

PCA Case No. 2023-01

IN THE MATTER OF AN ARBITRATION

-before-

**THE COURT OF ARBITRATION CONSTITUTED
IN ACCORDANCE WITH THE INDUS WATERS TREATY 1960**

-between-

THE ISLAMIC REPUBLIC OF PAKISTAN

-and-

THE REPUBLIC OF INDIA

PROCEDURAL ORDER NO. 6

(DECISION ON FURTHER PROCEEDINGS)

COURT OF ARBITRATION:

**Professor Sean D. Murphy (Chairman)
Professor Wouter Buytaert
Mr. Jeffrey P. Minear
Judge Awn Shawkat Al-Khasawneh
Dr. Donald Blackmore**

SECRETARIAT:

The Permanent Court of Arbitration

6 July 2023

I. PROCEDURAL HISTORY

1. The detailed history of the origin of the present dispute and of these proceedings is set out in the Court's Award on the Competence of the Court of today's date.
2. On 19 August 2016, the Islamic Republic of Pakistan ("**Pakistan**") initiated this arbitration by way of a request for arbitration (the "**Request for Arbitration**") served upon the Republic of India ("**India**") pursuant to Article IX and Paragraph 2(b) of Annexure G to the Indus Waters Treaty 1960 (the "**Treaty**").
3. Pakistan's request seeks to resolve before the Court of Arbitration (the "**Court**") certain questions that have arisen between the Parties concerning the interpretation or application of various parts of the Treaty governing the design and operation of run-of-river hydro-electric plants on the Indus, Jhelum, and Chenab rivers and their tributaries, including in the context of the Kishenganga Hydro-Electric Plant (the "**KHEP**") and the Rattle Hydro-Electric Plant (the "**RHEP**").
4. On 6 September 2016, after exchanges within the Permanent Indus Commission, the India Commissioner for Indus Waters wrote to India's Ministry of Water Resources and Pakistan's Ministry of Water and Power, seeking the appointment of a neutral expert.
5. In its request for the appointment of a neutral expert, India seeks the resolution of certain design and operation questions concerning the KHEP and the RHEP ("**KHEP/RHEP Design and Operation Issues**") that are essentially identical to some of the questions presented by Pakistan in its Request for Arbitration.
6. On 4 October 2016, India requested that the International Bank for Reconstruction and Development ("**World Bank**") appoint a neutral expert.
7. After taking initial steps toward the constitution of the Court, on 12 December 2016, the President of the World Bank wrote to the Parties, stating that he had "decided to pause the process of appointing the Chairman of the Court of Arbitration and the Neutral Expert" (the "**Pause**").
8. On 31 March 2022, the World Bank notified Pakistan and India that it was lifting the Pause and would proceed to move forward both with the empanelment of a court of arbitration and the appointment of a neutral expert.
9. On 13 October 2022, the World Bank confirmed the appointment of the Chairman of the Court and the Neutral Expert.
10. Although India has not communicated with the Court in the course of these proceedings, on 21 December 2022, India sent a letter to the World Bank ("**21 December 2022 Letter**"), enclosing an "explanatory note" as "Enclosure A" ("**21 December 2022 Explanatory Note**"). In the 21 December 2022 Explanatory Note, India set out its objections "to the creation and functioning of any court of arbitration" and stated that it "expressly decline[d] to accept or recognize the existence of the so-called Court of Arbitration".

11. On 27 and 28 January 2023, the Court held its first meeting with the Parties in the Peace Palace in The Hague, the Netherlands. India did not appear or participate at this meeting.

12. On 2 February 2023, the Court of Arbitration issued its Procedural Order No. 1 in which it decided as follows:

1. Scheduling of a Preliminary Phase on the Competence of the Court

1.1 The Court considers that India's 21 December Letter (including its enclosed explanatory note) constitutes a plea concerning the competence of the Court for the purposes of paragraph 16 of Annexure G of the Treaty and will be treated as such for the purposes of this arbitration.

1.2 The Court will conduct a preliminary phase of the proceedings to consider the competence of the Court and the operation of Article IX of the Treaty, on an expedited basis (the "Preliminary Phase on Competence").

