

**IN THE MATTER OF
THE INDUS WATERS KISHENGANGA ARBITRATION**

-before-

**THE COURT OF ARBITRATION CONSTITUTED
IN ACCORDANCE WITH THE INDUS WATERS TREATY 1960
BETWEEN THE GOVERNMENT OF INDIA
AND THE GOVERNMENT OF PAKISTAN
SIGNED ON 19 SEPTEMBER 1960**

-between-

THE ISLAMIC REPUBLIC OF PAKISTAN

-and-

THE REPUBLIC OF INDIA

**DECISION ON INDIA'S REQUEST FOR
CLARIFICATION OR INTERPRETATION DATED 20 MAY 2013**

COURT OF ARBITRATION:

**Judge Stephen M. Schwebel (Chairman)
Sir Franklin Berman KCMG QC
Professor Howard S. Wheeler FREng
Professor Lucius Caflisch
Professor Jan Paulsson
Judge Bruno Simma
H.E. Judge Peter Tomka**

SECRETARIAT:

The Permanent Court of Arbitration

20 December 2013

I. INTRODUCTION

1. On 17 May 2010, the Government of Pakistan initiated the present proceedings against the Government of India under the Indus Waters Treaty of 1960 (the "**Treaty**"). On 18 February 2013, the Court of Arbitration (the "**Court**") issued its *Partial Award*. A detailed history of the proceedings through that date is set out in that award. The present decision answers a request for clarification or interpretation of the *Partial Award* made by India.

II. BACKGROUND TO THE REQUEST

2. Paragraph 27 of Annexure G to the Indus Waters Treaty sets out the scope of the Court of Arbitration's duty to clarify or interpret its Award. Paragraph 27 states that:

At the request of either Party, made within three months of the date of the Award, the Court shall reassemble to clarify or interpret its Award. Pending such clarification or interpretation the Court may, at the request of either Party and if in the opinion of the Court circumstances so require, grant a stay of execution of its Award. After furnishing this clarification or interpretation, or if no request for such clarification or interpretation is made within three months of the date of the Award, the Court shall be deemed to have been dissolved.

3. Invoking Paragraph 27, India, on 20 May 2013, filed a *Request for Clarification or Interpretation* (the "**Request**") in which it sought "clarification or interpretation with respect to paragraph B.1" of the Court's *Partial Award*. Paragraph B of the "Decision" section (Part V) in the Court's *Partial Award* (the "**Decision**") relates to the Second Dispute, in which Pakistan requested the Court to determine

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?¹

4. Paragraph B of the Decision provides as follows:

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.

¹ Pakistan's Request for Arbitration, para. 4.

- (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) 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.
5. At the invitation of the Court, Pakistan filed a *Submission in Response to India's Request for Interpretation or Clarification* on 19 July 2013. India in turn presented a *Reply on the Request for Clarification or Interpretation* on 2 September 2013. Finally, Pakistan submitted its *Rejoinder to India's Reply dated 2 September 2013 in the matter of India's Request for Clarification or Interpretation* on 30 September 2013.
 6. The Court has considered the submissions of each Party carefully. In accordance with Paragraph 27 of Annexure G and Article 19 of the Court's Supplemental Rules of Procedure (the "**Supplemental Rules**"), the Court hereby issues its *Decision on India's Request for Clarification or Interpretation*.

III. THE PARTIES' ARGUMENTS

7. In its Request, India takes issue with the Court's decision in its *Partial Award* that "[e]xcept 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
8. India asks the Court to "clarify that the permissibility of depletion or reduction below Dead Storage Level of the water level in the reservoirs of future Indian Run-of-River plants on the Western Rivers depends on a site-specific analysis of the feasibility of methods of sediment control other than drawdown flushing."³ In response, Pakistan submits that "there is no shadow of ambiguity in paragraph B.1" of the Court's Decision and that India's Request "is an attempt to have the Court's unambiguous reasoning and determinations in respect of the Second Dispute replaced by quite different reasoning and determinations in favour of India."⁴

² *Ibid.*, at para. B(1).

³ India's Request for Clarification or Interpretation, para. 2 ("India's Request").

⁴ Pakistan's Submission in Response to India's Request for Interpretation or Clarification, para. 3 ("Pakistan's Response").

