

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. 10

(SITE VISIT PROTOCOL)

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

3 February 2024

WHEREAS paragraph 16 of Annexure G of the Indus Waters Treaty 1960 (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”;

WHEREAS on 31 March 2023, the Court of Arbitration (the “**Court**”) issued its Supplemental Rules of Procedure, in which it determined, among 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”;

WHEREAS Pakistan’s Request for Arbitration dated 19 August 2016 (as amended on 28 July 2023) (the “**Request for Arbitration**”), 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;

WHEREAS on 6 July 2023, the Court issued its Procedural Order No. 6 (“**PO6**”), 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;

WHEREAS in PO6, 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**”);

WHEREAS 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;

WHEREAS 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;

WHEREAS 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;

WHEREAS on 28 September 2023, Pakistan wrote to the Court indicating its agreement to a site visit to the NJHEP by the Court;

WHEREAS no response to the Court’s letter of 28 July 2023 was received from India by 29 September 2023;

WHEREAS on 23 December 2023, the Court provided the Parties with a draft of this Procedural Order and invited the Parties’ comments by 12 January 2023, and comments on the other Party’s comments by 19 January 2023;

WHEREAS on 12 January 2024, Pakistan provided comments on the draft Procedural Order;

WHEREAS on 18 January 2024, India wrote to the Registrar of the Court objecting to the proposed site visit, contending that the Court lacks competence in this matter and observing that the NJHEP is in territory claimed by India;

WHEREAS on 19 January 2024, the Court invited Pakistan to respond to India’s objections by no later than 26 January 2024;

WHEREAS on 26 January 2024, Pakistan responded to India’s objections, maintaining that, among 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, and therefore India’s objections should not be accepted;

WHEREAS on 2 February 2024, the Court issued its Procedural Order No. 9 (“**PO9**”), which rejected India’s objections to the site visit;

WHEREAS the Court further recalls that, pursuant to Article 25(1) of its Supplemental Rules of Procedure, “[t]he presumption is that the proceedings will continue in the absence of a Party or failure of a Party to defend its case”, and that further to Article 10(4) of its Supplemental Rules of Procedure, communications to the Court “shall not be considered *ex parte* if [they are] made in a meeting, teleconference, videoconference, or hearing of which the other Party has been notified, but in which it has decided not to participate”; and

WHEREAS having regard to the preceding recital, the Court observes that the lack of participation by India in the site visit shall not cause the site visit to be considered *ex parte*, given the opportunity afforded to India to participate fully in the site visit;

THE COURT OF ARBITRATION HEREBY DECIDES:

1. Purpose of the Site Visit

- 1.1 Having considered the submissions received from Pakistan concerning the desirability of the Court carrying out a site visit, and India’s objections to the site visit, the Court determined in PO9 that conducting a site visit to the NJHEP, 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, is appropriate.
- 1.2 The Court recalls 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. As such, the Court emphasizes 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.
- 1.3 The Court also emphasizes that the purpose of the site visit is not to receive any information that seeks to apply facts to the Treaty, or otherwise seeks to interpret or apply the Treaty. In particular, the Court recalls that it fixed the schedule for written and oral submissions in the First Phase on the Merits in its Procedural Order No. 7 of 22 July 2023 (and amended such schedule further to the letter on behalf of the Court dated 21 December 2023); the site visit to the NJHEP is not an opportunity for the Parties to make written or oral submissions outside of that schedule.
- 1.4 The Parties shall instruct the members of their delegations as to the purpose of the site visit and as to their conduct during the site visit, as indicated in this Order.

2. Site Visit Dates and Itinerary

- 2.1 The Court will conduct the site visit in accordance with the outline for the itinerary of the site visit contained in Confidential Annexure A.

- 2.2 Pakistan shall propose an initial detailed itinerary for the site visit by 8 February 2024. India shall provide any comments on Pakistan's proposal by 19 February 2024. The Court shall provide guidance on Pakistan's proposal, taking into account any comments by India, by 23 February 2024. Having regard to such guidance and comments, Pakistan shall propose a revised detailed (hour-by-hour) itinerary by 8 March 2024. The Court shall transmit a final itinerary to the Parties by 22 March 2024.
- 2.3 The Court may vary the itinerary for the site visit, on its own motion or at the request of a Party, as the Court considers appropriate, including as a result of any contingencies that may arise before or during the site visit. Any variation shall have regard to logistical arrangements already in place, as well as any overriding considerations of safety and security, and shall be carried forward on the basis of appropriate consultation with the Parties participating in the site visit.