1.3 The schedule for further written submissions and an oral hearing in the Preliminary Phase on Competence shall be as follows:

Date	Deadline / Event
17 March 2023	Pakistan's Response
7 April 2023	India's Reply
21 April 2023	Pakistan's Sur-Reply
11 May 2023 – 13 May 2023	Hearing (<i>Peace Palace, The Hague, The Netherlands</i>) [13 May 2023 to be held as a reserve day]

1.4 The Court may, at any time, after seeking the views of the Parties, amend the schedule for the Preliminary Phase on Competence set out above.

1.5 The Court may, at any time, invite the Parties to address specific issues or questions relating to the competence of the Court and/or the operation of Article IX of the Treaty, in their written submissions or at the Hearing as set out in the schedule above, or in supplementary written submissions within a deadline to be prescribed by the Court.

2. Leave to Apply

2.1 Any Party has leave to apply to the Court for a variation of this Order, giving particulars of the variation sought and the reason for it.

2.2 Any Party may, at any point in these proceedings, request that the Court convene a conference with the Parties to address any procedural aspect of these proceedings. The Court will arrange to confer with the Parties in person or by videoconference, according to the circumstances.

13. On 3 February 2023, the Court wrote to the Parties as follows:

Separately from the schedule set out in Procedural Order No. 1, and as indicated at the close of the first meeting, the Court invites the Parties to file with the Court, no later than **Friday, 24 February 2023**, a statement addressing the possibility of coordination between the Court of Arbitration and Mr. Michel Lino in his capacity as a Neutral Expert, with respect to matters placed before both bodies pursuant to the Indus Waters Treaty.

In particular, the Court would find it helpful to understand better the Parties' positions on the following points:

(a) specifically what issues now before the Court and the Neutral Expert might be addressed by the Court;

- (b) specifically what issues now before the Court and the Neutral Expert might be addressed by the Neutral Expert; and
- (c) the optimal sequencing and suggested time frame for decisions by the Court and the Neutral Expert in addressing their respective issues.

The Court notes that such filing would be without prejudice to either Party's position with respect to the competence of the Court of Arbitration or the Neutral Expert.

14. On 8 February 2023, the Chairman of the Court sent a letter to the Neutral Expert, which was copied to the Parties, informing him that the Court, in principle, was open to the idea of a coordinated process between the Court and the Neutral Expert, and inviting him to indicate whether he would be open to such an approach in principle.
15. On 11 and 21 February 2023, India sent letters to the Neutral Expert, rejecting any proposed coordination between the Neutral Expert and the Court of Arbitration.¹ In both letters, India reiterated its objections to the competence and constitution of the Court, as outlined in its 21 December 2022 Letter and 21 December 2022 Explanatory Note.
16. On 23 February 2023, Pakistan submitted a statement on "Coordination between the Court of Arbitration and the Neutral Expert—A Workable Division of Competence" ("**Division of Competence Statement**"). In its Division on Competence Statement, Pakistan outlined what it considered could be a "workable division of competence between the Court and the Neutral Expert in structural terms" that would be based on:

a sequential exercise of functions by the Court and the Neutral Expert as follows:

First, the Court would address questions of Treaty interpretation arising from the Parties' respective Requests.

Second, the Neutral Expert would thereafter address the application of the Court's interpretative rulings to the Parties' disagreements concerning the design specifications of the KHEP and the RHEP. A necessary element of this determination would be an assessment of whether aspects of India's design of the KHEP or the RHEP, and its operation of the KHEP, were in breach of the terms of the Treaty, as construed authoritatively by the Court.

Third, in the event of a finding of breach of the Treaty in respect of the KHEP and/or RHEP design specifications or operation, the Court would address the appropriate remedies.

