

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

CERTIFIED TRANSCRIPT
(HEARING ON COMPETENCE)

COURT OF ARBITRATION:

Professor Sean D. Murphy (Chairman)
Professor Wouter Buytaert
Mr. Jeffrey P. Minear
Judge Awn Shawkat Al-Khasawneh
Dr. Donald Blackmore

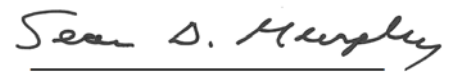
SECRETARIAT:

The Permanent Court of Arbitration

ON BEHALF OF THE COURT OF
ARBITRATION:

CERTIFIED PURSUANT
TO
PARAGRAPH 19 OF ANNEXURE G

11 May 2023



Professor Sean D. Murphy
Chairman

Arbitration pursuant to Article IX and Annexure G
of the Indus Waters Treaty 1960

Permanent Court of Arbitration
Peace Palace
The Hague
The Netherlands

Day 1
Hearing on Competence

Thursday, 11th May 2023

Before:

PROFESSOR SEAN D MURPHY
HE JUDGE AWN AL-KHASAWNEH
DR DON BLACKMORE
MR JEFFREY P MINEAR
PROFESSOR WOUTER BUYTAERT

BETWEEN:

THE ISLAMIC REPUBLIC OF PAKISTAN

-and-

THE REPUBLIC OF INDIA

Certified pursuant to paragraph 19 of Annexure G

Professor Sean D Murphy
On behalf of the Court of Arbitration

Transcript produced by Trevor McGowan
Georgina Vaughn and Lisa Gulland

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MR HASSAN NASIR JAMY, Secretary, Ministry of Water Resources
MR SYED MUHAMMAD MEHAR ALI SHAH, Commissioner for
Indus Waters
HE MR SULJUK MUSTANSAR TARAR, Ambassador of Pakistan to
the Netherlands
MR MUHAMMAD WASIF, First Secretary, Embassy of Pakistan
MS FATIMA HAMDIA TANWEER, First Secretary-II, Embassy of
Pakistan
MS LEENA NISHTAR, Consultant, Office of the Attorney General
MR ZOHAI WAHEED, Consultant, Office of the Attorney General

THE REPUBLIC OF INDIA WAS NOT REPRESENTED

FOR THE PERMANENT COURT OF ARBITRATION

MR GARTH SCHOFIELD, Deputy Secretary General
MR BRYCE WILLIAMS, Legal Counsel
MR SEBASTIAN KING, Assistant Legal Counsel

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08:52 1 Thursday, 11 May 2023
 2 (9.19 am)
 3 THE CHAIRMAN: Good morning to everyone. It's good to see
 4 you. Welcome almost all of you back. I think there's
 5 a few new faces, perhaps.
 6 Let me begin by saying this proceeding is in the
 7 matter of an arbitration before the Court of Arbitration
 8 constituted in accordance with the Indus Waters Treaty
 9 1960 between the Islamic Republic of Pakistan and the
 10 Republic of India.
 11 I take note of the presence of the delegation
 12 representing Pakistan, including the Agent of Pakistan,
 13 Mr Ahmad Aslam. Welcome, sir. It's good to have you
 14 here. I take note as well of the presence of Pakistan's
 15 Secretary of the Ministry of Water Resources, Mr Hassan
 16 Nasir Jami, Pakistan's Commissioner for Indus Waters,
 17 Mr Syed Muhammad Mehar Ali Shah, and Pakistan's
 18 Ambassador to the Netherlands, His Excellency Mr Suljuk
 19 Mustansar Tarar. Good to see you gentlemen as well.
 20 Welcome back.
 21 There are other familiar faces as well from the rest
 22 of Pakistan's delegation, but perhaps three new
 23 additional faces: Ms Fatima Hamdia Tanweer is the First
 24 Secretary-II of the Embassy in The Hague, I believe;
 25 Mr Zohair Waheed, the consultant to Pakistan's Office of

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09:24 1 which was made in India's letter to the World Bank dated
 2 December 21, 2022. Among other things, my letter of
 3 February 6 informed India of the dates of this hearing.
 4 Unfortunately I received no response to that letter,
 5 nor has India provided any responsive communication to
 6 various other messages sent to it with respect to the
 7 proceedings to date. I regret that, as the Court is
 8 best informed as to issues of fact and law that are
 9 before it only when it can hear fully and directly from
 10 both the parties.
 11 At our first meeting in January, we had brief
 12 introductions of the members of the Court and of our
 13 Secretariat. Those need not be repeated today, though
 14 I note the presence of an additional lawyer from the
 15 PCA, Mr Sebastian King, over there.
 16 I do wish to observe that various steps have
 17 occurred since our first meeting on January 27 and 28.
 18 I will just briefly mention a few of them.
 19 On February 3, the Court of Arbitration issued
 20 Administrative Order No. 1 on terms of appointment.
 21 From February to May, the Court issued five procedural
 22 orders. Procedural Order 5, inter alia, sets the
 23 schedule for this hearing. On March 31, the Court
 24 issued its supplemental rules of procedure.
 25 We have received various filings from Pakistan. On

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09:20 1 the Attorney General; and -- I didn't see him when
 2 I came in, but he's here -- Mr Stephen Fietta, a counsel
 3 for Pakistan.
 4 So, Mr Aslam, before I continue with my introductory
 5 remarks, is there anyone else I have neglected to
 6 mention that's new to the proceedings?
 7 (Pause to resolve a technical problem)
 8 MR ASLAM: Good morning, Mr Chairman and members of the
 9 Court. Thank you. There is another colleague who
 10 wasn't there the last time: our colleague Mr Muhammad
 11 Wasif. He is not here at present, but he will be here
 12 over the course of today and tomorrow. He is from the
 13 Embassy of Pakistan: he is the First Secretary. Thank
 14 you.
 15 THE CHAIRMAN: Very good. Thank you very much, Mr Aslam.
 16 I did not intend to create any difficulty in just
 17 checking with you on that. But let me now continue with
 18 my introductory remarks.
 19 I note with regret the absence of a delegation
 20 representing India. By letter dated February 6, 2023,
 21 I informed Shri Pankaj Kumar, the Secretary of India's
 22 Department of Water Resources, River Development & Ganga
 23 Rejuvenation, of the Court's decision to conduct written
 24 and oral proceedings to address what the Court has
 25 deemed a challenge by India to the Court's competence

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09:26 1 February 23, Pakistan filed its statement on
 2 coordination between the Court of Arbitration and the
 3 Neutral Expert. On March 24, Pakistan filed its
 4 response to India's challenge to the Court's
 5 jurisdiction, which included appendices, factual
 6 exhibits and legal authorities. And on May 9, Pakistan
 7 filed additional exhibits and authorities.
 8 I also note an exchange of letters between myself
 9 and Mr Michel Lino. My letter to him was dated
 10 February 8 and his letter in response was of May 3.
 11 Beyond that, the Court looks forward to hearing the
 12 submissions of Pakistan and the responses to the Court's
 13 questions during the course of this hearing.
 14 I will close by noting that, despite India's
 15 non-appearance to date, the Court will ensure that the
 16 issues before it are fully, fairly and impartially
 17 considered. If the Court ultimately decides that it is
 18 not competent, then this proceeding will come to an end.
 19 If the Court decides that it is competent to proceed
 20 with respect to all or some of Pakistan's Request for
 21 Arbitration, then my hope is that India will participate
 22 in future proceedings.
 23 That concludes my introductory remarks. Mr Aslam,
 24 are there any procedural issues we need to address
 25 before I turn the floor over to you and your delegation

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09:27 1 for your presentations?
 2 MR ASLAM: Thank you, Mr Chairman. There are no procedural
 3 remarks, thank you.
 4 THE CHAIRMAN: In that case, I give you the floor, Mr Aslam.
 5 (9.28 am)
 6 Opening submissions on behalf of
 7 the Islamic Republic of Pakistan
 8 MR ASLAM: It is my privilege and honour to appear before
 9 you once more as the Agent for the Islamic Republic of
 10 Pakistan in these most important of proceedings under
 11 the Indus Waters Treaty 1960. You are already familiar
 12 with members of our delegation, but for purposes of the
 13 record I would seek your permission to introduce them
 14 formally once again to the Court and so that they are
 15 placed on record.
 16 Members of Pakistan's delegation, aside from myself,
 17 include Mr Hassan Nasir Jamy, the Secretary for Water
 18 Resources; Mr Suljuk Tarar, Pakistan's Ambassador to the
 19 Netherlands; Mr Muhammad Mehar Ali Shah, Pakistan's
 20 Commissioner for Indus Waters; Sir Daniel Bethlehem,
 21 King's Counsel and barrister, and Pakistan's lead
 22 counsel; Professor Attila Tanzi, counsel and member of
 23 3 Verulam Buildings in London; Mr Stephen Fietta,
 24 King's Counsel and principal partner at Fietta LLP;
 25 Professor Philippa Webb, counsel and barrister at Twenty

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09:30 1 The disputes before you are over two decades old,
 2 and they have collectively become an open wound in our
 3 bilateral relations and now threaten the Treaty's
 4 integrity and, by extension, the lives and livelihoods
 5 of hundreds of millions of people in the Indus Basin.
 6 While we are very pleased to be here today, this day
 7 is not without its disappointments. The two parties
 8 responsible for our presence here are not present
 9 themselves. The first is India.
 10 As you will hear from Pakistan's counsel in the
 11 course of today and tomorrow, India gives every
 12 appearance of not wanting this dispute between the
 13 parties resolved, dragging the Treaty into dysfunction
 14 and irrelevance.
 15 Thanks to Indian intransigence, the two hydropower
 16 projects that provoked this dispute, Kishenganga and
 17 Ratle, were mired for years in the Permanent Indus
 18 Commission. When Pakistan, after years of negotiation
 19 and of prior arbitration, moved to seize the Court,
 20 India, acting mala fides, instituted parallel
 21 proceedings before a Neutral Expert, insisting that
 22 these have priority over the Court, despite commencing
 23 later in time.
 24 Rather than explain its position to the Court, India
 25 has elected to challenge the Court's jurisdiction from

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09:29 1 Essex chambers in London; Dr Cameron Miles, counsel and
 2 barrister at 3 Verulam Buildings chambers in London;
 3 Mr Jiries Saadeh, counsel and partner at Fietta;
 4 Ms Laura Rees-Evans, counsel at Fietta LLP;
 5 Mr Zohair Waheed, consultant in Pakistan's Office of the
 6 Attorney-General; Ms Leena Nishtar, consultant in the
 7 Office of Pakistan's Attorney-General; Ms Fatima Tanweer
 8 and Mr Muhammad Wasif from Pakistan's Embassy in
 9 The Hague.
 10 Mr Chairman, members of the Court, I propose to make
 11 only a few remarks to contextualise Pakistan's views in
 12 these proceedings, before handing over to Sir Daniel
 13 Bethlehem, who will talk you through the substantive
 14 parts of the issues at hand.
 15 Mr Chairman, members of the Court, my delegation and
 16 I are very pleased to be finally here to contemplate
 17 questions of this Court's competence to consider
 18 disputes that Pakistan, by its Request for Arbitration
 19 of 19 August 2016, has put before it. We have had to
 20 wait for nearly seven years to get to this date. For
 21 nearly seven years, Pakistan was denied its right to
 22 access the Treaty's dispute settlement mechanism, to
 23 seek provisional measures, and India was allowed to
 24 complete construction at the Kishenganga site and to
 25 commence the works on Ratle.

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09:32 1 afar, while not deigning to appear itself, issuing
 2 inflammatory statements via correspondence through the
 3 World Bank and media, and threatening Pakistan with
 4 unilateral modification of the Treaty.
 5 In contrast, Pakistan has consistently pursued the
 6 course of engagement and asserting our rights as
 7 provided under the Treaty. Pakistan's commitment to the
 8 Treaty is strong, and the duty to its people too
 9 compelling for it to adopt any course other than that
 10 which it is pursuing; that is, entrusting members of
 11 this Court of Arbitration to restore balance to the
 12 Treaty and uphold Pakistan's rights thereunder.
 13 India did not create this situation by itself.
 14 There is a second responsible party: the World Bank.
 15 Sir Daniel will speak to the Bank's conduct at great
 16 length, but I shall say this much: the Bank's role under
 17 the Treaty was simple and limited. All it was required
 18 to do was to nominate the person who would draw the lots
 19 that would in due course allow this Court to be
 20 empanelled, after it had received Pakistan's Request for
 21 Arbitration dated 19 August 2016.
 22 Instead, the Bank embarked on an extraordinary
 23 journey of suspending its Treaty obligations, taking one
 24 position at one point and an opposing position at
 25 another, and then finally pausing the process of

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09:33 1 empanelment of this Court for over six years, denying
 2 Pakistan her right to access the Treaty's dispute
 3 settlement mechanism, to seek interim measures, to
 4 prevent construction of Kishenganga and Ratle, and to
 5 create a fait accompli situation with impunity. By
 6 doing so, the Bank did not only violate the Treaty
 7 obligation, it inserted itself into the parties'
 8 disputes.
 9 This breach, unprecedented in its magnitude and
 10 duration, was entirely to India's advantage, enabling
 11 India to complete the Kishenganga Project and
 12 substantially advance the Ratle project, without
 13 affording this Court a lawful opportunity to examine
 14 Pakistan's objections to the lawfulness of these
 15 projects.
 16 The "pause", as the suspension of process of
 17 empanelment came to be called, was partisan, egregious
 18 and in flagrant violation of Pakistan's right to
 19 peaceful settlement of its disputes with India, a right
 20 guaranteed not only by Article IX of the Treaty but by
 21 Article 33 of the Charter of the United Nations.
 22 That is why, members of the Court, whatever your
 23 decision on competence, Pakistan asks you to provide
 24 clear direction to the parties, and especially the Bank,
 25 as to the Bank's role and responsibilities in cases like

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09:37 1 future by delaying empanelment of dispute settlement
 2 fora under the Treaty. We ask you to provide clear
 3 guidance to the Bank as to its responsibility under the
 4 Treaty.
 5 The Bank's and indeed India's conduct have led to
 6 an extraordinary situation where two parallel bodies now
 7 exist adjudicating overlapping disputes. This has made
 8 real the possibility of conflicting outcomes and
 9 permanent damage to the Treaty, already weakened by
 10 India and the Bank.
 11 The drafters of the Treaty did not envisage such
 12 a situation, and as a result the Treaty is silent on how
 13 best to address the present situation. It now falls on
 14 this Court to help forge an exit path out of this
 15 difficult situation. By addressing questions of its own
 16 competence, and through a harmonious reading of the
 17 Treaty, the Court can help the parties get out of legal
 18 uncertainty.
 19 The Court alone can perform this task; the Neutral
 20 Expert forum is neither designed for nor suited to such
 21 discussions.
 22 Turning now to the Neutral Expert. As I said,
 23 Pakistan considers India's commencement of proceedings
 24 before him to be improper. Nevertheless, having sat
 25 with him in this building a month or so ago, we found

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09:35 1 this one. The Bank's conduct in relation to the pause
 2 has stretched the dispute settlement architecture of the
 3 Treaty to a breaking point. It must never be repeated.
 4 As India and Pakistan's populations grow, placing
 5 ever greater pressures on natural resources like river
 6 waters, and as India embarks on unprecedented ambitious
 7 plans of developing dozens of hydroelectric plants on
 8 Western Rivers, coupled with all the challenges of
 9 climate change, there will naturally be disputes between
 10 India and Pakistan. These disputes will have to be
 11 settled promptly to ensure not only continued unhindered
 12 flow of water in the Western Rivers but also the
 13 preservation of the Treaty itself.
 14 As we have submitted in the past, the Indus Waters
 15 Treaty is akin to a treaty of peace. The Treaty more
 16 broadly, and the dispute settlement system specifically,
 17 works as a pressure valve, releasing steam in the most
 18 difficult of times and helping calm things down. And
 19 that is why the Treaty has worked wonderfully and
 20 flawlessly through conflict and tensions.
 21 The World Bank cannot, and must not, be allowed to
 22 pursue extra-Treaty measures, playing with the lives and
 23 livelihoods of millions of people, straining bilateral
 24 relations between two often hostile neighbours. The
 25 Bank cannot be allowed to disrupt regional peace in the

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09:38 1 him to be competent, professional and keenly aware of
 2 his duties and responsibilities under the Treaty.
 3 While he has deemed, as is his prerogative, that
 4 cooperation between him and the Court is not, at least
 5 for now, desirable, Pakistan still considers it
 6 imperative that some modus vivendi between the two
 7 adjudicative bodies seized of this matter be developed.
 8 The nightmare scenario of international dispute
 9 settlement inconsistent decisions is very real in this
 10 case, and the weight of such an outcome may be more than
 11 the Treaty, weakened already, can bear.
 12 Finally, Mr Chairman, members of the Court, I want
 13 to say a few words on how we got where we are now. From
 14 the perspective of someone who was present when most of
 15 the relevant decisions were taken, and as a participant
 16 in those processes, I make two observations in this
 17 respect.
 18 First, the Court is aware from India's interventions
 19 that they consider Pakistan's decisions in February 2016
 20 to revoke its Request for a Neutral Expert with respect
 21 to the Kishenganga and Ratle projects, and replace it
 22 with a call for arbitration engaging a wider and
 23 Treaty-systemic dispute, to be something of an ambush,
 24 to be somehow unfair.
 25 In making this claim, India does not trouble itself

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09:40 1 to explain exactly what tactical advantage Pakistan
 2 would get out of such a shift or how it might have
 3 promoted Pakistan's interests at India's expense. And
 4 that is because there was none.
 5 As our colleague Dr Miles will explain, Pakistan's
 6 change in position arose from the realisation, formed
 7 honestly and held consistently, that the disagreements
 8 between the parties were not just about Kishenganga and
 9 Ratle but concerned India's hydropower ambitions in the
 10 Western Rivers in their entirety; and that, as
 11 a consequence, those disagreements entailed involving
 12 legal, technical, systemic problems requiring
 13 consideration by a body formed of expert lawyers and
 14 expert engineers.
 15 Secondly, India also seems to be accusing Pakistan,
 16 once it made the decision to pursue arbitration, of
 17 unseemly haste; of a rush to the courthouse, as it were.
 18 Again, speaking as someone who was in the room at the
 19 time, I do not recognise this description.
 20 The issues that form the basis of Pakistan's Request
 21 for Arbitration have been on foot between the parties on
 22 either a plant-specific or systemic level since 2006.
 23 When Pakistan, a decade after those issues first arose,
 24 chose to approach this Court, it did so only having made
 25 absolutely certain that there was no scope for their

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09:41 1 amicable resolution, whether in the Commission or
 2 elsewhere, at the government-to-government level. And
 3 it did so against the background of India's repeated
 4 refusals to pause construction of the Kishenganga and
 5 Ratle Plants so that these issues could be properly
 6 ventilated.
 7 In those circumstances, Mr Chairman, members of the
 8 Court, Pakistan had no option. It committed itself to
 9 you in the hope that justice in the Western Rivers would
 10 be done, and would be seen to be done.
 11 I stand before you nearly seven years after that
 12 decision. Kishenganga is built, commissioned and
 13 operational. Ratle is under construction. A finding by
 14 this Court that it is competent to resolve these
 15 disputes will breathe life into a Treaty process that is
 16 on the verge of unworkability and reaffirm the essential
 17 bargain that Pakistan and India, in times of greater
 18 friendship, committed themselves and their peoples to
 19 for the ultimate prosperity of all the people in
 20 South Asia.
 21 I thank you, Mr Chairman, members of the Court, for
 22 your kind attention. Unless I can assist you any
 23 further, if you have any further question, I will give
 24 the floor to Sir Daniel Bethlehem to deliver Pakistan's
 25 further opening submissions.

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09:43 1 THE CHAIRMAN: Thank you, Mr Aslam. I think we have no
 2 questions. But thank you for your statement.
 3 Mr Bethlehem, you have the floor.
 4 SIR DANIEL: Mr Chairman, members of the Court, it is
 5 an honour to be back before you representing Pakistan in
 6 these proceedings.
 7 Mr Chairman, you mentioned that it's not long since
 8 we were last here, three and a half months ago, and you
 9 also drew attention to all the developments that have
 10 taken place since then: principally our Statement on
 11 Division of Competence, our Response to the Objections
 12 on Competence raised by India. And in the intervening
 13 period, there has also been the first meeting of the
 14 Neutral Expert, in which India did participate. So
 15 there's a lot of water under the bridge, so to speak.
 16 Noting India's participation in the Neutral Expert
 17 proceedings, I must put on the record our expression of
 18 regret that our friends from India are not here today.
 19 Pakistan and India live under the same Indus Waters
 20 Treaty. It serves the interests of both countries and
 21 peoples. It is a fixture in the peaceful relations
 22 between the two states. And I note that arbitral
 23 proceedings and court proceedings are a means of
 24 resolving disputes between states, not a cause for
 25 exacerbating them.

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09:45 1 India's absence in the room and from these
 2 proceedings, we say, neither serves India well, nor the
 3 cause of settled relations between Pakistan and India.
 4 We would very much have wished to join argument with our
 5 colleagues and friends opposite from India today in
 6 a spirit of good neighbourliness, and we regret their
 7 absence.
 8 Mr Chairman, members of the Court, perhaps before
 9 I go back to my scripted remarks, there are one or two
 10 observations, I think, Mr Chairman, arising out of your
 11 opening observations and also from the statement made by
 12 Pakistan's Agent that I might just address, to put
 13 properly in context.
 14 Mr Chairman, you said quite properly on the record
 15 that the Court takes its task of addressing its
 16 competence very seriously, even in the absence of the
 17 Respondent in these proceedings. You also identified
 18 various steps that had been undertaken since we last
 19 met.
 20 There was one rather material step, Mr Chairman,
 21 that you did not mention, which I'm going to take the
 22 opportunity to do so, and that is that two weeks ago,
 23 the parties -- for these purposes, Pakistan -- received
 24 36 multi-part written questions from the Court for
 25 response in this hearing. May I say on the record that

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09:46 1 we consider ourselves to be subject to cross-examination
 2 and the closest of scrutiny. We don't take this process
 3 lightly, notwithstanding the absence of the Respondent.
 4 I should say that we don't take issue with the
 5 questions. Indeed, as I recall, we invited them
 6 expressly because I think it helps to hone the
 7 engagement and the response to the issues.
 8 I should say that normally when there is
 9 a respondent on the other side of the proceedings, the
 10 claimant state will have an opportunity to focus its
 11 observations on the written submissions of the other
 12 side. We don't have that today.
 13 We have chosen not -- and I hope this will sit well
 14 with you -- we have chosen not to simply try and repeat
 15 our written submissions; that's not going to serve
 16 anyone. We hope our written submissions were clear and
 17 as fully comprehensive as possible. So we have chosen
 18 to address the proceedings, in a way that I will come to
 19 in just a moment, in response to the questions that you
 20 put, and to sort of weave those responses around
 21 a larger narrative. But I hope that that will work
 22 well.
 23 I should also say, because our Agent drew attention
 24 to the parallel proceedings, it's a point that we'll get
 25 to probably in most detail in my closing submissions

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09:48 1 tomorrow morning. But just so that you have this
 2 clearly in mind and we can clear away this small aspect.
 3 There are now two parallel proceedings. The Neutral
 4 Expert's terms of retainer were signed by him after each
 5 party signed them on 2 May, so that's just over a week
 6 ago. So the terms of retainer of the Neutral Expert are
 7 now in place. I should say clearly that they were
 8 signed by Pakistan with no objection.
 9 We have, of course -- and I'll come back to this in
 10 due course -- we have, of course, raised certain
 11 competence issues. And although aspects of procedure
 12 are not yet resolved by the Neutral Expert, it seems
 13 fairly clear, on the basis of the first meeting -- and
 14 in particular, Pakistan drawing this to the attention of
 15 the Neutral Expert and indeed of India -- that there is
 16 an obligation on the part of the Neutral Expert to
 17 undertake his own competence process under paragraph 7
 18 of Annexure F, which I will come on to, that there will
 19 be such an initial competence process. The timing and
 20 the scope of that is yet to be resolved, but that
 21 process will happen.
 22 So I think the points to take from this are that
 23 there are now two parallel processes underway, as
 24 Mr Aslam has noted, but the shape and contour of those
 25 processes remains to be resolved: in the case of the

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09:49 1 Court, through not simply the proceedings on competence
 2 but also having regard to our Statement on Coordination;
 3 and before the Neutral Expert, indeed these issues will
 4 fall to be resolved once we engage in the paragraph 7,
 5 Annexure F competence hearing. That's, in other words,
 6 to decide whether the issues that have been put by India
 7 before the Neutral Expert fall to be regarded as
 8 difference or disputes, or whether the Neutral Expert
 9 should deem any of them to be disputes.
 10 So that's just to sort of contextualise. One other
 11 sort of housekeeping point to make, and then I'll return
 12 to my scripted remarks.
 13 We understand that you have, courtesy of the PCA --
 14 and we thank the PCA for its efforts -- three bundles of
 15 written documents. I should say: for purposes of my
 16 remarks, I'm only going to be taking you to the slim
 17 one, that's to the Treaty; my colleagues will take you
 18 to others.
 19 You should also by now have received -- I think they
 20 were sent at about 7 o'clock this morning -- hearing
 21 materials and demonstratives for some of my colleagues,
 22 and we'll take you to those. And I think some of my
 23 colleagues will also be referring you to other documents
 24 which we didn't consider necessary to put in a hardcopy
 25 bundle. We will either call them up on the screen or in

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09:51 1 fact, in a number of instances, we've printed out twelve
 2 copies and we will hand up those that are necessary. So
 3 that's by way of housekeeping.
 4 As I mentioned, I will be taking you to the Treaty,
 5 so if you do have that to hand, your slim bundle, that
 6 will be helpful.
 7 I should say that -- and this is no observation on
 8 the tremendous and very welcome efficiency of the PCA --
 9 but I was a little troubled that the copy of the Treaty
 10 that you now have may be a new copy of the Treaty,
 11 because I was rather hoping that you might have the
 12 marked-up one from two months ago. There we are. And
 13 I take note for the record that the Chairman has waved
 14 his heavily marked-up copy of the Treaty before us.
 15 So let me return, Mr Chairman, members of the Court,
 16 to my scripted opening remarks, and say that my task is
 17 to set the scene for Pakistan's substantive submissions
 18 on competence. Having stood in front of you, I think,
 19 for six or seven hours at the time of the first meeting,
 20 that did not seem to be a good use of our time, so we're
 21 going to be spreading the submissions across seven
 22 counsel.
 23 In effect, my starting off and then concluding
 24 tomorrow, I'm the bread in the sandwich, if I can put it
 25 in those terms. Those following me will address the

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09:52 1 details of Pakistan's case, both its affirmative case on
 2 competence and its response to the specific objections
 3 that India has raised. So my task is to frame that
 4 case, to identify key threads running through it and to
 5 contextualise what you will hear from others in greater
 6 detail.
 7 Mr Chairman, members of the Court, you have in front
 8 of you a draft scheme of our submissions, both to give
 9 you a sense of who will be addressing what and so that
 10 you can mark the progress that we are making. For ease
 11 of future reference, I have also noted who will be
 12 addressing which amongst the 36 questions that you have
 13 put to us for response during the hearing. And as we do
 14 so, we will endeavour to cite to the particular
 15 question, so that when you go back to the transcript,
 16 that will be readily apparent.
 17 Although you have the written text of the scheme of
 18 observations, let me take you through it quickly to
 19 orientate you to it. I expect to be on my feet perhaps
 20 for an hour, maybe a little bit more. I think our
 21 timings are going to be dependent on questions that we
 22 get from you, and I will come back to that: we do very
 23 much invite questions, but we're also conscious of time,
 24 so I'll address that in just a moment.
 25 In the course of my opening submissions, I will

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09:54 1 respond to a number of the questions that go to
 2 preliminary framing and incidental issues.
 3 I will be followed by Laura Rees-Evans, who will
 4 focus principally on the issues raised by your questions
 5 concerning the Kishenganga arbitration -- those,
 6 I think, are rather important framing considerations --
 7 and what we say you should take from that Court's -- in
 8 particular, its partial award. Of course, there were
 9 other decisions and awards.
 10 Ms Rees-Evans will be on her feet for 35 minutes or
 11 so, and she's got slides and demonstratives. We will
 12 probably need to take a coffee break in the middle of
 13 her submissions, but she will be attentive to this and,
 14 Mr Chairman, will, with your permission, alert you to
 15 a convenient point to break in the middle of her
 16 submissions.
 17 Ms Rees-Evans will be followed by Dr Cameron Miles,
 18 who will address the factual issues running from
 19 March 2013, so that's before the Kishenganga arbitration
 20 finally concluded in December 2013, running from then up
 21 until the intergovernmental negotiations of July 2016
 22 that preceded Pakistan's Request for Arbitration on
 23 19 August. And he will address your questions going to
 24 the period 2014 to July 2016.
 25 You will recall well, and you will know from our

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09:55 1 submissions, that this is a critical period, in which
 2 Pakistan, first of all, made a Neutral Expert Request,
 3 in July 2015; thereafter it withdrew that request, in
 4 February 2016; and then it took all necessary and
 5 appropriate steps, prior to the submission of its
 6 Request for Arbitration on 19 August 2016.
 7 If I may, I will just remind you that that date of
 8 19 August 2016 is the date on which Pakistan's Request
 9 for Arbitration was physically transmitted to India. It
 10 was handed over to India in hard copy, to the Indian
 11 High Commissioner to Islamabad. And under paragraph 3
 12 of Annexure G, that is the deemed date of institution of
 13 these proceedings. So 19 August 2016 is a critical
 14 date, if I can put it in those terms.
 15 Dr Miles will take you to the key documents, most of
 16 which are in volume II of our Competence Response.
 17 I think you have them in a slightly different format in
 18 the bundles that have been prepared for you by the PCA.
 19 You will be familiar with many of those documents, and
 20 certainly some of the key documents, such as the
 21 February 2016 document, because you'll recall I walked
 22 you through that in some detail at the end of January.
 23 Dr Miles considers that his submissions will run for
 24 about 70 minutes. I expect that they may run for two or
 25 three hours, because no doubt you will have lots of

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09:57 1 questions to put to him, but I didn't want to sort of
 2 irk him unduly before he came into the room!
 3 Dr Miles will be followed by Mr Jiries Saadeh, who
 4 will address the period from the conclusion of the
 5 intergovernmental negotiations in July 2016, through the
 6 period of Pakistan's Request for Arbitration on
 7 19 August 2016, and again through the period of India's
 8 Request to the World Bank for the Appointment of
 9 a Neutral Expert on 4 October 2016, and to the
 10 institution of the pause by the World Bank on
 11 12 December 2016. And again, you will recall, I hope,
 12 some of the key documents from this period from the
 13 first meeting.
 14 Mr Saadeh will be on his feet for 25 minutes or so.
 15 He will be followed -- this is now taking us into the
 16 afternoon. I should have said that I think Dr Miles
 17 will straddle the lunch break, but again he will be
 18 attentive to a suitable time for that break. But we
 19 then come, after Mr Saadeh, to Professor Philippa Webb.
 20 She will address Pakistan's affirmative case on
 21 competence and respond to India's principal objections,
 22 and will address various questions going to those
 23 issues.
 24 I should say here, when we come to those detailed
 25 legal responses, which are mostly Professor Webb and

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09:58 1 then Mr Fietta, that again we are going to approach this
 2 through the prism of your questions, rather than simply
 3 reiterate our written submissions. But Professor Webb
 4 will be on her feet for 75 minutes or so, and her
 5 submissions will likely straddle the afternoon coffee
 6 break.
 7 Then finally for today, Mr Stephen Fietta will
 8 address the scheme of the Treaty, the interpretation of
 9 Article IX and India's Article IX objections, another
 10 key aspect of this hearing. And he will also address
 11 the quite extensive questions that you've put to the
 12 parties on these issues. It is likely -- almost
 13 certain -- that Mr Fietta's submissions will carry us
 14 overnight, to conclude tomorrow morning.
 15 Then I will conclude our first-round submissions
 16 thereafter by addressing your remaining questions that
 17 go to the parallel proceedings before the Neutral Expert
 18 and the issue of a workable division of competence. And
 19 I think, in the light of Mr Lino's response,
 20 Mr Chairman, to you, I am no longer going to be talking
 21 about cooperation but rather a division of competence.
 22 But as you'll see when I come to make my submissions, we
 23 think that everything remains on the table, perhaps bar
 24 a symbiotic engagement between the two mechanisms.
 25 I will also then tomorrow set out Pakistan's

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10:00 1 submission on an appropriate way forward. Mr Chairman,
 2 the Court has -- in I think it's questions 35 and
 3 perhaps 36 -- invited some submissions on that, and
 4 I will address our views on the appropriate way forward.
 5 I very much anticipate that this will become
 6 a matter on which you would like to engage with us
 7 further, and it may be that this is a matter that will
 8 be held over in some respects to Saturday morning, in
 9 the light of your further questions at the first
 10 meeting, noting the absence of the other party. This
 11 proceeded by way of a back-and-forth between counsel and
 12 the Court. And if that's the appropriate way that you
 13 wish to proceed, we'd be very happy to do so on Saturday
 14 morning. But I will try and set some framing remarks.
 15 Mr Chairman, members of the Court, we would,
 16 of course, be very happy to take further questions as we
 17 proceed. It will not be conducive to anyone staying
 18 awake in these proceedings if we just talk for
 19 six hours, so we would be very happy indeed to take
 20 questions.
 21 We are mindful of the constraints of time. We
 22 didn't want to try your patience and ask for the whole
 23 of tomorrow, so we only asked for an hour and a half,
 24 but we are likely to bump up against that time. So
 25 I hope you will not mind or take offence if, when you do

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10:02 1 ask questions, we politely defer those to Saturday
 2 morning, or give short answers and then defer the longer
 3 answers to the Saturday morning.
 4 We do not wish to hide from any scrutiny. There are
 5 issues of both legal and factual complexity which, I say
 6 in all candour, sometimes we have been struggling with.
 7 And you'll note from our written response, where we
 8 cited, if memory serves me, from Sir Franklin Berman's
 9 observations in the first Kishenganga case, where he
 10 spoke about that Court's struggle with the complexity of
 11 the Treaty and how some of these provisions work, we do
 12 not pretend that there is perfect clarity in these
 13 provisions.
 14 As Mr Aslam has said, and as I will come on to say,
 15 one of the big challenges that we face in these
 16 proceedings is that we consider that through the actions
 17 of India in raising its Request for the Appointment of
 18 a Neutral Expert with the World Bank on 4 October and
 19 then the Court's institution of the pause, that that led
 20 to a systemic malfunction in the workings of Article IX
 21 of the Treaty. So we are within the contours of
 22 Article IX, but clearly the circumstances that we are
 23 facing now are not addressed by Article IX. And I'll
 24 come back to deal with that in a little bit more detail.
 25 Let me then move to issues of substance. As I do

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10:03 1 so, let me, if I may, make one preliminary point, and
 2 it's a point that picks up on an observation that
 3 Mr Aslam made. It's also set out in our written
 4 submissions, but nonetheless it warrants, I think,
 5 a specific reference now. It's a point that goes to
 6 judicial method. And of course I say this with the
 7 utmost respect, and this is by way of a submission and
 8 you will decide on the way that you wish to proceed in
 9 due course.
 10 As you come to deliberate after the close of these
 11 proceedings, you may identify a pathway to your decision
 12 on competence that would be minimalist in its approach,
 13 in terms of its engagement with a wide range of issues
 14 presented by the dispute over competence.
 15 There are the duelling requests of the parties.
 16 There is the evaluation of the factual record. We have
 17 attempted to be as full as possible, in the interests of
 18 transparency, in putting that material in front of you,
 19 but there is a lot of the factual record that will have
 20 to be evaluated for the purposes of this decision on
 21 competence. There is the issue of the interpretation
 22 and application of Article IX and of Annexure F and
 23 Annexure G. There is the role of the World Bank. There
 24 are the implications of the pause, and there are more.
 25 Mr Chairman, members of the Court, we would urge you

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10:05 1 not to take a minimalist route, not to rely on notions
 2 of judicial economy to avoid addressing key issues.
 3 I know, having sat on the other side of the bench,
 4 that it is often appealing to rely on notions of
 5 judicial economy because one doesn't want to get drawn
 6 into a thicket of issues that one considers may not be
 7 necessary for reaching the end of the matter before you.
 8 But that is not the case -- or we urge that it should
 9 not be the case in these proceedings, for reasons that
 10 Mr Aslam has already mentioned.
 11 Almost more than the dispute of which you are
 12 seised, Pakistan is concerned that the duelling requests
 13 by the parties, Pakistan's Request for Arbitration and
 14 India's subsequent Neutral Expert Request, and then the
 15 institution of the pause by the World Bank, caused
 16 a serious malfunction in the Treaty's dispute settlement
 17 architecture. And I would urge you to go back to
 18 Mr Aslam closing observations on this, about the
 19 importance of the Treaty and getting it back to
 20 functionality.
 21 The drafters and the signatories of the Treaty could
 22 not have contemplated the issues with which we are now
 23 concerned. Had they done so, they would have written in
 24 different texts into the Treaty. The idea that the
 25 World Bank could unilaterally simply impose a pause and

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10:06 1 put a block on proceedings for six years would have
 2 beggared belief in 1960.
 3 Article IX and Annexures F and G address the issues
 4 with which you are faced only imperfectly. The Bank
 5 should not have acted as it did on 12 December 2016 in
 6 imposing the pause. As you heard, and as we said in the
 7 first meeting, that caused immeasurable damage both to
 8 the edifice of the Treaty and to Pakistan's rights and
 9 interests.
 10 The Bank is a party to the Treaty, expressly a party
 11 to the Treaty: it put its fingerprint on the bottom of
 12 the page. In the signature block, it says: and the Bank
 13 for purposes of, inter alia, Annexure F and Annexure G.
 14 So it is a party to the Treaty. It had, and it has,
 15 obligations under the Treaty. It had choices to make in
 16 2016 which could have reinforced the Treaty's settlement
 17 architecture, notwithstanding the duelling requests. It
 18 failed to act in fulfilment of its obligations under the
 19 Treaty.
 20 As you have heard from Pakistan's Agent, unless
 21 there is clear guidance from the Court on the issues
 22 with which you are presented, including the pause, we
 23 are concerned that there is every risk that the
 24 structural dispute settlement issues with which we are
 25 faced in these proceedings could repeat themselves in

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10:08 1 other cases in times to come. Part of the task of the
 2 Court's decision on competence must be to script
 3 a pathway back to the functionality of the Treaty's
 4 [dispute] settlement architecture. And this imperative
 5 will only be achieved if the Court addresses all of the
 6 issues with which it is faced, not only those that are
 7 narrowly necessary for its decision.
 8 Mr Chairman, members of the Court, we appreciate
 9 of course that part of your calculation will be to
 10 encourage India's re-engagement with the proceedings --
 11 and, Mr Chairman, you have mentioned this already, quite
 12 properly -- and to avoid unnecessary escalation. And
 13 we've seen, both in the correspondence from India to the
 14 Bank and indeed in other correspondence and oral
 15 statements -- and you have on the record the transcript
 16 of the proceedings before the Neutral Expert. We urge
 17 you to read those, both because they go to these issues
 18 of competence but also because they go to issues of
 19 merit.
 20 But you will see, as you go through that transcript,
 21 that there is a lot of thumping of the drum by our
 22 friends and colleagues from India. We regret that, but
 23 it's there. So we appreciate that part of your
 24 calculation will be to avoid an unnecessary escalation.
 25 And I should say on the record that Pakistan is very

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10:09 1 sensitive to these imperatives, and does not urge upon
 2 you decisions that would not serve a wider Treaty
 3 purpose.
 4 As we will address in more detail in due course,
 5 Pakistan is no longer objecting to a full and engaged
 6 role for the Neutral Expert, even though it is of the
 7 view that India's Neutral Expert Request, as you heard
 8 from our Agent, was both improper and invalid. But
 9 Pakistan is now committed, through its engagement in the
 10 Neutral Expert process, to cure that invalidity. This
 11 is akin to the principle of forum prorogatum, by which
 12 a party assents to the competence or jurisdiction of
 13 a court or tribunal through its participation in the
 14 settlement process.
 15 I'll come back and unpack some of that in a little
 16 bit more detail tomorrow, because it goes to one of your
 17 questions. But we are participating in the process,
 18 notwithstanding our concerns about impropriety and
 19 invalidity. We are, with eyes open, curing that aspect
 20 of invalidity.
 21 Now, there may be some residual aspects of
 22 competence of the Neutral Expert, both under paragraph 7
 23 of Annexure F but also going to issues under
 24 paragraph 13 of Annexure F, which we will have to get
 25 to, but we don't need to do so now.

