

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. 9

**(DECISION ON INDIA'S OBJECTIONS
TO THE PROPOSED SITE VISIT TO THE NJHEP)**

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

2 February 2024

I. INTRODUCTION

1. This Procedural Order addresses objections raised by the Republic of India (“**India**”) to the conduct of a proposed site visit by the Court of Arbitration (the “**Court**”) to the Neelum-Jhelum Hydro-Electric Plant (“**NJHEP**”). These objections were raised by way of India’s letter to the Registrar of the Court dated 18 January 2024 (“**18 January Letter**”).

II. PROCEDURAL HISTORY

2. 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 dated 6 July 2023 (“**Award on Competence**”), and in the Court’s subsequent procedural orders.
3. 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 India pursuant to Article IX and Paragraph 2(b) of Annexure G to the Indus Waters Treaty 1960 (the “**Treaty**”). The Request for Arbitration (as amended on 28 July 2023) advances a series of facts as to the design and operation of run-of-river hydro-electric plants along the Indus system of rivers, which Pakistan maintains must be understood when interpreting or applying the Treaty.
4. Paragraph 16 of Annexure G of the Treaty provides that, “[s]ubject to the provisions of this Treaty and except as the Parties may otherwise agree, the Court shall decide all questions relating to its competence and shall determine its procedure”. To that end, on 31 March 2023, the Court issued its Supplemental Rules of Procedure, in which it determined, amongst other things, that “[e]ach Party shall have the burden of proving the facts relied on to support its claim or defense” and that the Court “may take all appropriate measures in order to establish the facts”.
5. Following the receipt by the Court of objections by India to the competence of the Court, by way of India’s letter to the World Bank dated 21 December 2022, the Court determined that it would 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**”).
6. On 6 July 2023, following written submissions and an oral hearing, the Court issued its Award on Competence, finding that the Court is competent to consider and determine the disputes set forth in the Request for Arbitration.
7. On 6 July 2023, the Court also issued its Procedural Order No. 6, determining that the Court would conduct these proceedings in a phased manner, and that the next phase of the proceedings (the “**First Phase on the Merits**”) would address certain questions 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, in addition to a related question concerning the legal effect of past decisions issued by dispute resolution bodies established pursuant to Article IX of the Treaty.

8. In Procedural Order No. 6, the Court decided to convene a case management conference by videoconference to determine the schedule for the First Phase on the Merits and other matters (“**Case Management Conference**”).
9. On 10 July 2023, Pakistan wrote to the Court, proposing to add the desirability of arranging a site visit by the Court to the agenda for the Case Management Conference, and in turn, addressed the matter at the Case Management Conference on 14 July 2023, in which India did not participate.
10. On 28 July 2023, the Court wrote to the Parties, indicating that a site visit would be of assistance as it sought to apprehend the issues before it in the First Phase on the Merits. The Court observed that it would particularly welcome the opportunity to visit Indian run-of-river hydro-electric plants, including the Kishenganga Hydro-Electric Plant (“**KHEP**”) and Ratle Hydro-Electric Plant (“**RHEP**”), and invited India’s views by 29 September 2023.
11. In its letter of 28 July 2023, the Court also welcomed the opportunity to visit a Pakistani run-of-river hydro-electric plant, including the Neelum-Jhelum Hydro-Electric Plant (“**NJHEP**”), as Pakistan had proposed at the Case Management Conference, and invited Pakistan’s agreement by 29 September 2023.
12. On 28 September 2023, Pakistan wrote to the Court indicating its agreement to a site visit to the NJHEP by the Court. No response to the Court’s letter of 28 July 2023 was received from India by 29 September 2023.
13. On 23 December 2023, the Court provided the Parties with a draft protocol for a site visit by the Court to the NJHEP, and invited the Parties’ comments by 12 January 2024, and comments on the other Party’s comments by 19 January 2024.
14. On 12 January 2024, Pakistan provided comments on the draft site visit protocol.
15. On 18 January 2024, India wrote to the Registrar of the Court, setting out its objections to the proposed site visit. In its letter, India contended that the Court lacks competence in this matter and observed that the NJHEP is in territory claimed by India.
16. On 19 January 2024, the Court invited Pakistan to respond to India’s objections by no later than 26 January 2024.
17. On 26 January 2024, Pakistan responded to India’s objections (“**26 January Letter**”), maintaining that, amongst other things, the Court had already determined that it was competent in this matter and that the Treaty, and dispute resolution proceedings under it, are without prejudice to the territorial claims of either Party. As such, Pakistan requested that India’s objections should not be accepted.

