

**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 SEPTEMBER 19, 1960**

**-between-**

**THE ISLAMIC REPUBLIC OF PAKISTAN**

**-and-**

**THE REPUBLIC OF INDIA**

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**ORDER  
ON THE INTERIM MEASURES APPLICATION  
OF PAKISTAN DATED JUNE 6, 2011**

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**COURT OF ARBITRATION:**

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

**SECRETARIAT:**

**The Permanent Court of Arbitration**

**September 23, 2011**

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Commission  
**Dr. Pankaj Sharma**, Minister, Indian Embassy,  
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**TABLE OF CONTENTS**

<b>I.</b>	<b>PROCEDURAL HISTORY.....</b>	<b>1</b>
A.	The Indus Waters Treaty and The Initiation of Arbitration.....	1
B.	The Constitution of the Court of Arbitration.....	2
C.	The First Meeting of the Court of Arbitration.....	4
D.	Confidentiality.....	5
E.	The Site Visit.....	5
F.	Provisional Measures .....	6
<b>II.</b>	<b>THE REQUESTED INTERIM MEASURES .....</b>	<b>13</b>
<b>III.</b>	<b>SUMMARY OF THE PARTIES' ARGUMENTS .....</b>	<b>14</b>
A.	Pakistan's Decision not to Seek Interim Measures at the First Meeting .....	14
	Pakistan's Position .....	14
	India's Position.....	15
B.	The "Proceed at Own Risk" Principle .....	17
	Pakistan's Position .....	17
	India's Position.....	18
C.	Applicable Legal Standards.....	20
	Pakistan's Position .....	20
	India's Position.....	22
D.	Urgency and Irreversibility.....	23
	Pakistan's Position .....	23
	India's Position.....	25
E.	The Issuance of Interim Measures on Grounds of "Safeguarding [the Applicant's] Interests under the Treaty with Respect to the Matter in Dispute".....	28
	Pakistan's Position .....	28
	India's Position.....	30
F.	The Issuance of Interim Measures on Grounds of Avoidance of "Prejudice to the Final Solution . . . of the Dispute" .....	31
	Pakistan's Position .....	31
	India's Position.....	32
G.	The Issuance of Interim Measures on Grounds of "Aggravation or Extension of the Dispute".....	33
	Pakistan's Position .....	33
	India's Position.....	34

H.	The Parties' Characterization of the Historical Record.....	34
	Pakistan's Position .....	35
	India's Position.....	36
<b>IV .</b>	<b>ANALYSIS OF THE COURT.....</b>	<b>37</b>
A.	India's Assurances and Representations .....	37
B.	The Court's Power to Specify Interim Measures: Paragraph 28 of Annexure G to the Treaty.....	39
C.	The Necessity "to avoid prejudice to the final solution . . . of the dispute" under Paragraph 28 of Annexure G to the Treaty.....	42
D.	CONCLUSIONS .....	43
	1. Pakistan's Claims Satisfy the Test of Plausibility .....	43
	2. Temporarily enjoining India's construction of many components of the KHEP (including the headrace tunnel and powerhouse facility) is not necessary to avoid prejudice to the Award.....	44
	3. Temporarily enjoining the operation of the bypass tunnel is not necessary to avoid prejudice to the Award.....	45
	4. Temporarily enjoining India's construction of certain elements of the dam at the Kishenganga/Neelum riverbed is necessary to avoid prejudice to the Award .....	46
<b>V .</b>	<b>ORDER.....</b>	<b>49</b>

## **I. PROCEDURAL HISTORY**

### **A. THE INDUS WATERS TREATY AND THE INITIATION OF ARBITRATION**

1. On September 19, 1960, the Government of India and the Government of Pakistan signed the Indus Waters Treaty 1960 (the “**Treaty**”). Instruments of ratification were exchanged between the Parties on January 12, 1961; upon ratification, the Treaty entered into force retroactively as of April 1, 1960.<sup>1</sup>
2. Article IX of the Treaty provides for a system for the settlement of differences and disputes that may arise in relation to the Treaty. In its relevant part, Article IX states:

ARTICLE IX  
Settlement of Differences and Disputes

[. . .]

- (4) Either Government may, following receipt of the report referred to in Paragraph (3), or if it comes to the conclusion that this report is being unduly delayed in the Commission, invite the other Government to resolve the dispute by agreement. [. . .]
- (5) A Court of Arbitration shall be established to resolve the dispute in the manner provided by Annexure G
  - (a) upon agreement between the Parties to do so; or
  - (b) at the request of either Party, if, after negotiations have begun pursuant to Paragraph (4), in its opinion the dispute is not likely to be resolved by negotiation or mediation; or
  - (c) at the request of either Party, if, after the expiry of one month following receipt by the other Government of the invitation referred to in Paragraph (4), that Party comes to the conclusion that the other Government is unduly delaying the negotiations.

[. . .]

3. In turn, Paragraph 2 of Annexure G of the Treaty provides as follows:

2. The arbitration proceeding may be instituted

[. . .]

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<sup>1</sup> See Article XII, Indus Waters Treaty 1960.

- (b) at the request of either Party to the other in accordance with the provisions of Article IX (5) (b) or (c). Such request shall contain a statement setting forth the nature of the dispute or claim to be submitted to arbitration, the nature of the relief sought and the names of the arbitrators appointed under Paragraph 6 by the Party instituting the proceeding.
4. Through a “Request for Arbitration” dated May 17, 2010, the Islamic Republic of Pakistan initiated arbitration proceedings pursuant to Article IX and Annexure G to the Treaty against the Republic of India.
  5. In its Request for Arbitration, Pakistan stated that the Parties had failed to resolve the “Dispute” concerning the Kishenganga Hydro-Electric Project (“**KHEP**”) by agreement pursuant to the terms of Article IX(4) of the Treaty.
  6. Pakistan identified “two questions that are at the centre” of the dispute in the following way:
    - a. 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)?
    - b. 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?<sup>2</sup>

**B. THE CONSTITUTION OF THE COURT OF ARBITRATION**

7. Pursuant to Article IX(5) of the Treaty, a Court of Arbitration has been established. Seven arbitrators were appointed in accordance with Paragraph 4 of Annexure G to the Treaty.
8. On May 17, 2010, Pakistan appointed His Excellency Judge Bruno Simma and Professor Jan Paulsson as arbitrators in accordance with Paragraphs 4 and 6 of Annexure G.
9. On June 16, 2010, India appointed His Excellency Judge Peter Tomka and Professor Lucius Caflisch as arbitrators in accordance with paragraphs 4 and 6 of Annexure G.
10. Having failed to maintain a Standing Panel of umpires as provided under Paragraph 5 of Annexure G or to reach an agreement on the remaining umpires as specified in Paragraph

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<sup>2</sup> Pakistan’s Request for Arbitration, para. 4.

7(b)(i), the Parties proceeded to select umpires in accordance with the procedure set out in Paragraph 7(b)(ii) of Annexure G, which provides:

7. The umpires shall be appointed as follows:

(a) [ . . . ];

(b) If a Panel has not been nominated in accordance with Paragraph 5, or if there should be less than three names on the Panel in any category or if no person in a category accepts the invitation referred to in Paragraph 7(a), the umpires, or the remaining umpires or umpire, as the case may be, shall be appointed as follows: -

(i) By agreement between the Parties.

(ii) Should the Parties be unable to agree on the selection of any or all of the three umpires, they shall agree on one or more persons to help them in making the necessary selection by agreement; but if one or more umpires remain to be appointed 60 days after the date on which the proceeding is instituted, or 30 days after the completion of the process described in sub-paragraph (a) above, as the case may be, then the Parties shall determine by lot for each umpire remaining to be appointed, a person from the appropriate list set out in the Appendix to this Annexure, who shall then be requested to make the necessary selection.

11. The Parties not having been able to agree on the persons to be appointed as umpires, in accordance with Paragraph 7(b)(ii) of Annexure G, three of the persons provided in the Appendix to Annexure G—the Secretary-General of the United Nations (for selection of the Chairman), the Rector of the Imperial College of Science and Technology, London, England (for selection of the Engineer Member), and the Lord Chief Justice of England (for selection of the Legal Member)—were called upon to appoint the umpires.
12. On October 12, 2010, the Secretary-General of the United Nations appointed Judge Stephen M. Schwebel as umpire and Chairman of the Court in accordance with Paragraphs 4(b)(i), 7, and 8 of Annexure G.
13. On December 12, 2010, the Lord Chief Justice of England and Wales appointed Sir Franklin Berman KCMG QC as umpire, in accordance with Paragraphs 4(b)(iii) and 7 of Annexure G.
14. On December 17, 2010, the Rector of Imperial College, London, appointed Professor Howard S. Wheeler FREng as umpire, in accordance with Paragraphs 4(b)(ii) and 7 of Annexure G.
15. At the First Meeting of the Court on January 14, 2011, the Court made the following appointments with the consent of the Parties pursuant to Paragraph 15(a) of Annexure G: (i) the

Permanent Court of Arbitration (the “PCA”) as Secretariat; (ii) Mr. Aloysius P. Llamzon, Legal Counsel of the PCA, as Registrar; and (iii) Mr. Brooks W. Daly, Deputy Secretary-General and Principal Legal Counsel of the PCA, as Treasurer.

16. Following the First Meeting, draft Terms of Appointment were sent to the Parties for comment and approval, resulting in the signing of the Terms of Appointment by the Parties, the Chairman, and the Secretary-General of the PCA, with effect from March 8, 2011. In Paragraph 2.11 and 2.12 of the Terms of Appointment, the Parties confirmed that (a) “the members of the Court have been validly appointed in accordance with the Treaty,” and (b) they “have no objection to the appointment of any member of the Court on the grounds of conflict of interest and/or lack of independence or impartiality in respect of matters known to them at the date of the signature of these Terms of Appointment.”

**C. THE FIRST MEETING OF THE COURT OF ARBITRATION**

17. By e-mail communication dated December 17, 2010, the Chairman invited the Parties, pursuant to Paragraph 14 of Annexure G, to meet with the members of the Court at the premises of the PCA in The Hague on January 14, 2011. Paragraph 14 of Annexure G provides as follows:
  14. The Court of Arbitration shall convene, for its First Meeting, on such date and at such place as shall be fixed by the Chairman.
18. By e-mail communications dated December 26 and 27, 2010, the Parties accepted the Chairman’s invitation to the First Meeting of the Court. Thereafter, the Chairman transmitted for the Parties’ comment a draft agenda for the meeting drafted pursuant to Paragraph 15 of Annexure G. The Parties’ comments thereon were incorporated as annotations to the agenda.
19. On January 14, 2011, the Court of Arbitration’s First Meeting was held at the Peace Palace, The Hague, the Netherlands. Immediately following the First Meeting, the PCA transmitted to the Parties a verbatim transcript of the day’s discussions, which was signed by the Chairman and constituted minutes for the purposes of Paragraph 19 of Annexure G. The Court also issued **Procedural Order No. 1** dated January 21, 2011, memorializing many of the matters agreed to by the Parties during the First Meeting.
20. During the First Meeting, one of the items discussed amongst the Court and the Parties pursuant to Paragraph 16 of Annexure G was the determination of what supplemental procedural rules might be employed for the conduct of this arbitration. After hearing the Parties’ views during the First Meeting and further exchanges made pursuant to paragraph 2 of Procedural Order



No. 1, the Court issued **Procedural Order No. 2** dated March 16, 2011, in which *inter alia* it adopted a set of “Supplemental Rules of Procedure” which apply in these proceedings subject to the Treaty, procedural orders of the Court, and the Terms of Appointment (signed by the Parties, the Chairman, and the PCA Secretary-General, and dated as of March 8, 2011).<sup>3</sup>

**D. CONFIDENTIALITY**

21. During the First Meeting, the Parties agreed that all written pleadings and any other documents or evidence relating to these proceedings are to remain confidential until otherwise agreed. The Court noted this agreement in paragraph 7 of Procedural Order No. 1, while also establishing a timeline for further consultation between the Parties concerning the possible opening of the hearing on the merits to the public, and the publication of the written pleadings, supporting documents, and the Award to be rendered by the Court.

**E. THE SITE VISIT**

22. In the course of discussions during the First Meeting of the Court, the Parties agreed that it would be desirable for the Court of Arbitration to conduct a site visit to the pertinent facilities and locations of the KHEP and to those of the Neelum Valley.

23. Pursuant to Procedural Order No. 1, the Court invited the Parties to confer and agree upon a joint itinerary and other arrangements for the site visit by March 18, 2011.

24. After further communication between the Parties, on March 21, 2011, the PCA transmitted to the Parties the Court’s decision concerning the site visit, providing that the dates of June 15-21, 2011 would be set aside for the conduct of the site visit and requesting that the Parties propose an itinerary—including the related logistical arrangements—by no later than April 29, 2011.

25. On May 10, 2011, having considered the Parties’ respective communications concerning the site visit itinerary, the Court issued **Procedural Order No. 3**, deciding, *inter alia*, the itinerary of the proposed visit, the size of the delegations, matters concerning the confidentiality of the site visit and the manner in which the costs were to be apportioned between the Parties.

26. From June 15, 2011 to June 21, 2011, a site visit to the Neelum-Jhelum and Kishenganga hydro-electric projects and surrounding areas located on the river Kishenganga/Neelum was

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<sup>3</sup> Procedural Order No. 2, para. 1.1.

conducted. The Court arrived in Islamabad on June 15, 2011, visited the Neelum Valley by helicopter, and inspected components of the Neelum-Jhelum Hydro-Electric Project. The Court then crossed the line of control on June 17, 2011 and proceeded to Srinagar. On June 18 and 19, 2011, it inspected components of the KHEP located in the Gurez valley and the area near Bandipura north of Wular Lake. The Court then departed from India by way of New Delhi on 20-21 June 2011.