9. Before turning to its analysis, the Court will summarize the Parties' arguments in respect of the admissibility of India's Request as well as of the necessity of clarification or interpretation.

A. The Timeliness and Admissibility of India's Request

Pakistan's Argument

10. As an initial matter, Pakistan argues that India's Request is untimely. In Pakistan's view, 20 May 2013 is not within three months of 18 February 2013, the date of the *Partial Award*.⁵
11. Pakistan further submits that the Request is inadmissible because "in fact it is not seeking interpretation, but rather a new decision."⁶ Following the practice of the International Court of Justice (the "ICJ"), Pakistan argues that the object of a request for interpretation "must be solely to obtain clarification of the meaning and the scope of what the Court has decided with binding force, and not to obtain an answer to questions not so decided."⁷ Against this standard, Pakistan contends that the Request should be dismissed: the language of the *Partial Award* being unambiguous, India has no basis for seeking clarification.⁸

India's Argument

12. India maintains that its Request was filed in a timely manner, as India acted in accordance with the Supplemental Rules, which specify that any request for interpretation made pursuant to Paragraph 27 of Annexure G must be filed within 90 days of the Award.⁹ The method for calculating periods of time is also contained in the Supplemental Rules. As the 90-day limit fell on Sunday, 19 May 2013, India contends that when it submitted its request on 20 May 2013, the next working day, it did so in a timely manner.¹⁰

⁵ *Ibid.*, para. 5.

⁶ *Ibid.*, para. 6.

⁷ *Ibid.*, para. 6, quoting *Request for Interpretation of the Court's Judgment of 20 November 1950 in the Asylum Case (Colombia/Peru)*, I.C.J. Reports 1950, p. 402.

⁸ *Ibid.*, para. 6.

⁹ Article 19(1) of the Supplemental Rules provides: "Any request for interpretation of the Award, in accordance with Paragraph 27 of Annexure G to the Treaty, shall be made within 90 days after the receipt of the Award, by giving notice to the Court and the other Party."

¹⁰ India's Reply on the Request for Clarification or Interpretation, paras. 6-7 ("India's Reply").

13. India further submits that its Request relates to “genuine ambiguity” in Paragraph B.1 of the Court’s Decision in light of the reasoning in other sections of the *Partial Award*. In India’s view, the Award “must be interpreted as requiring a site-specific analysis for future projects that come within the ambit of the Treaty;”¹¹ but this proposition is said not to be apparent in the Court’s decision. According to India, “[i]t is precisely to clarify this point of interpretation, and to avoid future disputes on the issue, that India has submitted its Request.”¹²

B. The Necessity of Clarification or Interpretation

India’s Argument

14. India submits that a clarification or interpretation of the Court’s *Partial Award* is required because Paragraph B(1) of the Court’s Decision could be read—incorrectly, in India’s view—“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.”¹³ India requests the Court to clarify that, rather than a categorical prohibition, “the permissibility of depletion or reduction below Dead Storage Level of the water level in the reservoirs of future Indian Run-of-River plants on the Western Rivers depends on a site-specific analysis of the feasibility of methods of sediment control other than drawdown flushing.”¹⁴
15. India argues that clarification is required for two reasons. First, in India’s view, the Parties presented and argued the Second Dispute in the context of the Kishenganga Hydro-Electric Project (the “**KHEP**”), not in terms of the general permissibility of drawdown flushing. According to India, “Pakistan did not argue that alternatives to such drawdown flushing exist, and thus that depleting or reducing water level below Dead Storage Level during drawdown flushing is not necessary and not allowed, at any site other than the KHEP dam site.”¹⁵ As a corollary to this point, India contends that, consistent with the manner in which the Parties submitted the question, the Parties “did not present any evidence regarding the existence of a feasible and effective alternative to depleting or reducing water level below Dead Storage Level

¹¹ *Ibid.*, para. 4.

¹² *Ibid.*, para. 5.

¹³ India’s Request, para. 3.

¹⁴ *Ibid.*, para. 2.

