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

PRELIMINARY PHASE ON THE COMPETENCE OF THE COURT AND THE OPERATION OF ARTICLE IX OF THE INDUS WATERS TREATY

RESPONSE OF PAKISTAN

VOLUME I

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I. INTRODUCTION

A. Procedural context and Pakistan's Response in Outline

1. By correspondence dated 21 December 2022 addressed to the Senior Vice-President and Group General Counsel of the World Bank (the "**World Bank**" or the "**Bank**"), Mr Christopher H. Stephens, the Republic of India ("**India**") asserted that "the very existence of the so-called Court of Arbitration has no legitimacy whatsoever under the Treaty" (at paragraph 9).[1] This letter, and a more detailed Explanatory Note appended to it (respectively "**21 December 2022 Letter**" and "**21 December 2022 Explanatory Note**") followed a letter from the Bank dated 19 September 2022, addressed to both India and the Islamic Republic of Pakistan ("**Pakistan**"; together, the "**Parties**"), in which the Bank (*inter alia*) informed the Parties that "the President of the World Bank has decided on the appointment of Professor Sean Murphy to serve as the Chair for the Court of Arbitration." The Bank's letter regarding the appointment of the Chair of the Court of Arbitration (the "**Court**"), also described as an "umpire", followed the institution of arbitral proceedings by Pakistan against India by the transmittal of a Request for Arbitration on 19 August 2016 ("**Request for Arbitration**"). The more than six-year delay in the appointment of the Chair of the Court was a consequence of the Bank's 12 December 2016 unilaterally imposed and treaty-inconsistent "Pause" in the dispute settlement process under the Indus Waters Treaty 1960 (respectively the "**Pause**" and the "**Treaty**").

2. By the same correspondence of 19 September 2022, the Bank also informed the Parties that it would "appoint Mr Michel Lino to the role of Neutral Expert" in parallel proceedings that India had purported to initiate by the transmittal to the Bank, on 4 October 2016, of a Request for the Appointment of a Neutral Expert ("**Neutral Expert Request**").[2] As will become apparent in the course of this submission, there is a dispute between the Parties about when India's Neutral Expert Request was made. What is not in contention, however, is that India's request to the President of the Bank to appoint a Neutral Expert was first made in

[1] Letter No. Y-18012/1/2020-Indus enclosing an Explanatory Note (Enclosure 'A') dated 21 December 2022, **Exhibit P-0001**.
[2] India's Request for the Appointment of a Neutral Expert dated 4 October 2016 ("**Neutral Expert Request**"), **Exhibit P-0156**.

correspondence dated 4 October 2016, more than six weeks after Pakistan had instituted arbitral proceedings before the Court.

3. Both the context of the present Preliminary Phase on Competence, directed by the Court by Procedural Order No.1 of 2 February 2023, and core elements of India's objection to the "very existence … [and] legitimacy" of the Court, are bound up with the fact of the duelling Court and Neutral Expert proceedings, and India's visceral antipathy to the Court.

4. The 19 September 2022 notification of the Bank's intention to appoint Professor Murphy and Mr Lino to their respective positions was followed by the appointment as umpires of the Court, pursuant to Annexure G of the Treaty, of Professor Wouter Buytaert, on 28 September 2022, by the President of Imperial College London, and Mr Jeffrey P. Minear, on 13 October 2022, by the Chief Justice of the United States of America. These appointments followed appointments by Pakistan of Dr Donald Blackmore and Judge Awn Shawkat Al-Khasawneh as arbitrators of the Court, in accordance with Annexure G. Although India failed to appoint any arbitrators, as it was entitled to do, the Court became "competent to transact business", pursuant to Paragraph 11 of Annexure G, upon the appointment of the three umpires and the two arbitrators appointed by Pakistan.

5. The appointments of Professor Murphy and Mr Lino were officially communicated on 13 October 2022 and handover meetings convened by the Bank with each at the Bank's headquarters in Washington, D.C. on 21 November 2022. India did not participate in the handover meeting with Professor Murphy. It did take part in the meeting with Mr Lino.

6. The Court held a First Meeting with the Parties in the Peace Palace in The Hague on 27–28 January 2023. India did not participate in that meeting.

7. Following the First Meeting of the Court, the Court's Terms of Appointment, issued in the form of Administrative Order No. 1, were signed on 3 February 2023. The Court is thus fully and formally functional. As of the date of this submission (24 March 2023), the Neutral Expert's Terms of Retainer (this being the language used in Paragraph 4 of Annexure F of the Treaty) have yet to be "fixed". The appointment of the Neutral Expert, and the Neutral Expert proceedings, have thus not yet formally crystallised, the fixing of Terms of Retainer being an

essential step to enabling the Neutral Expert to begin dealing with the issues that have been put before him.

8. Amongst other documents that were before the Court at its First Meeting were India's 21 December 2022 Letter and Explanatory Note referenced above. Having given careful consideration to these documents, and heard the views of Pakistan, the Court concluded that the position set out by India in its 21 December 2022 documents "constitutes a plea concerning the competence of the Court for the purposes of paragraph 16 of Annexure G of the Treaty and will be treated as such for the purposes of this arbitration."[3] The Court went on to schedule "a preliminary phase of the proceedings to consider the competence of the Court and the operation of Article IX of the Treaty, on an expedited basis (the "**Preliminary Phase on Competence**")."[4] A schedule of written pleadings, subsequently amended by Procedural Order No. 2, following an application of Pakistan, was laid down directing the submission of a Response by Pakistan to India's deemed objection to the Court's competence by 24 March 2023.

9. Pakistan welcomed this conclusion and direction by the Court, considering it to be both necessary and appropriate that the Court should address its competence and related threshold matters of interpretation and application of the Treaty in a preliminary phase. The present submission is Pakistan's Response on the Competence of the Court and the Operation of Article IX of the Indus Waters Treaty, as directed by the Court ("**Pakistan's Response**"). In the spirit of cooperation, including with regard to the settlement of differences and disputes, that permeates every corner of the Treaty, and the Parties engagement thereunder, Pakistan hopes that India will engage with Pakistan's Response. In anticipation that this might not be the case, however, and that the Court would therefore be faced with the task of addressing its competence and the operation of Article IX without the assistance of submissions from the contesting Party, Pakistan has resolved to put before the Court, through this Response, and its appendices, exhibits and authorities, as full and as accessible a statement of facts, evidence and law as it has been able to produce. The intention in doing so is not to deluge the Court with documents but rather to ensure that the Court, as it considers the issue of its competence, and

[3] Procedural Order No.1, ¶ 1.1.
[4] *Id.*, ¶ 1.2.

the operation of Article IX, will be able to do so with reassurance that it has before it all relevant facts, evidence and arguments.

10. The submissions that follow are addressed under three broad heads. **Section II** provides some necessary contextualisation to the present proceedings and sets out, at high level, Pakistan's affirmative case on the competence of the Court. That case is elaborated upon more fully in response to India's objections to the Court's competence and in Pakistan's submissions on the operation of Article IX of the Treaty.

11. **Section III** addresses the interpretation and application of Article IX as well as, necessarily, closely associated provisions in Annexures F and G of the Treaty that govern, respectively, Neutral Experts and Courts of Arbitration. As will be readily apparent from this Section, an assessment of the Court's competence requires a close appreciation of a delicately balanced and symbiotic set of provisions. It is an uncontroversial principle of treaty interpretation that the interpretation of any provision of a treaty in its context requires that it be construed by reference to the treaty as a whole.

12. Pakistan's position on what is required of the Court in this phase of the proceedings on the closely related question of the competence of the Neutral Expert and the validity of his appointment is also addressed in Section III. Pakistan proposes a pragmatic way forward that rests on the Neutral Expert's clear statement on the record, in the course of his First Meeting, that, as an engineer, he has "no competence to interpret any part of the Treaty. So it is clear for me and I will stick to that."[5] Having regard to this statement, Pakistan considers that there is a workable and pragmatic division of functions between the Court and the Neutral Expert that should allow both proceedings to take place without endangering the integrity of the Treaty. In this regard, Pakistan refers also to, and incorporates herein by reference, its Statement on Coordination and Division of Competence submitted pursuant to directions of the Court on 23 February 2023 ("**Division of Competence Statement**"). As is addressed further below, Pakistan understands that the Court's Preliminary Phase on Competence is the appropriate context for observations and guidance from the Court on the issues raised in the Division of Competence Statement.

[5] (Draft) Transcript, Neutral Expert First Meeting (*Indus Waters*), Day 1, **Exhibit P-0040**, p. 188, lines 18-21 (the Neutral Expert).

13. In **Section IV**, Pakistan addresses India's objections to the competence of the Court that are apparent, or can be deduced, from not only India's 21 December 2022 Letter and Explanatory Note but also from other statements of position by India. As is explained more fully at the start of Section IV, India's objections have not been advanced in a clear and systematic manner. With a view to assisting the Court in its task in this Preliminary Phase, Pakistan has endeavoured to pull them together under five broadly formulated objections which reflect a common (but fundamentally misconceived) thread of argument.

14. In the event that Pakistan has overlooked any argument that India has, or may be deemed to have, made, it stands ready to address this either in a further round of written submissions (perhaps in response to questions from the Court) or in the hearing scheduled for 11–13 May 2023.

15. Pakistan's submissions herein are supplemented by four Appendices in **Volume II** of this Response. **Appendix A** addresses the procedural background of the dispute in greater detail. Its purpose is to provide the Court with as full a picture as possible of the evolution of the dispute, including for purposes of better contextualising India's competence objections.

16. For ease of reference, **Appendix B** reproduces 16 documents, from 24 July 2015 to 6 September 2016, which are at the heart of the procedural dispute between the Parties as to the competence of the Court. This correspondence covers the period that runs from the Pakistani Commissioner's request for the appointment of a Neutral Expert on 24 July 2015, to the subsequent exchanges between the Parties that led to the revocation of that request on 25 February 2016, to subsequent inter-State negotiations, and thereafter to Pakistan's Request for Arbitration on 19 August 2016 and India's response thereto. As will be addressed in detail in the submissions that follow, the change in focus from disagreements of a technical, Plant-specific nature to disputes of a legal or Treaty-systemic nature that is reflected in these documents rests on an appreciation on Pakistan's part that there are fundamental disputes between the Parties on questions of interpretation and application of the Treaty. These disputes go beyond technical design issues concerning the Kishenganga Hydroelectric Plant ("**KHEP**") and the Ratle Hydroelectric Plant ("**RHEP**") alone and engage issues that can only be addressed by a Court of Arbitration.

17. **Appendix C** addresses the *travaux préparatoires* of the Treaty provisions engaged by this preliminary phase of proceedings. Its purpose is to give the Court visibility into the *travaux* and comfort that Pakistan has left no stone unturned in putting before the Court any and all material that may assist the Court in reaching a fully informed view of the issues engaged by India's competence challenge. As will be apparent from Appendix C, the available *travaux* are incomplete and largely inconsequential for the issues before the Court in this phase of the proceedings.

18. **Appendix D** contains a red-text annotation by Pakistan of India's 21 December 2022 Letter and Explanatory Note for purposes of highlighting, for ease of reference by the Court, Pakistan's blow-by-blow response to India's objections. The annotations in this Appendix are not intended to supplement the submissions set out in the main body of Pakistan's Response in considerably more detail, or indeed issues of procedural background addressed in Appendix A, but simply to provide the Court with a quick-and-easy point of reference to India's arguments, as India has made them, and Pakistan's responses thereto.

19. Finally, Pakistan's Response is accompanied by a considerable number of factual exhibits and, in smaller number, a collection of legal authorities. The volume of factual exhibits is dictated by Pakistan's imperative of ensuring that the Court has before it as complete a record of material as possible to which the Court may wish to have regard for purposes of reaching a fully informed appreciation of the issues before it.

B. Some preliminary observations of substance

20. Before turning to the detail of the factual record, the interpretation and application of Article IX, Pakistan's affirmative case on the competence of the Court, and India's challenge thereto, it is useful to step back a little for purposes of trying to capture the issues in the round. As will become evident, there are twists and turns in the factual narrative, and the arguments of law at times require patience and attention to untangle. When all is done, however, there is a robust and readily discernible thread that runs through the facts, the evidence and the law that unambiguously supports Pakistan's case on competence. There is a high imperative to secure decisions from the Court – whatever those decisions may be – that lay to rest once and for all the running sore of systemic disputes of Treaty interpretation and application concerning the construction and operation by India of new run-of-river hydroelectric Plants on the Western

Rivers of the Indus Basin. Without such determinations by the Court – determinations that only the Court can make – there is a real risk that the Treaty will become dysfunctional, with potentially catastrophic consequences for hundreds of millions of people who rely on the waters of the Indus Basin and for relations between Pakistan and India more generally.

21. As Pakistan noted in the First Meeting of the Court, the Indus Waters Treaty is akin to a treaty of peace. It is a cornerstone of much-sought-for peaceful and cooperative relations between Pakistan and India. It is a delicate mechanism which works well, when the carefully calibrated accommodation between the Parties that is reflected in the Treaty's provisions is respected. Dysfunction in one area, however, risks cascading effects in others, putting the entire edifice in jeopardy.

22. The provisions on the settlement of differences and disputes in Article IX and Annexures F and G of the Treaty are designed to be the Treaty's self-correcting mechanism. But for self-correction to work, the modalities of settlement have to work. For the past eight years, since July 2015, they have not. While one reason for this is the Pause that was imposed by the World Bank on 12 December 2016 – in breach of its Treaty obligations – on the empanelment of the Court and the appointment of a Neutral Expert, the Pause was not the proximate cause of the problem.

23. India has put in place an extensive run-of-river hydroelectric Plant construction agenda on the Western Rivers of the Indus Basin. This is a matter of public record.[6] The Treaty allows India to construct new run-of-river Plants. But it requires such Plants to meet carefully calibrated and tightly constrained design and operational requirements. The purpose of these requirements is to give content to India's "let flow" obligation in Article III of the Treaty in respect of the waters of the Western Rivers.

[6] See Jammu and Kashmir State Power Development Corporation, "Projects Under Construction", available at http://www.jkspdc.nic.in/beta/projects_under_construction.html (last accessed 22 March 2023), **Exhibit P-0004**; Moushumi Das Gupta, "Modi govt steps up work on project that will tap Pakistani waters, J&K's UT status helps", *The Print*, dated 29 August 2019, available at https://theprint.in/india/modi-govt-steps-up-work-on-projects-that-will-tap-pakistani-waters-jks-ut-statushelps/283505/ (last accessed 22 March 2023), **Exhibit P-0005**; Moushumi Das Gupta, "Why India's unlikely to accept any interim arbitration decision on Indus Waters Treaty projects", *The Print*, dated 20 February 2023, available at https://theprint.in/india/why-indias-unlikely-to-accept-any-interim-arbitration-decision-on-indus-waters-treaty-projects/1384918/ (last accessed 22 March 2023), **Exhibit P-0006**; Dr Daniel Haines, "India and Pakistan Are Playing a Dangerous Game in the Indus Basin", *United States Institute of Peace*, dated 23 February 2023, available at https://www.usip.org/publications/2023/02/india-and-pakistan-are-playing-dangerous-game-indus-basin (last accessed 22 March 2023), **Exhibit P-0007**.

24. Pakistan considers that India, incrementally, by intent, and with a larger purpose, has been stretching the design and operational parameters of individual Plants with a view to enlarging and enhancing its overall use of the waters of the Western Rivers, to Pakistan's enduring detriment. India's larger purpose, by the stealth of visible incrementalism, is to cascade seemingly minor enhancements with respect to individual Plants into a regulatory regime that, when viewed in retrospect, will have moved far beyond the terms of Article III and Annexure D of the Treaty, as they were drafted and agreed in 1960.

25. As India's intent became apparent, Pakistan endeavoured to address this through Plant-specific expressions of concern. This was the approach initially adopted with respect to Pakistan's design-specific concerns over the KHEP and the RHEP. In July 2015, after years of failed negotiations within the Permanent Indus Commission ("**Commission**"), the standing bilateral body established by Article VIII of the Treaty, Pakistan requested that its concerns be remitted for determination by a Neutral Expert. India, however, sought to frustrate that initiative. In the months that followed, as is evidenced by the multiple exchanges between the Parties, it became clear that what had been perceived as apparent differences of view on issues of technical design were in fact much deeper and more fundamental disputes concerning the interpretation of the Treaty and its application to India's wider run-of-river Plant construction agenda.

26. In correspondence on 25 February 2016, Pakistan's Commissioner for Indus Waters wrote to his Indian counterpart to say just this, to withdraw his request for a Neutral Expert of eight months previously (with which India had refused to engage and had decried as "premature"), and to state his intention of remitting the matters to a Court of Arbitration for settlement.

27. India's response was to play it long and run interference in response to Pakistan's expressions of concerns and good faith intention to refer the matters for independent third-party settlement. Delay and obfuscation followed from India, in the form of failures to engage, objections on process, rejections of substance, proposals for negotiations, and more. All of this is visible on the face of the documents produced in **Appendix B** of this Response.

28. When it became apparent that delay and obfuscation would not divert Pakistan, India changed tack and signalled its own intention to request the appointment of a Neutral Expert in

a cynical attempt to derail Pakistan's request for arbitration. And one self-evident and visible purpose of this new approach was to buy time, to enable construction of the KHEP to be completed and for the Plant to enter into operation before Pakistan was able to obtain interim measures from a constituted Court of Arbitration to enjoin this from happening.

29. India got its way – at least in part. As a result of its efforts, the Bank imposed its Pause. Construction of the KHEP was completed, and the Plant entered into operation. Pakistan's Request for Arbitration of 19 August 2016, which included a request for interim measures to enjoin exactly what was feared would occur with the KHEP, was suppressed and rendered ineffective.

30. The larger result was that India was able to move ahead with its designs for further run-of-river Plants, insulated from any independent third-party oversight by operation of the dispute settlement provisions of the Treaty. In wider consequence, the systemic framework of the Treaty – and the six decades of stability with respect to water rights in the Indus Basin that it has engendered – is now under threat.

31. The empanelment of the Court promises to put a check on the onward sweep of India's design and construction plans. This is the reason for India's visceral opposition to the Court.

