



**Systemic interpretation and
paragraph 35(a) of PO6: the
scope of *Kishenganga's res
judicata* effect**

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Hearing for the First Phase on the Merits

Indus Waters Treaty Arbitration (Pakistan v. India)

PCA Case No. 2023-01

16 July 2024, The Hague

**Transcript Day 3, pages 143 lines 19-24 and 146, lines 13-19:
Prof Murphy's summary of Pakistan's submission on the extent of
res judicata of the *Kishenganga Awards***



THE CHAIRMAN: And this language at paragraph 23 that says, "The Award shall be accompanied by a statement of reasons" might be read to mean that the award is something like the *dispositif*, but not the reasons. And this seems relevant when we're then thinking about the *res judicata* effect of the award. [...]

I take it what you're saying is: [*res judicata* extends to] not just the *dispositif*; it does include aspects of the reasoning underlying what is determined in the *dispositif*.

There may be other aspects of the award that are not directly germane to the outcome that might not have *res judicata* effect. Is that the way you're seeing it?

**The *res judicata* of the Kishenganga Awards extends to the
KHEP-specific dispositifs and those of “general application”**



Kishenganga, Partial Award, 18 February 2013, PLA-003

V. Decision

“A. In relation to the First Dispute,

(1) The Kishenganga Hydro-Electric Project, as described to the Court by India, constitutes a Run-of-River Plant for the purpose of Paragraph 15 of Annexure D to the Indus Waters Treaty, and in particular sub-paragraph (iii) thereof.

(2) [...]

(3) India is however under an obligation to construct and operate the Kishenganga Hydro-Electric Plant in such a way as to maintain a minimum flow of water in the Kishenganga/Neelum River, at a rate to be determined by the Court in a Final Award.”

**The *res judicata* of the *Kishenganga Awards* extends to the
KHEP-specific *dispositifs* and those of “general application”**



Kishenganga, Partial Award, 18 February 2013, PLA-003

V. Decision [cont'd]

“B. In relation to the Second Dispute,

- (1) Except in the case of an unforeseen emergency, the Treaty does not permit reduction below Dead Storage Level of the water level in the reservoirs of Run-of-River Plants on the Western Rivers.**
- (2) The accumulation of sediment in the reservoir of a Run-of-River Plant on the Western Rivers does not constitute an unforeseen emergency that would permit the depletion of the reservoir below Dead Storage Level for drawdown flushing purposes.**
- (3) Accordingly, India may not employ drawdown flushing at the reservoir of the Kishenganga Hydro-Electric Plant to an extent that would entail depletion of the reservoir below Dead Storage Level. [...]**”

**The *res judicata* of the *Kishenganga Awards* extends to the
KHEP-specific *dispositifs* and those of “general application”**



***Kishenganga*, Decision on India’s Request for Clarification or Interpretation, 20 December 2013,**

PLA-0021

V. Decision

Having considered the Parties’ written submissions, the Court of Arbitration unanimously decides that:

A. [...]

B. Subject to Paragraph B(4) of the “Decision” section (Part V) in the Partial Award of 18 February 2013, the prohibition on the reduction below Dead Storage Level of the water in the reservoirs of Run-of-River Plants on the Western Rivers, except in the case of unforeseen emergency, is of general application.

**The *res judicata* of the *Kishenganga Awards* extends also to
the reasoning underlying their *dispositifs***



Question of the Delimitation of the Continental Shelf beyond 200 Nautical Miles (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016, p. 126, PLA-0108

“59. [...] it is also necessary to ascertain the content of the decision, the finality of which is to be guaranteed. [...]

61. The decision of the Court is contained in the operative clause of the judgment. However, **in order to ascertain what is covered by *res judicata*, it may be necessary to determine the meaning of the operative clause by reference to the reasoning set out in the judgment in question.**”

**The *res judicata* of the Kishenganga Awards extends also to
the “reasoning underlying the *dispositifs*”**



*Case Concerning the Delimitation of the Continental Shelf between the United Kingdom and France,
Decision on Application Concerning the Meaning and the Scope of the Decision of 30 June 1977, 14
March 1978, para 25*

“25. [...] it by no means follows that the "decision" referred to in those Articles [of the Arbitration Agreement] is to be considered as denoting a disembodied *dispositif* and chart wholly detached from the reasoning leading up to and justifying the provisions of the *dispositif* and the course of the boundary drawn on the chart. Such a view of the effect of Articles 2, 9 and 10 would be so contrary to the accepted concepts in international procedure that it could not be adopted without the clearest indication that such was indeed the intention of the Parties.”

**The *res judicata* of the Kishenganga Awards extends also to
the “reasoning underlying the *dispositifs*”**



Case Concerning the Delimitation of the Continental Shelf between the United Kingdom and France, Decision on Application Concerning the Meaning and the Scope of the Decision of 30 June 1977, 14 March 1978, paras 26, 28

“26. That the words “the decision of the Court” should have been intended by the Parties in this provision to refer only to the *dispositif* and the drawing of the course of the boundary on a chart is really inconceivable. To interpret the paragraph in such a way would run directly counter not only to the consistent and long established practice of the International Court of Justice but also to the object and purpose of the provision itself. [...]

28. [...] [I]f findings in the reasoning constitute a condition essential to the decision given in the *dispositif*, these findings are to be considered as included amongst the points settled with binding force in the decision (*ibid.*[*Chorzow Factory case*, PCIJ, Series A, No. 13], p. 20).

