

PCA Case No. 2023-01

INDUS WATERS WESTERN RIVERS ARBITRATION

(ISLAMIC REPUBLIC OF PAKISTAN V. REPUBLIC OF INDIA)

CONCURRING OPINION

Professor Jeffrey P. Minear

1. I concur fully in the Court's Award on Issues of General Interpretation of the Indus Waters Treaty but write separately in response to the partly dissenting opinion of my esteemed colleague, Judge Awn Shawkat Al-Khasawneh.
2. I write to make three basic points that might otherwise be lost in the Court's comprehensive Award. First, the Court and Judge Al-Khasawneh are in full agreement on all the issues in this phase of the arbitration except the question of how to determine maximum Pondage for Annexure D, Part 3 HEPs. That question is significant, but it is far less important in protecting Pakistan's rights to the flow of the Western Rivers than other Treaty provisions addressed in the Award. Second, the divergence between the Court and Judge Al-Khasawneh turns on a discrete point: They differ on whether the text of the Treaty spells out a clear and unambiguous formula for determining maximum Pondage. Judge Al-Khasawneh sees clarity where the Court finds it lacking. Third, the Court, in the absence of textual clarity, engages in a searching inquiry according to the accepted rules of treaty interpretation that is both necessary and sound as a matter of international law, practice, and jurisprudence. That analysis leads to a meaningful limitation on maximum Pondage.¹

The scope of disagreement

3. Although Judge Al-Khasawneh dissents "respectfully but firmly" from the Court's reasoning in Part XI as to maximum Pondage,² the difference of view expressed in his opinion is in fact quite limited.

¹ Judge Al-Khasawneh questions the need for my concurring opinion. See Partial Dissent para. 3. I am motivated by my conviction that arbitrators are obligated to explain their reasoning, including the reasons why the court and a dissenting member have divergent views. This concurrence attempts to advance that core objective by identifying and explaining, in direct and concise terms, the reasons for the divergence in this case between the Court and the Partial Dissent.

² Partial Dissent, para. 2.

4. In particular, all members of the Court, including Judge Al-Khasawneh, agree without reservation on all but one of the central determinations of the Court's Award, including:
 - (a) the law to be applied by the court of Arbitration (Part VI);
 - (b) the binding or otherwise controlling effect of dispute settlement decisions under the Treaty (Part VII);
 - (c) the overall approach to when interpreting Article III and Annexure D, Part 3 (Part VIII);
 - (d) the engineering concepts and terminology relevant to run-of-river hydro-electric plants (Part IX);
 - (e) the general interpretation of Annexure D, Paragraph 8(d) through (f) on low-level outlets, gated spillways, and power intakes (Part X);
 - (f) the general interpretation of Annexure D, Paragraph 8(a) on the artificial raising of the water level above Full Pondage Level (Part XII); and
 - (g) the shared obligation of India and Pakistan to engage in cooperation and information sharing under the Treaty (Part XIII).
5. Judge Al-Khasawneh limits his Partial Dissent to Part XI of the Court's Award, which addresses the maximum permissible Pondage for run-of-river hydro-electric plants subject to Annexure D, Part 3, Paragraph 8(c).³ Even so, as discussed below, Judge Al-Khasawneh agrees with the Court's Part XI analysis as to the use of certain restrictions when calculating maximum Pondage, notably restrictions from the minimum mean discharge of the river at the site of a plant and the Treaty's downstream delivery requirements. His disagreement, therefore, is limited solely to whether the installed capacity and anticipated load of the plant also should be elements when restricting maximum Pondage.
6. Moreover, Judge Al-Khasawneh does not dispute that the question of maximum Pondage, although significant, pales in importance compared to the location of a reservoir's outlets, spillways, and intakes discussed in Part X.⁴ The Treaty's prescriptions on the location of low-level outlets, gated spillways, and power intakes have surpassing importance because they govern India's ability to control the full depth of the waters impounded by Annexure D, Part 3 HEPs, including the waters designated as Dead Storage. By contrast, the Treaty's restriction on

³ Partial Dissent, paras. 2, 5-6.