32. This is the wider context of India's objection to the competence of the Court and to the validity of its constitution. As is addressed in careful detail in the pages that follow, Pakistan is convinced beyond any doubt that there is no credible and sustainable basis in law or fact for India's objections. While Pakistan is deeply concerned with the outcome on the merits of the disputes that it has brought to the Court, it is equally concerned to ensure that the systemic integrity of the Treaty is upheld and reinforced, and that the provisions on the settlement of differences and disputes continue to work, are seen to continue to work, and are thereby returned to their rightful place as a central pillar of the Treaty.

* * *

II. THE CONTEXT OF THE PRESENT PHASE OF THE PROCEEDINGS AND PAKISTAN'S AFFRMATIVE CASE ON THE COMPETENCE OF THE COURT

33. This Section provides necessary contextualisation to India's objection to the competence of the Court and the validity of its appointment. The discussion is supplemented by the more detailed material given in **Appendix A** hereto, which provides an extensive chronology of the procedural developments that have brought the Parties to this point. This Section also sets out at high level Pakistan's affirmative case on the competence of the Court. This is elaborated upon more fully in response to India's objections to the Court's competence, which are addressed in subsequent sections of this Response.

A. Background to these proceedings

34. The background to the present proceedings is to be found in the history of the dispute between the Parties concerning key aspects of the design specifications of run-of-river Plants on the Western Rivers. Two cases have so far been referred for third-party settlement, the *Baglihar* Neutral Expert determination (the "***Baglihar* Determination**")[7] and the *Kishenganga* proceedings before a Court of Arbitration (the "***Kishenganga* arbitration**")[8]. The present dispute is framed and informed by both, including by the Parties' continuing and deeply entrenched disagreement over the implications of the decisions that emerged from each of these prior proceedings for future run-of-river Plant design specifications and operations. Of itself, this continuing disagreement over the weight and effect of the *Baglihar* Determination and the *Kishenganga* awards for the design of run-of-river Plants more generally cannot be construed as anything but a dispute concerning the interpretation and application of the Treaty that requires settlement by a Court of Arbitration, the questions to which this disagreement gives rise falling manifestly outside the competence of a Neutral Expert under the Treaty.

35. It was Pakistan's growing appreciation, in 2015–2016, that the long-simmering disagreements between the Parties concerning the KHEP and the RHEP could only be satisfactorily addressed by way of a systemic interpretation of the Treaty, that led it to inform

[7] *Baglihar Hydroelectric Plant (Pakistan v India)*, Indus Waters Treaty Annexure F, Neutral Expert Determination dated 12 February 2007 ("***Baglihar* Determination**"), **PLA-0002**.
[8] *Indus Waters Kishenganga Arbitration (Pakistan v India)* (2011–2013) XXXI RIAA 1 ("***Kishenganga* arbitration**").

to India, by letter of 25 February 2016,[9] that it considered that the dispute should be referred to a Court of Arbitration. This letter is of cardinal importance as it marks a watershed between the dysfunctional engagement between the Parties to that point, in which Pakistan's persistent expressions of concern and attempts to resolve matters were stymied by India's evasive and dilatory tactics, and Pakistan's resolve to have recourse to a Court of Arbitration under the Treaty to seek "an award of general applicability for the parties' future guidance", both as regards the KHEP and the RHEP and as regards other hydroelectric plants on the Western Rivers. Only a Court of Arbitration is competent to render such an interpretative award of general application under the Treaty.

36. Following the 25 February 2016 letter, a further round of negotiations between the Parties, and a cynical and half-baked initiative by India to divert Pakistan's resolve to refer the dispute to a Court of Arbitration, Pakistan filed its Request for Arbitration on 19 August 2016. India sought to counter this by submitting its Neutral Expert Request to the Bank on 4 October 2016. Faced with these two Requests, the Bank froze, failing either to empanel a Court or to appoint a Neutral Expert, as it was obliged to do under the Treaty. Instead, it imposed a "Pause" on 12 December 2016, in breach of its Treaty-obligations.[10] That Pause, disastrous for Pakistan but enabling for India, lasted until March 2022, at which point the Bank resumed its responsibilities and took steps to both empanel the Court and, in parallel, to appoint a Neutral Expert. While this action by the Bank took the Parties (of which the Bank is one) beyond the blackletter of the Treaty, the object and purpose of the Treaty remains, including as embodied by its settlement of differences and disputes provisions in Article IX and Annexures F and G. It is the interpretation and application of these provisions, in the context of the factual circumstances addressed below, that are at the heart of the present Preliminary Phase on Competence.

37. Against this background, Pakistan turns to set out in more detail the factual circumstances that have brought the Parties to this point.

[9] Letter No. WT(132)/(7531-A)/PCIW (with enclosure) from the PCIW to the ICIW dated 25 February 2016 (see Appendix B, Document 9), **Exhibit P-0023**.
[10] Letter from the World Bank to Pakistan dated 12 December 2016, **Exhibit P-0008**.

1. The KHEP and the *Kishenganga* arbitration: 1994–2013

38. The underlying questions of interpretation and application of the Treaty that give rise to these proceedings have their origins in the same Plant – the KHEP – that was the subject of the *Kishenganga* arbitration. In 1994, India, via its Commissioner for Indus Waters ("**ICIW**" or "**India's Commissioner**" or "**Indian Commissioner**"), informed Pakistan of its intention to build the KHEP on the Kishenganga/Neelum river, a tributary of the Jhelum.[11] The initial proposed design of the Plant was a storage work under Annexure E of the Treaty. Following protests by Pakistan's Commissioner for Indus Waters ("**PCIW**" or "**Pakistan's Commissioner**" or "**Pakistani Commissioner**"), India reconfigured the Plant in 2006 into a run-of-river project governed by Annexure D of the Treaty,[12] unveiling the design in the Permanent Indus Commission ("**PIC**" or "**the Commission**") in June of that year.[13]

39. In Pakistan's view, the revised KHEP was not compliant with Annexure D of the Treaty, leading to the first round of protracted discussions concerning the KHEP during the Commission's 99th Meeting held in New Delhi from 30 May to 4 June 2007.[14]

40. The 99th PIC Meeting having failed to resolve Pakistan's concerns, Pakistan's Commissioner, in correspondence in February 2008, identified several questions concerning the KHEP for examination in the Commission in accordance with Article IX(1) of the Treaty. These were: (a) India's latitude to divert the Jhelum as part of the design of the KHEP; (b) the excessive design of the KHEP freeboard; (c) the excessive pondage calculation used by India in the KHEP design and the associated placement of the power intakes; (d) the placement and design of outlets in the KHEP, taking into consideration the Treaty's prohibition on depleting Plant reservoirs below Dead Storage Level; and (e) the placement of spillways and the use of spillway gating in the KHEP design. To these questions, a further was added on whether a Plant's reservoir could be fully depleted.[15]

41. The reaction of the Indian Commissioner was to delay any substantive engagement on the questions raised. At the 100th and 101st Meetings of the Commission in 2008, the Indian

[11] Appendix A, ¶ 1.
[12] *Id.*, ¶ 2.
[13] *Id.*, ¶ 3.
[14] *Id.*
[15] *Id.*

Commissioner refused to concede that any questions had arisen, and no progress was made.[16] The following year, having reached the conclusion that further discussion within the Commission would be fruitless, Pakistan's Commissioner, and Pakistan, notified India of the emergence of certain disputes, and attempted, in August 2009, to engage India in inter-State negotiations under Article IX(4) of the Treaty. India again delayed, refusing to appoint negotiators on the basis that no questions had arisen in the Commission for determination.[17]

42. These delaying tactics left Pakistan with little choice. On 17 May 2010, Pakistan filed a request for arbitration requiring – over India's protests – the constitution of what would become the *Kishenganga* Court of Arbitration (the "***Kishenganga* Court**"*)*. By that request, Pakistan put forward two of the questions identified by Pakistan's Commissioner in February 2008, described respectively as the "**First and Second Disputes**", namely (a) whether India's proposed diversion of the Kishenganga/Neelum River for the KHEP was consistent with the Treaty, and (b) whether India was entitled to deplete the reservoir of the KHEP below Dead Storage Level.[18] The remaining questions concerning the KHEP's design were held over for determination after the *Kishenganga* Court had ruled.[19]

43. On 18 February 2013, the *Kishenganga* Court rendered its Partial Award on the First and Second Disputes. Having rejected India's objections to admissibility, the Court held:

> 43.1 On the First Dispute, the KHEP was a run-of-river Plant for the purposes of Annexure D, and India was accordingly entitled to divert the Kishenganga/Neelum River as designed, subject to its obligation to maintain a minimum downstream flow.[20]
>
> 43.2 On the Second Dispute, except in the case of an unforeseen emergency, the Treaty did not permit reduction below Dead Storage Level of the water level in the reservoirs of run-of-river Plants. Further, the accumulation of sediment in the reservoirs did not constitute an unforeseen emergency.[21] The Court noted, additionally, that

[16] *Id.*
[17] *Id.*
[18] *Id*.
[19] *Id*., ¶ 4.
[20] *Indus Waters Kishenganga Arbitration (Pakistan v India)*, Partial Award (2013) XXXI RIAA 55 ("***Kishenganga* arbitration**, **Partial Award**"), **PLA-0003**, *dispositif* A.
[21] *Id*., *dispositif* B.

design changes to the KHEP could be required to optimise sediment management in light of the Partial Award.[22]

44. On 20 December 2013, the *Kishenganga* Court issued its Final Award, fixing the minimum downstream flow of the KHEP.[23]

2. Disagreement over the RHEP: 2012–2015

45. While the *Kishenganga* arbitration was ongoing, the Indian Commissioner, in the PIC in August 2012, presented the initial design for another run-of-river Plant to be sited on the Chenab – the RHEP. Pakistan's Commissioner responded shortly thereafter, and within the time stipulated by the Treaty, noting that the design of the RHEP was not consistent with Annexure D. Given certain design similarities between the RHEP and the KHEP, Pakistan took issue with many of the same features in the RHEP, including the excessive pondage built into the design and the associated placement of the power intakes, the location and size of outlets, the use of gated spillways, and the height of the freeboard.[24]

46. The Indian Commissioner responded to these concerns in January 2013, and discussions continued within the Commission at its 108th to 111th Meetings, from March 2013 to February 2015. India's tactic was again to delay substantive engagement, while progressing its works on both of the hydro-electric plants ("**HEPs**"), insisting (wrongly) that Pakistan had not provided technical information supporting its position on the RHEP and otherwise refusing to concede that the Commission process was not assisting the Parties in resolving the disagreements that had emerged between them.[25] The issues that had arisen regarding the RHEP were therefore unresolved when the *Kishenganga* arbitration concluded, and thus merged with the remaining issues concerning the KHEP.

[22] *Id*., ¶ 522 (fn 739).
[23] *Indus Waters Kishenganga Arbitration (Pakistan v India)*, Final Award (2013) XXXI RIAA 309 ("***Kishenganga* arbitration**, **Final Award**"), **PLA-0004**, *dispositif*.
[24] Appendix A, ¶ 16.
[25] *Id*., ¶¶ 18–26.

3. India attempts to avoid third party settlement of the Parties' disagreements: 2015–2016

47. With the *Kishenganga* arbitration concluded, the Commission took up the remaining issues concerning the KHEP alongside the now-emerged issues concerning the RHEP. With the KHEP First and Second Disputes resolved in principle (though not in implementation), the biggest issue between the Parties concerned the calculation of pondage, with each Party putting forward rival formulae for its determination. Pakistan's formula turned on the precise terms of Paragraph 8(c) of Annexure D, taking as a key input the minimum mean discharge of the river at the site of the Plant, which is integral to India's overriding obligation to "let flow all the waters of the Western Rivers" under Article III(2) of the Treaty. India's formulation turned on the requirements of load demand for the Plant, resulting in a greatly increased allocation of water. In reaching this conclusion, India relied principally on the finding by the Neutral Expert in the *Baglihar* Determination[26] (a decision that the *Kishenganga* Court had questioned and refused to endorse, even though it confirmed the binding (*res judicata*) application of the determination in respect of the Baglihar Plant[27]).

48. At the 110th Meeting of the Commission in August 2014, Pakistan's Commissioner noted that the questions surrounding pondage and power intakes, orifices, gated spillways at the KHEP and the RHEP, and freeboard height at the RHEP,[28] could not be resolved in the Commission. He accordingly indicated that differences had arisen under Article IX(2) and proposed that they be referred to a Neutral Expert. The response of India's Commissioner was again to delay. Despite the fact that these matters had been under active consideration within the Commission without resolution since 2008, the Indian Commissioner insisted that no difference had arisen and that referral of the relevant questions to a Neutral Expert would not be appropriate.[29]

49. Ahead of the 111th Meeting of the Commission in January–February 2015, Pakistan's Commissioner indicated that the time had come to elevate matters. If the Commission could

[26] *Id.*, ¶¶ 9–14, 19-21, 24.
[27] *Kishenganga* arbitration, Partial Award, **PLA-0003**, ¶ 470.
[28] The PCIW proclaiming himself satisfied by the ICIW's technical explanation for why the freeboard height at the KHEP was necessary: Record of the 110th Meeting of the Permanent Indus Commission, 23-27 August 2014 dated 1 February 2015, **Exhibit P-0024**, ¶ 43.
[29] Appendix A, ¶ 24.

not resolve the issues between the Parties concerning the KHEP and the RHEP at the forthcoming meeting, Pakistan's Commissioner stated that "no other option will be left but to approach one of the two forms of third-party settlement" referred to in the Treaty.[30] Once again, despite a full ventilation of the issues, no progress was made at the 111th Meeting.[31] It ended with the Indian Commissioner insisting, again, that not only was there no difference between the Commissioners but even that "the stage of framing questions in terms of Article IX(1) of the Treaty has not yet arisen and issues raised by Pakistan on the designs of these [Plants] may be discussed for amicable resolution in the meetings of the Commission".[32] Meanwhile, India continued apace with its works on the KHEP and the RHEP.

50. After still further correspondence, Pakistan's Commissioner notified India's Commissioner on 3 July 2015 that he "intend[ed] to ask for the appointment of a Neutral Expert" to decide on the points of differences over the KHEP and the RHEP.[33] This correspondence was met with further delaying tactics by the Indian Commissioner, who refused to engage with his Pakistani counterpart to prepare the joint statement of points of difference required by the Treaty.[34] He insisted, rather, that "invocation of Article IX(2)(a) of the Indus Waters Treaty at this stage is premature and not in line with cooperative spirit [sic] enshrined in the Treaty".[35]

51. On 24 July 2015, Pakistan's Commissioner communicated a draft statement of points of difference, containing Pakistan's views only, to both Pakistan and India and requested that a Neutral Expert be appointed.[36] He wrote further to the Indian Commissioner on the same day explaining that "[a]micable resolution of questions/issues is … not designed to take years when the construction on the [Plants] and discussions keep on moving in circles".[37] Pakistan's Commissioner continued: "I am, therefore, unable to agree to your suggestion that we should

[30] Letter No. WT(47)/(7464-A)/PCIW from the PCIW to the ICIW dated 30 January 2015, **Exhibit P-0026**, ¶ 14.
[31] Appendix A, ¶¶ 25–26.
[32] Record of the 111th Meeting of the Permanent Indus Commission, 31 January-4 February 2015 dated 31 May 2015, **Exhibit P-0025**, ¶¶ 14, 86.
[33] Appendix A, ¶ 28; Letter No. WT(132)/(7493-A)/PCIW (with enclosure) from the PCIW to the ICIW dated 3 July 2015, **Exhibit P-0010**, ¶ 3.
[34] Appendix A, ¶ 28.
[35] Letter No. Y-20014/1/2015-16/2152 from the ICIW to the PCIW dated 16 July 2015, **Exhibit P-0012**, ¶ 6.
[36] Letter No. WT(132)/(7497-98-A)/PCIW (with enclosure) from the PCIW to the Secretary, Ministry of Water and Power, Government of Pakistan and Secretary, Ministry of Water Resources, Government of India dated 24 July 2015 (see Appendix B, Document 1), **Exhibit P-0013**.
[37] Letter No. WT(132)/(7496-A)/PCIW from the PCIW to the ICIW dated 24 July 2015 (see Appendix B, Document 2), **Exhibit P-0014**, ¶ 11.

come back to square one … and am requesting the Government of India and the Government of Pakistan to appoint a Neutral Expert to deal with the points of difference".[38]

52. India's response to the 24 July 2015 letter mirrored that of the Indian Commissioner, namely, an assertion that the Pakistani Commissioner's request to appoint a Neutral Expert "appears premature" and that the matter should continue to be addressed in the PIC.[39] India thus refused to cooperate with Pakistan in the selection of a Neutral Expert.

53. While India refused to engage with Pakistan on the question of appointment of the Neutral Expert, Pakistan's Commissioner continued his good faith efforts to discuss the KHEP and RHEP with his Indian counterpart and thereby break the emerging *impasse*. Their correspondence in the period August 2015 to February 2016 is illuminating and important.[40] It shows the gulf between the Parties on a number of key legal and Treaty-systemic issues, including (a) the scope and wider binding effect of the *Baglihar* Determination on pondage and the validity of the *Baglihar* Neutral Expert's approach to the interpretation of the Treaty, (b) the extent to which India was obliged to modify the design for the KHEP (and, by extension, the RHEP) as a consequence of the *Kishenganga* Court findings, and (c) India's refusal to pause construction of the KHEP and RHEP whilst the Commission discussed these issues further.[41]

54. Of considerable significance is that the refusal of the Indian Commissioner to engage in substantive discussions on the questions raised by Pakistan's Commissioner, and the attendant delay, must be seen in the light of India's extensive multi-Plant run-of-river construction projects planned for the Western Rivers.[42] And, as has subsequently become

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[38] *Id.*

[39] Note Verbale No. ISL/112/1/2015 from India to Pakistan dated 23 November 2015, **Exhibit P-0015**.