¹⁵ *Ibid.*, para. 22.

during drawdown flushing at any site other than the KHEP dam site or on any other Western River or tributary thereof.”¹⁶

16. Second, India submits that the Court's reasoning on the impermissibility of drawdown flushing is dependent on the availability of effective alternative methods for flushing sediment, which need to be established on a case-by-case basis: “[t]he Court reasoned that the permissibility of depleting or reducing the water level below Dead Storage Level during drawdown flushing ultimately depends on the availability of an alternative effective method of sediment control.”¹⁷ According to India, the availability of such alternative means must therefore be established for each site before a prohibition on drawdown flushing could apply.¹⁸

Pakistan's Argument

17. Pakistan submits that “[t]here is no shadow of ambiguity in paragraph B.1 of the Court's dispositive, whether viewed in isolation or together with the underlying reasoning of the Court.”¹⁹
18. According to Pakistan, the Court's decision on the Second Dispute corresponds to the broad manner in which the question was presented and argued. In Pakistan's view, the Second Dispute “is a question of obvious breadth in that it goes to what the Treaty permits. It is not a question that is in any way confined to operations at the KHEP.”²⁰ The Parties' arguments were similarly broad and “in its pleadings India sought to address the issues of sedimentation and sedimentation control in notable breadth.”²¹ India, Pakistan argues, “of course understood the case it had to meet.”²² Similarly, in Pakistan's view, the Parties introduced no shortage of evidence on sedimentation, and India's “contentions are based on India portraying discrete elements of the argument and evidence as if these were the sole elements before the Court.”²³ It was for India to make site-specific arguments if it wished to do so and, according to Pakistan,

¹⁶ *Ibid.*, para. 24.

¹⁷ *Ibid.*, para. 30.

¹⁸ *Ibid.*, para. 38.

¹⁹ Pakistan's Response, para. 3.a.

²⁰ *Ibid.*, para. 13.

²¹ *Ibid.*, para. 16.c.

²² *Ibid.*, para. 16.c.

²³ *Ibid.*, para. 16.a.

the “suggestion that it was somehow for Pakistan to introduce all the evidence and to persuade the Court that drawdown flushing was not essential at other [hydro-electric project] sites on the Western Rivers is . . . to turn the case on its head.”²⁴

19. Based on this record of evidence and argument, Pakistan argues that the Court issued a clear, categorical prohibition. The decision does not, however, “negate India’s right to develop hydro-electric power through the use of Run-of-River Plants provided for elsewhere in the Treaty” as India has argued.²⁵ Rather, in Pakistan’s view, “[t]he general prohibition on drawdown flushing limits India’s right to develop hydro-electric power through the use of Run-of-River Plants: it does not negate it.”²⁶ According to Pakistan, the prohibition is precisely the type of regulatory limit on the development of hydro-electric power identified and discussed by the Court in its *Partial Award*.

IV. ANALYSIS OF THE COURT

20. The Court begins its analysis with the preliminary matters raised by the Parties and concludes that India’s Request was timely. The 90-day deadline specified in the Supplemental Rules adds further precision to the Treaty’s requirement that a request be submitted “within three months.” As noted correctly by India, the final day of the 90-day period following the Court’s issuance of the *Partial Award* was a Sunday. Because Article 2(2) of the Supplemental Rules states that when the last day of a period for filing is a non-workday, the period is extended until the next workday, the Parties were free to submit any request for clarification or interpretation of the *Partial Award* until Monday, 20 May 2013. India filed its Request on that day.
21. On the admissibility of India’s Request, the Court recalls Paragraph 27 of Annexure G:

At the request of either Party, made within three months of the date of the Award, the Court shall reassemble to clarify or interpret its Award. Pending such clarification or interpretation the Court may, at the request of either Party and if in the opinion of the Court circumstances so require, grant a stay of execution of its Award. After furnishing this clarification or interpretation, or if no request for such clarification or interpretation is made within three months of the date of the Award, the Court shall be deemed to have been dissolved.

²⁴ *Ibid.*, para. 26(e).

²⁵ Pakistan’s Rejoinder to India’s Reply dated 2 September 2013 in the matter of India’s Request for Clarification or Interpretation, para. 8 (“Pakistan’s Rejoinder”).

²⁶ Pakistan’s Rejoinder, para. 8.