27. Pursuant to paragraph 6 of Procedural Order No. 3, on August 2, 2011, the PCA transmitted to the Parties and the members of the Court a set of four DVD-format discs containing videos of the various presentations made during the site visit, and numerous photographs of the site visit.

**F. PROVISIONAL MEASURES**

28. Paragraph 28 of Annexure G of the Indus Waters Treaty provides:

28. Either Party may request the Court at its first meeting to lay down, pending its Award, such interim measures as, in the opinion of that Party, are necessary to safeguard its interests under the Treaty with respect to the matter in dispute, or to avoid prejudice to the final solution or aggravation or extension of the dispute. The Court shall, thereupon, after having afforded an adequate hearing to each Party, decide by a majority consisting of at least four members of the Court, whether any interim measures are necessary for the reasons hereinbefore stated and, if so, shall specify such measures: Provided that

- a) the Court shall lay down such interim measures only for such specified period as, in its opinion, will be necessary to render the Award: this period may, if necessary, be extended unless the delay in rendering the Award is due to any delay on the part of the Party which requested the interim measures in supplying such information as may be required by the other Party or by the Court in connection with the dispute; and
- b) the specification of such interim measures shall not be construed as an indication of any view of the Court on the merits of the dispute.

29. In Paragraph 10 of its Request for Arbitration, Pakistan stated:

Accordingly, pursuant to Annexure G, paragraph 28 of the Treaty, Pakistan will request the Court at its first meeting to lay down, pending its Award, interim measures both to safeguard Pakistan's interests under the Treaty with respect to the matters in dispute, and to avoid prejudice to the final solution and aggravation or extension of dispute.

30. Pakistan sought, *inter alia*, the following relief in its Request for Arbitration:

An interim order restraining India from proceeding further with the planned diversion of the river Kishenganga/Neelum until such time as the legality of the diversion is finally determined by a Court of Arbitration.<sup>4</sup>

31. On January 14, 2011, during the Court's First Meeting, Pakistan made the following statement in respect of provisional measures:

Our assessment of the present situation in Kishenganga is that while the plan certainly envisages works on the Indus that would breach the Indus Waters Treaty and cause great harm to Pakistan, the project is not yet so far advanced that such harm is imminent.

We are aware of the principle of international law, applied for example by the International Court in paragraphs 30-33 of its Order on provisional measures in the *Great Belt* case, that in cases such as the present a State engaged in works that may violate the rights of another State can proceed only at its own risk. The court may, in its decision on the merits, order that the works must not be continued or must be modified or dismantled.

We are content at this stage to rely upon that principle.

Major construction projects are, however, not easily reversible processes. The excavation of construction sites and the filling of dams cannot easily be undone. Equally importantly, costs are not incurred in a regular and uniform fashion. There are points at which major investments of capital and resources have to be made. Beyond those points a State might find it more difficult to abandon the project and restore the status quo ante.

We therefore invited India to give an undertaking to inform the Court, and at the same time the Government of Pakistan, of any actual or imminent developments or steps in relation to the Kishenganga project that it considers would have a significant adverse effect upon the practicality of abandoning the project and restoring the status quo ante, or would in any other way seriously jeopardize Pakistan's interests.

On that basis, and on the understanding that we may apply to the Court for provisional measures at any point in the future should it become apparent (whether as a result of a communication from India or otherwise) that the ordering of such measures is an urgent necessity, we have decided to make no application for provisional measures at this meeting.

32. By e-mail communication dated March 6, 2011, counsel for Pakistan requested that counsel for India provide, by March 17, 2011, its comments on, *inter alia*: (1) India's understanding of the "proceed at your own risk" principle first outlined in the *Great Belt* case<sup>5</sup> before the International Court of Justice, providing that in respect of provisional measures a "State engaged in works that may violate the rights of another State can proceed only at its own risk;" (2) the status of the undertaking to inform Pakistan and the Court of "any actual imminent steps in relation to the KHEP that it considers would have a significant adverse effect upon the

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<sup>4</sup> Pakistan's Request for Arbitration, para. 54(a).

<sup>5</sup> *Passage through the Great Belt* (Finland v. Denmark), Provisional Measures, Order of 29 July 1991, ICJ Reports 1991, p. 12.

practicability of abandoning the project and restoring the status quo ante or would in any other way seriously jeopardize Pakistan's interests;" (3) information on the current state of works at the site; and (4) the planned date for diversion of the river.

33. By e-mail communication dated March 17, 2011, counsel for India replied to counsel for Pakistan to the effect that: (1) India considered that in its understanding the "proceed at your own risk" principle was "covered by the existing International Law;" (2) as a consequence of Pakistan's decision, expressed at the January 14, 2011 meeting, to forego lodging an application for provisional measures, India considered it inappropriate for Pakistan to be "seeking any unilateral undertakings on the part of India;" (3) India would address the status of current construction in "substantive pleadings on the merits according to the schedule laid down by the Court;" and (4) the "planned date of diversion is not before 2015."
34. On June 6, 2011, Pakistan submitted an Application for Provisional Measures (the "**Application**") by e-mail.
35. By e-mail communication dated June 7, 2011, India wrote to the PCA, requesting "adequate time to respond to Pakistan's [A]pplication." India submitted that in its view Pakistan's application should have been filed earlier, especially because "India's last letter to Pakistan was on 17 March 2011." India also recalled that at the Court's First Meeting, Pakistan had stated that it would not pursue an application for provisional measures.
36. After considering the comments of the Parties on the manner and timing on which the Court should consider Pakistan's "Application for Provisional Measures," the Court issued **Procedural Order No. 4** on June 12, 2011 deciding, *inter alia*, on a schedule for written submissions and hearing.
37. By e-mail communication dated June 30, 2011, Pakistan recalled to the Court, *inter alia*, the statement made by India during the course of the site visit according to which "the temporary tunnel at the Kishenganga dam site is 100% complete" and the "river would be dammed at the site in November 2011." Pakistan submitted that a

section of the Kishenganga/Neelum would be diverted as a result, however, the interference in the flow of the river at this section is intended to be permanent – the former riverbed would be lost, and would become a construction site for the permanent 37m high dam structure . . . Pakistan considers that the imminence of these works adds a further element of urgency to its Application.

By e-mail communication dated July 1, 2011, the PCA, on behalf of the Chairman of the Court, invited India to comment on Pakistan's communication of June 30, 2011 as part of its Response to Pakistan's Application, due on July 22, 2011.

38. On July 22 2011, India submitted its Response to Pakistan's Application for Provisional Measures.
39. After consulting with the Parties, on July 26, 2011, the Court issued **Procedural Order No. 5**, deciding, *inter alia*, the time, place and conduct of the hearing on interim measures. The Court determined that the hearing would be organized in two rounds of oral argument: starting with statements by Pakistan on the first day, India on the second, and reply and closing statements by both Parties on the final day of the hearing.
40. On August 3, 2011, Pakistan submitted its Reply to India's Response on Pakistan's Application for Provisional Measures.
41. On August 15, 2011, India submitted its Rejoinder to Pakistan's Reply.
42. On August 25-27, 2011 an interim measures hearing was held at the Great Hall of Justice, the Peace Palace, The Hague. Present at the hearing were the following persons:

**The Court of Arbitration**

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

**Pakistan**

Mr. Kamal Majidulla, Agent for Pakistan  
H.E. Khalil Ahmed, Ambassador at Large, Co-agent  
Mr. Mohammad Karim Khan Agha, Additional Attorney General for Pakistan, Co-agent  
Mr. Aijaz Ahmed Pitafi, Joint Commissioner for Indus Waters  
Professor James Crawford (*by telephone conference*)  
Professor Vaughan Lowe, Legal Counsel  
Barrister Samuel Wordsworth, Legal Counsel  
Ms. Shamila Mahmood, Legal Counsel  
H.E. Ambassador Aizaz Chaudhry, Ambassador for Pakistan to the Netherlands  
Mr. Asif Baig, Technical Expert  
Mr. Mehr Ali Shah, Technical Expert

**India**

Mr. Dhruv Vijai Singh, Agent for India  
H.E. Bhaswati Mukherjee, Ambassador of India, The Hague

Mr. A.K. Bajaj, Chairman, Central Water Commission, Technical Advisor  
Dr. Pankaj Sharma, Minister, Indian Embassy, The Hague  
Mr. Fali S. Nariman, Counsel for India  
Mr. R.K. P. Shankardass, Counsel for India  
Professor Stephen C. McCaffrey, Counsel for India  
Mr. Rodman Bundy, Counsel for India  
Prof. Daniel Magraw, Counsel for India  
Mr. S.C. Sharma, Counsel for India  
Mr. Y.K. Sinha, Co-Agent for India  
Mr. Narinder Singh, Co-Agent for India  
Mr. K.S. Nagaraja, Executive Director NHPC  
Mr. G. Aranganathan, Co-Agent for India  
Mr. Darpan Talwar, SJC (Indus), Technical Advisor

**Registry**

Mr. Aloysius Llamzon, Registrar and Legal Counsel  
Mr. Dirk Pulkowski, Legal Counsel  
Mr. Garth Schofield, Legal Counsel  
Ms. Anna Vinnik, Assistant Legal Counsel  
Ms. Willemijn van Banning, Legal Secretary

**Court Reporters**

Mr. David Kasdan  
Mr. Randy Salzman

43. At the hearing, the following persons presented oral arguments before the Court on behalf of Pakistan:

Mr. Kamal Majidulla, Agent for Pakistan  
Barrister Samuel Wordsworth, Legal Counsel  
Professor Vaughan Lowe, Legal Counsel

44. The following persons presented oral arguments before the Court on behalf of India:

Mr. Dhruv Vijai Singh, Agent for India  
Mr. Fali S. Nariman, Counsel for India  
Mr. R.K. P. Shankardass, Counsel for India  
Mr. Rodman Bundy, Counsel for India  
Professor Stephen C. McCaffrey, Counsel for India  
Professor Daniel Magraw, Counsel for India

45. In the morning of August 27, 2011, the third day of the hearing, a member of the Court, Professor Wheater, requested that India provide information on the following points with respect to the technical aspects of the proposed Kishenganga Dam:

- (1) One or more cross-sections of the dam.
- (2) A drawing of the dam elevation showing the location of the proposed spillways and any other discharge outlets with respect to design levels of water elevation, such as

the drawing provided for the Baglihar dam in Volume 7 of Pakistan's Memorial at Figure 5.2.1. on Page 141.

- (3) Specification of the hydraulic design of the proposed spillways and any other downstream outlet works; the capacity of the dam to transmit flows downstream as a function of the ponded water level.
- (4) The intended mode of operation of India, including the transmission of flows downstream to meet the needs of existing uses as specified in the Treaty, including any environmental flows and for sediment flushing.
- (5) A diagram showing the upstream extent of inundation at the Full Pondage Level and under surcharge storage; that is, during the passage of the design flood, including the location of any nearby upstream riparian settlements, and such a document could be a plan view of the inundated areas.
- (6) India's Environmental Impact Assessment for the dam.
- (7) An outline schedule of the proposed construction works; that is including the currently proposed timing of key phases of the dam.<sup>6</sup>

46. During the afternoon of the third hearing day, the Chairman of the Court requested that India provide the technical data and construction schedules requested by Professor Wheater by no later than September 2, 2011, and that Pakistan submit its comments on that data, should it wish to make any comments, by no later than September 7, 2011.<sup>7</sup>

47. In response, the Agent for India pointed out that some of the information requested by the Court "is very much part of" India's Counter-Memorial<sup>8</sup> and needed to be placed within proper context, as it would be in the Counter-Memorial. The Agent for India requested that the Court allow India to submit only such information as is "absolutely necessary and which does not preempt our filing of the Counter-Memorial."<sup>9</sup>

48. The Chairman replied that the Court recognized that "the time offered is short" but requested that India nonetheless submit "such papers as it quickly can put in" and assured the Agent for India that the Court did not "expect a comprehensive revelation of all the data that it [India] will bring into play in its Counter-Memorial . . . Clearly, what is left for the merits should be left for the merits, and we don't anticipate that our order will go into the merits."<sup>10</sup>

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<sup>6</sup> Interim Measures Hearing Transcript, 201:6-202:25.

<sup>7</sup> Interim Measures Hearing Transcript, 294:10-17.

<sup>8</sup> Interim Measures Hearing Transcript, 294:21-23.

<sup>9</sup> Interim Measures Hearing Transcript, 295:4-5.

<sup>10</sup> Interim Measures Hearing Transcript, 296:3-10.

49. By letter dated August 29, 2011, the PCA sent the Parties copies of documents provided by India to the Court and Pakistan during the hearing, including a set containing several of the documents requested by Professor Wheeler.
50. On September 2, 2011, India wrote the Court in relation to the question posed by Professor Wheeler during the interim measures hearing. India's Agent confirmed that most of the documents requested had been provided earlier to Pakistan, and identified those that were included as documentary exhibits in Pakistan's Memorial. It was also confirmed that apart from those documents already provided by India during the interim measures hearing on August 27, 2011, further documentation (including those concerning India's environmental impact assessment for the dam) would be provided in India's Counter-Memorial.
51. On September 7, 2011, Pakistan commented on India's September 2, 2011 communication and provided the Court with two additional documents previously referred to by Pakistan during the interim measures hearing.