⁴ Award on Issues of General Interpretation of the Indus Waters Treaty, paras. 532-533 ("**Award**"). As Pakistan's expert acknowledged, "the pondage volumes ... are really insufficient to have a huge impact on weaponisation". Award, para. 534.

maximum Pondage limits only the comparatively narrow stratum of water in the Operating Pool above Dead Storage.⁵

7. Finally, although Judge Al-Khasawneh “consider[s] the Majority’s reasoning in Part XI regarding maximum Pondage to be fundamentally misconceived as a matter of the interpretation of treaties under international law”,⁶ he does not take issue with the Court’s articulation of the governing rules of treaty interpretation set out in Part VI, or the Court’s application of those rules with respect to any provision of the Treaty apart from the determination of maximum Pondage. In fact, his actual disagreement over the Court’s application of the interpretive rules is exceedingly narrow: he disputes “whether the anticipated load of a particular HEP and the installed capacity of that HEP are determinants of maximum Pondage.”⁷ With all due respect for my colleague, I disagree with his Partial Dissent on this issue. I believe the Court gives careful consideration to that issue, it correctly applies the governing legal principles, and its conclusion is both legally sound and persuasive.

The text of Paragraph 8(c)

8. The Partial Dissent correctly notes that the starting point of treaty analysis is the ordinary meaning of its terms.⁸ But the Partial Dissent adds that “in addition to being the starting point of any treaty interpretation, the ordinary meaning of the terms of the treaty may well be the end point.”⁹ That may be true in some circumstances, but not in this case.
9. Paragraph 8(c) of Annexure D states, “The maximum Pondage in the Operating Pool shall not exceed twice the Pondage required for Firm Power”, and Paragraph 2(i) of Annexure D defines “Firm Power” as “the hydro-electric power corresponding to the minimum mean discharge at the site of a plant”.¹⁰
10. The Partial Dissent concludes from those two provisions:

⁵ Award, para. 534. The Award notes a useful comparison in this regard; for India’s Baglihar HEP, the Pondage available based on the methodology that Judge Al-Khasawneh rejects is 32.5 million cubic meters, while the gross storage capacity of that plant is more than ten times that amount (400 million cubic meters), making the key issue not the comparatively small Pondage, but the existence of low-level outlets allowing control of the *entire* reservoir. Award, para. 534.

⁶ Partial Dissent, para. 2.

⁷ Partial Dissent, para. 6.

⁸ Partial Dissent, para. 7.

⁹ Partial Dissent, para. 7.

¹⁰ **PLA-0001**, Treaty, Annexure D, Part 3, paras. 2(i), 8(c).

“The plain meaning of the relevant terms thus makes abundantly clear that the maximum Pondage shall not exceed twice what is required to generate power when the flow of water is equal to the minimum mean discharge at the site of the HEP in question.”¹¹

11. But that claim of textual clarity races past the fundamental question that divides the Parties: How does one measure “the Pondage required for Firm Power”? It is not sufficient to simply say that “the maximum Pondage shall not exceed twice what is required to generate power when the flow of water is equal to the minimum mean discharge at the site of the HEP” because that prescription leaves unanswered key subsidiary questions: How does one translate “power” measured in watts, and flow of water measured in cubic meters per second, into Pondage, measured by volume? And what is the appropriate time frame for making that assessment—a day, a week, or longer? The supposedly “plain meaning of the relevant terms” does not answer those questions.¹²
12. The Parties offer two competing approaches. India claims the proper measure is the maximum volume of Pondage required to operate a run-of-river plant with a prescribed installed capacity to meet that plant’s anticipated load over the course of a day or seven-day period when the river is flowing at the minimum mean discharge.¹³ Pakistan, by contrast, asserts that the proper measure is the maximum volume of Pondage needed to operate a run-of-river plant at a power level corresponding to the minimum mean discharge for a portion of any day in which the stream flow falls below the minimum mean discharge.¹⁴ The ordinary meaning of the sparse terms of Paragraph 8(c), even when supplemented with Paragraph 2(i)’s definition of “Firm Power”, does not definitively support either alternative or provide a basis for choosing between them.
13. The Partial Dissent thus stops short in its analysis by declaring textual clarity where it simply does not exist. The Court correctly discerns that it must proceed beyond the bare text to determine what is meant by “the Pondage required for Firm Power”. In accordance with Annexure G, Paragraph 29 of the Treaty, the Court properly looks to guidance from Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT), which are widely recognized as reflecting customary international law.¹⁵

¹¹ Partial Dissent, para. 8.