[40] See Letter No. Y-11017/2/2015-IT/2155 from the ICIW to the PCIW dated 21 August 2015, **Exhibit P-0016**; Letter No. WT(132)/(7505-A)/PCIW from the PCIW to the ICIW dated 11 September 2015, **Exhibit P-0018**; Letter No. Y-11017/2/2015-IT/2162 from the ICIW to the PCIW dated 13 October 2015, **Exhibit P-0019**; Letter No. WT(132)/(7513-A)/PCIW from the PCIW to the ICIW dated 4 November 2015, **Exhibit P-0020**; Letter No. Y-11017/2/2015-IT/2169 from the ICIW to the PCIW dated 27 November 2015, **Exhibit P-0021**; and Letter No. WT(132)/(7523-A)/PCIW from the PCIW to the ICIW dated 5 February 2016, **Exhibit P-0022**. See Appendix B, Documents 3-8.

[41] See further Appendix A, ¶¶ 31–41.

[42] Request for Arbitration, ¶ 32; "Technical Aspects of the Indus Waters Treaty", Presentation by Mehar Ali Shah, Pakistan Commissioner for Indus Waters, at the Court of Arbitration First Meeting (*Indus Waters*), 27 January 2023, slides 11-12; Transcript, Court of Arbitration First Meeting (*Indus Waters*), Day 1, p. 97, line 20 to p. 99, line 10; "Kishenganga and Ratle HEP Matters", Presentation by Shri AK Pal, Commissioner (Indus), Department of Water Resources, River Development & Ganja Rejuvenation, at the Neutral Expert First Meeting (*Indus Waters*), 27 February 2023, **Exhibit P-0042**, slide 9; (Draft) Transcript, Neutral Expert First Meeting (*Indus*

clear, India's play-it-long approach bore fruit as, alongside the Bank's imposition of the Pause,[43] it enabled India to complete construction of the KHEP, to bring it into operation, to significantly advance design planning and construction of the RHEP, and to advance design planning of other run-of-river Plants on Western Rivers,[44] all without any third-party settlement engagement and direction on the interpretation and application of the Treaty.

4. Pakistan moves to seise a Court of Arbitration: February 2016–October 2016

55. In the light of the continuing delaying tactics by India, and the self-evidently legal and treaty-systemic nature of the questions that had crystallised between the two sides, Pakistan's Commissioner wrote to his Indian counterpart on 25 February 2016 to notify him formally of a change of position. By that notification, Pakistan's Commissioner noted that the issues between the Parties could not be regarded as purely technical, confined to a specific Plant or Plants, but were rather legal and treaty-systemic in character, and as such that they were unfit for determination under the Plant-specific competence of a Neutral Expert.[45]

Waters), Day 1, **Exhibit P-0040**, p. 29, lines 10-20 (Shri AK Pal) and p. 123, lines 6-21 (Sir Daniel Bethlehem KC); Moushumi Das Gupta, "Modi govt steps up work on project that will tap Pakistani waters, J&K's UT status helps", *The Print*, dated 29 August 2019, available at https://theprint.in/india/modi-govt-steps-up-work-on-projects-that-will-tap-pakistani-waters-jks-ut-statushelps/283505/ (last accessed 22 March 2023), **Exhibit P-0005**; Moushumi Das Gupta, "Why India's unlikely to accept any interim arbitration decision on Indus Waters Treaty projects", *The Print*, dated 20 February 2023, available at https://theprint.in/india/why-indias-unlikely-to-accept-any-interim-arbitration-decision-on-indus-waters-treaty-projects/1384918/ (last accessed 22 March 2023), **Exhibit P-0006**, p. 4 ("A third government source said that with more than a dozen projects – either being planned or where work has started – on the western and eastern rivers of the Indus river basin, India is concerned that any adverse decision [by the Court of Arbitration] could imperil them all. // 'That is why we want to renegotiate the treaty,' the source pointed out."); Dr Daniel Haines, "India and Pakistan Are Playing a Dangerous Game in the Indus Basin", *United States Institute of Peace*, dated 23 February 2023, available at https://www.usip.org/publications/2023/02/india-and-pakistan-are-playing-dangerous-game-indus-basin (last accessed 22 March 2023), **Exhibit P-0007**, p. 2. For completeness, Pakistan also submits to the Court the other presentations made by India at the First Meeting of the Neutral Expert (*Indus Waters*): "Kishenganga Hydroelectric Project" and "Ratle Hydroelectric Project", Presentations by Mr Kushvinder Vohra, Chairman, Central Water Commission, 27 February 2023, **Exhibits P-0043** and **P-0044**; the (Draft) Transcript from Day 2 of the Neutral Expert First Meeting (*Indus Waters*) ((Draft) Transcript, Neutral Expert First Meeting (*Indus Waters*), Day 2, **Exhibit P-0041**); and the index from the hearing bundle submitted by Pakistan for First Meeting of the Neutral Expert (Neutral Expert First Meeting (*Indus Waters*), 27-28 February 2023, Pakistan's Hearing Bundle (Index only), **Exhibit P-0039**).

[43] I.e., the decision of the Bank to "pause the process of appointing the Chairman of the Court of Arbitration and the Neutral Expert" (the "**Pause**") (Letter from the World Bank to Pakistan dated 12 December 2016, **Exhibit P-0008**).

[44] Several of these Plants are currently under consideration within the Commission, including Lower Kalnai, Pakal-Dul, Kiru, Tamasha, Kalaroos II, Baltikalan, Durbuk Shyok, Nimu Chilling, Kargul Hunderman, Phagla, Kulan Ramwari and Mandi. The Office of Pakistan's Commissioner is aware of several other planned Plants which India has yet formally to disclose.

[45] Appendix A, ¶ 42.

56. This letter of 25 February 2016 is a key marker in the evolution of the present dispute and critical to the Court's task in this preliminary phase of proceedings.[46] Elements of this correspondence that warrant particular attention include the following.

56.1 The letter recalls the exchanges between the two Commissioners in the period from 24 July 2015.[47]

56.2 It sets out the interactions between Pakistan and India under Paragraph 4(b)(ii) of Annexure F of the Treaty in response to the Pakistani Commissioner's 24 July 2015 request:

> "In parallel, following up on my letter of 24 July 2015, the Pakistan Ministry of Foreign Affairs sent a Note Verbale to the High Commission of the Republic of India on 12 November 2015 (No. KA(II)-2/11/2015) inviting the Government of India to propose modalities for the appointment of a Neutral Expert within 10 days. In response, the High Commissioner of India, vide its Note Verbale of 23 November 2015 (No. ISL/112/1/2015), stated that the appointment of a Neutral Expert '*appears premature*.'"[48]

56.3 By the letter, Pakistan's Commissioner stated that his request for the appointment of a Neutral Expert of 24 July 2015 had lapsed and was formally revoked, viz.:

> "As reflected in the above correspondence, the Government of India has rejected the invitation of 24 July 2015 to jointly appoint a Neutral Expert pursuant to Paragraph 4(b)(i) of Annexure F of the Indus Waters Treaty, and *that invitation has lapsed and is hereby formally revoked*."[49]

India expressly acknowledged that revocation in subsequent correspondence.[50]

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[46] Letter No. WT(132)/(7531-A)/PCIW (with enclosure) from the PCIW to the ICIW dated 25 February 2016 (see Appendix B, Document 9), **Exhibit P-0023**.
[47] *Id.*, ¶ 2.
[48] *Id.*, ¶ 3.
[49] *Id.*, ¶ 4 (emphasis added).
[50] See Letter No. Y-11017/2/2015-IT/2181 from the ICIW to the PCIW dated 14 March 2016, **Exhibit P-0027**; Letter No. Y-11017/2/2015-IT/2202 (with enclosure) from the ICIW to the PCIW dated 11 August 2016, **Exhibit P-0032**; Letter No. Y-11017/2/2015-IT/2206 from the ICIW to the PCIW dated 6 September 2016, **Exhibit P-0037**. See Appendix B, Documents 10, 13 and 16.

56.4 The letter of 25 February 2016 sets out clearly Pakistan's position that the correspondence between the two Commissioners since the 25 July 2015 request had caused Pakistan's Commissioner to reassess the issues between the Parties as "substantially, if not predominantly, legal in nature".[51] Pakistan's Commissioner continued as follows:

> "You continue to insist, for instance, that the pondage calculation for the [KHEP] and [RHEP] should be resolved by reference to the Neutral Expert's pondage determination in the *Baglihar* case, notwithstanding the fact that the Partial Award issued by the Court of Arbitration in the *Kishenganga* case (i) rejected the 'best practices' interpretation of the Treaty that led to the Neutral Expert's final determination on pondage and other issues in the *Baglihar* case and (ii) declared that the Neutral Expert's determinations do not have general precedential value beyond the specific hydro-electric plant before him.
>
> Similarly, although the Court of Arbitration in the *Kishenganga* case ruled that drawdown flushing is not permitted under the Treaty, India insists on maintaining a design with deep orifice spillways for sediment control in both the [KHEP] and [RHEP] configurations that would not be effective unless water can be drawn down to or near the streambed.
>
> Your positions on these and related issues, which Pakistan rejects, present legal questions of Treaty interpretation which will inevitably recur as India proceeds with other [Plant] projects on the Western Rivers."[52]

56.5 The letter states Pakistan's Commissioner's view that the "the legal and technical aspects of the disputes over the [KHEP] and [RHEP]" should be resolved by a Court of Arbitration under Article IX(5) of the Treaty "in the interests of efficiency, economy and finality". He went on to observe that a Court of Arbitration "comprised of experts trained in both law and engineering … can render an award of general applicability for the parties' future guidance, and … 'binding on the general question presented'".[53]

56.6 Finally, the letter attached a draft statement of points of dispute, intended to form the basis of a joint report as required by Article IX(3) of the Treaty, and

[51] Letter No. WT(132)/(7531-A)/PCIW (with enclosure) from the PCIW to the ICIW dated 25 February 2016 (see Appendix B, Document 9), **Exhibit P-0023**, ¶ 5.
[52] *Id.*, ¶¶ 5–7.
[53] *Id.*, ¶ 7 (referring to the *Kishenganga* arbitration, Partial Award, **PLA-0003**, ¶ 470).

> noted that it would be forwarded to Pakistan and India for their consideration under Article IX(4) in 14 days in the event that the Indian Commissioner failed to complete the relevant portion.[54]

57. As the 25 February 2016 letter makes clear, in the light of India's insistence that the designs of the KHEP and the RHEP were consistent with the Treaty, and that India's planned programme of Plant construction extended well beyond those two Plants, Pakistan had reached a conclusion that a Neutral Expert would be neither competent, nor effectively able, to resolve the fundamental and systemic issues that had arisen between the Parties as regards the interpretation and application of the Treaty. The only competent and satisfactory forum in which all matters could effectively be addressed would be a Court of Arbitration. The effect of this letter was thus to move the settlement trajectory between the Parties from the Commission, and the possibility of a Neutral Expert determination, onto a dispute settlement track before a Court of Arbitration.

58. In response, the Indian Commissioner again sought to delay referral of Pakistan's concerns for third-party settlement. He again requested that disagreements arising from the KHEP and RHEP be resolved in the Commission, notwithstanding the Commission's persistent inability to progress (still less resolve) those issues over several years. The Indian Commissioner further suggested, despite his prior refusal to admit of such possibility, that if a third party was required to resolve those specific disagreements, they could only be addressed by a Neutral Expert.[55]

59. This approach was echoed at the inter-State level. In response to Pakistan's request that India engage in negotiations under Article IX(4), India argued that the disputes that Pakistan's Commissioner had identified could only be resolved by a Neutral Expert, and insisted they be taken up again in the Commission. Nevertheless, and without prejudice to its position, India agreed to appoint negotiators and arranged for talks to take place in New Delhi on 14–15 July 2016.[56]

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[54] Letter No. WT(132)/(7531-A)/PCIW (with enclosure) from the PCIW to the ICIW dated 25 February 2016 (see Appendix B, Document 9), **Exhibit P-0023**, ¶ 8.
[55] Appendix A, ¶¶ 44-46.
[56] *Id.*, ¶¶ 47–49.

60. These negotiations were unsuccessful, however. Notwithstanding "detailed, broad-based discussions", in which the contested matters were "discussed in exhaustive details", agreement proved impossible, the Minutes of the meeting recording a "lack of adequate convergence".[57]

61. While the Minutes also recorded India's proposal for further talks, Pakistan had by this point become acutely concerned by the further delay, particularly given the acceleration in KHEP construction. Pakistan, accordingly, rejected this proposal for further talks, noting that "extensive discussions on all aspects of the Points of Dispute have been held on multiple occasions over a long period of time and another round is unlikely to lead to any convergence".[58]

62. The Article IX(4) negotiations having been unsuccessful, and Pakistan having formed the view that further talks would not resolve the dispute, Pakistan moved to finalise its Request for Arbitration. As would have been clearly anticipated by India at that point, and was subsequently affirmed by the text of its Request, Pakistan's Request for Arbitration included both a series of generic requests for relief related to all Plants on the Western Rivers and a request for interim measures under Paragraph 28 of Annexure G of the Treaty to "enjoin[] India from initiating or continuing the construction and operation of works that are the subject of one of the seven Disputes raised in this Request."[59]

63. India having to this point dragged its feet for years, at every turn, now took a different approach, aimed at undermining Pakistan's move to request arbitration and thereby preventing referral of the interpretive and systemic issues (and related requests for relief) to a third party under the Treaty. On 11 August 2016, in full knowledge that Pakistan would shortly be transmitting its Request for Arbitration, India's Commissioner wrote to his Pakistani counterpart to declare, for the first time, that a difference had arisen, and signal his intention "to seek the appointment of a Neutral Expert" to decide on what were described as "issues [that] are purely technical in nature" with respect to the KHEP and the RHEP.[60] The points of

[57] Minutes of Secretary Level Meeting on Kishenganga and Ratle Hydroelectric Plants held in New Delhi, 14–15 July 2016, dated 15 July 2016 (see Appendix B, Document 12), **Exhibit P-0031**, ¶¶ 4, 7.
[58] *Id.*, ¶¶ 6, 7.
[59] Request for Arbitration, ¶ 90.
[60] Letter No. Y-11017/2/2015-IT/2202 (with enclosure) from the ICIW to the PCIW dated 11 August 2016 (see Appendix B, Document 13), **Exhibit P-0032**, ¶ 5.

difference attached to this communication were substantively identical to those that Pakistan's Commissioner had previously attached to his rescinded request for a Neutral Expert of 24 July 2015.[61] This letter of 11 August 2016 from the Indian Commissioner is a key pillar of India's objection to the competence of the Court and the validity of its empanelment.[62]

64. Significantly, on 12 August 2016, the day after the Indian Commissioner's letter signalling an intention to seek the appointment of a Neutral Expert, India's Commissioner wrote to his Pakistani counterpart to inform him that the KHEP's reservoir was being filled to Dead Storage Level.[63] The clear import of this was that the KHEP was nearing completion and was intended to be brought into operation within a very short period. Seen in this context, the reason behind the *volte face* of India's letter of the previous day was clear – to create space within which India could complete construction of the KHEP and bring it into operation, and to undermine the prospect of Pakistan instituting arbitral proceedings and its anticipated request for interim measures to enjoin continued construction and the operation of the Plant.

65. On 19 August 2016, Pakistan transmitted its Request for Arbitration to India under cover of a Note Verbale of that date handed over in hard copy by Pakistan's Ministry of Foreign Affairs to India's High Commission in Islamabad.[64] By that Note Verbale, Pakistan recalled the failure of the Parties' negotiations in July 2016 and stated that "Pakistan has come to the conclusion that the Disputes are not likely to be resolved by further negotiations per Article IX(5)(b)" such that the Court of Arbitration was able to be seised.[65] In addition to setting out in detail its case on the merits and requests for both specific and generic relief, Pakistan also requested interim measures in the terms noted above to enjoin India (*inter alia*) from initiating or continuing the construction and operation of the KHEP and the RHEP.[66] Pursuant to Paragraph 3 of Annexure G of the Treaty, the date on which the Request for Arbitration was received by India, i.e., 19 August 2019, "shall be deemed to be the date on which the proceeding is instituted." Pursuant to this provision, therefore, 19 August 2016 is the date on which arbitral proceedings before the Court commenced. This legal position is unaffected by

[61] Appendix A, ¶¶ 51-52.
[62] Letter No. Y-11017/2/2015-IT/2202 (with enclosure) from the ICIW to the PCIW dated 11 August 2016 (see Appendix B, Document 13), **Exhibit P-0032**.
[63] Appendix A, ¶ 54.
[64] Note Verbale No. KA(II)-2/11/2016 from Pakistan to India dated 19 August 2016, **Exhibit P-0034**.
[65] *Id.*
[66] Request for Arbitration, ¶ 90.

the long delay in empanelling the Court by the Bank in consequence of the Pause imposed by the Bank on 12 December 2016.

66. On 22 August 2016, the Pakistani Commissioner wrote to his Indian counterpart, in response to the Indian Commissioner's letter of 11 August 2016 signalling an intent to request a Neutral Expert, noting that "arbitral proceedings hav[ing] been instituted through Pakistan's Request, your belated and contradictory proposal for joint appointment of a Neutral Expert is untenable."[67]

67. Pakistan forwarded its Request for Arbitration to the Bank, in anticipation that the Bank would be required to perform its assigned functions in order to complete the constitution of the Court in accordance with Annexure G of the Treaty.[68] On 31 August 2016, the Bank's President confirmed receipt.[69]

68. These developments notwithstanding, on 6 September 2016, India's Commissioner wrote to India and Pakistan to request the appointment of a Neutral Expert with respect to the KHEP and the RHEP. On 4 October 2016, India transmitted its Neutral Expert Request to the Bank, with the request that the Bank appoint a Neutral Expert.[70]

5. The Bank imposes the Pause: October 2016–March 2022

69. On 18 October 2016, the President of the Bank wrote to the Parties, noting that the Bank was in the "unprecedented" situation of being "seized of two requests" – namely Pakistan's Request for Arbitration and India's Request for the Appointment of a Neutral Expert.[71] He nevertheless signalled the Bank's willingness to perform its mandated functions under Annexures F and G of the Treaty with respect to the appointment of the Neutral Expert and constitution of the Court of Arbitration, and to allow both bodies to be put in place simultaneously.