## II. THE REQUESTED INTERIM MEASURES

52. As specified in Paragraph 15 of its Application, Pakistan requests that the Court “issue an order for provisional measures in the following terms”:

- (i) India shall cease work on the KHEP until such time as the Court renders its award on the merits in these proceedings;
- (ii) India shall inform the Court and Pakistan of any actual or imminent developments or steps in relation to the Kishenganga project that may have a significant adverse effect upon restoring the *status quo ante* or that may in any other way seriously jeopardise Pakistan's rights and interests under the Treaty;
- (iii) Any steps that India has taken or may take in respect of the KHEP are taken at its own risk and without prejudice to the possibility that the Court may in its decision on the merits order that the works must not be continued or must be modified or dismantled; and
- (iv) Such further relief as the Court considers to be necessary.

53. In its response, India requests the Court “to reject Pakistan’s Application for Provisional Measures, and to decide that the circumstances of the case are not such to justify the ordering of interim measures under the 1960 Treaty.”

### III . SUMMARY OF THE PARTIES' ARGUMENTS

54. The arguments raised by the Parties may be summarized as follows.

#### A. PAKISTAN'S DECISION NOT TO SEEK INTERIM MEASURES AT THE FIRST MEETING

55. Paragraph 28 of Annexure G of the Indus Waters Treaty provides that “[e]ither Party may request the Court at its first meeting to lay down, pending its Award, such interim measures as, in the opinion of that Party, are necessary to safeguard its interests under the Treaty . . .”

56. During the First Meeting of January 14, 2011, Pakistan informed the Court that it had chosen to forego the immediate pursuit of an order for interim measures, but that it would reserve the right to make such an application should it later determine that “the ordering of such measures is an urgent necessity.”<sup>11</sup> An exchange of correspondence between Pakistan’s and India’s counsel followed in March 2011.<sup>12</sup> On June 6, 2011, Pakistan submitted its Application for Provisional Measures.

#### *Pakistan’s Position*

57. In its Application, Pakistan noted the following developments in relation to its pursuit of interim measures at that stage in the proceedings:

Work on the KHEP continues. Pakistan is seriously concerned by India’s unwillingness to commit itself to adherence to the ‘proceed at own risk’ principle, and to give an undertaking to inform the PCA and Pakistan of any actual or imminent developments or steps in relation to the Kishenganga project that would have a significant adverse effect upon the practicability of abandoning the project and restoring the status quo ante or would in any other way seriously jeopardise Pakistan’s interests. Pakistan regards India’s response as a reservation of its position that amounts to a refusal to accept those principles.<sup>13</sup>

58. At the January meeting, Pakistan argues, “India had not carefully and deliberately refused to confirm that it proceeded at its own risk and had not carefully and deliberately refused to give an undertaking as to informing the Court and Pakistan of any actual or imminent steps in relation to KHEP.”<sup>14</sup> According to Pakistan, the communications made by India only after the

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<sup>11</sup> First Meeting Transcript, 21:6-12.

<sup>12</sup> *See supra*, paras. 32-33.

<sup>13</sup> Pakistan’s Application for Provisional Measures, para. 9.

<sup>14</sup> Interim Measures Hearing Transcript, 203:25 to 204:4.

January meeting “explain [ ] why the application was not made then,”<sup>15</sup> as do the “conflicting reports about the state of readiness of the [KHEP]”<sup>16</sup> that Pakistan had received. Additionally, Pakistan observes that practical considerations, including work on its Memorial in April and May 2011<sup>17</sup> and the need for the Application to be made prior to the site visit “and with sufficient notice for the matter to be dealt with in this hearing slot,”<sup>18</sup> influenced the precise timing of its request for interim measures. Overall, Pakistan submits that the reasons for the timing of its Application have been addressed, and that continued attention to the issue “is a distraction.”<sup>19</sup>

59. Having advanced the foregoing explanation for its decision not to seek interim measures at the First Meeting of January 14, 2011, Pakistan rejects India’s position that a later application carries an ‘enhanced’ burden of proof.<sup>20</sup> Falling in with such a suggestion, Pakistan submits, would “contradict the concept of provisional measures as a procedural mechanism necessary to preserve the efficacy and the fairness of judicial proceedings.”<sup>21</sup>

#### *India’s Position*

60. India agrees that Pakistan’s decision not to pursue interim measures at the First Meeting does not mean that it is “precluded” from pursuing such measures at the present moment.<sup>22</sup> India accepts that “after the Court’s first meeting, circumstances could arise of a compelling nature whereby a Request for Interim Measures would be justified.”<sup>23</sup>
61. Nevertheless, India submits that if “circumstances genuinely dictated the appropriateness, at least in Pakistan’s mind, of provisional measures at the time, that first meeting in January was the appropriate time and place to file a request.”<sup>24</sup> In India’s view, such timing would

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<sup>15</sup> Interim Measures Hearing Transcript, 15:11-13.

<sup>16</sup> Pakistan’s Reply, para. 4.

<sup>17</sup> Interim Measures Hearing Transcript, 18:7-10.

<sup>18</sup> Interim Measures Hearing Transcript, 18:4-5.

<sup>19</sup> Interim Measures Hearing Transcript, 203:18-19.

<sup>20</sup> Pakistan’s Reply, para. 3.

<sup>21</sup> Pakistan’s Reply, para. 3.

<sup>22</sup> Interim Measures Hearing Transcript, 249:23 to 250:3.

<sup>23</sup> Interim Measures Hearing Transcript, 250:4-6.

<sup>24</sup> Interim Measures Hearing Transcript, 249:15-18.

correspond to the Treaty drafters' expectation that the grounds for interim measures "would be apparent" at the time of the First Meeting, "given the history of a dispute."<sup>25</sup>

62. Pakistan's statements at the First Meeting also indicate, in India's view, that Pakistan had accepted that there was "no imminent harm to Pakistan in view of its assessment of the status of the Kishenganga Project."<sup>26</sup> Specifically, India relies upon the following observation of the Agent for Pakistan:

Mr. President, members of the Court, our assessment for the present situation along the Kishenganga is that while the plan certainly envisages works that would breach the Indus Waters Treaty and cause great harm to Pakistan, the project is not yet so far advanced that such harm is imminent.<sup>27</sup>

63. Against this backdrop, India argues that Pakistan "bears a heavy burden to show that the situation has later changed justifying a subsequent request for such measures."<sup>28</sup> Far from meeting this burden, India submits that Pakistan has "made no attempt—no attempt—to explain why Pakistan suddenly considered interim measures to be warranted in June when it had taken the exact opposite position in January and again at the end of May,"<sup>29</sup> when it submitted its Memorial on the merits, which did not include the prayer for interim measures previously set out in its Request for Arbitration.<sup>30</sup> Moreover, India maintains that "assertions about conflicting reports and limited information" as a reason for the submission of the Application only in June 2011 "are not backed up by a shred of evidence . . . filed in these proceedings."<sup>31</sup>
64. India also considers that the June 6, 2011 Application was Pakistan's "second request" for interim measures, the same having been raised prior to the First Meeting in Pakistan's original Request for Arbitration.<sup>32</sup>

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<sup>25</sup> India's Response, para. 47.

<sup>26</sup> India's Response, para. 3. *See also* Interim Measures Hearing Transcript, 128:6-15.

<sup>27</sup> First Meeting Transcript, 19:22 to 20:2.

<sup>28</sup> India's Response, para. 48.

<sup>29</sup> Interim Measures Hearing Transcript, 144:5-9.

<sup>30</sup> Interim Measures Hearing Transcript, 142:18-25.

<sup>31</sup> Interim Measures Hearing Transcript, 130:9-11.

<sup>32</sup> India's Response, para. 2.

**B. THE “PROCEED AT OWN RISK” PRINCIPLE**

65. During the January 14, 2011 First Meeting, Pakistan invoked the principle (considered by Pakistan to be one of international law) applied by the International Court of Justice (“ICJ”) in the *Passage through the Great Belt* case<sup>33</sup> that “a state engaged in works that may violate the rights of another state can proceed only at its own risk. The court may in its decision on the merits order that the works must not be continued or must be modified or dismantled.”<sup>34</sup> During that meeting, Pakistan stated that in reliance upon this principle, it would not seek interim measures at that time.<sup>35</sup>
66. Thereafter, on March 6, 2011, Pakistan’s counsel wrote to India’s counsel, requesting that India affirm its adherence to the principle articulated by the ICJ in the *Great Belt* case. Pakistan further reiterated its invitation, expressed during the First Meeting, that India provide an undertaking not to take steps that would have a “significant adverse effect” on its ability to abandon the project and return to the *status quo ante*.<sup>36</sup>

*Pakistan’s Position*

67. According to Pakistan, the justification for its counsel’s March 6, 2011 communication was India’s silence on what Pakistan considered to be “an essential, if relatively uncontentious point.”<sup>37</sup> Pakistan contends that India’s letter of March 17, 2011 and subsequent submissions demonstrate that “India has . . . in various notably elaborate ways and on three separate occasions refused to say that it proceeds at risk . . .”<sup>38</sup> India’s statement that the “proceed at own risk” principle is “covered by provisions of existing international law”<sup>39</sup> provides, in Pakistan’s view, “no clue there as to what provisions India considers to apply, how India interprets those provisions, [or] how India considers that they apply to it in the current circumstances.”<sup>40</sup> Moreover, Pakistan argues, India’s understanding appears to contemplate at

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<sup>33</sup> *Passage Through the Great Belt* (Finland v. Denmark), Provisional Measures Order, ICJ Reports 1991, p. 12.

<sup>34</sup> First Meeting Transcript, 20:7-11.

<sup>35</sup> First Meeting Transcript, 20:12-13.

<sup>36</sup> Letter from Pakistan’s Counsel, dated March 6, 2011.

<sup>37</sup> Interim Measures Hearing Transcript, 13:1-3.

<sup>38</sup> Interim Measures Hearing Transcript, 13:23-25.

<sup>39</sup> Letter from India’s Counsel dated March 17, 2011.

<sup>40</sup> Interim Measures Hearing Transcript, 14:13-16.

most a risk that it would be required to open the spillways of the KHEP and allow the Kishenganga to flow unhindered—but not the possibility that it might be required to dismantle the dam.<sup>41</sup>

68. In Pakistan’s view, India’s unwillingness to confirm “well-established principles of international law concerning the conduct of parties during the pendency of litigation . . . can only be construed as a reservation of the right to violate [these principles].”<sup>42</sup> India’s purportedly equivocal statements in this regard are said to stand in stark contrast to the assurances provided in the “clearest of terms” by India<sup>43</sup> in the *Baglihar* case<sup>44</sup> or the undertaking by Uruguay during the hearing on provisional measures in the *Pulp Mills on the River Uruguay* case<sup>45</sup> before the ICJ.<sup>46</sup>
69. In evaluating India’s statements on this question, Pakistan rejects the argument that the March 2011 correspondence exchanged among counsel for the two Parties occurred outside the parameters of this arbitration or could be distinguished from the Parties’ own positions.<sup>47</sup> In any event, Pakistan submits that even if some “relatively fine line could be drawn between inter-counsel correspondence sent pursuant to instructions of the Parties and correspondence between the Agents of the two states,” the positions stated in those letters were later “adopted and reflected” in the Parties’ official submissions.<sup>48</sup>

#### *India’s Position*

70. At the close of the hearing, India stated that it “is committed to proceed on ‘the own-risk principle’ of international law . . . [and] that any actual or imminent development or steps in relation to the Kishenganga Project during the progress of this arbitration that would have

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<sup>41</sup> Interim Measures Hearing Transcript, 16:20 to 17:9.

<sup>42</sup> Pakistan’s Reply, paras. 5-6.

<sup>43</sup> Interim Measures Hearing Transcript, 20:7 to 21:11.

<sup>44</sup> R. Lafitte, “Determination of Neutral Expert on the Baglihar Project” of 12 February 2007 (Exhibit PK-230).

<sup>45</sup> *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, ICJ Reports 2006, p. 113.

<sup>46</sup> Interim Measures Hearing Transcript, 17:10-21.

<sup>47</sup> Interim Measures Hearing Transcript, 13:14-22.

<sup>48</sup> Interim Measures Hearing Transcript, 13:17-21.

significant adverse effect on Pakistan's stated rights or interests will be promptly intimated to the Court and to Pakistan.”<sup>49</sup>

71. Within the context of this assurance, India disputes that the response of its counsel to counsel for Pakistan’s March 6, 2011 letter was insufficient, or that this exchange of correspondence can provide any basis for Pakistan’s request for interim measures. As an initial matter, India submits that it was under no obligation to respond to the letter from Pakistan’s counsel or to offer supplemental information on developments in the KHEP outside the Treaty provisions for the exchange of information.<sup>50</sup> The response from India’s counsel was “as a matter of courtesy”<sup>51</sup> and “was taken outside of the arbitration proceedings on a counsel-to-counsel basis.”<sup>52</sup> India further maintained that even if it had refused to answer the questions posed by Pakistan’s counsel, Pakistan gave “no indication of being dis-satisfied with the response of India’s counsel,”<sup>53</sup> and that, whatever its content, a “counsel-to-counsel letter cannot be a valid reason for the Court to grant interim measures under Paragraph 28.”<sup>54</sup>
72. More importantly, in India’s view, “international law contains no duty requiring one State to accede to a demand by another State that the first State recognize a principle of international law.”<sup>55</sup> In any case, India asserts that there has been “no refusal – much less a continuing refusal – on the part of India to say that it accepts well-established legal principles.”<sup>56</sup> India further notes that the principle of international law enunciated in the *Great Belt* case must be applied to both Parties in the dispute, and extend with equal force to Pakistan’s Neelum-Jhelum project.<sup>57</sup>
73. Finally, as to the alleged unwillingness of India to acknowledge the possibility that the dam would be ordered to be dismantled, counsel for India expressed skepticism that the physical dismantling of the dam could ever be necessary. Nonetheless, counsel for India made the

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<sup>49</sup> Interim Measures Hearing Transcript, 269:24 to 270:6.

<sup>50</sup> India’s Response, para. 25.

