

**PCA PRESS RELEASE****INDUS WATERS KISHENGANGA ARBITRATION
(PAKISTAN V. INDIA)****Court of Arbitration Concludes Hearing on the Merits****THE HAGUE, September 1, 2012.**

The Court of Arbitration constituted in the matter of the *Indus Waters Kishenganga Arbitration (Pakistan v. India)* has concluded a two-week hearing on the merits at the Peace Palace in The Hague.

Pakistan initiated this arbitration with India under Article IX and Annexure G of the Indus Waters Treaty, an international agreement concluded by India and Pakistan in 1960 which regulates the use by the two States of the Indus system of rivers.

In these proceedings, Pakistan places two matters for determination by the Court of Arbitration:

1. Whether India's proposed diversion of the river Kishenganga (Neelum) into another Tributary, i.e. the Bonar Madmati Nallah, being one central element of the Kishenganga Project, breaches India's legal obligations owed to Pakistan under the Treaty, as interpreted and applied in accordance with international law, including India's obligations under Article III(2) (let flow all the waters of the Western rivers and not permit any interference with those waters) and Article IV(6) (maintenance of natural channels)? [the "First Dispute"]
2. Whether under the Treaty, India may deplete or bring the reservoir level of a run-of-river Plant below Dead Storage Level (DSL) in any circumstances except in the case of an unforeseen emergency? [the "Second Dispute"]

The primary subject of the arbitration is the Kishenganga Hydro-Electric Project (the "KHEP") currently under construction by India on the Kishenganga/Neelum River, a tributary of the Jhelum River. The KHEP is designed to generate power by diverting water from a dam site on the Kishenganga/Neelum (within the Gurez valley, an area of higher elevation) to the Bonar Madmati Nallah, another tributary of the Jhelum (lower in elevation and closely located to Wular Lake) through a system of tunnels, with the moving water powering turbines having a capacity of 330 megawatts. For the management of sedimentation in the reservoir, India intends to employ drawdown flushing, a technique requiring the depletion of the level in the KHEP reservoir below Dead Storage Level (the Treaty's definition of this term is reproduced in the annex to this press release). Pakistan contends that the KHEP's planned diversion of the waters of the Kishenganga/Neelum, as well as the use of the drawdown flushing technique, both at the KHEP or at other Indian hydro-electric projects that the Treaty regulates, are impermissible under the Indus Waters Treaty. India maintains that both the design and planned mode of operation of the KHEP are fully in conformity with the Treaty.

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Judge Stephen M. Schwebel, Chairman of the Court of Arbitration, opened the hearing on August 20, 2012 by noting on the historic importance of the *Indus Waters Kishenganga Arbitration* for inter-State arbitration and the Permanent Court of Arbitration and observing that "the Indus Waters Treaty was a great achievement of Pakistan and India and of the World Bank, and it remains so; . . . and these proceedings are an illustration of its continuing vitality."

Opening Statements

The Agent of Pakistan, Mr. Kamal Majidulla (Special Assistant to the Prime Minister for Water Resources and Agriculture), spoke first on behalf of Pakistan. Mr. Majidulla recalled the “existential importance” of the waters of the Indus system of rivers to the people and agriculture of the Indus valley. He described the “Solomonic solution” adopted by India and Pakistan in the Indus Waters Treaty – the apportionment of the rivers of the Indus system between the two States. Mr. Majidulla emphasized the fundamental principle of the Treaty in Pakistan’s view: that India should not interfere with the flow of the waters of the “Western Rivers” allocated to Pakistan, including the Jhelum River and its tributaries. Pakistan maintained that India’s plan to construct the KHEP on the Kishenganga/Neelum River, which includes the diversion of its waters, is in breach of India’s obligations under the Treaty. After Mr. Majidulla’s address, Professor James Crawford introduced Pakistan’s legal arguments.

The Agent of India, Mr. Dhruv Vijay Singh (Secretary to the Government of India, Ministry of Water Resources), made opening remarks on behalf of India. Mr. Singh stressed the crucial role of hydro-electric projects such as the KHEP in alleviating poverty and improving quality of life across India. He emphasized that under the Indus Waters Treaty both Pakistan and India have rights to the use of all the rivers of the Indus system for certain purposes, even when particular rivers are in principle allocated to the other State. These rights, Mr. Singh maintained, include India’s right to hydro-electric uses on the Kishenganga/Neelum River. Mr. Singh also argued that the Treaty’s negotiating history shows that hydro-electric power generation was in the Parties’ minds from the beginning of the World Bank’s involvement in the negotiations, and that the Treaty authorizes certain inter-tributary transfers by India for the purpose of generating hydro-electric power, including, in India’s view, the KHEP. Mr. Fali S. Nariman spoke next, introducing India’s legal arguments.

