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**INDUS WATERS KISHENGANGA ARBITRATION
(PAKISTAN V. INDIA)**

**Court of Arbitration Issues Partial Award
in First Arbitration under the Indus Waters Treaty 1960**

THE HAGUE, February 19, 2013.

The Court of Arbitration constituted in the matter of the *Indus Waters Kishenganga Arbitration (Pakistan v. India)* has rendered a Partial Award in respect of the dispute between Pakistan and India under the Indus Waters Treaty concerning (1) the legality of the construction and operation of an Indian hydro-electric project located in India-administered Jammu and Kashmir; and (2) the permissibility under the Treaty of the depletion of the reservoirs of certain Indian hydro-electric plants below “Dead Storage Level.”¹

In its Partial Award, which is final with respect to the matters decided therein, without appeal and binding on the Parties, the Court of Arbitration unanimously decided:

1. that the Kishenganga Hydro-Electric Project (KHEP) constitutes a Run-of-River Plant under the Treaty, and India may accordingly divert water from the Kishenganga/Neelum River for power generation by the KHEP in the manner envisaged.

However, when operating the KHEP, India is under an obligation 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.

2. Except in the case of an unforeseen emergency, the Treaty does not permit India’s reduction below “Dead Storage Level” of the water level in the reservoirs of Run-of-River Plants located on the rivers allocated to Pakistan under the Treaty. This ruling does not apply to Plants already in operation or under construction (whose designs have been communicated by India and not objected to by Pakistan)

The Court expects to be able to render its Final Award determining the minimum flow of water India would be required to release in the Kishenganga/Neelum River by the end of 2013.

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The Indus Waters Treaty is an international agreement signed by India and Pakistan in 1960 that regulates the use by the two States of the waters of the Indus system of rivers. Pakistan instituted arbitral proceedings against India in 2010, requesting that a court of arbitration determine the permissibility under the Treaty of a hydro-electric project (the Kishenganga Hydro-Electric Project, or 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 Nallah, another tributary of the Jhelum (lower in elevation and closely located to Wular Lake) through a system of tunnels, with the water powering turbines having a capacity of 330 megawatts.

¹ As defined in the Treaty, “dead storage” is “that portion of storage which is not used for operational purposes.”

Pakistan challenges, in particular, the permissibility of the planned diversion by the KHEP of the waters of the Kishenganga/Neelum into the Bonar Nallah, arguing that this inter-tributary transfer will adversely affect the operation of a hydro-electric project—the Neelum-Jhelum Hydro-Electric Project or NJHEP—being built by Pakistan on the Kishenganga/Neelum downstream of the KHEP (the “First Dispute”). The transfer of water contemplated by India may be represented graphically as in the attached diagram (Annex A). Pakistan has also requested that the Court determine whether the Treaty permits India to deplete or bring the reservoir level of “run-of-river” hydro-electric plants below a level identified as “Dead Storage Level” in the Treaty (the “Second Dispute”). Pakistan submits that that such reservoir depletion would give India impermissibly broad control over the flow of the river waters allocated to Pakistan under the Treaty. For its part, India had stated its intent to use such reservoir depletion to flush sediment out of the KHEP’s reservoir. 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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In its analysis, the Court emphasized at the outset that its Partial Award, just as the Indus Waters Treaty itself, does not have any bearing on any territorial claims or rights of the Parties over Jammu and Kashmir. The Court’s findings pertain solely to the Parties’ rights and obligations with respect to the *use* of the waters of the Indus system of rivers, including with respect to the use of the waters of those portions of the rivers that flow through disputed territory.

THE FIRST DISPUTE

1. The Permissibility of Inter-Tributary Transfers under the Treaty

In the First Dispute, the Court was called upon to determine whether India is permitted under the Treaty to deliver the waters of the Kishenganga/Neelum River into the Bonar Nallah in the course of the operation of the KHEP.