<sup>51</sup> India’s Response, para. 25.

<sup>52</sup> India’s Response, para. 24.

<sup>53</sup> India’s Response, para. 28.

<sup>54</sup> Interim Measures Hearing Transcript, 95:4-5.

<sup>55</sup> India’s Response, para. 66.

<sup>56</sup> India’s Rejoinder, para. 28.

<sup>57</sup> India’s Response, para. 57; Interim Measures Hearing Transcript, 159:3-11.

following statement: “Yes, I agree to a dismantling. I say that there is no occasion in this case. You could modify, you could do it, and the cases do say you can order a dismantling.”<sup>58</sup> The Agent for India assured the Court that India has “no hesitation in committing that we will fully and wholly abide by any decision taken by the Court of Arbitration.”<sup>59</sup>

**C. APPLICABLE LEGAL STANDARDS**

74. Paragraph 28 of Annexure G of the Indus Waters Treaty provides as follows:

Either Party may request the Court at its first meeting to lay down, pending its Award, such interim measures as, in the opinion of that Party, are necessary to safeguard its interests under the Treaty with respect to the matter in dispute, or to avoid prejudice to the final solution or aggravation or extension of the dispute. The Court shall, thereupon, after having afforded an adequate hearing to each Party, decide, by a majority consisting of at least four members of the Court, whether any interim measures are necessary for the reasons hereinbefore stated and, if so, shall specify such measures: Provided that

- a) the Court shall lay down such interim measures only for such specified period as, in its opinion, will be necessary to render the Award: this period may, if necessary, be extended unless the delay in rendering the Award is due to any delay on the part of the Party which requested the interim measures in supplying such information as may be required by the other Party or by the Court in connection with the dispute; and
- b) the specification of such interim measures shall not be construed as an indication of any view of the Court on the merits of the dispute.

*Pakistan’s Position*

75. Pakistan submits that its Application for Provisional Measures is based solely on Paragraph 28 of Annexure G to the Treaty, which provides a self-contained set of rules. In Pakistan’s view, “[n]o other reasons or criteria are relevant; and no reference to other sources of law is necessary or permissible in order to interpret or apply paragraph 28 of Annexure G.”<sup>60</sup> In particular, Pakistan objects to India’s reliance on the decisions on provisional measures of the ICJ rendered under the terms of Article 41 of that Court’s Statute. In particular, ICJ jurisprudence on “questions of urgency and necessity” is, in Pakistan’s view, “not relevant.”<sup>61</sup>

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<sup>58</sup> Interim Measures Hearing Transcript, 281:6-8.

<sup>59</sup> Interim Measures Hearing Transcript, 289:5-6.

<sup>60</sup> Pakistan’s Reply, para. 18.

<sup>61</sup> Pakistan’s Reply, para. 17.



76. Pakistan accepts that “Paragraph 29 of Annexure G permits the Court to apply other treaties and customary international law,”<sup>62</sup> but emphasizes that this provision is a general applicable law clause not specifically tied to interim measures and restricts recourse to such supplementary sources to instances “necessary” for the interpretation and application of the Treaty.<sup>63</sup> This provision constitutes, in Pakistan’s view, a “very deliberately formulated hurdle” to the application of law beyond the text of the Treaty,<sup>64</sup> and Pakistan maintains that “India has made out no case for recourse to Paragraph 29. It has offered no explanation as to why it is necessary to go beyond the perfectly clear text of Paragraph 28 and have recourse to these other sources.”<sup>65</sup>
77. For Pakistan, “Paragraph 28 of Annexure G is perfectly clear in its own terms.”<sup>66</sup> The Parties were free to “adopt the wording in the [ICJ] Statute or at least to use it as a model,” yet elected not to do so.<sup>67</sup> Given this background, Pakistan argues, “other texts cannot be used as substitutes for reading what the Treaty that governs these proceedings actually says.”<sup>68</sup>
78. Pakistan argues that, interpreted on its own terms, “the test established by Paragraph 28 of Annexure G is not the same as the test in Article 41 of the ICJ Statute.”<sup>69</sup> In Pakistan’s view, *urgency*, “which is an important consideration in the ICJ jurisprudence, is not an element in the test prescribed in . . . paragraph 28.”<sup>70</sup> Nor, Pakistan contends, is the Court sitting as a court in equity, bound to apply a balance-of-convenience test found nowhere in the Treaty.<sup>71</sup> Rather than imposing a formula from the ICJ or any other court, Pakistan submits that “the Court is simply to exercise its discretion under Paragraph 28 and ask: Is this order needed now?”<sup>72</sup>

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<sup>62</sup> Interim Measures Hearing Transcript, 54:13-14.

<sup>63</sup> Interim Measures Hearing Transcript, 54:15 to 55:2.

<sup>64</sup> Interim Measures Hearing Transcript, 47:4-5.

<sup>65</sup> Interim Measures Hearing Transcript, 55:3-6.

<sup>66</sup> Interim Measures Hearing Transcript, 53:22-23.

<sup>67</sup> Interim Measures Hearing Transcript, 46:18-21.

<sup>68</sup> Interim Measures Hearing Transcript, 55:16-18.

<sup>69</sup> Interim Measures Hearing Transcript, 46:16-18.

<sup>70</sup> Pakistan’s Reply, para. 19.

<sup>71</sup> Interim Measures Hearing Transcript, 47:6-16.

<sup>72</sup> Interim Measures Hearing Transcript, 226:5-6.

*India's Position*

79. In contrast to the view that Paragraph 28 is self-contained, India maintains that “the terms of Paragraph 28 are quite spare. They don’t provide the Court with much guidance as to the conditions under which interim measures should be granted, and those conditions are a matter of great moment. . . .”<sup>73</sup> Paragraph 28 “does not purport to lay down a legal standard; rather it empowers the Court to order interim measures for certain stated reasons,”<sup>74</sup> and there is, India notes, no “code nor any experience accumulated or otherwise relating to the granting of interim measures under Paragraph 28.”<sup>75</sup>
80. Against this background, India believes that recourse to the decisions of other international courts is appropriate insofar as those bodies were also faced with interpreting spare textual guidance; the ICJ in particular has interpreted its Statute in a manner that ensured “that provisional measures are granted only when absolutely necessary and clearly justified.”<sup>76</sup> Recourse to such jurisprudence is permissible, India argues, because Paragraph 29 of Annexure G permits recourse to both “[i]nternational conventions establishing rules which are expressly recognized by the Parties [and] customary international law.”<sup>77</sup> The Court is entitled to have recourse to customary international law insofar as “any clarification is needed as to . . . whether provisional measures are necessary within Paragraph 28.”<sup>78</sup> Pakistan’s objections to the use of ICJ precedents in this regard are belied, in India’s view, by its willingness to invoke the *Great Belt* case in support of its own position.<sup>79</sup>
81. Turning to the experience of the ICJ, India submits that four criteria guide the indication of provisional measures: “first, plausibility of the alleged rights whose protection is being sought; second, a link between these rights and the Measures requested; third, risk of irreparable prejudice; and, fourth, urgency: a real and imminent risk that irreparable prejudice may be caused to the rights in dispute before the Court has given its final decision.”<sup>80</sup> India notes in

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<sup>73</sup> Interim Measures Hearing Transcript, 148:21-25

<sup>74</sup> India’s Rejoinder, para. 11.

<sup>75</sup> Interim Measures Hearing Transcript, 150:6-8.

<sup>76</sup> Interim Measures Hearing Transcript, 150:14-15.

<sup>77</sup> India’s Response, para. 36; Interim Measures Hearing Transcript, 154:6-22.

<sup>78</sup> Interim Measures Hearing Transcript, 254:15-20.

<sup>79</sup> India’s Rejoinder, para. 19; Interim Measures Hearing Transcript, 129:1-25.

<sup>80</sup> Interim Measures Hearing Transcript, 153:9-14.

particular the need to show irreparable harm and urgency and emphasizes that “as a matter of customary international law, it can be safely said that urgency is a criterion for the ordering of provisional measures.”<sup>81</sup>

82. Additionally, in India’s view, a “balance of convenience test” is inherent in the nature of the Court as a court of justice—whether such a test is described in those terms or in the language of the “justice of the case.”<sup>82</sup> Accordingly, in evaluating Pakistan’s request, the Court must look also to the effect of the requested interim measures on India. Equal treatment of the Parties, India submits, is a fundamental principle of international law, and is incorporated in the Treaty through Paragraph 29 of Annexure G as well as under Article 7 of the Court’s Supplemental Rules of Procedure.<sup>83</sup> In particular, India argues, in evaluating the plausibility of the rights to be protected by interim measures, the Court should bear in mind that “India’s right to construct the Kishenganga Project is at the very least plausible”<sup>84</sup> and that the measures requested by Pakistan would in India’s view inflict irreparable harm upon it.<sup>85</sup>

#### **D. URGENCY AND IRREVERSIBILITY**

##### *Pakistan’s Position*

83. Consistent with its view on the non-applicability of the requirements for the granting of provisional measures found in ICJ case-law, Pakistan submits that Paragraph 28 of Annexure G does not “refer to urgency as a condition for the ordering of provisional measures.”<sup>86</sup> Nevertheless, Pakistan maintains that “there is in fact urgency in this case.”<sup>87</sup> This urgency stems in the first instance from India’s continued refusal to accept the obligation “not to prejudice the solution of the dispute, not to aggravate the dispute, and to avoid harm to Pakistan’s interests under the [Treaty].”<sup>88</sup> A “further element” of urgency was said to have been added when Pakistan discovered during the site visit that the local diversion of the

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<sup>81</sup> Interim Measures Hearing Transcript, 254:21-23; *see also* India’s Response, para. 38.

<sup>82</sup> Interim Measures Hearing Transcript, 84:2 to 85:1.

<sup>83</sup> Interim Measures Hearing Transcript, 156:14-18.

<sup>84</sup> Interim Measures Hearing Transcript, 161:18-20.

<sup>85</sup> India’s Response, paras. 83-89.

<sup>86</sup> Pakistan’s Application for Provisional Measures, para. 14; *see also* Pakistan’s Reply, para. 19.

<sup>87</sup> Pakistan’s Application for Provisional Measures, para. 14.

<sup>88</sup> Pakistan’s Reply, para. 10.

Kishenganga River through the by-pass tunnel is contemplated to take place in November 2011.<sup>89</sup>

84. For Pakistan, the possibility that the ultimate diversion of the Kishenganga would take place only in 2015 does not negate the urgency of its Application. The 2015 diversion, Pakistan contends, is “no more than one particularly serious act in a project that has been unlawful from its inception.”<sup>90</sup>
85. In response to India’s assertion that information regarding the by-pass tunnel had been available to Pakistan for some time, Pakistan submits that it is not arguing that it had only recently become aware of the by-pass tunnel’s construction. Rather, it was only “during the site visit [that] it learned of the imminent local diversion of the Kishenganga.”<sup>91</sup> This “imminent local diversion,” Pakistan argues, reveals India’s plans to make “significant modifications to the hydraulics of the Kishenganga”<sup>92</sup> and to accelerate work on the KHEP.<sup>93</sup> For Pakistan, the local diversion is itself a violation of the Treaty, and is submitted as reason enough for the Court to order interim measures.<sup>94</sup> In respect of future developments, however, Pakistan maintains that it is under no obligation to identify the precise point at which India’s construction of the KHEP will be irreversible, such information being available only to India.<sup>95</sup> For this reason, Pakistan argues, the second element of its requested interim measures—an obligation for India to provide information—is necessary.<sup>96</sup>
86. Finally, with respect to urgency, Pakistan does not agree with the proposition that “all projects involving the building of dams are in a sense physically reversible.”<sup>97</sup> First, Pakistan questions India’s acceptance of the possibility that it could in fact be required to dismantle the KHEP.<sup>98</sup> Second, Pakistan argues that it “cannot realistically be denied that it is significantly less likely

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<sup>89</sup> Pakistan’s Reply, para. 14.

<sup>90</sup> Pakistan’s Reply, para. 8.

<sup>91</sup> Interim Measures Hearing Transcript, 207:14-25.

<sup>92</sup> Pakistan’s Reply, para. 14.

<sup>93</sup> Pakistan’s Reply, para. 20.

<sup>94</sup> Pakistan’s Reply, para. 23.

<sup>95</sup> Pakistan’s Reply, para. 34.

<sup>96</sup> Interim Measures Hearing Transcript, 70:9-18.

<sup>97</sup> Interim Measures Hearing Transcript, 16:23-25; India’s Response, para 36.

<sup>98</sup> Interim Measures Hearing Transcript, 17:4-9.

that the dam would be demolished than that India would refrain from building it in the first place, and that is what we mean by prejudice to Pakistan's interests."<sup>99</sup> In Pakistan's view, India's insistence that Pakistan's concerns can be addressed by India regulating the flow rather than dismantling the works ignores a "central purpose" of the Treaty, which is to "limit the extent to which India has a tap in its hands which it can turn on and off as it pleases."<sup>100</sup>

#### *India's Position*

87. Paragraph 28 of Annexure G speaks of the laying down of interim measures when "necessary" on the grounds provided therein. India submits that because the KHEP will not be operational until 2015, Pakistan cannot possibly show that it is "urgent" or "necessary" to grant interim measures.<sup>101</sup> At present, India argues, construction of the KHEP continues, without acceleration, in a manner which is not different from the situation that existed at the time of the First Meeting of the Court on January 14, 2011.<sup>102</sup>
88. With respect to assurances, India argues that it has not reserved the "right to take 'irreversible or pre-emptive action' at any moment."<sup>103</sup> Rather, India submits, it has repeatedly offered assurances that the diversion of the Kishenganga's waters will not take place before 2015. In India's view, the Court should consider its willingness to offer assurances sufficient and refuse to order interim measures, as was done by the ICJ in the *Great Belt* case.<sup>104</sup>
89. With respect to the temporary by-pass tunnel, the operation of which was allegedly discovered during the site visit, India submits that no urgency or necessity for the specification of interim measures arises from it. First, India argues that the by-pass tunnel is expressly permitted under the Treaty insofar as Article I(15) provides that a "temporary by-pass . . . shall not be deemed to be an interference with the waters."<sup>105</sup> Second, India notes that the by-pass will have "no impact on the volume or timing of the flow of the water as it flows to the Line of Control

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<sup>99</sup> Interim Measures Hearing Transcript, 62:12-16.