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10:11 1 But the curing of invalidity by participation in the
 2 process does not mean and should not mean that the
 3 causes of the systemic malfunction that brought us to
 4 this point should be sidestepped in this phase of the
 5 proceedings in the hope that they will simply fade into
 6 the residue of memory. The malfunction that brought us
 7 to this point could readily occur again in the absence
 8 of clear guidance from the Court about the proper
 9 workings of the Treaty and the Treaty's settlement
 10 modalities in all of its aspects.

11 Mr Chairman, members of the Court, I pause here,
 12 recalling, Mr Chairman, in particular your remarks or
 13 enquiries at the time of the first meeting, where,
 14 although you didn't put it in these terms, I read
 15 into -- I think this is on the record -- into your
 16 enquiry at that point that there may be a presumptive --
 17 rebuttable, no doubt -- but a presumptive hesitancy and
 18 caution on the part of the Court to engage on issues
 19 which may take it to pass on the conduct of the Bank.
 20 And we appreciate that there is a high sensitivity
 21 there.

22 We also appreciate, notwithstanding that we might
 23 wish you to go there, but we also appreciate that you
 24 may have a proper caution about reaching conclusions
 25 about aspects of the Bank's conduct.

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10:12 1 When I suggest or contend that we hope that you will
 2 not be enticed by notions of judicial economy, and that
 3 you will address all of these issues, as I suggested, we
 4 do not urge you to reach conclusions or decisions that
 5 you do not need to reach for purposes of the operation
 6 of the Treaty. The guidance that we are looking for,
 7 and the guidance that we think is absolutely essential
 8 as regards the pause and the Bank's conduct, is the
 9 obligation to empanel the Court once proceedings have
 10 been instituted; that the pause itself did immeasurable
 11 harm: it put a thumb on the scale in India's cause.
 12 I will come back to that in more detail. Those are the
 13 kinds of issues that we think it is absolutely essential
 14 that the Court engages with.

15 Let me then turn -- unless there are any questions
 16 that you would like to raise on what I have said so far,
 17 then I will turn to some of the more substantive
 18 aspects.

19 Let me then turn to some of the meat of what I'd
 20 like to say, bearing in mind that I'm still the bread in
 21 the sandwich, but I'm going to go to the meat: to
 22 India's failure to cooperate.

23 Mr Chairman, members of the Court, the substance of
 24 the broader dispute between Pakistan and India concerns
 25 the interpretation and application of Article III of the

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10:14 1 Treaty and Annexure D of the Treaty, and in particular
 2 paragraph 8 of the latter of the Treaty. We took you
 3 through those provisions: both I did, in terms of the
 4 law, and Pakistan's Indus Waters Commissioner, in terms
 5 of the practicality, took you through those provisions
 6 and their context in the first meeting. They concern
 7 new run-of-river hydroelectric plants on the
 8 Western Rivers of the Indus Basin.

9 Having regard to the extensive hydroelectric plant
 10 construction projects that India has in train --
 11 an issue that is addressed in our Competence Response
 12 and to which Pakistan's Agent has already adverted --
 13 having regard to these issues, the dispute between the
 14 parties about the interpretation and application of
 15 these provisions -- Article III, Annexure D,
 16 paragraph 8 -- has a reach beyond the individual plants,
 17 going to the wider application of the Treaty. This
 18 seems to me to be unarguable. It's there. This is
 19 a concern that we have and we've expressed for years.

20 Assuming that you affirm your competence, which we
 21 hope you will do, the Court will get to those issues.
 22 And looking at the two engineering members of the Court,
 23 we have no doubt at all that you will move out of your
 24 discomfort zone into your comfort zone as we go on, if
 25 you affirm your competence. So you will have to grapple

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10:16 1 with those issues of interpretation and application.
 2 For the moment, though, in this competence phase of
 3 the proceedings there are other aspects of the Treaty
 4 that are engaged. And I don't, at this particular
 5 point, refer to Article IX and Annexures F and G,
 6 although of course those provisions are absolutely front
 7 and centre of this hearing. But I don't refer to those
 8 provisions. What I refer to, rather, is to the
 9 cooperation imperative that runs throughout the Treaty
 10 from its preamble through to its core provisions.

11 This imperative, and the substantive obligations to
 12 which it gives rise, are at the very heart of the
 13 factual narrative that led Pakistan to make a Neutral
 14 Expert Request in July 2015; then to withdraw that
 15 unacted-upon request in February 2016; then to trigger
 16 the dispute settlement machinery of Article IX,
 17 paragraphs 3 to 5 of the Treaty; and eventually to
 18 transmit to India, on 19 August 2016, a Request for
 19 Arbitration.

20 I will take you to those provisions that deal with
 21 cooperation in a moment. But before I do so, let me
 22 provide you with a little bit more context.

23 The cooperation imperative of the Treaty -- and
 24 Pakistan's high concern that India has persistently
 25 thumbed its nose at these provisions -- is not simply at

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10:18 1 the heart of the present dispute, it was at the core of
 2 the dispute that led to the Kishenganga arbitration that
 3 ran from the Request for Arbitration in May 2010 to the
 4 final award of the Court in December 2013. And that
 5 dispute began life in a similar fashion to the present
 6 dispute, rooted in a number of disagreements between the
 7 parties, concerning the same run-of-river provisions
 8 that are engaged by this dispute.
 9 As your questions have enquired about, Pakistan made
 10 a Neutral Expert Request in 2009 in the circumstances of
 11 those disagreements. And there was eventually a tacit
 12 understanding between the parties that the Neutral
 13 Expert process would await the outcome of the
 14 Kishenganga arbitration instituted by Pakistan by its
 15 Request for Arbitration of May 2010.
 16 Now, I pause here just to interpolate as an aside --
 17 and this is an issue that both Ms Rees-Evans and
 18 Dr Miles will address in their respective submissions --
 19 but I note that the 2009 Neutral Expert Request, which
 20 was subsequently subsumed into the July 2015
 21 Neutral Expert Request, was eventually withdrawn in
 22 February 2016. So that's sort of the "wrapping up with
 23 a ribbon", if you like, from 2009 up until
 24 February 2016. But as I said, both Ms Rees-Evans and
 25 Dr Miles will address that rather more fully.

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10:19 1 But returning to my key point, the key takeaway from
 2 the period subsequent to the Kishenganga arbitration,
 3 and in the latter period after the Kishenganga award,
 4 concerning the implementation of the Kishenganga
 5 award -- because there was difficulty, there was dispute
 6 over the implementation of the Kishenganga award; that's
 7 why we're here before you today -- the key takeaway is
 8 that India simply disengaged. It simply disengaged,
 9 post the Kishenganga award. It did not reply to
 10 correspondence, it refused to take steps to give effect
 11 to the Kishenganga award, and it failed in its duty of
 12 cooperation under the Treaty more widely.
 13 Mr Chairman, members of the Court, with your
 14 permission, we put before you two days ago some
 15 supplementary materials, including a bundle of documents
 16 concerning Pakistan's request for site visits and tours
 17 of inspection, mostly focused on the Kishenganga Plant
 18 but also, particularly in the latter stages, focused on
 19 the Ratle Plant.
 20 This is all correspondence and communications
 21 between the two Indus Commissioners and between the two
 22 governments. So this is material that India has had for
 23 years and years and years, as we said in our application
 24 to you to allow those documents to be put in, and as you
 25 quite properly addressed in your procedural order giving

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10:21 1 us permission.
 2 Given considerations of time, I do not propose to
 3 take you through the detail of this material. But we
 4 have given you a brief roadmap guiding you through it as
 5 part of the bundle of documents, and I would very much
 6 urge you, members of the Court, to read that.
 7 That material is striking. And it is directly
 8 relevant to the issues with which you are now concerned,
 9 both for purposes of contextualising the present issues
 10 and because it goes to the good faith of the parties
 11 about which you asked, and because it goes to relations
 12 between the parties around the issue of cooperation.
 13 What is quite striking about this correspondence is
 14 that Pakistan, on dozens of occasions between 2014 and
 15 2023, over a nine-year period, on dozens of occasions
 16 wrote formally to India to request site visits and tours
 17 of inspection, pursuant to express provisions in the
 18 Treaty. In the vast majority of cases, India simply
 19 failed to respond. In a number of instances, India
 20 responded, but only to give excuses about why a site
 21 visit or tour of inspection could not take place, and
 22 promising to follow up when conditions were right. It
 23 never followed up, not once.
 24 You may be stunned to learn that since the site
 25 visits that were part of the Kishenganga court

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10:22 1 proceedings, Pakistan has not once, not on a single
 2 occasion, been able to undertake a tour of inspection of
 3 the Kishenganga Plant, despite concerns about downstream
 4 effects from the operation of that plant, and despite
 5 the dozens of requests. On only one occasion, in 2009,
 6 as part of a wider tour of inspection, has Pakistan been
 7 able to see the Ratle site, and this was before
 8 construction began.
 9 More recently, notwithstanding that the Indian
 10 Indus Waters Commissioner himself wrote to the Pakistani
 11 Commissioner in January of this year to notify expressly
 12 on the record, as he was required to do, modifications
 13 to the Ratle Plant designs, India has failed to respond
 14 to three follow-up requests since January of this year
 15 from Pakistan's Commissioner to visit the site and to
 16 provide further information in response to India's
 17 notification of modifications. The correspondence
 18 speaks for itself.
 19 Mr Chairman, members of the Court, I draw this
 20 material to your attention for two principal reasons.
 21 The first and the most compelling reason is that the
 22 beginning of this sequence of correspondence is
 23 12 August 2014.
 24 Between that date, 12 August 2014 -- now, remember,
 25 the final award of the Kishenganga Court was

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10:24 1 December 2013, so we're now eight months later. Between
 2 12 August 2014 and the date on which Pakistan withdrew
 3 its Request for a Neutral Expert and indicated its
 4 intention to make a Request for Arbitration -- that's
 5 25 February 2016, that's 18 months -- between those two
 6 dates, that 18-month period, there is a record of
 7 21 exchanges between the parties on Pakistan's request
 8 to undertake a tour of inspection of the Kishenganga
 9 Plant. That's 21 exchanges in 18 months. No site visit
 10 was permitted by India.
 11 The site visit correspondence and the exchanges
 12 consummately illustrate India's tactics: play long,
 13 dissemble, delay, do not engage; and in the meantime
 14 build, build, build on the Western Rivers. Tactics that
 15 played out in parallel to Pakistan's initial Request for
 16 a Neutral Expert in July 2015, and that played out too
 17 following Pakistan's indication on 25 February 2016 that
 18 it considered that the issues now framed in the Request
 19 for Arbitration should be addressed by the Court of
 20 Arbitration.
 21 So all of this was happening in parallel. And those
 22 sort of parallel streams of engagement are going to be
 23 very material for how you view what happened between
 24 July 2015, when Pakistan made a Request for a Neutral
 25 Expert, February 2016, when Pakistan withdrew the

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10:26 1 Request for a Neutral Expert, the negotiations in
 2 July 2016, which failed, and then the August 2016
 3 Request for Arbitration. While that was going on,
 4 Pakistan was requesting site visits. Nothing. No
 5 response. No site visits.
 6 So there is a wider swathe of exchanges which inform
 7 the way that Pakistan reached its conclusion that there
 8 was no scope to proceed with a Neutral Expert Request;
 9 there was only one route that was credibly open to
 10 Pakistan, which was to request a Court of Arbitration.
 11 Pakistan went through the process meticulously of
 12 going through the Article IX, paragraphs 3, 4 and 5
 13 processes. There were negotiations. Then India said,
 14 "Well, let's play it long" -- they didn't quite put it
 15 in those terms -- "Come back for more negotiations".
 16 But Pakistan had seen what India was doing, not just on
 17 this track but also on the site visit track. There was
 18 a record of dissembling, of playing it long, of kicking
 19 it into the long grass and building, building, building.
 20 And this was the point at which the Kishenganga
 21 Plant was very, very close to completion. This is
 22 exactly what happened. And then, with the pause, India
 23 got its way: it was allowed to finish the plant and
 24 bring it into operation.
 25 THE CHAIRMAN: Thank you, Mr Bethlehem.

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10:27 1 I fully understand the point you're making about the
 2 failure to allow the site visits over a lengthy period
 3 of time. What I'd like you to address a little bit more
 4 directly is how that would lead to Pakistan thinking
 5 that instead of a Neutral Expert approach, a Court of
 6 Arbitration approach is the way to go. Because I'm not
 7 quite sure I see the connection between the two.
 8 SIR DANIEL: Let me give you a very preliminary answer, and
 9 I'm not going to defer to Saturday on this but I'm going
 10 to defer to Dr Miles, because in fact he's going to be
 11 taking you through all of this.
 12 You will recall at the time of the first meeting
 13 that I took you, I think almost line by line, through
 14 the Pakistani correspondence of February 2016 where the
 15 Pakistani Commissioner says, "There's been no response
 16 on the Neutral Expert Request. We withdraw that
 17 request; it has elapsed, we withdraw it. The issues
 18 that are before us we consider can only be addressed
 19 through a systemic process and can only be addressed by
 20 the Court".
 21 So the short answer is: all of the material that
 22 I've drawn to your attention now goes to the reasonable
 23 apprehension in Pakistan's mind that they did not have
 24 an engaged partner on the other side with India.
 25 Through the Neutral Expert Request, through the

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10:29 1 negotiating process, we went through all of those
 2 matters, but then into the Court of Arbitration.
 3 I think the question that you asked me goes to the
 4 motivation of why Pakistan considers that the Neutral
 5 Expert process would not be conducive to resolving the
 6 issues and that it was appropriate that the matter be
 7 referred to the Court. That's the February 2016
 8 correspondence, which Dr Miles will take you through.
 9 Pakistan reached the conclusion that the issues that
 10 were raised in the exchanges between the parties were
 11 not just plant-specific issues; they were systemic
 12 Treaty interpretation issues, which concern not just
 13 Kishenganga and Ratle but the 60 or so other plants that
 14 are part of India's run-of-river Western Rivers
 15 construction project.
 16 THE CHAIRMAN: Thank you.
 17 SIR DANIEL: So just coming back, to cap this off.
 18 The site visit correspondence is not simply similar
 19 fact evidence which opens up a window into India's
 20 conduct and its approach to engagement with Pakistan.
 21 It's that these exchanges were happening at exactly the
 22 same time as Pakistan was trying to engage India on the
 23 Neutral Expert and then the negotiating process under
 24 Article IX, paragraph 4. These other tracks of
 25 exchanges with India, in which India's dilatory tactics

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10:31 1 were clearly in evidence, were at the forefront of
 2 Pakistan's consciousness as it weighed how to proceed on
 3 the larger issues.
 4 Now, the second reason for drawing this material to
 5 your attention is that of course it goes to the issue of
 6 good faith or bad faith that you've asked about in
 7 connection with the conduct of both parties. We
 8 consider that this correspondence burnishes Pakistan's
 9 good faith, but that they show something less compelling
 10 and laudatory on India's part.
 11 Professor Webb will address the issues of good faith
 12 and bad faith more fully. While Pakistan refrains, in
 13 the interests of salvaging relations with India on these
 14 issues, Pakistan refrains from formally pressing
 15 an allegation of bad faith, it considers that there is
 16 compelling circumstantial evidence on the record that
 17 would allow the Court to reach such a conclusion, were
 18 you minded to do so.
 19 With that, Mr Chairman, members of the Court,
 20 I would like to take you through the key cooperation
 21 provisions of the Treaty. So if you have that to hand,
 22 that would be useful, in your small bundle. I'm not
 23 going to be making detailed submissions on them, but it
 24 would be helpful just to take you through them so that
 25 you can mark them in the margins.

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10:32 1 The first provision that I'd like to take you to is
 2 the preamble, page 1 of your text:
 3 "The Government of India and the Government of
 4 Pakistan, being equally desirous of attaining the most
 5 complete and satisfactory utilisation of the waters of
 6 the Indus system of rivers and recognising the need,
 7 therefore, of fixing and delimiting, in a spirit of
 8 goodwill and friendship, the rights and obligations of
 9 each in relation to the other concerning the use of
 10 these waters ..."
 11 And this is the critical part:
 12 "... and of making provision for the settlement, in
 13 a cooperative spirit, of all such questions as may
 14 hereafter arise in regard to the interpretation or
 15 application of the provisions agreed upon herein ..."
 16 This sets the tone of the Treaty and for the
 17 provisions to come. And the preamble of a treaty is, of
 18 course, uncontroversially, relevant to the
 19 interpretation of the Treaty as a whole and its
 20 application. And indeed, from memory, the Kishenganga
 21 Court referred to the preamble as well as a matter of
 22 some importance.
 23 I then reference, but skip over lightly, Articles II
 24 and III. But I reference them just to make the
 25 observation that the "let flow" obligations in

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10:33 1 Articles II and III, concerning the Eastern and Western
 2 Rivers, is essentially a particularised iteration of the
 3 duty to cooperate. Each state is under a reciprocal
 4 duty not to interfere with the other state's use of the
 5 waters of the Eastern and Western Rivers respectively.
 6 We then come, if I may take you to Article VI of the
 7 Treaty. And again, I reference this, I won't dwell upon
 8 it, but it is rather important.
 9 Article VI contains a similarly particularised
 10 dimension of the duty of cooperation in respect of the
 11 exchange of information, specifying that the parties
 12 shall exchange certain categories of information
 13 concerning aspects of daily water flow, daily water
 14 extraction, daily water withdrawals, daily water
 15 escapages and daily water deliveries on a monthly basis.
 16 Very, very specific.
 17 We then come to some rather more express cooperation
 18 provisions in Article VII, which is entitled "Future
 19 Co-operation". And let me highlight two elements of
 20 this provision, if I may.
 21 First, the chapeau of paragraph (1) of the article
 22 sets out expressly a general duty to cooperate "to the
 23 fullest extent possible":
 24 "The two Parties recognize that they have a common
 25 interest in the optimum development of the Rivers and,

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10:35 1 to that end, they declare their intention to co-operate,
 2 by mutual agreement, to the fullest possible extent."
 3 And the paragraph then goes on to highlight a number
 4 of areas of specific application of the general duty to
 5 cooperate to the fullest extent possible.
 6 Then I take you to paragraph 2, which is of
 7 considerable importance:
 8 "If either Party plans to construct any engineering
 9 work which would cause interference with the waters of
 10 any of the Rivers and which, in its opinion, would
 11 affect the other Party materially, it shall notify the
 12 other Party of its plans and shall supply such data
 13 relating to the work as may be available and as would
 14 enable the other Party to inform itself of the nature,
 15 magnitude and effect of the work. If a work would cause
 16 interference with the waters of any of the [other]
 17 Rivers but would not, in the opinion of the Party
 18 planning it, affect the other Party materially,
 19 nevertheless the Party planning the work shall, on
 20 request, supply the other Party with such data regarding
 21 the nature, magnitude and effect, if any, of the work as
 22 may be available."
 23 Mr Chairman, members of the Court, it is Pakistan's
 24 contention that India has failed to comply with its
 25 cooperation obligations in respect of these provisions.

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10:37 1 This does not require your close attention at this
 2 point, but it will be relevant on the assumption that
 3 the proceedings move forward. And you will see issues
 4 relating to this cooperation obligation in some of the
 5 site visit correspondence, because Pakistan has
 6 requested information from India.
 7 Apologies for moving through this rapidly, but this
 8 is really to allow you to make marginal notations.
 9 We then come to Article VIII, which contains the
 10 clearest and most explicit manifestation of the duty to
 11 cooperate, through the creation of a Permanent Indus
 12 Commission, the essential raison d'être of which is
 13 cooperation between the parties through their respective
 14 Indus Waters Commissioners.
 15 Paragraph 4 of this provision is particularly
 16 important. I will read aspects of it into the record.
 17 So the chapeau of paragraph 4:
 18 "The purpose and functions of the Commission shall
 19 be to establish and maintain co-operative arrangements
 20 for the implementation of this Treaty, to promote
 21 co-operation between the Parties in the development of
 22 the waters of the Rivers and, in particular ..."
 23 And I can skip over paragraph (a), but I urge you to
 24 have a look at it in slower time. Then paragraph (b):
 25 "... to make every effort to settle promptly, in

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10:38 1 accordance with the provisions of Article IX(1), any
 2 question arising thereunder ..."
 3 And I interpolate here: this reprises the language
 4 of the preamble. Paragraph (c):
 5 "... to undertake, once in every five years,
 6 a general tour of inspection of the Rivers for
 7 ascertaining the facts connected with various
 8 developments and works on the Rivers ..."
 9 And then paragraph (d) -- and let me pause for
 10 a moment and urge you to take out the black underliner
 11 and the red pen and put a big circle around this. It
 12 says:
 13 "... to undertake promptly, at the request of either
 14 Commissioner, a tour of inspection of such works or
 15 sites on the Rivers as may be considered necessary by
 16 him for ascertaining the facts connected with those
 17 works or sites ..."
 18 And then there's a paragraph (e) which I need not
 19 dwell upon.
 20 Mr Chairman, members of the Court, it will not have
 21 escaped your attention that paragraph 4 contains
 22 an express duty to facilitate site visits, tours of
 23 inspection. This provision is at the heart of the
 24 request that Pakistan has made over the past nine years,
 25 all coming to nothing in the face of India's

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10:40 1 comprehensive failure to engage.
 2 Still dealing with cooperation, I just make the
 3 point in passing: Article IX, with which you are
 4 principally concerned in this phase of the proceedings,
 5 also contains cooperation duties, but I am going to
 6 leave that to Mr Fietta to address. There are other
 7 cooperation obligations elsewhere in the Treaty: for
 8 example, in Annexure D, which we will come to, we hope,
 9 in due course.
 10 This overview of the headline provisions of the
 11 Treaty concerning cooperation suffices, I hope, for
 12 present purposes, to convey the appreciation that the
 13 Treaty is at heart a cooperation arrangement between the
 14 parties in respect of the management, utilisation and
 15 conservation of shared resources.
 16 Mr Chairman, members of the Court, I have not spent
 17 the time on these issues to distract you from the task
 18 at hand or simply to provide general context to the
 19 issues with which you are faced. On the contrary. In
 20 Pakistan's submission, this duty of cooperation is
 21 directly relevant to the issues you are asked to
 22 address: how you perceive your role and function going
 23 forward, and what you may consider you can properly say
 24 about the duelling Article IX settlement processes that
 25 are underway; and indeed, what you may consider you can

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10:41 1 properly say not simply to the parties in respect of
 2 these duelling processes, but perhaps also to the
 3 Neutral Expert through the medium of your decisions and
 4 awards.
 5 This goes to your question 26, on whether there is
 6 anything in the Treaty or in general international law
 7 that imposes a duty upon the Neutral Expert and the
 8 Court to cooperate. I will come back to this in more
 9 detail tomorrow, but let me just say a word or two more
 10 to lay the function for that.
 11 The duty of cooperation is, first and foremost,
 12 visited upon the two states parties; that is, Pakistan
 13 and India. The World Bank, which is also a party to the
 14 Treaty for specific purposes, cannot escape the reaches
 15 of the duty to cooperate when it comes to the exercise
 16 of its obligations under the Treaty.
 17 But beyond this -- and perhaps this is the nub of
 18 the issue for present purposes -- beyond this, the Court
 19 and the Neutral Expert are creations of the Treaty as
 20 well. And although the Treaty does not say in terms
 21 that a Court of Arbitration and a Neutral Expert shall
 22 cooperate -- because of course it did not contemplate
 23 duelling proceedings -- so although the Treaty does not
 24 say that in terms, the fundamental task of a Court and
 25 a Neutral Expert is to bridge disagreements between the

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10:43 1 parties. It's to bridge failures to cooperate.
 2 While the Court of Arbitration and the Neutral
 3 Expert are not permanent standing settlement bodies,
 4 they are also not institutions of settlement that are
 5 detached from the Treaty regime [with] which they
 6 engage. They are not the International Court of
 7 Justice, they are not an UNCITRAL tribunal. The Court
 8 and a Neutral Expert are themselves modalities of
 9 cooperation through the medium of third-party
 10 engagement, to secure cooperation and to achieve
 11 a return to cooperation between the parties when that
 12 breaks down.
 13 In Pakistan's submission, therefore, your function
 14 and the function of the Neutral Expert are rooted in the
 15 cooperation imperative of the Treaty, and must take
 16 cognisance of and proceed in the light thereof.
 17 I will return to this, Mr Chairman, members of the
 18 Court, in tomorrow's submissions.
 19 Mr Chairman, members of the Court, I'm going to turn
 20 now to some of the questions. I am mindful of the time,
 21 and also of the imperative of bringing on my colleagues
 22 sooner rather than later. So it may be that some of the
 23 questions that I was proposing to address in this
 24 opening submission I will defer to my closing
 25 submission, or deal with in a truncated form and then

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10:46 1 Mr Chairman, members of the Court, in our
 2 submission, one only has to spell out the proposition in
 3 these terms to become immediately cautious about it.
 4 Treaties are real-world instruments that have the
 5 purpose of shaping the conduct of their parties.
 6 Interpretation is not an abstract matter. Even advisory
 7 opinions -- as may happen across the hallway here --
 8 even advisory opinions emerge out of disputed facts or
 9 disputed interpretations of fact.
 10 But there is a more fundamental point engaged by the
 11 question, and this is what brings me to question 27:
 12 whether there is agreement that the Treaty does not
 13 permit the conduct of parallel proceedings under the
 14 Treaty on the exact same issues.
 15 Just to interpolate here before I get to that,
 16 I note for the avoidance of doubt that this formulation
 17 of the question, "the conduct of parallel proceedings
 18 under the Treaty on the exact same issues", does not
 19 quite accurately describe the situation at hand. The
 20 subject matter of India's Neutral Expert Request is
 21 entirely a subset of the subject matter of Pakistan's
 22 Request for Arbitration. India's request is therefore
 23 fully subsumed within Pakistan's request, but the same
 24 is not true vice versa. Pakistan's request goes much,
 25 much, much beyond India's request.

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10:44 1 come back to on Saturday, if I may.
 2 But there are two questions that I would like to
 3 spend a little bit of time on now, at the outset, and
 4 those are questions 22 and 27.
 5 In question 22, you ask whether the pause that was
 6 in place from December 2016 to March 2022 has any effect
 7 on the interpretation of Article IX; and in question 27,
 8 you ask whether the parties are in agreement that the
 9 Treaty does not permit the conduct of parallel
 10 proceedings under the Treaty on exact same issues. And
 11 for reasons that will become apparent from my response,
 12 it is convenient to take these two questions together.
 13 Focusing on question 22, whether the pause has any
 14 effect on the interpretation of Article IX, on first
 15 consideration, the fact of the pause would seem not to
 16 have any effect on the interpretation of Article IX.
 17 The interpretation of the text of a treaty should be
 18 a matter for objective analysis, capable of detachment
 19 from the particular circumstances in which it is
 20 invoked. A good faith interpretation of the ordinary
 21 meanings of the words of the Treaty, in their context,
 22 and in the light of the Treaty's object and purpose,
 23 should not, one might think, be affected by
 24 an artificially imposed pause on the operation of the
 25 provisions in question.

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10:47 1 Coming though to whether there is agreement that
 2 there cannot be parallel proceedings under the Treaty on
 3 exactly the same issues, there does indeed appear to be
 4 such agreement.
 5 Mr Chairman, members of the Court, you will recall
 6 from the first meeting the matrix of cooperation which
 7 I handed out to you, which you will find -- I don't
 8 invite you to turn it up, but you will find it at
 9 tab 3-B, volume II of the PCA hearing bundle. In that
 10 matrix of cooperation on the first page, the page with
 11 the text, we highlighted three statements, one from the
 12 Bank, one from India and one from Pakistan, each of
 13 which, in broadly similar terms, highlighted the dangers
 14 of potentially contradictory and inconsistent outcomes,
 15 and expressed the view that the Treaty does not
 16 anticipate parallel processes.
 17 I don't propose to tread into Mr Fietta's
 18 submissions on Article IX. I note though that, subject
 19 to some quite intricate variable geometry -- which he
 20 will begin to address, but you may wish then to follow
 21 up with further questions -- subject to some quite
 22 intricate variable geometry, the Treaty is crafted in
 23 terms of, in legal parlance, a number of forks in the
 24 road. Or maybe that's not legal parlance; that's
 25 parlance of a driver. A number of forks in the road.

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10:49 1 There is a Neutral Expert process and there is
 2 a Court process. A Neutral Expert can and must
 3 relinquish disputes to a Court process, and a Neutral
 4 Expert may also relinquish differences that are tied to
 5 disputes to a Court process; that's Article IX(2)(b) and
 6 paragraph 7 of Annexure F.
 7 A Court cannot address a difference "while it is
 8 being dealt with by a Neutral Expert"; that's
 9 Article IX(6).
 10 Questions arising out of a Neutral Expert decision
 11 that are not within the Neutral Expert's competence
 12 shall be addressed by a process that has the Court at
 13 its pinnacle; that's paragraph 13 of Annexure F.
 14 So these are the various forks in the road.
 15 While a Court may deal with anything, differences or
 16 disputes, a Neutral Expert may only deal with
 17 differences that are narrowly circumscribed by Part 1 of
 18 Annexure F.
 19 So Article IX, and its related provisions in
 20 Annexures F and G, set out tightly scripted modalities
 21 for settlement which do not contemplate at any stage
 22 proceedings between the Court and a Neutral Expert on
 23 exactly the same matters. At various points, there is
 24 a fork in the road: it goes to one, it goes to the
 25 other.

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10:52 1 Now, here's the rub, I think, and this is something
 2 that Pakistan's Agent mentioned already: given that we
 3 are faced with a situation of systemic malfunction of
 4 the Article IX architecture, that the current
 5 circumstances are not addressed by the text,
 6 interpretation is the only available medium by which
 7 a return to functionality can be achieved.
 8 Now, we are not asking you to contort here. The
 9 rules of interpretation focus not only on the words.
 10 Good faith, context, object and purpose, all cardinal
 11 principles of treaty interpretation, trump the lacuna in
 12 the words. All three of these elements -- good faith,
 13 context, object and purpose -- are touchstones that
 14 bring us back to cooperation.
 15 The Court's interpretative task, we submit, is to
 16 set out a pathway back to functionality. And we believe
 17 that this can be achieved, we have set out concrete
 18 proposals to this end, and I will address them in my
 19 closing submissions tomorrow.
 20 There are two other topics that I would like to
 21 address now, and then I will pause and pick up the
 22 remaining elements tomorrow.
 23 First, Mr Chairman, members of the Court, let me
 24 make one more brief and passing point about the
 25 World Bank, and it is to underline the importance that

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10:51 1 India's Neutral Expert Request to the Bank of
 2 4 October 2016, following Pakistan's earlier Request for
 3 Arbitration, and then the Bank's imposed pause, and then
 4 the parallel empanelment of the Court and the
 5 appointment of the Neutral Expert, had the effect of
 6 causing the system of Article IX to malfunction. It's
 7 just not catered for. Article IX does not contemplate
 8 the circumstances with which we are now faced. This is
 9 a rubric under which we are operating, however, and
 10 there are clearly elements of Article IX and Annexures F
 11 and G which remain relevant, functional and controlling.
 12 Now, the consequence of this, we contend, is that
 13 the pause, and India's conduct that led to the pause,
 14 and the Bank's action in bringing the pause to an end,
 15 we say are highly material to the interpretation of
 16 Article IX. And I note in this regard that Article IX,
 17 paragraph (1) contemplates questions concerning the
 18 interpretation or application of the Treaty, including
 19 necessarily the interpretation of Article IX itself.
 20 And as we all know, interpretation and application are
 21 symbiotically linked. You can't have one side of a coin
 22 without the other side of a coin; one goes with the
 23 other. And the application of Article IX is
 24 fundamentally affected by the pause and its related
 25 events.

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10:54 1 Pakistan attaches to its good relations with the Bank.
 2 Engaged cooperation with the Bank is essential to
 3 Pakistan's development and wellbeing. The Bank plays
 4 a pivotal role, and it is an imperative for Pakistan to
 5 maintain and enhance those good relations.
 6 This said, and without prejudice to the issue of
 7 Pakistan's wider relations with the Bank that I have
 8 just addressed, Pakistan's appreciation is that it has
 9 not been afforded fair dealing by the Bank in the past
 10 on issues relating to matters with which you are now
 11 seised. Many of those engaged on these issues
 12 historically at senior levels have moved on. So this is
 13 not an observation about those currently in place. And
 14 we appreciate that the current leadership made efforts
 15 to lift the pause and to move things forward.
 16 But the fact remains that historically the Bank put
 17 its thumb on the scale in India's interests. The pause
 18 allowed India to complete the Kishenganga Plant. The
 19 pause eviscerated Pakistan's interim measures request.
 20 The pause allowed the construction of the Ratle Plant to
 21 commence away from appropriate scrutiny. The pause
 22 caused the dysfunction of Article IX. The Bank may also
 23 consider that it has an interest in ensuring that its
 24 actions in the past are not exposed to critical
 25 scrutiny.