22. Although the Parties have referred to the case law of the ICJ on the admissibility of a request for interpretation, this Court notes that the body of ICJ practice on the matter is based specifically on the ICJ Statute and the ICJ Rules of Court, which include substantive preconditions to the exercise of the ICJ's interpretative power.²⁷ By contrast, neither the Treaty nor the Supplemental Rules set any condition, except the filing deadline, for a Party requesting interpretation or clarification. Once a timely request is made by a Party, the Court, in accordance with Paragraph 27 of Annexure G, "shall reassemble to clarify or interpret its Award."
23. That said, the Court's mandate to clarify or interpret its Award remains limited. It is a well established principle of international law—accepted by both Parties²⁸—that it is not the function of the Court, when asked to interpret or clarify its prior decision, to revise that decision.²⁹ The Court "confines itself to explaining, by an interpretation, that upon which it has already passed judgment."³⁰ The Court now turns to the question of whether its *Partial Award* requires or admits the clarification or interpretation requested by India.
24. In its Request, India posits that two aspects of the Court's *Partial Award* warrant clarification or interpretation. First, India argues that the Court's general decision on the permissibility of reservoir depletion for drawdown flushing exceeds the scope of the question presented to it and discussed by the Parties, and the scope of the evidence on record. Second, India notes the Court's general consideration of the feasibility of alternative methods of sediment control and contends that, in light of the scope of the question submitted, the permissibility of drawdown

²⁷ See I.C.J. Statute, Article 60 ("In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party."); I.C.J. Rules of the Court, Article 98.

²⁸ India's Reply, paras. 2-3; Pakistan's Response, paras. 7-9.

²⁹ Ethiopia-Eritrea Boundary Commission, Decision Regarding the 'Request for Interpretation, Correction and Consultation' submitted by the Federal Democratic Republic of Ethiopia on 13 May 2002, para. 16 (24 June 2002) ("The concept of interpretation does not open up the possibility of appeal against a decision or the reopening of matters clearly settled by a decision."), available at http://www.pca-cpa.org/showpage.asp?pag_id=1150; *Arbitration on the Delimitation of the Continental Shelf (France-United Kingdom)*, Decision of 14 March 1978, para. 29, RIAA, Vol. XVIII, p. 3, at pp. 295-296 ("'Interpretation' is a process that is merely auxiliary, and may serve to explain but may not change what the Court has already settled with binding force as *res judicata*."). Similarly, the ICJ recently explained that when interpreting its judgment it "must keep strictly within the limits of the original judgment and *cannot question matters that were settled therein with binding force*." *Request for Interpretation of the Judgment of 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment of 11 November 2013, para. 66 (emphasis added).

³⁰ *Interpretation of Judgments Nos. 7 & 8 (The Chorzów Factory) (Germany v. Poland)*, P.C.I.J., Series A, No. 13, at p. 21 (16 December 1927).

flushing at future Run-of-River Plants, other than the KHEP, must depend on the conduct of a further, site-specific analysis. The Court will address each proposition in turn.

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.³¹

26. The Court mentioned and further discussed the "broad scope of the Second Dispute" in the following terms:

The terms of the Second Dispute could be understood to relate to the permissibility of reservoir depletion in the abstract.⁶⁷¹ 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.⁶⁷² 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.⁶⁷³ 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.

[. . .]

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.⁶⁷⁷ 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.

⁶⁷¹ The use of the phrase "except in case of unforeseen emergency" could also be understood to indicate a specific concern with the paragraph of Annexure E (concerning Storage Works) that provides that "[t]he Dead Storage shall not be depleted except in an unforeseen emergency." It may be asked whether this provision applies equally to Run-of-River Plants. The Parties' pleadings make clear, however, that the dispute concerns whether any provision of the Treaty prevents the depletion of the reservoirs at Run-of-River Plants on the Western Rivers below Dead Storage Level for the purpose of drawdown flushing.

⁶⁷² India's Counter-Memorial, Appendix 2, paras. 35-37 ("Envisaged Procedure for Carrying Out Drawdown Flushing").

⁶⁷³ See Pakistan's Memorial, para. 6.21 (" . . . the legality of drawdown flushing . . . constitutes a central aspect of the [Second Dispute] . . . the central feature of drawdown flushing is that the reservoir will be depleted (drawn down) below the Dead Storage Level"); see also the relief sought by Pakistan in relation to the Second Dispute, Pakistan's Memorial, chapter 7 ("Submissions"):

³¹ Partial Award, para. 263, quoting Request for Arbitration, para. 4, and Pakistan's Memorial, para. 1.12.

