

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

**FURTHER QUESTIONS TO BE ADDRESSED AT
THE HEARING FOR THE FIRST PHASE ON THE MERITS**

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

13 July 2024

The Court of Arbitration invites Pakistan to address the following further questions during its second-round submissions on 15 and 16 July 2024 during the Hearing for the First Phase on the Merits:¹

A. Questions concerning certain types of obligation under the Indus Waters Treaty

3. Pakistan has indicated that Article VII(2) of the Treaty imposes a mutual obligation on the Parties to provide information on HEPs at the planning stage. When specifically in the planning stage does that obligation crystallize and what categories of information must be exchanged to make the notification process meaningful?
4. With respect to the selection of sites for Indian HEPs on the Western Rivers:
 - a. Do the constraints that exist in the Treaty for the design of a HEP establish an obligation on India when it selects a site for a HEP? If so, what is that obligation?
 - b. What is the relationship between the concept of necessity in Paragraphs 8(d) and 8(e) and the choice of the site for a HEP? If an outlet below Dead Storage or a gated spillway is necessary at one site, but not another, is India obligated to choose the site not requiring such elements?
 - c. How does this relationship compare to the relationship between site selection and the prohibition on drawdown flushing found by the *Kishenganga* Court?
 - d. Does India have an obligation to provide Pakistan the opportunity to review site selection more than six months in advance of the beginning of construction?
5. With respect to the different ways the concept of best practices is referenced in the Treaty, what is the support for the proposition that doing so refers to international best practices?

B. Questions concerning precedential effects

6. Has India acted in compliance with the *Kishenganga* Court's Partial and Final Awards as they related to the KHEP? (Tr., (Day 1) 184:19–185:1).
7. In the event that a party considers that a neutral expert has exceeded his competence:
 - a. How, procedurally, could a party “appeal” or challenge that decision before a Court of Arbitration? Is there any time limit to such a challenge and, if so, from where does such limit arise?
 - b. If a party elects not to raise the issue of a neutral expert exceeding his/her competence with a Court of Arbitration, do the matters on which the neutral expert potentially exceeded his competence become binding on a Court of Arbitration (i) with respect to issues concerning the plant in respect of which the neutral expert decision was rendered; or (ii) more generally?

¹ Questions Nos. 1 and 2 were posed in advance of the Hearing. Transcript references are included for reference only where the same or similar question may have been raised during the Hearing.

C. Questions concerning the relevance of Annexure E

8. What is the relationship between Annexure D and Annexure E to the Treaty, recognizing that Annexure E includes storage for use in generating power? What sort of power storage work is permitted in this regard? (Tr., (Day 3) 220:7–22).
9. Does the existence of Annexure E have a bearing on the “let flow/non-interference/no storage” principle advanced by Pakistan? Does it have a bearing on the risk perceived by Pakistan with respect to the outcomes from the competing methods for calculation of Pondage with respect to Annexure D? What effect would it have on Dr. Morris’ simulation if the potential storage or the allowance of storage pursuant to Annexure E were taken into account? (Tr., (Day 5) 26:9–21).
10. What was the basis for Pakistan’s belief that the Kishenganga HEP, as originally planned as a storage work, violated Annexure E? Does it relate to Annexure E, Paragraph 7?

D. Questions concerning the possible “weaponization” of the Western Rivers

11. Pakistan has emphasized its deep concern as to the possibility of India either withholding or flooding the waters on the Western Rivers in a manner that harms Pakistan, and that this concern is relevant to the proper interpretation of the Indus Waters Treaty.
 - a. Is it correct that this concern turns primarily on the existence of low-level outlets? In other words, if India’s HEPs have no or relatively few such outlets, is the concern largely addressed?
 - b. By contrast, if India’s HEPs habitually have low-level outlets, does the concern exist regardless of whether the active storage at those HEPs is at (i) the level permitted in the *Baglihar Determination*; or (ii) the level advocated by Pakistan in this proceeding?
 - c. Is this concern altered by the existence of dams in a cascade?
12. What is Pakistan’s capability to mitigate the harm of India either withholding or flooding the waters on the Western Rivers in the light of the re-regulating effect of downstream reservoirs and the conjunctive use of groundwater and surface water? How has this capability changed since the Treaty was concluded? To what extent is this relevant to the proper interpretation of the Treaty?
13. Pakistan has expressed a concern regarding the potential weaponization of HEPs on the Western Rivers through increased controllable storage, but has also expressed the view that India is simply using “off the shelf” design principles, not tailored to the design restrictions of the Indus Waters Treaty. What does Pakistan understand to be India’s motivation for the HEP designs it has proposed for sites on the Western Rivers? What evidence supports Pakistan’s understanding of India’s motivations?

E. Questions concerning outlets, spillways, and power intakes

14. To what extent is cost a relevant consideration with respect to outlets, spillways, and intakes (*c.f.* Tr., (Day 4) 164:18–20), given the references to “economical design” (Paragraph 8(d)) and “economical construction” (Paragraph 8(f))? And if it is not relevant, how is that consistent with the principle of effectiveness in the law of treaties? Is there a distinction to be drawn between “economical design” (Paragraph 8(d)) and “economical construction” (Paragraph 8(f)) for the purposes of the Treaty?

