of Article IX(2) of the Indus Waters Treaty 1960.
- D. FINDS that the initiation of the present proceedings was in accordance with Article IX(3),(4), and (5) of the Indus Waters Treaty 1960.
- E. FINDS that the Court of Arbitration was properly constituted in accordance with Paragraphs 4 to 11 of Annexure G to the Indus Waters Treaty 1960.
- F. FINDS that India’s request for, and the World Bank’s appointment of, a Neutral Expert does not, pursuant to Article IX(6) of the Indus Waters Treaty 1960, deprive the Court of Arbitration of competence or limit its competence.
- G. FINDS that Paragraph 1 of Annexure G to the Indus Waters Treaty 1960 does not create an independent test for the necessity of the constitution of a Court of Arbitration beyond the requirements of Article IX of the Treaty.
- H. DECLARES that the Court of Arbitration is competent to consider and determine the disputes set forth in Pakistan’s Request for Arbitration.
- I. RESERVES for further consideration and directions all issues not decided in this Award.”



The Parties' ongoing differences with regard to the legal status and relevance of *Baglihar* and *Kishenganga*

The Parties' disagreement on the binding effect of *Kishenganga* Court Awards and the limited/non-binding effect of *Baglihar* Neutral Expert determination



Record of the 108th Meeting of the Commission, 24-25 March 2013, dated 24 September 2013, P-0070

- **PCIW** highlighted the “conclusive” nature of the *Kishenganga* Court decision on the question of drawdown flushing, both in respect of plant-specific disputes and “in general for all the future run-of-river HEPs on the Western Rivers”.
- **PCIW** stated that “Pakistan, did not consider the interpretation provided by the NE in *Baglihar* case as a valid interpretation of the Treaty”.
- **ICIW** stated that “irrespective of the views held by PCIW on NE's interpretations in *Baglihar* case, Pondage is governed by the provisions of the Treaty”.

The Parties' disagreement on the binding effect of *Kishenganga* Court Awards and the limited/non-binding effect of *Baglihar* Neutral Expert determinations



Record of the 110th Meeting, 23-27 August 2014, dated 1 February 2015, P-0024

- **PCIW** highlighted the binding quality of the *Kishenganga* Court decision, both in respect of plant-specific disputes and more generally on the Western Rivers.
- **PCIW** stated, in particular, that “as per the Final Award of Court of Arbitration issued in December 2013 it is a settled matter that India cannot drawdown the reservoir below the DSL except in an unforeseen emergency -not only *Kishenganga* HEP but in general for all the future run-of-river HEPs on the Western Rivers.”
- **PCIW** dismissed the reasoning of the Neutral Expert in the *Baglihar* determination and rejected its purported *erga omnes* effect, by reference to the finding of the *Kishenganga* Court on that issue.
- **PCIW** further stated that, while the *Baglihar* Neutral Expert’s decision was “final and binding in respect of the particular matter on which the decision [wa]s made”, the Neutral Expert’s determination on maximum pondage [...] could not be accepted as a “guideline”.

The Parties' disagreement on the binding effect of *Kishenganga Court Awards* and the limited/non-binding effect of *Baglihar Neutral Expert determinations*



Record of the 110th Meeting, 23-27 August 2014, dated 1 February 2015, P-0024

- **ICIW** put forward as a “guideline” the methodology proposed by the *Baglihar* Neutral Expert for calculating maximum pondage.
- **ICIW** stated that “an unambiguous neutral view is available in the *Baglihar* determination which can always serve as guideline [and i]f the same is followed, the issue can be resolved in all run of the river [HEPs] on [the] Western Rivers [...]”.
- **ICIW** further noted that “[t]hough the determination of pondage by the Neutral Expert was for *Baglihar*, the same can be considered as a guideline for the other projects of India on Western Rivers”.

Record of the 111th Meeting, 31 January-4 February 2015, dated 31 May 2015, P-0025

- **PCIW** once again rejected the purported *erga omnes* effect of the Neutral Expert *Baglihar* decision.