¹² The Partial Dissent says the Court “introduce[s] ambiguity in what is otherwise patently clear”. Partial Dissent, para. 9. But the ambiguity arises from Paragraph 8(c) itself, which defines a volume of water based on a measurement of power, without providing the formula for doing so.

¹³ See Award, para. 640.

¹⁴ See Award, para. 622.

¹⁵ **PLA-0005**, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 (“**VCLT**”), Arts. 31-32; See Award, paras. 269-272.

14. The Partial Dissent challenges the Court’s reasoning in Part XI as “fundamentally misconceived as a matter of the interpretation of treaties under international law”.¹⁶ But Part XI assiduously adheres to the VCLT’s framework for treaty interpretation through a methodical and painstakingly thorough analysis of:
- (a) the Treaty’s usage of hydropower engineering terms;¹⁷
 - (b) relevant context (including related Treaty provisions);¹⁸
 - (c) the Treaty’s object and purpose;¹⁹
 - (d) subsequent practice of the parties;²⁰ and
 - (e) the Treaty’s *travaux préparatoires*.²¹

In accordance with established international law, practice, and jurisprudence, the Court considers these various elements in combination, weighing each in light of its interpretive value, and it concludes that the Treaty’s method for calculating maximum Pondage of an Annexure D, Part 3 HEP must take into account the HEP’s installed capacity and anticipated load.²² I briefly address each of the Partial Dissent’s challenges to the Court’s methodology.

The object and purpose of the Treaty

15. The Partial Dissent suggests that the Court’s analysis of the Treaty’s restriction on maximum Pondage gives inadequate regard to the object and purpose of the Treaty, citing the Treaty objectives of protecting “the vulnerability of Pakistan as the downstream riparian of a critical but shared natural resource”, “limit[ing] the storage of water by India on the Western Rivers”, and “fixing and delimiting of the rights and obligations of the Parties”.²³

¹⁶ Partial Dissent, para. 2.

¹⁷ Award, paras. 663-676.

¹⁸ Award, paras. 677-700.

¹⁹ Award, paras. 701-707.

²⁰ Award, paras. 708-731.

²¹ Award, paras. 732-736.

²² Award, paras. 737-748.

²³ Partial Dissent, para. 12 (internal quotation marks omitted). The Partial Dissent adds that the Court’s “approach accords with that of the Neutral Expert in the *Baglihar* proceedings”. Partial Dissent, para. 14. But as the Court has made clear, the Neutral Expert’s determinations in that matter carry no interpretative weight and have no bearing in this proceeding. Award, para. 365. The Court’s decision stands on its own reasoning. As for the observation of the respected engineer, John Briscoe, that the Neutral Expert’s decision in the *Baglihar* case put Pakistan at risk (Partial Dissent, para. 14), he was referring to the Neutral Expert’s allowance of low-level outlets—not Pondage. See **P-0325**, J. Briscoe, “War or Peace on the Indus”, *The*