As an initial matter, the Court observed that the Treaty expressly permits the transfer of water by India from one tributary of the Jhelum to another for the purpose of generating hydro-electric power, subject to certain conditions. The Court first found that this right is not circumscribed by the Treaty’s restriction of Indian uses on the Western Rivers (which include the Kishenganga/Neelum as a tributary of the Jhelum) to the drainage basin of those rivers. This restriction relates to where water may be used, and is not violated by the use outside of the drainage basin of electricity generated from the water. The Court then examined the Treaty provision requiring the Parties to maintain the natural channels of the rivers and its effect on inter-tributary transfers. The Court found that this obligation involves maintaining the river channels’ physical capacity to carry water, and does not require maintaining the timing or volume of the flow in the river. Accordingly, this obligation does not limit India’s right to transfer water for the purpose of generating hydro-electricity.

Having established that India’s right to inter-tributary transfer is not prohibited by other provisions of the Treaty, the Court considered whether the KHEP meets the express conditions on such transfer. The Court noted that for transfer to be permissible, the KHEP must (1) be a “Run-of-River Plant”; (2) be located on a tributary of the Jhelum; and (3) conform to Paragraph 15(iii) of the Treaty Annexure governing hydro-electric power generation. The Court observed that a “Run-of-River Plant” is a term of art defined by the Treaty and that the KHEP is a Run-of-River Plant within that definition. The Court further decided that on the facts of the case the KHEP should be regarded as located on the Kishenganga/Neelum notwithstanding that the KHEP’s power house is situated at a distance of 23 kilometres from that river. The Court also found that, by releasing water into the Bonar Nallah after it has passed through the power house, the KHEP complies with the requirement that the “water released below the Plant” be delivered “into another Tributary.” Finally, the Court found that the KHEP’s inter-tributary transfer is “necessary,” as required by the Treaty, for the generation of hydro-electric power, as power can be generated on the scale contemplated by India in this location only by

using the 665 metre difference in elevation between the dam site on the Kishenganga/Neelum and the place where the water is released into the Bonar Nallah.

2 The Interpretation of the Treaty with Respect to “then existing Agricultural Use or hydro-electric use by Pakistan”

In addition to the requirements described above, the Court recognized that Paragraph 15(iii) requires that “then existing Agricultural Use or hydro-electric use by Pakistan” on the downstream reaches of the Kishenganga/Neelum not be adversely affected by the KHEP’s inter-tributary transfer. Pakistan argued that “then existing” uses are to be determined on an ongoing basis, whenever water is transferred from one tributary to another. India, in contrast, argued that such uses must be determined at a fixed point during the design of its hydro-electric project.

In seeking to establish when a “then existing” agricultural or hydro-electric use is to be determined, the Court was guided in the interpretation of the Treaty by Article 31(1) of the Vienna Convention on the Law of Treaties: “[a] treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.” The Court first examined the text of Paragraph 15(iii), noting the provision’s focus on the operation of hydro-electric plants and the implication that the determination of “then existing” uses should take place on an ongoing basis throughout the operational life of a plant. The Court then considered the context of Paragraph 15(iii) and noted that the provision falls within a continuum of design, construction and operation. The Court observed that the provisions of the Treaty must be interpreted in a mutually reinforcing fashion, as it would make little sense for the Treaty to permit a plant to be designed and built in a certain manner, but then to prohibit the operation of that plant in the very manner for which it was designed. Finally, the Court examined the object and purpose of the Treaty and found that the Treaty both gives Pakistan priority in the use of the waters of the Western Rivers (including the Kishenganga/Neelum) and India a right to generate hydro-electric power on the Western Rivers.

Turning to the application of the Treaty to the KHEP, the Court first considered the implications of the approaches advocated by the Parties. The Court observed that under the “ambulatory” approach advocated by Pakistan, a project’s design could be cleared for construction as being consistent with the design specifications of the Treaty, but then be prevented from operating by new uses by Pakistan. In the Court’s view, the uncertainty created by this approach, and the potential for wastage, would have a chilling effect on the undertaking of any hydro-electric projects by India on the Western Rivers. With respect to the approach advocated by India, under which Pakistan’s uses would be determined at the moment that India communicates a “firm intention” to proceed with a project, the Court observed that identifying a critical date will often be difficult, but that it may be possible to identify a “critical period” in which design, tenders, financing, public consultations, environmental assessments, governmental approvals and construction come together to indicate a firm intention to proceed with a project. Nevertheless, the Court noted that a solely “critical period” approach could result in a “race” in which each Party would seek to create uses that would freeze out future uses by the other, an outcome the Court rejected.