Hearing of Expert Witnesses

Following the opening statements, the Chairman called upon the Parties to present their expert witnesses. The experts were cross-examined on matters within their scientific and technical expertise.

Pakistan first presented Mr. Syed Muhammad Mehr Ali Shah for cross-examination regarding the potential hydrological impact of the KHEP on the reach of the Kishenganga/Neelum River downstream, as well as the anticipated impact of the KHEP on the production of electricity by the Neelum-Jhelum Hydro-Electric Project (the “N-JHEP”) Pakistan is constructing downstream on the same river. Pakistan then presented Dr. Jackie King and Mr. Vaqar Zakaria for cross-examination with respect to the expected environmental impact downstream of the KHEP. Finally, Pakistan presented Dr. Gregory Morris for cross-examination on sediment management in relation to hydro-electric plants, including the KHEP.

India then presented its experts. Mr. Jesper Goodley Dannisøe and Dr. Niels Jepsen were called to testify with respect to the potential environmental impact of the KHEP. Dr. K.G. Rangaraju was presented for cross-examination regarding sediment control in response to Dr. Morris’ views.

The expert examinations concluded mid-day on August 22, 2012.

The Parties’ Oral Arguments

Counsel for both Parties next delivered two rounds of oral arguments. Ms. Shamila Mahmood, Professor James Crawford, Professor Vaughan Lowe, and Mr. Samuel Wordsworth argued on behalf of Pakistan. Dr. Neeru Chadha, Mr. Fali Nariman, Professor Stephen McCaffrey, Mr. RKP Shankardass, Mr. Rodman Bundy, and Professor Daniel Magraw argued on behalf of India. Over the course of pleading, the Members of the Court of Arbitration asked questions and sought clarifications from counsel.

Pakistan's Arguments

Pakistan maintains that the planned diversion of the waters of the Kishenganga/Neelum River by the KHEP is prohibited by the Indus Waters Treaty.

During the hearing, Pakistan first recalled the ten-year history of painstaking negotiations between the Parties, facilitated through the good offices of the World Bank, which resulted in the conclusion of the Treaty in September 1960. According to Pakistan, the Treaty, drafted at a time when cooperation between the Parties for the joint development of the Indus river system did not seem possible, was written so as to allow each Party to develop water resources in an independent manner. To this end, Pakistan argued that the Treaty apportions the rivers of the Indus river system between the Parties, strictly fixing and delimiting the Parties' rights and obligations with regard to these rivers. Noting the Treaty's careful and nuanced drafting, Pakistan argued that the Treaty terms should be interpreted according to their ordinary meaning and in case of doubt in such a way as to reinforce the Treaty's precise delimitation of the Parties' respective rights.

Pakistan emphasized India's obligation under Article III of the Treaty (see the annex) to "let flow" and "not permit any interference with" the waters of the Western Rivers (the Indus, the Chenab, the Jhelum and their tributaries, including the Kishenganga/Neelum) before they flow into Pakistan. According to Pakistan, this obligation constitutes an essential element of the compromise reached by the Parties in the Treaty, serving to prevent India from "manipulating" the flow of the waters of the Western Rivers to Pakistan's detriment.

Pakistan recognized that, as a matter of exception, Article III(2) of the Treaty allows India to make use of the waters of the Western Rivers on their upstream stretches for certain purposes, including the generation of hydro-electricity through "run-of-river" plants. However, Pakistan pointed out that the Treaty strictly regulates India's rights on the Western Rivers, for instance through Annexure D, which sets forth the restrictions on Indian hydro-electric power generation.

In particular, Pakistan argued that the Treaty does not establish a general right for India to deliver water from one Western River tributary into another for the generation of hydro-electric power. Such inter-tributary transfers are contrary both to India's general obligation to "let flow" the waters of the Western Rivers under Article III as well as India's specific obligation spelled out in the chapeau of Paragraph 15 of Annexure D (see the annex) to deliver into the river below the hydro-electric plant the same volume of water that is received in the river above the plant within any given 24-hour period.