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10:56 1 Mr Chairman, members of the Court, Pakistan has less
 2 interest in the past than in the future. The past is
 3 relevant and lessons must be learned. And as I have
 4 already addressed, we hope and request that the Court
 5 will address these issues in the form of appropriate
 6 guidance for future conduct. There is a risk of
 7 repetition in the future, and this is what most
 8 exercises Pakistan.
 9 I then come to some brief observations about
 10 Pakistan's Request for Arbitration. And a number of my
 11 colleagues are going to be picking this up in more
 12 detail, so I do so because I will be providing
 13 a framework for some of their observations.
 14 I took you through the Request for Arbitration
 15 I think in some detail in the first meeting, and I hope
 16 that you will have a measure of recollection about that.
 17 We also addressed the Request for Arbitration in
 18 some considerable detail in our Competence Response, in
 19 paragraphs 76 to 88 of that Response. And I would also
 20 direct your attention to other aspects of the Response,
 21 because we addressed the antecedent communications from
 22 Pakistan to India that formed the basis of the Request
 23 for Arbitration at paragraphs 215 to 235 of our
 24 Competence Response. And there are three cardinal
 25 points that will be manifestly apparent from that

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10:57 1 discussion and from the underlying documents.
 2 The first point is that the Request for Arbitration
 3 is very materially different, and qualitatively so, from
 4 Pakistan's Neutral Expert Request of July 2015, more
 5 than a year previously.
 6 Second, the preponderant focus of the Request for
 7 Arbitration is on non-plant-specific systemic issues of
 8 treaty interpretation and requests for declaratory and
 9 injunctive relief. While technical design issues
 10 concerning the Kishenganga and Ratle Plants are raised,
 11 they are a foil by which to illustrate the issues of
 12 systemic interpretation that are the principal focus of
 13 the Request.
 14 Third, by a preponderant margin, the issues raised
 15 for resolution in the Request for Arbitration could not
 16 and cannot, on any conception, on any theory of the
 17 case, be addressed by the Neutral Expert or by any
 18 Neutral Expert. They simply do not come within the
 19 scope of Part 1 of Annexure F of the Treaty, which
 20 determines within narrow limits the scope of a Neutral
 21 Expert's putative competence.
 22 It also bears anticipating -- and this is a point
 23 that will be developed by Ms Rees-Evans and Dr Miles in
 24 their respective submissions in just a moment -- so it
 25 bears anticipating that the effect [is] that the Court

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10:59 1 of Arbitration is presumptively competent to address
 2 both systemic, interpretative and design-technical
 3 matters. In other words, the Court can address all
 4 differences and all disputes.
 5 Leaving aside the very many other grounds for such
 6 a conclusion, which Ms Rees-Evans and Mr Fietta will
 7 address, this proposition is clear from a plain reading
 8 of Article IX(2)(b) and, importantly, paragraph 7(b) of
 9 Annexure F of the Treaty, and also from Article IX(6).
 10 I don't ask you to turn up those provisions, again in
 11 the interests of time. But Article IX(2)(b) and
 12 paragraph 7(b) of Annexure F expressly contemplate the
 13 possibility that a Neutral Expert could decide to
 14 characterise a difference as a dispute, for settlement
 15 in accordance with the procedures addressed in
 16 Article IX(3) to (5), of which the Court is at the
 17 pinnacle. And Article IX(6) expressly, in terms,
 18 acknowledges that a Court could deal with technical
 19 plant-specific differences, although not at the same
 20 time as a Neutral Expert is doing so.
 21 So there are provisions of the Treaty which
 22 explicitly acknowledge that a Court can deal with
 23 differences, not only disputes.
 24 Now, the consequence of these cardinal points that
 25 emerge from a review of the Request for Arbitration is

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11:01 1 that unless the Court is for some reason not competent
 2 to address Pakistan's Request for Arbitration for some
 3 threshold procedural reason, there is no reason
 4 intrinsic to the Request for Arbitration itself that
 5 could conceivably preclude the Court from addressing the
 6 substance of the dispute that is raised.
 7 So this leaves then only the possibility of
 8 threshold procedural reasons why the Court may not be
 9 competent. And in broadbrush, there are two possible
 10 categories of reasons that may be apparent: the first is
 11 that there was some procedural flaw or impropriety in
 12 the manner in which Pakistan proceeded to institute
 13 proceedings before the Court; and the second is that
 14 India got there first with its Neutral Expert Request,
 15 that the Neutral Expert has been appointed and that the
 16 Neutral Expert was already dealing with the matter.
 17 Now, these two broadbrush possibilities are,
 18 of course, at the heart of this phase of the case, and
 19 various aspects of these issues will be addressed by
 20 Dr Miles, by Mr Saadeh, by Professor Webb and by
 21 Mr Fietta. For the moment though, my purpose is simply
 22 to lay the foundation for their submissions and to leave
 23 you with the cardinal points that emerge from a review
 24 of the Request itself.
 25 As a decision-tree matter, there is nothing in the

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11:02 1 terms of the Request itself that could even remotely, on
 2 our view, engage questions of the Court's competence.
 3 Mr Chairman, members of the Court, I was going to go
 4 on to address now questions 1, 2 and 3, which deal with
 5 who is competent to determine competence, compétence
 6 de la compétence in question 2, and then the issue of:
 7 does non-appearance deprive a Court or Neutral Expert of
 8 competence? I'm going to defer those to my closing
 9 submissions, I think, in the interests of time.
 10 I note that it's probably also the time for
 11 a mid-morning break. After that break, Mr Chairman, if
 12 you would be good enough to invite Ms Rees-Evans to the
 13 podium. But I should say: if there are any questions
 14 that you'd like to put to me on what you've heard from
 15 me now, of course I'd be happy to respond to them,
 16 either now or afterwards.
 17 THE CHAIRMAN: Thank you very much for your presentation,
 18 Mr Bethlehem. I don't think we do have any questions at
 19 this time. But I agree with you that we're at that time
 20 for a coffee break. So let's take that, and we'll come
 21 back at half past the hour.
 22 SIR DANIEL: Thank you.
 23 (11.04 am)
 24 (A short break)
 25 (11.30 am)

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11:30 1 THE CHAIRMAN: Okay, Ms Rees-Evans, we're ready to hear you
 2 whenever you're ready.
 3 MS REES-EVANS: Thank you, Mr Chairman.
 4 (Slide 1) Mr Chairman, members of the Court, good
 5 morning. I'm Laura Rees-Evans. It's my great pleasure
 6 to appear before you for the first time in this
 7 proceeding representing Pakistan.
 8 So, as Mr Bethlehem said this morning before we
 9 broke for coffee, I'm here to set the scene for what
 10 will follow from my colleagues by providing an overview
 11 of the two concluded proceedings under the Indus Waters
 12 Treaty: the Neutral Expert proceeding regarding the
 13 Baglihar Hydroelectric Plant; and the Kishenganga
 14 arbitration before a Court of Arbitration.
 15 The disputes before you now are framed and informed
 16 by these two proceedings. A number of the Court's
 17 questions sent before this hearing raise points arising
 18 out of them. I'll address or touch on Pakistan's
 19 answers to these questions during the course of my
 20 presentation, and you'll hear further about these
 21 decisions from my colleagues throughout Pakistan's
 22 opening submissions.
 23 (Slide 2) My presentation is structured into three
 24 parts.
 25 First, I will take you back to 2007 and briefly

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11:31 1 summarise the relevant aspects of the Baglihar
 2 determination. I do this to provide context to some of
 3 the determinations in Kishenganga which stand in stark
 4 contrast to the Neutral Expert's approach. And it's the
 5 parties' different approaches to the implications of
 6 Baglihar and Kishenganga that prompted Pakistan's
 7 realisation that there exist Treaty-systemic questions
 8 between the parties which can only be resolved by
 9 a Court. And Dr Miles will elaborate on this in due
 10 course.
 11 Second, I will run through the events that led up to
 12 the initiation of the Kishenganga arbitration. In this
 13 part of my presentation, I'll be providing Pakistan's
 14 answer to the Court's question 4 and the background to
 15 Pakistan's answer to your question 5. The events
 16 leading up to the Kishenganga proceeding are also
 17 relevant to your question 15, although I'll leave it to
 18 Dr Miles to provide you with Pakistan's full answer to
 19 that question.
 20 Third, I'll set out the aspects of the Kishenganga
 21 Court's awards that are most pertinent for this Court's
 22 immediate task of determining its competence. Here I'll
 23 be answering the Court's question 7 and laying the
 24 ground for Mr Bethlehem to provide Pakistan's full
 25 response to question 23 tomorrow morning.

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11:33 1 I'll also highlight in the third part of my
 2 presentation a fundamental way in which the Kishenganga
 3 Court took issue with the Baglihar determination. As
 4 I mentioned, the starkly contrasting approaches of the
 5 Court and the Neutral Expert on certain issues provide
 6 important context to the parties' exchanges prior to
 7 this proceedings. In that respect, I'll also address
 8 the Court's question 6.
 9 (Slide 3) So, Mr Chairman and members of the Court,
 10 I'm turning first now to the first part of the
 11 presentation and just a very brief overview of the
 12 Baglihar determination.
 13 That proceeding arose out of Pakistan's objections
 14 to various design features of the Baglihar Hydroelectric
 15 Plant, in particular in relation to gated spillways and
 16 freeboard, that's paragraphs 8(e) and (a) of Annexure D;
 17 the calculation of pondage, that's paragraph 8(c); and
 18 the location of turbine intakes, that's paragraph 8(f).
 19 And the Baglihar determination is at PLA-2, but I don't
 20 ask you to turn it up just now.
 21 (Slide 4) I have drawn out on this slide the primary
 22 determination that we think is relevant to this
 23 proceeding, which is how the Neutral Expert began his
 24 determination (PLA-2). He observed that his decision
 25 was:

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11:34 1 "... based on the premise that the terms of the
2 Treaty, in accordance with the general rules of treaty
3 interpretation ..."
4 And I've underlined:
5 "... allow him to have recourse to rules of science
6 and technology and to state-of-the-art practices in his
7 assessment of the concept and design of the Baglihar ...
8 Plant."
9 That's at page 12 of his determination.
10 The executive summary, which is one of the documents
11 that Pakistan submitted to the record earlier this week,
12 PLA-20, at page 5, conveys a similar view, as shown in
13 the quote on the slide.
14 So the Neutral Expert's approach of recourse to
15 state-of-the-art practices permeates his determinations.
16 And this best-practices approach of the Baglihar Neutral
17 Expert is an approach which divided the parties in the
18 Kishenganga proceeding, and which continues to do so.
19 Dr Miles will return to this in his presentation.
20 (Slide 5) So turning now to the Kishenganga
21 arbitration itself and the events leading up to it.
22 I will set out the factual background in this section to
23 Pakistan's answers to your questions 5 and 15, and
24 I will answer the Court's question 4.
25 As we go through -- and as Mr Bethlehem flagged this

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11:35 1 morning -- you will notice that the background has many
2 parallels with the background that led up to this
3 proceeding. It is a familiar story: India persistently
4 gives the appearance that it does not want the
5 disagreements resolved, in the words of Pakistan's Agent
6 in his opening this morning. And as Mr Bethlehem also
7 said this morning, this dispute was rooted in
8 disagreements concerning the same run-of-river
9 provisions as in this proceeding before you.
10 I will be referring to various correspondence in
11 this part of my presentation, and I won't take you to it
12 but I have set out the references for that
13 correspondence in slides 8 and 9 in your slide pack.
14 (Slide 6) So the concerns of the Pakistan
15 Commissioner over the design of the Kishenganga Plant,
16 which we call "KHEP", crystallised in 2008 in the form
17 of six questions to be resolved by the Commission under
18 Article IX(1) of the Treaty. And this is set out in the
19 record of the 100th meeting of the Commission (P-60), in
20 Annexure I, and in various other places.
21 This and the next slide (7) set out questions 1
22 [and] 6 and 2 to 5 that are contained within that
23 annexure. And if it's not already clear, it will become
24 clear why I've split the questions in that way. These
25 questions relate to gated spillways and freeboard, the

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11:36 1 calculation of pondage, the necessity and location of
2 outlets or turbine intakes, and the necessity and
3 location of gated spillways.
4 (Slide 8) So by letter of 11 March 2009, Pakistan's
5 Commissioner indicated an intention to seek the
6 appointment of a Neutral Expert in respect of
7 questions 3 to 5. He observed that questions 1 and 6,
8 which are shown on the previous slide (6), were
9 self-evidently not questions of a purely technical
10 nature, and were therefore outside the jurisdiction of
11 a Neutral Expert. Instead, they were disputes arising
12 under Article IX(2)(b) of the Treaty. The letter is at
13 P-62.
14 India's response was that the referral of the
15 disputes and differences indicated in Pakistan's
16 11 March letter was "premature". It also argued that
17 question 1 fell within the scope of the jurisdiction of
18 a Neutral Expert, and was not appropriate for resolution
19 by a Court.
20 The Pakistan Commissioner responded by letter of
21 29 April 2009. And this Exhibit P-[225] is the
22 communication referred to indirectly in the Court's
23 question 20.
24 The Commissioner reaffirmed Pakistan's view that
25 question 1, set out in the slide I put on screen just

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11:38 1 now (slide 6), was a legal matter properly for the Court
2 of Arbitration. He informed the Indian Commissioner
3 that if he felt strongly otherwise, in circumstances
4 where Pakistan had not yet requested the establishment
5 of a Court of Arbitration under Article IX(5), he was
6 free to refer the matter to a Neutral Expert. The
7 Neutral Expert could then determine if it should be
8 dealt with as a difference or a dispute.
9 (Slide 9) On 11 May 2009, the Pakistan Commissioner
10 wrote to the governments of Pakistan and India
11 requesting that they jointly appoint a Neutral Expert as
12 per paragraph 4(b)(i) of Annexure F to the Treaty within
13 one month (P-64). India made clear in its brief
14 response that it saw no need to move beyond the
15 Commission level. It requested that the KHEP be
16 discussed again in the next Commission meeting.
17 Pakistan agreed to that request, without prejudice
18 to its position that disputes had arisen under
19 Article IX of the Treaty. And it agreed to it in
20 a spirit of goodwill and cooperation, with the sincere
21 wish that the differences regarding the KHEP could be
22 resolved at that Commission meeting.
23 Pakistan's hopes were dashed. The parties reached
24 no agreement. India maintained its position that no
25 dispute had arisen.

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11:39 1 A month after that meeting, on 10 July 2009,
 2 Pakistan sent a note verbale, P-67, inviting India to
 3 agree to the appointment of a Neutral Expert "for the
 4 resolution of differences relating to Pakistan's
 5 Questions ... 2 [to] 5" -- in other words, with the
 6 addition of question 2 regarding the water level in the
 7 operating pool, as compared to the March
 8 communication -- in accordance with "Paragraph 4 and
 9 5(c) of Annexure F to the Treaty". And it also made
 10 a formal request to India under Article IX(4) of the
 11 Treaty with respect to the questions that subsequently
 12 formed the basis of the Kishenganga arbitration.
 13 In its response of 20 August 2009 (P-68), India
 14 refused to agree to the appointment of a Neutral Expert
 15 and maintained its view that everything had to be
 16 determined at Commission level. So you see there's
 17 a repeated pattern here of India's unwillingness to
 18 engage.
 19 India rejected the request to enter into
 20 negotiations pursuant to Article IX(4) of the Treaty
 21 with respect to questions 1 and 6. It argued that the
 22 appointment of negotiators was -- and you've heard this
 23 before -- "not warranted at present", so premature
 24 again, and instead proposed further discussions in the
 25 Commission.

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11:41 1 Despite Pakistan's attempts to engage with India
 2 through negotiations, none took place between the
 3 Pakistani and Indian Governments before Pakistan's
 4 Request for Arbitration of 17 May 2010. The
 5 disappointment and frustration as regards the impasse
 6 between the parties over the KHEP disagreements is
 7 palpable from Pakistan's note verbale of 9 April 2010,
 8 and that's one of the new exhibits that Pakistan added
 9 to the record this week at P-226.
 10 In the absence of India's agreement to the
 11 appointment of a Neutral Expert for the resolution of
 12 differences relating to questions 2 to 5, Pakistan's
 13 Commissioner could have requested that the World Bank
 14 appoint a Neutral Expert pursuant to Article IX(2)(a)
 15 and paragraph 5(c) of Annexure F of the Treaty.
 16 Pakistan chose not to do so, opting instead to put the
 17 two threshold legal questions -- that's questions 1
 18 and 6 -- before a Court of Arbitration. And Pakistan
 19 formally initiated the Kishenganga arbitration with its
 20 Request for Arbitration on 17 May 2010.
 21 This takes me to the Court's question 4, your
 22 question 4, by which you asked whether Pakistan
 23 requested, but then withdrew its Request for the
 24 Appointment of a Neutral Expert in 2009; and if so, what
 25 were the consequences for the Kishenganga arbitration.

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11:42 1 Mr Bethlehem touched on the answer to this question
 2 already in his presentation just now.
 3 The short answer is that Pakistan requested the
 4 appointment of a Neutral Expert in 2009 but, as you
 5 said, didn't withdraw it until 2016. So on
 6 11 March 2009, Pakistan indicated its intention to
 7 submit questions 3, 4 and 5 to a Neutral Expert (P-62);
 8 and on 10 July 2009, Pakistan invited India to agree to
 9 put those questions before a Neutral Expert (P-67).
 10 Pakistan proceeded throughout and beyond the
 11 Kishenganga arbitration on the basis that that request
 12 remained valid and in force. This is evident in
 13 a number of contemporaneous records, and I'm going to
 14 give you three examples from the record: the Pakistan
 15 Commissioner's letter to the Indian Commissioner of
 16 6 March 2013, which is at P-69; and two letters sent by
 17 Pakistan's Commissioner in July 2015, shortly before and
 18 on the same day as Pakistan invited India to agree to
 19 the appointment of a Neutral Expert to decide on points
 20 of difference over the KHEP and the Ratle Plant, the
 21 RHEP. That's P-10, of 3 July 2015, at paragraph 2; and
 22 P-14, of 24 July 2015, also at paragraph 2.
 23 As Dr Miles will go on to explain in further detail,
 24 the questions contained in Pakistan's 2009 request for
 25 a Neutral Expert were ultimately subsumed within

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11:44 1 Pakistan's 2015 request.
 2 The existence of Pakistan's expressed intention to
 3 submit questions 2 to 5 to a Neutral Expert was the
 4 basis for the second of India's two objections to the
 5 admissibility of the second dispute in the Kishenganga
 6 arbitration; that is, whether the Treaty prohibits
 7 drawdown flushing by India at the KHEP and other future
 8 run-of-river plants on the Western Rivers.
 9 The Court rejected this objection. First, it found
 10 there was no substantive overlap between the questions
 11 intended for a Neutral Expert and Pakistan's Request for
 12 Arbitration. In the Court's words, the difference
 13 Pakistan had "proposed to refer to a neutral expert is
 14 not identical with the Second Dispute now put before the
 15 Court". That was at the partial award (PLA-3),
 16 paragraph 489.
 17 The Court further found that the Neutral Expert
 18 provisions under Article IX only become relevant "if
 19 a request for the appointment of a neutral expert is
 20 actually made". The Court found that Pakistan had never
 21 made a request. And that's at paragraph 488.
 22 So in answer to the Court's question 4, there were
 23 no consequences for the arbitration of Pakistan's
 24 standing request for a Neutral Expert in July 2009.
 25 Mr Chairman, members of the Court, I turn now to the

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11:45 1 third and final part of my presentation, which is --
 2 yes, sir.
 3 THE CHAIRMAN: Sorry, Ms Rees-Evans, I just have two small
 4 questions while you're on this particular point.
 5 The first would be if you could just address to some
 6 extent why it was left pending from 2009 to ultimately
 7 2016. Was it because of the Kishenganga Court of
 8 Arbitration or was it for some other reason that it was
 9 left pending? That's the first question.
 10 And the second is: would it be fair to characterise
 11 the posture of both parties in that period when there
 12 had been a request -- or maybe it's more accurate to say
 13 an expression of an intention to pursue a Neutral
 14 Expert -- that that itself did not, in the view of
 15 either party, initiate a Neutral Expert proceeding?
 16 MS REES-EVANS: Thank you, Mr Chairman, for the questions.
 17 I'm just taking a note of your second one.
 18 So in answer to your first question, why was it left
 19 pending, I think Mr Bethlehem touched on this
 20 this morning. And essentially the answer is that
 21 Pakistan and I think India, as I understand it, were
 22 proceeding on the implicit understanding that the two
 23 questions that were ultimately put before the Court,
 24 questions 1 and 6, were, as it were, threshold legal
 25 questions. Before those questions were determined, the

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11:49 1 MS REES-EVANS: Thank you.
 2 Yes, I can give a first answer to that, which is
 3 that -- and I'm struggling to find the reference now,
 4 but we can come back to it and give it to you. But in
 5 the partial award itself, the Court does identify that
 6 there had been no dispute between the parties that
 7 a request had not been made as to the subject matter in
 8 dispute before the Court.
 9 And it doesn't then make an additional statement, in
 10 its award at least, about the effect that the parties
 11 said or didn't say about the 10th July 2009 request. So
 12 they don't make any statement about how the parties
 13 characterised that request. But I think the statement
 14 of the Court -- and we'll find the reference and give it
 15 to you -- but I think the statement of the Court may be
 16 relating to the parties' position on the March 2009
 17 request.
 18 That's a sort of initial answer to your question,
 19 but we will have a look and come back if we wish to add
 20 anything to that question, because there may be more in
 21 the parties' pleadings in Kishenganga that sheds light
 22 on it.
 23 THE CHAIRMAN: That's fine. Thank you very much.
 24 MS REES-EVANS: (Slide 10) So just turning then to the
 25 awards themselves.

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11:47 1 subsequent questions -- 2, 3, 4, 5 -- didn't, as it
 2 were, come into relevance. So if you didn't get past
 3 the first hurdle, then there would be no need to
 4 determine the following questions.
 5 So I think that's the main reason why it was left
 6 pending. And I'll just pause there to say that we may
 7 want to elaborate on that in due course, after
 8 discussion with my client and the Agent. But that's the
 9 core understanding that I have on that point.
 10 As to your question 2, just to ensure that I've
 11 understood the question that you've asked, the question
 12 is: did the parties proceed on the understanding that
 13 the July 2009 request didn't initiate formally a Neutral
 14 Expert proceeding or that it did? Have I paraphrased
 15 accurately?
 16 THE CHAIRMAN: I think so. I think what I'm trying to drive
 17 at is understanding the parties' postures in a situation
 18 where there's been either an intention to pursue
 19 a Neutral Expert or a request that the other party agree
 20 to pursue a Neutral Expert, whether that's viewed, in
 21 the practice of the parties, as initiating a Neutral
 22 Expert proceeding or not.
 23 And for all these questions, if you prefer to
 24 postpone them and consult and come back to us, that's
 25 absolutely fine.

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11:50 1 The two questions before the Court were the
 2 following -- these are questions 1 and 6 from the
 3 initial slide that I put up -- whether India's proposed
 4 diversion of the Kishenganga/Neelum River for the KHEP
 5 was consistent with the Treaty, that was the first
 6 dispute; and the second dispute was whether India was
 7 entitled to deplete the reservoir of the KHEP below dead
 8 storage level.
 9 The most relevant aspects of the Court's awards and
 10 decisions for this proceeding are twofold: first, its
 11 findings on admissibility and its competence in relation
 12 to the second dispute; and second, its substantive
 13 findings with respect to the second dispute.
 14 I think it would be helpful for this part of my
 15 presentation if the Court were to have the partial award
 16 to hand, either in the form of extracts in the hardcopy
 17 bundle that you've been provided with -- volume III,
 18 reference materials, tab 29 -- or in the electronic form
 19 if you prefer, and that's PLA-3.
 20 At this stage I would ask that the technician please
 21 put up my colleague's screen, and we will show the
 22 relevant paragraphs that I will go through on the screen
 23 before you as well, if you don't have the extracts to
 24 hand yourself.
 25 (Slide 11) I'll first highlight some of the most

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11:52 1 relevant points on admissibility and the Court's
 2 competence.
 3 The first point, as this Court identified in its
 4 questions 7 and 23 is that the Kishenganga Court
 5 concluded that it was competent to act even in the
 6 absence of the matter having been put before a Neutral
 7 Expert. In other words, the appointment of and initial
 8 determination by a Neutral Expert is not a prerequisite
 9 for the identification of a dispute. This is at
 10 paragraphs 478 to 481 of the partial award. The Court
 11 did so in response to an objection by India which is, in
 12 its substance, identical to India's second objection in
 13 this proceeding. And Mr Bethlehem will provide
 14 Pakistan's full answer to question 23 tomorrow.
 15 As regards the Court's question 7, you asked whether
 16 the Kishenganga Court's determination should be
 17 understood as confirming that matters placed before
 18 a Court of Arbitration need not be first considered by
 19 a Neutral Expert, or understood as confirming that they
 20 need not do so only when both parties accept the Court's
 21 competence.
 22 The Court's determination in the Kishenganga partial
 23 award at the paragraphs I just referenced, but also in
 24 paragraphs 484 to 485, can only be understood as
 25 confirming the first alternative. There is no basis to

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11:53 1 read into the Court's determination a caveat that
 2 matters placed before a Court of Arbitration need not be
 3 first considered by a Neutral Expert only when both
 4 parties accept the Court's competence.
 5 If the Court's determination was conditioned on the
 6 acceptance by both parties of its competence, it would
 7 have said so. This is particularly so given the fact
 8 that the parties did not both accept the Kishenganga
 9 Court's competence. On the contrary, the Court's
 10 determination arose precisely out of India's objection
 11 to the admissibility of and the competence of the Court
 12 over the parties' dispute over the permissibility of
 13 drawdown flushing under the Treaty.
 14 That aside, it would be inconsistent with basic
 15 principles of international dispute settlement if one
 16 party's objections to the jurisdiction or competence of
 17 an international dispute settlement body could deprive
 18 that body of jurisdiction. Under the Indus Waters
 19 Treaty specifically, it's clear that they cannot, for
 20 the reasons that Mr Bethlehem will set out.
 21 The second important finding of the Kishenganga
 22 Court on its competence for your purposes relates to the
 23 respective competences of the Court on the one hand, and
 24 the Neutral Expert on the other, under the Treaty. And
 25 this is paragraphs 484 and 485 of the partial award.

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11:54 1 This issue is relevant to India's third objection,
 2 which Professor Webb will address shortly, and that is
 3 that the disputes raised by Pakistan's Request for
 4 Arbitration are technical in nature, and therefore fall
 5 within the competence of a Neutral Expert.
 6 The Kishenganga Court's response to a similar
 7 objection by India was crystal-clear. It found in the
 8 partial award, at paragraph 484, that:
 9 "... nothing in the Treaty requires that a technical
 10 question listed in Part 1 of Annexure F be decided by
 11 a neutral expert rather than a court of arbitration --
 12 except where a Party so requests (and then only if the
 13 neutral expert considers himself competent)."
 14 And that's the text highlighted on the screen now.
 15 At paragraph 485, the Court continued that it was
 16 able to identify:
 17 "... no Treaty provision that would bar it from
 18 considering a technical question ..."
 19 On the contrary, and as the Court held in
 20 paragraph 486, the Treaty positively supports
 21 a conclusion that it can do so. The Court said:
 22 "The very composition of a court of arbitration also
 23 points to its competence in technical matters."
 24 The Court's conclusion at paragraph 487 was that:
 25 "... no dispute brought a court of arbitration could

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11:56 1 be rendered inadmissible merely on the grounds that it
 2 involved a technical question."
 3 Relatedly, and of relevance to the Court's
 4 question 20, the Kishenganga Court confirmed that:
 5 "... only an actual request for the appointment of
 6 an expert would activate the neutral expert process and
 7 preclude such a difference from submission to a court of
 8 arbitration."
 9 So I'm moving on now to a third important finding
 10 that I will highlight. And I should say, as a subscript
 11 to that, that there are many important aspects of the
 12 Kishenganga award that I don't draw attention to in my
 13 presentation, but they will be picked up by others on
 14 the counsel team during the course of our submissions
 15 today and tomorrow.
 16 The third important finding of the Kishenganga Court
 17 on admissibility and competence relates to the
 18 respective competences of the Court and the Neutral
 19 Expert again, and is also relevant to India's third
 20 objection; that is, that the disputes raised by
 21 Pakistan's Request for Arbitration are technical in
 22 nature, as I said before. It's found in paragraphs 468
 23 and 470 of the partial award.
 24 The Kishenganga Court recognised at paragraph 468,
 25 and confirmed in its subsequent December 2013 decision

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11:57 1 on India's request for clarification and interpretation
 2 of the partial award -- that's at paragraph 27 of that
 3 decision; PLA-21, for the record -- that its:
 4 "... decision on the Second Dispute will apply to
 5 other run-of-river plants to be built, as well as to the
 6 KHEP."
 7 In other words, the Court's answer to the second
 8 dispute was general and not limited to the KHEP.
 9 At paragraph 470 of the partial award, the Court
 10 reaffirmed that:
 11 "... the present decision ... is binding in respect
 12 of the general question presented ..."
 13 That's at the end of paragraph 470.
 14 So the decision has general precedential value
 15 beyond the particular matter before it, unlike
 16 a Neutral Expert's determination, which is confined to
 17 its particular plant. And the Court's decision is
 18 a closed matter.
 19 You will hear further today -- and this is precisely
 20 why Pakistan is here before you -- that the disagreement
 21 between the parties is one about how the relevant Treaty
 22 provisions are to be interpreted and applied across the
 23 fleet of hydroelectric plants that India is planning on
 24 the Western Rivers. And that is a matter only for the
 25 Court.

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12:00 1 Baglihar project; the present decision ... is binding in
 2 respect of the general question presented in these
 3 proceedings."
 4 Having set that general framework for its decision
 5 on the second dispute in these terms, and confirming the
 6 admissibility of the second dispute, the Court
 7 considered its merits. And the Court's overall
 8 approach, when you read the partial award, is very much
 9 a rebuff of the approach of the Neutral Expert in
 10 Baglihar. As I mentioned at the start, the approach
 11 that permeates the determination of the Neutral Expert
 12 in Baglihar is one of recourse to new technical norms
 13 and standards or state-of-the-art practices, and that
 14 was based on his improper interpretation of the Treaty.
 15 The Court's contrary finding is set out at
 16 paragraph 522 of the partial award, which is at page 243
 17 of the reports. The Court emphasised that:
 18 "It is not for the Court to apply 'best practices'
 19 in resolving this dispute."
 20 And that it:
 21 "... consider[ed] the Treaty restraints on the
 22 construction and operation by India of reservoirs ...
 23 a regulatory factor [governing HEP design under the
 24 Treaty]."
 25 I will just conclude on this point by addressing the

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11:58 1 (Slide 12) Mr Chairman, members of the Court, I am
 2 now turning to the Court's substantive findings with
 3 respect to the second dispute.
 4 As I've said, that second dispute centred on whether
 5 India is permitted under the Treaty to lower the water
 6 level in the reservoir of a run-of-river plant on the
 7 Western Rivers for purposes of sediment control, through
 8 a technique known as "drawdown flushing". And that
 9 explanation is at paragraph 464 of the partial award; we
 10 don't need to go to it.
 11 But at paragraph 469 of the [partial] award, the
 12 Court was careful to underline that its decision would
 13 "have no effect on the Parties' rights and obligations
 14 in respect of the Baglihar [Plant]", which was obviously
 15 subject to the determination of the Neutral Expert in
 16 the Baglihar proceeding. Baglihar was final and binding
 17 with respect to the Baglihar Plant, and it had no
 18 further effect.
 19 The Court explained this in paragraph 470 of its
 20 decision, which we just went to. It explained that:
 21 "... the Court does not see in Annexure F any
 22 indication that the Parties intended a neutral expert's
 23 determination to have a general precedential value
 24 beyond the scope of the particular matter before him.
 25 Baglihar is binding for the Parties in relation to the

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12:01 1 Court's question 6, by which it asked: what is the
 2 support for Pakistan's assertion that India has
 3 committed unequivocally to abide by the decision of the
 4 Court of Arbitration in the Kishenganga case?
 5 The Court's question quotes from a letter from the
 6 Pakistan Commissioner to the Indian Commissioner, P-22,
 7 in which the Pakistan Commissioner recalled India's
 8 previously expressed commitment to abide by the
 9 Kishenganga Court's decision. His assertion that India
 10 "committed unequivocally to abide by the decision" was
 11 based on a number of prior communications by India,
 12 starting in the Kishenganga arbitration itself.
 13 In its Rejoinder in the Kishenganga arbitration --
 14 which is another of the exhibits that Pakistan has added
 15 to the record this week, at P-227 -- India confirmed
 16 that:
 17 "The Court's award in this case [would be] final and
 18 binding with respect to the particular dispute(s)
 19 decided by the Court."
 20 Citing Annexure G, paragraph 23 of the Treaty.
 21 India also confirmed that it was bound by the
 22 fundamental principle of pacta sunt servanda under
 23 Article 26 of the VCLT, the Vienna Convention, and that
 24 it would follow this principle in performing its
 25 obligations under the Treaty. And those were

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12:02 1 paragraphs 1.8 and 2.20 of its Rejoinder.
 2 After the Court rendered its final award in
 3 December 2013, at the 111th PIC meeting in early 2015,
 4 India's Commissioner again reassured his Pakistani
 5 counterpart that India had given its "unequivocal
 6 assurance to abide by" the restriction imposed by the
 7 CoA, the Court in Kishenganga; that's at P-25,
 8 paragraph 33. And it added that it "stands by the Award
 9 of Third Party given under the provisions of Treaty";
 10 that's paragraph 34.
 11 India then reiterated those assurances in its letter
 12 from the Indian Commissioner of August 2015, and that's
 13 Exhibit P-16 at paragraphs 6 and 13. And India has
 14 continued to offer those assurances even after the
 15 February 2016 correspondence to which the Court's
 16 question 6 makes reference. One example is the minutes
 17 of the 115th meeting of the Permanent Indus Waters
 18 Commission at P-188, paragraph 29, on the fifth page.
 19 Unless the members of the Court have any further
 20 questions ...
 21 MR MINEAR: Thank you, Ms Rees-Evans.
 22 I'm struck by the fact in your presentation that
 23 India resisted the appointment of a Neutral Expert both
 24 before and after the Kishenganga arbitration. But we
 25 don't know about India's position with regard to the

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12:04 1 Baglihar Request for a Neutral Expert. Was there
 2 a similar resistance? And would it be possible for
 3 Pakistan to provide the Request for Appointment of
 4 a Neutral Expert in that case?
 5 MS REES-EVANS: Thank you, Mr Minear, for the question.
 6 I'm afraid that I don't have the answer to that
 7 question. But we will certainly take a look and find
 8 out, and provide the answer to the Court.
 9 MR MINEAR: Thank you.
 10 THE CHAIRMAN: I think we have no further questions. Thank
 11 you very much for the presentation.
 12 MS REES-EVANS: Thanks very much for your attention. I will
 13 now hand over to my colleague Dr Miles to explain how
 14 these disagreements between the parties in the aftermath
 15 of the Baglihar and Kishenganga decisions played out
 16 during the period 2014 to 2016, and how they bring
 17 Pakistan to the Court today. Thank you very much.
 18 THE CHAIRMAN: Dr Miles, you have the floor. (Pause)
 19 DR MILES: (Slide 1) Mr Chairman, members of the Court,
 20 I will be addressing you on some of the factual elements
 21 of Pakistan's case on competence.
 22 In particular, I will be addressing you on India's
 23 ambitious programme of HEP construction -- hydroelectric
 24 plant -- on the Western Rivers, and how this fed into
 25 the dispute between the parties after the Kishenganga

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12:07 1 partial award was handed down in March 2013. And I'll
 2 end the narrative in July 2016 with the failure of the
 3 Article IX(4) negotiations between the parties, at which
 4 point I will ask you to invite Mr Saadeh to the
 5 microphone to address you on the events leading up to
 6 the imposition of the pause in December 2016.
 7 (Slide 2) Now, just by way of roadmap, I propose to
 8 structure my submissions as follows.
 9 First, I'll be setting out India's wider HEP
 10 construction programme.
 11 Second, I will cover the discussions concerning the
 12 KHEP -- the Kishenganga Plant -- conducted in light of
 13 the Kishenganga partial and final awards, within the
 14 Commission from March 2013 to July 2015, and leading up
 15 to the Pakistan Commissioner referring the issues
 16 related to the KHEP and the RHEP -- which is the
 17 Ratle Plant -- to a Neutral Expert.
 18 Third, I'll take you through the critical period of
 19 July 2015 to February 2016 and the process by which
 20 Pakistan, in the person of its Commissioner, reached the
 21 conclusion that the KHEP and the RHEP should be referred
 22 to a Court of Arbitration as a dispute, rather than to
 23 a Neutral Expert as a difference.
 24 (Slide 3) In navigating that roadmap, I'll be guided
 25 by the Court's questions, and focus on those factual

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12:09 1 matters of greatest interest to its members.
 2 In particular, I'll be looking at question 4,
 3 concerning the withdrawal of the 2009 request by
 4 Pakistan's Commissioner for appointment of a Neutral
 5 Expert with respect to some of the issues concerning the
 6 KHEP, and Ms Rees-Evans has already looked at some
 7 aspects of this.
 8 I'll be looking at question 5, dealing with
 9 Pakistan's efforts to negotiate with India from
 10 March 2013 onwards, and I'll be building on
 11 Ms Rees-Evans's submissions in that respect as well.
 12 And I'll be looking at questions 14 to 16,
 13 concerning the critical period between the letter of
 14 Pakistan's Commissioner of 25 February 2016, in which
 15 Article IX(3) was invoked with respect to this matter,
 16 and the close of the Secretary-level negotiations under
 17 Article IX(4) on 15 July 2016, some five months later.
 18 I don't propose, in the course of my submissions, to
 19 address more than a few short legal points. Sir Daniel
 20 has addressed some of those already, and my colleagues
 21 Professor Webb and Mr Fietta will be addressing you in
 22 detail on others later on.
 23 (Slide 4) So, let us begin: India's programme of HEP
 24 construction.
 25 Now, this heralds an important point, members of the

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12:10 1 Court. So far as the dispute before you is concerned,
 2 this case is not just about the KHEP and the RHEP. It
 3 is much, much bigger, and concerns India's aspirations
 4 for the entire Western Rivers.
 5 The Court will recall that this was addressed in
 6 some detail by Pakistan's current Commissioner, Mr Shah,
 7 at the Court's first meeting, and I just want to remind
 8 the Court of two things he said.
 9 (Slide 5) I've put back up on the screen one of
 10 Mr Shah's slides from the first meeting, setting out
 11 Pakistan's understanding of what India has planned for
 12 the Western Rivers. And that plan, members of the
 13 Court, is ambitious.
 14 India presently has 30 HEP projects, totalling
 15 3,476 MW, operating on the Western Rivers. That's the
 16 pie chart on the left of the slide. And in the pie
 17 chart on the right of the slide, you'll see what India
 18 has in store for the Western Rivers: a further
 19 65 projects, producing a total of 12,816 MW, so a little
 20 over four times the current output, nearly 90% of it
 21 concentrated in the Chenab Basin. Given the constraints
 22 of the Treaty, the majority of these projects will be
 23 the run-of-river HEPs, with which Annexure D -- and this
 24 Court -- is concerned.
 25 So that's India's long-term plan. What about the

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12:11 1 medium term?
 2 (Slide 6) On the screen you'll see another side from
 3 Mr Shah's presentation which deals with the medium term:
 4 India's plans for the Western Rivers within the current
 5 decade.
 6 India is looking at bringing 14 new HEPs online on
 7 the Western Rivers before 2030, mostly in the
 8 Chenab Basin but also elsewhere. Those projects will be
 9 producing 3,246 MW of hydroelectric power, so doubling
 10 India's current capacity. In this respect, India is
 11 planning a mix of run-of-river works, regulated by
 12 Annexure D of the Treaty, and storage works, regulated
 13 by Annexure E.
 14 That's all I want to say for now about India's
 15 plans. But the apt terms for those plans would be:
 16 ambitious in the long term, and ambitious and rapid in
 17 the medium term.
 18 (Slide 7) So with that background set out, I'll pick
 19 up the narrative where Ms Rees-Evans left off, in the
 20 aftermath of the Kishenganga arbitration.
 21 (Slide 8) Now, just to recap a few points that
 22 Ms Rees-Evans touched on that will be important for the
 23 story going forward. There's four of them.
 24 First, in the Kishenganga arbitration, Pakistan had
 25 prevailed with respect to the second dispute. The Court

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12:12 1 of Arbitration had declared in the partial award that
 2 drawdown flushing below dead storage level was
 3 prohibited by the Treaty, specifically paragraph 19 of
 4 Annexure E.
 5 Secondly, in making that determination, the
 6 Kishenganga Court expressly acknowledged (PLA-3,
 7 footnote 739) that:
 8 "In the case of the KHEP, the Court is cognizant
 9 that changes to the design of the project may be
 10 required to optimize the management of the sediment in
 11 light of this Partial Award."
 12 Thirdly, with respect to the contrary determination
 13 by the Neutral Expert in Baglihar that drawdown flushing
 14 below dead storage level was permitted under the Treaty,
 15 the Kishenganga Court held that determination, by virtue
 16 of paragraph 11 of Annexure F, had no effect beyond the
 17 Baglihar Plant itself, but that (PLA-3, paragraph 470):
 18 "... the present decision, by contrast, is binding
 19 in respect of the general question presented in these
 20 proceedings."
 21 Fourthly, in declining to follow Baglihar, the
 22 Kishenganga Court implicitly disagreed with the treaty
 23 interpretation methodology applied by the Neutral Expert
 24 there, noting in terms (PLA-3, paragraph 522):
 25 "It is not for the Court to apply 'best practices'

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12:14 1 in resolving this dispute."
 2 And further noting that "the Treaty restraints on
 3 the construction of and operation by India of
 4 reservoirs" are a regulatory factor governing HEP design
 5 under the Treaty.
 6 So with that in mind, I'll now turn to where the
 7 Commissioners picked up on the KHEP in the wake of the
 8 Kishenganga arbitration. And my objective here is to
 9 give you an understanding of how Pakistan perceived the
 10 developments that occurred within the Commission after
 11 that time.
 12 (Slide 9) Now, we start our narrative in the
 13 immediate aftermath of the partial award in
 14 February 2013. On 6 March 2013, Pakistan's Commissioner
 15 wrote to his counterpart in light of the partial award
 16 (P-69). He made several observations.
 17 Firstly, he recalled the six questions that had
 18 initially emerged in the Commission with regards to the
 19 KHEP, including the four questions concerning freeboard,
 20 pondage, intake placement, low-level outlets and the
 21 gated spillway, that Pakistan referred to the Neutral
 22 Expert in 2009.
 23 Secondly, he noted with respect to the low-level
 24 outlets that in light of the Kishenganga Court's
 25 recognition that flushing below dead storage level was

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12:15 1 prohibited by the Treaty, these outlets could no longer
 2 be maintained as part of the KHEP's design, given that
 3 their very purpose was to allow for flushing below dead
 4 storage level.
 5 Thirdly, given the passage of time since Pakistan
 6 had referred the four remaining questions to the Neutral
 7 Expert, and given the clear direction of the Kishenganga
 8 Court, Pakistan's Commissioner invited the Indian
 9 Commissioner to revise the KHEP's design, failing which
 10 a Neutral Expert would need to be appointed.
 11 And finally, he asked, in light of a further
 12 direction given by the Kishenganga Court, that India
 13 pause construction of the KHEP until the parties'
 14 disagreements regarding its design had been resolved.
 15 (Slide 10) The Indian Commissioner's response to
 16 this sets the tone moving forward. He answered
 17 Pakistan's Commissioner's letter on 15 April 2013
 18 (P-71), and there are three key points in there.
 19 First of all, he refused to comment on the partial
 20 award and its contents in circumstances where the final
 21 award remained pending.
 22 Secondly, he noted that the interim measures that
 23 had been imposed by the Kishenganga Court on the KHEP's
 24 construction in September 2011 had been lifted by the
 25 partial award. So much, we may say, for not commenting.