The Parties' disagreement on the binding effect of *Kishenganga* Court Awards and the limited/non-binding effect of *Baglihar* Neutral Expert determinations



Letter No. WT(47)/(7464-A)/PCIW from the PCIW to the ICIW dated 30 January 2015, P-0026

- **PCIW** reiterated that the *Baglihar* determination “had no general precedential value and that it was only binding in the specific case before him but not in respect of such future hydroelectric plants, while the decision of the Court of Arbitration, by contrast, would be binding generally for all such plants.”

Letter No WT(132)/(7531-A)/PCIW (with enclosure) from the PCIW to the ICIW dated 25 February 2016, P-0023

- **PCIW** stated that “India's reliance upon the Neutral Expert's decision on pondage with respect to the *Baglihar* HEP was ‘invalid’ because, pursuant to [...] the Partial Award by the Court of Arbitration in the *Kishenganga* case, ‘(t)he effect of a neutral expert's determination is restricted to the elements of the design and operation of the specific hydro-electric plant considered by that Expert.’”



Question (a)

Procedural Order No. 6, paragraph 35(a)

“(a). To what extent and on what basis are the decisions of past dispute resolution bodies established pursuant to Article IX of the Treaty concerning (i) competence, (ii) matters of fact, (iii) the interpretation of the Treaty, or (iv) the application of the Treaty in particular factual circumstances, binding or otherwise controlling with respect to (a) the Parties, (b) the present proceedings before the Court, (c) the present proceedings before the Neutral Expert, and (d) future proceedings before a court of arbitration or a neutral expert? Insofar as such decisions are binding or otherwise controlling, what—if any—exceptions or limitations may limit their binding/controlling effect?”



The “binding or otherwise controlling effect” of decisions of a Court of Arbitration



Annexure G of the IWT

Decisions of a Court of Arbitration

“16. Subject to the provisions of this Treaty and except as the Parties may otherwise agree, **the Court shall decide all questions relating to its competence [...].**”

“23. The Court shall render its Award, in writing, on the issues in dispute and on such relief, including financial compensation, as may have been claimed. The Award shall be accompanied by a statement of reasons. An Award signed by four or more members of the Court shall constitute the Award of the Court. A signed counterpart of the Award shall be delivered by the Court to each Party. **Any such Award rendered in accordance with the provisions of this Annexure in regard to a particular dispute shall be final and binding upon the Parties with respect to that dispute.**”



The doctrine of *res judicata*

B. Cheng, *General Principles of Law as applied by International Courts and Tribunals*, p. 336, PLA-0095

“There seems little, if indeed any question as to *res judicata* being a general principle of law or as to its applicability in international judicial proceedings. Thus the *Trail Smelter* Arbitral Tribunal (1935) stated in its *Final Award* (1941): –

‘That the sanctity of *res judicata* attaches to a final decision of an international tribunal is an essential and settled rule of international law.’

‘If it is true that international relations based on law and justice require arbitral or judicial adjudication of international disputes, it is equally true that such adjudication must, in principle, remain unchallenged, if it is to be effective to that end.’”



The doctrine of *res judicata*

**B. Cheng, *General Principles of Law as applied by International Courts and Tribunals*, pp. 336-337,
PLA-0095**

“As to the meaning of *res judicata*, the Permanent Court of International Justice held in the *Société commerciale de Belgique Case* [Belgium v. Greece] (1939), that: –

‘Recognition of an award as *res judicata* means nothing else than recognition of the fact that the terms of that award are definitive and obligatory.’”



The doctrine of *res judicata*

Question of the Delimitation of the Continental Shelf beyond 200 Nautical Miles (Colombia v. Nicaragua), Preliminary Objections, Judgment, I.C.J. Reports 2016, p. 126, PLA-0108

“59. It is not sufficient, for the application of *res judicata*, to identify the case at issue, characterized by the same parties, object and legal grounds; it is Also necessary to ascertain the content of the decision, the finality of which is to be guaranteed. The Court cannot be satisfied merely by an identity between requests successively submitted to it by the same parties; it must determine whether and to what extent first claim his already been definitively settled. [...]