Having considered the approaches advocated by the Parties, the Court concluded that neither the ambulatory nor the critical period approach were fully satisfactory and that the proper interpretation of the Treaty combines elements of both. The Court considered that it must first establish for each of the KHEP and the NJHEP the critical period in which the Parties not only planned the projects, but took concrete steps toward their realization. Reviewing the evidence provided by the Parties, the Court concluded that the KHEP reached this period in 2004–2006. In contrast, the Court found that Pakistan demonstrated a comparable commitment to the NJHEP in 2007 and 2008. Given this timing, the Court decided that India’s right to divert the waters of the Kishenganga/Neelum by the KHEP is protected by the Treaty.

However, the Court also decided that India's right to divert the Kishenganga/Neelum is not absolute—it is subject to the constraints specified in the Treaty and, in addition, by the relevant principles of customary international law. Paragraph 15(iii) gives rise to India's right to construct and operate hydro-electric projects involving inter-tributary transfers, but also obliges India to operate those projects in such a way as to avoid adversely affecting Pakistan's then existing agricultural and hydro-electric uses. Both Parties' entitlements under the Treaty must be made effective so far as possible. The Court therefore found that Pakistan retains the right to receive a minimum flow of water from India in the Kishenganga/Neelum riverbed at all times. The Court noted that this right also stems from customary international environmental law, and that it considered that the Treaty must be applied in light of contemporary international environmental law principles.

In this context, the Court recalled the commitment made by India's Agent in the course of the hearing that India would ensure a minimum environmental flow downstream of the KHEP at all times.

3. The Court's Request for Further Data

Having concluded that the Treaty requires the preservation of a minimum flow of water downstream of the KHEP, the Court determined that the data provided by the Parties are insufficient to allow it to decide the precise amount of flow to be preserved.

The Court therefore deferred its determination of the appropriate minimum flow to a Final Award, and requested the Parties to provide additional data concerning the impacts of a range of minimum flows at the KHEP dam on, (for India), (a) power generation at the KHEP; and (b) environmental concerns from the dam site at Gurez to the Line of Control; and, (for Pakistan), (a) power generation at the NJHEP; (b) agricultural uses of water downstream of the Line of Control to Nauseri; and (c) environmental concerns at and downstream of the Line of Control to Nauseri.

THE SECOND DISPUTE

1. The Admissibility of the Dispute over the Depletion of Reservoirs below "Dead Storage Level"

Insofar as India had raised two objections to the admissibility of the Second Dispute, the Court considered, first, whether Pakistan had followed the Treaty procedure for the submission of disputes to the Court; and second, whether the Second Dispute, given its subject-matter, could properly be heard by the Court. With respect to the first question, the Court observed that the Treaty provides for disagreements between the Parties to be resolved either by a seven-member court of arbitration or by a single, highly-qualified engineer, acting as a neutral expert. The Court concluded that the neutral expert process is given priority only if one or the other Party has in fact requested the appointment of a neutral expert. In the present case, neither Party made such a request and the Court was therefore not precluded from hearing the Second Dispute. With respect to the second question, the Court found that although the Treaty specifies the technical matters that may be referred to a neutral expert, it does not give the neutral expert exclusive competence over these listed matters. Once constituted, a court of arbitration is empowered to consider any question arising out of the Treaty, including technical questions. Having rejected both objections, the Court found that the Second Dispute is admissible.

2. The Permissibility of the Depletion of Reservoirs for Drawdown Flushing

In approaching the merits of the second dispute, the Court observed that the question of reservoir depletion is linked in the Parties' disagreement with the permissibility of controlling sediment through the procedure of drawing down the reservoir and flushing accumulated sediment downstream. The Court briefly reviewed the process of sedimentation in the reservoirs of hydro-electric plants and the various techniques available for sediment control, including drawdown flushing.