16. The Court, however, gives careful consideration to the Treaty's object and purpose throughout its Award.²⁴ In the case of maximum Pondage, the Court squarely addresses Pakistan's vulnerability as a downstream riparian, the consequent limitations on India's storage of water, and the objective of determining the Parties' rights and obligations.²⁵
17. In assessing the object and purpose of the Treaty, it is important to bear in mind that a treaty's object and purpose can and often does contain different elements, with no one element operating to the exclusion of all else. The essence of treaty negotiation is a compromise that balances the competing interests of the treaty partners. The Indus Water Treaty accommodates both Pakistan's right to the flow of the Western Rivers and India's right to limited non-consumptive use of that flow for hydro-electric power generation.²⁶ The Court's determination that the maximum Pondage calculus must include consideration of installed capacity and anticipated load is consistent with that accommodation.
18. The Partial Dissent questions whether the Court's Award "adequately addresses the vulnerability of Pakistan and serves the objective of limiting India's storage of water on the Western Rivers".²⁷ As the Court explains, the choice between including or not including installed capacity and anticipated load in the maximum Pondage calculus is not a choice between limiting or not limiting Pondage; either approach places significant limitations on India's ability to store water as Pondage.²⁸ In particular, the Court and the Partial Dissent agree that the volume of Pondage is calculated on the basis of assisting in generating power only when the river is flowing at a very low rate at the site of the plant—the historic minimum mean discharge. Thus, under either approach, the Pondage that can possibly be accumulated is considerably restricted. In short, the object and purpose of the Treaty does not require a calculation method that leads to the smallest possible Pondage, but rather one that balances Pakistan's interest in the Western Rivers against India's interest in limited non-consumptive use of those waters for hydro-electric power development.²⁹

News International, 3 April 2010 p. 1 ("This was a critical issue at stake in the Baglihar case. Pakistan (reasonably) said that the gates being installed were in violation of the specifications of the treaty.") See note 5, *supra*.

²⁴ See, e.g., Award, paras. 420-438, 541, 562-563, 575, 586, 597, 650, 655, 681, 769, 772, 782, 793-794.

²⁵ Award, paras. 701-707.

²⁶ **PLA-0003**, *Indus Waters Kishenganga Arbitration (Pakistan v India)*, PCA Case No. 2011-01, Partial Award, 18 February 2013, para. 504.

²⁷ Partial Dissent, para. 14.

²⁸ Award, paras. 653-654, 702, 704.

²⁹ Award, para. 704.

19. The Partial Dissent also protests that the Court’s Award, which requires India to make a “realistic, well-founded, and defensible projection of the proposed Annexure D, Part 3, HEP’s installed capacity and anticipated load”, allows India “considerable discretion” to manipulate its Pondage calculations.³⁰ But India is under an obligation to proceed in good faith, and there is nothing novel in requiring India to exercise responsible engineering judgment in designing Treaty-compliant HEPs. The Treaty requires similar engineering judgment with respect to the placement of outlets, spillways and intakes, as well as other highly technical features of HEPs.³¹ Moreover, India’s determinations of installed capacity and anticipated load are subject to review through the Treaty’s robust provisions for settling technical disputes, which provide strong safeguards against abuse.³²

Construing maximum Pondage as an “exception”

20. The Partial Dissent claims that the Court gives “inadequate weight” to “the operation of Annexure D as an express exception to India’s ‘let flow’ obligation under Article III(2) of the Treaty.”³³ The Court and the Partial Dissent share common ground that the Treaty expresses a general rule that India must “let flow” the Western Rivers and that certain exceptions, including India’s generation of hydro-electric power, must be strictly construed as limited departures from the general rule.³⁴ The Partial Dissent, however, seems to interpret “strictly construed” as mandating adoption of Pakistan’s restrictive interpretation of maximum Pondage to the exclusion of other considerations, citing the *Kishenganga* decision as support for that construction.³⁵
21. The *Kishenganga* Court’s Partial Award points decidedly away from that view and toward a more moderate perspective. That Court acknowledged that Annexure D of the Treaty restricts the permissible volume of Pondage, that Annexure D pegs it to the minimum mean discharge at the site, and that such a limit is “not generous”.³⁶ But it also stated:

“The outcome was significant in that it achieved a careful balance between the Parties’ respective negotiating positions, allowing India hydro-electric use of the waters of the Western Rivers while protecting Pakistan against the possibility of water storage on the

³⁰ Partial Dissent, para. 16, *quoting* Award, para. 747(b).

³¹ See, e.g., **PLA-0001**, Treaty, Annexure D, para. 8.

³² Award, para. 743; **PLA-0001**, Treaty, Art. IX. The Court has not had an opportunity to address this matter in detail, because the issue was not briefed in this proceeding, but the Court remains open to addressing it in future proceedings. Award, para. 743.

³³ Partial Dissent, para. 19.

³⁴ Award, paras. 439-459.