Pakistan argued that Paragraph 15(iii) of Annexure D to the Treaty is an operational provision that allows, in specific cases, for the waters of a tributary of the Jhelum (such as the Kishenganga/Neelum) to be delivered into another tributary. However, Pakistan argued that the KHEP's planned diversion cannot be justified by reference to this exception. In Pakistan's view, the Treaty does not allow India to permanently divert all of the waters of one tributary of the Jhelum into another in order to create a potential for the generation of hydro-electric power that does not naturally arise from the flow of the river within its course, as India proposes to do with the KHEP. Pakistan argued that the Treaty solely permits a diversion of the waters of a tributary of the Jhelum when "necessary" – that is, diversion can only be done from time to time as an "emergency exit."

Further, in Pakistan's view, the Treaty gives Pakistan's downstream agricultural and hydro-electric uses on the tributaries of the Jhelum priority, requiring India to adjust its uses so as not to affect Pakistan's uses either now or as they develop in the future. Pakistan contended that selecting a cut-off date at which Pakistan's uses would be evaluated once and for all by India would "freeze" Pakistani development and undermine the bargain struck by the Parties in dividing the Indus system of rivers between them. Pakistan argued that the Treaty protects Pakistan's downstream uses as they exist from time-to-time, at the moment of delivery of the diverted waters.

Pakistan further argued that as a matter of fact, its agricultural and hydro-electric uses will be adversely affected by the KHEP. Specifically, Pakistan argued that the KHEP, under its planned mode of operation, would divert the entirety of the waters of the Kishenganga/Neelum during the lean season and up to its design capacity of 58.4 m³/s during the high flow season. This would result in a significant loss in power generation and revenue for the downstream N-JHEP and any other hydro-electric projects Pakistan may choose to construct on the Kishenganga/Neelum in the future. Pakistan maintained that it informed India of the anticipated adverse impact on its downstream uses over two decades before construction of the KHEP was commenced. With regard to the N-JHEP, Pakistan asserted that it has continuously reaffirmed its commitment to the project since 1989.

In addition, Pakistan argued that there arises out of Article IV(6) of the Treaty (reproduced in annex) an obligation for India to carry out a good faith assessment of the environmental downstream impacts of the KHEP. This, in Pakistan's submission, India did not do. Relying on its own expert reports, Pakistan argued that a reduced flow in the Kishenganga/Neelum would have an adverse environmental impact on its downstream reaches.

With regard to the Second Dispute, Pakistan submitted that drawdown flushing, the technique India proposes to use for the management of sedimentation in the KHEP reservoir, is prohibited by the provisions of the Treaty. Drawdown flushing consists of drawing down the level of the water in the reservoir close to the river bed by releasing it through low level outlets in the dam, in order to expel sediments from the reservoir. Pakistan argued that the use of drawdown flushing would give India an impermissible control over the timing and volume of the flow of water downstream of the dam, as well as have adverse environmental impact downstream. Pakistan argued that India is obligated to employ alternative sediment management methods.

India's Arguments

India contends that the planned diversion of the waters of the Kishenganga/Neelum by the KHEP is in compliance with the Indus Waters Treaty.

During the hearing, India submitted that all the provisions of the Treaty must be interpreted in light of its object and purpose as it is set forth in the Treaty's preamble. In India's view, the preamble spells out the Parties' desire in signing the Treaty to "attain the most complete and satisfactory utilisation of the waters of the Indus system of rivers." According to India, this object will be served by the planned diversion of the Kishenganga/Neelum waters, as this design will allow India to realize the full power generating potential of the upstream stretch of the Kishenganga/Neelum River, while also benefitting Pakistan's hydro-electric uses (albeit further downstream of the N-JHEP).

India stressed that while the rivers of the Indus system were divided between India and Pakistan, the Treaty also gave each State significant rights in the rivers that were allocated to the other. In particular, India pointed to Article III(2) of the Treaty, which expressly stipulates India's right to use the waters of the Western Rivers to generate hydro-electric power (subject to the provisions of Annexure D to the Treaty) as an exception to India's obligation to "let flow" the waters of these rivers. India argued that the KHEP falls within this exception.