**The *res judicata* of the Kishenganga Awards extends also to
the “reasoning underlying the dispositifs”**



Boundary Dispute between Argentina and Chile concerning the frontier line between boundary post 62 and Mount Fitzroy ("Laguna del Desierto") (Argentina/Chile), Judgment, para. 94 (21 Oct. 1994), reprinted in 113 I.L.R, 21 October 1994, para 70, PLA-0067

“70. The force of *res judicata* of an international award applies, primarily, to its operative part, i.e., the part in which the Court rules on the dispute and states the rights and obligations of the parties. The legal precedents have also established that the provisions of the preambular part, which are the logically necessary antecedents of the operative provisions, are equally binding (see Interpretation of Judgements Nos. 7 and 8—*Chorzów Factory* case [...])”

The *res judicata* of the *Kishenganga Awards* extends also to the reasoning underlying their *dispositifs*



Iran v. US (IUSCT Case No. B61), Partial Award, 17 July 2009, para 115

“115. Not everything contained in a decision acquires the force of *res judicata*. In addition to the operative part (*dispositif*) of a decision, the reasons (*motifs*) provided in a decision also have *res judicata* effect to the extent that those reasons are relevant to the actual decision on the question at issue. In the *Genocide Case*, the International Court of Justice ("I.C.J.") stated the following with respect to the scope of the doctrine of *res judicata*: [...]

In respect of a particular judgment, it may be necessary to distinguish between, first, the issues which have been decided with the force of *res judicata*, or which are necessarily entailed in the decision of those issues; secondly any peripheral or subsidiary matters, or *obiter dicta* ; and finally matters which have not been ruled upon at all [...]

**The *res judicata* of the *Kishenganga Awards* extends also to
the reasoning underlying their *dispositifs***



***RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l, v. Kingdom of Spain* (ICSID Case No. ARB/13/30), Decision of Responsibility, 30 November 2018, para 209, PLA-0106**

“209. Although these findings [at paras 74 and 75 of the Decision on Jurisdiction] do not appear in the operative part of the Decision on Jurisdiction, they constitute the necessary support for it and are therefore *res judicata*. The Tribunal therefore considers that, as regards the relevance of EU law with regard to its jurisdiction, the discussion is closed and the relating issues will not be reopened at this stage.”

The *res judicata* of the *Kishenganga Awards* extends also to the reasoning underlying their *dispositifs*



ILA Final Report on Res Judicata and Arbitration, [2009], para 52

“52. [The ILA Committee] endorse a more extensive notion of *res judicata*, which is also followed in public international law, under which *res judicata* not only is to be read from the dispositive part of an award but also from its underlying reasoning. More restrictive notions of the scope of *res judicata*, limiting conclusive and progressive effects to the dispositive parts of awards, have not been followed in the Recommendations, because the Committee considered the latter notion to be overly formalistic and literal. If it is clear from an arbitral tribunal’s reasoning that the dispositive part is to be interpreted in a way to bar further or subsequent arbitration proceedings, claim preclusion ought to follow for the sake of arbitral efficiency and finality. [...]”

**The *res judicata* of the *Kishenganga Awards* extends also to
the reasoning underlying their *dispositifs***



ILA Final Recommendations on Res Judicata and Arbitration, [2009], para 52

“4. An arbitral award has conclusive and preclusive effects in the further arbitral proceedings

as to:

4.1 determinations and relief contained in its dispositive part as well as in all reasoning necessary thereto;

4.2 issues of fact or law which have actually been arbitrated and determined by it, provided any such determination was essential or fundamental to the dispositive part of the arbitral award.”

This Court has confirmed that the *res judicata* of the *Kishenganga Awards* extends also to the reasoning underlying their *dispositifs*



Award on the Competence of the Court, 6 July 2023, para 189

“189. India’s Second Objection posits that, unless the Parties agree that the differences qualify as a dispute, the differences must be directed to a neutral expert for initial determination. India advanced this same argument before the *Kishenganga Court*, which rejected India’s argument. [FN: PLA-0003, *Kishenganga Partial Award*, paras. 476–479, which are not repeated in the Partial Award *dispositif*.] That interpretation of Article IX is final and binding upon India.”

Examples of paragraphs in the *Kishenganga Partial Award* which have general *res judicata* effect



1. Paras. 476–479 (interpretation of Article IX), as confirmed at Award on Competence, para 189
2. Para. 410 (underlying reasoning for *dispositifs* A(2), A(3), B(1) and B(2) as regards the “unrestricted use” and “let flow” provisions at Article III and the deliberate division of the Western and Eastern Rivers between the Parties as a “defining characteristic of the Treaty”, pursuant to its object and purpose)
3. Paras. 433-436 (underlying reasoning for *dispositifs* A(2) and A(3) and a systemic interpretation of the words “then-existing Agricultural Use or hydro-electric use of Pakistan” at para. 15(iii) of Annexure D to the Treaty)
4. Paras. 448-452 (underlying reasoning for *dispositifs* A(2), A(3) and B(1) to (4), confirming that principles of international environmental law must be taken into account when interpreting and applying the Treaty)

Examples of paragraphs in the *Kishenganga Partial Award* which have general *res judicata* effect, cont'd



5. **Paras. 464-468 (underlying reasoning for *dispositifs* B(1) and B(2) prohibiting reduction of the water level below Dead Storage Level and use of drawdown flushing at any Indian HEP to be designed and constructed on the Western Rivers)**
6. **Paras. 469-470 (explaining how the systemic holdings at *dispositifs* B(1) and B(2) were unaffected by the Neutral Expert's previous (contradictory) *Baglihar* determination and did not change the *res judicata* effect of that determination only for the *Baglihar* HEP)**
7. **Paras. 509, 517 and 521-522, as confirmed at paras. 31-34 of the Decision on Interpretation (explaining how the general prohibitions at *dispositifs* B(1) and B(2) were: (a) based on availability of alternative methods of sediment control at appropriate locations for Indian HEPs on the Western Rivers; and (b) unaffected by arguments about 'best practices' in HEP design and operation)**