The Court then examined three aspects of the context of the Treaty with respect to drawdown flushing. First, the Court observed that one of the primary objectives of the Treaty was to limit the storage of water by India on the Western Rivers and that the Treaty includes strict restrictions on the volume of storage permitted to India. The Court noted that in contrast, the volume of Dead Storage is not controlled, suggesting that such storage was not intended to be subject to manipulation. Second, the Court noted that the Treaty includes design restrictions on the low-level outlets that would be required to deplete a reservoir and that these restrictions make sense only if depletion is also restricted. Third, the Court recalled that the Treaty drafters intended for India to have the right to generate hydro-electric power on the Western Rivers, and noted that this right must be given effect by allowing India's hydro-electric development to be sustainable.

Reading the provisions of the Treaty in light of these contextual aspects, the Court concluded that the Treaty prohibits depletion below Dead Storage Level of the reservoirs of Run-of-River Plants (and, correspondingly, drawdown flushing) through reference to a provision of the Treaty Annexure dedicated to storage works, which states that "the Dead Storage shall not be depleted except in an unforeseen emergency." The Court also noted that the Treaty includes restrictions on the permissible variation in the volume of flow in a river above and below a hydro-electric plant, and that these restrictions may also be incompatible with drawdown flushing in certain reservoirs and in certain flow conditions.

To complete its analysis, the Court examined whether the sustainable generation of hydro-electric power on the Western Rivers is possible without drawdown flushing. After reviewing the technical documentation submitted by the Parties and the testimony of the experts presented by them, the Court observed that drawdown flushing is only one means of sediment control and concluded that hydro-electricity may be generated without flushing.

Finally, insofar as certain hydro-electric plants are under construction or have been completed by India, the Court stated that its decision on the Second Dispute may not be so interpreted as to cast doubt retrospectively on any Run-of-River Plants already in operation on the Western Rivers, nor as to affect retrospectively any such Plant already under construction the design of which (having already been duly communicated by India under the relevant provisions of the Treaty) has not been objected to by Pakistan as provided for in the Treaty.

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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.