3. Orientations and Presentations during the Site Visit

- 3.1 General statements of welcome, introduction of persons associated with the visit, safety briefings and logistical information shall be given by officials of the government of Pakistan ("**Officials**"). Officials shall not address any aspect of the design and operation of run-of-river hydro-electric plants.
- 3.2 Presentations made to the Court during the site visit (while touring the sites or while stationary) shall be limited to objective, technical presentations given by experts in the design and operation of the NJHEP ("**Site Experts**"). Site Experts shall not be persons who are acting as a Party's representative or counsel in these proceedings, or who will be giving expert evidence on behalf of a Party in these proceedings. Legal issues or arguments shall not be discussed at any point during the Site Experts' presentations. Presentations shall be succinct and remain neutral in tone.
- 3.3 The Members of the Court shall be free to ask questions at any time during a presentation. Subject to paragraph 3.4 below, no member of any Party delegation shall be permitted to ask questions during or after a presentation. If given leave by the Court to do so, the non-presenting Party's delegation may respond to a point made in a presentation, provided that such response shall be limited strictly to technical or factual matters. The non-presenting Party may also provide written comments, if any, on the presentations, by 31 May 2024.
- 3.4 At the end of a presentation, if a member of a Party delegation believes that it would assist the Court to obtain from the Site Expert, by means of a question, a point of clarification or possible correction on a technical or factual matter addressed in the presentation, the member shall first raise the proposed question with its Agent or lead Counsel, who may in turn seek leave from the Court to pose the question to the Site Expert. Any such question shall be succinct, shall not be leading in nature, and shall be for the sole purpose of obtaining the Site Expert's views, and not for eliciting the view of a member of a Party's delegation.
- 3.5 A list of the names and positions of the Site Experts and the general topic of their presentations shall be provided to the Court and the other Party by 22 March 2024.
- 3.6 Any materials intended to be distributed during the presentations (including slides, maps, plans, technical illustrations, and similar documents) shall be provided to the Court and the other Party by 5 April 2024. If given leave by the Court to do so, a Party may make limited supplements or amendments to these materials during the site visit, providing them to both the Court and the other Party.

- 3.7 Without prejudice to paragraph 3.3 above, the Court may put questions to the Parties in writing in advance of the site visit that it wishes addressed during the site visit. Any such questions shall be transmitted to the Parties by 15 April 2024.
- 3.8 For the avoidance of doubt, and further to paragraphs 1.2 and 1.3 above, the site visit (including the presentations made therein) shall not be considered a “hearing” within the meaning of Article 24 of the Supplemental Rules of Procedure.

4. Size of Delegations

- 4.1 The Parties’ respective delegations (including the Parties’ Agents, Co-Agents, counsel, and experts) are to be limited to not more than 12 persons each. This limit does not include Site Experts pursuant to paragraph 3.2 above, security or medical personnel (“**Support Personnel**”), or persons involved in the logistical and protocol aspects of the site visit (“**Diplomatic Hosts**”). Support Personnel and Diplomatic Hosts shall have no speaking role during the site visit presentations.
- 4.2 The Parties shall confirm their intention to participate in the site visit by 14 February 2024, and shall submit a list of the names and positions of the persons on their delegation to the Court by 1 March 2024.
- 4.3 The Court’s delegation shall be comprised of not more than 10 persons, including all the Members of the Court, the Registrar, the members of the Secretariat involved in documentation and logistical support to the Court, and any videographer(s). The Secretariat shall provide a list of the names and positions of the persons on the Court’s delegation to the Parties by 1 March 2024.
- 4.4 The Observer’s delegation shall be comprised of the Observer, appointed pursuant to paragraph 5.1 below, and any necessary support staff accompanying the Observer. The Secretariat shall provide a list of the names and positions of the persons on the Observer’s delegation to the Parties by 1 March 2024.