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12:16 1 Put another way, he was implying that India did not
 2 consider the construction of the KHEP to be restrained;
 3 and even though he wasn't going to talk about the
 4 partial award, India would be pushing forward with
 5 construction of the KHEP despite the parties'
 6 differences.
 7 And thirdly, he said, he was awaiting technical
 8 details from Pakistan's Commissioner as to the basis of
 9 his objections to the KHEP's design.
 10 Fast-forward nine months. After the Court had
 11 rendered the final award in December 2013, Pakistan's
 12 Commissioner tried again. On 10 January 2014, he wrote
 13 to the Indian Commissioner (P-73) and he drew attention
 14 to what he had said in his letter of 6 March. Would the
 15 Indian Commissioner, he asked, be willing to resolve the
 16 remaining four questions on the KHEP in the Commission
 17 with a view to obtaining amicable settlement? And would
 18 he further be willing to reconsider his stance on the
 19 low-level outlets in the KHEP design, in light of the
 20 Kishenganga Court's findings on drawdown flushing below
 21 the dead storage level?
 22 In response to this request, the Indian
 23 Commissioner's reaction appears to have again been to
 24 prevaricate. He reverted on 6 February 2014 (P-75). In
 25 that letter, he made no substantive comment at all on

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12:18 1 the 10 January 2014 letter from Pakistan's Commissioner.
 2 Rather, he just repeated his request from April 2013
 3 that more technical information on Pakistan's objections
 4 to the KHEP be provided.
 5 In the context of the wider dispute over the KHEP,
 6 the objective of the Indian Commissioner in sending this
 7 letter can only have been, in my submission, further
 8 delay. India was well aware of what Pakistan's
 9 objections to the KHEP were: they had been on foot since
 10 2006, and the questions with which the parties were
 11 concerned had been clearly formulated since 2008.
 12 (Slide 11) When he replied on 31 March 2014 (P-74),
 13 Pakistan's Commissioner pointed this out. In response
 14 to the Indian Commissioner's request for further
 15 technical information on Pakistan's remaining objections
 16 to the KHEP, he noted:
 17 First, that these objections had been discussed "at
 18 great length" at the 99th, 100th and 101st meetings of
 19 the Commission, culminating in the formation of the six
 20 questions in 2008.
 21 Secondly, that the four questions not referred to
 22 the Court of Arbitration had been made the subject of
 23 a Neutral Expert request by Pakistan's Commissioner on
 24 11 May 2009.
 25 And thirdly, notwithstanding that reference, the

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12:19 1 four questions were again discussed at the 103rd
 2 meeting, which was entirely given over to the KHEP.
 3 So, frankly, the notion that India's Commissioner
 4 didn't understand Pakistan's objection to the KHEP
 5 becomes somewhat farcical in light of this.
 6 (Slide 12) Despite this, however, Pakistan's
 7 Commissioner nevertheless attached a seven-page
 8 appendix A to his letter, restating Pakistan's
 9 objections to the KHEP with respect to the freeboard,
 10 pondage and intakes, low-level outlets and spillway
 11 gating, in detail. And his reasons for doing so deserve
 12 quoting in full, again to get a sense of what Pakistan's
 13 understanding of the situation was. I've got it for you
 14 on the slide:
 15 "In light of the decisions of the Court of
 16 Arbitration, and given the ongoing construction of the
 17 KHEP on fast track, it has now become necessary to
 18 proceed further with the resolution of Questions No 2-5.
 19 I am therefore sending the technical basis behind
 20 Pakistan's objections in a consolidated manner as
 21 Annexure A.
 22 Since the above said bases have already been
 23 discussed threadbare in various earlier meetings of the
 24 Commission therefore the purpose of providing these
 25 again is to expedite the resolution. In this regard

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12:20 1 I expect that the forthcoming meeting of the Commission
 2 on this matter would be conclusive."
 3 (Slide 13) Pakistan did in fact consent to not one
 4 but two further meetings of the Commission on the
 5 subject of the KHEP, and these were the 110th and
 6 111th meetings of the Commission. The 110th was held
 7 from 23 to 27 August 2014. The 111th was held from
 8 [31] January to 4 February 2015.
 9 The minutes of these meetings are considerable;
 10 I don't propose to take you to them in detail. But
 11 again, there are some useful headline points that can be
 12 gleaned from their 30-plus pages, and these can help us
 13 understand what Pakistan was dealing with with respect
 14 to the KHEP.
 15 Firstly, on pondage. The parties' disagreement
 16 centred on the determination by the Neutral Expert in
 17 Baglihar, which was the only prior occasion on which
 18 a third party had opined on the meaning of the term as
 19 it appeared in paragraph 8(c) of Annexure D.
 20 Pakistan considered Baglihar to be wrongly decided.
 21 While acknowledging that the Neutral Expert's
 22 determination was binding with respect to the Baglihar
 23 HEP, Pakistan's Commissioner rejected its application
 24 with respect to the KHEP, or indeed any other Indian
 25 HEP.

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12:22 1 India, on the other hand, considered Baglihar to
 2 provide "a guideline" for all Western Rivers HEPs moving
 3 forward. This was despite the Kishenganga Court's
 4 finding that a Neutral Expert's determination could have
 5 no binding effect outside the project with which it was
 6 concerned.
 7 Secondly, low-level outlets. Pakistan considered
 8 that India was under an obligation to remove large
 9 low-level outlets from the KHEP design in light of the
 10 Kishenganga Court's findings.
 11 India considered that the Kishenganga Court imposed
 12 only operational restrictions on the KHEP, and did not
 13 require modification of the design. Put another way:
 14 you can have your low-level outlets, you just can't use
 15 them. This was despite the Kishenganga Court flagging
 16 in the partial award that design changes to the KHEP
 17 could be required as a result of its determination.
 18 Thirdly, the other issues between the parties
 19 concerning the KHEP. Pakistan considered its reasons
 20 for opposing these other elements to be well understood
 21 by India -- we've been through all the Commission
 22 meetings, and so on and so forth, already -- such that
 23 if the Commission process failed again, settlement by
 24 a third party was the only remaining option. Pakistan
 25 did, however, drop its objections to the KHEP freeboard,

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12:23 1 on the basis that it was a technical matter and it could
 2 live with India's design.
 3 India, conversely, considered that despite the many
 4 discussions in the Commission concerning the KHEP since
 5 2006, and despite the remaining KHEP questions having
 6 already been the subject of a Neutral Expert request in
 7 2009, and despite the seven-page annex that the Pakistan
 8 Commissioner had recently provided, India still
 9 considered that Pakistan had not provided sufficient
 10 technical information for India to understand its
 11 objections.
 12 So, so far as India was concerned, not only was
 13 there no difference under Article IX(2), or a dispute
 14 under Article IX(3) between the parties, there wasn't
 15 even a question under Article IX(1).
 16 Fourthly, on the RHEP, which had been discussed in
 17 detail within the Commission on three occasions whilst
 18 the Kishenganga arbitration was on foot.
 19 Pakistan considered that the same issues -- save
 20 that of the freeboard -- had arisen between the parties
 21 regarding the RHEP as with the KHEP, with a similar
 22 large of convergence on key points. Its Commissioner
 23 accordingly formed the view that differences had arisen
 24 with respect to the RHEP as well.
 25 India unsurprisingly disagreed, claiming that the

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12:25 1 time had not yet come to recognise differences on the
 2 RHEP. Indeed, in its view, the time had once again not
 3 even come to formulate questions for the purposes of
 4 Article IX(1).
 5 Fifthly and finally, on the question of KHEP
 6 construction, Pakistan was of the view that in light of
 7 the Kishenganga Court's statement on the desirability of
 8 HEP construction not occurring until design issues had
 9 been resolved, India should pause construction of the
 10 KHEP. This was necessary to avoid a fait accompli for
 11 Pakistan, whereby the KHEP has completed with possibly
 12 illegal features in situ.
 13 India considered (P-25, paragraph 20) that the
 14 relevant statements of the Kishenganga Court were "not
 15 directions but ... observations", and that it was not
 16 obliged to stop construction of the KHEP. And it
 17 maintained that position, moreover, while refusing to
 18 allow Pakistan's Commissioner so much as a visit to the
 19 KHEP site, in violation of its obligations under
 20 Article VIII(4)(d), as Sir Daniel highlighted earlier
 21 this morning.
 22 Now, pausing there, members of the [Court], let's
 23 step back for a second. If you are Pakistan's
 24 Commissioner in that situation, what is your impression?
 25 Let's assess that together.

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12:26 1 First, you have a long-running dispute with your
 2 counterparty over the KHEP, which he refuses to
 3 acknowledge on the basis that he still claims not to
 4 understand your objections after ten years of talking
 5 about them.
 6 Secondly, despite parts of that disagreement
 7 concerning low-level outlets being resolved in
 8 Pakistan's favour by the Kishenganga Court, your
 9 counterpart also refuses to acknowledge that fact.
 10 Thirdly, the Indian Commissioner does, however,
 11 insist that the Baglihar determination, which supports
 12 India's position on pondage, is somehow generally
 13 binding under the Treaty, despite the Kishenganga Court
 14 expressly saying that it isn't.
 15 Fourthly, any attempt at compromise by you -- for
 16 example, by acquiescing on the issue of the KHEP
 17 freeboard -- is not met with equivalent compromise by
 18 your partner, and instead he uses the fact of your
 19 compromise to suggest that there are no differences or
 20 disputes with respect to those matters on which
 21 compromise is not possible.
 22 Fifthly, this situation is playing out against the
 23 backdrop of India's accelerated construction of the
 24 KHEP, which threatens to create a fait accompli for
 25 Pakistan in the event it is completed. Requests by you

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12:27 1 that India pause construction so that the issues between
 2 the parties can be worked out are rebuffed.
 3 Sixthly, at the same time, your counterpart refuses
 4 to allow you access to the KHEP site, despite you
 5 requesting such access in a timely manner, as is your
 6 right under Article VIII(4)(d) of the Treaty.
 7 And finally, negotiations within the Commission over
 8 the RHEP, in respect of which you have raised virtually
 9 the same issues as the KHEP, are about to go the same
 10 way.
 11 Mr Chairman, members of the Court, in such
 12 a situation, standing in the shoes of Pakistan's
 13 Commissioner, you would be justified in thinking that so
 14 far as the KHEP and the RHEP -- and indeed any other HEP
 15 like them -- are concerned, your relationship with the
 16 Indian Commissioner was in a situation of profound
 17 dysfunction.
 18 And this explains what happens next, which is that
 19 after some further correspondence, Pakistan's
 20 Commissioner felt he had no choice but to take up the
 21 option he had floated in 2009 and put the remaining
 22 issues on the KHEP before a Neutral Expert.
 23 (Slide 14) Now, on 3 July 2015 (P-10), Pakistan's
 24 Commissioner communicated the necessary intent to the
 25 Indian Commissioner.

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12:28 1 Just to pick up on a question that the Chairman
 2 asked my colleague Ms Rees-Evans, it's important to
 3 highlight that this does not signal the start of
 4 a Neutral Expert process. To make that good, I have the
 5 reference for you: you can find this in our Response at
 6 paragraph 199, and that refers to paragraph 478 of the
 7 Kishenganga partial award. I might just read it into
 8 the record for you:
 9 "... the conjunction within Article IX(2)(a) of both
 10 references manifests the Parties' intention ..."
 11 That is, intention on the one hand and then actual
 12 request on the other:
 13 "... to exercise a dual role under that Article,
 14 both as the initiators of the neutral expert process and
 15 a part of a mechanism that requires recourse to
 16 a neutral expert in certain circumstances.
 17 Article IX(2)(a) thus requires that a difference be
 18 referred to a neutral expert if either Commissioner
 19 believes that it relates to one of the identified
 20 technical matters and prefers that it be resolved by
 21 a neutral expert."
 22 But, and this is the important part:
 23 "This requirement only becomes effective, however,
 24 if a request for the appointment of a neutral expert is
 25 actually made. It is insufficient for a Commissioner

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12:30 1 merely to express the view that a difference would, at
 2 some point, be an appropriate matter for a neutral
 3 expert."
 4 Turning back to the letter of 3 July 2015. Here we
 5 see Pakistan's Commissioner communicating his opinion
 6 that a Neutral Expert would be a good idea. In
 7 communicating that intention, he also committed to
 8 submitting the RHEP for Neutral Expert determination as
 9 well.
 10 I'd like to ask the members of the Court to turn to
 11 that document now. I think I've given you with the pack
 12 some hardcopy documents. The exhibit number is P-0010.
 13 The critical part of that letter is worth examining
 14 in full. After referring to the record of the 110th and
 15 111th meetings of the Commission, which we've just
 16 discussed, the Pakistan Commissioner observes at
 17 paragraph 2 that:
 18 "Pakistan indicated as far back as 2009 its
 19 intention to take the questions [regarding] the [KHEP]
 20 to the Neutral Expert, while taking two of the six
 21 questions relating to the Plant to the Court of
 22 Arbitration. At the conclusion of the 110th Meeting of
 23 the Commission, I stated that points of difference on
 24 the design parameters of the [RHEP] had arisen, and
 25 Pakistan would, therefore, refer the matter to the

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12:31 1 Neutral Expert or Court of Arbitration, although you did
 2 not agree. In spite of our best efforts, the questions
 3 relating to both could not, however, be resolved, during
 4 the 111th meeting of the Commission held in New Delhi
 5 and I stated that the difference had arisen in respect
 6 of the design of both the plants."
 7 That's paragraph 2.
 8 At paragraph 3, we see he is specifically invoking
 9 Article IX(2)(a):
 10 "As a difference has arisen, I ... invoke
 11 paragraph 2(a) of Article IX ..."
 12 And then at paragraph 4, he asks for the Indian
 13 Commissioner's cooperation in preparing a joint
 14 statement of points of difference within two weeks,
 15 which is required by paragraph 5(b) of Annexure F.
 16 Now, these two paragraphs contain an important point
 17 of detail, which in due course may be relevant to the
 18 Court's consideration of its question 5, on Pakistan's
 19 2009 referral of some of the KHEP questions to the
 20 Neutral Expert.
 21 Now, as those paragraphs make clear -- the ones I've
 22 just taken you to -- Pakistan's Commissioner intended in
 23 2015 to effectively merge or consolidate the 2009
 24 request with the newly emergent issues on the RHEP;
 25 minus, of course, the question of the KHEP freeboard,

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12:32 1 which, as we've seen, was amicably resolved by the
 2 parties as a concession by Pakistan in the 110th meeting
 3 of the Commission.
 4 To make that point good, let's turn to the next
 5 page; it's actually page 3, I think, of the document.
 6 And you'll see that the old questions 3 to 5 on the KHEP
 7 formulated in 2008, minus question 2 on the freeboard,
 8 which is paragraph 8(a) of Annexure D, are reproduced
 9 exactly in section 1. And in section 2 you'll see those
 10 same questions, this time with the freeboard
 11 reintroduced as question (i), being put forward for the
 12 RHEP.
 13 We can put that document away now.
 14 (Slide 15) Now, the reaction of the Indian
 15 Commissioner to this escalation by the Pakistan's
 16 Commissioner is entirely unsurprising, given what we
 17 know of his attitude. On 16 July 2015, he writes to
 18 Pakistan's Commissioner (P-12) repeating his arguments
 19 from the Commission and refusing to cooperate:
 20 "In view of the above, I am of the considered view
 21 that the issues reflected in your letter neither take
 22 into account the facts, particularly, those discussed in
 23 the various meetings ... nor ... the potential for their
 24 resolution at the Commission level has [not] been
 25 exhausted. The above position was clearly explained by

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12:34 1 me during [the] 111th meeting of the PIC also and
 2 I requested you to provide the technical basis/grounds
 3 for the objections ...", et cetera.
 4 "As such, your invocation of Article IX(2)(a) of the
 5 Indus Waters Treaty 1960 is premature and not in line
 6 with the cooperative spirit enshrined in the Treaty."
 7 Now, members of the Court, Mr Chairman, this is
 8 further evidence of how dysfunctional this Commission
 9 had become. Under paragraph 5(b) of Annexure F, the two
 10 Commissioners are obliged to "endeavour to prepare
 11 a joint statement of the point or points of difference".
 12 But the Indian Commissioner can't even do that.
 13 Instead, he pretends that the desire of Pakistan's
 14 Commissioner to advance matters is somehow premature,
 15 and that, multiple years of failure notwithstanding, the
 16 Commission is still somehow to resolve these divisive
 17 and pressing issues.
 18 Now, in the face of this, members of the Court,
 19 a fair-minded observer, in my submission, may well
 20 conclude that what India really wants is not to resolve
 21 these issues, but rather to keep the KHEP and the RHEP
 22 mired in the Commission, without resolution, until such
 23 time as these projects are completed.
 24 Yes.
 25 THE CHAIRMAN: Dr Miles, on the prior slide (15), it's

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12:35 1 an example, I think, of the Indian Commissioner saying
 2 that you must "provide the technical basis/grounds for
 3 [your] objections".
 4 DR MILES: Yes.
 5 THE CHAIRMAN: And maybe you're going to get to this, but my
 6 question is: what is it that India is expecting from
 7 Pakistan? And can Pakistan provide some of that
 8 information being sought if you're not being given
 9 access to relevant sites and things of that sort?
 10 If you want to address that later, it's fine. But
 11 I'm just curious.
 12 DR MILES: I can find some references for you. But I can
 13 give you the answer now, based on my general
 14 understanding, which is: in his view, precise technical
 15 detailed calculations are required in order to advance
 16 the matter.
 17 Our version is basically that we provided plenty of
 18 detail over the many, many years in various iterations;
 19 and that when you're looking at questions like pondage,
 20 for example, where the issue is really about Baglihar
 21 and is that calculation correct, and when you're looking
 22 at questions like low-level outlets, and did the
 23 Kishenganga Court say you could have low-level outlets
 24 or not, that's also not the kind of thing that requires
 25 technical information in order to be resolved.

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12:37 1 But I will take your point -- assuming that one is
 2 implied, Mr Chairman -- that when the Indian
 3 Commissioner says, "I require more technical
 4 information", he's not exactly forthcoming on the kind
 5 of information that he requires.
 6 Yes, Mr Minear.
 7 MR MINEAR: Dr Miles, I think earlier in your presentation
 8 you characterised the Indian Commissioner as describing
 9 the Baglihar decision as "binding". My recollection is
 10 he said it provided guidance. Am I mistaken in my
 11 recollection?
 12 DR MILES: I'm coming on to that point, Mr Minear. It's
 13 a very good question. But he says initially that it's
 14 a guideline, and useful, and so on and so forth. But
 15 later on -- and we'll come to that -- his position
 16 hardens, and he starts to say something that's very
 17 similar to saying, "This is a precedent that must be
 18 followed in all cases on the Western Rivers". But I'm
 19 coming on to that.
 20 MR MINEAR: Okay, thank you. Proceed.
 21 DR MILES: Thank you. (Pause)
 22 Pakistan's Commissioner, talking of dysfunction, had
 23 plainly reached the same conclusion, because on
 24 24 [July] 2015, he formally issued a request to India
 25 and Pakistan for appointment of a Neutral Expert under

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12:38 1 paragraph 5(c) of Annexure F (P-13).
 2 It might help to turn up this document quickly. I'm
 3 not sure if you've got in hardcopy the second volume of
 4 exhibits. It's tab B, internal page 38; document
 5 number P-13, if you have it in another format. (Pause)
 6 Members of the Court, there are a few things to note
 7 here quickly. (Pause) At the top of the page, we see
 8 that it is addressed to the secretaries of the two water
 9 ministries on behalf of their respective governments.
 10 At paragraph 2, we see a brief recitation of the
 11 procedural history and the differences that emerged in
 12 the Commission for the KHEP; see references there to the
 13 six questions that arose in 2009. Two of them go to the
 14 Court; the remaining four are taken up in the Commission
 15 again.
 16 If we turn the page, we can see we've got a similar
 17 recitation at paragraph 3 for the RHEP.
 18 Then at paragraphs 4 to 5, we see the process by
 19 which Pakistan's Commissioner notified the Indian
 20 Commissioner of his intention to request a Neutral
 21 Expert, and the lengths he went to to notify the Indian
 22 Commissioner, which rather seem from that description,
 23 particularly at paragraph 5, that it included multiple
 24 unanswered letters and phone calls.
 25 And then at paragraph 6, over the page, we see the

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12:40 1 request itself.
 2 Before we leave this document, I'd just like the
 3 members of the Court to turn the page, and you will see
 4 there the expanded "Statement of Points of Difference"
 5 that Pakistan's Commissioner has put together in the
 6 annexure. And this is just to flag this for you;
 7 I won't make anything of it now. But I will be doing
 8 another flag in due course, and Professor Webb will be
 9 paying great attention to these in answering one of
 10 India's objections as to your competence.
 11 So the second of my four parts ends there.
 12 We're now on to the period between July 2015 and
 13 February 2016, where Pakistan's Commissioner formed the
 14 view that given the systemic character of the disputes
 15 between the parties concerning the KHEP and the RHEP,
 16 a Neutral Expert process would not put these issues to
 17 bed. Put another way: that in order to resolve these
 18 issues for all time, a Court of Arbitration with the
 19 capacity to make rulings binding on the general
 20 questions presented was required.
 21 I'll briefly step away from the interaction between
 22 the two Commissioners and focus on what is happening at
 23 the governmental level.
 24 By 24 July 2015, the two Secretaries were in receipt
 25 of the request by Pakistan's Commissioner to appoint

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12:42 1 a Neutral Expert. What happened then?
 2 I can take this quickly: the dynamic that was
 3 present in the Commission played out again at the
 4 government level.
 5 On 12 November 2015, Pakistan sent a note verbale to
 6 India asking that India propose modalities for the
 7 selection of a Neutral Expert (P-93).
 8 India responded by way of a note verbale dated
 9 [23 November] 2015 (P-15). There it took note of the
 10 fact that the two Commissioners were still corresponding
 11 on the KHEP and the RHEP, and that therefore, in its
 12 view, there was still scope for the resolution of the
 13 relevant differences in the Commission.
 14 To that end, India claimed that the request was:
 15 "... premature and the Government of India is of the
 16 view that the ... Commission may continue to address the
 17 matter for ... amicable resolution."
 18 (Slide 19) Turning back to the Commissioners.
 19 India, in its note verbale (P-15), seemed to consider
 20 the fact that the Commissioners were still talking meant
 21 that there remained hope for resolution of the KHEP and
 22 RHEP issues through the Commission. But the
 23 correspondence itself tells a rather different story.
 24 Read fairly -- this is coming on to Mr Minear's point --
 25 it shows the two Commissioners becoming further

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12:43 1 entrenched in their positions.
 2 We've got that correspondence set out for you in
 3 tab B of volume II; I don't propose to take you to it.
 4 But if you want to look at it later on, it's internal
 5 pages 44 to 66. But again, the headline points are
 6 these.
 7 With respect to the point by Pakistan's Commissioner
 8 that the Kishenganga Court had held that the Baglihar
 9 determination was not generally binding, the Indian
 10 Commissioner's position seems to have hardened. He
 11 noted, in a letter of 21 August 2015 (P-16,
 12 paragraph 9), that the Court's comment on the
 13 non-binding force of Baglihar:
 14 "... was actually made in [the] context of drawdown
 15 flushing, [and so] is not relevant to [the] Pondage
 16 issue."
 17 And then he further seems to imply that the Court's
 18 comment actually bestows binding force on Baglihar:
 19 "... as your present objections on the principle of
 20 calculation of pondage in case of [the KHEP and the
 21 RHEP] are [the] same as the one raised before the
 22 Neutral Expert in [the] case of Baglihar, thus falling
 23 within the same scope."
 24 In that same letter, the Indian Commissioner also
 25 takes issue with the suggestion by Pakistan's

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12:45 1 Commissioner that because the Kishenganga Court
 2 prohibited the drawing down of the KHEP reservoir below
 3 dead storage level, it also -- and necessarily --
 4 required that India remove from the KHEP design those
 5 low-level outlets. Again he repeats his position
 6 (paragraph 13):
 7 "The Court's Award on second dispute imposes
 8 operational restriction and does not require any design
 9 change. Therefore, your repeated assertion of design
 10 changes due to [the Court of Arbitration] Award is
 11 beyond my comprehension."
 12 In response to this, on 11 September 2015,
 13 Pakistan's Commissioner sent a nine-page letter to the
 14 Indian Commissioner rebutting each point made (P-18).
 15 Special attention in this respect was drawn to the
 16 assertions made by the Indian Commissioner on the
 17 precedential effect, or not, of Kishenganga and
 18 Baglihar.
 19 In that same letter, Pakistan's Commissioner again
 20 expressed alarm that despite the issues between the
 21 parties remaining unresolved, India was continuing to
 22 advance construction on the KHEP and the RHEP, such that
 23 Pakistan would be placed in a fait accompli with respect
 24 to these projects. As such, he could not agree to the
 25 Indian Commissioner's request to reintroduce these

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12:46 1 matters back into the Commission.
 2 There's two final letters there.
 3 On 13 October 2015, the Indian Commissioner
 4 responded again (P-19). No serious engagement with the
 5 point: a two-page letter that added nothing to the
 6 debate.
 7 Pakistan sent a further response on 4 November 2015
 8 (P-20), and that received the same treatment: a single
 9 page letter sent by the Indian Commissioner on
 10 27 November 2015 (P-21).
 11 (Slide 20) When one reads the final letter in this
 12 chain of correspondence, sent by Pakistan's Commissioner
 13 on 5 February 2016 (P-22), one gets a sense of the
 14 exasperation felt by its author:
 15 "Since I find from perusal of your letter that you
 16 are sticking to your old position on both the maximum
 17 pondage and the placement of spillways ..."
 18 That is to say the low-level outlets:
 19 "... I do not see any point in going back to discuss
 20 these issues/differences in the ... Commission. Even
 21 otherwise, you would appreciate this is not the stage
 22 when we can reopen discussions in the ... Commission as
 23 the construction of the plants continues apace towards
 24 a fait accompli situation. It is, therefore, not
 25 possible for me to agree to delay invocation of

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12:47 1 Article IX of the Indus Waters Treaty to definitively
 2 resolve the issues identified in my correspondence of
 3 24 July 2015."
 4 At that point, members of the Court, I'll ask you
 5 yourselves again to put yourselves in the shoes of the
 6 Pakistan Commissioner. Take note of the following
 7 points:
 8 First, your counterpart, the Indian Commissioner,
 9 has no interest at all in engaging in the Neutral Expert
 10 process that you have initiated. Neither does his
 11 government, with both describing your request for
 12 Neutral Expert determination as "premature", and
 13 insisting that the KHEP and the RHEP must remain in the
 14 Commission.
 15 Secondly, at the same time, the Indian
 16 Commissioner's position on pondage seems to be
 17 hardening. He now claims that the Baglihar
 18 determination resolved the question of pondage under the
 19 Treaty with general effect, as it was concerned with the
 20 same aspect of paragraph 8 of Annexure D as is at issue
 21 in this case. To that end, you are well aware that the
 22 question of the binding force of Baglihar beyond the
 23 Baglihar Plant is not a technical matter within the
 24 meaning of Part 1 of Annexure F of the Treaty.
 25 Thirdly, your counterpart refuses to concede -- no

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12:49 1 matter how many times you explain -- the legal effect of
 2 the Kishenganga Court's findings, and how these findings
 3 require modification to the KHEP's design. Again, you
 4 are also keenly aware that interpretation of the
 5 Kishenganga partial award required to resolve this issue
 6 is not a technical exercise.
 7 Fourthly, you are aware, moreover, that India has
 8 many other HEPs of similar design planned for the
 9 Western Rivers, such that the issues that have arisen
 10 with respect to the KHEP and RHEP will, unless resolved,
 11 and soon, arise with respect to those projects as well.
 12 Fifthly, to make matters worse, this is all taking
 13 place against a background of accelerated Indian
 14 construction of both the KHEP and the RHEP, such that
 15 a fait accompli may well emerge whereby at least the
 16 KHEP is completed before your objections can be
 17 resolved.
 18 And sixthly, you're aware that a Neutral Expert
 19 appointed under Annexure F of the Treaty has no power to
 20 order interim measures to halt construction of the KHEP
 21 and the RHEP, with such measures being the only device
 22 that has ever convinced India to down tools and allow
 23 the issues between the parties to be properly resolved.
 24 Mr Chairman, members of the Court, were you standing
 25 in the shoes of Pakistan's Commissioner, in my

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12:53 1 setting out the background to his decision. And we can
 2 see he is taking particular note of some of the points
 3 I made. He notes the passage of time, and the Indian
 4 Commissioner's refusal to engage in that process:
 5 "Although [these] issues have been discussed within
 6 the Indus Waters Commission for several years, you
 7 responded on 21 August ... that my 'unilateral intention
 8 to take the matter to Neutral Expert ... is premature'.
 9 We can see he then notes the Indian Commissioner's
 10 position on Mr Minear's point, on the supposed binding
 11 force of Baglihar. And he extracts a quote from the
 12 Indian Commissioner:
 13 "... 'the principle of calculation of pondage in
 14 case of Ratle HEP and KHEP are the same as the one
 15 raised before the Neutral Expert in case of Baglihar,
 16 thus falling within the same scope.'"
 17 And finally, at the very bottom of that paragraph,
 18 we see he notes in his prior request that his
 19 counterpart:
 20 "... 'send ... us the best configurations you can
 21 offer in response to our objections on the design
 22 parameters of [the KHEP and the RHEP].'"
 23 So there, in that prior exchange, he's effectively
 24 asking for evidence of some kind of flexibility on these
 25 matters. "Okay, you don't understand what my objection

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12:50 1 submission, you would be justified in concluding that
 2 the issues between the parties cannot be resolved in any
 3 systemic and enduring sense by a Neutral Expert under
 4 Annexure F. Indeed, you would be justified in
 5 concluding that the only body capable of upholding
 6 Pakistan's interests in this matter is a Court of
 7 Arbitration -- this Court of Arbitration -- under
 8 Annexure G.
 9 (Slide 21) That brings me to the fourth and final
 10 part of my submissions, dealing with the revocation by
 11 Pakistan's Commissioner of his Neutral Expert Request,
 12 his declaration of a dispute under Article IX(3), and
 13 the negotiations between the parties under Article IX(4)
 14 over the period February to July 2016. (Pause)
 15 So the relevant period of time: February 2016 to
 16 July 2016. We're picking up our narrative again.
 17 (Slide 22) On 25 February 2016, Pakistan's
 18 Commissioner wrote to his counterpart setting out, in
 19 condensed form, the points I just mentioned -- the
 20 points that hopefully you, standing in the shoes of
 21 Pakistan's Commissioner, now understand -- regarding the
 22 move from a Neutral Expert to a Court of Arbitration.
 23 We can turn that letter up, please. It's volume II,
 24 tab B, internal page 70, document P-23.
 25 At paragraph 2, we see Pakistan's Commissioner

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12:54 1 is; you tell me what you're willing to do". And he
 2 notes that this request was ignored, demonstrating that
 3 the Indian Commissioner had no interest in negotiating,
 4 no interest in compromise and no flexibility at all on
 5 these designs.
 6 At paragraph 3, he then records India itself taking
 7 the same line: the request is "premature" -- that's at
 8 the very bottom, the request "appears premature" -- and
 9 India refuses to engage when asked to by Pakistan.
 10 Now, at paragraph 4 we have the critical sentence:
 11 "... the Government of India has rejected the
 12 invitation of 24 July ... to jointly appoint a Neutral
 13 Expert pursuant to Paragraph 4(b)(i) of Annexure F of
 14 the Indus Waters Treaty, and that invitation has lapsed
 15 and ..."
 16 Double underline here:
 17 "... is hereby formally revoked."
 18 At paragraph 5, we see Pakistan's Commissioner
 19 noting that several of the basic points between the
 20 parties are legal and not technical matters. And we can
 21 see there that, at the very bottom of paragraph 5 and
 22 continuing over the page, he's talking there about the
 23 Baglihar determination not being binding beyond that
 24 plant. And he's also referring to the Kishenganga Court
 25 rejecting, in general terms, the Baglihar Neutral

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12:56 1 Expert's approach to treaty interpretation.
 2 Then at paragraph 6, another legal issue: the effect
 3 of the Kishenganga Court's findings on drawdown flushing
 4 and the corresponding effect that prohibition has on the
 5 design for the KHEP and the RHEP, which effect India
 6 refuses to admit.
 7 Paragraph 7, another very important statement, we
 8 see an acknowledgement of the systemic character of
 9 these issues:
 10 "Your positions on these and related issues, which
 11 Pakistan rejects, present legal questions of Treaty
 12 interpretation that will inevitably recur as India
 13 proceeds with other HEP projects on the Western Rivers."
 14 And then at the bottom, he says in light of that
 15 systemic character of these issues, a Court of
 16 Arbitration is required:
 17 "... which can render an award of general
 18 applicability for the parties' future guidance, and --
 19 as the Court of Arbitration clarified -- [be] 'binding
 20 on the general question presented' ..."
 21 At paragraph 8 we see the formal invocation of
 22 Article IX(3) and a request that India's position be set
 23 out in the statement of points of dispute annexed to the
 24 letter. And we see there that the Indian Commissioner
 25 is given a deadline of two weeks, and I'd ask the Court

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12:57 1 to take note that that is the same deadline given to the
 2 Commissioners in paragraph 5(b) of Annexure F for
 3 preparation of joint points of difference under
 4 a Neutral Expert proceeding.
 5 Then finally, in paragraph 9 we see Pakistan's
 6 Commissioner taking notice of the ongoing construction
 7 of the KHEP and the RHEP, despite Pakistan's
 8 long-standing objections to those designs:
 9 "Pakistan specifically notes that India has been,
 10 and still is, proceeding at its own risk with regard to
 11 the construction of the works of the Kishenganga and
 12 Ratle HEPs that are the subject of bona fide objections
 13 from Pakistan dating back to 2009 and 2012,
 14 respectively."
 15 Now, if we can just turn the page and look at the
 16 draft statement of points of dispute. Again, I don't
 17 want to spend much time on this, but again I'm just
 18 flagging it for Professor Webb's benefit. She will pick
 19 up with respect to India's objection that -- I mean, you
 20 may have noticed already this is a far more substantial
 21 statement than what we saw with respect to the Request
 22 for a Neutral Expert. It includes all kinds of systemic
 23 and legal questions in here. Professor Webb will bring
 24 those to the fore. And this is to deal with India's
 25 objection on how these objections are apparently

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12:59 1 identical -- they're clearly not, but India says they
 2 are identical to what was put forward in the
 3 Neutral Expert proceedings.
 4 So subsumed within these are the points of
 5 difference that were set out in Pakistan's Neutral
 6 Expert Request of 24 July 2015, which are then expanded
 7 on to reflect the legal and systemic nature of the
 8 issues that Pakistan's Commissioner discussed in that
 9 letter.
 10 So that's the 25 February 2016 letter and Pakistan's
 11 change of position.
 12 Mr Chairman, I think that's probably a convenient
 13 moment. (Pause)
 14 THE CHAIRMAN: I think we will let you go for another 10 to
 15 15 minutes. But if you can keep it to that, I think
 16 that would be very helpful.
 17 DR MILES: Mr Chairman, I will do my best.
 18 (Slide 25) So, pausing there, I did note at the
 19 outset that I would be addressing some of the Court's
 20 helpful questions. We've got those on the slide again
 21 as an aide-mémoire. And we can now start to answer some
 22 of these.
 23 The first aspect is question 4, and Pakistan's 2009
 24 Neutral Expert Request and the request of whether or not
 25 it was revoked. And the answer to that is: yes. It was

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13:00 1 revoked: it was revoked in the 25 February 2016 letter.
 2 If you'll recall, Pakistan's Commissioner, when
 3 indicating his intention to request a Neutral Expert on
 4 3 July 2015, specifically recalled that 2009 request and
 5 he merged the two, along with the new issues on the
 6 RHEP.
 7 So in our submission, the correct analysis was that
 8 Pakistan's 2009 Neutral Expert request merged with, was
 9 subsumed within or superseded by Pakistan's 2015 Neutral
 10 Expert request; and that all prior attempts to put the
 11 KHEP before a Neutral Expert were revoked in
 12 February 2016.
 13 In relation to that, I should note at the time that
 14 India acknowledged that revocation. It didn't say it
 15 was invalid; it didn't say there was a problem with it.
 16 It has only recently begun to peddle this theory that
 17 the request could not be revoked.
 18 Now, I've got here on the slide the exhibit
 19 references to those acknowledgements. They've been
 20 fully explained in the pleadings. I don't propose to
 21 spend any more time on that. But you have the
 22 references, should you need them later on.
 23 That's question 4. What about question 14, which is
 24 back on the slide? Did Pakistan's Commissioner seek
 25 an Article IX(3) report from the Commission?

