

**PRESS RELEASE****Proceedings under the Indus Waters Treaty
(Islamic Republic of Pakistan v. Republic of India)**

THE HAGUE, 6 JULY 2023

The Court of Arbitration Renders its Award on Competence; Issues Procedural Order No. 6 on Further Proceedings

On 6 July 2023, the Court of Arbitration rendered its Award on the Competence of the Court (“Award”), in an arbitration initiated by the Islamic Republic of Pakistan against the Republic of India pursuant to Article IX and Annexure G of the Indus Waters Treaty, as part of a preliminary phase of the arbitration proceedings.

In these proceedings, Pakistan requests the Court of Arbitration to address the interpretation and application of the Indus Waters Treaty to certain design elements of the run-of-river hydro-electric projects that India is permitted by the Treaty to construct on the tributaries of the Indus, Jhelum, and Chenab, before those rivers flow into Pakistan.

In the Award, the Court carefully considered objections to the competence of the Court raised by India (by way of correspondence to the World Bank). In a unanimous decision, which is binding on the Parties and without appeal, the Court rejected each of the objections raised by India and determined that the Court is competent to consider and determine the disputes set forth in Pakistan’s Request for Arbitration.

In light of the Court’s determination in the Award, the Court also issued Procedural Order No. 6, regarding the next phase of these proceedings. In the next phase, the Court will address certain questions concerning the overall interpretation and application of the Treaty’s provisions on hydro-electric project design and operation, as well as the legal effect of past decisions of dispute resolution bodies under the Treaty.

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1. Commencement of the Court of Arbitration Proceedings

By way of a Request for Arbitration dated 19 August 2016, Pakistan initiated the present arbitration proceedings before the Court of Arbitration (an arbitral panel consisting of highly-qualified lawyers and engineers) under Article IX and Annexure G of the Indus Waters Treaty.

Subsequently, on 4 October 2016, India requested that the World Bank appoint a neutral expert (a highly-qualified engineer) under Article IX and Annexure F of the Treaty, to address certain design and operation questions that are essentially identical to some of the questions presented by Pakistan in its Request for Arbitration.

In December 2016, the World Bank, which has a special but essentially ministerial role under the Treaty, decided to pause the process of appointing the Chairman of the Court of Arbitration and the Neutral Expert. This ‘pause’ was lifted in 2022, following which the Court of Arbitration was empaneled and the Neutral Expert was appointed.

2. The Court’s Preliminary Phase on Competence

On 21 December 2022, in advance of the Court of Arbitration’s first meeting in January 2023, India sent correspondence to the World Bank, in which it expressed the view that the Court of Arbitration is not

competent to consider the questions put to it and that such questions should instead be decided through the Neutral Expert process. The World Bank transmitted this correspondence to the Court of Arbitration.

In light of this correspondence, the Court decided that it would consider India's objections and address the competence of the Court in an expedited, preliminary phase of the proceedings. The Court invited the Parties to provide written submissions, as well as oral submissions at a Hearing on Competence, which took place at the Peace Palace, the headquarters of the Permanent Court of Arbitration (the "PCA") in The Hague, the Netherlands, from 11 to 13 May 2023.

India did not provide written submissions to the Court, and did not appear or participate in the Hearing on Competence.

3. Award on the Competence of the Court

In the Award, the Court addressed six distinct (though interrelated) objections, which the Court had distilled from India's correspondence. These objections concerned the interpretation of the dispute settlement provisions of the Treaty (contained in Article IX of the Treaty, together with Annexures F and G),¹ and the application of these provisions to the present circumstances.

As the Court observed, Article IX of the Treaty provides that any question concerning the interpretation or application of the Treaty must first be examined by the Permanent Indus Commission (comprised of Commissioners appointed by Pakistan and India) and, if the Commission fails to reach agreement, the questions may be resolved by a neutral expert or a court of arbitration (depending on the circumstances), or in any other way agreed upon by the Commission.

Preliminary Matters

Before addressing India's objections, the Court considered two preliminary matters, namely, the law to be applied by the Court, and the relevance of India's non-appearance before the Court.

In relation to the applicable law, the Court observed that the Treaty is the primary source of law for the Court to interpret and apply, but that where necessary for the Treaty's interpretation or application, the Court may also apply international conventions and customary international law. The Court also observed that some of India's objections raised issues of interpretation or application of the Treaty that had already been determined by a prior Court of Arbitration convened under the Treaty, known as the *Indus Waters Kishenganga Arbitration* (PCA Case No. 2011-01), and that such determinations remained final and binding upon both India and Pakistan.