61. The decision of the Court is contained in the operative clause of the judgment. However, **in order to ascertain what is covered by *res judicata*, it may be necessary to determine the meaning of the operative clause by reference to the reasoning set out in the judgment in question.**”



The doctrine of *res judicata*

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43, PLA-0109

“116. Two purposes, one general, the other specific, underlie the principle of *res judicata*, internationally as nationally. [...] The Court’s function, according to Article 38 of its Statute, is to ‘decide’, that is, to bring to an end, ‘such disputes as are submitted to it’. [...] Depriving a litigant of the benefit of a judgment it has already obtained must in general be seen as a breach of the principles governing the legal settlement of disputes.”

[See also para. 117 re *res judicata* applying to decisions on competence or jurisdiction]

The *Kishenganga* Court’s decisions on the “application of the Treaty in particular factual circumstances”



Kishenganga, Partial Award, 18 February 2013, PLA-003

V. Decision

“A. In relation to the First Dispute,

- (1) The Kishenganga Hydro-Electric Project, as described to the Court by India, constitutes a Run-of-River Plant for the purpose of Paragraph 15 of Annexure D to the Indus Waters Treaty, and in particular sub-paragraph (iii) thereof.
- (2) India may accordingly divert water from the Kishenganga/Neelum River for power generation by the Kishenganga Hydro-Electric Plant and may deliver the water released below the power station into the Bonar Nallah.
- (3) India is however under an obligation to construct and operate the Kishenganga Hydro-Electric Plant in such a way as to maintain a minimum flow of water in the Kishenganga/Neelum River, at a rate to be determined by the Court in a Final Award.”

The *Kishenganga* Court's decisions on the “interpretation of the Treaty” and its “application in particular circumstances” at the KHEP



Kishenganga, Partial Award, 18 February 2013, PLA-003

V. Decision [cont'd]

“B. In relation to the Second Dispute,

- (1) Except in the case of an unforeseen emergency, the Treaty does not permit reduction below Dead Storage Level of the water level in the reservoirs of Run-of-River Plants on the Western Rivers.
- (2) The accumulation of sediment in the reservoir of a Run-of-River Plant on the Western Rivers does not constitute an unforeseen emergency that would permit the depletion of the reservoir below Dead Storage Level for drawdown flushing purposes.
- (3) Accordingly, India may not employ drawdown flushing at the reservoir of the Kishenganga Hydro-Electric Plant to an extent that would entail depletion of the reservoir below Dead Storage Level.
- (4) [...].”

The generally binding effect of the *Kishenganga* Court's decision on legality of drawdown flushing under the Treaty



Kishenganga, Partial Award, 18 February 2013, PLA-003

“466. The terms of the Second Dispute could be understood to relate to the permissibility of reservoir depletion in the abstract. The record, however, both in the Commission and before this Court, indicates that Pakistan’s core concern is that India’s planned operation of the reservoirs at the KHEP and other, future hydro-electric projects will include depletion below Dead Storage Level for the purpose of flushing accumulated sediment from the reservoir. India, in turn, has confirmed its intention to employ drawdown flushing with respect to the KHEP. Within this context, the Parties’ pleadings with respect to the Second Dispute, as well as the relief requested by Pakistan, focus on the permissibility of this procedure. **The question facing the Court is therefore whether the Treaty prohibits drawdown flushing by India at the KHEP and at other, future Run-of-River Plants on the Western Rivers.**”

The generally binding effect of the *Kishenganga* Court's decision on legality of drawdown flushing under the Treaty



Kishenganga, Partial Award, 18 February 2013, PLA-003

“468. [...]. While the Parties’ disagreement has taken shape in the context of the KHEP’s design and India’s intention to use drawdown flushing for that reservoir, the Second Dispute, as framed by Pakistan and argued by both Parties, is not limited to the KHEP alone: it concerns India’s right to use drawdown flushing at any Run-of-River Plant that India may construct on the Western Rivers in the future. Accordingly, the Court’s decision on the Second Dispute will apply to other Run-of-River Plants to be built, as well as to the KHEP.”