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[67] Letter No. WT(132)/(7563-A)/PCIW from the PCIW to the ICIW dated 22 August 2016 (see Appendix B, Document 14), **Exhibit P-0035**.
[68] Namely nominating a person to draw lots to select the appointing authorities who are required to appoint the three umpires of the Court of Arbitration: Indus Waters Treaty 1960, **PLA-0001**, Annexure G, Paragraph 9.
[69] Appendix A, ¶ 61.
[70] *Id.*, ¶ 62.
[71] Letter from the World Bank to the Parties dated 18 October 2016, **Exhibit P-0038**, ¶¶ 4–5.

70. To that end, the President: (a) nominated the individual to draw the lots to select the appointing authorities for the umpires on the Court of Arbitration; (b) allowed those lots to be drawn, resulting in the President of the Bank being responsible for nominating the Chairman of the Court of Arbitration, the President of Imperial College London being responsible for nominating the technical umpire, and the Chief Justice of the United States of America being responsible for nominating the legal umpire; (c) nominated multiple candidates for Neutral Expert and submitted them to the Parties for agreement, including the present Neutral Expert, Mr Michel Lino.[72]

71. Despite these steps, and notwithstanding Pakistan's explicit entreaty in the Request for Arbitration that "time is of the essence in the adjudication of these [d]isputes",[73] on 12 December 2016, the President of the Bank wrote to the Parties notifying them that he had "decided to pause the process of appointing the Chairman of the Court of Arbitration and the Neutral Expert" (the "Pause"), and that he had taken this step "in the interest of preserving the Treaty and in order to provide a window to further explore whether Pakistan and India can agree on a way forward for resolving the matter".[74] This Pause, which had no basis whatever in the Treaty, and was in breach of the Bank's obligations (as a Party to the Treaty) under Annexures F and G thereof, was protested immediately and forcefully by Pakistan.[75] Despite Pakistan's entreaties, however, the Bank maintained the Pause for almost five-and-a-half-years, until March 2022.[76]

72. By imposing and maintaining the Pause, the Bank caused irreparable harm to Pakistan's position – not only depriving Pakistan of its lawful right to seek a timely settlement of its disputes with India but also by frustrating Pakistan's request for interim measures from the Court. This was entirely to India's advantage. Unimpeded by any settlement process or prescription of interim measures, India was able to complete work on the KHEP, and bring it into operation, and progress work on the RHEP during the pendency of the Pause.

[72] Appendix A, ¶¶ 64–71.
[73] Request for Arbitration, ¶ 12.
[74] Letter from the World Bank to Pakistan dated 12 December 2016, **Exhibit P-0008**.
[75] Appendix A, ¶ 74.
[76] *Id.*, ¶ 75.

73. With the lifting of the Pause and the empanelment of the Court, the dispute between the Parties concerning both the legal and systemic issues of treaty interpretation and the Plant-specific issues of technical design can now, belatedly, proceed to arbitration.

B. Pakistan's affirmative case on the competence of the Court and the validity of its empanelment

74. Before the Court can engage with the substance of Pakistan's claims, it must (properly) address India's objections to the competence of the Court and the validity of its empanelment. Pakistan considers that India's objections are bad both in fact and in law. Pakistan's response to the substance of India's objections is given in **Section IV** below. Before turning to these issues, however, and to the antecedent question of the interpretation and application of Article IX of the Treaty, it is useful to set out at a high-level Pakistan's affirmative case on the competence of the Court and the validity of its empanelment. These issues will be developed further in response to India's objections to the Court's competence.

75. Pakistan's affirmative case on the competence of the Court and the validity of its appointment is straightforward. It rests on the facts described above, is supported by a compelling, textual interpretation of Article IX of the Treaty, and finds support in the determinations of the *Kishenganga* Court. Over the course of an eight-year period since Pakistan's Commissioner first raised questions concerning the design of the KHEP in February 2008, until its Request for Arbitration on 19 August 2016, Pakistan complied meticulously with every procedural requirement for the commencement of arbitration under the Treaty. Further, the substantive scope of Pakistan's Request for Arbitration engages treaty interpretation and systemic application issues that fall within the exclusive substantive competence of the Court.

1. Pakistan's Request for Arbitration

76. It is useful to start with an overview of key elements of Pakistan's Request for Arbitration that place it, or at the very least fundamental elements of it, within the exclusive domain of the competence of a Court of Arbitration.

77. The lens through which the dispute addressed in the Request for Arbitration is viewed is that of the Parties' long-standing disagreements over certain design specifications of the KHEP and RHEP. These are formulated as seven clearly defined Disputes set out in paragraph 9 of the Request for Arbitration in terms that are almost identical to the "differences" enumerated in Pakistan's request for the appointment of a Neutral Expert in its July 2015 correspondence. This formulation of issues also mirrors the terms of India's Neutral Expert Request of 4 October 2016. It is not a matter of contention that these issues of design specification, which straddle the scope of the present Court proceedings and those of the parallel proceedings before the Neutral Expert, are the same.

78. The similarities between Pakistan's Request for Arbitration and its prior request for a Neutral Expert, and the Neutral Expert Request of India, however, end there.

79. The Request for Arbitration is formulated and framed, from the very outset, in systemic terms concerning the interpretation and application of the Treaty beyond the confines of particularised run-of-river Plants. This overarching concern, on Pakistan's part, is identified expressly in the opening paragraphs of the Request for Arbitration in the following terms:

> "The Parties' disagreements have arisen specifically in the context of two hydroelectric projects, the [KHEP] … and the [RHEP] … India is, however, developing many other Run-of-River Plants on the Western Rivers, giving greater significance to the resolution of the issues of Treaty interpretation raised here. As discussed in greater detail below, the principles established by this Court will apply not only to the KHEP and RHEP, but also *erga omnes* to future Run-of-River Plants.
>
> …
>
> This arbitration concerns the detailed design constraints of Annexure D to the Treaty, which govern India's qualified right to hydroelectric use of the Western Rivers for Run-of-River Plants."[77]

80. This point is elaborated upon later in the Request for Arbitration in the following terms:

> "In addition to the KHEP and the RHEP, India is planning to design and construct many additional Run-of-River Plants on the Western Rivers. Pakistan anticipates that India will design many of these projects using the same approach employed at the KHEP and

[77] Request for Arbitration, ¶¶ 5 and 7.

> RHEP: excessive Pondage, submerged power intakes, deep orifice spillways with gated openings below Dead Storage Level, and excessive freeboard."[78]

81. This elaboration of the issues in Treaty-operational terms additionally relevant in the context of design-specification disputes between the Parties, and the Parties' fundamentally divergent views on the weight and effect of the *Kishenganga* Court's construction of the Treaty. So, for example, Pakistan notes the following:

> "Notwithstanding the [*Kishenganga*] Court's ruling that the reservoir cannot be depleted below Dead Storage Level and that drawdown flushing is prohibited by the Treaty, India has not altered its designs and has not raised the level or reduced the size of the sediment outlets at either the KHEP or RHEP."[79]

82. Developing this theme, the Request for Arbitration continues:

> "The features of a Run-of-River Plant are inter-connected, and, at each turn, India has proposed legal interpretations of the Treaty and has made design choices at the KHEP and RHEP that give it the greatest amount of control over the largest volume of water—water that it has an obligation to 'let flow' to Pakistan. Measured individually and cumulatively, India's proposals on Pondage, intakes, sediment outlets, spillways, and freeboard cannot be reconciled with the parameters of Annexure D to the Treaty. India's approach marks a clear departure from the careful balance struck in the Treaty, which allows only restricted and circumscribed use of the waters of the Western Rivers so that Pakistan's rights on the waters of the Western Rivers, as enshrined in the Treaty, are not compromised. Water scarcity is a serious issue in the region, and India's ambitious agenda to build multiple HEPs similar to those proposed at Kishenganga and Ratle poses an existential threat to Pakistan's use of the Western Rivers and to the continued viability of the Treaty itself."[80]

83. Of high significance, the Request for Arbitration also carefully places Pakistan's dispute with India in the context of the law on State responsibility, including as regards remedies.

[78] *Id.*, ¶ 32.
[79] *Id.*, ¶ 7(i).
[80] *Id.*, ¶ 8.

84. So, for example, the Request for Arbitration notes that

> "India's continued construction of the HEPs pending final resolution of the Disputes is governed by the 'at own risk' principle of international law, with all attached consequences for India.[22]
>
> [22] As Pakistan has insisted previously, and as India accepted before the [*Kishenganga*] Court, any works completed in violation of the Treaty have been undertaken by India at its own risk. *See* Order on the Interim Measures Application of Pakistan dated September 23, 2011, ¶ 122 (noting India's acceptance of the "'proceed at own risk' principle"). Moreover, in light of India's apparent intent to imminently begin operations at the KHEP, Pakistan expressly invokes Article IV(14) of the Treaty which provides:
>
> > In the event that either Party should develop a use of the waters of the Rivers which is not in accordance with the provisions of this Treaty, that Party shall not acquire by reason of such use any right, by prescription or otherwise, to a continuance of such use."[81]

85. The position is even clearer when it comes to interim relief and the remedies requested.

86. On interim relief, Pakistan requested "interim measures enjoining India from initiating or continuing the construction and operation of works that are the subject of one of the seven Disputes raised in this Request."[82] In support of this request, Pakistan explained as follows:

> "One aspect of the relief sought in Part VI is interim measures restraining India from proceeding further with planned diversions resulting from construction of the works that are the subject of the Disputes as well restraining India from filling the KHEP's reservoir below the Dead Storage Level. On 12 August 2016, India sent Pakistan a letter indicating its intent to begin filling the KHEP's reservoir below the Dead Storage Level on 14 August 2016. It is for this reason that time is of the essence in the adjudication of these Disputes, and an order on interim measures is imperative for a complete and fair adjudication. This particular remedy is sought in light of the fact that India has begun filling the KHEP's Dead Storage and planned diversions shall cause irreparable harm to Pakistan. Accordingly, pursuant to Paragraph 28 of Annexure G to the Treaty, Pakistan shall request the Court of Arbitration at its first meeting to lay down, pending its Award, interim measures to safeguard Pakistan's interests under the Treaty with respect to the matters in dispute, to avoid prejudice to the final solution, and to avoid aggravation or extension of the Disputes."[83]

[81] *Id.*, ¶ 21 and fn. 22.
[82] *Id.*, ¶ 90.
[83] *Id.*, ¶ 12.

87. As regards remedies more broadly, the "Relief Sought" in the Request for Arbitration is wide-ranging, going far beyond determinations of technical issues of design specification.[84]

88. It is highly material that it is *only the Court* that is competent to specify interim measures and *only the Court* that is competent to afford relief, in the form of declaratory orders, injunctions, financial compensation, and "such [other] relief … as may have been claimed."[85] A Neutral Expert has no such competence.

89. The starting point for any appreciation of the competence of the Court must be what is asked of the Court in the Request by which it is presumptively seised. As will be evident from the preceding, the framing of Pakistan's Request for Arbitration, the specification of Pakistan's claims writ large, and the relief sought, fall with the purview of the Court, and only the Court. The technical design issues concerning the KHEP and the RHEP are the foil by which the Treaty-systemic issues are particularised, but they are not the overriding strategic concern. The overriding strategic concern is that India is seeking, Plant-by-Plant, in incremental and intentionally isolated steps, and coupled with a play-it-long strategy as regards third-party dispute settlement, to create facts on the ground with regard to multiple run-of-river projects on the Western Rivers. In doing so, India appears intent upon creating a series of facts on the ground that will entirely frustrate the dispute resolution procedures in the Treaty.[86]

90. This appreciation is also important for two other reasons, aspects of which will be elaborated upon in greater detail below. The first is that India has sought to make something of the fact that Pakistan, in July 2015, had requested the appointment of a Neutral Expert but thereafter, in February 2016, switched tracks, revoked its request for a Neutral Expert, and moved to refer its disputes with India to a Court of Arbitration. In essence, this argument is an *electa una via* argument writ small – that once Pakistan had adopted a course, it was bound to follow it, no matter what the changing circumstances; a prisoner of its own choice.

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[84] See, for example, *Id.*, ¶¶ 91(a), 91(c), 91(e), 91(f), 92(b), 92(d), 93(b), 93(c), 94(b), 94(c), 95(b), 95(c), 96(b), 96(c) and 97(b).

[85] See, *inter alia*, Paragraphs 23 and 28 of Annexure G of the Indus Waters Treaty 1960, **PLA-0001**.

[86] The Pakistani Commissioner has expressed this concern to his Indian counterpart on numerous occasions. See, for example, Letter No. WT(132)/(7496-A)/PCIW from the PCIW to the ICIW dated 24 July 2015, **Exhibit P-0014**; Letter WT(132)/(7505-A)/PCIW from the PCIW to the ICIW dated 11 September 2015, **Exhibit P-0018**; Letter No. WT(132)/(7513-A)/PCIW from the PCIW to the ICIW dated 4 November 2015, **Exhibit P-0020**; Letter No. WT(132)/(7523-A)/PCIW from the PCIW to the ICIW dated 5 February 2016, **Exhibit P-0022**; and Letter No. WT(132)/(7563-A)/PCIW from the PCIW to the ICIW dated 22 August 2016, **Exhibit P-0035** (see **Appendix B**, Documents 2, 4, 6, 8 and 14).

91. This contention has only to be stated for its absurdity to become apparent. Pakistan, in good faith, started down the settlement route under the Treaty by contemplating the possibility of a technical settlement, through the determination of an engineer, in the form of a Neutral Expert. India's response to this approach, in the period July 2015 to February 2016, and indeed also in the period from February to August 2016, made it clear that India was not a partner in dispute resolution. It was intent on using the levers of the Treaty to frustrate Pakistan's years-long concerns about India's run-of-river projects. The scope of and remedies available to a Neutral Expert could have no purchase on such an approach by India, as Pakistan only naively appreciated years after first raising its concerns. When it did, it decided to adopt a different course, and move for arbitration. In so doing, it jumped through every hoop required of it by the Treaty. It formally withdrew its request for a Neutral Expert. It elaborated transparently on its expanded and systemic concerns. It engaged with India in good faith with respect to those concerns. It complied with the time limits and procedural requirements of the Treaty. All to no avail, as India persisted in frustrating the possibility of third-party settlement at every turn. There can be nothing whatever in India's *electa una via* argument writ small, even were there to be such a principle of dispute settlement (which is denied). Any finding to the contrary would leave an aggrieved party the victim of its own good faith conduct.

92. The second appreciation that follows from the review of the scope of Pakistan's Request for Arbitration is that, were the Court to conclude – contrary to Pakistan's submissions – that India had in fact properly seised a Neutral Expert of technical design specification differences concerning the KHEP and the RHEP, that would not exclude the parallel competence of the Court in respect of questions concerning the interpretation and application of the Treaty writ large. On these issues, there is not, and could never be, any overlap between the issues of which the Court is seised by Pakistan's Request for Arbitration and India's Neutral Expert Request. Never the twain shall meet! A Neutral Expert has no competence in respect of questions of Treaty interpretation and application writ large. And, although the Court would be fully competent to address technical design issues, it could readily confine itself to addressing the issues that fell within its exclusive competence alone. This outcome would simply be a variation on the theme proposed by Pakistan in its Division of Competence Statement.

93. These two issues flow also into appreciations of fact, and it is to this aspect that Pakistan now turns.

2. The conditions precedent for the commencement of arbitration

94. The competence enquiry on which the Court is here engaged turns on whether the conditions precedent for the commencement of arbitration under the Treaty were met – whether Pakistan met the procedural and substantive requirements for instituting arbitration, whether arbitral proceedings were properly commenced, and whether the Court was validly empanelled. Independent of this, although closely related, is the question of whether India submitted an antecedent request for the appointment of a Neutral Expert (as opposed to expressing intent to make such a request) and, if it did, whether such request was dispositive such as to vitiate the empanelment of the Court, and its competence.

95. Whether the conditions precedent for the commencement of arbitration were met rest on the facts set out above, and described more fully in Appendix A hereto, that emerge from the exchanges between the two Indus Waters Commissioners, and indeed the Parties themselves, in the period from 24 July 2015 to 19 August 2016. While the period of deeper background, a snapshot of which is given above, provides important context, it is the period of 13 months from July 2015 to August 2016 that is key. This is the period that runs from Pakistan's initial request for the appointment of a Neutral Expert, on 24 July 2015, through the subsequent exchanges between the Commissioners that led to the revocation of that request by Pakistan, and the crystallisation of a wider legal and treaty-systemic dispute between the Parties as reflected in Pakistan's letter of 25 February 2016 and Request for Arbitration of 19 August 2016.

96. The key analytical stepping-stones are usefully recapped.

97. On 24 July 2015, Pakistan's Commissioner requested the appointment of a Neutral Expert to determine the questions that had emerged between the Parties concerning the KHEP and RHEP. However, in the face of Indian delaying tactics and the broadening of the issues in dispute between the Parties to include questions of legal interpretation and the systemic application of the Treaty, he subsequently concluded that the questions in issue were not

amenable to determination by a Neutral Expert but could only be addressed by a Court of Arbitration.

98. Given this appreciation, by his letter of 25 February 2016, the Pakistani Commissioner wrote to his Indian counterpart in the following terms:

> "… the Government of India has rejected the invitation of 24 July 2015 to jointly appoint a Neutral Expert pursuant to Paragraph 4(b)(i) of Annexure F of the Indus Waters Treaty, and that invitation has lapsed and is hereby formally revoked."[87]

99. By that same letter, Pakistan's Commissioner initiated the process to commence arbitral proceedings under Article IX(5) of the Treaty, placing Pakistan's concerns expressly within the framework of the systemic application of the Treaty to hydroelectric projects on the Western Rivers generally:

> "Your positions on these and related issues, which Pakistan rejects, present legal questions of Treaty interpretation that will inevitably recur as India proceeds with other HEP projects on the Western Rivers. In accordance with Article IX(5) of the Treaty, and in the interests of efficiency, economy, and finality, the legal and technical aspects of the disputes over the Kishenganga and Ratle HEPs should therefore be resolved by a full Court of Arbitration."[88]

100. Faced with the refusal of the Indian Commissioner to participate in the preparation of the Commission's joint report, Pakistan took the view that the report was being unduly delayed in the Commission, and approached India with a view to commencing negotiations under Article IX(4). Negotiations took place in New Delhi on 14–15 July 2016. Despite the Minutes of those negotiations recording the Parties' best efforts, there was no agreement between them. Pakistan accordingly signalled its intention to file its Request for Arbitration.