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13:02 1 The answer to this, as I've just shown you, is
 2 plainly: yes, he did. He expressly set out Pakistan's
 3 points in dispute in his 25 February 2016 letter and
 4 requested that his counterpart insert India's position
 5 in each. Had India's Commissioner done so, the
 6 resulting joint product would have constituted the
 7 report. So that's question 14, answered in the
 8 affirmative.
 9 (Slide 26) Let's now look at the Indian
 10 Commissioner's response to the invocation of
 11 Article IX(3) by Pakistan's Commissioner. I've got the
 12 exhibit reference for you on the slide (P-27), but
 13 I will briefly tell you the contents now.
 14 The letter is unsurprisingly argumentative, and
 15 takes issues with many of the points I highlighted in
 16 the 25 February 2016 letter. But the crucial point,
 17 members of the Court, is that the Indian Commissioner
 18 does not engage with the request by Pakistan's
 19 Commissioner to complete his part of the Article IX(3)
 20 report. And indeed, in paragraph 2 he states that
 21 Pakistan's approach is "improper and invalid".
 22 So in my submission, that's clearly tantamount to
 23 a refusal by the Indian Commissioner to participate in
 24 the process. It makes clear to Pakistan that India will
 25 not allow an Article IX(3) report to emerge from the

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13:03 1 Commission on these issues at any point in time.
 2 But nevertheless, Pakistan waits a little longer,
 3 until 29 March 2016, before drawing the conclusion that
 4 the report is not forthcoming -- the exhibit reference
 5 to that is P-28 -- and it expressly states in that note
 6 verbale that:
 7 "... as the ICIW has failed to provide India's
 8 position [on] the Statement of Points of Dispute, the
 9 Report of the Commission, as provided in Article IX(4)
 10 is being unduly delayed."
 11 (Slide 27) Now, this provides us with the answer to
 12 question 15, back on the slide:
 13 "On what date did the Government of Pakistan
 14 determine that the report within the Commission was
 15 'being unduly delayed'?"
 16 We have the answer to that: 29 March 2016, as
 17 communicated in that note verbale.
 18 And then we have the question asked:
 19 "Is there any precedent under the Treaty or
 20 international law for clarifying when undue delay has
 21 occurred?"
 22 Now, a preliminary observation on this question.
 23 When Article IX(4) speaks of undue delay, it does not
 24 say that that delay has to be ascertained objectively.
 25 What it says is that Article IX(4) requires that the

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13:04 1 party concerned form the subjective opinion that the
 2 report is unduly delayed in the Commission. That is
 3 a legally significant distinction that will be dealt
 4 with by Mr Fietta, but I just wanted to flag it here.
 5 Now, as far as precedent under the Treaty is
 6 concerned, I'm afraid the parties' practice is not of
 7 great assistance to the Court.
 8 In Kishenganga there was also a situation of undue
 9 delay, but it was not relevant in any contested sense.
 10 It was, moreover, complicated by the fact that after
 11 notifying the Indian Commissioner that the first and
 12 second disputes had arisen, Pakistan agreed to those
 13 matters being remitted back to the Commission on
 14 a without-prejudice basis. That's the 103rd meeting,
 15 taking place from 31 May to 3 [June] 2009. Those
 16 discussions failed, and so the need for an Article IX(3)
 17 report arose again.
 18 After the 103rd meeting was concluded, Pakistan
 19 waited until 10 July 2009 before declaring undue delay,
 20 so roughly five weeks, which is more or less the time
 21 elapsed here between 25 February and [29] March 2016;
 22 25 February being the Article IX(3) declaration by
 23 Pakistan's Commissioner (P-23), 29 March being the point
 24 at which Pakistan declared, via its note verbale (P-28),
 25 that in its opinion there was undue delay for the report

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13:06 1 within the Commission.
 2 As I said beforehand, if we're looking elsewhere in
 3 the Treaty for an understanding of what undue delay
 4 might be, it's worth noting that in the equivalent
 5 situation under paragraph 5(b) of Annexure F, concerning
 6 the preparation of joint points of difference in
 7 a Neutral Expert proceeding, the time given is
 8 two weeks. So five weeks is considerably more time than
 9 the two weeks you would expect for a joint statement of
 10 points of difference under a Neutral Expert proceeding.
 11 So our position is that what limited information is
 12 available under the Treaty, both in terms of practice
 13 and in terms of actual Treaty language, is in line with
 14 Pakistan's assessment of undue delay in this case.
 15 So far as wider international law is concerned, we
 16 couldn't find any direct analogy, but some broad points
 17 might be made.
 18 Again, we are not dealing here with an objective
 19 understanding of what delay is; we are dealing with the
 20 parties' internal subjective understanding that undue
 21 delay has occurred. And as Mr Fietta will explain,
 22 that's quite different.
 23 International law recognises indeed that
 24 generalisations in cases like this are not necessarily
 25 helpful. At paragraph 9 of the WHO advisory opinion

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13:07 1 (PLA-26) -- it's a new authority we have for you in the
 2 bundle -- the ICJ recognised that "what is reasonable
 3 and equitable in any given circumstance must depend on
 4 the particular circumstances" of the case.
 5 So that takes us back to an appreciation of the
 6 circumstances in this case, which, in my submission,
 7 firmly point towards undue delay. The Indian
 8 Commissioner made it abundantly clear that he would not
 9 participate at all in the preparation of the
 10 Article IX(3) report, and so undue delay arose
 11 axiomatically.
 12 (Slide 29) Turning to the final part of my
 13 submissions, we can see on the slide that we have our
 14 questions back. Question 16:
 15 "Do the Parties agree that Pakistan invited India to
 16 resolve the dispute by agreement, including by naming
 17 negotiators and indicating its readiness to meet at
 18 a time and place indicated by India, and that such
 19 negotiations took place on 14-15 July 2016?"
 20 Pakistan certainly agrees with this statement. So
 21 does the evidence.
 22 I take you back to the note verbale from Pakistan to
 23 India dated 29 March 2016. In the interests of time,
 24 I won't take you to it, but I did print it out for you.
 25 It's Exhibit P-0028. I'll let you look at that at your

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13:10 1 Paragraph 3: history of the matter.
 2 Paragraph 4: what occurred were detailed,
 3 broad-based discussions between the technical experts
 4 of, amongst other things, the pondage, the freeboard,
 5 the intake, the spillway. All were discussed in
 6 exhaustive detail.
 7 India offers a minor concession on pondage, which
 8 Pakistan [rejects] as insufficient, and in any event not
 9 sufficient to resolve the systemic problem that the
 10 parties have over pondage. This isn't about a one-off
 11 problem with the KHEP: it's about the whole pondage
 12 calculation for every HEP on the Western Rivers.
 13 (Paragraph 5): India offers a site visit to the
 14 KHEP. Well, we know how that went.
 15 (Paragraph 6): India offers further negotiations;
 16 and Pakistan, in view of the long history of the matter,
 17 refuses.
 18 Paragraph 7: the flexibility of both parties is
 19 praised.
 20 And finally (paragraph 8): Pakistan, indicates that
 21 it will be requesting arbitration forthwith.
 22 So the negotiations plainly took place.
 23 (Slide 32) Just to conclude, members of the Court,
 24 in chronological terms, that brings me to the end of my
 25 submissions. And I'll close by providing a fuller

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13:08 1 convenience.
 2 (Slide 30) Four things happened in that document,
 3 there on the face of it:
 4 (1) Pakistan concludes that the Article IX(3) report
 5 is being "unduly delayed".
 6 (2) It invites India to commence Article IX(4)
 7 negotiations and to appoint negotiators.
 8 (3) It lists Pakistan's negotiators as the Attorney
 9 General. The Attorney General didn't ultimately make it
 10 to the negotiations; he was replaced by the additional
 11 Attorney General, who was at that time Mr Aslam. He was
 12 joined by the Secretary and Joint Secretary of the
 13 Water Ministry and Pakistan's Commissioner.
 14 (4) And that note verbale also notifies India that
 15 Pakistan's negotiators are willing to meet at a time and
 16 place of India's choosing.
 17 So that's the first part of question 16 answered in
 18 the affirmative. What about the second part: did the
 19 negotiations take place?
 20 (Slide 31) Well, again, yes, they obviously did:
 21 they took place on 14 and 15 July 2016. Again, I won't
 22 take you to the minutes of that meeting, in the
 23 interests of time (P-31). But on the slide you can see
 24 a few helpful points that we have for you:
 25 Paragraph 1: the negotiations took place.

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13:11 1 answer to question 5, which is back on the slide:
 2 "How do Pakistan's efforts in 2009 [to negotiate]
 3 compare to the efforts [that took place] in the present
 4 case?"
 5 The question is framed in terms of inter-state
 6 negotiations under Article IX(4). I will answer it on
 7 that basis initially.
 8 In 2009, India refused to negotiate under
 9 Article IX(4) point blank, such that Pakistan moved to
 10 seize the Kishenganga Court under Article IX(5)(c),
 11 rather than Article IX(5)(b) as in this case. So there
 12 is, in my submission, no comparison to be made.
 13 But if I were to answer the question more widely,
 14 and take it as referring not just to inter-state
 15 negotiations but also negotiations within the
 16 Commission, then it gives us an opportunity for wider
 17 reflection on just how we got where we are.
 18 First -- and in a sense, there's no distinction
 19 between negotiations in 2009 and negotiations in 2016 --
 20 we are not dealing here with two separate disagreements.
 21 We are dealing with a single continuous disagreement
 22 concerning the design of the KHEP and other Indian HEPs
 23 that was ongoing within the Commission and beyond since
 24 2006.
 25 Secondly, while that disagreement abated somewhat

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13:12 1 during the Kishenganga arbitration, that doesn't mean it
 2 went away. Like an underground river, it was merely
 3 submerged, flowing as strongly as ever through the
 4 caverns of the Commission, and still ventilated in
 5 respect of the RHEP, until it re-emerged above ground in
 6 the wake of the partial award.
 7 And thirdly and finally, throughout that period we
 8 have a common and building theme. We see good faith
 9 efforts from Pakistan to resolve these issues from 2006,
 10 resulting in the six questions presented in 2008. Two
 11 of these are referred to the Kishenganga Court in 2010.
 12 But when that arbitration ends in late 2013, and
 13 Pakistan returns to the Commission having secured
 14 victory on the second dispute, the Indian Commissioner
 15 is unmoved. For him, the Kishenganga partial and final
 16 awards have no impact at all on the KHEP and later RHEP
 17 design. He refuses to entertain even the idea of
 18 change, claiming that he cannot understand the technical
 19 basis of Pakistan's objections. And so he refuses to
 20 admit there is even a question -- much less a difference
 21 or a dispute -- between the parties; all while refusing
 22 to pause construction of the KHEP and the RHEP so that
 23 proper discussions can occur, and refusing to allow
 24 Pakistan's Commissioner to access the KHEP site.
 25 This situation persists through multiple meetings of

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13:14 1 the Commission after the Kishenganga final award, the
 2 Indian Commissioner having refused to discuss the KHEP
 3 before then. The 110th and 111th meetings spend a great
 4 deal of time on these issues, as does the correspondence
 5 between the Commissioners -- between January 2014 and
 6 July 2016, a period of two and a half years -- all to no
 7 avail.
 8 Over that time, the only real movement in position
 9 is from Pakistan, dropping its position on the KHEP
 10 freeboard but getting nothing from India in exchange.
 11 And when Pakistan's Commissioner suggests that a body
 12 other than the Commission may be required to cut this
 13 Gordian knot, he is greeted with howls of protest by
 14 India.
 15 In a word, members of the Court, the Commission on
 16 these issues had become completely dysfunctional, and
 17 responsibility for that dysfunction lay with India.
 18 So when question 5 asks Pakistan to assess its
 19 negotiations in 2016 as opposed to 2009, Pakistan's
 20 answer is this: throughout both periods, and the
 21 lifetime of the present dispute, Pakistan never stopped
 22 negotiating in good faith. It was only after all its
 23 options had been exhausted that it turned to this Court
 24 of Arbitration to have these matters, which have been on
 25 foot between the Parties in one way or another since

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13:15 1 2006, finally resolved.
 2 Mr Chairman, members of the Court, unless you have
 3 any questions for me, those are my submissions.
 4 THE CHAIRMAN: One question. And this may be for Mr Saadeh,
 5 in which case it's fine to leave it to after the lunch,
 6 but because you did mention the negotiations that took
 7 place July 14-15 of 2016.
 8 I'm interested in whether, when we then look at
 9 Article IX(5) and we see that "A court of Arbitration
 10 shall be established" and then it lays out three
 11 possibilities -- it's the second possibility, (b), that
 12 unfolded here --
 13 DR MILES: That's right.
 14 THE CHAIRMAN: -- that there were in fact negotiations that
 15 began, but then:
 16 "... either Party ... in its opinion the dispute is
 17 not likely to be resolved by negotiation or
 18 mediation ..."
 19 It's a simple question of: when did Pakistan reach
 20 that conclusion? Is it best understood as at the point
 21 of making the Request for Arbitration, or is it
 22 evidenced in some way at an earlier point in time?
 23 DR MILES: If you look at the minutes of the meeting (P-31),
 24 the Secretary-level negotiations, it says at the end of
 25 those that Pakistan has formed the view that the road is

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13:16 1 an end and the time has come to look to other options.
 2 And we would say that that is the point at which -- the
 3 end of those negotiations, after they had failed, after
 4 there was no further movement to Pakistan's
 5 satisfaction -- the intention was formed to go to
 6 arbitration.
 7 THE CHAIRMAN: So essentially on July 15, at the end of the
 8 negotiations, that would be the point in time?
 9 DR MILES: That's correct, yes.
 10 THE CHAIRMAN: Okay, thank you.
 11 MR MINEAR: May I?
 12 THE CHAIRMAN: Yes, please.
 13 MR MINEAR: Just a quick question. I understand I'm
 14 standing between everybody and their lunch.
 15 I believe that India takes the position that those
 16 were not governmental negotiations because it objected
 17 to the resolution of this by dispute. And if that's the
 18 case, would it be permissible -- if we accepted that
 19 argument of India, would it be permissible to treat 5(c)
 20 as the basis here? Even if the negotiations ...
 21 DR MILES: Mr Minear, that's not a quick question. I'm
 22 afraid I'm going to have to come back to you on that
 23 one.
 24 MR MINEAR: Okay, great. I'll try and rephrase it when we
 25 come back and discuss it.

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13:17 1 DR MILES: Okay. Thank you, sir.
 2 THE CHAIRMAN: Very good. I think that's all of our
 3 questions. So thank you very much, Dr Miles, for your
 4 presentation.
 5 DR MILES: Thank you.
 6 THE CHAIRMAN: So looking at the clock, we are about
 7 18 minutes past the hour by my timepiece, and we had
 8 scheduled a lunch break to go until 2.15. I'm thinking
 9 we might resume at 2.30, if that's agreeable to the
 10 Government of Pakistan? In which case that's what we
 11 will do.
 12 So we'll break now for lunch and be back at 2.30.
 13 Thank you.
 14 (1.18 pm)
 15 (Adjourned until 2.30 pm)
 16 (2.28 pm)
 17 THE CHAIRMAN: Mr Saadeh, I think you're next up. So you
 18 have the floor, sir.
 19 MR SAADEH: Thank you, Mr Chairman. And I will try and
 20 satisfy your eagerness.
 21 It is a pleasure to be here. My name is Jiries
 22 Saadeh and I'm honoured to be before this Court
 23 representing Pakistan in these proceedings.
 24 My role is to take you through from where Dr Miles
 25 concluded, which were the intergovernmental talks of

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14:28 1 July 2016, to the end of the factual narrative in terms
 2 of the pause, so before the reconstitution of
 3 proceedings last year. I will pick up the story from
 4 those talks in July 2016.
 5 The next few months after that were important months
 6 in the story. Then comes Pakistan's Request for
 7 Arbitration; India's attempt to derail that process
 8 through its belated attempt to appoint a Neutral Expert;
 9 and finally, what we term "the pause", the six-year stay
 10 implemented by the World Bank.
 11 I will mention a few exhibits during my talk.
 12 I don't have a slide presentation; they are all in the
 13 exhibits folder on Box. But I will put up on the screen
 14 a handful of documents to show you specific paragraphs.
 15 So, like Dr Miles, my focus will be to elucidate the
 16 facts by reference to the materials before you. I will
 17 also touch on the legal implications of those facts, but
 18 my colleagues to follow will develop that in more detail
 19 in their submissions later.
 20 So where were the parties in July 2016, at the end
 21 of the intergovernmental talks? As the minutes of those
 22 talks record -- and this picks up a question you had,
 23 Mr Chairman, for Dr Miles -- Pakistan had by that point
 24 concluded they had run out of road. Pakistan had no
 25 faith that further talks would yield a different result,

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14:30 1 and it was clear with India that that was the case.
 2 As Dr Miles set out in detail, the Commissioners had
 3 discussed the points of dispute on multiple occasions
 4 over many years without any substantive progress. Notes
 5 verbales had been exchanged and other correspondence had
 6 been exchanged. In Pakistan's view, patient as it had
 7 been, the parties had reached an intractable stalemate.
 8 So Pakistan was, it firmly believed, left with no
 9 choice but to submit the Request for Arbitration that
 10 commenced these proceedings. And given the systemic
 11 general issues at stake, coupled as they are within the
 12 plant-specific issues related to the KHEP and the RHEP,
 13 Pakistan's position was, and remains, that only a Court
 14 of Arbitration could -- can -- provide a definitive and
 15 comprehensive resolution. The legal threshold issues
 16 were, and are, simply not capable of determination by
 17 a Neutral Expert.
 18 Of course, this position had been evident to India
 19 from as early as February of that year, 2016, and India
 20 was clear that Pakistan was preparing to refer the seven
 21 disputes to a Court of Arbitration, should resolution
 22 between the parties prove impossible. That had been
 23 made crystal-clear in the Pakistani Commissioner's
 24 letter to his Indian counterpart of 25 February 2016;
 25 that is Exhibit P-23. And again, Dr Miles talked you

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14:31 1 through that earlier.
 2 So back to the minutes of the July intergovernmental
 3 meeting. Pakistan concluded that meeting by noting its
 4 view that it was now urgent that the matter be escalated
 5 to the "impartial forum as provided for in the Indus
 6 Waters Treaty 1960" -- this is Exhibit P-31, right at
 7 the end -- a Court of Arbitration.
 8 Well, what happened next? India's next step was
 9 cynical in the extreme. Having for years sought to
 10 delay any definitive resolution to the disputes forming
 11 between the parties, and having dragged the process out
 12 at the Commission level, with glacial progress between
 13 the Commissioners while work on the KHEP and other
 14 projects continued at pace, the Indian Commissioner
 15 wrote to the Pakistan Commissioner on 11 August 2016
 16 putting him on notice that he intended to seek the
 17 appointment of a Neutral Expert.
 18 That letter of 11 August 2016 is Exhibit P-32, and
 19 I'll pull it up on the screen just to have a look at it
 20 in a little more detail. (Pause)
 21 This is P-32, the letter from the Indian
 22 Commissioner. What is plain from this letter, we would
 23 submit -- and you'll see this throughout -- is that the
 24 Indian Commissioner's and India's fundamental motivation
 25 at this stage was to seek to prevent Pakistan from

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14:34 1 taking the seven disputes to a Court of Arbitration. It
 2 knew, as I said, that Pakistan had long determined that
 3 the legal nature of many of the disputes could only be
 4 resolved by a Court. It also knew that Pakistan's
 5 Request for Arbitration was imminent.
 6 I'm just going to point to a few sections of this
 7 letter where it's clear that this Court of Arbitration
 8 is playing on India's mind, and India wants to stop it.
 9 You will see at the end of paragraph 3, for example,
 10 the Indian Commissioner complains that proceeding to
 11 a Court of Arbitration would be "inadmissible and
 12 against the letter and spirit of the Treaty".
 13 Again, the same complaint, in essence, at the
 14 beginning of the following paragraph:
 15 "... without prejudice to our view on the
 16 inadmissibility of unilaterally taking these technical
 17 issues to Court, my Government agreed ..."
 18 And then paragraph 5, so again the next paragraph,
 19 at the beginning:
 20 "It is clear that these issues are purely technical
 21 in nature and cannot be in any way legal in the sense
 22 which may require resolution through the Court of
 23 Arbitration."
 24 This desire not to refer disputes to a Court of
 25 Arbitration, and thereby -- and this has been touched on

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14:35 1 already today -- create a binding precedent for the many
 2 hydroelectric power projects that India is building and
 3 will build on the Western Rivers, has been a constant
 4 refrain by India to Pakistan throughout the lifetime of
 5 the Treaty. It formed the basis for India's objections
 6 to the Kishenganga arbitration, and it is a point that
 7 India has made repeatedly in discussions with Pakistan,
 8 at the Commission level and more broadly.
 9 So what does the Indian Commissioner do then?
 10 Having continually and flatly denied the need to
 11 progress matters beyond bilateral discussions, he
 12 purports to notify Pakistan that he believes
 13 a difference has arisen, and that he intends to seek the
 14 appointment of a Neutral Expert. You can see that set
 15 out in the final sentence of paragraph 5:
 16 "... I intend to seek the appointment ..."
 17 Dr Miles answered your question from earlier today,
 18 Mr Chairman, about the difference between an intention
 19 and a request. So here, clearly, the Indian
 20 Commissioner is just noting his intention to seek the
 21 appointment of a Neutral Expert in due course. And we
 22 would submit this is not a request.
 23 He does attach a statement of points of difference
 24 that are substantively identical to those that
 25 Pakistan's Commissioner had previously attached to his

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14:36 1 revoked Request for the Appointment of a Neutral Expert
 2 of 24 July 2015, over a year earlier.
 3 Mr Fietta will address you later on the legal
 4 implications of this belated notification by India, and
 5 how it could not derail Pakistan's imminent request for
 6 the empanelment of this Court.
 7 From a factual perspective, what cannot be in any
 8 doubt is that India was making a last-ditch attempt to
 9 put in place a wrecking mechanism that would prevent
 10 a Court of Arbitration proceeding smoothly to determine
 11 the issues.
 12 In doing so, India sought to create space within
 13 which it could complete construction of the KHEP and
 14 bring it into operation, as well as continue to develop
 15 the RHEP and other projects. India could not have known
 16 exactly what would happen next -- the six-year-long
 17 World Bank-mandated pause and so on -- but its plan
 18 certainly bore fruit.
 19 Here we are in this room in May 2023, still arguing
 20 over the competence of the Court, an argument that could
 21 have been had in 2016 or 2017, before the KHEP became
 22 operational and before ground was even broken on
 23 construction of the RHEP. Yet no substantive issues
 24 have been addressed. And in all this time, work has
 25 continued on a plethora of other Indian hydroelectric

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14:38 1 dams: projects, I respectfully remind you, over which
 2 Pakistan has had no visibility, in circumstances where
 3 India has failed to agree to any site visits, despite
 4 its clear treaty obligations to do so.
 5 The real-world consequences of the Indian
 6 Commissioner's letter of 11 August 2016 were not ones
 7 that Pakistan even had to infer. Indeed, India had no
 8 compunction in simultaneously informing Pakistan of the
 9 speedy progress of its work on the ground. The very
 10 next day, 12 August 2016, India's Commissioner wrote
 11 another letter to his Pakistani counterpart, and that is
 12 Exhibit P-33.
 13 This letter is short, but its import no less
 14 significant. India was, the Commissioner informed his
 15 Pakistani counterpart, about to start filling the KHEP
 16 below dead storage level. In other words, the KHEP was
 17 nearing completion and was soon to be brought into
 18 operation.
 19 This development shone a clear light, were it
 20 needed, on the Indian Commissioner's statement, just the
 21 day before, that he believed that what he termed to be
 22 "technical issues" could be resolved in the Permanent
 23 Indus Commission or through a Neutral Expert. Plainly,
 24 India was hoping to stall yet further.
 25 What was actually happening on the ground was that

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14:39 1 India's prevarications around the resolution of
 2 Pakistan's concerns were continuing, while it worked
 3 assiduously to change facts on the ground in disregard
 4 of Pakistan's concerns, and thereby construct the
 5 fait accompli that would stymie the forthcoming arbitral
 6 proceedings and block Pakistan's anticipated requests
 7 for interim measures. To reiterate Sir Daniel's
 8 comments from this morning, here was India engaging
 9 again in its habitual tactics: play it long, dissemble,
 10 delay.
 11 Pakistan initiated these arbitral proceedings
 12 through its Request for Arbitration of 19 August 2016.
 13 It was under cover of a note verbale (P-34) handed over
 14 in hard copy by Pakistan's Ministry of Foreign Affairs
 15 to India's High Commission in Islamabad. That request
 16 set out, inter alia, a range of interim measures seeking
 17 to enjoin India from initiating or continuing
 18 construction and operation of the KHEP and the RHEP.
 19 I do not need to take you to the Request for
 20 Arbitration now, and the precise scope of those requests
 21 is not pertinent for present purposes; only to note that
 22 they were plainly extensive and urgent. They required
 23 quick consideration by a Court of Arbitration and, if
 24 that Court were so minded, the implementation of
 25 measures that would at least maintain the status quo

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14:42 1 should -- derail the process. In the usual course of
 2 international dispute settlement, they were ones for
 3 India to raise before the Court once it had been
 4 empanelled; ones it should be raising in this room
 5 today.
 6 And matters certainly seemed to be progressing. On
 7 31 August 2016, the then-President of the World Bank
 8 confirmed receipt of the Request for Arbitration; that
 9 is Exhibit P-106. Crucially, in that same letter he
 10 confirmed his willingness, if needed, to proceed
 11 expeditiously to nominate a person to draw lots to
 12 select the appointing authorities who would appoint the
 13 three umpires of the Court.
 14 That is the function imposed on the President of the
 15 World Bank by paragraph 9 of Annexure G of the Treaty,
 16 and Pakistan of course expected that the Bank would
 17 fulfil this mandate if required to do so. The
 18 President's letter provided further comfort in that
 19 regard.
 20 In the meantime, India's bilateral communications
 21 were further imperilling the functioning of the Treaty.
 22 On 30 August, India protested again about the
 23 empanelment of a Court of Arbitration in favour of its
 24 new-found -- very new-found -- desire to engage
 25 a Neutral Expert. That is Exhibit P-36 of 30 August.

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14:41 1 while the parties' disputes were resolved.
 2 Three days later, on 22 August 2016, the Pakistani
 3 Commissioner replied to his Indian counterpart
 4 confirming that the ICIW's -- the Indian
 5 Commissioner's -- stated intention to appoint
 6 a Neutral Expert was too late and could go nowhere. He
 7 confirmed -- and this is Exhibit P-35; we don't need to
 8 pull it up -- but he confirmed that:
 9 "... arbitral proceedings having been instituted
 10 through Pakistan's Request, your belated and
 11 contradictory proposal for joint appointment of
 12 a Neutral Expert is untenable."
 13 That letter set out in some detail an overview of
 14 the previous few months, explaining the dispute
 15 resolution scheme under the Treaty and how it now
 16 mandated the need for a Court of Arbitration to
 17 determine the disputes put before it by Pakistan. It
 18 reminded India that it proceeded with construction at
 19 its own risk.
 20 That same day, 22 August, the World Bank received
 21 Pakistan's Request for Arbitration. That can be seen,
 22 inter alia, from Exhibit P-38.
 23 Now, as far as Pakistan was concerned, India's
 24 objections to the constitution and the competence of
 25 a Court of Arbitration were not ones that would -- or

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14:43 1 If we could bring this up, please.
 2 Notably, it acknowledged again in that note verbale
 3 that Pakistan had, in February 2016, revoked its
 4 intention to appoint a Neutral Expert. You can see that
 5 in (i). And you'll recall that India's initial
 6 acknowledgement of this revocation was by its
 7 Commissioner on 14 March 2016, in Exhibit P-27. So this
 8 is now being confirmed again, this recognition of the
 9 revocation by India itself.
 10 I will not talk further about that now, but it goes
 11 to questions the Court has raised about which body was
 12 formed first in time; questions which other members of
 13 Pakistan's counsel team will address later today and
 14 tomorrow.
 15 Similar points to the ones raised in this note
 16 verbale were made by the Indian Commissioner in a letter
 17 to his counterpart a few days later. That's
 18 Exhibit P-37 of 6 September 2016.
 19 Now, the ICIW, the Indian Commissioner, concluded
 20 that letter by stating that he was now proceeding --
 21 I'll just let that come up:
 22 "... to request both the Governments in terms of
 23 provisions of Paragraph 5(c) of Annexure F to the
 24 Treaty, to appoint a Neutral Expert ..."
 25 And the request itself to India and Pakistan is at

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14:45 1 Exhibit P-105. I'll leave that for you to read on
 2 another occasion.
 3 I won't get into -- sorry, Mr Minear. Yes, of
 4 course.
 5 MR MINEAR: If I may ask you the question I inartfully put
 6 to Dr Miles.
 7 In P-37 there's a statement from India that the
 8 intergovernmental negotiations did not qualify under
 9 Article IX because they had protested the admissibility
 10 of the Court of Arbitration, and I just wonder what
 11 Pakistan's response to that argument would be.
 12 The particular language I'm looking at is the
 13 following sentences from pages 91 and 92, or pages 1 and
 14 2 of P-37, which is, I think, the exhibit you have up
 15 right now.
 16 MR SAADEH: Sorry, sir, I didn't hear your reference.
 17 MR MINEAR: Okay. If you go to the top of the exhibit you
 18 currently have posted, the top of that page, the
 19 sentence:
 20 "It cannot therefore be construed that the above
 21 talks were held under Article IX(4) of the Treaty and
 22 the procedural steps are met."
 23 I just wonder what Pakistan's response to that
 24 assertion by India is.
 25 MR SAADEH: Pakistan's position, at the time and now,

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14:46 1 is that there were intergovernmental talks. Pakistan
 2 invited India to talks, and India took part in those
 3 talks. They were intergovernmental, and Pakistan's
 4 position is certainly that they complied with
 5 Article IX.
 6 For a fuller answer, I will have to get back to you
 7 later in the hearing.
 8 MR MINEAR: Yes, my specific question was whether, if we
 9 accepted India's point here, would Article IX,
 10 paragraph 5(c) come into play --
 11 MR SAADEH: Yes.
 12 MR MINEAR: -- given that sufficient time had elapsed and
 13 negotiations had not taken place? So you would have
 14 an argument under either (b) or (c). That's the
 15 question I was inartfully asking of Dr Miles.
 16 MR SAADEH: No, thank you for the question, Mr Minear. We
 17 were discussing it at the lunch break but we haven't
 18 finalised our response yet. So we'll return to it in
 19 due course, if that's okay with you.
 20 MR MINEAR: Thank you.
 21 MR SAADEH: Are there any other questions at this stage?
 22 Okay, so I'll leave the honourable members of this
 23 Court of Arbitration to consider the detail of those
 24 communications further in your own time, if needed.
 25 I would just like to conclude briefly with what then

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14:48 1 happened at the World Bank. While not strictly relevant
 2 to the Court's appreciation of its competence, those
 3 facts are important in explaining the situation in which
 4 we find ourselves today. And I can be brief, not least
 5 because you've heard about the Bank's conduct already,
 6 to an extent, today.
 7 Now, you'll remember that matters at the World Bank
 8 seemed to be in hand for the empanelment of a Court of
 9 Arbitration. The World Bank had said as much. It then
 10 received India's Request for the Appointment of
 11 a Neutral Expert on 4 October 2016; that is
 12 Exhibit P-156.
 13 Notwithstanding, the initial response from the Bank
 14 later in October 2016, Exhibit P-38, was not of
 15 particular concern. The President of the World Bank
 16 affirmed -- and this is at paragraph 14. You'll see
 17 there, at the beginning of paragraph 14, the President
 18 of the Bank affirmed that:
 19 "... the Bank is obligated to undertake the roles
 20 assigned to it under the Treaty, both to take steps to
 21 appoint a Neutral Expert and nominate a person to draw
 22 lots for the selection of an appointing authority for
 23 umpires on a Court of Arbitration."
 24 And that was despite the Bank recognising in
 25 paragraph 5, for example, that it was in

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14:49 1 an "unprecedented" -- to use its words -- situation of
 2 being seised of two requests.
 3 Unfortunately, that is not actually what happened.
 4 Rather, the World Bank took the extraordinary step, far
 5 beyond its scope of its role under the Treaty, to try to
 6 mediate a resolution of the disputes between the
 7 parties.
 8 There was a hint of this in this October 2016 letter
 9 because the Bank, at paragraph 16, proposed the
 10 involvement of a third-party mediator. But that was, at
 11 that point, a gentle proposal. What was not expected,
 12 and what happened, was ultimately that the Bank imposed
 13 unilaterally a pause on both of the steps it was due to
 14 take under the Treaty; or at least, from Pakistan's
 15 point of view, the step it had to take to empanel this
 16 Court on 12 December 2016. And that is Exhibit P-8.
 17 The pause provided the coup de grâce to Pakistan's
 18 attempts to halt India's construction of the KHEP and
 19 the RHEP. Pakistan complained forcefully and repeatedly
 20 to the World Bank. Exhibits P-116, P-117 and P-118 are
 21 just some examples. And you'll recall Sir Daniel's
 22 presentation on this matter at our first session.
 23 Again, the members of this Court can read those
 24 letters at their leisure, but the message that Pakistan
 25 delivered was frank and clear. The World Bank's actions