III. THE COURT’S ANALYSIS

A. Preliminary Observations

18. The Court recalls that the prospect of a site visit by the Court, including a site visit to the NJHEP, has been known to India for some six months, without objection:

- (a) On 10 July 2023, Pakistan wrote to the Court, raising the possibility of a site visit by the Court. This letter was copied to India.
- (b) The Court convened a Case Management Conference in this proceeding on 14 July 2023. Pakistan participated in that Conference. India chose not to. At the Conference, Pakistan elaborated on its proposal for a site visit. India was provided with copies of the transcript of the Conference shortly after its conclusion.
- (c) After careful consideration of Pakistan's proposal, the Court wrote to the Parties on 28 July 2023, indicating that site visits to hydro-electric plants constructed by *each of the Parties* would be of assistance as it sought to apprehend the issues before it in the First Phase on the Merits. Indeed, the objective in pursuing such site visits would be to familiarize the Court with the general aspects of the design and operation of run-of-river-hydro-electric plants along the Indus system of rivers.

In its letter of 28 July 2023, the Court observed that it would particularly welcome the opportunity to visit run-of-river hydro-electric plants constructed by India (and located in territory administered by India), including the KHEP and RHEP. While the Court invited India to respond to this possibility by 29 September 2023, India did not respond.

In the same letter, the Court also welcomed the opportunity to visit a Pakistani run-of-river hydro-electric plant, specifically the NJHEP, as Pakistan had proposed at the Case Management Conference.

- (d) On 28 September 2023, Pakistan indicated its agreement to a site visit to the NJHEP. India, again, did not respond to the Court's letter, nor indicate any objection to such a site visit.
19. Only by its letter of 18 January 2024 did India raise any objection to a site visit to the NJHEP.
 20. Nevertheless, notwithstanding India's delay in raising its objections to the proposed site visit, the Court has carefully considered both India's 18 January Letter and Pakistan's 26 January Letter in response.

B. The Court's Power to Conduct the Site Visit

21. Before addressing the specific objections raised by India in its 18 January Letter, the Court recalls the source of its power to conduct the proposed site visit. Indeed, the Treaty's specific terms, the Court's Supplemental Rules of Procedure, and past practice under the Treaty each support the Court's authority to conduct the proposed site visit.
22. *First*, paragraph 16 of Annexure G of the Treaty provides that, "[s]ubject to the provisions of this Treaty and except as the Parties may otherwise agree, the Court [of Arbitration] shall decide all questions relating to its competence and shall determine its procedure".¹ Thus, if the Court views it as helpful for addressing the matters before it to include as a part of its procedures one or more site visits, the Court is empowered to do so.
23. *Second*, the Court's Supplemental Rules of Procedure provide that "[e]ach Party shall have the burden of proving the facts relied on to support its claim or defense" and that the Court "may take

¹ **PLA-0001**, *Indus Waters Treaty 1960 Between the Government of India, the Government of Pakistan and the International Bank for Reconstruction and Development*, signed at Karachi on 19 September 1960, 419 U.N.T.S. 126 ("**Treaty**"), Annexure G, para. 16.

all appropriate measures in order to establish the facts”.² As such, if the Court regards a site visit as helpful for understanding how, as a factual matter, run-of-river hydro-electric plants operate within the Indus river system, the Court may conduct a site visit to that end.

24. *Third*, the power of the Court to conduct a site visit under the Treaty, including to areas of contested sovereignty, as well as the value for any court of arbitration under the Treaty of conducting such a site visit when deciding a Treaty dispute, is also confirmed by past practice, including the practice of both Parties. In particular, the court of arbitration convened under the Treaty in 2010³ (the “**Kishenganga Court**”) conducted two site visits, both of which occurred in disputed territory, involving areas administered by India and areas administered by Pakistan, including a site visit to the NJHEP.

C. India’s Site Visit Objections

25. By way of its 18 January Letter, India essentially advances three objections to the proposed site visit. *First*, that the Court is not competent in this proceeding; *second*, that the site visit will occur in territory claimed by both Parties, but administered by Pakistan, and thus the site visit would be prejudicial to India’s territorial claims; and *third*, that the proposed site visit to the NJHEP has no proper purpose.

