

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. 13

**(POST-HEARING PROCEDURE
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 August 2024

WHEREAS on 6 July 2023, the Court of Arbitration (the “**Court**”) 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 the Request for Arbitration concerning the overall interpretation or application of Article III of the Indus Waters Treaty 1960 (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 on 22 July 2023, the Court issued its Procedural Order No. 7, in which the Court envisaged that an oral hearing for the First Phase on the Merits would be held in the Peace Palace, The Hague, the Netherlands from 8 to 12 July 2024, with 15 to 17 July 2024 held in reserve (“**Hearing**”);

WHEREAS on 22 March 2024, Pakistan submitted its Memorial for the First Phase on the Merits, together with accompanying exhibits and authorities, including some materials relating to the Permanent Indus Commission, the *Baglihar* neutral expert proceedings, and the *Indus Waters Kishenganga Arbitration*;

WHEREAS on 27 May 2024, the Court issued its Procedural Order No. 11 (“**PO11**”), in which the Court directed Pakistan to produce papers and other evidence falling within certain specified categories (“**Required Documents**”) in order to ensure that the Court has available to it a comprehensive record of the views and positions of the Parties on the matters at issue before the Court in the First Phase on the Merits;

WHEREAS in its letter dated 6 June 2024, Pakistan requested that the Court, amongst other things, vary the document production schedule in PO11, such that the final tranche of documents would be produced on or before 30 September 2024 under the cover of a post-hearing submission;

WHEREAS in its letter dated 11 June 2024, the Court granted Pakistan’s request to vary the production schedule, and indicated that the Court would consider the necessity of any post-hearing submissions at the conclusion of, or following, the Hearing;

WHEREAS on 29 June 2024, the Court issued its Procedural Order No. 12 (“**PO12**”), addressing the organization of the Hearing;

WHEREAS on 1 July 2024, Pakistan submitted a first tranche of the Required Documents responsive to PO11, along with two indexes of the records produced;

WHEREAS in its letter dated 5 July 2024, Pakistan applied for leave of the Court to admit certain new exhibits into the record, pursuant to paragraph 3.4 of PO12, so that they might be referenced at the Hearing;

WHEREAS in its letter dated 6 July 2024, the Court granted Pakistan’s application dated 5 July 2024, and indicated that the Court would establish a post-Hearing schedule providing India with an opportunity to comment in writing on the additional exhibits submitted by Pakistan for use at the Hearing;

WHEREAS from 8 July 2024 to 12 July 2024, and from 15 July 2024 to 16 July 2024, the Court held the Hearing in The Hague, the Netherlands, in which Pakistan appeared and participated, but India did not appear or participate;

WHEREAS during the Hearing, on 8, 9, 12, 13, 15, and 16 July 2024, Pakistan applied, both orally and in writing, for leave of the Court to admit further new exhibits pursuant to paragraph 3.4 of PO12, which the Court granted;

WHEREAS in its letter dated 19 July 2024, Pakistan, further to observations made by the Chairman of the Court at the Hearing, proposed that post-hearing submissions could address certain issues relating

to the calculation of Pondage as arose in the course of the Hearing, together with any other issues that would be of assistance to the Court;

WHEREAS in its letter dated 25 July 2024, the Court indicated the scope of issues to be addressed by way of post-hearing submissions, and invited Pakistan to confirm, by 1 August 2024, its ability to address these issues by its proposed deadline, and to provide, by the same date, any comments on the publication of materials relating to the Court's site visit of April 2024 to the Neelum-Jhelum Hydro-Electric Plant ("**Site Visit**") and relating to the Hearing;

WHEREAS in its letter dated 1 August 2024, Pakistan responded to the enquiries in the Court's letter dated 25 July 2024, as well as raised various issues concerning its plans for document production;

THE COURT OF ARBITRATION HEREBY DECIDES:

1. India's Comments on Evidence Submitted by Pakistan in July 2024

1.1 India is invited to provide, on or before **27 August 2024**, any comments in relation to the evidence submitted in July by Pakistan in advance of, and during, the Hearing.

2. Further Directions regarding the Production of Papers and Other Evidence pursuant to PO11

Baglihar Neutral Expert Documents

2.1 In paragraph 1.2 of PO11, Pakistan was directed by the Court to produce records of the neutral expert proceedings concerning the *Baglihar Hydroelectric Plant*. Pakistan produced many of those records in advance of the Hearing, but informed the Court by letter dated 1 July 2024 that certain lacunae remain and that it is working to complete the record. Pakistan is directed to seek to complete the record by no later than **30 September 2024**, along with an updated index in this regard.

Relevance Analysis

2.2 In paragraphs 1.4.2, 1.5, 1.6.1, 1.6.2, and 1.7 of PO11, Pakistan was directed by the Court to produce certain categories of Required Documents to the extent they address "matters at issue before the Court in the First Phase on the Merits". For the avoidance of doubt (though subject to paras. 2.3 and 2.4 below):

2.2.1 Pakistan is directed to exclude from production only documents that fall clearly outside the scope of the Court's order and to favor production of documents that may be of relevance; and

2.2.2 Documents concerning the following matters should be understood to fall within the scope of Required Documents, to be produced by Pakistan pursuant to PO11:

(a) The calculation of pondage at any Indian hydro-electric plant or Storage Work on the Western Rivers; and

(b) Annexure E of the Treaty.