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14:50 1 were not permitted by the Treaty and were seriously
 2 prejudicial to Pakistan's interests. The World Bank
 3 should have taken steps to empanel the Court of
 4 Arbitration, Pakistan's request being first in time.
 5 Its failure to do so was catastrophic.
 6 As a result, no Court of Arbitration has yet
 7 considered Pakistan's request for interim measures,
 8 despite those requests now being nearly seven years old.
 9 No other Treaty mechanism is competent to hear those
 10 requests. And Pakistan has been prejudiced in other
 11 significant ways, not least by now trying to pick
 12 through the tangle of two parallel proceedings that have
 13 complicated matters with respect to this Court's
 14 competence. Complicated matters, but not changed them,
 15 for nothing that India or the World Bank has done
 16 diminishes or negates this Court's competence to
 17 determine the issues before it.
 18 My colleagues Professor Webb and Mr Fietta will
 19 address you next. They will explain why the facts that
 20 Dr Miles and I have set out establish this Court's
 21 competence, and address India's principal objections to
 22 that competence.
 23 So I thank you for your time. And unless there are
 24 any questions, I will hand over to Professor Webb.
 25 THE CHAIRMAN: No, no questions, Mr Saadeh. Thank you very

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14:52 1 much for your presentation.
 2 MR SAADEH: I must have been crystal-clear!
 3 THE CHAIRMAN: As you said, I think Professor Webb is next
 4 up. So when you're ready, please proceed.
 5 PROFESSOR WEBB: Mr Chairman, members of the Court, I will
 6 be addressing you on Pakistan's affirmative case on the
 7 competence of the Court of Arbitration and the response
 8 to India's principal objections.
 9 Pakistan's affirmative case is that the substantive
 10 scope of Pakistan's Request for Arbitration involves
 11 Treaty interpretation and systemic application issues
 12 that are within the exclusive competence of the Court.
 13 They cannot be resolved by a Neutral Expert. And the
 14 Request for Arbitration is intrinsically suited to
 15 resolution by this Court.
 16 India has objected to the Court's competence, not in
 17 the form of direct submissions but in detailed
 18 communications to the World Bank and in correspondence
 19 with the Neutral Expert. And in an effort to assist the
 20 Court, and conscious of India's non-participation in
 21 this hearing, Pakistan has distilled those arguments
 22 into five apparent objections to the Court's competence.
 23 India's objections are that Pakistan has not
 24 complied with the Treaty in instituting proceedings
 25 because: first, a Neutral Expert was already "dealing

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14:54 1 with the differences between the parties"; second,
 2 a dispute has not arisen; third, the disputes in
 3 Pakistan's Request for Arbitration are in fact identical
 4 to the differences in the Request for a Neutral Expert,
 5 and purely technical; fourth, that Articles IX(3), (4)
 6 and (5) have not been satisfied; and fifth, that the
 7 Court is illegally constituted.
 8 India's five objections fail on both the facts and
 9 the law. Over the eight-year period since Pakistan's
 10 Commissioner first raised questions concerning the
 11 design of the KHEP in February 2008, until the Request
 12 for Arbitration on 19 August 2016, which preceded
 13 India's Request for a Neutral Expert, Pakistan complied
 14 meticulously and in good faith with every procedural
 15 requirement for the commencement of arbitration under
 16 the Treaty.
 17 Pakistan's case has been outlined to you by
 18 Sir Daniel. It rests on the facts set out for you by
 19 Dr Miles and Mr Saadeh just now. Pakistan's case is
 20 also consistent with the findings of the Kishenganga
 21 Court that Ms Rees-Evans addressed, and with the
 22 interpretation of the Treaty that will be covered by
 23 Mr Fietta. Between us, Mr Fietta and I will
 24 specifically respond to each of India's objections.
 25 I will address India's third objection: that the

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14:55 1 disputes raised by Pakistan's Request for Arbitration
 2 are identical to those raised as differences with the
 3 Neutral Expert, and are technical in nature. I will
 4 also address the facts relevant to rebutting India's
 5 first objection: that the Court has not been validly
 6 seised because a Neutral Expert is dealing with the
 7 situation.
 8 I will proceed in four parts:
 9 First, to show that the Request for Arbitration goes
 10 beyond Pakistan's prior, and revoked, Request for
 11 a Neutral Expert.
 12 Second, that the Request for Arbitration concerns
 13 issues that only the Court is competent to address.
 14 Third, that India's third objection must therefore
 15 be rejected, including because the necessity to
 16 establish a Court of Arbitration arises at the time that
 17 the Request for Arbitration is received by the other
 18 party.
 19 And fourth, that conditions precedent for seising
 20 the Court were met because, contrary to India's first
 21 objection, the Court was validly seised before a Neutral
 22 Expert was dealing with differences between the parties.
 23 And in the course of this, I will address the
 24 Court's questions 8, 19, 24, 29, 33 and 34.
 25 So the starting point for an assessment of the

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14:57 1 competence of the Court has to be what is asked of the
 2 Court in the Request for Arbitration. And Pakistan's
 3 Request for Arbitration goes beyond its prior, and
 4 revoked, Request for a Neutral Expert.
 5 You have the Request for Arbitration in your
 6 hardcopy bundle; it is volume III on your table, at
 7 tab 3-B. If you like, you can turn it up. I will be
 8 putting the key paragraphs on the slides as well.
 9 Paragraph 9 of the Request for Arbitration sets out
 10 seven disputes. There are superficial similarities with
 11 the differences in Pakistan's Statement of Points of
 12 Difference of 24 July 2015 and with India's Statement of
 13 Points of Difference of 4 October 2016. And this is to
 14 be expected, because these are issues of design
 15 specification under Annexure D of the Treaty. But as
 16 Sir Daniel flagged this morning in his three cardinal
 17 points, there are material and qualitative differences
 18 between the Request for Arbitration and the Statements
 19 of Points of Difference.
 20 Pakistan's Request for Arbitration is not
 21 plant-specific in principle. It is concerned with
 22 Treaty interpretation issues that affect current and
 23 future run-of-river plants on the Western Rivers. As
 24 Dr Miles has shown, there is an ambitious programme
 25 underway. Pakistan's strategic concern underlying its

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14:59 1 request is clear: that India is seeking to create facts
 2 on the ground, a fait accompli, with regard to dozens of
 3 run-of-river projects, while at the same time
 4 frustrating the dispute resolution procedures under the
 5 Treaty.
 6 So at paragraph 5 of Pakistan's Request for
 7 Arbitration, we see the statement that:
 8 "The Parties' disagreements have arisen specifically
 9 in the context of two ... projects ... [but] India is,
 10 however, developing many other Run-of-River Plants on
 11 the Western Rivers, giving greater significance to the
 12 resolution of the issues of Treaty interpretation raised
 13 here."
 14 And it goes on to state that the principles
 15 established by the Court will be "erga omnes to future
 16 Run-of-River Plants".
 17 At paragraph 8 of the Request, Pakistan states that:
 18 "The features of a Run-of-River Plant are
 19 inter-connected, and, at each turn, India has proposed
 20 legal interpretations of the Treaty and has made design
 21 choices at the KHEP and RHEP that give it the greatest
 22 amount of control over the largest volume of water ..."
 23 It goes on to state that:
 24 "India's approach marks a clear departure from the
 25 careful balance struck in the Treaty ..."

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15:00 1 And notes that:
 2 "Water scarcity is a serious issue in the region,
 3 and India's ambitious agenda to build multiple HEPs
 4 similar to those proposed at Kishenganga and Ratle poses
 5 an existential threat to Pakistan's use of the Western
 6 Rivers and to the continued viability of the Treaty
 7 itself."
 8 The point is reiterated at paragraph 32 of the
 9 request, that:
 10 "In addition to the [two plants], India is planning
 11 to design and construct many additional Run-of-River
 12 plants on the Western Rivers. Pakistan anticipates that
 13 India will design many of these projects using the same
 14 approach employed at the KHEP and [the] RHEP."
 15 Another example of Treaty interpretation issues with
 16 systemic implications is the parties' disagreement on
 17 the weight and effect of the Kishenganga Court's
 18 interpretation of the Treaty. This has already been
 19 flagged by Ms Rees-Evans and Dr Miles.
 20 (Slide 6) In paragraph 7(i), Pakistan notes that
 21 India has not altered its designs and not made
 22 adjustments to the KHEP or the RHEP, notwithstanding the
 23 ruling of the Kishenganga Court. It states that:
 24 "The KHEP Court ... determined that in accordance
 25 with Paragraph 14 of Annexure D and Paragraphs 18 and 19

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15:02 1 of Annexure E ... the reservoir cannot be depleted below
 2 Dead Storage Level and that [the] drawdown flushing is
 3 not permissible under the Treaty ..."
 4 And Pakistan notes that:
 5 "Notwithstanding [this] ruling ... India has not
 6 altered its designs and has not raised the level or
 7 reduced the size of the sediment outlets at either the
 8 KHEP or [the] RHEP."
 9 Pakistan's Request for Arbitration also recognises
 10 the Court's exclusive competence in respect of remedies,
 11 and requests such remedies from this Court.
 12 (Slide 7) This is in paragraph 12 of the Request,
 13 where Pakistan requests:
 14 "... interim measures restraining India from
 15 proceeding further with planned diversions resulting
 16 from construction of the works that are the subject of
 17 the Disputes as well as restraining India from filling
 18 the KHEP's reservoir below the Dead Storage Level."
 19 And Pakistan noted that:
 20 "... an order on interim measures is imperative for
 21 a complete and fair adjudication."
 22 (Slide 8) In its request for relief, Pakistan
 23 requests declarations about the design and construction
 24 of run-of-river plants in the Western Rivers in general.
 25 I won't read these out, but you have the references here

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15:03 1 to paragraphs 91(a), 91(f), 93(c), 94(c), 95(c) and
 2 96(c).
 3 Mr Chairman, members of the Court, this now brings
 4 me to my second point -- yes, Mr Chairman.
 5 THE CHAIRMAN: Thank you, Professor Webb. Just back on this
 6 issue of the relief sought in the Request for
 7 Arbitration.
 8 PROFESSOR WEBB: Yes.
 9 THE CHAIRMAN: You've put up on the screen a series of
 10 paragraphs that you're pointing out speak broadly to the
 11 Western Rivers.
 12 PROFESSOR WEBB: Yes.
 13 THE CHAIRMAN: It seems to me -- but please correct me --
 14 that there are also paragraphs, let's say
 15 paragraph 91(c), that, although it's specific to KHEP,
 16 it is speaking about an injunction.
 17 PROFESSOR WEBB: Yes.
 18 THE CHAIRMAN: And I'm wondering if, in your view, that also
 19 is a type of relief that a Court can provide, as opposed
 20 to a Neutral Expert.
 21 PROFESSOR WEBB: Yes. Yes, we would. And that allows me to
 22 clarify that the paragraphs I've cited here are just
 23 an example of the type of relief that only this Court
 24 can grant. And in our Response we also pointed to the
 25 paragraphs referring to the mandatory injunctions, which

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15:06 1 Annexure D."
 2 And I'll take each of these issues in turn.
 3 So "a request for interim measures of protection" is
 4 within the exclusive competence of the Court. That is
 5 provided in paragraph 28 of Annexure G.
 6 Taking points (ii) and (iii) together, which both
 7 speak about "the precedential effect of prior ...
 8 decisions", either by the Neutral Expert or by the Court
 9 of Arbitration, we say the Neutral Expert does not have
 10 competence over the precedential effect, if it exists,
 11 of prior decisions of Neutral Experts or prior decisions
 12 of the Court of Arbitration.
 13 And I observe that, in general, an assessment of
 14 precedential effect is an exercise of Treaty
 15 interpretation that only the Court can engage in, as
 16 indicated by the fact that it is composed of highly
 17 qualified and legal and technical experts. And as
 18 Ms Rees-Evans explained, in Kishenganga the Court
 19 engaged in just such an exercise in finding that the
 20 Baglihar determination had no precedential value beyond
 21 that plant.
 22 We have also noted in our Response, but it's worth
 23 noting in this context, that the Neutral Expert in the
 24 first meeting made the firm, clear and unambiguous
 25 declaration that:

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15:05 1 arise in several places in the Request. Yes, we would
 2 fully agree with that.
 3 So now coming to my second point, and this is that
 4 it is only the Court that has competence to engage in
 5 Treaty interpretation of a systemic nature, to consider
 6 the precedential effect of the Kishenganga Court of
 7 Arbitration and, on India's argument, the Neutral Expert
 8 in the Baglihar determination, and to issue interim
 9 measures, declaratory orders, injunctions and financial
 10 compensation, beyond a plant-specific declaration of
 11 breach.
 12 (Slide 9) This takes me to the Court's question 29
 13 that you see on the slide, stating that:
 14 "India has indicated that the issues raised by
 15 Pakistan fall under Annexure F, paragraph 1 (11)."
 16 And asking:
 17 "In what sense do the following issues, which appear
 18 to be raised before this Court, fall within that
 19 paragraph: ..."
 20 Pakistan's answer is that these issues do not fall
 21 within Annexure F, paragraph 1(11) and are not within
 22 the competence of the Neutral Expert, and to recall that
 23 paragraph 1(11) of Annexure F reads:
 24 "Questions arising under the provisions of
 25 Paragraph 7, Paragraph 11 or Paragraph 21 of

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15:08 1 "I am an engineer and I have no competence to
 2 interpret any part of the Treaty. So it is clear to me
 3 and I will stick to that."
 4 That is in the transcript of Day 1, page 189,
 5 lines 15 to 19, at P-40(C).
 6 Coming to the fourth issue, "the competence of
 7 a particular Neutral Expert". The Neutral Expert has
 8 particular -- but not general -- competence under
 9 paragraph 7 of Annexure F. The Court, on the other
 10 hand, in its role as guardian of the Treaty and the body
 11 with general interpretative competence, can more
 12 generally assess the competence of a particular Neutral
 13 Expert as an ancillary matter. And any objection to the
 14 competence of a Neutral Expert that is not within
 15 paragraph 7 of Annexure F may be determined by the
 16 Court.
 17 Issue (v) is "the competence of a particular Court
 18 of Arbitration". It is the Court that can assess this
 19 competence. This is provided in paragraph 16 of
 20 Annexure G, that:
 21 "... the Court shall decide all questions relating
 22 to its competence ..."
 23 Issue (vi) is "the extent to which non-Treaty-based
 24 practices can be used to augment or alter provisions of
 25 the Treaty": again, a question of general interpretative

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15:09 1 competence arising under paragraph 29 of Annexure G, and
 2 for the Court.
 3 And then coming to the last point, on "equitable or
 4 other relief regarding the operation of plants on the
 5 Western Rivers", only the Court has general competence
 6 in respect of these remedies, under paragraph 23 of
 7 Annexure G and paragraph 13 of Annexure F, read
 8 together. The Neutral Expert is not allocated remedial
 9 competence under the Treaty to specify interim measures
 10 or to award financial compensation. In fact, that is
 11 expressly carved out from the Neutral Expert's
 12 competence.
 13 The Neutral Expert also cannot prescribe wide
 14 general remedies. It is for the Neutral Expert,
 15 according to paragraph 12 of Annexure F, to suggest, for
 16 the consideration of the parties, measures that are
 17 appropriate to implement his decision. It is only the
 18 Court that can address the operation and relief
 19 regarding plants in general, given that the Neutral
 20 Expert only has competence that is plant-specific.
 21 (Slide 10) A closely related question from the Court
 22 is question 33, which provides that:
 23 "Pakistan states that, while 'the Court would be
 24 fully competent to address technical design issues, it
 25 could readily confine itself to addressing the issues

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15:11 1 that fell within its exclusive competence alone.'
 2 And the question asks:
 3 "What are the issues within the ... exclusive
 4 competence?"
 5 And I've already mentioned a few of these. But just
 6 to recap, the answer is that the Court's exclusive
 7 competence includes and comprises any issue that falls
 8 outside the limited and technical competence of
 9 a Neutral Expert. This will include any non-technical
 10 questions, such as questions outside Part 1 of
 11 Annexure F, and any technical questions that have
 12 ramifications beyond a single plant; so questions asked
 13 not in terms of the KHEP or the RHEP, but with respect
 14 to future plants, plants built along similar lines, or
 15 with respect to the Treaty provision or the Treaty as
 16 a whole.
 17 By contrast, the competence of the Neutral Expert is
 18 narrow, and limited to technical matters listed in
 19 Part 1 of Annexure F, paragraph 1, and assessed on
 20 a strictly plant-by-plant basis; it's limited to whether
 21 a difference is before the Neutral Expert, and whether
 22 that falls within Part 1 of Annexure F or should be
 23 dealt with, in whole or in part, as a dispute, his
 24 paragraph 7 proceedings.
 25 (Slide 11) Mr Chairman, members of the Court, that

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15:12 1 brings me to India's third objection. India's third
 2 objection is that the disputes raised in the Request are
 3 "identical" to those raised as differences with the
 4 Neutral Expert, are "technical" and fall within the
 5 competence of the Neutral Expert, and there is no
 6 "necessity" for a Court of Arbitration.
 7 (Slide 12) As Dr Miles has demonstrated, the issues
 8 in the Pakistan Commissioner's letter of
 9 25 February 2016 were legal and Treaty-systemic in
 10 nature, falling within the competence of this Court
 11 alone, and not being identical to the differences in the
 12 2015 Neutral Expert Request.
 13 I can show this textually. This may be a little
 14 hard to read, but it's not about so much the specific
 15 words, but the difference between the documents.
 16 On the left, we have the July 2015 Statements of
 17 Points of Difference; this is Exhibit P-10. And on the
 18 right, we have the 25 February 2016 letter from
 19 Pakistan's Commissioner, and that is Exhibit P-23.
 20 So you can see that the first paragraph is the same:
 21 it is a concern about the question of pondage and power
 22 intakes with respect to the KHEP.
 23 But in the 25th February 2016 letter -- and Dr Miles
 24 brought you up to all the correspondence and other
 25 factors that led to this approach by Pakistan -- is that

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15:14 1 it's no longer just about Kishenganga. And the letter
 2 states specifically that:
 3 "Subsumed within this project-specific dispute is
 4 the more general question of [method:] what is the
 5 appropriate method under the Treaty for calculating
 6 maximum Pondage for Run of River HEPs on the
 7 Western Rivers."
 8 Going beyond a specific plant. And the letter
 9 observes that:
 10 "[The] point of dispute presents questions that will
 11 inevitably recur as India proceeds with [its]
 12 projects ..."
 13 And Pakistan notes that:
 14 "... the Court's award will be ... of general
 15 applicability and ... binding on the general question
 16 presented."
 17 (Slide 13) Also from the letter of 25 February 2016,
 18 we see a difference in the approach on the question of
 19 the size and placement of outlets. Once again, we see
 20 the first paragraph is the same, but then we see the
 21 expansion and the development in Pakistan's concerns and
 22 what it's asking of the Court in the 25 February letter.
 23 So it notes that:
 24 "Although the Court ... in the Kishenganga case
 25 ruled that drawdown flushing is not permitted ... India

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15:16 1 has presented designs that can only be effective if
 2 drawdown flushing is contemplated. This dispute over
 3 the binding nature of the prior award of the Court ...
 4 presents a question that will inevitably recur as India
 5 proceeds with [its] projects ..."
 6 And the parties need a binding determination that
 7 will resolve the issue not just with respect to
 8 Kishenganga, but for "general applicability" to these
 9 plants, current and future, on the Western Rivers.
 10 So we can see that Pakistan's Commissioner made
 11 substantial additions to prioritise the Treaty-systemic
 12 nature and the wider implications of the issues. He
 13 said in his letter expressly that this, in this dispute,
 14 it's "a question that will inevitably recur", and the
 15 parties are calling for "a binding determination" of
 16 "general applicability".
 17 Even if the issues in Pakistan's Request for
 18 Arbitration are technical in nature -- and certainly
 19 they are, some of them, technical in nature -- the Court
 20 of Arbitration is competent to decide technical disputes
 21 of a kind that could also be referred to the Neutral
 22 Expert as a difference. And Ms Rees-Evans took you to
 23 the expression of this by the Kishenganga Court holding
 24 that the very composition of the Court of Arbitration
 25 points to its competence in technical matters.

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15:17 1 (Slide 14) As part of its third objection, India
 2 also argues that the phrase in paragraph 1 of Annexure G
 3 must mean that parties have to exhaust the first stages
 4 or resolution under the Treaty before proceeding to
 5 arbitration. And the phrase that it invokes here is:
 6 "If the necessity arises to establish a Court of
 7 Arbitration, then the provisions of ... this
 8 Annexure ..."
 9 Meaning Annexure G, on the Court of Arbitration:
 10 "... shall apply."
 11 This argument places too much weight on the word
 12 "necessity". As Sir Daniel has explained, and as
 13 Mr Fietta will develop, Article IX contemplates
 14 a unilateral reference of a dispute to a Court of
 15 Arbitration provided that certain prerequisites have
 16 been met, and that is precisely what has happened here.
 17 Paragraph 1 has to be read with Article IX(5)(b),
 18 which addresses the circumstances in which a party may
 19 file a request for arbitration. And there it states
 20 that the necessity to establish a Court of Arbitration
 21 arises at the point at which a request for arbitration
 22 is filed in accordance with the Treaty.
 23 It is phrased in mandatory terms, as you see on the
 24 slide, that:
 25 "(5) A court of Arbitration shall be established to

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15:19 1 resolve the dispute ...
 2 "(b) at the request of either Party ..."
 3 And that is how we submit that necessity should be
 4 addressed.
 5 (Slide 15) I now come, Mr Chairman and members of
 6 the Court, to my fourth point, which is that the
 7 conditions for seising the Court have been met. And
 8 contrary to India's first objection, the Court was
 9 validly seised before a Neutral Expert was dealing with
 10 the differences between the parties.
 11 As Dr Miles and Mr Saadeh have set out on the facts,
 12 once Pakistan appreciated that its concerns about
 13 India's run-of-river projects required resolution by
 14 a Court of Arbitration, it fulfilled each requirement
 15 under the Treaty.
 16 So on 25 February 2016 -- the letter that I took you
 17 to, and that has also been brought to your attention by
 18 my colleagues (P-23) -- Pakistan revoked its Request for
 19 a Neutral Expert, and explained its systemic concerns in
 20 that letter, concerns that could only be addressed by
 21 a Court of Arbitration. India's Commissioner replied,
 22 in a letter of 14 March (P-27), saying that Pakistan's
 23 position was "improper and invalid".
 24 Pakistan understood that a joint report would not be
 25 produced under Article IX(3); and therefore, after

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15:21 1 a while, it was unduly delayed. So on 29 March 2016
 2 (P-28), Pakistan moved to commence inter-state
 3 negotiations under Article IX(4). And this led to the
 4 Secretary-level negotiations of 14 and 15 July 2016
 5 (P-31) which have already been described to you.
 6 Pakistan reached the opinion at the conclusion of
 7 those negotiations that the dispute was not likely to be
 8 resolved by negotiation or mediation at the end on
 9 15 July, and it acted under Article IX(5)(b) to request
 10 the establishment of a Court of Arbitration on
 11 19 August 2016 with its Request.
 12 (Slide 16) So India's first objection, which
 13 Mr Fietta will address on the law and I will focus on
 14 the facts, rests on the wording of Article IX(6) of the
 15 Treaty, that:
 16 "The provisions of Paragraphs (3), (4) and (5) shall
 17 not apply to any difference while it is being dealt with
 18 by a Neutral Expert."
 19 It is clear on the facts, as set out by my
 20 colleagues, that proceedings were instituted before the
 21 Court prior to when the Neutral Expert could be said to
 22 be dealing with any difference between the parties.
 23 In July 2015, there was a request by Pakistan's
 24 Commissioner for a Neutral Expert, but this did not
 25 subsist beyond 25 February 2016, when it was expressly

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15:23 1 revoked. And India recognised that revocation.
 2 On 19 August 2016, the Court was seized of the
 3 dispute when Pakistan's Request for Arbitration was
 4 received by India. And that is in compliance with the
 5 express terms of paragraph 3 of Annexure G.
 6 On 6 September, India's Commissioner wrote to India
 7 and Pakistan to request the appointment of a Neutral
 8 Expert with respect to two plants, Kishenganga and Ratle
 9 (P-105). And on 4 October 2016, India transmitted its
 10 Neutral Expert Request to the World Bank, with the
 11 request that the Bank appoint a Neutral Expert (P-156).
 12 And as Sir Daniel mentioned this morning, just recently,
 13 on 2 May, the Neutral Expert's terms of retainer were
 14 signed.
 15 So in answer to question 24 -- which Mr Fietta will
 16 also develop; I give you the answer on the facts. And
 17 that question is:
 18 "While the Treaty is clear about when arbitration
 19 proceedings commence, it is silent on when Neutral
 20 Expert proceedings are considered to be commenced.
 21 Given the circumstances and the correspondence between
 22 the Parties, can it be determined which commenced
 23 first?"
 24 The answer on the facts is that the arbitration
 25 proceedings commenced first, and this is before the

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15:24 1 Neutral Expert proceedings were initiated. The Neutral
 2 Expert was not even dealing, potentially, with any
 3 difference between the parties until 2 May this year at
 4 the earliest, given that's when his terms of retainer
 5 were concluded. And as I said, Mr Fietta will develop
 6 this point with reference to the interpretation of
 7 Article IX(6).
 8 (Slide 17) Mr Chairman, members of the Court, this
 9 is also a convenient point to address question 34. This
 10 question states that:
 11 "Pakistan [has said] that: 'In keeping with the
 12 established principles of international dispute
 13 settlement, nothing that occurred after [the filing of
 14 the Request for Arbitration] can deprive the Court of
 15 its competence over the Parties' disputes."
 16 And the Court asks:
 17 "What are those 'principles of international dispute
 18 settlement'?"
 19 It is a basic tenet of international dispute
 20 settlement that jurisdiction must be determined at the
 21 time of the act instituting proceedings. If
 22 an international court or tribunal has jurisdiction at
 23 that date, the date of institution of proceedings, it
 24 will continue to have jurisdiction regardless of
 25 subsequent events.

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15:26 1 In terms of where this principle has been addressed,
 2 I provide the references on the slide, and I will take
 3 them in turn.
 4 (Slide 18) So we can go back to 1953, when this
 5 principle was recognised by the International Court of
 6 Justice in the Nottebohm judgment (PLA-24). In that
 7 case, when Liechtenstein filed its application at the
 8 ICJ, Guatemala had a valid declaration accepting the
 9 court's jurisdiction under the optional clause to the
 10 statute. But that declaration provided within it that
 11 it was only valid for five years, and it expired
 12 one month after the filing of the application by
 13 Liechtenstein. The court held that the lapse in the
 14 declaration of Guatemala could not deprive the court of
 15 jurisdiction.
 16 In the Lockerbie case between Libya and the
 17 United Kingdom (PLA-12, paragraphs 37 to 38), the UK
 18 argued that Security Council resolutions that came after
 19 the institution of proceedings superseded rights that
 20 Libya had under the Montreal Convention for the
 21 Suppression of Unlawful Acts against the Safety of Civil
 22 Aviation. The court rejected that argument, stating
 23 that:
 24 "In accordance with its established jurisprudence,
 25 if the Court had jurisdiction on [the date of filing the

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15:27 1 Application], it continues to do so; the subsequent
 2 coming into existence of the ... resolutions cannot
 3 affect its jurisdiction once established."
 4 In the Arrest Warrant case between the Democratic
 5 Republic of the Congo and Belgium (PLA-28), the case
 6 concerned the immunity of the Congolese Minister for
 7 Foreign Affairs in relation to allegations of crimes
 8 against humanity against him. Belgium argued that
 9 two weeks after they filed their application, the
 10 minister in question, Mr Yerodia, had been relieved of
 11 his duties as Foreign Minister, so there was no longer
 12 a "legal dispute" and the Court lacked jurisdiction.
 13 The Court rejected that argument, recalling that its
 14 jurisdiction must be determined at the time of the act
 15 instituting proceedings. If it had jurisdiction "on the
 16 date the case was referred to it", the Court said
 17 (paragraph 26):
 18 "... it continues to do so regardless of subsequent
 19 events."
 20 It said:
 21 "Such events might lead to a finding that
 22 an application has become moot and to a decision not to
 23 proceed to a judgment on the merits, but they cannot
 24 deprive the Court of jurisdiction."
 25 Other international tribunals, other than the ICJ,

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15:28 1 have applied the same principle. And I would just point
 2 you to the references on the slide there to ICSID cases.
 3 I'll read them into the transcript. These are
 4 Exhibits PLA-27, PLA-30, PLA-33, PLA-34 and PLA-35.
 5 I would also note that the ICSID commentary at
 6 PLA-40 states that:
 7 "It is an accepted principle of international
 8 adjudication that jurisdiction will be determined by
 9 reference to the date on which the judicial proceedings
 10 are instituted. This means that on that date all
 11 jurisdictional requirements must be met. It also means
 12 that events taking place after that date will not affect
 13 jurisdiction."
 14 In this case, the "act instituting proceedings" was
 15 Pakistan's Request for Arbitration dated 19 August 2016,
 16 and events subsequent to the filing of that request
 17 cannot deprive this Court of its competence over the
 18 parties' disputes.
 19 I now turn to questions 8 and 19, which both address
 20 concepts of bad faith and abuse of rights.
 21 (Slide 19) So question 8 refers to Article IX(2)(a)
 22 of the Treaty, which provides that:
 23 "... [a]ny difference which, in the opinion of
 24 either Commissioner, falls within the provisions of
 25 Part 1 of Annexure F shall, at the request of either

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15:30 1 Commissioner, be dealt with by a Neutral Expert in
 2 accordance with the provisions of Part 2 of Annexure F'.
 3 Article IX(2)(b) then states that a dispute may arise
 4 '[i]f the difference does not come within the provisions
 5 of Paragraph (2)(a)."
 6 And the Court asks:
 7 "Given that Pakistan initially requested that
 8 certain questions be dealt with by a Neutral Expert, and
 9 then withdrew that request and commenced reference to
 10 the Court of Arbitration, what role, if any, can the
 11 concepts of 'bad faith' and/or 'abuse of right' play in
 12 respect of Pakistan's conduct?"
 13 The answer is that the concepts of "bad faith" and
 14 "abuse of rights" can play no role in respect of
 15 Pakistan's conduct. As Sir Daniel, Dr Miles and
 16 Mr Saadeh have demonstrated, Pakistan has conducted
 17 itself in good faith and in full compliance with the
 18 Treaty.
 19 It's worth noting that India has not raised any of
 20 these concepts in terms in its letter and enclosure of
 21 21 December 2022 (P-1). On Pakistan's withdrawal of its
 22 request to appoint a Neutral Expert and the initiation
 23 of its request to appoint a Court of Arbitration,
 24 India's primary objection is not about bad faith or
 25 abuse of rights. Their argument is that Pakistan's

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15:31 1 initial Request for a Neutral Expert "remained live" and
 2 subsisted beyond 25 February 2016. This is in their
 3 first objection. And as Dr Miles has shown, that is not
 4 at all the case, given that there was an express
 5 revocation of that Neutral Expert Request that was
 6 repeatedly recognised by India.
 7 The legal tests for bad faith and abuse of rights
 8 are onerous. And India has not only not raised them, it
 9 has come nowhere close to satisfying them. Bad faith is
 10 never to be presumed; it must always be proven by the
 11 party making the claim. That comes from the Permanent
 12 Court of International Justice nearly 100 years ago in
 13 the Upper Silesia case, PLA-22.
 14 India would have to show that Pakistan dealt
 15 dishonestly and unfairly with India, and intentionally
 16 took unfair advantage of it by withdrawing its request
 17 for a Neutral Expert and substituting it with
 18 a declaration of dispute to go to a Court of
 19 Arbitration. And as my colleagues have explained, that
 20 is not what the factual record shows.
 21 Pakistan, in good faith, started down the Article IX
 22 route under the Treaty, following a failure to resolve
 23 the relevant questions in the Commission under
 24 Article IX(1). It started by contemplating the
 25 possibility of a Neutral Expert in July 2015. But

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15:33 1 India's track record of interaction, its response to
 2 this approach in the period July 2015 to February 2016,
 3 and also from February to August 2016, made it clear
 4 that India was intent on using the Treaty to frustrate
 5 Pakistan's long-standing concerns about India's
 6 run-of-river projects. Pakistan therefore decided to
 7 adopt a different course to resolving what it now
 8 considered to be a dispute.
 9 Similarly, there is no pleading by India of abuse of
 10 rights. Abuse of rights is when a state exercises
 11 a right either in a way which impedes the enjoyment by
 12 other state of their own rights or exercises a right for
 13 an end different from that for which the right was
 14 created, to the injury of another state.
 15 Abuse of rights is also said to be properly a matter
 16 for the merits, according to the International Court of
 17 Justice in the Equatorial Guinea case; that's
 18 Exhibit PLA-37 at paragraph 151.
 19 (Slide 20) So I now turn to the other question on
 20 bad faith and abuse of right, which is question 19, and
 21 that focuses on the conduct of India. It states that:
 22 "Article IX(6) provides that paragraphs (3), (4) and
 23 (5), which relate to the resolution of a 'dispute'
 24 before a Court ... 'shall not apply to any difference
 25 while it is being dealt with by a Neutral Expert.'"

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15:35 1 And the Court notes that:
 2 "India maintains that this prevents the Court ...
 3 from acting."
 4 And the Court also observes that:
 5 "Given that India was aware of Pakistan's intention
 6 to bring the dispute to a Court of Arbitration as early
 7 as 25 February 2016, what role, if any, should the
 8 concept of 'bad faith' and/or 'abuse of right' by India
 9 play in the present proceedings?"
 10 Pakistan acknowledges, and also asserts, that the
 11 circumstances of the case could lead to a finding of bad
 12 faith or abuse of right. Those circumstances have been
 13 explained by Sir Daniel, Dr Miles and Mr Saadeh.
 14 They reveal a pattern of conduct by India: delays on
 15 acting on Pakistan's request within the Commission;
 16 delays on acting on Pakistan's requests for dispute
 17 resolution; delays and obstruction on issues of
 18 cooperation under the Treaty, in particular site visits;
 19 non-compliance within the findings of the Kishenganga
 20 Court of Arbitration; conduct that has taken advantage
 21 of the unlawful pause imposed by the World Bank; the
 22 pursuit of a programme of unlawful dam construction on
 23 rivers governed by the Treaty, including completing and
 24 filling the KHEP and significantly advancing the RHEP.
 25 Irreparable and ongoing harm has been caused to

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15:36 1 Pakistan and its people, such as when India filled the
 2 KHEP's dam in July 2017, causing a sudden and
 3 significant drop in the volume of water entering
 4 Pakistan.
 5 In short, to echo Sir Daniel, India's conduct has
 6 created a system malfunction in the Treaty framework.
 7 There is therefore a circumstantial basis for
 8 inferring that India has acted to subvert Pakistan's
 9 rights under the Treaty, and in the awareness of
 10 Pakistan's intention to bring the dispute to the Court
 11 of Arbitration.
 12 However, Mr Chairman, we do not urge the Court to
 13 address bad faith and abuse of rights at this stage: it
 14 would be a distraction from the current questions of
 15 competence before the Court. It is apparent that each
 16 party has its own theory of the proceedings, and that
 17 the correct understanding of Court's competence does not
 18 need to be resolved by reference to bad faith or abuse
 19 of rights.
 20 (Slide 21) Mr Chairman, members of the Court, in
 21 conclusion, Pakistan's Request for Arbitration frames
 22 the areas of disagreement between the parties in
 23 systemic terms. It involves key questions of Treaty
 24 interpretation, and the application to run-of-river
 25 plants beyond the KHEP and the RHEP. Its Request raises

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15:38 1 issues of compliance, rectification and remedy,
 2 including interim measures, injunctive relief and
 3 declarations of systemic legal interpretation.
 4 Pakistan is asking the Court for the determination
 5 of principles that will apply not to one plant, not to
 6 two plants, but erga omnes to current and future
 7 run-of-river plants designed by India and constructed on
 8 the Western Rivers. These are matters that are within
 9 the exclusive competence of the Court.
 10 As my colleagues have shown today, the dispute
 11 before you is a broad legal dispute that had its genesis
 12 many years ago. There are fundamental disagreements
 13 between the parties on the extent to which
 14 non-Treaty-based design and operational practices can be
 15 used to augment the plain words of the Treaty. There
 16 are persistent questions over the weight to be given to
 17 the approach of the Court in Kishenganga, or that of the
 18 Neutral Expert in the Baglihar determination. And the
 19 approach chosen on these questions will lead to
 20 materially divergent outcomes in the practice on the
 21 Western Rivers.
 22 These legal questions will -- as Pakistan's
 23 Commissioner said in the 25th February 2016 letter --
 24 "inevitably recur"; and an award of "general
 25 applicability", rendered by a Court comprised of experts

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15:40 1 in both law and engineering, is required.
 2 India's third objection contends that the disputes
 3 raised in Pakistan's Request for Arbitration are
 4 identical to those raised as differences to the Neutral
 5 Expert, and fall within his narrow technical
 6 plant-specific competence. This objection must fail.
 7 The issues before the Court include those that cannot be
 8 addressed by the Neutral Expert, whereas this Court has
 9 full jurisdiction and competence over everything in
 10 Pakistan's Request for Arbitration.
 11 In addition to its competence, the Court has also
 12 been validly seised; and seised first in time, on
 13 19 August 2016. As a result, India's first objection
 14 must also be rejected, also for the reasons of Treaty
 15 interpretation that Mr Fietta will address.
 16 Pakistan has complied to the letter with every
 17 procedural requirement for the commencement of
 18 arbitration under the Treaty. The Neutral Expert was
 19 not dealing with any difference at the time.
 20 Article IX(6) was not even triggered. At the time the
 21 Court was seised, a Neutral Expert had not even been
 22 requested by India.
 23 Pakistan has come to this Court in good faith,
 24 following the procedure under the Treaty to validly
 25 seise the Court of a dispute that is firmly within its

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15:41 1 competence. And Pakistan trusts in the Court to affirm
 2 its competence and bring the clarity that is so needed
 3 on the systemic issues between the parties.
 4 That brings me to the end of my pleading. I am
 5 happy to answer any questions.
 6 THE CHAIRMAN: No, thank you, Professor Webb. You have been
 7 very clear and we very much appreciate your
 8 presentation. I don't think we have any questions for
 9 you.
 10 PROFESSOR WEBB: Thank you.
 11 THE CHAIRMAN: Thank you.
 12 PROFESSOR WEBB: So I leave it to you, Mr Chairman, as to
 13 whether it's time for a coffee break, or to call
 14 Mr Fietta.
 15 THE CHAIRMAN: Given the shift in the lunch break, I think
 16 we could begin with Mr Fietta, if he's ready for us.
 17 There was already an intention to split his presentation
 18 across the coffee break. But if that's not convenient
 19 for any particular reason ... (Pause)
 20 I think it's better to take the break. We were
 21 planning for a half-hour; why don't we resume at 4.15.
 22 (3.42 pm)
 23 (A short break)
 24 (4.19 pm)
 25 THE CHAIRMAN: Perhaps I'll just begin by noting that

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16:21 1 It's a pleasure and a privilege for me to appear on
 2 behalf of Pakistan in this important case.
 3 The objective of my 75-minute or so presentation is
 4 to provide an overview of the scheme of the Treaty, with
 5 particular focus on its dispute settlement provisions at
 6 Article IX and Annexures F and G, in order to facilitate
 7 the Court's decision relating to its competence.
 8 The Court will assess its competence with reference
 9 to Pakistan's Request for Arbitration, or RfA, dated
 10 18 August 2016, and the relevant provisions of the
 11 Treaty. In particular, the Court must determine whether
 12 it has competence under the Treaty to resolve the seven
 13 disputes with reference to which Pakistan has instituted
 14 this proceeding under Article IX(5)(b) of the Treaty.
 15 (Slide 2) I'd like to open my submission with
 16 a reminder of the scheme of the Treaty. My first slide
 17 repeats the words of my colleague Sir Daniel Bethlehem
 18 at the first meeting of the Court (Day 1, page 11). He
 19 says:
 20 "The Indus Waters Treaty is not an ordinary Treaty;
 21 it is akin to a treaty of peace. It fixes and delimits
 22 the rights and obligations of India and Pakistan
 23 regarding the waters of the Indus system of rivers in
 24 a finely balanced architecture designed to ensure
 25 fairness and stability. Central to that Treaty

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16:19 1 I think we'll have Mr Fietta for the rest of today, and
 2 then we will end the day and resume tomorrow morning,
 3 I think, with Sir Daniel.
 4 Perhaps I'll also note that to the extent you may
 5 feel you are getting somewhat less questions from us
 6 over the course of today as compared with January,
 7 I think there may be two explanations for that.
 8 One is that we did give you quite a few questions to
 9 look at in advance, which we thought would be helpful
 10 for sharpening some of the issues that we found of
 11 particular interest, and are quite happy that you've
 12 taken that up and have woven it into your presentations.
 13 The second reason would be that your presentations
 14 have been very clear and helpful to us. So we thank you
 15 for that as well.
 16 And I suppose there's a third reason, which that we
 17 do have a chance to give you some more questions in due
 18 course.
 19 In any event, I think we are ready to resume. So,
 20 Mr Fietta, when you're ready, you have the floor.
 21 MR FIETTA: Thank you, Mr President. I would invite further
 22 questions, of course, during the course of my
 23 presentation, but I'm not begging for them; I have
 24 twelve already from you to answer in my part. So thank
 25 you for those.