<sup>100</sup> Interim Measures Hearing Transcript, 17:7-9.

<sup>101</sup> India's Response, para. 61.

<sup>102</sup> India's Response, para. 52.

<sup>103</sup> India's Response, para. 73.

<sup>104</sup> India's Response, para. 73.

<sup>105</sup> India's Rejoinder, para. 27; Interim Measures Hearing Transcript, 21-25; 132:21-25.

(“LOC”) because there will be no withdrawal of water.”<sup>106</sup> Third, India maintains that Pakistan’s communications in respect of interim measures have confounded the meaning of “diversion.”<sup>107</sup> The “diversion” against which Pakistan sought relief in its Request for Arbitration is the diversion—or “delivery” in the terms of the Treaty—of waters from the Kishenganga into another tributary of the Jhelum, *not* a temporary local diversion of the river.<sup>108</sup> India notes that “there were no questions of by-pass tunnels” in Pakistan’s Application for Provisional Measures.<sup>109</sup> Finally, India contests as a matter of fact any contention that Pakistan learned of the by-pass tunnel only during the site visit. In India’s view, Pakistan was provided information on the progress of the by-pass at meetings of the Indus Commission in November 2004 and never objected to its construction.<sup>110</sup> In sum, India argues, Pakistan’s attempt to justify interim measures on the basis of the by-pass tunnel is “no more than an ex post facto attempt to justify its application for provisional measures based on alleged urgency.”<sup>111</sup>

90. From a broader perspective, India argues that a construction project such as the KHEP can never, in and of itself, justify interim measures because construction is reversible. According to India, “all projects involving the building of dams are, in a sense, physically reversible, particularly a Run-of-River project like Kishenganga, since mechanisms always exist in every dam which can regulate the flow of water.”<sup>112</sup>
91. India rejects Pakistan’s argument that interim measures could be justified merely by the difficulty of abandoning the project after a certain point or of restoring the *status quo ante*.<sup>113</sup> Nor does India agree that urgency exists because of the construction of “spillway gates” which, according to Pakistan, India might not be willing to undo at a later date.<sup>114</sup> The irreversibility complained of by Pakistan, India contends, concerns only the physical structure—but does not

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<sup>106</sup> India’s Response, para. 15; *see also* India’s Response, para. 77.

<sup>107</sup> India’s Response, para. 15.

<sup>108</sup> India’s Response, paras. 12-13.

<sup>109</sup> Interim Measures Hearing Transcript, 256:25 to 257:1-2.

<sup>110</sup> Interim Measures Hearing Transcript, 106:5 - 107:16.

<sup>111</sup> India’s Response, para. 76.

<sup>112</sup> India’s Response, para. 63.

<sup>113</sup> India’s Response, para. 62.

<sup>114</sup> India’s Rejoinder, para. 30.

imply the irreversibility of the uninterrupted flow across the Line of Control.<sup>115</sup> In this respect, India cites the ICJ's *Gabčíkovo-Nagymaros Project*<sup>116</sup> decision as support for the proposition that it is the putting into operation of a project that gives rise to a wrongful act justifying the granting of provisional measures, not the preparation and construction of those works.<sup>117</sup> In any case, India maintains that the construction of the spillway is not a matter before the Court and should be decided by a Neutral Expert.<sup>118</sup> In India's view, Pakistan has otherwise failed to identify what the stage of construction making the project irreversible might be.<sup>119</sup>

92. While the construction of the KHEP is said to be reversible, and therefore cannot give rise to an urgent need for provisional measures, India submits that the harm that those measures would inflict on India would indeed be irreparable, *inter alia*, because the State of Jammu and Kashmir is "seriously short of power."<sup>120</sup> According to India, any interim measure ordering India to cease work on the KHEP would add "enormous financial costs" to the project and impact the lives of India's citizens currently engaged in the project who would lose their "jobs and their livelihood."<sup>121</sup>
93. In response to Pakistan's fear that India will "turn off the tap,"<sup>122</sup> India argues that the Treaty "provides ample safeguards"<sup>123</sup> against this, which include: (1) Paragraph 18 of Annexure E, which stipulates that there must be prior agreement between the Parties before the reservoirs are filled; (2) a limited period for filling the reservoirs in case no agreement is reached; and (3) the dispute resolution mechanism under the Treaty in case Pakistan comes to the conclusion that these provisions have not been complied with.<sup>124</sup> India also argues that "the whole point of run of river dams is that they allow water to pass through without storage."<sup>125</sup> India submits that it

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<sup>115</sup> India's Rejoinder, para. 30.

<sup>116</sup> *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), ICJ Reports 1997, p. 7.

<sup>117</sup> India's Response, para. 60.

<sup>118</sup> India's Rejoinder, para. 30.

<sup>119</sup> India's Response, para. 63.

<sup>120</sup> India's Response, para. 86.

<sup>121</sup> India's Response, para. 87-88.

<sup>122</sup> Interim Measures Hearing Transcript, 160:1.

<sup>123</sup> Interim Measures Hearing Transcript, 160:4.

<sup>124</sup> Interim Measures Hearing Transcript, 160:3-10.

<sup>125</sup> Interim Measures Hearing Transcript, 160:11-13

would be physically impossible to transform these plants into storage facilities in order to turn off the tap.<sup>126</sup>

94. Finally, concerning Pakistan's second requested interim measure—that of obliging India to provide information to the Court and Pakistan of actual or imminent developments or steps in relation to the KHEP that may have a significant adverse effect upon restoring the *status quo ante*—counsel for India made the following additional representation with respect to the provision of information:

[t]hat any actual or imminent development or steps in relation to the Kishenganga Project during the progress of this arbitration that would have significant adverse effect on Pakistan's stated rights or interests will be promptly intimated to the Court and to Pakistan.<sup>127</sup>

**E. THE ISSUANCE OF INTERIM MEASURES ON GROUNDS OF “SAFEGUARDING [THE APPLICANT’S] INTERESTS UNDER THE TREATY WITH RESPECT TO THE MATTER IN DISPUTE”**

95. In its Application for Provisional Measures, Pakistan submits that the specification of interim measures is necessary to “safeguard its interests under the Treaty with respect to the matter in dispute.”<sup>128</sup>

*Pakistan’s Position*

96. According to Pakistan, “it has rights to secure itself against violations of India’s duty to let flow the Kishenganga waters and not to permit any interference with them.”<sup>129</sup> It has “rights not to have the flow obstructed by the Kishenganga Dam or the waters diverted away from the river.”<sup>130</sup> And it has a right not to have India “build a dam to meet the needs of a people in a different River Basin.”<sup>131</sup>

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<sup>126</sup> Interim Measures Hearing Transcript, 160:18-19.

<sup>127</sup> Interim Measures Hearing Transcript, 270:2-6.

<sup>128</sup> Pakistan’s Application for Provisional Measures, paras. 11-13.

<sup>129</sup> Interim Measures Hearing Transcript, 59:22-24.

<sup>130</sup> Interim Measures Hearing Transcript, 59:25 to 60:1.

<sup>131</sup> Interim Measures Hearing Transcript, 60:2-3.



97. While the Treaty “refers to the *interests* and not to the *rights*” of a Party<sup>132</sup> (in contrast to the language used in the ICJ Statute, which refers to the “rights of the parties”),<sup>133</sup> this difference does not, in Pakistan’s view, permit the protection of any rights whatsoever, with no relation to the Treaty, as India is said to suggest.<sup>134</sup> Rather, the use of the term “interests” indicates that it is “not necessary at this stage for Pakistan to prove that it has a right under the Indus Waters Treaty that would, itself, be violated by continued construction of the Kishenganga plant.”<sup>135</sup> In Pakistan’s view, “it is enough that Pakistan has an interest in not having these claimed rights prejudiced pending the decision of this Court.”<sup>136</sup>
98. As set forth by Pakistan, its interests under the Treaty include preventing the deprivation of the aforementioned substantive rights,<sup>137</sup> as well as “interests in ensuring that the Indus Waters Treaty system for . . . the safeguarding of those rights works.”<sup>138</sup> In Pakistan’s view, India understates Pakistan’s essential interests under the Treaty by suggesting that Pakistan’s interests extend only to the delivery of a quantity of water over the Line of Control—rather than to the unrestricted usage of the Western Rivers, subject only to limited, enumerated rights granted to India.<sup>139</sup>
99. In respect of its substantive interests, Pakistan maintains that interim measures are necessary to prevent the creation of a *fait accompli* and harm to the likelihood of any remedy that the Court may order being effective in the “real world.”<sup>140</sup> Pakistan submits that “[i]f the work on the dam goes ahead now, it significantly reduces the practical possibility of the Court effectively upholding Pakistan’s rights if it upholds Pakistan’s claim.”<sup>141</sup> In respect of Pakistan’s interest in the Indus Waters Treaty system, Pakistan submits that interim measures are necessary to preserve the Court’s freedom of action and to protect the principle that “neither State can press

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<sup>132</sup> Interim Measures Hearing Transcript, 59:9-10. (italics supplied)

<sup>133</sup> Pakistan’s Reply, para. 27.

<sup>134</sup> Interim Measures Hearing Transcript, 59:12-17.

<sup>135</sup> Interim Measures Hearing Transcript, 59:18-21

<sup>136</sup> Interim Measures Hearing Transcript, 60:6-8.

<sup>137</sup> Interim Measures Hearing Transcript, 61:8-10; *see supra*, para. 96.

<sup>138</sup> Interim Measures Hearing Transcript, 61:11-14.

<sup>139</sup> Pakistan’s Reply, paras. 9, 29; Interim Measures Hearing Transcript, 229:1-21.

<sup>140</sup> Interim Measures Hearing Transcript, 61:20 to 62:20.

<sup>141</sup> Interim Measures Hearing Transcript, 62:16-19.

ahead with projects . . . in the face of an ongoing Court proceeding concerning the legality of that very question.”<sup>142</sup>

*India’s Position*

100. India emphasizes that Pakistan “prayed in its Memorial only to restrain India from diverting the waters of the Kishenganga to a Tributary.”<sup>143</sup> There can be no ground for the specification of interim measures, India submits, given the categorical assertion—made by India in its counsel’s March 17, 2011 correspondence—that there will be no such diversion until 2015.<sup>144</sup> In India’s view, “the un-interrupted flow, the only thing that is of material consequence to Pakistan . . . will remain the same . . .”<sup>145</sup>
101. India rejects Pakistan’s invocation of wider interests, as well as its distinction of “interests” under the Treaty from “rights.”<sup>146</sup> In India’s view, this would permit Pakistan to advance “any ‘interest’ that suited its particular agenda,” however far removed from “legally protected interests, i.e. rights recognized by the Treaty.”<sup>147</sup> Specifically, India submits that Pakistan is asserting rights in excess of those it actually possesses and without reference to India’s corresponding rights. According to India, “[t]here is no question of the Treaty giving Pakistan a right of veto of, or prior consent to, India’s construction and operation of” projects such as the KHEP.<sup>148</sup> For India, “the Treaty, while granting Pakistan’s right to waters of the Western Rivers in Article III(1), clearly protects India’s rights under Article III(2) . . . an aspect Pakistan rarely mentions or simply ignores.”<sup>149</sup> Denying India’s rights in this context is “tantamount” to denying the treaty.<sup>150</sup>

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<sup>142</sup> Interim Measures Hearing Transcript, 65:7-10.

<sup>143</sup> Interim Measures Hearing Transcript, 112:16-17.

<sup>144</sup> India’s Response, para. 8; Interim Measures Hearing Transcript, 124:7-9, 132:24 to 133:8, 182:17-20.

<sup>145</sup> India’s Rejoinder, para. 30.

<sup>146</sup> India’s Rejoinder, para. 35.

<sup>147</sup> India’s Rejoinder, para. 35.

<sup>148</sup> India’s Rejoinder, para. 38.

<sup>149</sup> Interim Measures Hearing Transcript, 116:5-11.

<sup>150</sup> India’s Rejoinder, para. 37.

102. Finally, India maintains that “there is no link between the rights under the Treaty whose protection Pakistan seeks and the Measures she requests.”<sup>151</sup> Insofar as, in India’s view, “Pakistan’s Neelum-Jhelum Project is not within her territory,” the specification of interim measures relating to the project is unrelated to the rights Pakistan “undoubtedly” possesses to construct dams “within her own territory on the Western Rivers.”<sup>152</sup>

**F. THE ISSUANCE OF INTERIM MEASURES ON GROUNDS OF AVOIDANCE OF “PREJUDICE TO THE FINAL SOLUTION . . . OF THE DISPUTE”**

103. Under Paragraph 28 of Annexure G, a Party may request that the Court lay down interim measures when necessary, *inter alia*, “to avoid prejudice to the final solution . . . of the dispute.” Pakistan accordingly submits that interim measures are necessary in this case to avoid prejudice to the final solution of the dispute.<sup>153</sup>

*Pakistan’s Position*

104. Pakistan considers that India’s “[p]roceeding with the Kishenganga Project now while this case is in progress, self-evidently increases the difficulty and costs of reversing the process, and the obvious fear is that India will plead the difficulty and cost of reversing the project as a reason constraining the Court’s exercise of discretion . . .”<sup>154</sup> Interim measures, Pakistan notes, are necessary when needed to “avert the possibility of the taking of a step by which one or the other Party could, in effect, box the Court in and limit the Court’s practical ability to resolve the case in accordance with the law.”<sup>155</sup>

105. Pakistan is particularly concerned that the ongoing work on the KHEP will render certain remedies technically unfeasible or will supply India with additional arguments to the effect that it would be “inequitable” to halt the project in light of sunk costs.<sup>156</sup> The costs of reversing the project, Pakistan notes, and the remedies available to the Court, do not necessarily progress gradually, but may pass through “step changes” that substantially increase the difficulty of certain solutions to the dispute. In particular, Pakistan points to the commencement of

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<sup>151</sup> Interim Measures Hearing Transcript, 162:9-11.