17. Pakistan opined that "[a] division of competence of this kind would both allocate to the Court and the Neutral Expert appropriate areas of responsibility and avoid them arriving at inconsistent decisions with respect to the same or related matters." Pakistan concluded its Division of Competence Statement as follows:

Coordination and cooperation between the Court and the Neutral Expert, on the basis of workable and effective modalities at the administrative, procedural and substantive level, will be essential if the integrity of the Treaty is to be maintained and reinforced, not just for the disagreements between the Parties currently in view but for purposes of heading off other disputes to come. In contemplating how to address the imperative of coordination and cooperation, both the Court and the Neutral Expert ought properly to have regard to the pivotal role that the Treaty has played in the peaceful relations between the Parties since 1960. The allocation of water by, and of the rights and responsibilities of the Parties under,

¹ **P-0002**, Letter from India to the Neutral Expert dated 11 February 2023; **P-0003**, Letter from India to the Neutral Expert dated 21 February 2023. The Court notes that this correspondence was not addressed to the Court, and was entered into the record of these proceedings by Pakistan, as exhibits to Pakistan's Response.

the Treaty is closely analogous to the settlement that comes with a peace treaty that brings active hostilities to an end. The risks associated with parallel Article IX mechanisms are too high to leave simply to an untamed running of the gauntlet by duelling proceedings that are untethered from each other, particularly in circumstances in which, as is so far plainly, and regrettably, apparent, one of the Parties to the Treaty is intent on pursuing a non-cooperative posture.

18. India did not communicate with the Court or provide any statement in response to the Court's invitation to submit a statement addressing the possibility of coordination between the Court and the Neutral Expert.
19. On 24 March 2023, Pakistan submitted its Response on the Competence of the Court and the Operation of Article IX of the Indus Waters Treaty, with accompanying documents.
20. On 3 May 2023, the Neutral Expert responded to the Chairman of the Court's letter of 8 February 2023, stating that, having considered the views of the Parties, the Neutral Expert had "arrived at the conclusion that at this time it would not be desirable to establish 'a coordinated process between the Court and the Neutral Expert'".
21. As detailed in the Court's Award on the Competence of the Court, from 11 to 13 May 2023, the Court held a Hearing on Competence at the Peace Palace in The Hague. India did not appear at, nor participate in, the Hearing on Competence.
22. On 6 July 2023, the Court issued its Award on the Competence of the Court in which it decided as follows:

...the Court of Arbitration unanimously:

- A. FINDS that India's non-appearance in these proceedings does not deprive the Court of Arbitration of competence.
- B. FINDS that the Court of Arbitration has competence, in accordance with Paragraph 16 of Annexure G to the Indus Waters Treaty 1960, to decide all questions relating to its competence.
- C. FINDS that the matters referred to arbitration in Pakistan's Request for Arbitration concern a dispute or disputes within the meaning of Article IX(2) of the Indus Waters Treaty 1960.
- D. FINDS that the initiation of the present proceedings was in accordance with Article IX(3), (4), and (5) of the Indus Waters Treaty 1960.
- E. FINDS that the Court of Arbitration was properly constituted in accordance with Paragraphs 4 to 11 of Annexure G to the Indus Waters Treaty 1960.
- F. FINDS that India's request for, and the World Bank's appointment of, a Neutral Expert does not, pursuant to Article IX(6) of the Indus Waters Treaty 1960, deprive the Court of Arbitration of competence or limit its competence.
- G. FINDS that Paragraph 1 of Annexure G to the Indus Waters Treaty 1960 does not create an independent test for the necessity of the constitution of a Court of Arbitration beyond the requirements of Article IX of the Treaty.
- H. DECLARES that the Court of Arbitration is competent to consider and determine the disputes set forth in Pakistan's Request for Arbitration.
- I. RESERVES for further consideration and directions all issues not decided in this Award.