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16:22 1 architecture is a dispute settlement system that
 2 provides for the orderly resolution of different types
 3 of disagreements."
 4 Now, we heard from Sir Daniel this morning that
 5 a pervasive theme of the Treaty is cooperation, and that
 6 includes in the settlement of disputes. This is
 7 emphasised in the preamble, which appears on my slide 3.
 8 The parties were desirous, it says, of:
 9 "... making provision for the settlement, in
 10 a cooperative spirit, of all such questions as may
 11 hereafter arise in regard to the interpretation or
 12 application of the provisions agreed upon herein."
 13 It's in pursuit of this overriding object and
 14 purpose of the Treaty that Pakistan appears before you
 15 today.
 16 The Court in Kishenganga summarised the object and
 17 purpose of the Treaty with respect to the Western Rivers
 18 at paragraphs 410 and 411 of its award (PLA-3). Its
 19 words appear on my next slide, number 4.
 20 And really there are three elements to these objects
 21 and purpose: first, to safeguard Pakistan's right to the
 22 "unrestricted use" of the waters of those Western
 23 rivers, including the Kishenganga/Neelum and Chenab
 24 Rivers, as relevant here; second, to enshrine India's
 25 concomitant obligation to let flow the waters of those

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16:24 1 rivers; and third, to preserve India's ability to
 2 generate hydroelectric power on the Western Rivers, but
 3 crucially, only -- and the words are at the end of the
 4 slide -- "to the extent permitted by the Treaty".
 5 Again, it is with a view to safeguarding this
 6 overriding object and purpose of the Treaty that
 7 Pakistan appears before you today.
 8 The scheme of the Treaty will provide important
 9 context to the Court's assessment of its competence.
 10 However, your assessment will ultimately turn on your
 11 interpretation and application of Article IX and its
 12 associated Annexures F and G. So the bulk of my
 13 presentation will focus on this and India's associated
 14 objections, which we say are based on
 15 a misinterpretation of the Treaty and a misapplication
 16 of its provisions.
 17 So I'm going to begin by making a submission that
 18 will certainly be trite to those legally qualified
 19 members of the Court, but perhaps -- perhaps -- less
 20 obvious to its members who are of a more technical
 21 persuasion. That is that the relevant provisions are to
 22 be interpreted in accordance with their ordinary
 23 meaning, as prescribed by the customary international
 24 law of treaty interpretation. And those rules, those
 25 customary international rules, are set out in the

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16:25 1 Vienna Convention on the Law of Treaties, and that is
 2 Exhibit PLA-5.
 3 Now, India itself acknowledged as much in
 4 Kishenganga. So this is not, in that sense,
 5 contentious. And this is clear from the partial award
 6 in Kishenganga (PLA-3), paragraph 174 and footnote 101,
 7 which appear on my slide 5.
 8 So the Court observed, at paragraph 401, later on,
 9 that it would be "guided by the fundamental rules of
 10 treaty interpretation set out in Article 31(1) of the
 11 VCLT", of the Vienna Convention on the Law of Treaties.
 12 And this Court should be similarly guided.
 13 Article 31 is on my next slide, slide 6, or the
 14 pertinent parts of it. As India acknowledged in
 15 Kishenganga, the fact that neither India nor Pakistan
 16 are parties to this Treaty, the VCLT, is immaterial,
 17 because Article 31 enshrines customary international
 18 law. And customary international law forms part of the
 19 applicable law in this proceeding by virtue of
 20 paragraph 29 of Annexure G, to the extent necessary.
 21 So it is trite that the Court must interpret the
 22 Indus Waters Treaty in good faith, in accordance with
 23 the ordinary meaning to be given to the Treaty's terms
 24 in their context and in the light of its object and
 25 purpose. I will keep returning to this fundamental rule

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16:27 1 of treaty interpretation as I walk you through each of
 2 the paragraphs of Article IX.
 3 The overriding point -- as I hope will become clear
 4 to the Court, if it is not already -- is that while
 5 Pakistan's interpretation of Article IX complies with
 6 this fundamental rule, India's apparent interpretation
 7 plainly does not. While Pakistan's interpretation
 8 accords with the ordinary meaning to be given to the
 9 full terms of Article IX, India's interpretation
 10 distorts their ordinary meaning.
 11 While Pakistan's interpretation takes full account
 12 of the context of Article IX, including as per
 13 Article 31(2) here on the slide -- that context includes
 14 the provisions of its preamble and its annexures,
 15 particularly Annexures F and G. Pakistan's
 16 interpretation accords with that context and object and
 17 purpose. India's interpretation ignores the context of
 18 these provisions, and would flatly undermine the object
 19 and purpose of the Treaty.
 20 So turning then to the primary focus of my
 21 submission, which is the interpretation of Article IX of
 22 the Treaty, and India's associated objections to
 23 jurisdiction or to the competence of this Court.
 24 THE CHAIRMAN: Mr Fietta, can I just trouble you with
 25 a question.

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16:29 1 You have on the screen here (slide 6) Article 31 of
 2 the Vienna Convention. You have taken out of it
 3 paragraph 3, with your ellipsis there. That paragraph
 4 indicates that one element in the interpretative process
 5 can be the practice of the parties to the Treaty,
 6 subsequent to the ratification of the Treaty, that
 7 evinces a sense of their interpretation of the Treaty.
 8 And I just wanted to connect this back to a question
 9 I asked earlier today that may not have been artfully
 10 formulated. But what I was trying to see if you had, on
 11 your team, any responses to is whether the practice of
 12 India and Pakistan, in prior situations where
 13 an intention to make a request had been articulated,
 14 whether that practice demonstrated an interpretation
 15 that that alone did not constitute the commencement of
 16 a Neutral Expert proceeding.
 17 So I am not asking you to respond to this now, but
 18 since you had this particular slide up, I thought
 19 I would perhaps clarify a little bit what I was fishing
 20 for in my earlier questions. And perhaps, either
 21 tomorrow or Saturday, your team might think about that,
 22 connecting that paragraph 3 back to some of the factual
 23 discussions of what happened in earlier situations where
 24 a Neutral Expert process was or was not launched.
 25 MR FIETTA: Yes, of course we will do that; and have a look

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16:30 1 back at the subsequent practice, as you say, to see
 2 whether that is informative.
 3 Obviously much of the subsequent practice in this
 4 context has not been -- by way of agreement, has not
 5 indicated a mutual practice or a mutual intention or
 6 understanding. There's been much disagreement on
 7 a number of these issues, including disagreements that
 8 panned out through the first Kishenganga case, through
 9 certain aspects of Article IX that we will come to. But
 10 we will check to see whether there is any subsequent
 11 practice overnight that could engage paragraph 3.
 12 So turning to the primary focus in Article IX of the
 13 Treaty, and India's associated objections. I will
 14 endeavour to respond to certain of the Court's questions
 15 in connection with Article IX. As I said before,
 16 I think there are twelve of them left for me. I'll tell
 17 you which ones I will answer now, and it probably would
 18 be worthwhile having a copy somewhere to hand as we go
 19 through. So they are questions 9 to 13, 17, 18, 20, 21,
 20 24, 25 and 30.
 21 I trust that once I have been through those
 22 questions, we collectively will have answered all of
 23 them, but no doubt somebody will correct me if I'm
 24 wrong. There are quite a few to cover. So please, as
 25 I say, keep them close to hand.

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16:32 1 (Slide 7) First of all, let's look at paragraph (1)
 2 of Article IX. And I've included the beginning of
 3 paragraph (2) and, we will come to paragraph (2) in more
 4 detail in a moment. My first point concerns the heading
 5 of Article IX: "Settlement of differences and disputes".
 6 It is important to keep in mind, when considering
 7 the respective competences of Courts of Arbitration and
 8 Neutral Experts under Article IX, that differences and
 9 disputes are not separate and distinct; they overlap.
 10 As the text of Article IX makes clear, all questions
 11 that cannot be resolved by agreement within the
 12 Commission at paragraph 1 become "differences" pursuant
 13 to paragraph (2). The opening of paragraph (2) here:
 14 "If the Commission [can] not reach agreement on any
 15 of the questions mentioned in Paragraph (1), then
 16 a difference will be deemed to have arisen ..."
 17 (Slide 8) Disputes which courts of arbitration could
 18 be tasked with resolving under Article IX later on are
 19 a subset of differences. This is again clear from the
 20 text of Article IX(2). Paragraph (2) of Article IX is
 21 split between subparagraph (a), which concerns
 22 differences to be dealt with by a Neutral Expert, and
 23 subparagraph (b), which deems all other differences as
 24 being disputes, ultimately susceptible to resolution by
 25 a Court of Arbitration.

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16:34 1 Thus, with the exception of the chaussette -- the
 2 wording at the bottom, the proviso, to which I will turn
 3 in a moment -- Neutral Experts have competence under
 4 subparagraph (2)(a) only in respect to a specific
 5 category of differences: namely, those that both fall
 6 within the list contained at Part 1 of Annexure F, and
 7 that are the subject of a request by either Commissioner
 8 to be dealt with by a Neutral Expert.
 9 This is again clear from the text of
 10 Article IX(2)(a) here, read in conjunction with
 11 paragraph 1 of Annexure F. It's only if a difference
 12 falls within Part 1 of Annexure F and has been the
 13 subject of a request by the Commissioner that it falls
 14 within a difference to be dealt with by a Neutral
 15 Expert.
 16 So two categories of disagreement fall beyond the
 17 competence of a Neutral Expert, and fall only to be
 18 resolved by a Court of Arbitration: namely, first, those
 19 that fall outside the specific differences listed at
 20 Part 1 of Annexure F; and second, those differences of
 21 any kind which have not been the subject of a request of
 22 either or both Commissioners that they be dealt with by
 23 a Neutral Expert.
 24 I say "either or both" because the chaussette --
 25 this wording, the proviso at the bottom -- contemplates

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16:35 1 the possibility of both Commissioners agreeing to refer
 2 any difference to a Neutral Expert, or alternatively to
 3 deem any difference to be a dispute susceptible to
 4 resolution by a Court of Arbitration. But of course the
 5 Commissioners reached no such agreement in this case,
 6 and so the chaussette or the proviso is not applicable
 7 here.
 8 The distinctions drawn by Article IX between forms
 9 of difference are critical to an assessment of the
 10 Court's competence in this case. As others have pointed
 11 out, a number of the issues referred to in Pakistan's
 12 Request for Arbitration, such as those related to
 13 Treaty-systemic interpretation affecting India's design
 14 of HEPs on the Western Rivers generally and those
 15 related to provisional measures and mandatory injunctive
 16 relief, can only fall within the competence of a Court
 17 of Arbitration.
 18 The importance of the Court's exclusive competence
 19 in these areas cannot be emphasised enough, in
 20 circumstances where India has already completed
 21 construction of one large HEP, namely the Kishenganga
 22 Hydroelectric Project, in violation of the Treaty; and
 23 is busy constructing another large HEP, the Ratle
 24 Hydroelectric Project, in violation of the Treaty; and
 25 is planning to add a dozen more such projects by 2030,

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16:37 1 thus doubling its hydropower generation capacity on the
 2 Western Rivers as compared to the capacity it has built
 3 up over more than 60 years; and is planning, as we heard
 4 earlier, to add as many as 65 projects in all on the
 5 Western Rivers.
 6 I refer here to Dr Miles's presentation earlier, and
 7 in turn to the presentation you heard from Commissioner
 8 Shah, Pakistan's Commissioner, at the first meeting, and
 9 slides 10 to 12 of his presentation.
 10 There is a compelling and urgent need for systemic
 11 Treaty interpretations in order to confirm the
 12 permissible design parameters of India's planned
 13 run-of-river plants on the Western Rivers under the
 14 Treaty.
 15 All of this means that, regardless of separate
 16 questions that have arisen about which of the Court or
 17 the Neutral Expert proceedings commenced first,
 18 et cetera, a substantial number of the differences and
 19 associated requests for relief, articulated in
 20 Pakistan's Request for Arbitration, fall within the
 21 exclusive competence of this Court.
 22 That this is the case follows not only from the
 23 clear text of Article IX(2); it follows also as a matter
 24 of logic, as we've heard, given the very different
 25 capacities and competencies of Courts of Arbitration and

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16:38 1 Neutral Experts under the Treaty.
 2 Courts of Arbitration are constituted of at least
 3 five, but more commonly seven, members. By virtue of
 4 paragraph 4 of Annexure G, a Court of Arbitration must
 5 include at least one "highly qualified engineer" and at
 6 least one "person well-versed in international law". So
 7 the five-to-seven-member Court will always blend legal
 8 and technical expertise.
 9 It is mandated by paragraph 29 of Annexure G to
 10 apply the Treaty as a whole and, to the extent
 11 necessary, other relevant conventions and customary
 12 international law. As such, a Court of Arbitration is
 13 well placed to resolve any difference that might arise
 14 under the Treaty, whether project-specific or systemic,
 15 and whether of a legal or technical -- or a mixed, quite
 16 often -- nature.
 17 By contrast, a Neutral Expert is one individual. By
 18 virtue of paragraph 4 of Annexure F, he or she will
 19 always be -- always -- a "highly qualified engineer",
 20 but he or she will not be a lawyer. He or she is not
 21 competent to interpret or apply the Treaty as a whole,
 22 or conventions more broadly, or customary international
 23 law. Still less is he or she mandated to do so by any
 24 equivalent of paragraph 29 of Annexure G. There is no
 25 equivalent in Annexure F. This is why the Neutral

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16:40 1 Expert is competent only to make decision in respect of
 2 a closed list of technical questions under Part 1 of
 3 Annexure F.
 4 As the Court observed in its question 30, Pakistan's
 5 position is that his interpretative competence here is
 6 confined to technical matters that do not engage
 7 questions of the law of the Treaty or its systemic
 8 application. That's Pakistan's position as to the
 9 competence generally of a Neutral Expert under the
 10 Treaty. And this limited competence was confirmed, in
 11 fact, by Mr Lino at his first meeting a few weeks ago,
 12 where, as you know -- because it is cited in our
 13 Response -- he said that he has "no competence to
 14 interpret any part of the Treaty".
 15 Therefore awards of a Court and decisions of
 16 a Neutral Expert have quite different consequences under
 17 the Treaty, as confirmed by the Court of Arbitration in
 18 Kishenganga (PLA-3). In particular, at paragraph 470,
 19 on my slide, slide 9, the Court observed that:
 20 "The effect of a Neutral Expert's determination is
 21 restricted to ... elements of the design and operation
 22 of the specific ... plant [that is] considered by that
 23 Expert."
 24 By contrast the decision of a Court -- in that case
 25 as to whether, as a matter of law, drawdown flushing was

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16:42 1 permissible on the Western Rivers under the Treaty --
 2 a decision of the Court can be of "general precedential
 3 value". They were the words used by the Court at
 4 paragraph 470: "general precedential value".
 5 For all of these reasons, India's submission that
 6 the Treaty "puts in place a graded dispute resolution
 7 mechanism" (P-2) by which a dispute can only reach the
 8 Court by virtue either of the mutual consent of the
 9 Commissioners or after an initial procedure before the
 10 Neutral Expert is plainly wrong.
 11 It would be nonsensical and grossly inefficient for
 12 a party faced with a recalcitrant counterpart to have to
 13 engage a Neutral Expert first as a means of settling
 14 a dispute that plainly falls outside his competence --
 15 for example, a legal dispute relating to whether or not
 16 the designs of HEPs generally on the Western Rivers
 17 violate the Treaty -- just as a means of gaining access
 18 to a Court that would have competence over those issues.
 19 As I will demonstrate, the Treaty plainly provides
 20 a route by which a party can unilaterally refer such
 21 disputes, or associated requests for interim relief,
 22 directly to a Court of Arbitration. It would plainly
 23 undermine the very purpose of interim relief, for
 24 example -- which is by definition time-sensitive -- to
 25 require a party first to obtain some kind of decision

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16:43 1 from a Neutral Expert before being able to secure such
 2 relief from a Court.
 3 The fact that time will often be of the essence in
 4 the settlement of design-focused disputes under the
 5 Treaty, and the grave risks that might follow from any
 6 undue delay in the settlement of such disputes, was
 7 highlighted again by the Court in the Kishenganga case
 8 (PLA-3). This is at paragraphs 443 and 444. Again,
 9 they're on my slide here, slide 10.
 10 Here, in discussing Article IX and the
 11 time-sensitive nature of disputes that may be referred
 12 under Article IX, the Court said:
 13 "... the Treaty prescribes a formal procedure
 14 designed to bring a measure of order and certainty in
 15 the resolution of competing claims, and to questions of
 16 propriety of Plant design, before construction
 17 commences."
 18 And the Court continued:
 19 "Article IX foresees that the Parties may reach
 20 a bilateral, negotiated solution through the
 21 Commission ..."
 22 That's paragraph (1):
 23 "... or (if the Commission cannot resolve the
 24 matter) may put a matter before either a neutral expert
 25 or Court of arbitration ..."

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16:44 1 And in that context, in 444, the Court cites
 2 Article IX(2). Again, the Court says:
 3 "These procedures are designed to achieve resolution
 4 before construction of a Project commences ..."
 5 So note here the emphasis of the Court that
 6 differences might be put either to a Court or to
 7 a Neutral Expert, in the alternative; not by means of
 8 a graded mechanism by which one would have to go through
 9 some kind of artificial proceeding before a Neutral
 10 Expert purely in order to engage competence of a Court.
 11 That is the sum of India's position.
 12 My next slide, slide 11, in the form, I think, of
 13 a Venn diagram -- I believe this is a form of Venn
 14 diagram, but I may be corrected -- this encapsulates
 15 everything that I've just said in connection with
 16 differences and disputes -- it tries to -- and the
 17 overlapping but distinct competences of Neutral Experts
 18 and Courts of Arbitration under Article IX.
 19 The large circle -- this applies, of course, where
 20 there have been questions on which a Commission does not
 21 reach agreement, giving rise to "differences". And then
 22 under Article IX, these differences, all such
 23 differences in principle fall within the competence of
 24 a Court; and only certain such differences -- in the
 25 form of disputes, of course: they are then deemed to be

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16:46 1 "disputes" -- and only certain differences, as specified
 2 in Annexure F, Part 1, can be dealt with by a Neutral
 3 Expert. And that circle is clearly a smaller circle
 4 within the larger circle encompassing the Court's
 5 competence.
 6 THE CHAIRMAN: Mr Fietta, if you don't mind, I'll try
 7 another question out on you.
 8 You have spoken quite well to what you might regard
 9 as an object and purpose, or a functional argument that
 10 there's a need in some situations to move quickly and
 11 therefore there shouldn't be a delay. And you pointed
 12 to the Kishenganga decision, which is quite important as
 13 well.
 14 I'm interested in the specific text of
 15 paragraph (2)(a) and (b). And unless you're about to
 16 take us through that, I'll indicate what my question is.
 17 As I understand Pakistan's position, it would make
 18 sense if subparagraph (b) began the same way as
 19 paragraph (a); that is, if it began in
 20 subparagraph (2)(b) reading, "Any difference which, in
 21 the opinion of either Commissioner, does not fall within
 22 the provisions of Part 1 of Annexure F", and then it
 23 would pick back up, "or if a Neutral Expert decides that
 24 it is not within Paragraph 7". That would be a very
 25 good mirroring image that I think would track the

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16:48 1 argument that I understand Pakistan is making.
 2 It doesn't say that, and so I'm just wondering
 3 a little bit about textually the way that Pakistan looks
 4 at this. Because I could imagine India taking the
 5 position that because in subparagraph (a) it
 6 specifically spoke about "in the opinion of either
 7 Commissioner", but doesn't do that in (b), that perhaps
 8 (b) is best interpreted as something along the lines of,
 9 "If, pursuant to (a), we have not reached a conclusion
 10 about what this is", meaning that you would have to have
 11 perhaps both Commissioners deciding that it does not
 12 fall within a Neutral Expert's domain, that therefore
 13 the way it should be interpreted is: you need both
 14 Commissioners or a Neutral Expert who decides that it's
 15 not appropriate for his mandate.
 16 I fully understand this is not your position, and
 17 I'm not disagreeing with arguments you've made. But I'm
 18 wondering if you could just talk us through a little bit
 19 the textual aspect of the way it's written.
 20 MR FIETTA: Yes, I absolutely am returning to the text.
 21 Don't worry, this will be my last diagram. I'm not
 22 going to be confusing the matter with more diagrams.
 23 And absolutely, the rest of my submission will be
 24 focused on the text, and I am very much coming back to
 25 text of (2)(a) and (2)(b). And I think your question

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16:50 1 goes to the Court's question 10 as well, which I'm
 2 getting to shortly. So if I don't cover it, let me know
 3 when I've finished speaking at least to question 10.
 4 So we were on slide 11, and we can move on from
 5 that.
 6 (Slide 12) The inescapable conclusion, we say, is
 7 that numerous of the disputes articulated in Pakistan's
 8 Request for Arbitration stand only to be resolved by
 9 a Court of Arbitration. And this is central to the
 10 Court's question 25, which asks:
 11 "What effect(s) would follow from a finding that the
 12 Court's jurisdiction/competence is distinct from, and
 13 yet more comprehensive than, that of a Neutral Expert?"
 14 The answer to that is that the Court of Arbitration
 15 unquestionably has exclusive competence over the
 16 disputes concerned, whether because they exclusively
 17 fall within its competence or because they are
 18 exclusively contained in the RfA and have not even been
 19 put to the Neutral Expert. We see no differences in
 20 scope between the RfA and the Request for a Neutral
 21 Expert. So it is clear that there are some disputes
 22 that are only before the Court, and that only the Court
 23 is competent to resolve.
 24 And given that, the consequence must be that the
 25 present proceeding must continue, regardless of the

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16:51 1 Neutral Expert's proceeding, and certainly without
 2 having to await a prior decision of the Neutral Expert,
 3 which will not address those issues that are exclusively
 4 before you. Indeed, the Neutral Expert is not even
 5 seised of those disputes, as we saw earlier.
 6 As regards the remainder of the disagreements
 7 referred to the Court -- so those that in principle are
 8 not within the exclusive competence of the Court -- [in]
 9 Pakistan's RfA, namely those which are in principle
 10 capable of referral alternatively to a Neutral Expert
 11 under Article IX(2)(a), they equally remain capable of
 12 forming, and do form, disputes capable of resolution by
 13 the Court.
 14 So, for the reasons I will explain, even if they
 15 have been put -- if there is some identity between
 16 disagreements that have been put as differences to the
 17 Neutral Expert and the same differences that have been
 18 put to the Court, they do form disputes for the purposes
 19 of this proceeding. And I will explain why, with
 20 reference to the text and the facts under Article IX.
 21 The starting point for this analysis is
 22 paragraph 484 of Kishenganga (PLA-3), where the Court
 23 [observed] that:
 24 "... nothing in the Treaty requires that a technical
 25 question listed in Part 1 of Annexure F be decided by

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16:53 1 a neutral expert rather than a court of arbitration --
 2 except where a Party so requests."
 3 And that is critical wording within Article IX(2)
 4 that I'll return to in a moment.
 5 But here the Court is confirming essentially what
 6 I tried to convey in that Venn diagram: that the Court's
 7 competence in principle encompasses everything that
 8 could alternatively find its way to a Neutral Expert.
 9 The essential requirement that a Request to
 10 a Neutral Expert be actually made by a Commissioner in
 11 order to divest the competence of a Court over
 12 a technical question was repeatedly emphasised by the
 13 Court again in Kishenganga. Here the relevant
 14 paragraphs are 477 to 480; and in particular,
 15 paragraph 478 of the partial award squarely addresses
 16 this point. It's on my next slide (13).
 17 The Court said that the requirement that the
 18 difference be referred to a Neutral Expert:
 19 "... only becomes effective ... if a request for the
 20 appointment of a neutral expert is actually made."
 21 You can see that at the bottom of that passage. And
 22 the Court continued:
 23 "It is insufficient for a Commissioner merely to
 24 express the view that a difference would, at some point,
 25 be an appropriate matter for a neutral expert."

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16:54 1 There had to be a request. And we'll see that again
 2 on the wording of Article IX(2) when we return to it in
 3 a second.
 4 This passage, though, goes directly to the Court's
 5 question 9, which asks whether Article IX(2)(b):
 6 "... can prevent a question being regarded as
 7 a 'dispute' if a Commissioner has opined ... that the
 8 question falls within the provisions of Part 1 of
 9 Annexure F, even if the Commissioner has not yet
 10 requested the appointment of a neutral expert."
 11 The answer to question 9 is: no. The mere framing
 12 of an opinion cannot prevent a difference being deemed
 13 to be a dispute.
 14 As the language of Article IX(2)(a) makes clear --
 15 I can go to that briefly before returning -- and as the
 16 Court in Kishenganga confirmed, it is the making of
 17 an "actual request", as opposed to the expression of
 18 an opinion or a future intention, that engages
 19 Article IX(2)(a). Absent a request -- and that was
 20 critical, central to the Court's passage we looked at
 21 a second ago -- absent a request, a difference will not
 22 come within paragraph (2)(a), and either party will then
 23 have a right to engage procedures for the settlement of
 24 disputes under paragraphs (3), (4) and (5).
 25 MR MINEAR: Excuse me, Mr Fietta, for interrupting your

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16:56 1 presentation, but I'm concerned about the text here
 2 because it's so central to India's argument and we don't
 3 have the benefit of India's presence here. So I'd like
 4 to explore this to make sure I understand its argument
 5 and your response.
 6 I take it that under (2)(a), if we ignored the
 7 language "at the request of either Commissioner",
 8 India's argument would be strong; is that right? If
 9 that language were not present there.
 10 MR FIETTA: I'm sure India would exploit the absence --
 11 MR MINEAR: In other words, if it simply said:
 12 "Any difference which, in the opinion of either
 13 Commissioner, falls within the provisions of Part 1 of
 14 Annexure F shall be dealt with by a Neutral Expert ..."
 15 The presence of that language is critical.
 16 MR FIETTA: It's very important to our argument. I'm sure
 17 if it was not there, India would point that out, yes.
 18 MR MINEAR: Yes, I would think the argument for India would
 19 almost be compelling if that language was not present
 20 there. So in order for India to succeed, we would have
 21 to find some basis for ignoring that language.
 22 MR FIETTA: Yes.
 23 MR MINEAR: And if we go to (b), where it makes a reference
 24 to, "If the difference does not come within the
 25 provisions of Paragraph (2)(a)", if that referred only

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16:57 1 to the provisions of (a), stopping short of "at the
 2 request of either Commissioner", that would provide
 3 a strong argument for India, right? If it were
 4 interpreted in that way.
 5 MR FIETTA: I think you could say that. I'm going to come
 6 to this. But please continue, yes.
 7 MR MINEAR: Okay.
 8 And on the other hand, if (2)(b) stated, instead of
 9 saying "does not come within the provisions of
 10 Paragraph (2)(a)", says "If the difference, in the
 11 opinion of either Commissioner, does not fall within the
 12 provisions of Part 1 of Annexure F", that also would
 13 provide a basis for India's argument?
 14 I'm just exploring the permutations of the language
 15 here working around this critical language, "at the
 16 request of either Commissioner", to see if there's any
 17 interpretive way to ignore that language. This is
 18 basically what, if India were here, I'd be exploring
 19 with them.
 20 So I'm asking you: if that were the case, would you
 21 agree that if we found a way to ignore that language,
 22 India's argument would be much more compelling than
 23 you've described it?
 24 MR FIETTA: I agree. I'm coming to that very point, in the
 25 sense that I'm going to explain to you how India is --

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16:59 1 essentially, its position would require a significant
 2 rewriting of the Treaty or it would require this Court
 3 to ignore the plain text of the Treaty. And that's why
 4 I first took you to the Vienna Convention and the
 5 sacrosanct nature of the text of the Treaty.
 6 MR MINEAR: Okay. I'll let you proceed from there.
 7 MR FIETTA: So I'm going to address those issues.
 8 Specifically on the point about the words "at the
 9 request of either Commissioner" and how that makes a big
 10 difference, that was picked up by the Court in the
 11 Kishenganga case -- I'll come to that -- in response to
 12 a similar argument by India. The Court noticed that
 13 those words were not in a previous draft of the Treaty,
 14 a 1959 draft, they were added later, and the Court goes
 15 on to explain why they were added. It says,
 16 essentially: if they had not been added, this would have
 17 been what's called a "pathological clause", and there
 18 would have been real practical difficulties in
 19 implementing it because there would be a clear risk of
 20 an impasse or a deadlock being created in certain
 21 situations.
 22 I'll come to that and I'll explain it to you. And
 23 then I'll also explain to you how India is trying to
 24 rewrite or ignore aspects of the text, in plain
 25 violation of the Vienna Convention.

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17:00 1 MR MINEAR: Thank you.
 2 MR FIETTA: Question 9. I don't think I've addressed
 3 question 9, so let me do that. If I've said this
 4 already, please stop me.
 5 The passage that I've just cited from Kishenganga
 6 goes to the Court's question 9, which asks whether
 7 Article IX(2)(b):
 8 "... can prevent a question being regarded as
 9 a 'dispute' if the Commissioner has opined ... that the
 10 question follows within the provisions of Part 1 of
 11 Annexure F, even if that Commissioner has not yet
 12 requested the appointment of a neutral expert."
 13 And the answer, as I said, is: no. As the language
 14 in Article IX(2)(a) makes clear, and as the Kishenganga
 15 Court confirmed in the passage we were at one second
 16 ago, on slide 13, as the Court makes clear here, it's
 17 the making of an actual request, as opposed to the
 18 expression of an opinion or future intention, that
 19 engages IX(2)(a). And absent such a request, either
 20 party will have the right to engage dispute resolution
 21 under paragraphs (3), (4) and (5).
 22 I did address that earlier. Apologies.
 23 So the fact that paragraph (2)(b) does not include
 24 the words "in the opinion of either Commissioner", as
 25 noted by the Court's question 10, we say cannot change

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17:02 1 that conclusion. No such wording -- let's go to the
 2 wording again of paragraph 2 (slide 8). No such wording
 3 is required, because either the difference comes within
 4 paragraph (2)(a) -- including via the making of a formal
 5 request -- or it does not, in which case
 6 paragraph (2)(b) is triggered and a dispute is deemed to
 7 have arisen, which either party can then move to resolve
 8 unilaterally via paragraphs (3), (4) and (5).
 9 The alternative, as the Court in Kishenganga
 10 observed, would be a "pathological clause". And this is
 11 where we come to the next passage from Kishenganga
 12 (PLA-3) which I wanted to refer you to, on slide 14,
 13 paragraph 479.
 14 The Court pointed out that "the requirement of
 15 an actual request" -- in the underlined wording there --
 16 under paragraph (2)(a) is necessary in order to avoid
 17 the procedural impasse that could otherwise arise if
 18 a Commissioner could simply express an opinion that
 19 a difference fell within Part 1 of Annexure F, thereby
 20 precluding access by the other Commissioner to a Court
 21 of Arbitration, and then decline actually to request
 22 a Neutral Expert to resolve the difference. There would
 23 then be a deadlock, in the absence of the addition of
 24 the words in paragraph (2)(a) "at the request of
 25 [a] Commissioner".