- i. a determination that under the Treaty, the water level of the reservoir of a Run-of-River Plant may not be reduced below Dead Storage Level except in the case of an unforeseen emergency, and
- ii. a determination that drawdown flushing for the purpose of sediment removal does not constitute an unforeseen emergency, and
- iii. a mandatory and permanent injunction restraining India from reducing the water level of the reservoir of the KHEP except in the event of an unforeseen emergency.

⁶⁷⁷ See Hearing Tr., (Day 10), 31 August 2012, at 44:9-11 (Pakistan's Closing Statement): "I stress again: the key point is that the Second [Dispute] is not about [the Kishenganga River]; it's about all the dams that India may build on the Western Rivers."³²

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.³³

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.

28. This conclusion does not fully dispose of India's Request, however. India argues that even if the Court's decision is not limited to the KHEP, the reasoning behind that decision suggests that India must conduct a site-specific evaluation of the feasibility of alternative methods of sediment control at its other, future Run-of-River Plants before the Court's prohibition on drawdown flushing would apply. While India's underlying concerns are understandable, the argument proceeds from a misapprehension of the place of alternative methods within the Court's interpretation of the Treaty.
29. The interpretative process of the Court began with an examination of the text of the Treaty, read in its context and in light of the Treaty's object and purpose.³⁴ In its *Partial Award*, the

³² Partial Award, paras. 466, 468.

³³ See also Partial Award, paras. 469-470 (regarding the *Baglihar* expert determination); Partial Award, para. 521 (regarding the extension of the Court's view on India's right to "other, future Run-of-River Plants"); Partial Award, para. 523 (regarding other plants in operation or "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").

³⁴ See, e.g., Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, Art. 31(1). Although neither India nor Pakistan is a party to the Vienna Convention, the Court recalls that India acknowledged that the principles of that Convention are part of customary international law. See Partial Award, para. 174, n.

Court examined the text of the Treaty and found that “[t]he decisive prohibition on the depletion of a reservoir below Dead Storage Level stems from Paragraph 14 of Annexure D, through its incorporation by reference of Paragraph 19 of Annexure E.”³⁵

30. The Court also considered the context of the Treaty. In doing so, the Court identified two aspects of the Treaty context consistent with a prohibition on the depletion of Dead Storage for drawdown flushing. First, the Court noted that the existence of strict limits on all types of storage other than Dead Storage is consistent “only if Dead Storage is somehow qualitatively different and was understood to be truly ‘dead’—an area to be filled once and not thereafter subject to manipulation.”³⁶ Second, the Court observed that the Treaty’s restrictions on low-level outlets from Dead Storage “make sense only against a background assumption that the uses to which Dead Storage could be put are also somehow constrained. If depletion of Dead Storage was intended, whether for flushing or otherwise, the Court can see no obvious purpose that would be served by limiting the size and placement of outlets from Dead Storage.”³⁷
31. It was in the course of the examination of the Treaty’s context that the Court considered alternative methods of managing sediment. As the Court noted, “it is beyond debate that the intention behind the Treaty was to allow India to develop the hydro-electric potential of the Western Rivers, largely through the use of Run-of-River Plants.”³⁸ Therefore, “[i]f a prohibition on drawdown flushing would render any sustainable hydro-electric development impossible, the Court would consider this relevant in approaching any Treaty provision seeming to suggest such a prohibition.”³⁹
32. The Court’s consideration of alternative methods of controlling sediment thus formed part of its interpretation of the Treaty, not the application of that interpretation to a particular site. The Court’s primary interest was not in establishing whether alternative methods were feasible at

101. In *Kasikili/Sedudu Island (Botswana/Namibia)*, I.C.J. Reports 1999, p. 1059, para.18, the ICJ stated that it “has already had occasion in the past to hold that customary international law found expression in Article 31 of the Vienna Convention Article 4 of the Convention which provides that it ‘applies only to treaties which are concluded after its entry into force . . . with regards to such States’ does not, therefore prevent the Court from interpreting the 1890 Treaty in accordance with the rules in Article 31 of the Convention.”

³⁵ Partial Award, para. 513.

³⁶ *Ibid.*, para. 505.

³⁷ *Ibid.*, para. 508.

³⁸ *Ibid.*, para. 509.