<sup>152</sup> Interim Measures Hearing Transcript, 162:8-16.

<sup>153</sup> Pakistan’s Reply, para. 30.

<sup>154</sup> Interim Measures Hearing Transcript, 68:3-8.

<sup>155</sup> Interim Measures Hearing Transcript, 67:25 to 68:3.

<sup>156</sup> Pakistan’s Reply, para. 32.

construction on the lower phases of the Kishenganga dam and the inclusion of large low-level outlets—to which Pakistan objects—in the dam design.<sup>157</sup>

106. The potential physical reversibility of the KHEP, Pakistan submits, does not lessen this concern.<sup>158</sup> According to Pakistan, while it may be physically possible to remove the dam and other works, India may create a situation in which work on the project is so far along that the Court will be forced to consider alternatives to abandoning the KHEP.<sup>159</sup> While the Court may order the complete demolition of the dam, Pakistan submits that this is “not the question.”<sup>160</sup> Rather, according to Pakistan, the question is “whether the possibility of restoring the *status quo ante* is prejudiced by India’s continued work on the Kishenganga Project, and in particular by the opening of the by-pass, the draining of the river and the construction of a dam on the riverbed.”<sup>161</sup> For Pakistan, “once that work is started, the chances of removing this obstruction to the flow of the waters of the Kishenganga will be reduced, and that is why we need this order, and that is why we need it now: to keep alive the possibility of the maintenance of the *status quo*.”<sup>162</sup> Is it “really credible,” Pakistan asks, “to say that it is as easy for this Court to say demolish as it is for this Court to say pause?”<sup>163</sup>

#### *India’s Position*

107. India disputes the idea that the Court would feel constrained in the remedies it could adopt in this case, and rejects the idea that the possibility of such a feeling can justify the imposition of interim measures.<sup>164</sup> In particular, India points to the way this issue was forthrightly handled by the ICJ in the *Great Belt* case, noting Pakistan’s own invocation of that precedent. Faced with the assertion by Denmark that an order to dismantle its project would be out of the question, India points out that the ICJ explicitly noted the possibility of an order “that such works must not be continued or must be modified or dismantled.”<sup>165</sup> Observing that the ICJ did not “feel

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<sup>157</sup> Pakistan’s Reply, paras. 32, 35.

<sup>158</sup> Pakistan’s Reply, para. 36.

<sup>159</sup> Pakistan’s Reply, para. 36.

<sup>160</sup> Interim Measures Hearing Transcript, 231:14.

<sup>161</sup> Interim Measures Hearing Transcript, 231:15-19.

<sup>162</sup> Interim Measures Hearing Transcript, 233:4-8.

<sup>163</sup> Interim Measures Hearing Transcript, 232:5-7.

<sup>164</sup> Interim Measures Hearing Transcript, 159:3-23; 184:6-25.

<sup>165</sup> Interim Measures Hearing Transcript, 159:18-19.

that it was in a box or in any other way constrained,” India questions why the present Court “would feel any more boxed in.”<sup>166</sup>

108. While maintaining that, “as a matter of principle,” the Court is unlikely to feel constrained, India further submits that the question of dismantling is “unlikely to arise.”<sup>167</sup> This is not, India hastens to add, due to what it considers its likely success on the merits. Rather, India is of the view that even if all of Pakistan’s claims were granted, it would still be permissible under the Treaty for India to operate the KHEP during at least a portion of the year. Accordingly, while the Court might need to regulate the flows that India would be obligated to provide,<sup>168</sup> it is unlikely to confront any issue of dismantling, “simply because on [Pakistan’s] own admission it is only for six months of the year during the lean season that the flow to Pakistan . . . would be affected.”<sup>169</sup>

**G. THE ISSUANCE OF INTERIM MEASURES ON GROUNDS OF “AGGRAVATION OR EXTENSION OF THE DISPUTE”**

109. Under Paragraph 28 of Annexure G, a Party may request that the Court lay down interim measures when necessary, *inter alia*, to avoid “aggravation or extension of the dispute.”

*Pakistan’s Position*

110. Pakistan submits that “India’s accelerating work on the KHEP, and its continuing refusal to say that it accepts well-established legal principles, is itself aggravating the dispute,” thereby justifying the specification of interim measures.<sup>170</sup>
111. Moreover, in Pakistan’s view, the introduction of claims relating to sovereignty or territorial control over the area in which Pakistan’s Neelum-Jhelum Project is being prepared “threatens to extend the dispute in a very regrettable manner.”<sup>171</sup>

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<sup>166</sup> Interim Measures Hearing Transcript, 159:20-22.

<sup>167</sup> Interim Measures Hearing Transcript, 263:5-11.

<sup>168</sup> Interim Measures Hearing Transcript, 263:22 - 264:9.

<sup>169</sup> Interim Measures Hearing Transcript, 279:22 - 280:1.

<sup>170</sup> Pakistan’s Reply, para. 42.

<sup>171</sup> Interim Measures Hearing Transcript, 9:6-8; see also Pakistan’s Reply, paras. 43-44.

*India's Position*

112. India rejects the proposition that any of its actions or arguments have had the effect of aggravating or extending the dispute, such that interim measures might be contemplated.<sup>172</sup> As India puts it, “[t]he third possible ground is aggravation or extension of the dispute, and Pakistan has failed to demonstrate in any way that the interim measures are necessary in order to do that.”<sup>173</sup>
113. First, in India’s view, continuing “work on the KHEP does not aggravate or extend the dispute” as Pakistan’s own exposition of the issues in dispute is said to be limited to “(a) whether India may deliver water from the KHEP to another tributary of the Jhelum, and (b) the permissibility of the lowering of the water level below the Dead Storage Level.”<sup>174</sup> Second, India denies that it has accelerated the pace of construction: “there has in fact been a slight slippage in the progress of works as against the targeted dates . . . .”<sup>175</sup> Third, in respect of any “refusal to say that it accepts well-established legal principles” (which it also contests as a matter of fact), India submits that Pakistan has not established “how such a ‘refusal’ (assuming quod non there was one) could aggravate or extend the dispute.”<sup>176</sup> Finally, India argues that its use of terms such as “Pakistan-occupied Kashmir . . . is a reflection of a fact . . . [that] should be carefully kept in mind while considering whether provisional measures should be imposed,”<sup>177</sup> but “is not what we call an ‘aggravation of the dispute.’”<sup>178</sup> On the contrary, India observes that “a real danger of aggravation of the dispute” exists “if India is restrained from further works . . . while Pakistan continues work on a project that is not even situated in its territory.”<sup>179</sup>

**H. THE PARTIES’ CHARACTERIZATION OF THE HISTORICAL RECORD**

114. In the course of their arguments on interim measures, the Parties introduced and commented on various historical events that are alleged to have a bearing on these proceedings.

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<sup>172</sup> India’s Rejoinder, paras. 46-47.

<sup>173</sup> Interim Measures Hearing Transcript, 186:10-13.

<sup>174</sup> India’s Rejoinder, para. 46.

<sup>175</sup> India’s Rejoinder, para. 28.

<sup>176</sup> India’s Rejoinder, para. 47.

<sup>177</sup> Interim measures Hearing Transcript, 82:6-11.

<sup>178</sup> Interim Measures Hearing Transcript, 82:3-5.

<sup>179</sup> Interim Measures Hearing Transcript, 82:11-14.

*Pakistan's Position*

115. In Pakistan's view, its Application for Provisional Measures must be approached by the Court in light of the "stark deficit in trust between the parties"<sup>180</sup> and the historical experience of 1948 "when the East Punjab Government cut off all the canals supplying West Punjab."<sup>181</sup> Pakistan observes that these experiences formed the background for the negotiation of the Indus Waters Treaty and

led to around a decade of hard-fought negotiations, leading ultimately to the carefully constructed and as a matter of engineering quite remarkable solution of the 1960 Treaty. The essence of that solution is that there is no equitable apportionment of uses, but rather a literal and permanent division of the Indus System of rivers; the Eastern Rivers go to India, the Western Rivers go to Pakistan, and that is as established by Articles 2 and 3 of the Treaty. That solution is a radical one, but it is readily understandable given the background of the Treaty. And it is Pakistan's interests in the finally agreed treaty regime that Pakistan seeks to protect by its current Application.<sup>182</sup>

116. Equally, this history makes clear the extent to which the Indus Rivers system is "fundamental to [Pakistan's] existence and the health and livelihood of its people."<sup>183</sup> "India's dam construction program," Pakistan believes, "is an existential issue."<sup>184</sup>

117. These concerns, Pakistan observes, are far from "anachronistic."<sup>185</sup> As it was developed, the bargain agreed upon depends upon "limitations on India's capacity to manipulate the timing of flows," a matter that "was hardwired into the Treaty. This was done by limiting the amount of live storage . . . for changing the timing of flows on each and every hydropower dam that India could construct on the two rivers."<sup>186</sup> With the recent *Baglihar* case, however, Pakistan has, in its view, been left without physical protection against the manipulation of flow on the Indus system.<sup>187</sup>

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<sup>180</sup> Pakistan's Reply, para. 39.

<sup>181</sup> Interim Measures Hearing Transcript, 24:3-4.

<sup>182</sup> Interim Measures Hearing Transcript, 28:17-25, 29:3.

<sup>183</sup> Interim Measures Hearing Transcript, 23:20-21.

<sup>184</sup> Interim Measures Hearing Transcript, 23:24-25.

<sup>185</sup> Interim Measures Hearing Transcript, 25:8.

<sup>186</sup> Interim Measures Hearing Transcript, 25:24 to 26:3.

<sup>187</sup> Interim Measures Hearing Transcript, 26:23 to 27:1.

*India's Position*

118. India denies the relevance of events that occurred in the immediate aftermath of partition, prior to the Indus Waters Treaty, for the present issue of interim measures.<sup>188</sup> In India's view, the 1948 incident took place "during a period of some confusion between two new States . . . that were sorting out their respective rights."<sup>189</sup> Moreover, "it was done by East Punjab without any consultation with India's central government. It was opposed by India's central government as soon as India's central government learned about it, and in fact it was terminated almost immediately after the central government learned of it."<sup>190</sup> Finally, "[n]othing remotely like that has occurred in the ensuing 63 years."<sup>191</sup>
119. In India's view, references to 1948 represent an attempt on the part of Pakistan to portray itself as the victim.<sup>192</sup> The same, India submits, is true with respect to the finding of the neutral expert in the *Baglihar* case and with India's other pending hydro-electric projects on the Western Rivers—which do not "have anything to do with Pakistan's Application for Provisional Measures."<sup>193</sup>
120. In fact, India argues, the implementation of the Treaty has been "relatively smooth" over more than fifty years,<sup>194</sup> and the assertion that the Baglihar Dam was filled in such a way as to harm Pakistan is factually incorrect.<sup>195</sup> In India's view, the evidence introduced on this matter should be disregarded as "inaccurate, emotion-laden and inflammatory."<sup>196</sup>

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<sup>188</sup> India's Rejoinder, para. 43.

<sup>189</sup> India's Rejoinder, para. 43.

<sup>190</sup> Interim Measures Hearing Transcript, 171:19-23.

<sup>191</sup> Interim Measures Hearing Transcript, 171:25 to 172:1.

<sup>192</sup> India's Rejoinder, para. 44.

<sup>193</sup> India's Rejoinder, para. 44.

<sup>194</sup> Interim Measures Hearing Transcript, 80:6-13.

<sup>195</sup> Interim Measures Hearing Transcript, 175:5-6.

<sup>196</sup> Interim Measures Hearing Transcript, 179:21-24 to 180:6.



#### IV . ANALYSIS OF THE COURT

##### A. INDIA'S ASSURANCES AND REPRESENTATIONS

121. This case marks the first instance in the fifty-year history of the Indus Waters Treaty that a court of arbitration has been constituted to resolve a Treaty dispute between the Parties. Vital interests are at stake for both Pakistan and India. The importance of launching arbitral proceedings under the Treaty for the first time, and on issues so profoundly affecting those vital interests, coupled with Pakistan's having applied for the laying down of interim measures, may give the impression that little common ground exists between the Parties. But the far-reaching and intricate terms of the Indus Waters Treaty, and the fact that it has endured and has been applied by the Parties for more than fifty years despite difficulties in their relations, attest to the essential mutuality of their interests, and to the skill of the World Bank in melding those mutual interests in the terms of the Treaty. It is accordingly important at the outset for the Court to record that key matters of agreement have emerged in the course of this arbitration concerning how India will conduct itself in its construction of the KHEP. Those elements of agreement bode well for the continuing vitality of the Treaty.
122. The first and apparently most contentious of the assurances sought by Pakistan was for India to recognize explicitly the "proceed at own risk" principle. The content of that principle is expressed by Pakistan, on the basis of the ICJ's *Passage Through the Great Belt* provisional measures order, to be as follows: "a State engaged in works that may violate the rights of another State can proceed only at its own risk."<sup>197</sup> The extent to which India did or did not agree with this principle was the subject of sustained debate through the written submissions and the hearing on interim measures. But any doubt about India's acceptance of this principle was put to rest during the last day of the hearing on interim measures, when counsel for India stated, "in unequivocal terms," that "in this case, India is committed to proceed on the 'own-risk principle' of international law."<sup>198</sup>

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<sup>197</sup> Pakistan's Application for Provisional Measures, para. 6, citing Letter of Counsel for Pakistan to Counsel for India dated March 6, 2011. That letter quoted directly from the *Great Belt* case as follows: ". . . it is for Denmark, which is informed of the nature of Finland's claim, to consider the impact which a judgment upholding it could have upon the implementation of the Great Belt project, and to decide whether or to what extent it should accordingly delay or modify that project" (*Passage through the Great Belt* (Finland v. Denmark), Provisional Measures, Order of 29 July 1991, ICJ Reports 1991, p. 18, para. 33).