101. By correspondence on 11 August 2016, India's Commissioner signalled his intention to "to seek the appointment of a Neutral Expert" to decide on technical issues with respect to the KHEP and the RHEP.

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[87] Letter No. WT(132)/(7531-A)/PCIW (with enclosure) from the PCIW to the ICIW dated 25 February 2016 (see Appendix B, Document 9), **Exhibit P-0023**, ¶ 4.
[88] *Id.*, ¶ 7.

102. The procedure for requesting the appointment of a Neutral Expert is a formal one, laid down in Paragraph 5 of Annexure F of the Treaty. This requires an initial notification of an intention to ask for the appointment of a Neutral Expert (Paragraph 5(a)). Thereafter, within two weeks of receipt of that notification, the two Commissioners are to endeavour to prepare a joint statement of points of difference (Paragraph 5(b)). Only after the expiry of this two-week period may the notifying Commissioner request the appropriate authority to appoint a Neutral Expert (Paragraph 5(c)).

103. As this makes clear, the mere signalling of an intention "to seek the appointment of a Neutral Expert" is not sufficient to meet the procedural requirements for *seisin* of a Neutral Expert under Paragraph 5 of Annexure F. And, as the *Kishenganga* Court held, having in mind precisely the kinds of circumstances that are now in contemplation, "only an actual request for the appointment of an expert would activate the neutral expert process and preclude such a difference from submission to a court of arbitration".[89] The Indian Commissioner's signalled intention to seek the appointment of a Neutral Expert was thus without dispositive effect. It was simply preparatory.

104. On 19 August 2016, Pakistan transmitted its Request for Arbitration to India. In the covering Note Verbale, Pakistan invoked Article IX(5)(b) of the Treaty, which allows a Party to submit a dispute to arbitration if "after negotiations have begun pursuant to Paragraph (4), in its opinion the dispute is not likely to be resolved by negotiation or mediation". More than eight years having elapsed since Pakistan's Commissioner first raised issues concerning the design of the KHEP. His opinion that the dispute was unlikely to be resolved by negotiation or mediation was more than justified.

105. With the filing of its Request for Arbitration, Pakistan had fulfilled the procedural requirements for the commencement of arbitral proceedings set out in Article IX. A putative Court of Arbitration had been validly seised of the proceedings. In keeping with established principles of international dispute settlement, nothing that occurred after that time can deprive the Court of its competence over the Parties' disputes. This includes India's Neutral Expert Request with respect to the KHEP and the RHEP filed with the Bank on 4 October 2016.

[89] *Kishenganga* arbitration, Partial Award, **PLA-0003**, ¶ 488.

106. Further, and in any event, as noted above, the differences that India purported to put before the Neutral Expert and those submitted to the Court by Pakistan do not cover the same ground. Pakistan's Request concerned legal determinations that would be applicable to every Plant that India could construct on the Western Rivers under the provisions of Annexure D of the Treaty. In contrast, India's Request raised technical, Plant-specific issues concerning the KHEP and the RHEP. The matters before the Neutral Expert are therefore a subset of the matters before the Court. Even if, therefore, the Neutral Expert could be said to be validly appointed, and even if his appointment might be said to have displaced the Court through the operation of Article IX(6) of the Treaty (which it could not, as described further below[90]), the most that could follow is that the Court's competence was displaced to the extent only of any substantive overlap between the two bodies. This would remove only the KHEP and RHEP from the Court's competence but leave untouched the issues pertaining to India's wider programme of Plant construction on the Western Rivers. As noted above, this would simply be a variation on the theme proposed in Pakistan's Division of Competence Statement.

107. With the Court properly seised, the remaining question is whether the procedure for the constitution of the Court set out in Annexure G of the Treaty has been complied with. It is clear that it has, with only one exception, arising from the latitude shown by the Court itself in permitting India to appoint its arbitrators after the deadline set in Paragraph 6 of Annexure G. That deadline passed on 18 September 2016, 30 days after Pakistan served its Request for Arbitration. While Pakistan welcomed, and welcomes, the approach taken by the Court in this issue, and regrets India's refusal to take advantage of it, this extra-Treaty flexibility shown by the Court cannot affect the validity of the Court's composition and its solemn obligation to resolve the disputes properly referred to it. India's failure to appoint arbitrators, as it was (and so far remains) entitled to do, cannot undermine the working of the Court, having regard to Paragraph 11 of Annexure G of the Treaty, which makes it clear that the Court is "competent to transact business" in a configuration of five (three umpires plus two arbitrators).

108. It follows from the preceding that the procedural preconditions for the commencement of arbitral proceedings have been met, that the Court has been properly constituted, and that it is competent to hear the dispute of which it has been seised.

* * *

[90] See Pakistan's Response to India's First Objection at ¶¶ 183-191 below.

III. THE INTERPRETATION AND APPLICATION OF ARTICLE IX OF THE TREATY

A. Preliminary observations

109. For reasons that were explored in detail at the First Meeting of the Court,[91] the present Preliminary Phase on Competence encompasses an enquiry on the operation of Article IX of the Treaty. This is sound and necessary for two reasons. First, the operation of Article IX is inextricably bound up with questions going to the interpretation and application of both Annexure G of the Treaty, addressing Courts of Arbitration, and Annexure F of the Treaty, addressing Neutral Experts, including the competence of each and related issues of their empanelment/appointment, applicable procedures, etc. A procedure focused on an assessment of the competence of the Court must therefore, necessarily, approach the issue through the prism of the operation of – the interpretation and application of – Article IX of the Treaty. It also warrants observation that, of the third-party settlement mechanisms under the Treaty, it is only a Court of Arbitration constituted under Article IX and Annexure G of the Treaty that is competent to interpret Article IX. A Neutral Expert has no such competence, this not being one of the enumerated questions in Part 1 of Annexure F of the Treaty on which a Neutral Expert is authorised to render decisions.

110. Second, as will be addressed in detail in the following Section of this Response, alongside its egregious misrepresentations of fact, India has advanced specific objections to the competence of the Court that rest on what are manifestly flawed and self-serving interpretations of Article IX. These include contentions that:

(a) a Neutral Expert was seised first in time and that Article IX(6) in any event accords priority to the determination of differences by a Neutral Expert;

(b) Article IX sets out "graded" procedures for the settlement of disagreements that require an applicant to request that a Neutral Expert seek to determine a "difference" before a Court of Arbitration can be seised of a "dispute";

[91] Transcript of the First Meeting of the Court of Arbitration, Day 2, p. 2, lines 5-12; p. 15, lines 17-24 (Professor Sean D. Murphy); p. 20, lines 3-25; p. 21, lines 1-25; p. 23, lines 7-9; p. 24, lines 4-14 (Sir Daniel Bethlehem KC).

(c) there is no "necessity" to establish a Court, pursuant to Paragraph 1 of Annexure G, because a Neutral Expert has already been asked to determine the same issues;

(d) Pakistan has not complied with the procedural requirements of Article IX(3)–(5) that are a prerequisite to the seisin of a Court of Arbitration; and

(e) the Court was not in any event constituted in accordance with the provisions of Annexure G.

111. Each of these contentions is addressed in detail in the Section that follows. In Pakistan's submission, none of them are even passably credible, even if the disentanglement of the parallel Court and Neutral Expert procedures that are a unique feature of these proceedings requires careful study. Careful study, however, shows clearly the resilient thread that leads to the seisin of the Court and its competence, and shines a bright light on the shortcomings of India's arguments.

112. Addressing an aspect of the interpretation and application of Article IX, Sir Franklin Berman KC, the legal umpire in the *Kishenganga* proceeding, observed as follows:

> "I myself have been puzzling at length over what I was tempted to describe as the Rococo splendours of [Article IX], but perhaps I ought better to describe it as one of those magnificent temple sculpted friezes in which you can't see at first sight exactly what's going on, and then afterwards you're quite surprised when you discover what is going on."[92]

113. Pakistan agrees whole-heartedly with this characterisation. There is a veil to be lifted on the interpretation and application of Article IX and the closely related provisions of Annexures F and G. But once it is lifted, it is clearly apparent that the moving parts of Article IX work, that they are enabling of the settlement of disagreements, including, ultimately, by unilateral resort to the third-party settlement mechanisms, and that roadblocks to such procedures erected by one party cannot divert or derail the rights of the other party to seek and secure a fair and considered outcome. As the Preamble to the Treaty makes clear –

[92] Transcript, Hearing on the Merits (*Kishenganga* arbitration), Day 9, **Exhibit P-0128**, p. 111, lines 17-23 (Sir Franklin Berman KC) (see further to p. 112, line 13).

"recognising the need … of making provision for the settlement, in a cooperative spirit, of all such questions as may hereafter arise in regard to the interpretation or application of the provisions agreed upon herein" – Article IX is one of the fundamental pillars of the Treaty. If it is allowed to become dysfunctional, at the instance of subversive conduct by one of the Treaty parties, the heart of the Treaty will be imperilled. Indeed, this is the issue that stands at the core of Pakistan's dispute with India with which the Court is presumptively seised: that India, through its interpretations of Article III and Annexure D of the Treaty concerning run-of-river Plants, coupled with its closely related "running interference" tactic that it has employed with regard to the interpretation and application of Article IX and Annexures F and G, is cynically setting out to render the Treaty dysfunctional.

114. There is also another reason why a careful examination of the interpretation and application of Article IX, and of Annexures F and G, is important in the context of the current phase of proceedings. As has been fully ventilated in correspondence,[93] in submissions at the First Meetings of the Court and of the Neutral Expert,[94] and in Pakistan's Division of Competence Statement, Pakistan has expressly maintained its "reserved issues", namely, the validity of India's purported Request for the appointment of a Neutral Expert, the World Bank's appointment of the Neutral Expert, and his competence, both absolutely and in respect of particular issues which may be said to be before him ("**Pakistan's reserved issues**").

115. Following the First Meeting of the Neutral Expert on 27–28 February 2023, and the Neutral Expert's firm, clear and unambiguous declaration for the record – "I clearly understand – and I think it is agreed by both parties – that I am an engineer and I have no competence to interpret any part of the Treaty. So it is clear for me and I will stick to that."[95] – Pakistan has

[93] See, e.g., Letter from Pakistan to the Neutral Expert dated 1 December 2022, **Exhibit P-0045**; Letter from Pakistan to the Neutral Expert dated 10 January 2023**, Exhibit P-0046**; Pakistan's Division of Competence Statement, ¶ 3.

[94] Transcript of the First Meeting of the Court of Arbitration, Day 1, pp. 65-66, lines 22-9; pp. 179-180, lines 19-3 Sir Daniel Bethlehem KC) (Professor Sean D. Murphy); p. 20, lines 3-25; p. 21, lines 1-25; p. 23, lines 7-9; p. 24, lines 4-14 (Sir Daniel Bethlehem KC); Transcript of the First Meeting of the Court of Arbitration, Day 2, pp. 23-24, lines 22-11; p. 31, lines 12-25 (Sir Daniel Bethlehem KC); (Draft) Transcript, Neutral Expert First Meeting (*Indus Waters*), Day 1, **Exhibit P-0040**, p. 144, lines 10-12 (Sir Daniel Bethlehem KC); (Draft) Transcript, Neutral Expert First Meeting (*Indus Waters*), Day 2, **Exhibit P-0041**, p. 37, lines 17-22 (Professor Philippa Webb); p. 44, lines 6-11 (The Neutral Expert); and p. 191, lines 11-20 (Sir Daniel Bethlehem KC).

[95] (Draft) Transcript, Neutral Expert First Meeting (*Indus Waters*), Day 1, **Exhibit P-0040**, p. 188, lines 18-21 (the Neutral Expert). See also Email from the Neutral Expert to the World Bank (regarding India's comments on the summary of the hand-over meeting with the Neutral Expert held on 21 November 2022), 31 January 2023, **Exhibit P-0155**.

concluded that there is no need, in this Preliminary Phase on Competence, for the Court to address the issue of the *validity* of the Neutral Expert's appointment.

116. For the avoidance of doubt, Pakistan maintains its position that the Court, and only the Court, is competent to address both the validity of the Neutral Expert's appointment and the interpretation and application of Article IX, insofar as it relates (*inter alia*) to the Neutral Expert – and indeed also the interpretation and application of Annexure F, save insofar as any provisions therein clearly engage the competence of the Neutral Expert alone (such as whether, "in his opinion", a difference should be treated as a dispute, under Paragraph 7 of Annexure F). This follows inexorably from the clear and unambiguous stipulation – in both Article IX(2) and Part 1 of Annexure F – that the competence of a Neutral Expert is confined to a specified, particularised and exhaustive list of questions. These do *not* include questions concerning the interpretation and application of provisions of the Treaty that are not particularised in Paragraph 1 of Annexure F or which are not central to the performance of the function of the Neutral Expert and allocated for his appreciation.

117. Pakistan further observes that, while it has concluded that there is no need for the Court, at this stage, to address the issue of the validity of the Neutral Expert's appointment, it is essential that the Court address, in this Preliminary Phase on Competence, the interpretation and application of Article IX(6) and Annexure F, Paragraph 11, in terms that make it clear that Article IX(6) does not preclude the engagement of the Court either on issues of the systemic interpretation and application of the Treaty or on the remedies that may follow from any determinations that the Neutral Expert may make in due course. Pakistan also invites the Court to affirm that, in circumstances like the present involving parallel proceedings, the duty of cooperation in the Treaty carries through to both the Court and the Neutral Expert such that both bodies are required to adopt an approach of pragmatic coordination, whether actively or in the form of *sub silentio* acknowledgement of the competence, role and responsibilities of the other. In this regard, Pakistan recalls its Division of Competence Statement, the discussion in which will be relevant to the Court's appreciation of the possible shape of an approach of pragmatic coordination that the Court may be minded to affirm.

118. In this regard, it bears emphasis that it is *no part* of Pakistan's case that a Court of Arbitration and a Neutral Expert cannot exist side-by-side. There are many circumstances that might be contemplated in which a Court and Neutral Expert might be engaged in parallel – in

respect of different issues; on the basis of a division of competence agreed by the Parties; or for some other reason. Pakistan's reserved issues concern, at bottom, the validity of the purported competence of a Neutral Expert in respect of issues of which a Court has already been seised. As noted above, however, given the Neutral Expert's affirmative declaration on the record of his proceedings, Pakistan considers that there is at this point no need for the Court to address the issue of the validity of the Neutral Expert's appointment. In this regard, Pakistan is content to adopt a pragmatic approach to the effect that the Court and the Neutral Expert, in the parallel proceedings here in issue, can in principle exist side-by-side, but that, having regard to the duty of cooperation that infuses the Treaty, and applies equally to the work of these bodies, each must be sensitive to the role and responsibilities of the other and take appropriate steps to proceed in a manner that does not imperil the Treaty. One possible modality of cooperation that would be attentive to the independence, competence and expertise of both the Court and the Neutral Expert is that described in Pakistan's Division of Competence Statement. Other appropriate modalities may also recommend themselves. Within the limits of the respective competences of the Court and the Neutral Expert, and with an eye to the fair and considered resolution of the Parties' disagreements, Pakistan is content to leave this issue to the principled and pragmatic appreciation of the Court and the Neutral Expert.

119. Against the background of these framing observations, Pakistan turns to address the interpretation and application of Article IX and its related provisions in Annexures F and G of the Treaty.

B. Article IX of the Treaty and rules of interpretation

1. The settlement of disagreements under the Treaty

120. As has already been noted, the Preamble to the Treaty makes clear that one of the Treaty's core objectives is "the settlement, in a cooperative spirit, of all such questions as may hereafter arise in regard to the interpretation or application of the provisions agreed upon herein" as co-riparians on the Indus Basin.

121. Article IX of the Treaty sets out the means by which disagreements between the Parties are to be settled. For ease of reference, Article IX provides:

"(1) Any question which arises between the Parties concerning the interpretation or application of this Treaty or the existence of any fact which, if established, might constitute a breach of this Treaty shall first be examined by the Commission, which will endeavour to resolve the question by agreement.

(2) If the Commission does not reach agreement on any of the questions mentioned in Paragraph (1), then a difference will be deemed to have arisen, which shall be dealt with as follows:

(a) Any difference which, in the opinion of either Commissioner, falls within the provisions of Part 1 of Annexure F shall, at the request of either Commissioner, be dealt with by a Neutral Expert in accordance with the provisions of Part 2 of Annexure F;

(b) If the difference does not come within the provisions of Paragraph (2) (a), or if a Neutral Expert, in accordance with the provisions of Paragraph 7 of Annexure F, has informed the Commission that, in his opinion, the difference, or a part thereof, should be treated as a dispute, then a dispute will be deemed to have arisen which shall be settled in accordance with the provisions of Paragraphs (3), (4) and (5);

Provided that, at the discretion of the Commission, any difference may either be dealt with by a Neutral Expert in accordance with the provisions of Part 2 of Annexure F or be deemed to be a dispute to be settled in accordance with the provisions of Paragraphs (3), (4) and (5), or may be settled in any other way agreed upon by the Commission.

(3) As soon as a dispute to be settled in accordance with this and the succeeding paragraphs of this Article has arisen, the Commission shall, at the request of either Commissioner, report the fact to the two Governments, as early as practicable, stating in its report the points on which the Commission is in agreement and the issues in dispute, the views of each Commissioner on these issues and his reasons therefor.

(4) Either Government may, following receipt of the report referred to in Paragraph (3), or if it comes to the conclusion that this report is being unduly delayed in the Commission, invite the other Government to resolve the dispute by agreement. In doing so it shall state the names of its negotiators and their readiness to meet with the negotiators to be appointed by the other Government at a time and place to be indicated by the other Government. To assist in these negotiations, the two Governments may agree to enlist the services of one or more mediators acceptable to them.

