

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

**QUESTIONS TO BE ADDRESSED AT
THE HEARING ON COMPETENCE**

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

26 April 2023

A. Questions relating to *kompetenz-kompetenz* and to the effect of non-appearance of a party

1. Bearing in mind Indus Waters Treaty (“**Treaty**”), Annexure G, para. 16, who is competent under the Treaty to determine whether (i) a Court of Arbitration is competent and (ii) a Neutral Expert is competent? It is noted that India has stated in the Neutral Expert proceedings that no one – except the sovereign states themselves – has authority to rule on the validity of a Neutral Expert’s appointment.¹ By contrast, Pakistan has stated that the Court is competent to address its own competence and that of the Neutral Expert.²
2. Is it consistent for India to accept the principle of *kompetenz-kompetenz*,³ which is commonly understood as according to a court or tribunal the competence to determine its own competence, and yet simultaneously to assert that it may determine whether the Court of Arbitration is duly constituted?
3. Under the Treaty or other rules of international law concerning dispute settlement, does the non-appearance of a Party in a proceeding before a Court of Arbitration or a Neutral Expert deprive that body of competence?⁴

B. Questions relating to the comparison of the current proceeding to the *Kishenganga Arbitration*

4. Did Pakistan request, but then withdraw its request, for the appointment of a Neutral Expert in 2009?⁵ If so, what were the consequences for the arbitration?
5. Pakistan asserts that attempts in 2009 to negotiate with India prior to invoking arbitration in 2010 were fruitless.⁶ How do Pakistan’s efforts in 2009 compare to the efforts taken in the present case?⁷
6. What is the support for Pakistan’s assertion that India has “committed unequivocally to abide by the decision of the Court of Arbitration in the *Kishenganga* case”?⁸
7. In the *Kishenganga* Arbitration, the Court of Arbitration determined that it was competent to act even in the absence of the matter having been placed before a Neutral Expert. Should that determination be understood as confirming that matters placed before a Court of Arbitration need

¹ See, **P-0040**, Transcript, Neutral Expert First Meeting (*Indus Waters*), Day 1, pp. 22.20-23.2.

² Response of Pakistan dated 24 March 2023 (“**Pakistan’s Response**”), paras. 9, 116, 270.

³ Letter from India to the World Bank dated 21 December 2022 (“**India’s Objection**”), pp. 3-4, para. 14.

⁴ See, Pakistan’s Response, paras. 272-274.

⁵ See, **P-0067**, Note Verbale No. Dir (India)-1/7/2009 dated 10 July 2009.

⁶ Pakistan’s Response, para. 41; See, **P-0067**, Note Verbale No. Dir (India)-1/7/2009 dated 10 July 2009; **P-0068**, Note Verbale No. J/112/03/2009.

⁷ See, **P-0031**, Minutes of Secretary Level Meeting on Kishenganga and Ratle Hydroelectric Plants held in New Delhi, 14–15 July 2016 dated 15 July 2016.

⁸ See, for example, **P-0022**, Letter No. WT(132)/(7523-A)/PCIW from the PCIW to the ICIW dated 5 February 2016.

not first be considered by a Neutral Expert, or understood as confirming that they need not do so only when both Parties accept the Court's competence?