³⁵ Partial Dissent, paras. 19-21.

³⁶ **PLA-0003**, *Indus Waters Kishenganga Arbitration (Pakistan v India)*, PCA Case No. 2011-01, Partial Award, 18 February 2013, para. 504.

upstream reaches of those Rivers having an unduly disruptive effect on the flow of water to Pakistan.”³⁷

22. Of particular relevance here, the *Kishenganga* Court additionally noted:

“Given the significant rights enjoyed by India as the upstream riparian under customary international law, as well as the natural advantages enjoyed by the upstream riparian, the Court recognizes, in view of the acute need both of India and Pakistan for hydro-electric power, that India might not have entered into the Treaty at all had it not been accorded significant rights to the use of those waters to develop hydro-electric power on the Western Rivers.”³⁸

23. The *Kishenganga* Court understood that, although exceptions must be strictly construed, they cannot be construed so strictly that they foreclose India’s reasonable ability to generate hydro-electric power. That is the balancing that the Court applies in this case.³⁹

The relevance of engineering treatises

24. The Partial Dissent takes issue with the Court’s use of engineering treatises, stating that those treatises “concern themselves with maximizing the efficiency of the use of the waters in the abstract” and “not with ‘the most complete and satisfactory utilization of the waters,’ a distinct standard set by the Treaty”.⁴⁰
25. At Pakistan’s invitation, the Court examines engineering treatises that existed at the time of the adoption of the Treaty to understand engineering concepts and terminology contained in a Treaty addressing the design and operation of HEPs.⁴¹ Those treatises explain engineering lexicon and shed considerable light on the meaning of both defined and undefined Treaty terms.⁴²
26. The Partial Dissent discounts the use of such engineering texts, claiming the “skewed focus of these treatises on power generation” limits their usefulness in the current context, and it further states that the Court has “not been able to cite a single other case where installed capacity and anticipated load have been determinants of maximum Pondage in cross-boundary situations.”⁴³ But the Partial Dissent overlooks that installed capacity and anticipated load are concededly

³⁷ **PLA-0003**, *Indus Waters Kishenganga Arbitration (Pakistan v India)*, PCA Case No. 2011-01, Partial Award, 18 February 2013, para. 504.

³⁸ **PLA-0003**, *Indus Waters Kishenganga Arbitration (Pakistan v India)*, PCA Case No. 2011-01, Partial Award, 18 February 2013, para. 420.

³⁹ Award, para. 650.

⁴⁰ Partial Dissent, para. 23.

⁴¹ See Pakistan Memorial, paras. 4.1-4.138. That examination should come as no surprise, given that the Treaty was drafted with extensive input from both Indian and Pakistani hydropower engineers.

⁴² Award, paras. 663-668.

⁴³ Partial Dissent, para. 24.

employed in determining Pondage for Storage Works and Small Plants under this very Treaty.⁴⁴ Furthermore, the Partial Dissent does not cite a single case where installed capacity and anticipated load have *not* been determinants of Pondage in cross-boundary situations. For purposes of engineering, boundaries are irrelevant. Engineering treatises are not like railway passes with limited geographic scope. They are useful because they explain the application of widely accepted scientific principles to the practical problems of hydropower design, construction, and operation—without regard to national borders.

Effet utile

27. The Partial Dissent raises questions of *effet utile*—generally speaking, the principle that a treaty provision should not be interpreted to render another treaty provision ineffective—in two aspects of the Court’s Award.
28. First, the Partial Dissent critiques the Court’s observation, as relevant context, that Pakistan’s method of calculating maximum Pondage would render Paragraph 15 of Annexure D, which requires India to maintain specified downstream flows, largely irrelevant.⁴⁵ The Partial Dissent does not dispute that Pakistan’s methodology would have that effect, but notes that it would not *completely* negate Paragraph 15’s usefulness.⁴⁶ Perhaps so, but as the Court points out, the contextual point remains pertinent: it is doubtful that the Parties agreed to a methodology for calculating maximum Pondage that would render irrelevant Paragraph 15’s application—which is formulated to ensure daily and weekly operational consistency—in all but the most extreme hydrologic conditions.⁴⁷
29. Second, the Partial Dissent suggests that the Court’s methodology for calculating maximum Pondage would negate the effectiveness of Paragraph 8(c) itself.⁴⁸ But that suggestion rests on the mistaken premise that the Court’s methodology “effectively does little more than doubling the Pondage needed to meet fluctuations in the discharge of the turbines arising from variations in the daily and the weekly loads of the HEP in question.”⁴⁹ That simply is not the methodology the Court identifies in the Treaty. As the Court explains, the methodology contains three critical

⁴⁴ See para. 31, *infra*.