Confidentiality

2.3 In paragraph 1.1 of PO11, Pakistan was directed to produce the Required Documents "to the extent that such papers and other evidence ... are not subject to a duty of confidentiality. If subject

to a duty of confidentiality, an explanation as to that duty shall be provided.” The Court maintains that direction, noting Pakistan’s explanation at the Hearing regarding the confidentiality of the current proceedings before the Neutral Expert.

Draft Documents

- 2.4 The Required Documents shall include draft documents that have been exchanged between Pakistan and India (or their respective representatives). Draft documents prepared by Pakistan or its representatives but not exchanged with India or its representatives may be excluded from production.

Scope of Reasonable Searches

- 2.5 In paragraph 2.2 of PO11, the Court indicated that its direction for production of open-ended categories of correspondence and records of meetings “would be satisfied by...a good faith search of repositories in which responsive materials would reasonably be expected to be found.” The Court confirms that searches of the archives of the Pakistan Commissioner for Indus Waters are sufficient to comply with this direction.

Index and Explanatory Memorandum Accompanying the Required Documents

- 2.6 Pakistan shall submit, on or before **30 September 2024**, together with the final tranche of the Required Documents:
- 2.6.1 an index (or indexes) of the Required Documents produced, including (to the extent feasible) each Required Document’s exhibit number and date, a basic description of the Document, and an indication of the issue(s) before the Court in the First Phase on the Merits to which the Document may relate; and
- 2.6.2 an explanatory memorandum, the content of which is confined to addressing the document production exercise that has been undertaken by Pakistan, including the scope of the searches carried out, and any categories of documents have been excluded from production to the Court. The memorandum shall not address the substance of the documents save only as doing so is necessary to explain the document production exercise or the index(es).

Further Submissions on the Required Documents

- 2.7 Further to paragraph 2.3 of PO11, any Party may apply, on or before **14 October 2024**, to make a further written submission regarding the content of the Required Documents produced by Pakistan, indicating its proposed deadline for doing so.
- 2.8 In the event of any such application, the Court shall, after inviting the views of the Parties, decide whether to grant such application and, if so, prescribe the deadline for the submission.

3. Post-Hearing Submission

- 3.1 On or before **1 November 2024**, Pakistan shall file a post-hearing submission addressing the following issues:
- 3.1.1 Questions relating to the calculation of Pondage, including the methodology for the calculation of Pondage advanced by Pakistan in the *Baglihar* neutral expert proceedings, the reason for the modification of that approach, and associated questions raised by Members of the Court during the Hearing;

- 3.1.2 Pakistan's current method of calculating Pondage as modified to accommodate a seven-day period;
 - 3.1.3 The relevance of Annexure E when considering: (i) the object and purpose of the Indus Waters Treaty; (ii) the context when interpreting Article III and Annexure D, including the calculation of Pondage in Annexure E; and (iii) Pakistan's concern as to the "weaponization" of the Western Rivers through India's ability to store and release water;
 - 3.1.4 What role, if any, should the criterion of the prevention of harm/adverse effects play where there are existing Pakistani Agricultural Uses or hydro-electric uses of the Western Rivers (other than in relation to uses on the Tributaries of the Jhelum, for which the criterion is expressly applied per para. 15(iii) of Annexure D and para. 10 of Annexure E to the Treaty); and
 - 3.1.5 Whether the concept of abuse of rights in international law is of any relevance to the principle of good faith, as raised by Pakistan in its Memorial (e.g., paras. 8.33–8.36) and during the Hearing, when interpreting or applying the Treaty.
- 3.2 Pakistan may also address in its post-hearing submission, by way of brief observations, supplementary points of smaller detail that arose during the course of the Hearing.
 - 3.3 By no later than **15 November 2024**, India is invited to indicate to the Court whether it wishes to provide any comments in relation to Pakistan's post-hearing submission. In the event that India so indicates, the Court shall set a deadline for such comments.

4. Publication of Documents

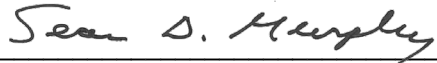
- 4.1 Further to Articles 14(4) and 14(8) of the Court's Supplemental Rules of Procedure, and paragraph 7.2 of PO12, the Secretariat shall publish the following documents:
 - 4.1.1 Volumes I and II of Pakistan's Memorial on the First Phase on the Merits;
 - 4.1.2 The Court's Questions to be Addressed at the Hearing for the First Phase on the Merits, dated 20 June 2024;
 - 4.1.3 The Court's Further Questions to be Addressed at the Hearing for the First Phase on the Merits, dated 13 July 2024;
 - 4.1.4 PowerPoint slides and demonstrative exhibits used at the Hearing;
 - 4.1.5 Corrected transcripts of the Hearing;
 - 4.1.6 The Court's Technical Questions for the Parties in Advance of the Site Visit, dated 15 April 2024.
 - 4.1.7 PowerPoint slides and demonstrative exhibits used during the Site Visit; and
 - 4.1.8 Corrected transcripts of the Site Visit.

5. Leave to Apply

- 5.1 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.

- 5.2 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 shall arrange to confer with the Parties in person or by videoconference, according to the circumstances.

Dated: 13 August 2024



Prof. Sean D. Murphy
Chairman

On behalf of the Court of Arbitration