(5) A Court of Arbitration shall be established to resolve the dispute in the manner provided by Annexure G

(a) upon agreement between the Parties to do so; or

(b) at the request of either Party, if, after negotiations have begun pursuant to Paragraph (4), in its opinion the dispute is not likely to be resolved by negotiation or mediation; or

(c) at the request of either Party, if, after the expiry of one month following receipt by the other Government of the invitation referred to in Paragraph (4), that Party comes to the conclusion that the other Government is unduly delaying the negotiations.

(6) The provisions of Paragraphs (3), (4) and (5) shall not apply to any difference while it is being dealt with by a Neutral Expert."

122. Article IX(1) contemplates three kinds of disagreements between the Parties: (a) questions concerning the interpretation of the Treaty; (b) questions concerning the application of the Treaty; and (c) questions concerning the existence of any fact which, if established, might constitute a breach of the Treaty. How disagreements over such questions will or may fall to be resolved depends in part on whether they can be or are classed as "differences" and/or as "disputes".

123. Article IX provides for four different mechanisms of settlement: the Commission, a Neutral Expert, inter-State negotiations, and a Court of Arbitration. The Commission, comprising the Commissioners of each Party, is competent to address any and all disagreements at their inception, and, if agreement can be reached between the Commissioners, to determine any appropriate mode of settlement. While inter-State negotiations (including through the use of mediators) is addressed in more confined terms (in Article IX(4)), the reality of a Treaty between two principal Parties is that they may, if agreement can be reached between them on appropriate modalities, decide to settle their disagreements in any manner that attracts their consent.

124. This leaves two compulsory methods of third-party settlement in circumstances in which the Parties, whether through their Commissioners or otherwise, are unable to agree – the settlement of differences by a Neutral Expert and the settlement of disputes by a Court of Arbitration. The settlement of differences by a Neutral Expert is addressed in Article IX(2) and Annexure F of the Treaty. The settlement of disputes by a Court of Arbitration is addressed in Article IX(5) and Annexure G of the Treaty. Key provisions on competence and procedure

in respect of each are set out in Article IX more generally and in the respective Annexures F and G.

125. **Sections III.C–F** below address the arrangements in respect of each settlement mechanism more fully. By way of headline points:

125.1 The role and function of the Commission, comprised of the Commissioners from Pakistan and India, are set out in Article VIII of the Treaty.

125.2 The Neutral Expert, a "highly qualified engineer",[96] is charged with resolving technical differences that arise on a Plant-by-Plant basis, subject to a tightly constrained competence remit set out in Part 1 of Annexure F.

125.3 Inter-State negotiations serve as a possible bridge between the Commissioners and a Court of Arbitration, and are referred to solely in Articles IX(4) and (5).

125.4 A Court of Arbitration is the ultimately dispositive third-party dispute settlement mechanism under Article IX, presumptively competent in respect of any and all disputes that may arise under the Treaty that come within the scope of the three Article IX(1) questions. Court decisions apply and, in contrast to Neutral Expert decisions, are binding beyond the narrow confines of any Plant-specific disagreement from which they may emerge.

126. Article IX falls to be interpreted not only by reference to its own terms but also by reference to the wider context of the Treaty and in particular to the terms of Annexures F and G.

127. Most points of disagreement between the Parties have historically been resolved within the Commission. Over the six-plus decades that the Treaty has been in force, the Parties have resorted to the third-party settlement mechanisms under Article IX on only three occasions: (a) the 2007 *Baglihar* Neutral Expert Determination; (b) the 2013 arbitral proceedings before the

[96] Indus Waters Treaty 1960, **PLA-0001**, Annexure F, Paragraph 4.

Kishenganga Court; and (c) the present case, in which duelling Court of Arbitration and Neutral Expert proceedings have been instituted.

2. The interpretation and application of the Treaty

128. Paragraph 29 of Annexure G contains an applicable law clause relevant to the competence of a Court of Arbitration (emphasis added):

> "Except as the Parties may otherwise agree, the law to be applied by the Court shall be this Treaty and, *whenever necessary for its interpretation or application, but only to the extent necessary for that purpose*, the following in the order in which they are listed:
>
> (a) International conventions establishing rules which are expressly recognized by the Parties.
>
> (b) Customary international law."

129. As the emphasised language makes clear, while a Court seised of a dispute concerning the interpretation or application of the Treaty may look beyond the terms of the Treaty, its latitude to do so is confined. It may only look beyond the Treaty when this is "necessary" for its interpretation or application, and then "only to the extent necessary for that purpose". In the wider scheme of treaty interpretation, and the general rule of interpretation reflected in Article 31 of the Vienna Convention on the Law of Treaties ("**VCLT**"),[97] this is an unusually confining applicable law clause that befits an agreement that is akin to a treaty of peace or a treaty that settles a boundary between States with an uneasy relationship. It is not an applicable

[97] Vienna Convention on the Law of Treaties (adopted on 22 May 1969 and opened for signature on 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 ("**VCLT**"), **PLA-0005**. While neither Pakistan nor India is a party to the VCLT, it is uncontroversial that Article 31 of the VCLT, which states the general rule of treaty interpretation, reflects customary international law and is thus presumptively applicable to the exercise of treaty interpretation. Article 31 provides:

> "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
> 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.
> 4. A special meaning shall be given to a term if it is established that the parties so intended."

law clause that pulls in the direction of evolutionary interpretation. The law to be applied by the Court when it comes to the settlement of disputes "shall be this Treaty", save only when wider recourse is necessary for fulfilment of the Court's dispute settlement task.

130. That Paragraph 29 is located in Annexure G warrants comment. There is no such applicable law clause, or indeed any applicable law clause at all, in Annexure F, which addresses the competence of the Neutral Expert. The absence of such a clause in Annexure F underscores the markedly different character of the two mechanisms. The Neutral Expert, in keeping with his background as a "highly qualified engineer",[98] is competent to determine only a prescribed universe of *technical* differences that may arise with respect to specific Plants. While a Neutral Expert "may have to interpret the Treaty in the process of rendering a determination on the matters before him",[99] the lack of an applicable law clause in Annexure F makes clear that a Neutral Expert's interpretive competence is confined to technical matters that do not engage questions of the law of the Treaty or of its systemic application.

131. While the *Kishenganga* Court was "guided by the fundamental rules on treaty interpretation" set out in Article 31(1) of the VCLT,[100] it was also careful to observe that the Treaty "expressly limits the extent to which the Court may have recourse to, and apply, sources of law beyond the Treaty itself."[101] In the *Kishenganga* Court's view, recourse to customary international law (for example, in the field of international environmental law), would not be permissible if the result would be to "negate rights expressly granted in the Treaty" as this would "no longer be 'interpretation or application' of the Treaty but the substitution of customary law in place of the Treaty".[102]

132. So far as reference to the *travaux préparatoires* ("***travaux***") and other supplementary means of interpretation are concerned, the Parties before the *Kishenganga* Court, and the Court itself, each made reference to the Treaty's *travaux*, indicating that there was no disagreement as to the applicability of the rule reflected in Article 32 of the VCLT that permits such recourse in certain specified circumstances.[103] The weight, utility and completeness of the *travaux* as

[98] Indus Waters Treaty 1960, **PLA-0001**, Annexure F, Paragraph 4.
[99] *Kishenganga* arbitration, Partial Award, **PLA-0003**, ¶ 490.
[100] *Id.*, ¶¶ 401, 406.
[101] *Kishenganga* arbitration, Final Award, **PLA-0004**, ¶ 111.
[102] *Id.*, ¶ 112, citing *Kishenganga* arbitration, Partial Award, **PLA-0003**, ¶ 446.
[103] See e.g. *Kishenganga* arbitration, Partial Award, **PLA-0003**, ¶¶ 175–189, 373, 504.

regards the issues engaged by the current phase of the Court's proceedings are addressed in **Appendix C** hereto.

133. Against this background, Pakistan turns to address the various moving parts of Article IX.

C. The resolution of disagreements by the Commission

134. Article IX(1) provides that any question which arises between the Parties "shall first be examined by the Commission, which will endeavour to resolve the question by agreement." The Commission is the Permanent Indus Commission established by Article VIII of the Treaty. Each Party's Commissioner will "ordinarily be a high-ranking engineer competent in the field of hydrology and water-use".[104] They are the representative of their respective Governments for all matters arising out of the Treaty and serve as the regular channel of communication on all matters relating to the implementation of the Treaty.[105] Article VIII(5) provides that the Commission shall meet at least once a year. Pursuant to Article VIII(8), the Commission is required to submit an annual report to the two Governments and may submit such other reports "as it may think be desirable." The majority of the Commission's discussions – including the ventilation of questions between the Commissioners – takes place via correspondence.

135. In this connection, when a question arises between the Parties, Article IX(1) requires that the Commission "endeavour to resolve [it] by agreement" before further action can be taken. Prior engagement by the Commission is therefore presumptively a gateway to the resort to other mechanisms under Article IX.

136. Such obligations are commonly found in treaties, including those relating to transboundary watercourses. In the *Lac Lanoux (Spain/France)* arbitration, for example, the tribunal held that such obligations did not impose a duty on the treaty parties to reach agreement, only that they had to endeavour to do so. In setting out the circumstances in which this requirement would not be met, the *Lac Lanoux* tribunal stated:

[104] Indus Waters Treaty 1960, **PLA-0001**, Article VIII(1).
[105] *Id*.

> "[T]he reality of the obligations thus undertaken is incontestable and sanctions can be applied in the event, for example, of an unjustified breaking off of the discussions, abnormal delays, disregard of the agreed procedures, systematic refusals to take into consideration adverse proposals or interests, and, more generally, in cases of violation of the rules of good faith."[106]

137. In the particular context of Article IX(1), moreover, the obligation to endeavour to resolve questions by agreement must be read against the requirement in Article VIII(4)(b) that the Commissioners must attempt to settle such questions "promptly". It follows that Article IX(1) does not contemplate a process of deliberations between Commissioners over months or years, and indeed many of the issues that arise under the Treaty could not tolerate such extended timelines. If "prompt" resolution within the Commission is not possible, the Parties are free to resort to the other settlement mechanisms of Article IX.

D. The settlement of differences by a Neutral Expert under Article IX(2) and Annexure F

138. Where a question cannot be resolved in the Commission under Article IX(1), "a difference will be deemed to have arisen".[107] At this point, absent agreement in the Commission as to how the difference should be resolved, an assessment is required. If the difference falls within the scope of the provisions of Part 1 of Annexure F, it may in principle be dealt with by a Neutral Expert, subject to a Neutral Expert being expressly requested by a Commissioner. If a difference does not come within the scope of Part 1 of Annexure F, or if an already appointed Neutral Expert considers that the difference should be treated as a dispute, "a dispute will be deemed to have arisen", which is to be settled in accordance with the provisions of Articles IX(3)–(5). The process by which these options emerge is set out in Article IX(2), which provides:

> "If the Commission does not reach agreement on any of the questions mentioned in Paragraph (1), then a difference will be deemed to have arisen, which shall be dealt with as follows:
>
> (a) Any difference which, in the opinion of either Commissioner, falls within the provisions of Part 1 of Annexure F shall, at the request of either Commissioner,

[106] *Lake Lanoux Arbitration (France v Spain)*, Award (1957) XII RIAA 281; 24 ILR 101, **PLA-0006**, p. 128.
[107] Indus Waters Treaty 1960, **PLA-0001**, Article IX(2), *chapeau.*

be dealt with by a Neutral Expert in accordance with the provisions of Part 2 of Annexure F;

(b) If the difference does not come within the provisions of Paragraph (2)(a), or if a Neutral Expert, in accordance with the provisions of Paragraph 7 of Annexure F, has informed the Commission that, in his opinion, the difference, or a part thereof, should be treated as a dispute, then a dispute will be deemed to have arisen which shall be settled in accordance with the provisions of Paragraphs (3), (4) and (5);

Provided that, at the discretion of the Commission, any difference may either be dealt with by a Neutral Expert in accordance with the provisions of Part 2 of Annexure F or be deemed to be a dispute to be settled in accordance with the provisions of Paragraphs (3), (4) and (5), or may be settled in any other way agreed upon by the Commission."

139. Article IX(2) is densely drafted, but its meaning is clear on close inspection. Read together, the *chapeau* and *chaussette* of Article IX(2) provide that where a difference emerges from the Commission, the Commissioners – acting together – can agree on the method of its resolution: either by a Neutral Expert or as a dispute to be resolved by the means set out in Articles IX(3)–(5), or indeed by such other methods as the Commission sees fit. Where the Commissioners do not agree on how the difference is to be resolved, the provisions of Articles IX(2)(a) and (b) apply.

140. Under Article IX(2)(a), a difference may, "in the opinion of either Commissioner", be deemed to fall within Part 1 of Annexure F. The issues listed in this Part concern technical aspects of the Treaty, including such matters as hydrology,[108] water engineering,[109] and Plant construction.[110] By Article IX(2)(a), these issues may be dealt with by a Neutral Expert, who must be "a highly qualified engineer".[111] A difference can only be resolved by a Neutral Expert on a case-by-case or Plant-specific basis, however, and his or her determination will have no wider systemic implications.[112]

[108] *Id.*, Annexure F, Paragraph 1(2) ("Determination of the boundary of the drainage basin of The Indus or The Jhelum or The Chenab for the purposes of Article III(2)").
[109] *Id.*, Annexure F, Paragraph 1(9) ("Determination of schedule of releases from Conservation Storage under the provisions of Paragraph 8 of Annexure C").
[110] *Id.*, Annexure F, Paragraph 1(11) ("Questions arising under the provisions of Paragraph 7, Paragraph 11 or Paragraph 21 of Annexure D").
[111] *Id.*, Annexure F, Paragraph 4.
[112] See, for example, *Id.*, Article IX(2)(b) and Annexure F, Paragraph 11 (providing that a Neutral Expert determination is only "final and binding, in respect of the particular matter on which the decision is made"). See further *Kishenganga* arbitration, Partial Award, **PLA-0003**, ¶ 470 ("The effect of a neutral expert's determination

141. Article IX(2)(b) and Paragraph 7 of Annexure F require a Neutral Expert to address in a preliminary procedure the reach of his or her competence in the event that the Commission is unable to agree whether a given difference asserted by one of the Commissioners falls within the scope of Part 1 of Annexure F. In this phase, the Neutral Expert may conclude that a given difference: (a) does indeed fall within the scope of Part 1 of Annexure F; (b) does not so fall, and should therefore be treated as a dispute; or (c) is in part a difference within the scope of Part 1 of Annexure F and in part to be treated as a dispute. The appropriate modality of settlement that follows from this decision will depend on the substance of the decision.

142. In this regard, Paragraphs 11 and 13 of Annexure F warrant reference. Paragraph 11 provides (*inter alia*) that "[t]he decision of the Neutral Expert on all matters *within his competence* shall be final and binding …" This, though, is subject to Paragraph 13, which provides:

> "Without prejudice to the finality of the Neutral Expert's decision, if any question (including a claim to financial compensation) which is not within the competence of a Neutral Expert should arise out of his decision, that question shall, if it cannot be resolved by agreement, be settled in accordance with the provisions of Article IX (3), (4) and (5)."

143. These provisions are of considerable importance, for (at least) five reasons. First, they make clear that the final and binding *res judicata* effect of Neutral Expert decisions operates only with respect to decisions on "matters within his competence". Second, they make clear that any dispute over competence that arises from a decision by the Neutral Expert must, in the absence of the agreement of the Parties, be settled by the other settlement modalities of Article IX, of which a Court of Arbitration is ultimately the authoritative voice. Third, this dispositive settlement competence necessarily applies not only to final decisions but also to both interlocutory decisions and procedural decisions, as any such decision may raise question of *ultra vires* decision-making on the part of the Neutral Expert.[113] Fourth, these provisions underscore that the competence of the Court reaches parts of the Treaty that the competence of the Neutral Expert cannot reach. Fifth, these provisions also point to the imperative of coherent coordination, whether active or passive, between a Court and Neutral Expert if engaged in

is restricted to the elements of the design and operation of the specific hydro-electric plant considered by that Expert").

[113] (Draft) Transcript, Neutral Expert First Meeting (*Indus Waters*), Day 1, **Exhibit P-0040**, pp. 21–22, lines 18–8 (Mr Singh); pp. 139–140, lines 14–3 (Sir Daniel Bethlehem KC).

parallel in relation to overlapping issues as, ultimately, issues that may arise about the reach of the decision-making competence of the latter may land on the doorstep of the former.

144. Returning to the interpretation of Article IX(2)(a), India's Second Objection to the competence of the Court (addressed in **Section IV** below) is that disagreement over a question *must* be referred to a Neutral Expert if in the opinion of either Commissioner it falls within Part 1 of Annexure F. This contention would effectively allow one Commissioner to exclude recourse to a Court of Arbitration merely by expressing an opinion that a disagreement constitutes a difference that comes within the scope of Part 1 of Annexure F.

145. India has tried this argument before and failed. As the *Kishenganga* Court observed:

> "Under Article IX(2)(a), the respective Commissioners exercise two distinct functions: (1) a Commissioner may have an opinion as to whether a difference falls among those that may be referred to a neutral expert; and (2) a Commissioner may request that a difference be referred to such an expert. Viewed in terms of the former function, a Commissioner's opinion as to the proper treatment of the difference can be read to create a procedural requirement: a difference must be referred to a neutral expert if 'in the opinion of either Commissioner' it falls within the relevant portion of Annexure F. Alternatively, and viewed in terms of the Commissioners' latter function, the Commissioner's request could be read to act only as a triggering mechanism: a difference that is objectively within the enumerated list shall be referred to a neutral expert 'at the request of either Commissioner.' …
>
> [T]he conjunction within Article IX(2)(a) of both references manifests the Parties' intention for the Commissioners to exercise a dual role under that Article, both as the initiators of the neutral expert process and a part of a mechanism that requires recourse to a neutral expert in certain circumstances. Article IX(2)(a) thus requires that a difference be referred to a neutral expert if either Commissioner believes that it relates to one of the identified technical matters and prefers that it be resolved by a neutral expert. *This requirement only becomes effective, however, if a request for the appointment of a neutral expert is actually made. It is insufficient for a Commissioner merely to express the view that a difference would, at some point, be an appropriate matter for a neutral expert.*"[114]

[114] *Kishenganga* arbitration, Partial Award, **PLA-0003**, ¶¶ 478–479 (emphasis added). See also ¶ 481: "Article IX(2)(a) ensures the appointment of a neutral expert where a Party actually requests the appointment of the same. It does not serve to impose—for its own sake—an additional procedural hurdle to access to a court of arbitration". The *Kishenganga* Court referred to the *travaux préparatoires* of the Treaty in order to confirm the meaning resulting from its good faith interpretation of Art IX(2)(a) in accordance with the ordinary meaning to be given to its terms in their context: see *id.*, ¶¶ 477, 479.