⁴⁵ Partial Dissent, para. 25. See Award, paras. 682-685.

⁴⁶ Partial Dissent, para. 25.

⁴⁷ Award, para. 684. See also Award, para. 682 (citing the historically rare occurrences of minimum flow conditions at the Kiru HEP site).

⁴⁸ Partial Dissent, para. 26.

⁴⁹ Partial Dissent, para. 26.

restrictions that individually and collectively constrain the amount of Pondage that India may use: Pondage is restricted by the historic minimum mean discharge of the river at the site; Pondage is restricted by the downstream delivery requirements; and Pondage is restricted by a realistic and defensible projection of the plant's installed capacity and anticipated load.⁵⁰

Notification Provisions

30. The Partial Dissent asserts that neither Paragraph 9 nor Appendix II of Annexure D—which specify the information that India must provide when notifying Pakistan of planned HEP construction—contains any express reference to installed capacity or anticipated load.⁵¹ The Partial Dissent suggests that, if that information were essential, Appendix D would have expressly required it.⁵² The Court directly addresses that point.⁵³ As the Court explains, Appendix II(3)(b) of Annexure D generally directs India to provide “calculations for the Operating Pool”; Appendix II(4)(h) of Annexure D more specifically directs India to provide the “[d]ischarge proposed to be passed through the Plant, initially and ultimately, and expected variations in the discharge on account of the daily and weekly load fluctuations”; and Appendix II(4)(h) of Annexure D also directs India to provide the “[m]aximum aggregate capacity of the power units ... for Firm Power and Secondary Power”.⁵⁴ Those provisions effectively require India to inform Pakistan of the plant's installed capacity and anticipated load.⁵⁵

Storage Works and Small Plants

31. The Partial Dissent questions, in separate sections, the contextual relevance of the Treaty's regulations governing Pondage for Storage Works and Small Plants.⁵⁶ The Treaty's regulations for each of those types of facilities have contextual relevance for a common reason: in each instance, the Treaty concededly regulates Pondage for those facilities based on the installed capacity and anticipated load of the plant.⁵⁷ Accordingly, departing from that approach solely in the context of an Annexure D, Part 3 HEP calls for a clear indication of an intent to do so, which does not exist. Rather, as the Court explains, those provisions and their evolution in the Treaty

⁵⁰ Award, paras. 653, 703-705.

⁵¹ Partial Dissent, para. 27.

⁵² Partial Dissent, para. 27.

⁵³ Award, paras. 686-690.

⁵⁴ Award, para. 689. See **PLA-0001**, Treaty, Annexure D, Appendix II, paras. (3)(b), (4)(h).

⁵⁵ Award para. 689.

⁵⁶ Partial Dissent, paras. 28, 33-36.

⁵⁷ Award, paras. 672 (Small Plants), 691-700 (Storage Works).

negotiations support the inference that Paragraph 8(c) and Paragraph 2(i)'s bespoke definition of "Firm Power", applicable to Annexure D, Part 3 HEPs, do not abruptly discard the established engineering practice for determining Pondage. Instead, in the case of Annexure D, Part 3 HEPs, they subject the established practice to a specific and important constraint—the "Pondage required for Firm Power" must be calculated according to the historic minimum mean discharge at the site.⁵⁸