The generally binding effect of the *Kishenganga Court's* decision on legality of drawdown flushing under the Treaty



Kishenganga, Decision on India's Request for Clarification or Interpretation, 20 May 2013, PLA-021

“25. With respect to the scope of the question submitted and discussed by the Parties, this Court considers it to be beyond doubt that the permissibility of drawdown flushing was put before the Court as a general issue. As noted in the *Partial Award*, Pakistan's Request for Arbitration was formulated in general terms, and was not limited to the KHEP: Whether under the Treaty, India may deplete or bring the reservoir level of a run-of-river Plant below Dead Storage Level in any circumstances except in the case of an unforeseen emergency.”

The generally binding effect of the *Kishenganga Court's* decision on legality of drawdown flushing under the Treaty



Kishenganga arbitration, Decision on India's Request for Clarification or Interpretation, 20 May 2013, PLA-021

“27. Faced in the Second Dispute with a question of interpretation centred on the general meaning and application of a particular provision of the Indus Waters Treaty and its relationship with the Treaty as a whole, the Court's answer to it was general as well and not limited to the KHEP. Indeed, the Court itself indicated the limits of its Decision, stating in Paragraph B(4) that: Paragraphs B(1) and B(2) above do not apply to Run-of-River Plants that are in operation on the date of issuance of this Partial Award. [...]. **The inclusion of such an express limitation makes clear that — except where so limited — the Court's Decision applies to Run-of-River Plants generally.**”

The generally binding effect of the Court's decisions on the legality of drawdown flushing under the Treaty



Kishenganga, India's Request for Clarification or Interpretation, 18 May 2013, P-0548 (KR-0011)

“3. The need for this clarification or interpretation arises because, on its face, Decision paragraph B.1 is ambiguous and may be read as categorically prohibiting India from reducing the water level below Dead Storage Level during drawdown flushing for sediment control in all future Run-of-River plants (save the ones grandfathered by the Court in paragraph B.4 of the Decision) at every dam site under all circumstances on every tributary on all three Western Rivers, on the ground that alternative effective methodologies for sediment control are feasible at each and every site on all of those rivers and their tributaries. Clarification or interpretation of this portion of the Court's Decision is necessary in order to preserve India's right to generate hydro-electric power on the Western Rivers under Article III(2)(d) of the Treaty and to prevent controversies in the future.”

“42. The interpretation requested by India would thus help to avoid future differences and disputes, lead to certainty, efficiency and accuracy in settling any differences or disputes that do arise and avoid weakening the Treaty and its continuing efficacy for both Parties.”

The generally binding effect of the *Kishenganga* Court's decision on legality of drawdown flushing under the Treaty



Kishenganga, Decision on India's Request for Clarification or Interpretation, 20 May 2013, PLA-021

“34. In respect of the realization of specific hydro-electric projects, particularly future projects, the Court noted that ‘[h]ydrologic, geologic, social, economic, environmental and regulatory considerations are all directly relevant’ and that **the prohibition on drawdown flushing constitutes one such regulatory consideration**. As the Court made clear in its *Partial Award*, **it is for India to secure appropriate locations** and to draw appropriate designs for its Run-of-River Plants, bearing in mind that **the Indus Waters Treaty has foreclosed the depletion of Dead Storage for drawdown flushing. That prohibition is based on constraints that are part of the Treaty's essential bargain**, as is evident from the *Partial Award's* analysis of the text and context of the Treaty. **It follows that the prohibition in question is not dependent on the particulars of a given site or project; that is, to use India's term, the prohibition is not 'site-specific' but general.**”

The *Kishenganga* Court's first "limitation or exception" to the *res judicata* effect of its Award (on drawdown flushing)



Kishenganga, Partial Award, 18 February 2013, PLA-003

V. Decision [cont'd]

"B. In relation to the Second Dispute,

(1) [...]