146. The reason for this is that technical issues under the Treaty are not the exclusive province of a Neutral Expert – an issue that arises in connection with India's Third Objection.[115] A Court is equally competent to address such matters and indeed – given its mixed legal and technical composition – may be even better suited to do so. This issue was addressed by *Kishenganga* Court in the following terms:

> "[N]othing in the Treaty requires that a technical question listed in Part 1 of Annexure F be decided by a neutral expert rather than a court of arbitration—except where a Party so requests (and then only if the neutral expert considers himself competent). With the exception of Article IX(2)(a), which the Court has considered and discussed in the context of India's first objection, recourse to a neutral expert is expressed throughout the Treaty in permissive—not mandatory—terms. Paragraph 1 of Annexure F, which sets forth the questions for which a neutral expert is competent, states that a 'Commissioner may ... refer to a Neutral Expert any of the following questions.' But nowhere does the Treaty stipulate that only a neutral expert may consider such matters. … Had the Parties so desired, the establishment of a Court could readily have been conditioned on a purely objective test of whether a dispute fell outside the list of identified technical questions; yet the Treaty does not adopt this approach. …
>
> The very composition of a court of arbitration also points to its competence in technical matters. In general, the skills or qualifications required of the members of a commission or tribunal represent a probative indication of the role the Parties intended that body to perform. Here, one of the Court's umpires is required to be a 'highly qualified engineer,' and, indeed, nothing would stop the Parties from appointing engineers as their Party-appointed arbitrators or as the Chairman of the Court."[116]

147. The procedure by which a Commissioner may request a Neutral Expert is set out in Part 2 of Annexure F. This provides that a request for the appointment of a Neutral Expert is only made after: (a) the requesting Commissioner has notified the other Commissioner of his or her intention to request a Neutral Expert; (b) the Commissioners, over the following fortnight, attempt to prepare a joint statement of points of difference; and (c) the requesting Commissioner (upon preparation of the joint statement or after the passage of two weeks) makes the request to the relevant appointing authority and provides a copy of the request to the other Commissioner.[117]

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[115] See below **Section IV.C**.
[116] *Kishenganga* arbitration, Partial Award, **PLA-0003**, ¶¶ 484, 486 (emphasis added).
[117] Indus Waters Treaty 1960, **PLA-0001**, Annexure F, Paragraphs 5(a)-(d).

148. The significance of this is plain, and the consequences for a key element of India's competence challenge fatal. The signalled intention of India's Commissioner, in his letter dated 11 August 2016, to request the appointment of a Neutral Expert can at its very highest only be taken to be an initial step in the process of requesting a Neutral Expert. It does not constitute an "actual request". As the *Kishenganga* Court concluded: "It is insufficient for a Commissioner merely to express the view that a difference would, at some point, be an appropriate matter for a neutral expert."[118]

149. It follows from this that, unless and until a request for the appointment of a Neutral Expert is formally and actually made, the question is consummately amenable to settlement as a dispute in accordance with Articles IX(3)–(5), including by a Court of Arbitration.[119] It further follows that there is no requirement that a requesting Commissioner first act to have a Neutral Expert determine a difference for purposes of then asserting that the difference must be deemed to be a dispute. An opinion of a Neutral Expert under Paragraph 7 of Annexure F that a difference (or a part thereof) should be treated as a dispute is clearly not the only gateway under the Treaty to the seisin, empanelment and competence of a Court under Article IX.

E. The settlement of disputes: Articles IX(3)–(5) and Annexure G

150. Articles IX(3)–(5) establishes a procedure for the settlement of disputes. Article IX(3) indicates the first step in the process: a report by the Commission to the Parties stating, *inter alia*, "the points on which the Commission is in agreement and the issues in dispute". Article IX(4) then provides for inter-State negotiations. Article IX(5) then addresses circumstances in which the dispute may be referred to a Court of Arbitration. By its Fourth Objection, India asserts that Pakistan has not met the requirements of these provisions.[120]

[118] *Kishenganga* arbitration, Partial Award, **PLA-0003**, ¶ 479. See also at ¶ 481.
[119] A dispute may also, and moreover, arise when a Neutral Expert refers a difference before him back to the Commission to be dealt with in whole or part as a dispute on the basis that it does not upon inspection fall within Part 1 of Annexure F: Indus Waters Treaty 1960, **PLA-0001**, Annexure F, Paragraph 7.
[120] See below, **Section IV.D**.

1. Reporting by the Commission: Article IX(3)

151. Article IX(3) provides as follows:

> "As soon as a dispute to be settled in accordance with this and the succeeding paragraphs of this Article has arisen, the Commission shall, at the request of either Commissioner, report that fact to the two Governments, as early as practicable, stating in its report the points on which the Commission is in agreement and the issues in dispute, the views of each Commissioner on these issues and his reason therefor."

152. This provision puts the Commission at the centre of the process for the settlement of disagreements under the Treaty. As with Article IX(2)(a) and the referral of a difference to a Neutral Expert, it provides that this process may be started at the initiative of one of the Commissioners, who may request that the Commissioners jointly report the fact of the dispute and the details of the same to the Parties for further action. That joint report is not mandatory, however, as Article IX(4) makes clear.

2. Settlement of a dispute by inter-State negotiations: Article IX(4)

153. Article IX(4) provides as follows:

> "Either Government may, following receipt of the report referred to in Paragraph (3), or if it comes to the conclusion that the report is being unduly delayed in the Commission, invite the other Government to resolve the dispute by agreement. In doing so, it shall state the names of its negotiators and their readiness to meet with the negotiators to be appointed by the other Government at a time and place to be indicated by the other Government. To assist in these negotiations, the two Governments may agree to enlist the services of two or more mediators acceptable to them."

154. As the express terms of this provision make clear, recourse to negotiations is permissive and discretionary, not mandatory – "Either Government *may* … *invite* the other Government …". Inter-State negotiations (including with the good offices of mediators) may be pursued but there is no requirement to do so. An invitation to negotiate may be made upon receipt of the Commission's Article IX(3) report by the Parties or, if the report is being unduly delayed, at a Party's request.

155. The language "if the report is being unduly delayed" is important as it makes clear, contrary to position taken by India, that an Article IX(3) report is *not* a prerequisite to negotiation. A Party may request negotiations if and when it comes to the conclusion that negotiations would be useful and appropriate. This follows also from the purpose of the Article IX(3) report, which is evidently to assist the two Governments in understanding what issues divide their respective Commissioners. If, however, the Parties' disagreement is already well crystallised, perhaps after years of exchanges (as in this case), a delay in the submission of the Article IX(3) report cannot operate as a veto on an invitation to negotiate.

156. Clauses like this, which give each Treaty party a discretionary power, are common in international law. As the International Court of Justice ("**ICJ**") held in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, they grant States "a very considerable discretion" in their implementation.[121] The essential consideration is that the exercise of discretion must not be arbitrary or abusive.[122]

3. The settlement of disputes by a Court of Arbitration: Article IX(5)

157. The final step in the Article IX dispute settlement framework is Article IX(5) – which sets out the conditions under which a Party is permitted to request arbitration of a dispute before a Court of Arbitration. This provides:

> "A Court of Arbitration shall be established to resolve the dispute in the manner provided by Annexure G
>
> (a) upon agreement between the Parties to do so; or
>
> (b) at the request of either Party, if, after negotiations have begun pursuant to Paragraph (4), in its opinion the dispute is not likely to be resolved by negotiation or mediation; or
>
> (c) at the request of either Party, if, after the expiry of one month following receipt by the other Government of the invitation referred to in Paragraph (4), that Party

[121] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, Judgment [2008] ICJ Rep 177, **PLA-0007**, ¶ 145.
[122] *Immunities and Criminal Proceedings (Equatorial Guinea v France)*, Judgment [2020] ICJ Rep 300, **PLA-0008**, ¶ 73.

> comes to the conclusion that the other Government is unduly delaying the negotiations."

158. Article IX(5) allows a dispute to be submitted to a Court of Arbitration in three circumstances: (a) if the Parties agree; (b) at the request of either Party after Article IX(4) negotiations have commenced, if in the opinion of that Party the dispute is "not likely" to be resolved by negotiation or mediation; or (c) at the request of a Party where, a month having elapsed after the other Party has been invited to enter into Article IX(4) negotiations, the requesting Party "comes to the conclusion" that the other Party is delaying those negotiations.

159. The inclusion, in Articles IX(5)(b) and (c), of discretionary language indicates that these provisions are similar to Article IX(4), and not akin to the obligation on the Commissioners to endeavour to resolve questions by agreement in Article IX(1). Put another way, in order for a Party to fulfil the requirements of these provisions, it is not necessary that Article IX(4) negotiations be objectively exhausted or futile.[123] Indeed, such an interpretation could not sensibly prevail as its effect would be to give to a putative respondent the absolute ability to frustrate resort to arbitration simply by inviting the other Party to continue negotiations. What is required under Article IX(5)(b) and (c) is for a Party to come in good faith to an "opinion" (or "conclusion") that "the dispute is not likely to be resolved by negotiations" or that the other Party is "unduly delaying" them.

160. Once the conditions for the fulfilment of Article IX(5) have been met, a Party may request the constitution of a Court of Arbitration. The moment that this occurs is established with precision in Paragraphs 2 and 3 of Annexure G. Paragraph 2(b) provides as follows:

> "The arbitration proceeding may be instituted … at the request of either Party to the other in accordance with the provisions of Articles IX(5)(b) or (c). Such request shall contain a statement setting forth the nature of the dispute or claim to be submitted to the arbitration, the nature of the relief sought and the names of the arbitrators appointed under Paragraph 6 by the Party instituting the proceeding."

161. Paragraph 3, in turn, provides in relevant part that "[t]he date … on which the request referred to in Paragraph 2(b) is received by the other Party, shall be deemed to be the date on which the proceeding is instituted". At this point, so long as the underlying difference is not

[123] See ¶¶ 154-155 *supra*.

already "being dealt with" by a Neutral Expert so as to engage Article IX(6), the procedure indicated in Article IX is at an end and the provisions of Annexure G take over to require the empanelment of a Court and the orderly settlement of the dispute.

F. Interpretation and application of Article IX(6)

162. The interpretation and application of Article IX(6) has already been addressed in passing above.[124] It addresses a situation in which a Neutral Expert is "deal[ing] with" a difference, and the impact thereof on Articles IX(3)–(5). India's objections to the competence of the Court place heavy reliance on it. Article IX(6) provides:

> "The provisions of Paragraphs (3), (4) and (5) shall not apply to any difference while it is being dealt with by a Neutral Expert."

163. This provision means that while a Neutral Expert is dealing with a given difference, that same matter cannot be dealt with as a dispute.

164. As a preliminary matter, it is axiomatic that Article IX(6) can only operate in circumstances in which (a) a request for the appointment of a Neutral Expert has been formally and actually made, in accordance with the procedural requirements of Paragraph 5 of Annexure F, and (b) that request is valid for purposes of the engagement of the Neutral Expert. It is also axiomatic that the provision can only operate where the question or questions purportedly being dealt with by the Neutral fall, at least on the basis of a *prima facie* appreciation, within the scope of a Neutral Expert's competence under Part 1 of Annexure F. If, for example, a Commissioner formally and actually made a request for the appointment of a Neutral Expert, but one that raised a question of financial compensation, which it sought to characterise as a difference, the effect of such a request could not be to oust the jurisdiction of a Court of Arbitration given that Paragraph 2 of Annexure F states explicitly that claims to financial compensation "shall not be referred to a Neutral Expert". At the very least, therefore, before any other issue arises for consideration, the operation of Article IX(6) must be contingent on a *prima facie* appreciation that the difference of which the Neutral Expert is purportedly dealing with in one that comes within his competence under Part 1 of Annexure F.

[124] See ¶ 117 *supra*.

165. Moving beyond these threshold issues, Article IX(6) is curiously worded. The *travaux* of the Treaty reveal that it appeared very late in the drafting process, and without explanation.[125] Prior to these proceedings, it does not appear to have been the subject of any relevant consideration, not having been addressed in either the *Baglihar* Determination or the *Kishenganga* arbitration. The interpretation and application of the provision must therefore turn on its terms alone, having regard to the applicable law clause in Paragraph 29 of Annexure G.[126]

166. Article IX(6) appears to admit of the possibility that a Commissioner may make a formal and actual request that a dispute be referred to a Neutral Expert to be dealt with as a difference at any point (a) during the reporting process under Article IX(3), (b) during negotiations pursuant to Article IX(4), or (c) during the process of referring a dispute to arbitration under Article IX(5). On this reading, Article IX(6) could therefore prevent a Party from fulfilling the conditions for requesting arbitration, given the other Party an effective veto against resort to arbitration.

167. But Article IX(6) is carefully limited. First, and axiomatically, its operation is subject to the threshold conditions noted above – that a request for the appointment of a Neutral Expert has been formally and actually made, that the request is valid for purposes of the engagement of the Neutral Expert, and that the issue(s) in relation to which the Neutral Expert is purportedly engaged fall at least presumptively within the scope of a Neutral Expert's competence under Part 1 of Annexure F.

168. To these threshold requirements, Pakistan adds the requirement of good faith, and its corollary, the principles of abuse of rights and abuse of process, which would preclude a Party from requesting the appointment of a Neutral Expert simply for purposes of obstructing or delaying the constitution or workings of a Court of Arbitration.

169. Second, Article IX(6) can only apply to prevent an arbitration from taking place up to the moment that a request for arbitration is received by the other Party. At that point – having regard to Paragraphs 2 and 3 of Annexure G – arbitral proceedings are deemed to have begun

[125] See **Appendix C**, n. 32.
[126] See ¶¶ 128-131 *supra.*

and a Court of Arbitration seised. Any request by a Commissioner for the appointment of a Neutral Expert under Article IX(2)(a) after that point can have no effect on the jurisdiction and competence of the Court.

170. Third, contrary to India's objections, the express language of Article IX(6) makes it clear that it will only operate while a difference "is being dealt with" by a Neutral Expert.

171. This is unusual language. It does not, quite plainly, say that a request for the appointment of a Neutral Expert precludes the operation of Article IX(3)–(5). It might have done, but did not. The "being dealt with" language must be given meaning, and the ordinary meaning of these words suggests that the clause will only operate at the point at which a Neutral Expert has been identified, appointed and his or her terms of retainer fixed. As the fixing of terms of retainer, in accordance with Paragraph 4 of Annexure F, is the formal and threshold requirement for the engagement of a Neutral Expert, and one that cannot ultimately be held procedurally hostage by either Party, this is the reasonable and appropriate point at which, subject to the other conditions addressed above, a Neutral Expert could be said to be dealing with a difference.[127]

172. Finally, but also of considerable importance, the operation of Article IX(6) must necessarily be confined to situations in which the question that is at the heart of the difference with which the Neutral Expert was dealing is *the same question* that would be engaged by the operation of Article IX(3)–(5). Article IX(6) cannot preclude the operation of Article IX(3)–(5) in respect of different questions, and in particular as regards questions in respect of which a Neutral Expert could never be competent. For example, Article IX(3)–(5) procedures that would engage consideration of Treaty-systemic interpretation and application questions, which could never come within the competence of a Neutral Expert under Part 1 of Annexure F, could not be precluded by operation of Article IX(6).[128] It follows that, even if a Neutral Expert is

[127] Useful but not determinative in this respect are the various definitions of "deal" as an intransigent verb in the *Shorter Oxford English Dictionary on Historical Principles*, vol 1 (OUP, 5th ed. (2002)), **PLA-0009**, p. 609: "Take part in, share or participate in or with, partake of"; "Be concerned with (a thing) in any way; busy or occupy oneself with, esp. with a view to discussion or refutation"; "Take action, act, proceed (in a matter)". See also *Garner's Dictionary of Legal Usage* (OUP, 3rd ed. (2011)), **PLA-0010**, p. 247, referring to the expression as the equivalent of "handle".

[128] *Kishenganga* arbitration, Partial Award, **PLA-0003**, ¶ 490:

> "As the Court understands it, Pakistan has not objected to drawdown flushing on the grounds that it is technically unfeasible at the KHEP (or elsewhere); rather, Pakistan's position is that, irrespective of its technical merits or demerits, drawdown flushing is precluded by the Treaty. This is a legal question and, in

dealing with a difference, a dispute which engages wider questions that do not come within the scope of the Neutral Expert's competence may still be addressed through Articles IX(3)–(5) procedures.

173. Beyond the ordinary meaning of the text, there are also multiple other reasons to read Article IX(6) in this way. First, such a reading is consistent with wider adjudicatory practice to the determination of the jurisdiction of international courts and tribunals. The jurisdiction of courts and tribunals cannot be affected by anything that post-dates seisin.[129] The logic behind this position was described by the ICJ in *Application of the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*:

> "It is easy to see why this rule exists. … If at the date of filing of an application all the conditions necessary for the Court to have jurisdiction were fulfilled, it would be unacceptable for that jurisdiction to cease to exist as the result of a subsequent event. In the first place, the result could be an unwarranted difference in treatment between different applicants or even with respect to the same applicant, depending on the degree of rapidity with which the Court was able to examine the cases brought before it. Further, a respondent could deliberately place itself beyond the jurisdiction of the Court by bringing about an event or act, after filing of an application, as a result of which the conditions for the jurisdiction of the Court were no longer satisfied – for example, by denouncing the treaty containing the compromissory clause. That is why the removal, after an application has been filed, of an element on which the Court's jurisdiction is dependent does not and cannot have any retroactive effect. What is at stake is legal certainty, respect for the principle of equality and the right of a State which has properly seised the Court to see its claims decided, when it has taken all the necessary precautions to submit the act instituting proceedings in time."[130]

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the Court's view, not an indispensable part of the question of "whether or not the design of a Plant conforms to the criteria set out in Paragraph 8," for which a neutral expert would be competent. The Court accepts, of course, that such an expert may have to interpret the Treaty in the process of rendering a determination on the matters put before him. But where a legal issue (such as the permissibility of reservoir depletion) is contested and does not fall within a question identified for the neutral expert, the Court considers that it would be incumbent on such an expert to refer the matter back to the Commission to be handled as a dispute."