15. What is the universe of outlets regulated by Paragraph 8(d) of Annexure D? Is it limited to outlets located entirely below Dead Storage Level? Or does it also include outlets located partially above and partially below Dead Storage Level (e.g., crest gated spillways or surface intakes)? To the extent that Pakistan maintains that this provision applies only to outlets located entirely below Dead Storage Level (as suggested during Day 4 of the Hearing), what is the basis for this interpretation? Would any difference of significance follow from also applying Paragraph 8(d) to outlets partially below Dead Storage Level?
16. With respect to outlets below Dead Storage Level:
 - a. Are low level outlets useful for sediment control without reservoir drawdown? If so, when and how?
 - b. What would Pakistan understand as constituting a potential “other technical purpose” for having an outlet below Dead Storage Level?
 - c. Much of the discussion has focused on “low level outlets” (i.e., located near the reservoir bottom), but Paragraph 8(d) refers to “outlets below Dead Storage Level”. Are there purposes that would call for an outlet below Dead Storage Level that is *not* located at a low level near the reservoir bottom? If so, when and how?

F. Question concerning freeboard

17. Pakistan posits that freeboard must be restricted even with an ungated spillway at Full Pondage Level because the level of controllable storage could nevertheless be later increased with fusegates, flashboards, or stoplogs. Would such instruments constitute part of “[t]he works themselves” for the purposes of Paragraph 8(a) if they were not an integral part of the HEP design?

G. Questions concerning maximum allowable Pondage

18. How have the positions of the Parties changed over time with respect to the calculation of maximum Pondage pursuant to Annexure D, paragraph 8(c), including: (a) during the negotiation of the Treaty; (b) with respect to the HEPs notified prior to the Baglihar proceedings; (c) following the *Baglihar* Determination; and (d) following the *Kishenganga* proceedings?
19. What is the basis *in the Treaty* of each of Pakistan’s sufficiency criteria with respect to the calculation of maximum Pondage? (Memorial, para. 11.43; PHM-0015, slide 32).
20. With respect to a seven-day calculation:
 - a. Can Pakistan provide a seven-day calculation as it would be done under its approach for calculating maximum Pondage? (Tr., (Day 5) 71:2–5).
 - b. Can Pakistan demonstrate the difficulties with calculating maximum Pondage on a seven-day basis as of 1960 with respect to either Pakistan or India’s approach? (Tr., (Day 5) 70:2–15).
21. What is the relationship between Firm Power and firm capacity? (Tr., (Day 5) 95:17–96:7).
22. Can Pakistan explain the basis for its position that Firm Power is to be calculated by reference to the power that is generated instantaneously, and not power averaged over a period, for example one day? (Tr., (Day 5) 75:7–76:9).

23. How should the defined term “Firm Power” be interpreted in the light of the ordinary meaning of the term? Why was this term chosen given that, on Pakistan’s interpretation, it could have been called something that did not already have a defined general meaning? (Tr., (Day 5) 97:9–13).
24. What is the difference between the Parties as to the language of “required for Firm Power”? (Tr., (Day 5) 97:21–25). Is there also a potential difference as to the meaning of “corresponding to” in the definition of Firm Power?
25. Pakistan has indicated that Paragraph 2(c) of Annexure D has a peripheral role. How is this consistent with the principle of effectiveness under the law of treaties? (see Memorial, para. 11.42; PHM-0015, slide 66)?
26. Can you further explain: (a) the potential relevance of Secondary Power, in particular, in the context of Paragraph 8(b) of Annexure D; and (b) how it interacts with Firm Power? Assuming Pakistan’s definition of Firm Power, is Secondary Power (that is, power other than Firm Power) almost always available? How is that consistent with the definition of Secondary Power in the Treaty (namely, that it is “available only during certain periods of the year”)?
27. Why, in Pakistan’s case, is the calculation of maximum Pondage premised on a flow rate of 50% of MMD, given that such a situation is rarely to occur in practice? In the past 25 years, how often has flow at the Neelum-Jhelum and Kiru HEPs fallen to, or below 50% of MMD?
28. Does Pakistan’s approach to the calculation of MMD and maximum Pondage make Paragraph 15 of Annexure D largely irrelevant in practice?
29. Appendix VII of P-0546 sets out India’s calculation of maximum Pondage at the Kiru HEP, the plant which Pakistan used to illustrate its calculation of maximum Pondage. The Court invites Pakistan to explain and comment on India’s calculation, including:
 - a. Whether Appendix VII reflects India’s current methodology;
 - b. Pakistan’s understanding of India’s methodology;
 - c. The differences between India’s and Pakistan’s approaches; and
 - d. Any other considerations relevant to the calculation of maximum Pondage.
30. Additionally, individual Members asked whether the Treaty’s language would support two other alternative calculation methods for determining maximum Pondage:
 - a. multiplying the minimum mean discharge by a 24-hour duration factor, doubled, producing a maximum Pondage of 11.284 Mm³ for the Kiru HEP (65.3 x 3600 x 24 x 2); and
 - b. multiplying the minimum mean discharge, less the lowest historic minimum discharge, by a 24-hour duration period, doubled, producing a maximum Pondage of 4.959 Mm³ for the Kiru HEP ((65.3 -36.6) x 3600 x 24 x 2).

Pakistan is invited to comment on those alternatives.

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