<sup>198</sup> Interim Measures Hearing Transcript, 269:23 to 270:1.

123. Second, Pakistan sought in its Application that the Court issue an order providing that India “inform the Court and Pakistan of any actual or imminent developments or steps in relation to the Kishenganga project that may have a significant adverse effect upon restoring the *status quo ante* or that may in any other way seriously jeopardise Pakistan’s rights and interests under the Treaty.”<sup>199</sup> India has, in response, accepted in almost *verbatim* terms Pakistan’s request that it provide such information.<sup>200</sup>
124. Third, in response to Pakistan’s request for information concerning the “planned date for diverting the river and putting the KHEP into operation,”<sup>201</sup> India has assured both Pakistan and the Court that “the planned date of diversion is not before 2015.”<sup>202</sup>
125. A fourth, much lesser point of seeming contention was the extent to which Paragraph 28 of Annexure G (“[e]ither Party may request the Court *at its first meeting* to lay down, pending its Award, such interim measures . . .”) imposes a temporal limitation on the ability of a State to apply for interim measures. Pakistan argued that it did not, and in response to a query from the Court, India confirmed that it “does not take the position – that Pakistan or any Party is precluded from requesting provisional measures at a later time.”<sup>203</sup>
126. Finally, India has given an unequivocal assurance that, regardless of the outcome, it will comply with the Court’s Award. The Agent of India’s statement in this regard merits quotation:

I had said in my Opening Statement that India wants peace and friendship with its neighbors, and we have striven very hard to build friendship, build confidence and trust, and this even now guides us in our approach. India believes in the sanctity of [the] Indus Waters Treaty, not only the Indus Waters Treaty, all our international legal commitments, and I have no hesitation in committing that we will fully and wholly abide by any decision taken by the Court of Arbitration.<sup>204</sup>

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<sup>199</sup> Pakistan’s Application for Provisional Measures, para. 15.

<sup>200</sup> During the hearing on interim measures, counsel for India said: “But let me state here, in unequivocal terms, . . . that any actual or imminent development of steps in relation to the Kishenganga Project during the progress of the arbitration that would have ‘significant adverse effect’ . . . on Pakistan’s stated rights or interests will be promptly intimated to the Court and to Pakistan.” Interim Measures Hearing Transcript, 269:5-10

<sup>201</sup> E-mail Letter of March 6, 2011 from counsel for Pakistan, Appendix A, Application for Provisional Measures dated June 6, 2011.

<sup>202</sup> E-mail Letter of March 17, 2011 from counsel for India, Appendix B, Application for Provisional Measures dated June 6, 2011. *See also* Interim Measures Hearing Transcript 258:22-25, 278:12-14.

<sup>203</sup> Interim Measures Hearing Transcript, 250:1-3.

<sup>204</sup> Interim Measures Hearing Transcript, 288:25 to 289:7.

127. The assurances sought from India by Pakistan have thus to a great extent been met. These assurances have reduced the need for the Court to pass upon some of Pakistan's claims. Moreover, these assurances have helped foster a spirit of cooperation that conduces to the efficient conduct of these proceedings and, more than that, to the continued effectiveness of the Treaty.

**B. THE COURT'S POWER TO SPECIFY INTERIM MEASURES: PARAGRAPH 28 OF ANNEXURE G TO THE TREATY**

128. Paragraph 28, Annexure G to the Treaty governs the issuance of interim measures. It provides:

Either Party may request the Court at its first meeting to lay down, pending its Award, such interim measures as, in the opinion of that Party, are necessary to safeguard its interests under the Treaty with respect to the matter in dispute, or to avoid prejudice to the final solution or aggravation or extension of the dispute. The Court shall, thereupon, after having afforded an adequate hearing to each Party, decide, by a majority consisting of at least four members of the Court, whether any interim measures are necessary for the reasons hereinbefore stated, and, if so, shall specify such measures: Provided that

- (a) the Court shall lay down such interim measures only for such specified period as, in its opinion, will be necessary to render the Award : this period may, if necessary, be extended unless the delay in rendering the Award is due to any delay on the part of the Party which requested the interim measures in supplying such information as may be required by the other Party or by the Court in connection with the dispute; and
- (b) the specification of such interim measures shall not be construed as an indication of any view of the Court on the merits of the dispute.

129. As set out above,<sup>205</sup> the Parties, having been afforded an adequate hearing, differ over the interpretation of Paragraph 28. The essence of their difference is whether, to be "necessary," interim measures must be required urgently and so as to avoid irreparable injury to the interests of the Party seeking those measures.

130. In the view of the Court, an interpretation of the term "necessary" in Paragraph 28 that engrafts the requirements of "urgency" and "irreparable injury," as those concepts have been developed by the International Court of Justice in its case-law on provisional measures,<sup>206</sup> is not required.

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<sup>205</sup> See *supra* paragraphs 83-94.

<sup>206</sup> See, e.g., *Passage through the Great Belt* (Finland v. Denmark), Order of 29 July 1991, ICJ Reports 1991, p. 17, para. 23. ("Whereas provisional measures under Article 41 of the Statute are indicated 'pending the final decision' of the Court on the merits of the case, and are therefore only justified if there is urgency in the sense that action prejudicial to the rights of either party is likely to be taken before such final decision is given;"); *Frontier Dispute* (Burkina Faso/Republic of Mali), Order of 10 January 1986, ICJ Reports 1986, p.

One evident reason not wholly to import the ICJ's provisional measures requirements is, of course, the difference in the respective wording of Article 41 of the ICJ Statute<sup>207</sup> and Paragraph 28 of Annexure G. Paragraph 28 sets out three distinct, specific grounds on the basis of which the meaning of "necessary" can be ascertained. It thus functions as a kind of *lex specialis* prescribed by the framers of that provision that makes unnecessary the imposition of further requirements.

131. Under Paragraph 28, the Court is empowered—and indeed appears to be obliged—in three instances to specify interim measures if it concludes that those measures are necessary:

- (i) to safeguard the interests of the requesting Party with respect to the matter in dispute; or
- (ii) to avoid prejudice to the final solution of the dispute; or
- (iii) to avoid aggravation or extension of the dispute.

132. In specifying the three grounds on which interim measures may be granted, the framers of the Treaty chose to use a disjunctive "or" rather than the conjunctive "and," thus indicating that the measures required need only meet one of these criteria in order that interim measures may be ordered.<sup>208</sup>

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10, para. 21 ("Whereas the facts that have given rise to the requests of both Parties for the indication of provisional measures expose the persons and property in the disputed area, as well as the interests of both States within that area, to serious risk of irreparable damage; and whereas the circumstances consequently demand that the Chamber should indicate . . .").

<sup>207</sup> Article 41 of the ICJ Statute provides:

- 1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.
- 2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council."

<sup>208</sup> The use of the disjunctive word "or" has a logical meaning, creating alternative elements which can each satisfy a given condition. In *Plama v. Bulgaria*, the question before the tribunal was whether the Claimant was a legal entity owned or controlled by citizens or nationals of a third state under Article 17(1) of the Energy Charter Treaty. The Tribunal determined that the word "or" in that provision must signify that "ownership and control are alternatives: in other words, only one need be met for the first limb to be satisfied . . ." *Plama Consortium Ltd. (Cyprus) v. Bulgaria*, Decision on Jurisdiction, ICSID ARB/03/24, para. 170, February 8, 2005. In the *Anglo-Iranian Oil Co.* case, ICJ Judge John Read observed that a plain reading of the disjunctive word "or" in the clause "with regard to situations or facts relating directly or indirectly to the application of treaties or conventions accepted by Persia" had an "unequivocal meaning." He reasoned that

133. Each of the three grounds for interim measures enunciated in Annexure G has a different focus: the first places the Parties' "interests" as the central consideration, while the third requires the demonstration of the likelihood of aggravation or extension of the dispute.
134. The second ground is conceived in even broader terms; as worded, interim measures may be required in order to avoid potential prejudice to the final outcome of the arbitration. This ground for the specification of interim measures appears to be primarily intended to safeguard the Court of Arbitration's own freedom to prescribe what it in due course considers to be the correct outcome on the substance of a given dispute. Other international courts and tribunals, including the ICJ, have acknowledged the cogency of this concern even in the face of less specific guidance.<sup>209</sup> The terms of Paragraph 28 of Annexure G make it plain that the need not to constrain the Court in its findings or choice of remedies by "facts on the ground" constitutes a legitimate and independent basis for an order of interim measures.
135. Yet, as broad as the scope of Paragraph 28 may be, the Court nonetheless recognizes that interim measures under the Treaty remain an extraordinary recourse. Consistent with the general practice of international and national courts and tribunals, the Court must be satisfied that, without prejudice to its decision on the merits, the claims set forth by the Party seeking interim measures appear to be at least "plausible."<sup>210</sup> Regardless of the conditions under which a court is authorized under its rules to indicate interim relief, such relief cannot be said to be "necessary" under any of those conditions if it is apparent to that court at an early stage that it is

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the use of that word had been "deliberate" and had the effect of broadening the scope of the declaration in question beyond those instruments which were "directly" accepted by Persia, to those having an indirect relationship to the treaties or conventions in question. *Anglo-Iranian Oil. Co. Case* (United Kingdom v. Iran), ICJ Reports 1952, p. 142 at p. 146 (dissenting opinion of Judge Read).

<sup>209</sup> Article 41 of the ICJ Statute, for example, does not expressly mention prejudice to the proceedings before the Court as a criterion of which account is to be had in considering provisional measures applications. Yet then ICJ President Jiménez de Aréchaga, in reflecting on the essential function of provisional measures pursuant to the ICJ Statute, noted that "[t]he essential object of provisional measures is to ensure that the execution of a future judgment on the merits shall not be frustrated by the actions of one party *pendente lite*." *Aegean Sea Continental Shelf* (Greece v. Turkey), Order on Interim Protection, ICJ Reports 1976, p. 3, at p. 16 (separate opinion of President Jiménez de Aréchaga.).

<sup>210</sup> In the terminology used by the ICJ: see, e.g., *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear* (Cambodia v. Thailand), Order on Provisional Measures of 18 July 2011, para. 33. Indeed, some jurisdictions would require the demonstration of something more than a plausible case, such as a *prima facie* determination that the case is meritorious. Under the UNCITRAL Model Law (2006 Revisions), the party requesting interim measures must satisfy the arbitral tribunal that, *inter alia*, "[t]here is a reasonable possibility that the requesting party will succeed on the merits of the claim." Article 17A(1)(b).

unlikely to have jurisdiction or that the applicant has failed to present a plausible case on the merits.

**C. THE NECESSITY “TO AVOID PREJUDICE TO THE FINAL SOLUTION . . . OF THE DISPUTE”  
UNDER PARAGRAPH 28 OF ANNEXURE G TO THE TREATY**

136. Having found that any one of the three grounds provided under Paragraph 28 would be sufficient for the Court to specify interim measures, the Court now addresses the ground that, in its view, bears the most relevance to these proceedings—that of ordering provisional measures when “necessary . . . to avoid prejudice to the final solution.” In the circumstances of the present case, the Court finds merit in the argument that direction from the Court in the form of interim measures—albeit not in as far-reaching a form as requested by Pakistan—is necessary to “avoid prejudice to the final solution” of the present dispute as it may be prescribed in the Court’s eventual Award.
137. The circumstances in which it will be appropriate for the Court of Arbitration to exercise its powers under Paragraph 28 in the interest of avoiding “prejudice to the final solution” of the dispute will necessarily vary depending on the alleged violation of the Treaty and the facts of the dispute insofar as they may by then appear to have been established. In the present proceedings, the Parties principally look to this Court of Arbitration to assist them in the authoritative interpretation of certain provisions of the Treaty that raise questions, none of which have been decided before by a court of arbitration under the Treaty. The specific remedies regarding the construction of the KHEP requested by Pakistan are contingent on the interpretation of the Treaty that the Court will adopt. Accordingly, what must be preserved *pendente lite* is the Court’s ability eventually to render an award with the content that it considers is warranted both in terms of legal principle and in terms of the remedies that it may order, once it has had the benefit of a complete exposition of fact and law by both Parties.
138. In addition, the Court must be satisfied that an order of interim measures at the present stage is “necessary” in the circumstances of this case. As noted earlier, the urgency and irreparable injury criteria developed in the ICJ’s case-law on provisional measures are not dispositive under Paragraph 28 of Annexure G. At the same time, the Court cannot rule out the possibility that its interpretation of the first ground for interim measures—“to safeguard its interests under the Treaty” —might be usefully informed by the ICJ’s case-law on the phrase “to preserve the respective rights of either party” in the ICJ Statute, not so much by virtue of any particular relevance of the ICJ Statute for the interpretation of the Indus Waters Treaty, but by virtue of

the comparable position in which the applicant finds itself in both situations. The Court however fails to see how either criterion—that of urgency or that of irreparable harm to a party—would affect the interpretation of the phrase “necessary . . . to avoid prejudice to the final solution . . . of the dispute,” as this second ground, on which the present order relies, is essentially intended to protect the *Court’s* position rather than the rights or interests of a party.