II. THE COURT'S ANALYSIS

23. As set out above and in the Court's Award on the Competence of the Court, the dispute presently before the Court arises in circumstances that have seen both the constitution of a Court of Arbitration and the appointment of a Neutral Expert.
24. It is also apparent that the dispute placed before this Court and the matters referred to the Neutral Expert involve a significant degree of overlap insofar as they pertain to the KHEP/RHEP Design and Operation Issues. At the same time, it is also apparent that the dispute placed before this Court includes the determination of certain general questions concerning the interpretation or application of the Treaty that are not before the Neutral Expert.
25. In its Award on the Competence of the Court, the Court has determined and held that it is competent to address all aspects of the dispute placed before it by Pakistan's Request for Arbitration. In particular, the Court has held that it was properly constituted notwithstanding India's request for the appointment of a neutral expert and that the World Bank's appointment of the Neutral Expert does not alter or limit the competence of this Court.
26. At the same time, the Court has not been asked to decide—and has not decided—whether the Neutral Expert was properly appointed or whether the Neutral Expert is competent with respect to the matters before him. Instead, during the Hearing on Competence, Pakistan made the following statement to the Court:
- Pakistan considers that India's Neutral Expert Request was improper and invalid, thereby fundamentally tainting the competence of the Neutral Expert. Pakistan has, though, now resolved to participate in the Neutral Expert process, the consequence of which is to cure the invalidity of the Neutral Expert's appointment. Without prejudice to this, Pakistan maintains a residual reservation of position as regards the possibility of challenges to the competence of the Neutral Expert on the basis that paragraph 13 of Annexure F provides that if any question which is not within the competence of the Neutral Expert should arise out of his decision, that question would fall to be resolved through the procedures of Article IX(3), (4) and (5), of which the Court is the backstop.²
27. It appears, therefore, that irrespective of whether the Neutral Expert was properly appointed or is competent pursuant to Article IX of the Treaty, the Neutral Expert may be competent in respect of the issues presented to him on the basis, and to the extent, of the Parties' joint consent (expressed by India through its request for the appointment of a Neutral Expert and by Pakistan through its participation in the Neutral Expert process).
28. Accordingly—although the Court expressly reserves taking any position on the status of the Neutral Expert proceeding—it may be the case that both the Court of Arbitration and the Neutral Expert are presently competent to address the KHEP/RHEP Design and Operation Issues that have been presented in both processes. On these issues, the Court of Arbitration is competent pursuant to the operation of Article IX of the Treaty; the Neutral Expert may be competent either by operation of that article or through the Parties' joint consent.
29. As a general matter, situations in which multiple dispute resolution bodies have competence in respect of the same matter are, in fact, commonplace in public international law. Relations

² Hearing on Competence Tr., (Day 3), 13 May 2023, p. 48.6-20.

between States are based on a multiplicity of bilateral and multilateral agreements with different arrangements for the resolution of disputes, all framed against a background of customary international law. Successive treaties may provide for dispute resolution in respect of the same issues. A general treaty for the resolution of disputes may exist alongside a treaty addressing a particular subject matter that also provides for dispute resolution. A multilateral treaty may operate in parallel with a bilateral treaty, both providing for dispute resolution. And an *ad hoc* dispute resolution process may be given competence alongside a standing procedure for dispute resolution. Except to the extent that the instruments on which such proceedings are based so provide, or the international law on the interpretation of treaties indicates, there is no *a priori* basis to conclude that the competence of one dispute resolution body has priority over another.

30. In such circumstances, there is a general duty of any international dispute resolution body to exercise its competence in such a manner as to facilitate the actual resolution of the Parties' dispute and to avoid the risks of duplicative proceedings or conflicting decisions. Such mutual respect and comity may call for one dispute resolution body to structure its proceedings in a manner mindful of the other, to stay or defer its proceedings pending developments before the other body, or to give way and refrain from exercising its competence if it appears that the agreement of the Parties or the dictates of the applicable instruments so indicate.
31. In the context of the Treaty, dispute settlement processes are envisaged in Article IX involving a neutral expert and a court of arbitration. While there are certain provisions in the Treaty that speak to the final and binding nature of decisions reached by both bodies, there is no express prohibition on the simultaneous operation of two bodies, nor might one be implied when two bodies are not simultaneously addressing the same issues. The Court will organize its future proceedings mindful of the general duty of mutual respect and comity referred to above, given the possible parallel competence of the Neutral Expert in respect of the KHEP/RHEP Design and Operation Issues. The Court considers it axiomatic that the same duty of mutual respect and comity is applicable to the Neutral Expert in the organization and conduct of his proceedings.
32. At present, the Court has little insight into the status or likely course of the Neutral Expert proceedings. It is apparent, however, that the dispute presented to this Court by Pakistan in its Request for Arbitration includes a series of issues relating to the interpretation or application of the Treaty that are not part of the difference before the Neutral Expert, who has been presented only with the application of the Treaty to the KHEP/RHEP Design and Operation Issues. Accordingly, the Court considers it appropriate to organize its future proceedings in phases, addressing in the first instance certain issues presented to it by Pakistan that are not specific to the KHEP/RHEP Design and Operation Issues (and that are therefore not also before the Neutral Expert), without prejudice to being informed as to the KHEP/RHEP Design and Operation Issues.
33. The Court will determine at a later date, after seeking the views of the Parties, whether and how it may be called upon to exercise its competence in respect of the other issues of the dispute set out in Pakistan's Request for Arbitration.