³⁹ *Ibid.*, para. 509 (emphasis added).

the KHEP or any other particular site. Rather, its interest lay in establishing whether run-of-river hydro-electric power generation without the use of drawdown flushing was so unfeasible as to effectively negate India's right to generate hydro-electric power on the Western Rivers. If so, such a result would call into question a prohibition specified in the Treaty text and elsewhere in the Treaty context. Based upon the evidence presented by the Parties, however, the Court found this not to be the case.⁴⁰

33. In its Request, India relies upon paragraph 521 of the *Partial Award* and what it considers to be the Court's qualified language with respect to the prohibition on drawdown flushing.⁴¹ In particular, India highlights the Court's acknowledgment that "the potential impact of sediment must be evaluated and modelled in relation to each particular site and dam design" to argue that a site-specific analysis was an intended condition to the prohibition. This argument, however, overlooks the context in which this aspect of the Court's analysis was made. Faced with a Treaty applicable throughout the tributary system of the Western Rivers, the Court's evaluation of alternative methods of sediment control was necessarily general, and not dependent upon the characteristics of particular sites—although as the Court also recognized, the actual impact of sediment at any particular site can only be evaluated in the context of that site. Rather than limiting the application of the Treaty's prohibition on drawdown flushing, however, this fact goes to the question of whether a particular site will be available as a practical matter to India for hydro-electric development. In short, the Court's analysis in paragraph 521 does not—and was not intended to—qualify the overall conclusion reached by the Court.
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

⁴⁰ *Ibid.*, paras. 517, 521.

⁴¹ Paragraph 521 of the *Partial Award* states as follows:

The Court's view that India's right to generate hydro-electric power on the Western Rivers can meaningfully be exercised without drawdown flushing extends beyond the specifics of the KHEP to other, future Run-of-River Plants. Based on the evidence provided to it, the Court notes that, in general, sluicing is recommended for narrow, hydrologically small reservoirs located on rivers where surplus inflow is available for discharging sediment, and that sluicing with little drawdown is particularly effective in regions where a significant percentage of the annual sediment load is carried by the river in short and predictable periods. While acknowledging that the potential impact of sediment must be evaluated and modelled in relation to each particular site and dam design, the Court presently sees no reason why the factors favouring the feasibility of a sluicing mode of operation at the KHEP site would not apply equally to other sites on the Western Rivers at which India would be likely to construct Run-of-River Plants. (footnotes omitted)

constitutes one such regulatory consideration.⁴² 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.⁴³ 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.

V. DECISION

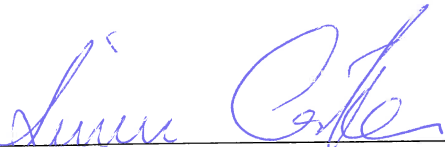
Having considered the Parties' written submissions, the Court of Arbitration unanimously decides that:

- A. India's Request for Clarification or Interpretation of the Court's *Partial Award* of 18 February 2013 is timely and admissible.
- B. Subject to Paragraph B(4) of the "Decision" section (Part V) in the *Partial Award* of 18 February 2013, the prohibition on the reduction below Dead Storage Level of the water in the reservoirs of Run-of-River Plants on the Western Rivers, except in the case of unforeseen emergency, is of general application.

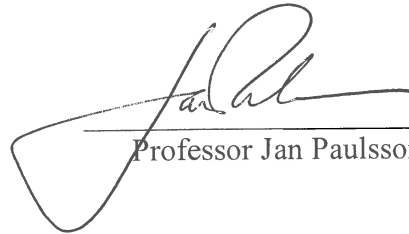
⁴² *Partial Award*, para. 522.

⁴³ *Ibid.*, paras. 521, 522.

Done at the Peace Palace, The Hague
Dated: 20 DECEMBER 2013



Professor Lucius Caflisch



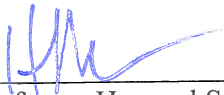
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Judge Bruno Simma



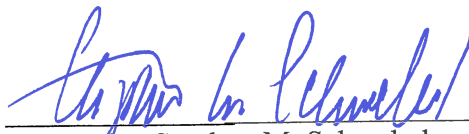
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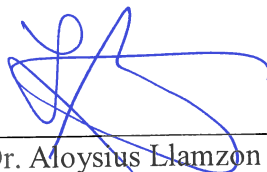
Professor Howard S. Wheeler FREng



Sir Franklin Berman KCMG QC



Judge Stephen M. Schwebel
Chairman



Dr. Aloysius Llamzon
Registrar