1. Objection Based on the Court’s Competence

26. *First*, India contends that a site visit is impermissible because the Court is not properly constituted and is incompetent to address Pakistan’s claims. India states that it “has declined to accept or recognise as valid, the existence of the ‘Court of Arbitration’ and any orders, directions or rulings issued by it”.⁴ India asserts that, because “there is no validly constituted Court of Arbitration currently in existence in terms of the Treaty, the question of India acceding to a site visit by, or in aid of, the proceedings of the ‘Court of Arbitration[?]’ cannot arise”.⁵
27. In response, Pakistan contends that the purpose of India’s 18 January Letter, and its enclosures, is to revisit India’s objection to the competence of the Court, the substance of which the Court had examined and rejected in its Award on Competence.⁶ In turn, Pakistan argues that “[t]here is no basis in law or settled international practice that allows India to properly maintain its competence objections after the Court has ruled on the issues [or]... that allows India to decline to accept or recognise as valid the existence of the Court and orders, directions and rulings issued by the Court”.⁷
28. The Court has already carefully and thoroughly considered India’s objections to its constitution and competence, and it has rejected those objections in its Award on Competence. Consequently,

² Supplemental Rules of Procedure dated 31 March 2023, Arts. 22(1)-(2).

³ *Indus Waters Kishenganga Arbitration (Pakistan v. India)*, PCA Case No. 2011-01.

⁴ Letter from the Secretary, Department of Water Resources, River Development and Ganga Rejuvenation, Ministry of Jal Shakti, Government of India, to the Registrar of the Court of Arbitration, dated 18 January 2024 (“**India’s 18 January Letter**”), para. 4.

⁵ India’s 18 January Letter, para. 11.

⁶ Letter from the Deputy Agent of Pakistan to the Registrar of the Court of Arbitration, dated 26 January 2024 (“**Pakistan’s 26 January Letter**”), paras. 5, 8–13.

⁷ Pakistan’s 26 January Letter, para. 13.

India's first objection to the site visit based on its previously-rejected objections to the Court's constitution and competence cannot be sustained.

2. *Objection Based on Prejudice to the Parties' Territorial Claims*

29. *Second*, India contends that the NJHEP is located within "Indian Territory which is under the illegal and forcible occupation of Pakistan" and that "[a]ny visit by the 'Court of Arbitration' to the NJHEP would amount to a flagrant violation of India's sovereignty and territorial integrity and an interference in India's internal affairs".⁸
30. In response, Pakistan notes the existence of a "long-standing dispute between the Parties over sovereignty on either side of the Line of Control".⁹ Pakistan contends that given this wider dispute, the Treaty "includes a number of provisions that have the express purpose of excluding from the ambit of the Treaty all sovereignty and territorial claims".¹⁰ Further, the *Kishenganga* Court had examined a similar allegation by India in the context of its proceedings, which had been rejected.¹¹ As such, India, by way of its 18 January Letter, "is doing nothing more than ploughing old ground in an attempt to upset [this] Court's decision to undertake a site visit to the NJHEP".¹²
31. In the Court's view, under both the Treaty and past arbitral decisions, a site visit by a court of arbitration to a Pakistan-administered area of the disputed Jammu and Kashmir region does not infringe upon India's territorial integrity. Rather, the Treaty is carefully designed to ensure that neither its terms nor its application will affect the territorial claims of the Parties. Article IV(15) of the Treaty specifically states:
- Except as otherwise required by the express provisions of this Treaty, nothing in this Treaty shall be construed as affecting existing territorial rights over the waters of any of the Rivers or the beds or banks thereof, or as affecting existing property rights under municipal law over such waters or beds or banks.
32. In addition, Article XI(1) of the Treaty states:
- Each of the Parties agrees that it will not invoke this Treaty, anything contained therein, or anything arising out of the execution thereof, in support of any of its own rights or claims whatsoever or in disputing any of the rights or claims whatsoever of the other Party, other than those rights or claims which are expressly recognized or waived in this Treaty.
33. These Treaty provisions make clear that neither the Treaty, nor the Parties' actions under the Treaty, can affect the territorial rights of the Parties. Consequently, the Court visiting a hydro-electric plant within an area that Pakistan administers does not infringe upon India's territorial claims. Indeed, for the avoidance of doubt, the Court confirms that any site visit by the Court to an area administered by Pakistan does not and cannot be construed as having any effect on either Party's territorial claims.

⁸ India's 18 January Letter, para. 7.

⁹ Pakistan's 26 January Letter, para. 16.

¹⁰ Pakistan's 26 January Letter, paras. 16–17, citing **PLA-0001**, Treaty, Arts. IV(14)–(15), IX(1)–(2).

¹¹ Pakistan's 26 January Letter, paras. 18–19, citing **PLA-0003**, *Indus Waters Kishenganga Arbitration (Pakistan v India)*, PCA Case No. 2011-01, Partial Award, 18 February 2013, 31 Rep. of Intl. Arb. Awards 55 ("**Kishenganga Partial Award**"), paras. 359–366.

¹² Pakistan's 26 January Letter, para. 19.