(4) Paragraphs B(1) and B(2) above **do not apply to Run-of-River Plants that are in operation on the date of issuance of this Partial Award.** Likewise, Paragraphs B(1) and B(2) **do not apply to Run-of-River Plants already under construction on the date of issuance of this Partial Award, the design of which, having been duly communicated by India under the provisions of Annexure D, had not been objected to by Pakistan as provided for in Annexure D.**"

The generally binding effect of the Court's decisions on the legality of drawdown flushing under the Treaty



Kishenganga, Decision on India's Request for Clarification or Interpretation, 20 May 2013, PLA-021

“27. Faced in the Second Dispute with a question of interpretation centred on the general meaning and application of a particular provision of the Indus Waters Treaty and its relationship with the Treaty as a whole, the Court's answer to it was general as well and not limited to the KHEP. Indeed, the Court itself indicated the limits of its Decision, stating in **Paragraph B(4)** that:

Paragraphs B(1) and B(2) above do not apply to Run-of-River Plants that are in operation on the date of issuance of this Partial Award. Likewise, Paragraphs B(1) and B(2) do not apply to Run-of-River Plants already under construction on the date of issuance of this Partial Award, the design of which, having been duly communicated by India under the provisions of Annexure D, had not been objected to by Pakistan as provided for in Annexure D.

The inclusion of such an express limitation makes clear that — except where so limited — the Court's Decision applies to Run-of-River Plants generally.”

The generally binding effect of the Court's decisions on the legality of drawdown flushing under the Treaty



Kishenganga arbitration, Partial Award, 18 February 2013, PLA-003

“523. The Court is conscious of the fact that the issues of reservoir construction and operation raised by the Second Dispute come before it at a time at which the process of harnessing the potential for the generation of hydro-electricity on the Western Rivers, as foreseen by the Treaty, is already under way. This does not alter the duty of the Court to interpret and apply the Treaty in the manner required by Paragraph 29 of Annexure G. It would not be in accordance with the governing principles enunciated in this Partial Award for the interpretation of the Treaty, and its application, to cast doubt retrospectively on any Run-of-River Plants already in operation on the Western Rivers. For the same reasons, the Court wishes to make plain that this Partial Award may not be so interpreted as to affect retrospectively any such Plant already under construction (although not yet in operation) the design of which, having been duly communicated by India under the provisions of Annexure D, had not been objected to by Pakistan as provided for in Annexure D. That is plainly not the case for the Kishenganga Hydro-Electric Project itself.”

See also Kishenganga arbitration, Partial Award, para. 469, at slide 35 below.

The role of rules of customary environmental law in the interpretation of the Treaty by a Court of Arbitration



Kishenganga arbitration, Partial Award, 18 February 2013, PLA-003

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

The *Kishenganga* Court's interpretation of the importance of India's "let flow" obligation under Article III of the IWT



Kishenganga arbitration, Partial Award, 18 February 2013, PLA-003

“410. Turning to the object and purpose of the Treaty, the Court notes that the Treaty establishes a regime of qualified rights and priorities in respect of specific uses, which governs the interpretation of Paragraph 15. The Treaty recognizes Pakistan’s right to ‘unrestricted’ use of all the waters of the Western Rivers, including the Kishenganga/Neelum. **The deliberate division and allocation of the six main watercourses of the Indus system of rivers between the Parties is a defining characteristic of the Treaty.** The inevitable conclusion is that **Pakistan is given priority in the use of the waters of the Western Rivers, just as India has priority in the use of the waters of the Eastern Rivers.**”



The *Kishenganga* Court's holding on the contrasting binding effect of Court of Arbitration awards and Neutral Expert determinations

Kishenganga arbitration, Partial Award, 18 February 2013, PLA-003

“470. The effect of a neutral expert's determination is restricted to the elements of the design and operation of the specific hydro-electric plant considered by that Expert. Although India has urged the Court to consider the Second Dispute to have been effectively resolved by *Baglihar*, the Court does not see in Annexure F any indication that the Parties intended a neutral expert's determination to have a general precedential value beyond the scope of the particular matter before him. *Baglihar* is binding for the Parties in relation to the Baglihar project; the present decision, by contrast, is binding in respect of the general question presented in these proceedings.”

The *Kishenganga* Court's second "limitation or exception" to the *res judicata* effect of its awards (on minimum flows)



Kishenganga arbitration, Final Award, 20 December 2013, PLA-004

“117. [...] Uncertainty is also present in attempts to predict future flow conditions, and the Court is cognizant that flows in the Kishenganga/Neelum may come to differ, perhaps significantly, from the historical record as a result of factors beyond the control of either Party, including climate change.