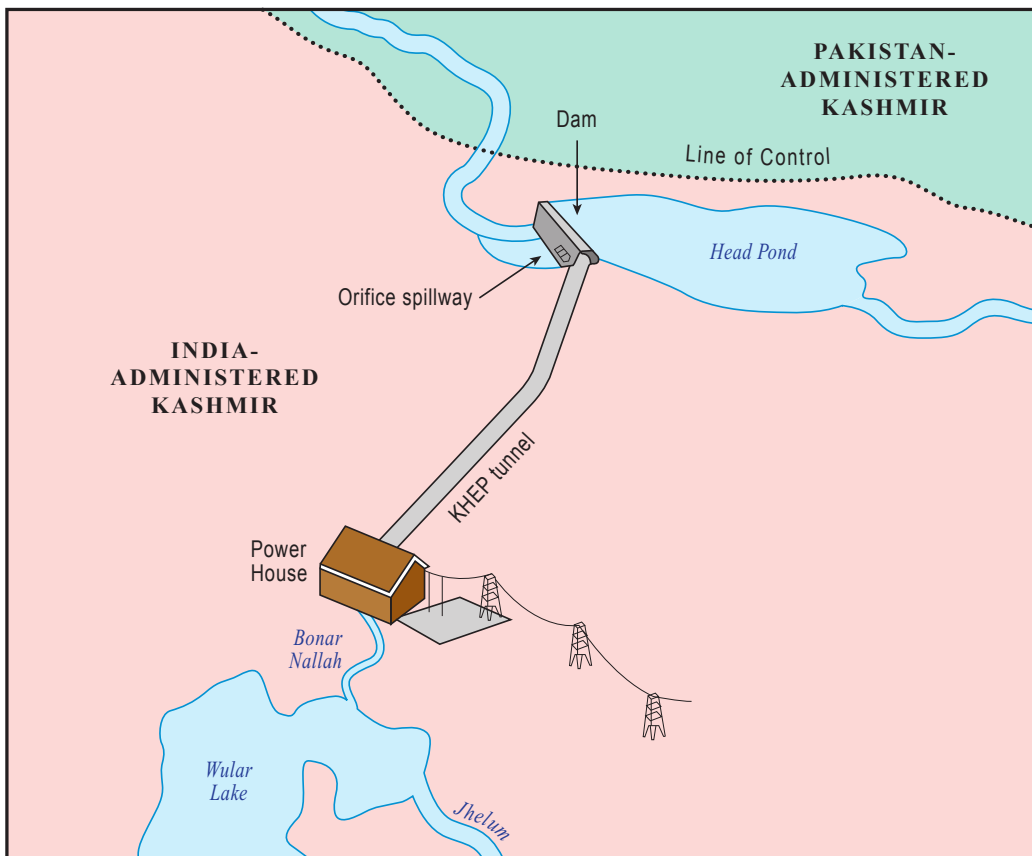
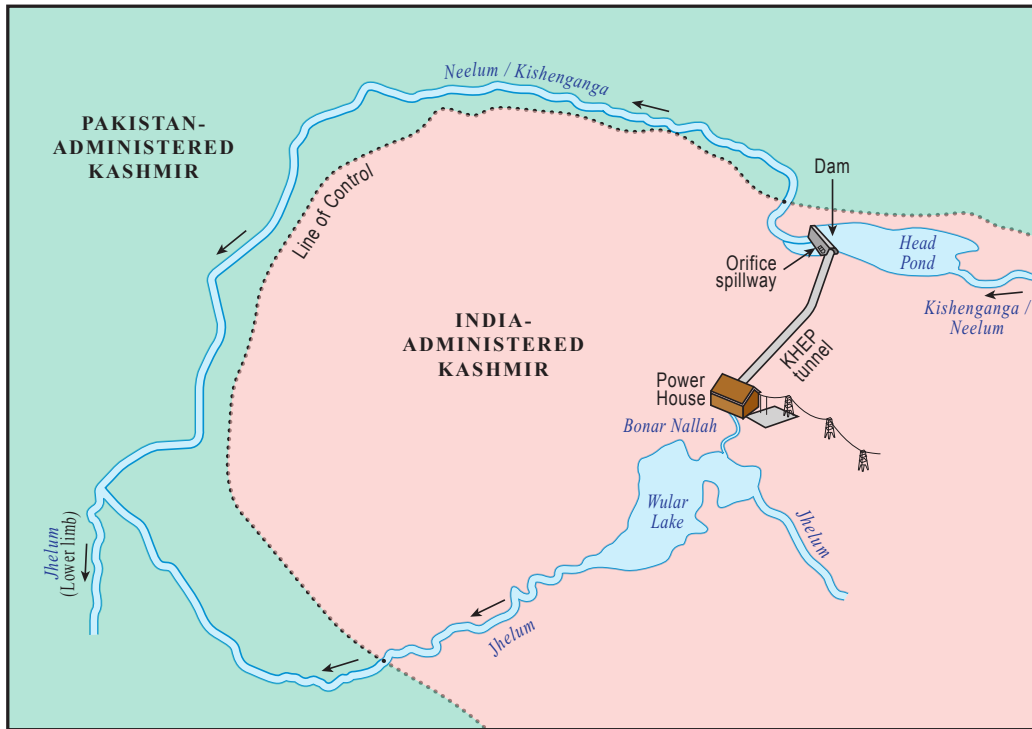
In June 2011, the Court of Arbitration conducted a site visit to the Neelum/Jhelum and Kishenganga hydro-electric projects and surrounding areas located on the Kishenganga/Neelum river. In February 2012, a delegation of the Court conducted a second site visit to the Neelum river valley. The Parties have also submitted written pleadings. From August 20 to 31, 2012, the Court of Arbitration conducted a two-week hearing on the merits of the dispute between the Parties.

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

Contact: Permanent Court of Arbitration
E-mail: bureau@pca-cpa.org

Annex A: Schematic representation of the KHEP



Source: Partial Award, page. 51, reproduced from Pakistan's Memorial.