India maintained that it has a right to transfer water between the tributaries of the Jhelum River for the purpose of hydro-electric power generation. Such a right is evident, India argued, given that prior to the Treaty's signature, India was already contemplating the construction of a hydro-electric project at the current location of the KHEP that would include an inter-tributary transfer. In this context, India submitted that it would not have consented to any Treaty provision that would preclude the realization of such a project.

With regard to the stipulation at Paragraph 15(iii) of Annexure D to the Treaty that water from one tributary of the Jhelum may be delivered into another tributary only "if necessary," India submitted

that the Treaty allows India to judge what is necessary for the generation of hydro-electric power. In the present case, the KHEP's planned diversion is necessary, being, in light of the area's topography, the only option for significant power generation in the region.

India further recalled that Paragraph 15(iii) of Annexure D to the Treaty only protects Pakistan's "then existing" downstream agricultural and hydro-electric uses, of which, India contends, there are none on the Kishenganga/Neelum. India interpreted "then existing" to mean that India must take into account Pakistan's downstream uses only up to a critical cut-off date, at which point India's hydro-electric design can be finalized. India argued that an interpretation of this provision requiring India to continuously adjust its hydro-electric operations on the Kishenganga/Neelum to Pakistan's downstream uses as they develop would negate India's express right to use the waters of the Western Rivers to generate hydro-electricity, and result in the waste of the vast amount of resources invested in the KHEP.

India submitted that between 1989, when Pakistan was first apprised of the KHEP, and 2006, when the final design of the KHEP was notified to Pakistan, India repeatedly indicated its willingness to take into account Pakistan's downstream uses, urging Pakistan to document them. However, in India's view, Pakistan consistently failed to substantiate its uses within the Neelum valley with verifiable data. With respect to the N-JHEP, for example, India argued that Pakistan relied solely on verbal assurances that the project was "in hand" and "under construction" without demonstrating its commitment to its realization. India also asserted that the agricultural uses of the residents of the Neelum valley are not dependent on the waters of the Kishenganga/Neelum River.

India argued that even if the N-JHEP were a "then existing" use, it would not be adversely affected by the KHEP. India emphasized that the KHEP will divert less than 1% of the total volume of waters of the Western Rivers. Thus, despite operation of the KHEP, during the high flow season the N-JHEP would receive a volume of water in excess of its maximum discharge capacity. During the lean season, the N-JHEP could be operated by using the water from the numerous tributaries that flow into the Kishenganga/Neelum River between the KHEP and N-JHEP dam sites; in fact, during this period of the year the N-JHEP would receive more water than the KHEP itself.

India added that any adverse effect to hydro-electric power generation by the N-JHEP would be mitigated by the release of water during the lean season from the storage work which Pakistan intends to construct on the Kishenganga/Neelum River at Dudhnial between the KHEP and the N-JHEP. Any adverse effects to the N-JHEP would also be set off, in India's view, by the benefits Pakistan's projected Kohala hydro-electric plant would derive from increased flow in the Jhelum River resulting from the diversion of the Kishenganga/Neelum's waters by the KHEP.

India argued that the provisions of the Treaty, including its Article IV(6), provide no basis for incorporating any international environmental obligations into the Treaty; the alleged breach of such obligations is therefore not a proper subject for determination by the Court of Arbitration. In any event, India submitted that it has complied with Article IV(6) of the Treaty, domestic Indian environmental regulations, any environmental customary international law obligations India may have, and the international standards applicable to engineers in the design and operation of hydro-electric projects. India argued that it had commissioned a comprehensive environmental impact assessment in 2000 which has shown that the KHEP will not have any significant adverse environmental impact on the Kishenganga/Neelum. India maintains that a minimum "environmental flow" of at least $3.9 \text{ m}^3/\text{s}$ will be released at all times below the KHEP dam.

With regard to the Second Dispute, at the outset, India disputed its admissibility for determination by the Court of Arbitration, arguing that it should have been referred by Pakistan to a Neutral Expert appointed pursuant to the Treaty. India then urged the Court to follow the decision of the Neutral Expert in the Baglihar case (a proceeding under the Indus Waters Treaty concerning India's Baglihar hydro-electric project), which found that drawdown flushing is permissible under the Treaty. India argued that sediment management is essential to the sustainability of hydro-electric plants and can

only be effectively achieved at the KHEP by lowering the water level in the reservoir below Dead Storage Level – *i.e.* by drawdown flushing. Given that the re-filling of the KHEP reservoir after its depletion is only permitted under the Treaty during a short period in the high flow season, and in light of the relatively small storage capacity of the KHEP, India submitted that the operation will have minimal effect on Pakistan.