Subsequent Practice

32. The Partial Dissent rejects the significance of the Parties' practices in the application of the Treaty concerning the calculation of maximum Pondage following the Treaty's entry into force in 1960.⁵⁹ As the Court recounts, between 1968 and 1991, India furnished Pakistan with several notifications under Paragraph 9 and Appendix II of Annexure D for Annexure D, Part 3 HEPs and consistently provided Pondage calculations that took account of the installed capacity and anticipated load of the plants at issue.⁶⁰ Throughout that period, Pakistan raised many detailed objections to the design features of those HEPs, but it did not question India's practice of using anticipated load in the Pondage calculation, and it indicated on several occasions that consideration of anticipated load was either appropriate or required.⁶¹ The Court concludes that this practice, coming within the first decade after the entry into force of the Treaty and continuing for two more decades, has interpretive weight and is consistent with an interpretation that Paragraph 8(c) calls for a method of calculating "maximum Pondage" based on the proposed HEP's installed capacity and anticipated load.⁶²
33. The Partial Dissent discounts the interpretive value of this subsequent practice primarily because, after the passage of some thirty years, Pakistan retreated from its apparent acceptance of India's methodology.⁶³ The Court notes Pakistan's latter-day change of heart, but that does not dispel the fact that, for many years following the Treaty's entry into force, Pakistan accepted the methodology that it now disavows, including through communications transmitted by a Pakistan Commissioner who participated in the negotiations of the Treaty.⁶⁴ Contrary to the Partial

⁵⁸ Award, paras. 672, 699.

⁵⁹ Partial Dissent, paras. 29-30.

⁶⁰ Award, paras. 710-726.

⁶¹ Award, paras. 714-726.

⁶² Award, paras. 718, 727, 731.

⁶³ Partial Dissent, para. 29.

⁶⁴ Award, paras. 718-719, 727-728.

Dissent's suggestion,⁶⁵ the Court does not limit itself to assessing only Pakistan's practice; the practice of both Parties is considered. The Court and the Partial Dissent agree that this subsequent practice does not rise to the level of an "agreement" between the Parties under Article 31(3)(b) of the VCLT.⁶⁶ That practice nevertheless has interpretive value as a supplementary means under Article 32 of the VCLT for confirming the meaning of Article 8(c).⁶⁷

The travaux préparatoires

34. The Partial Dissent also makes brief note of the Court's examination of the Treaty's negotiation history, discounting its importance.⁶⁸ The Court agrees that the *travaux préparatoires* cast little light on the meaning of Paragraph 8(c), save one aspect: An early version of the Treaty appeared to use the same methodology for Annexure D, Part 3 Plants and Small Plants, and subsequent textual revisions appeared to preserve that understanding.⁶⁹
35. The Partial Dissent's observations discounting the *travaux préparatoires* bring us full circle to the basic source of disagreement. The Partial Dissent finds the plain meaning of the relevant terms for determining "maximum Pondage" "abundantly clear", ⁷⁰ concludes that the object and purpose of the Treaty warrants selecting a calculation methodology that minimizes the threat to the downstream riparian,⁷¹ and discounts any other interpretive considerations.⁷² The Court, by contrast, concludes that the relevant text is not clear and engages in a searching inquiry, in accordance with the VCLT, into the meaning of the relevant terms.⁷³ The Court's thorough and holistic analysis, reflected throughout the Court's Award, leads to a sound and persuasive conclusion.

⁶⁵ Partial Dissent, paras. 29-30.

⁶⁶ Award, para. 727; Partial Dissent para. 31; see **PLA-0005**, VCLT, Art. 31(3)(b).

⁶⁷ Award, para. 727; **PLA-0005**, VCLT, Art. 32.

⁶⁸ Partial Dissent, para. 37.

⁶⁹ Award, paras. 733-736.

⁷⁰ Partial Dissent, para. 8.

⁷¹ Partial Dissent, paras. 12-18.

⁷² See, e.g., Partial Dissent, paras. 22-24, 25, 27, 28, 29-32, 33-36, 37.

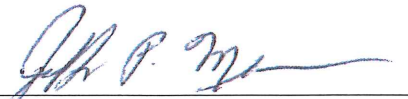
⁷³ Award, paras. 649-748.

Conclusion

36. Respectfully, I am unpersuaded by my colleague's Partial Dissent, and I concur without reservation in the Court's Award.

* * *

Date: 8 August 2025



Professor Jeffrey P. Minear