5. Observer

- 5.1 The Court shall appoint a neutral Observer for the site visit, after seeking the views of the Parties on the identity of the Observer (the “**Observer**”).
- 5.2 The Observer shall accompany the Court on the site visit and observe all of the Court’s interactions with the Parties and Site Experts. The Observer shall not take photographs or video recordings during the site visit, but may take notes for use in fulfilling the Observer’s function. If the Observer regards any aspect of the site visit as deviating from the terms of this Order, the Observer shall immediately bring the matter to the attention of the Chairman of the Court, who shall decide how best to proceed.
- 5.3 The Observer shall issue a certification as to whether the conduct of the site visit conformed with this Order, within seven days of the conclusion of the site visit. The Observer’s certification shall be public and made available on the website of the Secretariat.
- 5.4 The Observer (who may be accompanied by one or more support staff, if necessary) shall be reimbursed for any expenses incurred in the performance of their mandate. The Observer (and any staff accompanying the Observer) may receive remuneration in accordance with their terms of reference. Such expenses and any remuneration shall be paid by the Treasurer from the case deposit, following receipt of invoices indicating the expenses and time spent.

5.5 There shall be no interactions between the Parties and the Observer (other than the exchange of cordial greetings).

6. Record of the Site Visit

6.1 The Secretariat shall arrange for the video recording of the site visit by a videographer, including:

- (a) any orientation sessions by Officials, further to paragraph 3.1 above;
- (b) any presentations by Site Experts, further to paragraph 3.2 above (including any interactions with the Court and the Parties during the presentations); and
- (c) any other interactions between the Court, the Parties, and/or the Site Experts at the sites or otherwise during the site visit,

(collectively, the “**Site Visit Activities**”). Site Visit Activities shall not include the exchange of cordial greetings, nor shall it include coffee breaks, meals, transportation or other activities associated with the site visit but during which interactions between the Court, the Parties’ delegations and/or the Site Experts are not mandated and not anticipated.

6.2 The Secretariat shall also arrange for still photographs to be taken during the site visit by a member of the Secretariat.

6.3 The Secretariat shall have control over the video and photographic recording of the site visit, under the supervision of the Chairman of the Court:

- (a) The Court may direct the Secretariat that an aspect of the site visit (for example, a specific feature of a site) be captured as part of the video and/or photographic recording. Members of the Court and of the Secretariat shall not make video recordings, and Members of the Court shall not take photographs during the site visit.
- (b) A member of any Party delegation may, through their Agent or lead Counsel, make a request to the Secretariat that an aspect of the site visit be captured as part of the video and/or photographic recording. The Parties shall not make video recordings or take photographs during the site visit.

6.4 The Secretariat shall arrange for the verbatim recording (transcription) of the Site Visit Activities from the video recording.

6.5 The Secretariat shall make a copy of the video recording, draft transcript, and still photographs available to the Parties following the site visit.

6.6 The Parties shall submit any proposed corrections of the draft transcript to the Court within 21 days of receipt of the draft transcript, in the format prescribed by the Secretariat. The Court shall determine whether to adopt the proposed corrections, including in the event of a disagreement between the Parties. The Court shall then issue a final transcript to the Parties.

6.7 The Members of the Court and members of the Secretariat shall be free to take or dictate notes for exclusive use in internal deliberations. Members of the Parties’ delegations may take notes for their own internal purposes.

7. Logistical Arrangements

- 7.1 The Parties shall each nominate two officials responsible for logistical issues and provide their contact details to the Secretariat by 8 March 2024.
- 7.2 The Secretariat shall arrange transport for the Court's and the Observer's delegations to Islamabad for the commencement of the site visit and from Islamabad at the end of the site visit. The Parties shall arrange such transportation to and from Islamabad for their own delegations.
- 7.3 Pakistan shall ensure that the necessary visas are issued to those attending the site visit, including the Parties', the Court's, and the Observer's delegations. Pakistan shall provide information on the modalities of visa issuance by 1 March 2024.
- 7.4 Subject to paragraph 7.2, Pakistan shall arrange transportation and hotel accommodations for those attending the site visit.
- 7.5 The Secretariat shall provide Pakistan with the necessary medical information on behalf of the Court's and the Observer's delegations, including details of any medications and pre-existing conditions.
- 7.6 Pakistan shall make the necessary medical support and security arrangements to ensure the health and safety of those attending the site visit from their arrival in Pakistan until their departure, and shall inform the Secretariat of these arrangements by 22 March 2024. Information regarding the security arrangements to be implemented by Pakistan may be provided to the Secretariat on a confidential basis. The Court will keep the security situation under close review.
- 7.7 The Secretariat shall arrange for appropriate medical evacuation insurance for the Court's and the Observer's delegations.

