

**PCA PRESS RELEASE****INDUS WATERS KISHENGANGA ARBITRATION
(PAKISTAN V. INDIA)****Court of Arbitration Renders its Final Award
in the First Arbitration under the Indus Waters Treaty 1960****THE HAGUE, December 21, 2013.**

The Court of Arbitration constituted in the matter of the *Indus Waters Kishenganga Arbitration (Pakistan v. India)* yesterday rendered its Final Award in respect of the dispute between Pakistan and India under the Indus Waters Treaty involving the Kishenganga Hydro-Electric Project (the “KHEP”) located on the Kishenganga/Neelum River.

On February 18, 2013, the Court had issued a Partial Award, in which it unanimously decided that the KHEP is a Run-of-River Plant within the meaning of the Indus Waters Treaty and that India may accordingly divert water from the Kishenganga/Neelum River for power generation. However, the Court also decided that India is under an obligation to construct and operate the KHEP in such a way as to maintain a minimum flow of water in the Kishenganga/Neelum River, at a rate to be determined subsequently. Also in its Partial Award, the Court decided a second dispute relating to the permissibility of reducing the water level in the reservoirs of Indian Run-of-River Plants on certain tributaries of the Indus for the purpose of flushing sediment accumulated in the reservoir.

In its Final Award dated December 20, 2013, which is binding upon the Parties and without appeal, the Court of Arbitration unanimously decided the question of the minimum flow that was left unresolved by the Partial Award. The Court decided that India shall release a minimum flow of 9 cumecs into the Kishenganga/Neelum River below the KHEP at all times. However, the Court also decided that either India or Pakistan may seek reconsideration of this decision through the Permanent Indus Commission and the mechanisms of the Indus Waters Treaty after a period of seven years from the first diversion of water from the Kishenganga/Neelum River.

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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 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 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. In commencing this arbitration, Pakistan challenged, in particular, the permissibility of the planned diversion by the KHEP of the waters of the Kishenganga/Neelum into the Bonar Nallah and the effect that this diversion would have on Pakistan’s Neelum-Jhelum Hydro-Electric Project (the “NJHEP”), also currently under construction on the Kishenganga/Neelum downstream of the KHEP.

In its Partial Award of February 18, 2013, the Court of Arbitration decided that India’s right to divert the waters of the Kishenganga/Neelum 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 the relevant principles of customary international law, and both India and Pakistan’s entitlements under the Treaty must be made effective so far as possible. The Court thus 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 further observed that the data provided by the Parties up to that point were insufficient to allow the Court to decide the precise amount of flow to be preserved. The Court therefore deferred its determination of the minimum flow to a Final Award and requested the Parties to provide additional data.

In two rounds of simultaneous submissions made in June and August 2013, each Party provided data on the flow in the river at various locations along the Kishenganga/Neelum. Each Party then used this data to evaluate the potential impact of a range of minimum flows on the environment, agriculture and power generation at the KHEP and NJHEP.

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THE FINAL AWARD

At the outset, the Court defined its task and addressed the Parties’ differences regarding hydrological data. The Court then proceeded to assess the effects the KHEP is likely to have on ongoing agricultural and hydro-electric uses by Pakistan and on the downstream environment and, taking into account these effects, to determine the minimum flow. Finally, the Court described a review mechanism for revisiting its minimum flow determination and allocated the costs of arbitration.

1. The Court’s Task

Recalling the matters already decided in the Partial Award, the Court noted its finding that India had “coupled intent with action” in the planning and construction of the KHEP before Pakistan achieved the same with respect to the NJHEP, and that the KHEP had acquired priority in right as a result. The Court also recalled that in the Partial Award it had nevertheless found that Pakistan’s downstream agricultural and hydro-electric uses remain relevant on an ongoing basis throughout the operation of India’s hydro-electric plant.

Accordingly, the Court characterized the task before it as follows: “to determine a minimum flow that will mitigate adverse effects to Pakistan’s agricultural and hydro-electric uses throughout the operation of the KHEP, while preserving India’s right to operate the KHEP and maintaining the priority it acquired from having crystallized prior to the KHEP.” The Court noted that, at the same time, it would have to give due regard to “the customary international law requirements of avoiding or mitigating trans-boundary harm and of reconciling economic development with the protection of the environment.”

2. The Parties’ Differences Regarding Hydrological Data

The Parties had presented extensive evidence regarding the hydrological data to indicate with accuracy the level and patterns of flow in the Kishenganga/Neelum River; the Court observed that the differences between the Parties’ data were actually small. Accordingly, the Court emphasized that the choice of data sets between those presented by the Parties had no effect on its decision with respect to the minimum flow.