118. In its *Partial Award*, the Court stated that 'stability and predictability in the availability of the waters of the Kishenganga/Neelum for each Party's use are vitally important for the effective utilization of rights accorded to each Party by the Treaty (including its incorporation of customary international environmental law).
[...] At the same time, the Court considers it important not to permit the doctrine of *res judicata* to extend the life of this Award into circumstances in which its reasoning no longer accords with reality along the Kishenganga/Neelum. The minimum flow will therefore be open to reconsideration as laid down in the following paragraph.

119. [...] If, beginning seven years after the diversion of the Kishenganga/Neelum through the KHEP, either Party considers that reconsideration of the Court's determination of the minimum flow is necessary, it will be entitled to seek such reconsideration through the Permanent Indus Commission and the mechanisms of the Treaty.”



The “binding or otherwise controlling effect” of decisions of a Neutral Expert



Annexure F of the IWT

Neutral Expert

“PART 1 – Questions to be referred to a Neutral Expert

1. Subject to the provisions of Paragraph 2, either Commissioner may, under the provisions of Article IX (2)(a), refer to a Neutral Expert **any of the following questions**: [...] [sub-paras 1-23 of Part 1 of Annexure F]

7. Should the Commission be unable to agree that any particular difference falls within Part 1 of this Annexure, the Neutral Expert shall, after hearing both Parties, decide whether or not it so falls. Should he decide that the difference so falls, he shall proceed to render a decision on the merits; should he decide otherwise, he shall inform the Commission that, in his opinion, the difference should be treated as a dispute. Should the Neutral Expert decide that only a part of the difference so falls, he shall, at his discretion, either:

(a) proceed to render a decision on the part which so falls, and inform the Commission that, in his opinion, the part which does not so fall should be treated as a dispute, or

(b) inform the Commission that, in his opinion, the entire difference should be treated as a dispute. [...]

11. **The decision of the Neutral Expert on all matters within his competence shall be final and binding, in respect of the particular matter on which the decision is made, upon the Parties and upon any Court of Arbitration established under the provisions of Article IX (5).**”



Article IX(2)(a) of the IWT

Settlement of differences and disputes

“(2) 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 1 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 [...].”

Paragraph 7 of Annexure F of the IWT

Neutral Expert



“7. Should the Commission be unable to agree that any particular difference falls within Part 1 of this Annexure, the Neutral Expert shall, after hearing both Parties, decide whether or not it so falls. Should he decide that the difference so falls, he shall proceed to render a decision on the merits; should he decide otherwise, he shall inform the Commission that, in his opinion, the difference should be treated as a dispute. Should the Neutral Expert decide that only a part of the difference so falls, he shall, at his discretion, either:

- (a) proceed to render a decision on the part which so falls, and inform the Commission that, in his opinion, the part which does not so fall should be treated as a dispute, or
- (b) inform the Commission that, in his opinion, the entire difference should be treated as a dispute. [...]



The *Kishenganga* Court rejected the *Baglihar* Neutral Expert's approach in adopting its systemic interpretation of the Treaty

Kishenganga arbitration, Partial Award, 18 February 2013, PLA-003

“522. In carrying out this evaluation, the Court emphasizes that it is not considering whether the development of hydro-electric power without recourse to drawdown flushing is preferable for India. **It is not for the Court to apply ‘best practices’ in resolving this dispute.** India has quite understandably argued in these proceedings for a right to the optimal design and operation of its hydro-electric installations on the upstream stretches of the Western Rivers. However, **any exercise of design involves consideration of a variety of factors—not all of them technical. Hydrologic, geologic, social, economic, environmental and regulatory considerations are all directly relevant, and the Court considers the Treaty restraints on the construction and operation by India of reservoirs to be such a regulatory factor. For the Court, the optimal design and operation of a hydro-electric plant is that which can practically be achieved within the constraints imposed by the Treaty.**”



The *Kishenganga* Court recognised the binding effect of the *Baglihar* Neutral Expert's determination with respect to the *Baglihar* HEP