139. The Court sees no reason to read the term “necessary” in Paragraph 28 as embodying any special meaning beyond the normal use of the term, expressing simply the idea that an action is required, needed or essential for a particular purpose.<sup>211</sup> Thus, under the second head of Paragraph 28, interim measures are necessary to avoid prejudice to the final solution of a dispute when, in the absence of their issuance, there would be the risk of a *fait accompli* that compromises the liberty of the Court of Arbitration to render its Award in the manner it considers to be legally warranted, or the Parties’ ability to implement such award without prohibitive delays or costs.

## D. CONCLUSIONS

### 1. Pakistan’s Claims Satisfy the Test of Plausibility

140. Pakistan’s claims of Treaty violation challenge the permissibility of the construction and operation of the KHEP on the river Kishenganga/Neelum. At this stage in the proceedings, the Court has not and cannot form any views as to the merits of Pakistan’s claims.<sup>212</sup> That said, the Court is satisfied that Pakistan has presented a plausible, provisionally tenable argument under the Treaty in support of its case. Having reviewed Pakistan’s arguments as they are stated in its Memorial, the Court cannot exclude the possibility that India’s planned installations, or elements of those installations, on the Kishenganga/Neelum would not be in conformity with the Treaty.<sup>213</sup>

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<sup>211</sup> The OXFORD ENGLISH DICTIONARY (Concise 11th ed. 2008) defines “necessary” as a synonym of “required to be done, achieved, or present; needed.” (at p. 956). Similarly, the NEW OXFORD AMERICAN DICTIONARY (3d ed., 2010) provides the following synonyms for “necessary”: “required to be done, achieved, or present; needed; essential.”

<sup>212</sup> In this context, the Court stresses the provision of Paragraph 28(b) of Annexure G, pursuant to which “the specification of such interim measures shall not be construed as an indication of any view of the Court on the merits of the dispute.”

<sup>213</sup> Article III of the Treaty, “Provisions regarding Western Rivers,” provides:

- (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. Temporarily enjoining India's construction of many components of the KHEP (including the headrace tunnel and powerhouse facility) is not necessary to avoid prejudice to the Award.**

141. In considering which aspects of the KHEP present a real risk of “prejudice to the final solution” of the dispute, the construction schedule of the KHEP as compared to the procedural timetable of the present arbitration is of critical importance.<sup>214</sup> Under the current timetable, the Court intends to communicate its final Award to the Parties late in 2012 or early in 2013.<sup>215</sup> It follows that it cannot be “necessary” to order a halt of any construction activity on the KHEP that will take place after the issuance of the Court’s final Award.<sup>216</sup> On the other hand, specific works put at issue in the dispute that are scheduled to commence soon, and are likely to have reached a certain degree of permanence by the time the Award will be rendered, create by that token a risk of “prejudice to the final solution . . . of the dispute,” thereby rendering an interim measures order “necessary.”

142. In the Court’s view, the suspension of many of the key components of construction activity of the KHEP, such as the boring of tunnels and the construction of the power house, does not appear to be “necessary” to safeguard its ability to render an effective Award. As seen during

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(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 . . . in the case of each of the rivers, The Indus, The Jhelum and The Chenab, to the drainage basin thereof:

[. . .]

(d) Generation of hydro-electric power, as set out in Annexure D.

Whether or not construction and operation of the KHEP on the Kishenganga River is or would be an “interference” with the flow of the waters of the Indus River system into and through Pakistan or is or would be an authorized exception to such interference is a question – indeed, the question – for the merits of the dispute before the Court. It cannot and will not be addressed in this Order.

<sup>214</sup> An updated construction schedule was handed by the Government of India to the Court of Arbitration and the Government of Pakistan on the last day of the hearing on interim measures. It forms part of the case file as Exhibit IN-21.

<sup>215</sup> The Court notes, in this regard, that the hearing on the merits in this case is currently scheduled for August 20 to 31, 2012 (Procedural Order No. 1, para. 5.2.2(a)), and that the Court “shall endeavour to render its Award within 6 months of the close of the hearings.” (Supplemental Rules of Procedure, Art. 16).

<sup>216</sup> In this connection, the Court refers to India’s assurances that the delivery of the waters from the Kishenganga into the Bonar-Madmati Nallah will not occur before 2015 (E-mail Communication of March 17, 2011 from counsel for India, Application for Provisional Measures dated June 6, 2011, Appendix B), and that India will inform the Court and Pakistan of any significant developments concerning the construction schedule of the KHEP (Interim Measures Hearing Transcript, 270:2-6).



the Court's site visit, the construction and completion of these elements of the KHEP occur at some distance from the Kishenganga/Neelum riverbed, and would thus not in and of themselves affect the flow of the river. Thus, even under the hypothesis that the Court finds at the merits stage that Pakistan's claims, or elements of those claims, are meritorious and the KHEP cannot be completed and put into operation as planned, no violations of Pakistan's rights would have been caused by the tunneling and power house construction aspects of the KHEP, and no particular remedies seem to be available from the Court in this regard (at least as far as the Court can see at this early phase in the proceedings).

143. In the Court's view, the continuation of such activity is appropriately governed by the "proceed at own risk" principle of international law, as specifically recognized by India during the hearing. The situation would merely be one in which India would have invested considerable sums of money without reaping the benefit of the operation of the KHEP as currently envisaged. This, however, is precisely the risk that India has declared it is willing to assume, and there seems to be no further risk of "prejudice to the final solution," in terms of the Court's Award, in allowing these aspects of the KHEP's construction works to proceed.

**3. Temporarily enjoining the operation of the bypass tunnel is not necessary to avoid prejudice to the Award**

144. In its pleadings<sup>217</sup> and during the hearing on interim measures,<sup>218</sup> India maintains that the construction and operation of the KHEP's by-pass tunnel<sup>219</sup> at the Gurez site does not violate the Treaty, as that tunnel is a permitted "temporary by-pass" under Article I(15)(b) of the Treaty, and is therefore not an "interference with the waters" of the Kishenganga/Neelum. Pakistan disagrees with this interpretation.<sup>220</sup>
145. At this stage in the proceedings, the Court finds that this issue has not been fully briefed. Nonetheless, consistent with the nature of interim measures, the Court, on a provisional basis, cannot exclude that the by-pass tunnel of the KHEP at the Gurez site is a "temporary by-pass" within the meaning of Article I(15)(b), as that provision relates to Article III(2) of the Treaty. The Court also notes that, as described by India, the KHEP by-pass tunnel is, by its very nature,

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<sup>217</sup> India's Response, paras. 78-79.

<sup>218</sup> Interim Measures Hearing Transcript, 182:23 to 183:8

<sup>219</sup> Also called the "diversion tunnel" in India's Exhibit IN-21.

<sup>220</sup> Interim Measures Hearing Transcript, 63:1-18.

intended to be essentially of temporary use and would thus not by itself be capable of rendering more or less likely the implementation of any remedies that the Court may decide upon in its Award. The same can be said for the temporary cofferdams.

**4. Temporarily enjoining India's construction of certain elements of the dam at the Kishenganga/Neelum riverbed is necessary to avoid prejudice to the Award**

146. Conversely, the Court considers that the construction of the permanent dam which India proposes to emplace in and on the Kishenganga/Neelum riverbed falls squarely within the category of works that create a significant risk of "prejudice to the final solution." Although the dam component of the KHEP presumably accounts for only a fraction of the overall construction costs, Pakistan's legal arguments are, in essence, conditional upon its completion. It is the dam that would eventually enable India to exercise a certain degree of control over the volume of water that will reach Pakistan; the temporary obstruction of the river and its channeling through a by-pass tunnel does not have any such effect. Moreover, it is the dam that would eventually place India in a position to divert parts or all of the waters of the Kishenganga/Neelum river into the Bonar-Madmati Nallah, thus potentially affecting water supplies in downstream areas of the Neelum valley.
147. Accordingly, while the dam is of course intended to function as only one (albeit integral) part of a complex hydro-electric installation, it is clear that it is a key component of Pakistan's complaints of breaches of the Treaty. A temporary halt to the construction of the dam would, in the Court's view, go a long way toward avoiding any situation of potential inconsistency with the Treaty while these proceedings are ongoing. It is the Court's conclusion that so holding is in accordance with the purport of the Indus Waters Treaty system, which the arbitration mechanism in Article IX and Annexure G is intended to serve.
148. Moreover, even if the Court were ultimately to reject Pakistan's arguments regarding the alleged illegality of the KHEP in all its elements, as it fully retains the option of doing, the Court at this stage cannot rule out that adjustments to the design of the KHEP dam or related works at the Gurez site may be required. The entirely unconstrained construction of the KHEP *pendente lite* thus presents a risk of constricting the legal principles to which the Court may have recourse in its Award. Continued construction may also have the effect of foreclosing, delaying the implementation of, or rendering disproportionately large the cost of particular

remedies that the Court may choose to order.<sup>221</sup> It is not difficult to envisage a situation where the construction of permanent works leading to the erection of a dam on the riverbed runs the risk of a prejudicial *fait accompli*, as the existence of such works would inevitably need to be taken into account in any consideration of remedies should a breach of the Treaty be determined to have occurred.

149. The Court understands that activities to prepare the construction of the dam in the riverbed at the Gurez site are set to commence in November 2011, some two-odd months away; such activity is thus imminent. Even under the assumption that any construction activity will slow down significantly over the winter months, the work on the dam could progress at least during the late spring, summer, and early fall of 2012. Based upon the Parties' submissions and the construction schedule, and bearing in mind the Court's inspection of the dam site during the site visit, the Court is persuaded that, while the present proceedings are underway, works on the dam are likely to advance to a point where the possible restoration of the flow of the Kishenganga/Neelum to its natural channel will be rendered significantly more difficult and costly to the potential prejudice of any prescriptions that may be made by the Court in its Award.
150. In the circumstances, the Court concludes that the construction of this portion of the KHEP is capable of leading to "prejudice to the final solution . . . of the dispute," and that it is necessary to enjoin India from proceeding with the construction of permanent works on or above the Kishenganga/Neelum riverbed that may inhibit the full flow of that river to its natural channel until the Court renders its Award.
151. The Court considers that while this arbitration is pending, and subject to any agreement between the Parties as to the implementation of the present Order, India may: (i) erect temporary cofferdams and operate the by-pass tunnel it has said to have completed; (ii)

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<sup>221</sup> The Court recalls the argument made by India that the ICJ, acting under Article 41 of its Statute, has never found it appropriate to order the suspension of construction activity for the duration of the proceedings of installations that were potentially in violation of international law (*See, e.g.*, Interim Measures Hearing Transcript, 255:5 to 256:7; at 256:2-6: "In these kinds of cases dealing with construction activities which may or may not be legitimate under a convention or a treaty, all you have to do is look at *Great Belt* and *Pulp Mills* to see that provisional measures were not so ordered.").

In the Court's view of Paragraph 28 of Annexure G within the context of the Indus Waters Treaty—which deals with legitimate uses of the Indus waters system, including precisely the kind of large-scale construction projects as the KHEP—it is reasonable to conclude that the drafters of the Treaty had contemplated the possibility that an interim order to suspend construction works can be issued under appropriate circumstances.

temporarily dry out the riverbed of the Kishenganga/Neelum at the Gurez valley; (iii) excavate the riverbed; and (iv) proceed with the construction of the sub-surface foundations of the dam. However, as specified above, until the Court renders its Award, India may not construct any other permanent works on or above the riverbed that may inhibit the restoration of the full flow of that river to its natural channel.

**V . ORDER**


152. Having found that it is necessary to lay down certain interim measures in order to “avoid prejudice to the final solution . . . of the dispute” as provided under Paragraph 28 of Annexure G to the Indus Waters Treaty, the Court unanimously rules that:


- (1) For the duration of these proceedings up until the rendering of the Award,
  - (a) It is open to India to continue with all works relating to the Kishenganga Hydro-Electric Project, except for the works specified in (c) below;
  - (b) India may utilize the temporary diversion tunnel it is said to have completed at the Gurez site, and may construct and complete temporary cofferdams to permit the operation of the temporary diversion tunnel, such tunnel being provisionally determined to constitute a “temporary by-pass” within the meaning of Article I(15)(b) as it relates to Article III(2) of the Treaty;
  - (c) Except for the sub-surface foundations of the dam stated in paragraph 151(iv) above, India shall not proceed with the construction of any permanent works on or above the Kishenganga/Neelum riverbed at the Gurez site that may inhibit the restoration of the full flow of that river to its natural channel; and
- (2) Pakistan and India shall arrange for periodic joint inspections of the dam site at Gurez in order to monitor the implementation of sub-paragraph 1(c) above. The Parties shall also submit, by no later than December 19, 2011, a joint report setting forth the areas of agreement and any points of disagreement that may arise between the Parties concerning the implementation of this Order.

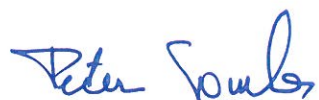
153. The Court shall remain actively seized of this matter, and may revise this Order or issue further orders at any time in light of the circumstances then obtaining.


Done at the Peace Palace, The Hague  
Dated: *September 23*, 2011


  
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Professor Lucius Caflisch

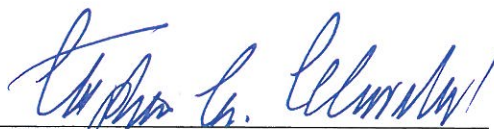
  
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Judge Stephen M. Schwebel  
Chairman

  
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Mr. Aloysius Llamzon  
Registrar