Closing Arguments

On August 31, 2012, the Parties gave their closing arguments. Mr. Kamal Majidulla (Agent) and Professor James Crawford (Counsel) completed Pakistan’s submissions. On the part of India, Mr. D.V. Singh (Agent) and Mr. Fali Nariman (Counsel) completed India’s submissions.

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Under the Court of Arbitration’s Rules of Procedure, “[t]he Court shall endeavour to render its Award within 6 months of the close of the hearings.”

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The seven-member Court of Arbitration is chaired by Judge Stephen M. Schwebel (United States), former President of the International Court of Justice. The other members of the Court are Sir Franklin Berman KCMG QC (United Kingdom), Professor Howard S. Wheeler FREng (United Kingdom), Professor Lucius Caflisch (Switzerland), Professor Jan Paulsson (Sweden), Judge Bruno Simma (Germany), and H.E. Judge Peter Tomka (Slovakia). The Permanent Court of Arbitration in The Hague acts as Secretariat to the Court of Arbitration.

In June 2011, the Court of Arbitration conducted a site visit to the N-JHEP and KHEP and surrounding areas located on the Kishenganga/Neelum River. In February 2012, a delegation of the Court conducted a second site visit to the Neelum River Valley. The Parties have also exchanged written pleadings.

On September 23, 2011, the Court of Arbitration issued an Order on Interim Measures, which is available on the website of the PCA at http://www.pca-cpa.org/showpage.asp?pag_id=1392.

Other press releases and information relating to this arbitration are available at: http://www.pca-cpa.org/showpage.asp?pag_id=1392

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Annex: Select Provisions of the Indus Waters Treaty

Article III

- (1) Pakistan shall receive for unrestricted use all those waters of the Western Rivers which India is under obligation to let flow under the provisions of Paragraph (2).
- (2) India shall be under an obligation to let flow all the waters of the Western Rivers, and shall not permit any interference with these waters, except for the following uses, restricted (except as provided in item (c) (ii) of Paragraph 5 of Annexure C) in the case of each of the rivers, The Indus, The Jhelum and The Chenab, to the drainage basin thereof:
 - (a) Domestic Use ;
 - (b) Non-Consumptive Use ;
 - (c) Agricultural use, as set out in Annexure C ; and
 - (d) Generation of hydro-electric power, as set out in Annexure D.
- (3) Pakistan shall have the unrestricted use of all waters originating from sources other than the Eastern Rivers which are delivered by Pakistan into The Ravi or the Sutlej, and India shall not make use of these waters. Each Party agrees to establish such discharge observation stations and make such observations as may be considered necessary by the Commission for the determination of the component of water available for the use of Pakistan on account of the aforesaid deliveries by Pakistan.
- (4) Except as provided in Annexures D and E, India shall not store any water of, or construct any storage works on, the Western Rivers.

Article IV (6)

- (6) Each Party will use its best endeavours to maintain the natural channels of the Rivers, as on the Effective Date, in such condition as will avoid, as far as practicable, any obstruction to the flow in these channels likely to cause material damage to the other Party.

Paragraph 15 (iii) of Annexure D

15. Subject to the provisions of Paragraph 17, the works connected with a Plant shall be so operated that (a) the volume of water received in the river upstream of the Plant, during any period of seven consecutive days, shall be delivered into the river below the Plant during the same seven-day period, and (b) in any one period of 24 hours within that seven-day period, the volume delivered into the river below the Plant shall be not less than 30%, and not more than 130%, of the volume received in the river above the Plant during the same 24-hour period : Provided however that :

[...]

- (iii) where a Plant is located on a Tributary of The Jhelum on which Pakistan has any Agricultural use or hydro-electric use, the water released below the Plant may be delivered, if necessary, into another Tributary but only to the extent that the then existing Agricultural Use or hydro-electric use by Pakistan on the former Tributary would not be adversely affected.

Paragraph 2(a) of Annexure D

“Dead Storage” means that portion of the storage which is not used for operational purposes and “Dead Storage Level” means the level corresponding to Dead Storage.