Kishenganga arbitration, Partial Award, 18 February 2013, PLA-003

“469. Although it is the Court’s duty to decide, as a matter of law, upon the permissibility of drawdown flushing generally under the Treaty, the Court must emphasize that its decision will have no effect on the Parties’ rights and obligations in respect of the Baglihar hydro-electric project, as determined by the Neutral Expert in Baglihar. In the time since that determination, India has finalized the design of the project and completed construction in reliance upon the Neutral Expert’s determination, which it was fully entitled to do. **The Neutral Expert’s determination has thus quite literally been realized in concrete at Baglihar, and it is not for this Court to revisit fundamental aspects of the design and operation of that Plant.** Nor could Pakistan so ask: Annexure F expressly provides that the decision of a neutral expert shall be final and binding ‘in respect of the particular matter on which the decision is made.’ Indeed, Pakistan itself has not sought a reversal of the Baglihar determination, nor has it asked for the dismantling of the Baglihar hydro-electric plant. Pakistan has made it clear that it does not purport to appeal the Baglihar determination.”



The *Kishenganga* Court highlighted the contrasting consequences of Court of Arbitration awards and Neutral Expert decisions

Kishenganga arbitration, Partial Award, 18 February 2013, PLA-003

“470. The effect of a neutral expert’s determination is restricted to the elements of the design and operation of the specific hydro-electric plant considered by that Expert. Although India has urged the Court to consider the Second Dispute to have been effectively resolved by Baglihar, the Court does not see in Annexure F any indication that the Parties intended a neutral expert’s determination to have a general precedential value beyond the scope of the particular matter before him. Baglihar is binding for the Parties in relation to the Baglihar project; the present decision, by contrast, is binding in respect of the general question presented in these proceedings.”

India acknowledged in *Kishenganga* that the *Baglihar* determination was not a “binding precedent”



India’s Rejoinder (*Kishenganga* arbitration), 21 May 2012, P-0227

“4.44 India, through its Commissioner or otherwise, has maintained that there was a decision available by way of a precedent on the question whether drawdown flushing was permissible under the Treaty or not; and that India was entitled to rely on it as a relevant and applicable precedent. Relying on precedents of courts and other tribunals is a desirable and universally accepted practice. Such reliance is not sought as a binding precedent, but simply as a decision dealing with similar facts and law; and therefore one that obviously sheds authoritative light, from a Treaty-based dispute-resolution mechanism, on the interpretation of the provisions in question. It is important to point out that the decision is clearly *res judicata* with respect to the Baglihar Plant and the issues that were decided by the Neutral Expert (under Paragraph 11 of Annexure F); it is also ‘final and binding in respect of the particular matter on which the decision is made upon any Court of Arbitration ...’. This strengthens its value as a precedent. Such an authoritative interpretation should be respected by the Parties in a way that would eliminate repetitive examination of the same issue. In relying on the *Baglihar* Determination in this respect, India did just that and no more.”

India acknowledged in *Kishenganga* that the *Baglihar* determination was not a “binding precedent”



India's Rejoinder (*Kishenganga* arbitration), 21 May 2012, P-0227, cont'd

“4.110 [...] [T]here is no prohibition under the Treaty against depletion of the reservoir below Dead Storage Level for maintenance purpose by drawdown flushing or otherwise. The decision of the Neutral Expert in the Baglihar case holding such practice a maintenance measure permitted by the Treaty, while not binding on this Court, is a sound precedent to be followed.”



The *Kishenganga* Court highlighted the contrasting consequences of Court of Arbitration awards and Neutral Expert decisions

Kishenganga arbitration, Partial Award, 18 February 2013, PLA-003

“470. The effect of a neutral expert’s determination is restricted to the elements of the design and operation of the specific hydro-electric plant considered by that Expert. Although India has urged the Court to consider the Second Dispute to have been effectively resolved by *Baglihar*, **the Court does not see in Annexure F any indication that the Parties intended a neutral expert’s determination to have a general precedential value beyond the scope of the particular matter before him.** *Baglihar* is binding for the Parties in relation to the Baglihar project; the present decision, by contrast, is binding in respect of the general question presented in these proceedings.”