In relation to India's non-appearance before the Court, the Court concluded that a Party's non-appearance does not deprive the Court of competence, nor does it have any effect on the establishment and functioning of the Court, including the final and binding nature of its awards. At the same time, India's non-appearance does not lessen the Court's standing duty to verify that it is competent and that it has jurisdiction over the dispute before it.

The Court recalled India's approach in the *Kishenganga* proceedings, where, notwithstanding India's objections to that Court's competence, India nevertheless appointed two arbitrators to that Court and appeared before that Court so as to present its objections. To that end, the Court of Arbitration in the present proceedings noted that India remained welcome to assume participation in these proceedings, including by appointing arbitrators in accordance with the Court's Supplemental Rules of Procedure.

India's First Objection

The Court observed that India's First Objection was that India had decided that the Court of Arbitration was illegally constituted and that the Court was not empowered to second-guess that decision (thus, the Court was not competent to rule on its own competence).

¹ An extract of Article IX of the Treaty is set out at paragraph 65 of the Award.

The Court recalled the core principle of international law that no State can be made subject to a court or tribunal's jurisdiction without its consent. However, as an exercise of its sovereignty, a State can consent to such jurisdiction so as to secure binding dispute settlement vis-à-vis another State. In the present case, the Court found that India had provided its consent by entering into and ratifying the Indus Waters Treaty (including its compulsory dispute settlement provisions). Under the Treaty, India expressly agreed that "the Court shall decide all questions relating to its competence" (Annexure G, para. 16), and not that either Party alone could do so.

India's Second Objection

The Court observed that India's Second Objection was that the type of question (a "dispute") that could be taken to a court of arbitration had not yet arisen under the terms of Article IX(2) of the Treaty. In India's view, a "dispute" could only arise (absent the agreement of the Commissioners) if a neutral expert first had been appointed, and that neutral expert had determined that a part or all of the difference between the Parties should be treated as a "dispute". The Court noted that India had raised a similar objection in the *Kishenganga* proceedings, which had been rejected.

The Court first recalled that the Parties had been unable to resolve the questions that had arisen through discussions in the Commission, despite determined efforts over a period of years. In the language of the Treaty, these questions had become "differences" able to be resolved by an independent third party. The Court further noted that the nature of the differences had evolved over time, to include legal differences of Treaty interpretation as well as technical differences.

The Court then turned to the language of Article IX(2), finding, consistent with the approach adopted by the Court in the *Kishenganga* proceedings, that a "dispute" could arise and be placed before a court of arbitration without first being addressed by a neutral expert, so long as a Commissioner had not already made an actual request for appointment of a neutral expert to address the matter. On the factual record, India made no such request prior to Pakistan's initiation of the Court's proceedings.

India's Third Objection

The Court observed that India's Third Objection was that Pakistan had not satisfied the procedural requirements of Articles IX(3), (4), and (5) of the Treaty before initiating these proceedings.

The Court first examined the requirements of Article IX(3), relating to the preparation of a report in the Commission on the "dispute". The Court observed that while no report had been prepared, Article IX(4) of the Treaty permitted the process of forming a court of arbitration to move forward where one Party was of the view that the report was being "unduly delayed". The Court found that, in the present circumstances, Pakistan had reasonably come to the conclusion that the report was being "unduly delayed".

The Court then examined Article IX(4), concerning a requirement for inter-governmental negotiations. The Court found that the Parties had held substantive negotiations in July 2016 and that there was no basis for finding that Pakistan did not genuinely engage in them.

In relation to Article IX(5), concerning the method by which a court of arbitration may be established, the Court concluded that Pakistan had satisfied the method in Article IX(5)(b), whereby a Party may request arbitration after inter-governmental negotiations are held if it is of the opinion that the dispute was not likely to be resolved by negotiation or meditation. The Court found that Pakistan properly formed such an opinion prior to submitting its request for arbitration in August 2016.

India's Fourth Objection

The Court observed that India's Fourth Objection was that the procedure for empaneling the court of arbitration, set out in Annexure G to the Treaty, had not been complied with in the present case, with the consequence that there was no effectively constituted court of arbitration.

The Court examined compliance with each of the requirements of Annexure G in the present case, and found that there were no flaws or discrepancies in the appointment of the members of the Court. The only deviation (if any) was the Court's recognition of India's right to appoint two arbitrators more than

30 days after Pakistan filed its request for arbitration, allowing it to do so up to seven days after an (affirmative) decision on the Court's competence, a deviation which operates to India's advantage.