34. The *Kishenganga* Court, which conducted site visits in both India-administered areas and Pakistan-administered areas, explicitly recognized that the purpose of Article XI(1) “was precisely to assure the Parties that their respective rights in or claims to disputed territories would remain unaffected by the Treaty”.¹³ The *Kishenganga* Court further found that its actions do not “have any bearing on the rights or claims that either Party may maintain to sovereignty over the territory of Jammu and Kashmir”.¹⁴ This Court concurs in that assessment.
35. In light of the above, India’s second objection to the site visit based on alleged prejudice to India’s territorial claims cannot be sustained.

3. *Objection Based on the Purpose of the Proposed Site Visit*

36. *Third*, India contends the “purpose of the site visit to the NJHEP, as stated in paragraphs 1.1 to 1.3 of the draft ‘Procedural Order’, is flawed and internally inconsistent”.¹⁵ Specifically, India states that “[t]he NJHEP has no bearing on the differences between India and Pakistan, neither in fact nor in law. The ‘purpose’ [of the site visit], therefore, appears to be hollow, and made up purely to continue the proceedings of the ‘Court of Arbitration’ in breach of the Treaty”.¹⁶
37. Pakistan does not specifically address this objection in its 26 January Letter, but it does address the utility of a site visit to the NJHEP over potential alternative hydro-electric plant sites, maintaining its view that “the NJHEP would still be the most appropriate location for a site visit”.¹⁷ Pakistan reiterates its submissions made at the Case Management Conference that Pakistani run-of-river hydro-electric plants “have geologic, topographic, hydrographic as well as design, construction and operational parallels with India’s run-of-river plants on the Western Rivers”, the NJHEP “has many, many similarities with India’s plants”, the NJHEP is located on the same river as the KHEP, and that the *Kishenganga* Court had visited the site as part of that Court’s proceedings under the Treaty.¹⁸
38. The Court recalls it made clear in its draft site visit protocol of December 2023 that the purpose of the proposed site visit is “solely for the purpose of familiarizing the Court with general aspects of the design and operation of run-of-river hydro-electric plants along the Indus system of rivers”. The Court further noted that “the questions before it in the First Phase on the Merits predominantly concern the overall interpretation and application of provisions of the Treaty that relate to the design of new *Indian* run-of-river hydro-electric plants on the Western Rivers” and emphasized that “the purpose of the site visit to the NJHEP, a *Pakistani* run-of-river hydro-electric plant, is not to establish facts specific to any such Indian run-of-river hydro-electric plants”.
39. The Court further recalls that it wrote to India on 28 July 2023, and observed that it would have particularly welcomed the opportunity to visit run-of-river hydro-electric plants constructed by India (and located in territory administered by India), including the KHEP and RHEP, two plants which were addressed in Pakistan’s Request for Arbitration. India did not respond to that letter, and has not indicated that it would make the KHEP or RHEP sites (or any other sites) available

¹³ **PLA-0003**, *Kishenganga* Partial Award, para. 361.

¹⁴ **PLA-0003**, *Kishenganga* Partial Award, para. 362.

¹⁵ India’s 18 January Letter, para. 10.

¹⁶ India’s 18 January Letter, para. 10.

¹⁷ Pakistan’s 26 January Letter, para. 25.

¹⁸ Pakistan’s 26 January Letter, paras. 24–25.

to visit by the Court. Further, India has not identified any alternative hydro-electric plant sites (in territory administered by Pakistan or elsewhere in the world) that would be more appropriate sites for the Court to visit when compared with the NJHEP.

40. In the circumstances, the Court determines that the proposed site visit to the NJHEP remains an appropriate exercise of its procedural powers (outlined in section B above) for addressing the issues presently before it. Specifically, the purpose of the proposed site visit is solely to familiarize the Court with general aspects of the design and operation of run-of-river hydro-electric plants along the Indus system of rivers, which will assist the Court in understanding the questions before it in the First Phase on the Merits.
41. In light of the above, India's third objection to the site visit based on it not having a proper purpose cannot be sustained.

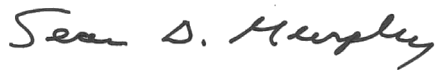
IV. DECISION

42. For the reasons indicated above, India's objections to the Court's proposed site visit to the NJHEP are rejected.
43. Even so, the Court reiterates its interest in conducting a site visit to a run-of-river hydro-electric plant or plants constructed by India. Moreover, the Court reaffirms its hope that India will participate in this proceeding, as the Court would greatly benefit from hearing its views on all issues before the Court.

V. LEAVE TO APPLY

44. 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.
45. 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.

Dated: 2 February 2024



Prof. Sean D. Murphy
Chairman

On behalf of the Court of Arbitration