At the same time, the Court commended to the Parties the practice of undertaking quality assurance on hydrological data and of subsequently sharing such quality-assured data through the mechanisms of the Permanent Indus Commission.

3. The Downstream Effects of the KHEP

The Court examined the anticipated effects of the KHEP on downstream agriculture and hydro-electric uses by Pakistan and on the environment.

With respect to agricultural uses, the Court noted that, although Pakistan had described plans to increase the use of lift irrigation in the Neelum Valley, it had been unable to provide a quantitative estimate of the likely scale of such development. In the absence of concrete evidence, the Court found itself unable to take account of agricultural uses, but noted its view that the minimum flow ultimately adopted would ensure adequate water for development in the valley.

With respect to Pakistani hydro-electric uses, and in particular the NJHEP, the Court noted that the diversion of water by the KHEP would have a direct effect and would somewhat reduce the downstream generation of hydro-electric power under almost any minimum flow regime.

Finally, with respect to the environmental impact of the KHEP, the Court noted the differences in the environmental assessments provided by the Parties. Pakistan had provided the Court with a holistic assessment of the interaction of a range of environmental indicators and attempted to capture the complexity of interactions within the river ecosystem. In contrast, India had submitted a simpler assessment, drawing its conclusions from more limited data regarding the habitat for fish species. While noting that there is no single “correct” approach to environmental assessments, the Court expressed the view that Pakistan’s in-depth assessment, while not perfect, was more appropriate for a project of the magnitude of the KHEP. The Court acknowledged, however, that Pakistan’s approach in these proceedings does not match its own historical practices. The Court therefore encouraged both Parties to continue or expand their attention to environmental concerns at all their hydro-electric projects.

Examining the Parties’ hydrological tables and the anticipated effects of various flow scenarios, the Court provisionally concluded that taking exclusive account of environmental considerations would suggest an environmental flow of 12 cumecs. The Court noted that below this level, the lowest flows recorded at the Line of Control increasingly become the norm during parts of the winter dry season.

4. The Minimum Flow Determination

Having assessed the effects of the KHEP, the Court emphasized that this was only the first step of its analysis and that two additional factors had to be considered in fixing the minimum flow.

First, in considering the use of a minimum flow to mitigate the ongoing effects of the KHEP on power generation at the NJHEP, the Court emphasized that it was bound to recognize the priority accorded to the KHEP in the Partial Award. To preserve such priority, the Court decided that, on the basis of the evidence currently available to it, India should have access to at least half of the average flow at the KHEP site during the driest months of the year.

Second, with respect to the environment, the Court concluded that although customary international law requires the provision of a minimum flow, the Indus Waters Treaty limits the use of customary law to the extent necessary for the interpretation and application of the Treaty. Accordingly, the Court did not consider that the Treaty permitted it to apply customary law to such an extent as to negate rights expressly granted in the Treaty. Instead, the Court considered its authority to be limited to mitigating significant harm.

Examining the hydrological data, the Court concluded that a flow of 9 cumecs at the KHEP would be sufficient to maintain the natural flows throughout the dry months of December, January, and February, even in the driest winter of the 34-year flow data record presented by the Parties. Although the Court considered this approach to be somewhat severe in environmental terms, the Court concluded that, in light of the right of India to develop hydro-electric power, and the associated right to operate the KHEP effectively, such an approach represents an appropriate balance between the needs of the environment and India’s right to power generation.

Reviewing the effects of a 9 cumec minimum flow, the Court noted that such a flow would accord India 51.9 percent of the flow at the KHEP dam site during the month of January and a higher proportion in other months. On average, the minimum flow would reduce electricity generation at the KHEP by 19.5 GWh per month from October to March but would result in an annual reduction of only 5.7 percent. On the evidence before it, the Court concluded that such a reduction in output would not render the KHEP economically unviable.

5. Review Mechanism

Noting the uncertainty inherent in any attempt to predict environmental responses to changing conditions and the potential for climatic change, the Court decided that its determination of the minimum flow would be open to reconsideration. Specifically, 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.

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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.

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 February 18, 2013, the Court issued a Partial Award, which is available at: http://www.pca-cpa.org/showpage.asp?pag_id=1392

On December 20, 2013, the Court issued its Decision on India's Request for Clarification or Interpretation, which is available 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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