8. Costs of the Site Visit

- 8.1 Pakistan shall bear all costs of the site visit from the arrival of delegations in Pakistan until their departure, including the costs of internal transportation, hotel accommodations, medical support and security arrangements.
- 8.2 All other expenses relating to the site visit shall form part of the costs of the proceedings, further to Article 31 of the Supplemental Rules of Procedure.

9. Interactions with the Court / Meals / Hospitality

- 9.1 There shall be no interactions between the Members of the Court and the Parties other than:
- (a) as indicated in paragraph 3 above (to be captured by the video recording and the transcript further to paragraph 6 above); and
 - (b) the exchange of cordial greetings.
- 9.2 To that end, during meals the Parties' delegations shall be seated separately from the Court's delegation and the Observer's delegation.
- 9.3 Hospitality provided at sites shall be limited to basic refreshments (coffee, tea, biscuits, lunch, etc.). All participants are to inform Pakistan of any dietary requirements by 1 March 2024.

- 9.4 To the extent practicable, the Court's delegation and the Observer's delegation shall be transported separately from the Parties' delegations.
- 9.5 Gifts or similar tokens of hospitality of any kind to the Members of the Court, the Secretariat, the Observer, or the videographer are neither expected nor permitted.

10. Confidentiality / Press Releases

- 10.1 In accordance with Article 14(3) of the Supplemental Rules of Procedure, a copy of this Order shall be public and made available on the website of the Secretariat, subject to the redaction of sensitive information, including the dates and itinerary of the site visit in Confidential Annexure A ("**Sensitive Information**"). The Parties must ensure the absolute confidentiality of Sensitive Information until the site visit has been concluded.
- 10.2 A press release regarding the site visit shall be prepared by the Secretariat for publication on the website of the Secretariat, after seeking the views of the Parties.

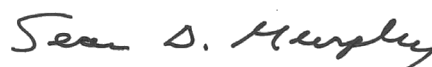
11. Privileges and Immunities

- 11.1 During the site visit, Pakistan shall accord the Members of the Court, the members of the Secretariat, and India's Agents and Counsel privileges and immunities in accordance with paragraph 7.3 of Administrative Order No. 1 (the "**Terms of Appointment**"), and shall accord India's other participants in the site visit privileges and immunities in accordance with paragraph 7.4 of the Terms of Appointment.
- 11.2 Pakistan shall accord the same privileges and immunities as stated in paragraph 7.3 of the Terms of Appointment to the Observer and any necessary support staff accompanying the Observer, and to any videographer(s) engaged by the Secretariat for the site visit. The Chairman of the Court, with the approval of the Court, has the right and duty to waive these immunities in any case where the immunity would impede the course of justice and can be waived without prejudice to the interests of the Court.

12. Leave to Apply

- 12.1 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.
- 12.2 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.

Dated: 3 February 2024



Prof. Sean D. Murphy
Chairman

On behalf of the Court of Arbitration

CONFIDENTIAL ANNEXURE A: Outline of Site Visit Itinerary

The Court will conduct the site visit between 23 and 30 April 2024, in accordance with the following outline for the itinerary of the site visit:

DAY	DETAILS OF VISIT	PROPOSED DATE
Day 1	Arrival of the Court and the Parties' Delegations in Islamabad, Pakistan	Tuesday, 23 April 2024
Day 2	[AM] Transfer to Muzaffarabad [PM] General Orientation for the Visit; Internal Court Meeting	Wednesday, 24 April 2024
Day 3	Visit to NJHEP Dam Site, including orientation and Site Expert presentations	Thursday, 25 April 2024
Day 4	Visit to NJHEP Power Station, including orientation and Site Expert presentations [PM] Internal Court Meeting; Court to provide directions for Day 5 with respect to any return visit(s) and/or Court questions to the Site Experts.	Friday, 26 April 2024
Day 5	[As directed by the Court]	Saturday, 27 April 2024
Day 6	[Contingency Day]	Sunday, 28 April 2024
Day 7	[Contingency Day] [PM] Transfer to Islamabad, Pakistan	Monday, 29 April 2024
Day 8	Departure of the Court and the Parties' Delegations from Islamabad, Pakistan	Tuesday, 30 April 2024