III. DECISION

34. The Court of Arbitration will conduct these proceedings in a phased manner, bearing in mind the status of, and developments concerning, the proceedings taking place before the Neutral Expert.

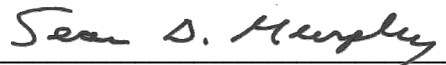
35. The next phase of these proceedings will address the following questions (b) through (g) that arise from Pakistan’s Request for Arbitration concerning the overall interpretation or application of Article III of the Treaty and paragraph 8 of Annexure D thereto, as well as a related general question (a) concerning the legal effect of past decisions issued by dispute resolution bodies established pursuant to Article IX of the Treaty upon the Parties and upon subsequent dispute resolution bodies:
- (a) To what extent and on what basis are the decisions of past dispute resolution bodies established pursuant to Article IX of the Treaty concerning (i) competence, (ii) matters of fact, (iii) the interpretation of the Treaty, or (iv) the application of the Treaty in particular factual circumstances, binding or otherwise controlling with respect to (a) the Parties, (b) the present proceedings before the Court, (c) the present proceedings before the Neutral Expert, and (d) future proceedings before a court of arbitration or a neutral expert? Insofar as such decisions are binding or otherwise controlling, what—if any—exceptions or limitations may limit their binding/controlling effect?
 - (b) To what extent can non-Treaty-based design and operational practices be taken into account for purposes of interpreting the technical requirements set out in Annexure D, paragraph 8?
 - (c) With respect to Annexure D, paragraph 8(a), what is to be taken into account for the purposes of designing the freeboard for a plant and what is to be excluded?
 - (d) With respect to Annexure D, paragraph 8(c), what is to be taken into account for the purposes of calculating maximum pondage for a plant and what is to be excluded?
 - (e) With respect to Annexure D, paragraph 8(d) of Annexure D, what is to be taken into account for the purposes of designing low-level sediment outlets for a plant and what is to be excluded?
 - (f) With respect to Annexure D, paragraph 8(e) of Annexure D, what is to be taken into account for the purposes of designing gated spillways for flood control for a plant and what is to be excluded?
 - (g) With respect to Annexure D, paragraph 8(f), what is to be taken into account for the purposes of designing submerged power intakes for a plant and what is to be excluded?
36. The Court may, after seeking the views of the Parties, add to or modify these questions or adjust the procedure envisaged in this Order as may be required by future developments.
37. Pursuant to Article 7 of the Supplemental Rules of Procedure, India may appoint two further Members to the Court of Arbitration in accordance with the provisions of Annexure G. However, “[t]hese appointments shall be made no later than 7 days following an (affirmative) decision of the Court on its competence”, i.e., by **13 July 2023**.
38. The Court will convene a case management conference with the Parties by videoconference in the near future to determine the schedule for the next phase of the proceedings and other matters.

39. Questions relating to further phases of these proceedings, including the exercise of this Court's competence in respect of the KHEP/RHEP Design and Operation Issues, will be determined as appropriate in due course.

IV. LEAVE TO APPLY

40. Any Party has leave to apply to the Court for a variation of this Order, giving particulars of the variation sought and the reason for it.
41. Any Party may request that the Court convene a conference with the Parties to address any procedural aspect of these proceedings. The Court will arrange to confer with the Parties in person or by videoconference, according to the circumstances.

Dated: 6 July 2023



Prof. Sean D. Murphy
Chairman

On behalf of the Court of Arbitration