India's Fifth Objection

The Court observed that India's Fifth Objection was that Article IX(6) of the Treaty prevented the Court from considering the questions "being dealt with by" the Neutral Expert.

In interpreting Article IX(6), the Court found that the provision only operates so as to preclude certain steps up until the initiation of a court of arbitration proceeding (and not at any later point in time). In the present case, Pakistan's Request for Arbitration initiated the Court of Arbitration proceeding on 19 August 2016. At that point in time, India had not yet requested the appointment of a neutral expert, and thus there was no neutral expert "dealing with" the questions placed before the Court so as to preclude the initiation of the Court's proceeding.

India's Sixth Objection

The Court observed that India's Sixth Objection was that the Court is not competent as there is no "necessity" for the Court, further to paragraph 1 of Annexure G to the Treaty.

In interpreting paragraph 1 of Annexure G, the Court found that that paragraph does not establish a new or separate requirement of "necessity" beyond the requirements set out in Article IX of the Treaty. Instead, it captures the point that if the requirements of Article IX are met, a court of arbitration should be formed and operate in accordance with the procedures set out in Annexure G. In this context, the Court noted a general complaint of India that the Treaty does not allow "parallel proceedings" before both a court of arbitration and a neutral expert. The Court found that the Treaty contains no such prohibition and, depending on what is meant by the term, parallel proceedings are possible, including where two such bodies are addressing related but different questions. In any event, the Court observed that, in this instance, it was India's conduct in requesting the appointment of a neutral expert (taken after Pakistan had already initiated the proceeding before the Court) that resulted in parallel proceedings.

The Court's Decision

In light of its findings in relation to India's objections, the Court unanimously made the following findings and declarations:

- 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.

4. Procedural Order No. 6 (Further Proceedings)

In light of the Court's decision in the Award, the Court also issued Procedural Order No. 6, regarding the next phase of the Court's proceedings.

In Procedural Order No. 6, the Court recalled the procedural history of both the Court's proceedings and the Neutral Expert process commenced by India.

The Court stressed that it had not been asked to decide, and had not decided, whether the Neutral Expert had been properly appointed or was competent to decide the issues before him. Nevertheless, in light of Pakistan's consent to participate in the Neutral Expert process, a situation potentially arose in which both the Court of Arbitration and Neutral Expert were competent to address certain design and operation issues specific to the Kishenganga and Ratle hydro-electric plants.

The Court recalled that situations in which multiple bodies may have competence over the same subject matter are relatively commonplace in public international law, and when parallel proceedings arise, each body has a duty of mutual respect and comity. This duty means that each body must perform its function in such a way as to facilitate the resolution of the Parties' dispute.

The Court noted that it had little insight into the likely course of the Neutral Expert proceedings. However, the Court observed that the issues before the Court of Arbitration were broader than those before the Neutral Expert. The Court decided to proceed in a phased manner, with the next phase to address certain questions concerning the overall interpretation and application of the Treaty's provisions on hydro-electric project design and operation, as well as the legal effect of past decisions of dispute resolution bodies under the Treaty. These questions were solely before the Court and not before the Neutral Expert.

The Court further indicated that it would convene a case management conference to determine the schedule for this next phase and other matters.

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The Court of Arbitration is chaired by Professor Sean D. Murphy of the United States. The other members are presently Professor Wouter Buytaert of Belgium, Mr. Jeffrey P. Minear of the United States, Judge Awn Shawkat Al-Khasawneh of Jordan, and Dr. Donald Blackmore of Australia. To date, India has not exercised its right under the Treaty to appoint two arbitrators to the Court of Arbitration.

Pursuant to Article 7 of the Court's Supplemental Rules of Procedure, India shall make any appointments no later than 7 days following an (affirmative) decision of the Court on its competence, that is, by 13 July 2023.

Pursuant to a decision by the Court of Arbitration, the PCA acts as the secretariat for the proceedings.

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The **Permanent Court of Arbitration** is an intergovernmental organization established by the 1899 Hague Convention on the Pacific Settlement of International Disputes. The PCA has 122 Contracting Parties. Headquartered at the Peace Palace in The Hague, the Netherlands, the PCA facilitates arbitration, conciliation, fact-finding, and other dispute resolution proceedings among various combinations of States, State entities, intergovernmental organizations, and private parties. The PCA's

International Bureau is currently administering 4 inter-State arbitrations, 2 other inter-State proceedings, 111 investor-State arbitrations, and 86 cases arising under contracts involving a State or other public entity. More information about the PCA can be found at www.pca-cpa.org.

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