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17:03 1 Here you can see, as I just mentioned, that the
 2 Court made reference to the 1959 draft (P-139), which is
 3 on the record and I can probably find you a reference
 4 for it if helpful, where that wording, "at the request
 5 of [a] Commissioner", was simply not present. And the
 6 Court proceeds:
 7 "... under the ... 1959 draft: a Commissioner could
 8 express the view that a difference fell within
 9 Annexure F ..."
 10 One opinion:
 11 "... thereby unequivocally foreclosing access to
 12 a court of arbitration, and yet decline to request
 13 a neutral expert to resolve the difference."
 14 And:
 15 "Such a 'pathological clause' (to use the parlance
 16 of international arbitration) was commendably avoided in
 17 the final version ..."
 18 By adding those very words that you highlighted, "at
 19 the request of [a] Commissioner".
 20 So on the basis of this passage, the Kishenganga
 21 [court] dismissed an Indian objection that had been put
 22 in remarkably similar terms to the proposition that is
 23 made at question 10.
 24 This passage of Kishenganga also deals with
 25 question 11, because it confirms that the net result of

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17:05 1 the interpretation of Articles IX(2)(a) and (b), posited
 2 in questions 9 and 10 of the Court, would be to create
 3 conditions in which one party could obstruct or delay
 4 the formation of a Court in order to address matters
 5 that plainly do not fall within a Neutral Expert's
 6 competence.
 7 And we are going to see shortly that that has been
 8 India's tactic in this case. And you saw that earlier,
 9 when I think it was Professor Webb addressed you in
 10 indicating that it was only very belatedly that India
 11 actually ever raised a request for a neutral expert to
 12 become involved, and that was well after the Request for
 13 Arbitration had been submitted and this proceeding had
 14 been instituted under the Treaty.
 15 Finally, before I revert to the Article IX text
 16 again, let me deal with question 12, about the words "If
 17 the necessity arises". I think Professor Webb addressed
 18 this partially as well.
 19 This is the wording at paragraph 1 of Annexure G,
 20 "If the necessity arises". India leaps on that wording.
 21 But because the interpretations in questions 9 and 10
 22 cannot be correct, we say, and each was rejected in
 23 Kishenganga, the answer to question 12 is necessarily:
 24 no. The "necessity" referred to in Annexure G will
 25 arise at the point at which any of the conditions for

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17:06 1 establishment of a Court in Article IX(5) have been met.
 2 Obviously there are procedures to go through before
 3 one reaches the ability to establish a Court
 4 unilaterally under paragraph (5), and we're going to go
 5 through those. But this again is confirmed by the
 6 mandatory language in the chapeau of Article IX(5), my
 7 slide 15, which we can see here:
 8 "A court of Arbitration shall be established ..."
 9 That's mandatory language: it "shall be established"
 10 if any of these three circumstances come to pass. And
 11 that's when the necessity to set up a Court of
 12 Arbitration is triggered under Annex G. And that's why
 13 you see that wording, "If the necessity arises", under
 14 Annexure G.
 15 (Slide 16) So let's go back again to the wording of
 16 paragraph (2), because it is central here.
 17 Because no actual request for a decision by
 18 a Neutral Expert had been made at the time of Pakistan's
 19 RfA, the remaining differences -- namely, the
 20 differences that could conceivably fall within the
 21 competence of a Neutral Expert -- were referred to the
 22 Court as disputes following the process set out in
 23 paragraphs (3), (4) and (5). And those residual, if you
 24 can say, or remaining differences, alongside the ones
 25 that are exclusively within your competence, also

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17:08 1 squarely fall within your competence.
 2 Paragraph IX(2)(b) and paragraph IX(5) and
 3 paragraph 23 of Annexure G all require the Court to
 4 resolve those disputes, all of those disputes, just as
 5 it is duty-bound to resolve the legal and systemic
 6 disputes which, in any event, fall beyond the competence
 7 of the Neutral Expert.
 8 In its question 13, the Court asks whether there is
 9 any particular time period during which Commissioners
 10 must have an opportunity to consider whether
 11 a difference falls within the provisions of Part 1 of
 12 Annexure F, and to request that the difference be dealt
 13 with by a Neutral Expert before a dispute is deemed to
 14 have arisen under IX(2)(b). Is there a minimum period
 15 that should be given, a grace period for a Commissioner
 16 to reach that view and action a request?
 17 Well, as a matter of plain Treaty interpretation,
 18 the answer is: no, there is no time period in the
 19 Treaty. And certainly under fundamental principles of
 20 international law and treaty interpretation -- the
 21 Vienna Convention -- no such minimum period should be
 22 implied. That would be to rewrite the Treaty or insert
 23 a text which is not there.
 24 The International Court of Justice has observed that
 25 where a treaty is silent on an issue, that silence

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17:09 1 cannot be ignored. And there is a silence here as to
 2 any particular time period that must be allowed in order
 3 for a Commissioner to reach the view that a difference
 4 falls and should be referred to a Neutral Expert.
 5 In any event, as we have heard on the facts, India
 6 had six months to reach its view and to make a request.
 7 And they are the six months between Pakistan's
 8 notification, on 25 February 2016 (P-23), of the
 9 existence of disputes susceptible to resolution by
 10 a Court, and Pakistan's referral of those disputes to
 11 a Court of Arbitration on 19 August 2016 (P-34). So
 12 that's almost six months later.
 13 Within that intervening period, India's Commissioner
 14 had a fulsome opportunity to trigger paragraph (2)(a) by
 15 making an actual request to a Neutral Expert. But he
 16 did not do that. That opportunity was all the more
 17 fulsome given the fact that a number of these issues
 18 have been the subject of years of fruitless exchanges
 19 that had by then taken place between the Commissioners
 20 on the same or similar matters. At no point had he made
 21 a request.
 22 Instead, the Indian Commissioner consistently
 23 refused to acknowledge that a difference of any kind had
 24 even arisen until August 2016. He asserted repeatedly
 25 that it would be "premature" to engage Article IX

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17:11 1 third-party dispute resolution procedures of any kind,
 2 insisting again and again that Pakistan's concerns be
 3 resolved within the Commission; while at the same time
 4 of course, as we've heard, India continued with its
 5 building of the dams and the HEPs on the rivers, the
 6 ones which were the subject of these consistent
 7 concerns.
 8 In fact, the Commissioner himself said: we are going
 9 to continue with these works because they, he said,
 10 "cannot afford to wait". That's in his initial response
 11 to the 25th February letter at Exhibit P-27
 12 (paragraph 13). If they could not afford to wait, if he
 13 had been acting in good faith, he would have triggered
 14 an actual request to have these issues resolved by
 15 a Neutral Expert, to the extent they were within his
 16 competence.
 17 The Indian Commissioner raised the possibility of
 18 an appointment of a Neutral Expert only at the eleventh
 19 hour, on 11 August 2016 (P-32), after Pakistan had
 20 notified its intent to refer the disputes to a Court
 21 under Article IX(5)(b). Meanwhile again, India forged
 22 ahead with its illegal works, and notified Pakistan that
 23 it was proceeding to fill the KHEP reservoir to dead
 24 storage level; that was on 12 August (P-33).
 25 In such circumstances, six months after invoking the

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17:12 1 dispute settlement process under Article IX(3) in its
 2 February letter, the Pakistan Commissioner was fully
 3 entitled to engage his right and Pakistan's right
 4 unilaterally to engage the Court under paragraph (5)(b).
 5 So we say that more than enough opportunity was accorded
 6 to India to invoke a Neutral Expert process, had it
 7 wished to do so.
 8 India's second objection -- to the effect that the
 9 Court of Arbitration has not been validly seised because
 10 a dispute has not arisen -- therefore fails on the plain
 11 language of Article IX(2). The Court has been validly
 12 seised of all of the disputes articulated in the RfA,
 13 whether because they fall within the exclusive
 14 competence of the Court or because, at the date of
 15 institution of this proceeding, they were not the
 16 subject of any actual request that they be dealt with by
 17 a Neutral Expert.
 18 So at this point I am going to move on to
 19 paragraphs (3), (4) and (5), unless there are further
 20 questions on paragraph (2).
 21 (Slide 17) Paragraphs (3), (4) and (5) establish the
 22 procedure for settlement of disputes under the Treaty.
 23 (3) and (4) are on my first slide here. In addressing
 24 these paragraphs, I will also touch further on India's
 25 fourth objection, to the effect that the Court has not

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17:14 1 been validly seized of the disputes.
 2 The essential point here is that, contrary to
 3 India's submission, Articles (3), (4) and (5) provide
 4 a clear route for one party to refer disputes to the
 5 Court, and those requirements have been met.
 6 To recap, the sequence of key facts, as my
 7 colleagues have already recounted in more detail, are as
 8 follows.
 9 First, for the purposes of Article IX(3), on
 10 25 February 2016, the Pakistani Commissioner wrote to
 11 his counterpart enclosing a statement of points of
 12 dispute and inviting views thereon; that's Exhibit P-23.
 13 The Indian Commissioner responded on 14 March, stating
 14 he considered this improper and invalid; that's
 15 Exhibit P-27. Hence, the Commission was unable to
 16 produce the report contemplated in Article IX(3), which
 17 should be prepared at the request of either
 18 Commissioner.
 19 However, this does not matter because of what
 20 Article IX(4) then provides. For the purposes of
 21 Article IX(4), on 29 March 2016, Pakistan sent a note
 22 verbale to India indicating that it considered that the
 23 report contemplated in paragraph (3) had been "unduly
 24 delayed". That's the wording at the second line there
 25 of paragraph (4), the report had been "unduly delayed".

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17:15 1 And accordingly, Pakistan invited India to engage in
 2 negotiations under paragraph (4). That's Exhibit P-28.
 3 This aspect of the operation of Article IX is
 4 important for two reasons. First, it illustrates that,
 5 contrary to India's fourth objection, there is no
 6 requirement for the Commission actually to issue
 7 a report under paragraph (3) in order for the dispute
 8 [settlement] process to move forward. And second, even
 9 though an invitation to negotiate is not mandatory under
 10 paragraph (4) -- either government "may" invite
 11 negotiations -- it is a mandatory step if either party
 12 is subsequently to request the establishment of a Court
 13 of Arbitration under either paragraph (5)(b) or (5)(c).
 14 And we'll come to that in a moment.
 15 For the purposes of the applicable subparagraph
 16 here -- that of course is subparagraph (5)(b), on
 17 Pakistan's case -- under subparagraph (5)(b), if that is
 18 to be met, negotiations have begun pursuant to (4) and,
 19 in the opinion of Pakistan, the dispute is not likely to
 20 be resolved by negotiation or mediation.
 21 Pakistan's case is, of course, that
 22 [paragraph] (5)(b) is the one which has been invoked.
 23 We have a question which has been raised a couple of
 24 times by the Court: we are going to reflect on that
 25 question carefully overnight, both as a matter of law

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17:17 1 and as a matter of fact, and we will revert on it.
 2 But our primary position is that Pakistan invoked
 3 Article IX(4): it invited negotiations. Those
 4 negotiations took place and they discussed the disputes
 5 that are now before you. And regardless of India's now
 6 without-prejudice assertions as to whether or not
 7 a Court can subsequently be instituted, Pakistan says
 8 that those facts are sufficient to meet the requirements
 9 of (5)(b). We will revert to you on (5)(c).
 10 This addresses the Court's question 17, I think, and
 11 brings me to my third key fact under (5)(b).
 12 (Slide 18) After negotiations had begun on
 13 19 August, Pakistan formed an opinion -- in fact, before
 14 then: as we heard earlier, it formed an opinion after
 15 the negotiations or at the close of the negotiations
 16 that the dispute was not likely to be resolved by
 17 further negotiation. And that was articulated in
 18 Exhibit P-34.
 19 In response to the first part of the Court's
 20 question 18, as Professor Webb has pointed out, Pakistan
 21 reached the opinion that was the dispute was not likely
 22 to be resolved by the end of the negotiations. And
 23 there can be no serious question, we say, that Pakistan
 24 formed its opinion reasonably and in good faith.
 25 Pakistan's opinion was fortified upon receipt of India's

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17:18 1 cursory notification on 12 August about filling the
 2 reservoir at the KHEP. Having reached its opinion, on
 3 the plain text and ordinary meaning of paragraph (5),
 4 Pakistan was entitled to request the establishment of
 5 a Court.
 6 The remainder of question 18 asks whether there is
 7 any precedent under the Treaty or international law for
 8 clarifying when "a dispute is not likely to be resolved
 9 by negotiation or mediation".
 10 There is no precedent under the Treaty, because
 11 paragraph (5)(b) was not engaged in Kishenganga. But,
 12 on the wording of paragraph (5)(b), it is not for the
 13 Court to make an independent assessment of whether the
 14 dispute was likely to be resolved by negotiation.
 15 That's my first submission. All that is required by
 16 that subparagraph is that Pakistan reached an opinion to
 17 that effect, which clearly it did.
 18 (Slide 19) Now, the Court of Arbitration has
 19 referred in its question, in question 18, to the Georgia
 20 v Russia case (PLA-31). The negotiation precondition at
 21 issue in that case is on the slide here: Article 22 of
 22 the Convention on the Elimination of All Forms of Racial
 23 Discrimination.
 24 Importantly, we say this is a very different
 25 provision to Article IX(5)(b) because it refers to the

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17:20 1 fact of negotiations and settlement by negotiations. We
 2 say this is an objective test. And hence, in Georgia
 3 v Russia, the ICJ determined that Georgia had not
 4 fulfilled Article 22 because it made a factual finding
 5 that Georgia had not attempted to negotiate with Russia.
 6 Even if the same precondition applied here -- which it
 7 doesn't -- it patently has been met because there was
 8 an invitation to negotiate and negotiations took place.
 9 Here subparagraph (5)(b), however, refers to the
 10 subjective opinion of Pakistan, the moving party, that
 11 negotiations were unlikely to succeed. That's
 12 different, and absent from this provision.
 13 (Slide 20) And the ICJ recently acknowledged the
 14 difference between a discretionary clause based on
 15 a party's opinion, like the one we have here, and
 16 an objective clause based on a fact, like the one under
 17 Article 22 in the Georgia v Russia case. This was in
 18 a very recent judgment on 30 March of the ICJ in the
 19 Certain Iranian Assets case, Iran v The US. This is
 20 PLA-41.
 21 There the ICJ observed that a discretionary
 22 clause -- which typically refers, as here, to the
 23 considerations or opinion of a treaty party -- can
 24 accord "a very considerable discretion" -- there it is
 25 on the screen -- "a very considerable discretion", and

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17:22 1 greater than that afforded by an objective clause, which
 2 typically refers to whether negotiations have been
 3 sufficiently conducted; or there, in that case, it was
 4 whether certain impugned measures by the United States
 5 were actually necessary, as opposed to considered
 6 necessary by the party concerned.
 7 In light of the facts and the clear terms of
 8 paragraphs (3), (4) and (5) of Article IX, we say it's
 9 specious for India to assert that the Court has not been
 10 validly seised because "the Parties have never arrived
 11 at any agreement to refer ... outstanding differences to
 12 arbitration" (P-1, Enclosure A, paragraph 19). That
 13 cannot be a basis to deny competence.
 14 The three paragraphs that we've looked at, (3), (4)
 15 and (5), by which the disputes identified in the Request
 16 have been referred to the Court by Pakistan, do not
 17 require any such agreement in order for the Court to
 18 have been validly seised. To find otherwise would not
 19 only contradict the plain wording of these paragraphs;
 20 it would neutralise the ability of either party
 21 unilaterally to refer disputes to a Court, and thereby
 22 frustrate the fundamental aspects of the Treaty's scheme
 23 for the peaceful, effective and timely settlement of
 24 disputes.
 25 (Slide 21) I'm now going to pass to paragraph (6) of

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17:23 1 Article IX. I'm still on track to finish today, subject
 2 to questions.
 3 THE CHAIRMAN: Subject to questions!
 4 So Mr Fietta, if I can just ask you: with respect to
 5 the question of whether there needs to be negotiations,
 6 inter-state negotiations, is it Pakistan's
 7 interpretation that that is discretionary under
 8 paragraph (4), that either government may invite the
 9 other, and therefore doesn't need to; or are you
 10 accepting that you do need to do this, and then in
 11 paragraph (5) we think about what's happened?
 12 MR FIETTA: It's discretionary on the wording of
 13 paragraph (4). So in the event of a dispute, a deemed
 14 dispute, there is not an obligation to invite the other
 15 party to negotiate. It kind of depends what happens
 16 next and, in particular, which route that party wishes
 17 to have the dispute resolved by under the next
 18 paragraph, paragraph (5).
 19 If there is going to be, perhaps, an agreement
 20 between the parties in order to go straight to the Court
 21 without negotiations, then there is no need to have
 22 negotiations on the dispute under (a). There's no
 23 requirement, there's no reference to negotiations having
 24 happened under (5)(a).
 25 Of course, that's not the case here. Here is

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17:25 1 (5)(b), which is the basis for the request of Pakistan
 2 for the Court to be established. In that situation,
 3 negotiations must have begun, plainly on the wording of
 4 Article IX[5](b). And negotiations did begin.
 5 There's the third alternative under (c), which we
 6 will revert to tomorrow, where there are not actual
 7 negotiations perhaps, but there is a delay unduly caused
 8 by the other party in negotiations, including perhaps
 9 the commencement of negotiations.
 10 THE CHAIRMAN: Thank you.
 11 MR FIETTA: So turning to paragraph (6). It appears on
 12 slide 21. I have retained the text of paragraph (5)
 13 here as well because, as I will explain, it is critical
 14 context to any interpretation of paragraph (6). And
 15 this submission will address India's first objection, to
 16 the effect that the Court has not been validly seised
 17 because a Neutral Expert is dealing with the situation.
 18 The first point to make about paragraph (6) is that
 19 as a matter of Treaty interpretation, especially when
 20 read against the context provided by the remainder of
 21 Article IX, as we've seen, and Annexures F and G, it is
 22 inapplicable to those differences that fall squarely and
 23 plainly beyond the competence of a Neutral Expert.
 24 It would be inimical to the fair and effective and
 25 timely resolution of disputes under the Treaty for

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17:26 1 either party to be able to foreclose attempts to access
 2 a Court in respect of squarely legal or other
 3 differences falling only within the competence of
 4 a Court simply by issuing a request that such
 5 differences be dealt with by a Neutral Expert. This
 6 would be an open invitation to abuse by any party
 7 wishing to resist or delay proceedings before a Court,
 8 and to delay the remedies that can only be imposed by
 9 a Court.
 10 So regardless of questions that have arisen about
 11 the temporal application of paragraph (6) to certain
 12 technical differences that are now purportedly being
 13 dealt with by a Neutral Expert, to which I will return,
 14 a substantial proportion of the disputes referred to the
 15 Court in the RfA are incapable of falling within the
 16 scope of paragraph (6).
 17 The second point to be made is that, again on its
 18 plain terms, paragraph (6) serves only to disapply
 19 paragraphs (3), (4) and (5) of Article IX:
 20 "Paragraphs (3), (4) and (5) shall not apply" in this
 21 situation.
 22 This is an important temporal limitation because
 23 paragraph (6) cannot apply so as to disable proceedings
 24 before a Court that have already been instituted
 25 pursuant to the operation of the three previous

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17:27 1 paragraphs. In other words, paragraph (6) stops to
 2 apply as soon as paragraphs (3), (4) and (5) have done
 3 their work.
 4 Paragraphs 2(b) and 3 of Annexure G, which are shown
 5 on my next slide (22), are clear as to when the
 6 proceeding before this Court was instituted, and
 7 therefore paragraph (5) completed its work: namely, on
 8 the date on which India received Pakistan's request for
 9 establishment of the Court under Article IX(5)(b).
 10 That's paragraph (3) in particular, at the bottom there,
 11 of Annexure G.
 12 That date is 19 August 2016, when Pakistan
 13 transmitted its Request for Arbitration to India,
 14 Exhibit P-34. This means that any assessment temporally
 15 as to whether a difference was "being dealt with" by
 16 a Neutral Expert for the purposes of paragraph (6) must
 17 be undertaken as at 19 August 2016, when the Court's
 18 proceeding was instituted under paragraph 3 of
 19 Annexure G. Plainly no differences, even those
 20 conceivably falling within the competence of a Neutral
 21 Expert, were being dealt with by a Neutral Expert on
 22 that critical date.
 23 Pakistan's position on this first temporal
 24 application of paragraph (6) is consistent with general
 25 principles of international law, as Professor Webb

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17:29 1 explained, and as the Response at paragraphs 173 to 175
 2 explains.
 3 I won't delay the Court further on this issue. But
 4 essentially, those principles confirm that the critical
 5 date for the purposes of establishing your jurisdiction
 6 is the date of filing or registration of the relevant
 7 application; namely, here, 19 August. And clearly
 8 that's the case under paragraph 3 of Annex G. From that
 9 point onwards, nothing should be able to deprive
 10 an international court or tribunal of jurisdiction or
 11 competence that has already crystallised.
 12 A contrary approach would openly invite abuse
 13 because it would allow a recalcitrant party to derail
 14 a duly instituted proceeding ex post facto simply by
 15 referring -- or purportedly referring -- certain
 16 differences to a Neutral Expert, and thereby contriving
 17 a situation in which the duly instituted Court must
 18 cease its proceeding. Any such approach would be
 19 particularly offensive to Article IX, given the
 20 mandatory language at paragraph (5), as we've seen, that
 21 a Court must resolve a dispute once paragraph (5) has
 22 been engaged.
 23 Reverting to the text of paragraph (6) again, the
 24 third important point to make with reference to the text
 25 of this provision -- it's another temporal point -- is

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17:30 1 that it applies only to the extent that, as at that
 2 critical date, differences are being dealt with by
 3 a Neutral Expert at all. Plainly, on any ordinary
 4 meaning of the term, no Neutral Expert was dealing with
 5 differences on 19 August 2016, when the Court proceeding
 6 was instituted. As Dr Miles has explained, Pakistan had
 7 revoked its earlier invitation to India to refer certain
 8 technical differences to a Neutral Expert, so that was
 9 long dead.
 10 India only requested its own appointment of
 11 a Neutral Expert for the first time, with respect to
 12 some technical aspects of the KHEP and RHEP dispute,
 13 several weeks after the critical date of 19 August.
 14 That is in its communications of 6 September and
 15 4 October, Exhibits P-105 and P-156.
 16 And indeed, for a long time after that, there was
 17 still no Neutral Expert dealing with anything. Neutral
 18 Expert Lino was not appointed until 13 October 2022,
 19 more than six years later. And as we've heard, his
 20 terms of retainer were fixed only a few days ago.
 21 So Pakistan's position on the temporal limitations
 22 of paragraph (6) of Article IX accords with the ordinary
 23 meaning of the provision, read in its context and in
 24 light of the Treaty's object and purpose. It would be
 25 contrary, we say, to the object of the Indus Waters

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17:32 1 Treaty, expressed in its preamble -- to provide for "the
2 settlement, in a cooperative spirit, of all such
3 questions as may ... arise in regard to [its]
4 interpretation or application" -- for either party to be
5 able to disrupt a duly instituted Court proceeding by
6 subsequently instituting parallel proceedings before
7 a Neutral Expert.
8 Of note, India itself, at paragraph 2 of its letter
9 to the World Bank on 21 December 2022, Exhibit P-1, has
10 observed that parallel proceedings "are an anathema to
11 the Treaty".
12 The Court's questions 20 and 21 go to these timeline
13 issues, so I'll address them briefly here. Question 20
14 is on my next slide (24).
15 The first proposition here -- "Is Article IX(6) only
16 applicable when a Neutral Expert is requested prior to
17 the request for a Court of Arbitration and with respect
18 to issues that are being dealt with by the Neutral
19 Expert" -- the first proposition is correct insofar as
20 the issues concerned are being dealt with by a Neutral
21 Expert as a difference prior to institution of a Court
22 of Arbitration with respect to those same issues.
23 The second part:
24 "If so, what is the best understanding of Pakistan's
25 communication referred to in India's Objection ...?"

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17:35 1 Pakistan of Court proceedings. As we've heard, India's
2 Commissioner chose not to take up that right, he chose
3 not to make a request at that time, just as India's
4 Commissioner similarly chose not to refer any present
5 differences to a Neutral Expert prior to Pakistan's
6 Request for Arbitration on 19 August 2016. Both times,
7 India has refrained from doing that.
8 Had India's Commissioner done so on either occasion,
9 had the Neutral Expert begun to deal with the
10 differences concerned, then Article IX(6) would have
11 foreclosed establishment of this or any Court until the
12 Neutral Expert had rendered a decision under paragraph 7
13 of Annexure F. But the Indian Commissioner clearly did
14 not do that, whether before the Kishenganga case or
15 here.
16 (Slide 25) As regards the following question, 21,
17 the first part asks why -- it's on the slide -- why the
18 terms of retainer of a Neutral Expert need to be fixed
19 before it can be said he's "dealing with" a difference.
20 In short, until the terms of retainer have been
21 fixed, the Neutral Expert is not formally authorised by
22 the parties to deal with any differences under the
23 Treaty. It's only with the terms of retainer that
24 that's the case. Nor will the Neutral Expert even know
25 he or she is going to be paid until terms of retainer

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17:33 1 That's a historic communication in 2009 which
2 Ms Rees-Evans took you to.
3 The context of the Pakistani [Commissioner]'s letter
4 in 2009 is very different, we say, to the situation
5 here. His position at that point of time in 2009, in
6 that communication, was that the legality of the
7 diversion of the Jhelum, which was an issue in dispute,
8 India's proposed diversion of the Jhelum in connection
9 with Kishenganga, was a legal matter -- this was
10 Pakistan's position -- it was a legal matter squarely
11 falling before the Court of Arbitration.
12 By his letter to India's Commissioner, this letter
13 that's featured in the question, Pakistan's Commissioner
14 informed India's Commissioner that if he felt strongly
15 to the contrary, if India's Commissioner felt it was
16 a difference that should go to a Neutral Expert -- in
17 circumstances where Pakistan had not yet invoked Court
18 proceedings, critically, unlike here -- then India's
19 Commissioner was free to make a request to a Neutral
20 Expert, who would then determine if the diversion of the
21 Jhelum should be dealt with by the Neutral Expert or by
22 a Court.
23 So the Pakistan Commissioner's letter was reminding
24 India's Commissioner of that right that he had to invoke
25 the Neutral Expert proceeding prior to any invocation by

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17:36 1 have been signed, and nor will he be protected by any
2 immunities, for example. So these important issues need
3 to be settled in order that there can be certainty that
4 the Neutral Expert will be dealing with a dispute. They
5 are settled in the terms of the retainer.
6 The second part of this question posits whether the
7 Neutral Expert is already dealing with the difference
8 earlier. Pakistan reflected carefully on these issues
9 actually, before settling on its position that the terms
10 of retainer are the key point.
11 It certainly could be said that the Neutral Expert
12 is dealing with some matters, at least, when he or she
13 is appointed, or is in communication with the parties,
14 or first meets with the parties; these are the options
15 presented in the question. But the reason that Pakistan
16 didn't settle on that date is that until the terms of
17 retainer are fixed, there is no certainty or any
18 obligation for that particular Neutral Expert to deal
19 with the substance of the difference.
20 There are other equally arguable positions which
21 actually would have helped strengthen Pakistan's
22 position even further, in the sense that it could be
23 said that the Neutral Expert isn't even dealing with
24 a difference necessarily when the terms of retainer have
25 been signed.

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17:38 1 For example, if the first job of the expert is to
 2 decide whether a difference is a dispute, and therefore
 3 not within his competence, under paragraph 7 of
 4 Annexure F, he or she first has to decide that question.
 5 That will take some time. And he or she may decide he
 6 has no competence over that question, and that it's
 7 a dispute.
 8 If that is his decision, at that point he has not
 9 started dealing with the underlying issue, the
 10 underlying differences, the underlying disagreement. So
 11 arguably, in that situation, even after signing the
 12 terms of retainer, the Neutral Expert still would not be
 13 dealing within the situation until he or she takes
 14 competence, finds that this is a difference within his
 15 or her remit.
 16 But Pakistan hasn't adopted that position; it
 17 adopted a position based on the terms of retainer. It
 18 did that to avoid parallel proceedings which may
 19 otherwise arise in the event of a later date. And we
 20 think that our approach best accords with the object and
 21 purpose of the Treaty: to facilitate timely and
 22 effective settlement of disputes "in a cooperative
 23 spirit".
 24 As a final observation on this question, we'd say
 25 it's academic because the Court proceeding was

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17:39 1 instituted in fact here more than six years before each
 2 of the Court's alternative points at which the Neutral
 3 Expert might have started dealing with any differences.
 4 None of the things that are mentioned in this question
 5 happened until, at the earliest, late 2022. So any
 6 interpretation of the "being dealt with" formulation,
 7 paragraph (6) would not operate so as to preclude
 8 proceedings which had been instituted in 2016.
 9 The Court asked a related question on timing,
 10 question 24. This is on my next slide (26).
 11 The Court is correct that Annexure F contains no
 12 provision as to when a Court of Arbitration proceeding
 13 commences. Possibly this is because it does not need
 14 to, because nothing hinges on when the proceeding
 15 commences; what's important is when the expert starts to
 16 deal with the difference. Nevertheless, there are two
 17 possible answers to this question.
 18 The first is that the Neutral Expert proceeding
 19 commences when he or she starts to deal with the
 20 difference. This is perhaps the answer that's most
 21 faithful to the text because Article IX provides no
 22 reason to separate the two dates. As I've explained,
 23 Pakistan's submission is that the Neutral Expert starts
 24 dealing with a difference only when the terms of
 25 reference are completed.

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17:41 1 An alternative interpretation, to the extent there
 2 may be a distinction between the two dates, would put
 3 the Neutral Expert proceeding commencing before he or
 4 she starts dealing with a difference. The earliest
 5 conceivable date of commencement is when the request for
 6 a Neutral Expert is formally made by a Commissioner in
 7 the form required by paragraph 5(c) of Annex F. Prior
 8 to this point, the Neutral Expert proceeding has not
 9 commenced on any view, and it is, at most, an idea about
 10 how a difference might be dealt with.
 11 But on either view, the present Court of Arbitration
 12 proceedings commenced and was instituted well before the
 13 Neutral Expert proceedings.
 14 I want to close my submission on Article IX by
 15 taking you to the point I said I would revert to, which
 16 is how India reads this provision.
 17 Fundamentally, India's position is that there are
 18 only two routes to a Court of Arbitration: one is by
 19 agreement within the Commission; and the second is via
 20 a Neutral Expert, where a Neutral Expert decides, "This
 21 is not for me; it's a dispute, and therefore the parties
 22 need to engage paragraph (3), paragraph (4),
 23 paragraph (5), and then go to a Court of Arbitration
 24 after a decision under paragraph 7 of Annex F".
 25 On India's view, they are the only two ways that

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17:42 1 a dispute can reach a Court. There is no right, on
 2 India's objections, for a party unilaterally to go
 3 directly to a Court.
 4 The effect of India's submission, we say, is
 5 fundamentally to rewrite the text of Article IX of the
 6 Treaty. And my next set of slides -- they are animation
 7 slides; they may not come out properly in the printouts.
 8 We tried to make them work in the printouts, but you'll
 9 see what I am trying to achieve. We say the Indian
 10 position rewrites the Treaty and ignores key text.
 11 The first part that India ignores, of course, is "at
 12 the request of either Commissioner", the requirement
 13 that was inserted in order to avoid a deadlock. So on
 14 India's reading, that would disappear.
 15 On India's submission also -- this is all in its
 16 explanatory note, effectively -- you don't have
 17 competence because the Commission did not report under
 18 paragraph (3). That requires deletion of "at the
 19 request of either Commissioner", especially when you
 20 read the next provision, paragraph (4). They say that
 21 because there was no report, paragraph (4) was not
 22 engaged.
 23 But India's position ignores the words "or if
 24 [either government] comes to the conclusion that [the]
 25 report is being unduly delayed [by] the Commission".

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17:44 1 That was the recorded position of Pakistan. India
 2 ignores that provision. They would have this provision
 3 simply saying that either government may, following the
 4 report, invite the other to negotiations. But until
 5 there's a report, there can be no negotiations, on
 6 India's view.
 7 Finally, and perhaps most egregiously of all,
 8 India's position ignores paragraphs (5)(b) and (5)(c) of
 9 Article IX; most importantly, (5)(b), which is relevant
 10 here, because India denies that either party can make
 11 a unilateral request to a Court of Arbitration, having
 12 been through (3), (4) and (5). So India would have
 13 those words in paragraph (5) disappear, and have only
 14 the Commission, on agreement, being able to refer
 15 a dispute to a Court, absent a decision by
 16 a Neutral Expert.
 17 Finally, even on paragraph (6) India is not
 18 finished, because it would have paragraph (6) apply even
 19 after a Court has been instituted. They would
 20 essentially add the words, "The provisions of Annex G
 21 shall not apply to any difference while it is being
 22 dealt with by a Neutral Expert". That's because India
 23 says that you must "hold your hands", is the term they
 24 use -- i.e. I think maybe "sit on your hands" is what
 25 they mean; that's how I read it -- immediately that

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17:45 1 a Request for a Neutral Expert has been submitted; that
 2 you should defer to the Neutral Expert to make
 3 a decision.
 4 That would require the whole of Annexure [G] to be
 5 suspended the moment that a difference starts to be
 6 dealt with by a Neutral Expert. Again, that's patently
 7 not what paragraph (6) says. It stops to apply once
 8 (3), (4) and (5) have done their work.
 9 That's the end of my submission on Article IX,
 10 unless there are further questions. I note it is 5.45.
 11 I do actually have something I'd like to say tomorrow in
 12 order to finish on the fifth objection, which is
 13 a different point. But I should be able to deal with
 14 that briefly in the morning.
 15 MR MINEAR: I do have a question, mostly in the nature of
 16 an observation.
 17 When I first read the Treaty, it seemed to me
 18 unlikely that parallel proceedings of this type would
 19 occur, except in unusual circumstances. But then it
 20 occurred to me that what if we had this situation: both
 21 parties, India and Pakistan, agree that a difference has
 22 arisen. One believes that it falls within Part 1 of
 23 Annexure F, the other believes it does not. They both
 24 diligently, in good faith, pursue their respective
 25 courses: one to obtain a Neutral Expert, the other to

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17:47 1 obtain a Court of Arbitration.
 2 Looking at the timing that's provided here, it seems
 3 to me that it's very possible that both of those
 4 requests could arrive at the doorstep of the World Bank
 5 at about the same time. It depends in part on what we
 6 mean by "undue delay" in Article IX(4). And my concern
 7 is: it seems that the drafters of this must have
 8 understood that there might be some need for
 9 coordination or resolution of these two respective
 10 dispute resolutions being instituted at about the same
 11 time.
 12 Do you have any -- this is more in the nature of
 13 an observation, and maybe it's something that Sir Daniel
 14 will address at another time.
 15 MR FIETTA: Yes, this is --
 16 MR MINEAR: But it does occur to me, just in my thinking --
 17 it originally seemed to me that it was quite unusual to
 18 have parallel proceedings -- that in fact the Treaty is
 19 structured in a way that this could arise.
 20 MR FIETTA: You raise a very important point, practically
 21 a critical point. It is a point that we intend to
 22 address, and Sir Daniel will address it tomorrow,
 23 I believe. So we will come to that before we finish our
 24 opening submissions. But thank you for the prompt.
 25 MR MINEAR: Thank you.

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17:48 1 THE CHAIRMAN: I won't let you go quite yet, because I have
 2 a question that builds on the question by Mr Minear, and
 3 of course can also be addressed tomorrow. And it's
 4 related, in the following way.
 5 It seems to me that some part of your argument about
 6 why India's approach to when it is we should regard
 7 a Neutral Expert process as beginning has to do with
 8 an effort to stop a Court of Arbitration from happening;
 9 and if all it takes is an indication of an intent to
 10 appoint a Neutral Expert to suddenly put us in
 11 a situation where we might have an Article IX(6)
 12 scenario, that that frustrates the goal here of having
 13 sensible architecture for dispute resolution.
 14 But what about this the other way around. You've
 15 projected a pretty long potential timeline for
 16 a retainer to be in place for a Neutral Expert. So I'm
 17 wondering: if one party was to start that process of
 18 a Neutral Expert, did make a request, had a Neutral
 19 Expert appointed, they had a first meeting, but the
 20 retainer is not yet in place, is it the case that
 21 a Court of Arbitration process could be unleashed that
 22 would much more quickly take root? Because all it takes
 23 is that -- now, there are other steps, but all it takes
 24 is the initial request to fix that proceeding in place.
 25 And I suppose that makes me wonder if the Pakistani

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17:50 1 position of the retainer being the correct date is
 2 optimal for a sensible architecture, as opposed to the
 3 earlier date that you indicated as a possibility, which
 4 would be when the formal request is made. It doesn't,
 5 on your account, change things in this instance; I fully
 6 understand that. I'm just trying to think through
 7 architecture for future purposes, in the same way that
 8 I think Mr Minear was.
 9 MR FIETTA: Well, thank you for the question. It's another
 10 important question, but albeit not for the facts of this
 11 case. But I'm happy to address it. I think as I will
 12 be speaking further tomorrow, or Sir Daniel will be
 13 speaking as well tomorrow, I will address it tomorrow,
 14 with your forbearance. I'm conscious it's nearly
 15 6 o'clock already, so we're over time.
 16 THE CHAIRMAN: That's fine. Let's do that. Mr Fietta, you
 17 can answer that and any questions that we might have put
 18 to you that you'd like to take up tomorrow.
 19 So I think that does conclude the proceeding for
 20 today. Again, I thank the delegation of Pakistan for
 21 all the hard work you put into the presentations for
 22 today. The Court is well aware this is not easy and
 23 we're very grateful for the presentations you've made.
 24 We will resume again tomorrow, I believe, at 9.30 in
 25 the morning. And we will start back up, I take it, with

17:52 1 Mr Fietta, Sir Daniel -- both, neither, as you wish --
 2 and then we'll finish the first round tomorrow morning.
 3 So with that, I wish you all a good evening; unless,
 4 Mr Aslam, you have something you'd like to raise.
 5 MR ASLAM: Thank you, Mr Chairman.
 6 Some of the questions which come from the bench
 7 speak not only to the legal theory but also how the
 8 Commission works in practice. And so I think the Court
 9 might benefit if the Commissioner were to explain the
 10 internal workings of the Commission and how such things
 11 flow from that.
 12 So would you find that of assistance tomorrow?
 13 THE CHAIRMAN: I think if you'd like to make a presentation
 14 tomorrow morning -- I think we'd like to keep to the
 15 finish by 11.00 time if we can, but within those
 16 constraints.
 17 MR ASLAM: Of course. This shouldn't take more than
 18 five minutes or so.
 19 THE CHAIRMAN: Very good. We welcome it.
 20 MR ASLAM: Thank you very much.
 21 THE CHAIRMAN: Thank you. Okay, that's it.
 22 (5.53 pm)
 23 (The hearing adjourned until 9.30 am the following day)
 24
 25

ARBITRATION PURSUANT TO ARTICLE IX AND ANNEXURE G OF THE INDUS WATERS TREATY 1960

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ARBITRATION PURSUANT TO ARTICLE IX AND ANNEXURE G OF THE INDUS WATERS TREATY 1960

Day 1 -- Hearing on Competence

THE ISLAMIC REPUBLIC OF PAKISTAN -v- THE REPUBLIC OF INDIA

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ARBITRATION PURSUANT TO ARTICLE IX AND ANNEXURE G OF THE INDUS WATERS TREATY 1960

Day 1 -- Hearing on Competence

THE ISLAMIC REPUBLIC OF PAKISTAN -v- THE REPUBLIC OF INDIA

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ARBITRATION PURSUANT TO ARTICLE IX AND ANNEXURE G OF THE INDUS WATERS TREATY 1960

Day 1 -- Hearing on Competence

THE ISLAMIC REPUBLIC OF PAKISTAN -v- THE REPUBLIC OF INDIA

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ARBITRATION PURSUANT TO ARTICLE IX AND ANNEXURE G OF THE INDUS WATERS TREATY 1960

Day 1 -- Hearing on Competence

THE ISLAMIC REPUBLIC OF PAKISTAN -v- THE REPUBLIC OF INDIA

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ARBITRATION PURSUANT TO ARTICLE IX AND ANNEXURE G OF THE INDUS WATERS TREATY 1960

Day 1 -- Hearing on Competence

THE ISLAMIC REPUBLIC OF PAKISTAN -v- THE REPUBLIC OF INDIA

Thursday, 11 May 2023

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