C. Questions relating to the text of Article IX

8. Treaty Article IX(2)(a) provides that “[a]ny difference which, in the opinion of either Commissioner, falls within the provisions of Part 1 of Annexure F shall, at the request of either Commissioner, be dealt with by a Neutral Expert in accordance with the provisions of Part 2 of Annexure F.” Article IX(2)(b) then states that a dispute may arise “[i]f the difference does not come within the provisions of Paragraph (2)(a).” Given that Pakistan initially requested that certain questions be dealt with by a Neutral Expert, and then withdrew that request and commenced reference to the Court of Arbitration, what role, if any, can the concepts of ‘bad faith’ and/or ‘abuse of right’ play in respect of Pakistan’s conduct?
9. India maintains that there is a “graded mechanism” for the resolution of questions arising under the Treaty that involves first the examination by the Commission, then (if agreement is not reached) dealing with any “difference” by a Neutral Expert, and only thereafter, either upon “agreement between the two Commissioners” or “a recommendation by a duly appointed Neutral Expert,” can a “dispute” come before a Court of Arbitration.⁹ Can Article IX(2)(b) be interpreted as preventing a question being regarded as a “dispute” if a Commissioner has opined in the Commission, or in a notice under Paragraph 5(a) of Annexure F, that the question falls within the provisions of Part 1 of Annexure F, even if that Commissioner has not yet requested the appointment of a Neutral Expert? In other words, in paragraph 2(b), what exactly is meant by the phrase “does not come within the provisions of Paragraph (2)(a)”?
10. Alternatively, can Article IX(2) be interpreted to mean that under paragraph 2(a) either Commissioner (“in the opinion of either Commissioner”) may initiate the process before a Neutral Expert, but under paragraph 2(b) the process before a Court of Arbitration can only be initiated either by agreement of the Commissioners (given the omission of the above quoted phrase) or by a determination by a Neutral Expert that a dispute has arisen?
11. Would either interpretation serve the objective of having a sound dispute resolution procedure by avoiding simultaneous initiation by one Party of a Neutral Expert process and the other Party of a Court of Arbitration process on the same question? Or would both do the opposite by creating the conditions for one Party to obstruct or delay the formation of a Court for addressing matters that do not fall within the competence of a Neutral Expert?¹⁰
12. Would either interpretation also help explain the reference in Annexure G, paragraph 1, that “[i]f the necessity arises” then a Court of Arbitration shall be established?¹¹
13. Once a difference has arisen, is there a time period during which the Commissioners must have an opportunity to consider whether the difference falls within the provisions of Part 1 of Annexure F and/or to request that the difference be dealt with by a Neutral Expert, before there can be resort to Article IX(2)(b)? If so, was that time period respected in this instance?

⁹ India’s Objection, pp. 1-2, 6-11.

¹⁰ See, Pakistan’s Response, paras. 203-204.

¹¹ See, India’s Objection, pp. 12-13, paras. 13-14; Pakistan’s Response, paras. 208-213.

14. Article IX(3) provides that when a dispute has arisen, “the Commission shall, at the request of either Commissioner, report that fact to the two Governments....” Did Pakistan’s Commissioner seek such a report from the Commission?¹²
15. Article IX(4) provides that once a government comes to a conclusion that the report “is being unduly delayed in the Commission,” it may “invite the other Government to resolve the dispute by agreement.” On what date did the Government of Pakistan determine that the report within the Commission was “being unduly delayed”?¹³ Is there any precedent under the Treaty or international law for clarifying when undue delay has occurred?
16. Do the Parties agree that Pakistan invited India to resolve the dispute by agreement, including by naming negotiators and indicating its readiness to meet at a time and place indicated by India, and that such negotiations took place on 14-15 July 2016?¹⁴
17. Pakistan maintains that such negotiations are permissive but not mandatory.¹⁵ Yet Article IX(5)(b) provides that either Party may request the establishment of a Court of Arbitration “after negotiations have begun pursuant to Paragraph 4”; does this mean that such negotiations are a prerequisite to requesting a Court of Arbitration? Alternatively, Article IX(5)(c) provides that either Party may request the establishment of a Court of Arbitration one month after receipt of the invitation for negotiations under Article IX(4) if the inviting Party concludes that the other Party is unduly delaying the negotiations. Does this reinforce the proposition that such negotiations are a prerequisite to requesting a Court of Arbitration?
18. Article IX(5)(b) allows for a request if in a Party’s “opinion the dispute is not likely to be resolved by negotiation or mediation.” When did Pakistan reach the opinion that the dispute was not likely to be so resolved? Is there any precedent under the Treaty or international law for clarifying when a “dispute is not likely to be resolved by negotiation or mediation”? In other words, it would be helpful if Pakistan were to elaborate more on why, at a certain point in time, it came to the subjective conclusion that negotiations had reached an impasse. This is perennial problem in cases where negotiations that do not specify a time limit are present in the relevant treaty before resort to judicial or arbitral settlement.¹⁶
19. Article IX(6) provides that the paragraphs (3), (4) and (5), which relate to resolution of a “dispute” before a Court of Arbitration, “shall not apply to any difference while it is being dealt with by a Neutral Expert.” India maintains that this prevents the Court of Arbitration from acting.¹⁷ Given that India was aware of Pakistan’s intention to bring the dispute to a Court of Arbitration as early as 25 February 2016,¹⁸ what role, if any, should the concept of ‘bad faith’ and/or ‘abuse of right’ by India play in the present proceedings?

¹² See, India’s Objection, p. 14, para. 19.

¹³ See, Pakistan’s Response, paras. 248-249, 255.

¹⁴ See, India’s Objection, pp. 11, 14, paras. 10, 19; Pakistan’s Response, paras. 254-256, 260.

¹⁵ Pakistan’s Response, para. 154.

¹⁶ See, for example, *Application of the Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, ICJ Reports 2011.

¹⁷ India’s Objection, pp. 6, 12, 14, paras. 1, 12, 18.

¹⁸ See, **P-0023**, Letter No. WT(132)/(7531-A)/PCIW (with enclosure) from the PCIW to the ICIW dated 25 February 2016.

20. Is Article IX(6) only applicable when a Neutral Expert is requested prior to the request for a Court of Arbitration and with respect to issues that are being dealt with by the Neutral Expert?¹⁹ If so, what is the best understanding of Pakistan's communication referred to in India's Objection at pp. 15-16, para. 22?
21. Pakistan asserts that "[t]he 'being dealt with' language must be given meaning, and the ordinary meaning of these words suggests that the clause will only operate at the point at which a Neutral Expert has been identified, appointed and his or her terms of retainer fixed."²⁰ Why do the terms of the retainer need to be fixed before it can be said that a difference is being dealt with by a Neutral Expert? Can it be said that the Neutral Expert is dealing with the difference at a prior point in time, such as once he or she is appointed, is in communication with the Parties, or first meets with the Parties?
22. Does the 'pause' that was in place from December 2016 to March 2022 have any effect on the interpretation of Article IX?

D. Questions relating to the appointment of a Neutral Expert

23. Pakistan relies on the *Kishenganga* Court's conclusion²¹ that the appointment of a Neutral Expert is not a prerequisite for the identification of a "dispute". But that Court did not address the consequences of a Party requesting the appointment of a Neutral Expert before or after an arbitration proceeding has been instituted. Does the Treaty address, expressly or by implication, how a Court should proceed when a Neutral Expert has also been appointed?
24. While the Treaty is clear about when arbitration proceedings commence,²² it is silent on when Neutral Expert proceedings are considered to be commenced. Given the circumstances and the correspondence between the Parties, can it be determined which commenced first?
25. Regardless of which proceedings commenced first, what effect(s) would follow from a finding that the Court's jurisdiction/competence is distinct from, and yet more comprehensive than, that of a Neutral Expert?
26. If the Treaty procedures result in the simultaneous appointment of a Neutral Expert and a Court of Arbitration on the same or closely related issues, does the Treaty or principles of international law impose any duty upon the Neutral Expert and the Court to cooperate with one another?²³
27. Are the Parties in agreement that the Treaty does not permit the conducting of parallel proceedings under the Treaty on the exact same issues?²⁴
28. In the apparent absence of a retainer agreement, what is the current status of the Neutral Expert? Has Pakistan retained its reservation or objection to the competence of Neutral Expert in the Neutral Expert proceedings?

¹⁹ See, Pakistan's Response, paras. 162-177.

²⁰ Pakistan's Response, para. 171.

²¹ **PLA-0003**, *Kishenganga* arbitration, Partial Award, paras. 478-480.

²² See, Treaty, Annexure G, para. 3.

²³ See, Pakistan's Response, paras. 117-118.

²⁴ See, India's Objection, p. 1, para. 2.

E. Questions concerning the difference between technical/plant-specific questions and Treaty-systemic questions

29. India has indicated that the issues raised by Pakistan fall under Annexure F, paragraph 1(11).²⁵ In what sense do the following issues, which appear to be raised before this Court, fall within that paragraph: (i) a request for interim measures of protection; (ii) the precedential effect of prior Neutral Expert decisions on subsequent Neutral Experts; (iii) the precedential effect of Court of Arbitration decisions on subsequent Neutral Experts; (iv) the competence of a particular Neutral Expert; (v) the competence of a particular Court of Arbitration; (vi) the extent to which non-Treaty-based practices can be used to augment or alter provisions of the Treaty; and (vi) equitable or other relief regarding the operation of hydroelectric plants on the Western Rivers?
30. Does India agree with Pakistan's position as to the relevance of Annexure G, para. 29, when considering the scope of the Court's and Neutral Expert's respective interpretive competences?²⁶
31. Pakistan indicates that this Court of Arbitration is necessary to render "an interpretive award of general application under the Treaty," which includes "systemic" interpretation of the design criteria set out in Annexure D.²⁷ In that regard, what types of "systemic" guidance, beyond what is already set out in Annexure D, can the Court provide? Is it the guidance indicated at paragraphs 25-31 of Pakistan's Statement on Coordination dated 23 February 2023?
32. Given that paragraph 11 of Annexure D indicates that a Neutral Expert can determine "whether or not the design of a Plant conforms to the criteria set out in Paragraph 8" of Annexure D, can Neutral Experts answer all design questions plant-by-plant, each deciding for itself when the issue is beyond its competence and each recognizing that its decision does not bind other Neutral Experts in light of differing local conditions? Are design criteria, when phrased in terms of what is "consistent with sound and economical design and with satisfactory operation of the works",²⁸ best left to application by a Neutral Expert in context rather than a Court of Arbitration?
33. Pakistan states that, while "the Court would be fully competent to address technical design issues, it could readily confine itself to addressing the issues that fell within its exclusive competence alone."²⁹ What are the issues that fall within the Court's exclusive competence?
34. Pakistan states that: "In keeping with established principles of international dispute settlement, nothing that occurred after [the filing of the Request for Arbitration] can deprive the Court of its competence over the Parties' disputes."³⁰ What are those "principles of international dispute settlement"?

F. Questions in the event that the Court is competent

35. If the Court concludes it is properly established under the Treaty and is competent to address all of the matters encompassed in the disputes Pakistan has presented, what are the options for the Court with respect to the next phase? Can the Court:

²⁵ India's Objection, p. 15, para. 21.

²⁶ See, Pakistan's Response, paras. 128-132.

²⁷ Pakistan's Response, para. 35.

²⁸ For example, Annexure D, para. (8)(d).

²⁹ Pakistan's Response, para. 92.

³⁰ Pakistan's Response, para. 105.

- A. decide, perhaps on grounds of admissibility, that the Neutral Expert should proceed to address the differences before him, after which the Court will address any issues before the Court that have not been addressed by the Neutral Expert?
 - B. decide to order written and oral pleadings on issues regarding only questions concerning the systemic interpretation and application of the Treaty,³¹ with the intention that the Neutral Expert would address the differences before him relating to the Kishenganga Hydroelectric Plant and the Ratle Hydroelectric Plant? If so, should the Court (and does it have the power to) provide any direction to the Neutral Expert pending the Court's resolution of those issues? If so, what should that direction be?
 - C. decide that the Court of Arbitration's competence is exclusive of any parallel competence by the Neutral Expert and that the Court of Arbitration is the sole mechanism presently competent to resolve the disputes referred to it? or
 - D. decide upon a different course that either Party identifies?
36. In the event that the Court finds itself competent and determines to proceed in a coordinated fashion, leaving plant-specific issues for the determination of the Neutral Expert, would the competence of the Neutral Expert to address these issues arise from Article IX(2) of the Treaty, from the alignment of the Parties (albeit potentially on different bases) in not contesting the Neutral Expert's competence, or from some other source?

³¹ See, Pakistan's Statement on Coordination dated 23 February 2023, paras. 25-31.