[129] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v Yugoslavia)*, Preliminary Objections, Judgment [1996] ICJ Rep 595, **PLA-0011**, ¶ 33; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)*, Preliminary Objections, Judgment [1998] ICJ Rep 9, **PLA-0012**, ¶ 44; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, Preliminary Objections, Judgment [2008] ICJ Rep 412, **PLA-0013**, ¶¶ 79–80.

[130] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, Preliminary Objections, Judgment [2008] ICJ Rep 412, **PLA-0013**, ¶ 80.

174. This reasoning applies also to objections to admissibility: "[t]he critical date for determining the admissibility of an application is the date on which it is filed".[131] In *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)*, the UK objected to Libya's claims on the basis that, after they had been filed, intervening resolutions of the UN Security Council rendered these claims inadmissible. The ICJ disagreed:

> "The date, 3 March 1992, on which Libya filed its Application, is in fact the only relevant date for determining the admissibility of the Application. Security Council resolutions 748 (1992) and 883 (1993) cannot be taken into consideration in this regard since they were adopted at a later date. […] In the light of the foregoing, the Court concludes that the objection to admissibility derived by the United Kingdom from Security Council resolutions 748 (1992) and 883 (1993) must be rejected, and that Libya's application is admissible."[132]

175. While this rule is not immutable, it is – as the ICJ makes clear – necessary for the functioning of any international court or tribunal. If it did not exist, States would be able to denounce the jurisdiction of a court or tribunal *ex post facto*, rendering promises of dispute settlement meaningless. The principle applies equally with respect to objections to the competence of the Court.

176. Second, to read Article IX(6) any other way would give rise to potentially absurd consequences and a risk of abuse as it would open the door to Article IX(6) being used to stymie a valid resort to arbitration. The possibility of a Court proceeding, or the completion of a validly-commenced Court proceeding, could thus be excluded by the conduct of one Party alone.

177. Gamesmanship in the operation of the settlement mechanisms of the Treaty is not what the Treaty drafters intended, as the Preamble, with its reference to "a cooperative spirit", makes clear. In the circumstances of this case, there can be no basis for construing and giving effect to Article IX(6) in the way that India asserts. The correct reading of Article IX(6) is that it

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[131] *Border and Transborder Armed Actions (Nicaragua v Honduras)*, Jurisdiction and Admissibility, Judgment [1988] ICJ Rep 69, **PLA-0014**, ¶ 66.
[132] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)*, Preliminary Objections, Judgment [1998] ICJ Rep 9, **PLA-0012**, ¶¶ 44–45.

prevents a Party from requesting arbitration in circumstances in which a Neutral Expert is already engaged and dealing with a difference, and then only to the extent that the difference in question is the same as the dispute that would be engaged by the Article IX(3)–(5) procedures. If at the point at which a request for arbitration is made there is no extant Neutral Expert procedure, the operation of Article IX(6) is *per se* excluded.

* * *

IV. INDIA'S OBJECTIONS TO THE COMPETENCE OF THE COURT

178. Pakistan's affirmative case on the competence of the Court is set out in Section II above. That discussion is the foundation for Pakistan's response to India's objections to the Court's competence, and to its constitution. Although India's objections have not been raised in submissions addressed to the Court directly, they have been formally advanced in considered detail in communications from India to the World Bank, the Neutral Expert and Pakistan, including in the following:

178.1 the 21 December 2022 Letter and Explanatory Note "enunciating [India's] stand based on the clear stipulations in the Treaty";[133]

178.2 Letter No Y-18012/1/2020-Indus dated 11 February 2023 (the "**11 February 2023 Letter**");[134] and

178.3 Letter No Y-18012/1/2020-Indus dated 21 February 2023 (the "**21 February 2023 Letter**").[135]

179. India's arguments in these three documents are overlapping and repetitive, as well as vague and legally imprecise. For sake of clarity, and in an effort to assist the Court, Pakistan has identified and sought to distil five apparent objections to the Court's constitution and competence from India's correspondence. Should the Court, through its own review, identify any points that Pakistan may inadvertently have overlooked or misconstrued, Pakistan stands ready to supplement these submissions to address them. Particularly given India's absence from the Court's proceedings to this point, and having regard to the systemic importance of the Court's decision on this matter, Pakistan takes seriously its responsibility to inform the Court as fully as it can of the issues that should properly be before the Court for purposes of its decision.

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[133] 21 December 2022 Letter; 21 December 2022 Explanatory Note, **Exhibit P-0001**, ¶ 2.
[134] Letter No. Y-18012/1/2020-Indus from India to the Neutral Expert dated 11 February 2023, **Exhibit P-0002**.
[135] Letter No. Y-18012/1/2020-Indus from India to the Neutral Expert dated 21 February 2023, **Exhibit P-0003**. India repeated some of these objections in the First Meeting of the Neutral Expert, held on 27-28 February 2023. See, e.g., (Draft) Transcript, Neutral Expert First Meeting (*Indus Waters*), Day 1, **Exhibit P-0040**, p. 169, lines 12-21 (Shri Kumar).

180. To further assist the Court, Pakistan has produced an annotated version of India's 21 December 2022 Letter and Explanatory Note to allow the Court to identify more easily, by way of *précis*, Pakistan's response to India's arguments as India has advanced them. This annotated text is at **Appendix D** hereto. As Pakistan's red text annotations are only headline points that set out the essential elements of Pakistan's Response, it is these submissions that are controlling and to which the Court should have regard.

181. India's objections will be addressed in the following order, broadly reflecting the temporal sequence of the objections:

181.1 **India's First Objection** is that the Court has not been validly seised because a Neutral Expert is dealing with the situation. The essence of this objection is that Article IX(6) of the Treaty is triggered because a Neutral Expert was "in the process of dealing with the differences between the parties" before the Court was seised. This objection fails on both the facts and the law. At the time the Court was seised, a Neutral Expert was not even formally requested by India, let alone "dealing with" any differences between the Parties.

181.2 **India's Second Objection** is that Court has not been validly seised because a dispute has not arisen. This objection concerns the process by which a dispute emerges under Article IX(2). The facts show that no request for a Neutral Expert under Article IX(2)(a) had been "actually made" at the point at which Pakistan's Commissioner identified a dispute under Article IX(3) or at the point when Pakistan instituted arbitral proceedings under Article IX(5) and Annexure G of the Treaty. At all material times, therefore, a dispute between the Parties existed by automatic operation of Article IX(2)(b).

181.3 **India's Third Objection** is that the disputes raised by Pakistan's Request for Arbitration are "identical" to those raised by India before a Neutral Expert as differences, that the questions engaged are "purely technical" in nature, and that they fall within the competence of the Neutral Expert, such that there is no "necessity" for a Court of Arbitration to be established. This argument fails, however, as the "necessity" to establish a Court of Arbitration pursuant to Paragraph 1 of Annexure G arises when a valid request for arbitration has been transmitted to and received by the other Party.

Even if this is not the case, however, the issues put to the Court for settlement by Pakistan are largely systemic questions of treaty interpretation and application, even if they are brought into sharper focus through the lens of the design specifications of the KHEP and the RHEP. As set out in **Section III**,[136] the Neutral Expert has no competence to address such matters. There is accordingly no subject-matter identity between the key interpretative issues with which the Court is seised and the narrow subset of application issues that India has purported to put before the Neutral Expert.

181.4 **India's Fourth Objection** is that the Court has not been validly seised because Article IX(3), (4) and (5) have not been triggered. It claims, further, that Pakistan has not complied with these provisions in any event. Pakistan's position is that these provisions have been triggered by a dispute (a matter also addressed in response to the Second Objection) and, as the factual record shows, Pakistan has meticulously fulfilled the applicable Treaty requirements.

181.5 **India's Fifth Objection** is that the Court has been illegally constituted and is not competent to rule on its jurisdiction and competence. Paragraph 11 of Annexure G is clear, however, that the Court is "competent to transact business … when all three umpires and at least two arbitrators are present." Pursuant to Paragraph 16 of Annexure G, this includes *compétence de la compétence*, i.e., competence to "decide all questions relating to its competence". India's non-participation in the proceedings does not and cannot prevent the continuity of proceedings or stop the Court from transacting business.

182. In what follows, Pakistan addresses each of India's objections in turn in greater detail.

A. India's First Objection: the Court has not been validly seised because a Neutral Expert is dealing with the situation

183. India's First Objection rests on Article IX(6), which provides that "[t]he provisions of Paragraphs (3), (4) and (5) shall not apply to any difference while it is being dealt with by a Neutral Expert".

[136] See ¶ 130 *supra*.

184. The First Objection relies on three assumptions:

184.1 First, as a temporal matter, the First Objection assumes that Article IX(6) is triggered because a Neutral Expert was "in the process of dealing with the differences between the parties" before the Court of Arbitration was seised.[137] Article IX(6), India says, "does not permit the commencement of arbitral proceedings on a set of issues until the Neutral Expert concludes his deliberations on these issues".[138] In India's view, "as soon as either party requests an NE to be appointed, the provisions of Paragraphs (3), (4) and (5) are on a moratorium, and the NE resolution process takes primacy and precedence".[139] In its Explanatory Note, India asserts that the correct chronology of events is that Pakistan's Commissioner made a request to appoint a Neutral Expert on 3 July 2015; this request "remained live"; and India's Commissioner made a similar request on 11 August 2016.[140] As addressed in **Section II** above,[141] however, and as elaborated further below, the Pakistan Commissioner's request for a Neutral Expert did not subsist beyond 25 February 2016, when it was formally and expressly revoked in correspondence. Further, India's Commissioner made no dispositive request to appoint a Neutral Expert on 11 August 2016, and whatever signalling of intention to do so may have been made by India's Commissioner in his 11 August 2016 correspondence, that could not in any event have built on the lapsed and revoked request by Pakistan's Commissioner made more than 12 months prior.

184.2 Second, as an interpretative matter, the First Objection assumes that the Neutral Expert is "dealing with" a difference between the Parties for the purposes of Article IX(6). India asserts that the language of "dealing with" covers the period from when "either party requests an NE to be appointed" until he has "rendered his decision".[142] However, as set out below,[143] the phrase "when it is being dealt with" must mean the stage at which a Neutral Expert has been appointed and his or her terms of retainer

[137] 11 February 2023 Letter, **Exhibit P-0002**, ¶ 11(a).
[138] 21 February 2023 Letter, **Exhibit P-0003**, ¶ 10.
[139] 21 December 2022 Explanatory Note, **Exhibit P-0001**, ¶ 12.
[140] *Id.*, ¶ 16.
[141] See ¶¶ 56, 90 and 98 *supra*.
[142] 21 December 2022 Explanatory Note, **Exhibit P-0001**, ¶ 12.
[143] See also Section III, ¶¶ 144-149 *supra*.

fixed. It is only at that point that he or she could be said to be dealing with the difference of which they are seised.

184.3 Third, the First Objection assumes that the issues between the Parties constituted a "difference" and not a "dispute" and that "[i]t is only in the event that the Neutral Expert concludes that the unresolved questions, wholly or in part, constitute a 'dispute' that a reference to arbitration could arise".[144] This assumption is disproved in Pakistan's response to India's Second Objection (below) – there *is* a dispute between the Parties.

185. India's first assumption relies on a misreading of the factual record and is rebutted by reference to the timeline of events. It is clear that the Court was first seised of the dispute at the point at which Pakistan's Request for Arbitration was received by India on 19 August 2016.[145] Paragraph 3 of Annexure G states that the "date on which the request referred to in Paragraph 2(b) is received by the other Party, shall be deemed to be the date on which the proceeding in instituted."

186. In the First Meeting of the Neutral Expert, India asserted that "the proceedings of the Neutral Expert … were instituted by India on 11th August 2016 and the differences were seized by you, Mr Lino, with your appointment by the World Bank on 13th October 2022".[146] If this is read to mean that a Neutral Expert was seised from 11 August 2016, India is clearly incorrect. On that date, India merely indicated an intention to request a Neutral Expert. In the words of the *Kishenganga* Court, no request for the appointment of a Neutral Expert was "actually made" at this point. Indeed, India did not make an "actual request" until 4 October 2016, more than six weeks after receipt of Pakistan's Request for Arbitration, and thus more than six weeks after the Court of Arbitration had been seised of the dispute, pursuant to Paragraph 3 of Annexure G.[147]

187. India's assertion that Pakistan's request for a Neutral Expert of 25 July 2015 was "live" when Pakistan's Request for Arbitration was filed is also patently without merit, both in fact

[144] 21 December 2022 Explanatory Note, **Exhibit P-0001**, ¶ 20.
[145] Note Verbale No. KA(II)-2/11/2016 from Pakistan to India dated 19 August 2016, **Exhibit P-0034**.
[146] (Draft) Transcript, Neutral Expert First Meeting (*Indus Waters*), Day 1, **Exhibit P-0040**, p. 8, lines 4-8 (Shri Kumar).
[147] See ¶¶ 2, 65 and 161 *supra*.

and law. Indeed, it is undermined by India's own contemporaneous conduct as evidenced by key correspondence, which is provided in **Appendix B**.

187.1 On 24 July 2015, Pakistan's Commissioner wrote to the Governments of Pakistan and India to request the appointment of a Neutral Expert.[148]

187.2 On 21 August 2015, India's Commissioner responded describing the request as "premature", implicitly contesting its validity.[149]

187.3 After further fruitless exchanges between the Parties, Pakistan's Commissioner wrote to his Indian counterpart on 25 February 2016 noting that "the Government of India has rejected the invitation of 24 July 2015 to jointly appoint a Neutral Expert" and that "that invitation has lapsed and is hereby formally revoked."[150]

187.4 India's Commissioner expressly acknowledged Pakistan's revocation of its request for a Neutral Expert in letters dated 14 March 2016,[151] 11 August 2016[152] and 6 September 2016,[153] as did India, in its Note Verbale of 30 August 2016.[154]

188. Moreover, if India genuinely considered Pakistan's request still to be "live" when Pakistan's Request for Arbitration was filed on 19 August 2016, such that Pakistan's request for a Neutral Expert took priority, India would not itself have requested the appointment of a Neutral Expert on 4 October 2016. Paragraph 4(b)(ii) of Annexure F does not dictate which of Pakistan or India may refer the matter to the World Bank for the appointment of a Neutral Expert. As such, if India genuinely believed, at the time of the 25 February 2016 letter from Pakistan's Commissioner, that Pakistan's 24 July 2015 request was still "live", all that India

[148] Letter No. WT(132)/(7496-A)/PCIW from the PCIW to the ICIW dated 24 July 2015 (see Appendix B, Document 2), **Exhibit P-0014**, ¶ 6.
[149] Letter No. Y-11017/2/2015-IT/2155 from the ICIW to the PCIW dated 21 August 2015 (see Appendix B, Document 3), **Exhibit P-0016**, ¶¶ 1, 14.
[150] Letter No. WT(132)/(7531-A)/PCIW (with enclosure) from the PCIW to the ICIW dated 25 February 2016 (see Appendix B, Document 9), **Exhibit P-0023**, ¶¶ 4.
[151] Letter No. Y-11017/2/2015-IT/2181 from the ICIW to the PCIW dated 14 March 2016, **Exhibit P-0027**, ¶ 15.
[152] Letter No. Y-11017/2/2015-IT/2202 (with enclosure) from the ICIW to the PCIW dated 11 August 2016 (see Appendix B, Document 13), **Exhibit P-0032**, ¶ 3.
[153] Letter No. Y-11017/2/2015-IT/2206 from the ICIW to the PCIW dated 6 September 2016 (see Appendix B, Document 16), **Exhibit P-0037**.
[154] Note Verbale No. ISL/112/1/2016 from India to Pakistan dated 30 August 2016 (see Appendix B, Document 15), **Exhibit P-0036**, ¶ i.

would have had to do to secure the Neutral Expert would have been to request the Bank to appoint a Neutral Expert, having regard to Pakistan's 24 July 2015 request. The fact that India did not do so, read together with the Indian Commissioner's, and India's, express acknowledgement that the July 2015 request had been revoked, speaks volumes.

189. This argument also disposes of a related point that India makes regarding Pakistan's position before the *Kishenganga* Court. It points to Pakistan's submission that "in the absence of a formal request for the appointment of a Neutral Expert under the Treaty, a Court of Arbitration may validly be constituted". India also points to the *Kishenganga* Court's ultimate finding that "nothing in the Treaty requires that a technical question listed in Part 1 of Annexure F be decided by a Neutral Expert rather than a Court of Arbitration – except where a Party so requests".[155] But nothing Pakistan has done here conflicts with that finding. Pakistan's position before the Court of Arbitration in *Kishenganga*, and that Court's conclusion, did not address a situation in which (a) a request for a Neutral Expert had been revoked before any Neutral Expert had been appointed, and (b) that revocation had been expressly acknowledged by the other Party prior to its receipt of a request for arbitration.

190. As regards India's second assumption about the interpretation of "being dealt with" in Article IX(6), in its 21 December 2022 Explanatory Note, India contends that the Neutral Expert is dealing with a difference as soon as "either party requests an NE to be appointed".[156] As Pakistan has addressed at length in **Section III** above,[157] India's interpretation has no reasonable basis in the Treaty, particularly as a Neutral Expert had been neither appointed nor even identified at the point at which proceedings before the Court of Arbitration began, and could not therefore be said to be "dealing with" any points of difference between the Parties. As noted above, Article IX(6) cannot be triggered by a mere signalling of a request to appoint a Neutral Expert at some point in the future. The phrase "when it is being dealt with" must mean the stage at which a Neutral Expert has been appointed and his or her terms of retainer fixed. It is only at that point that he or she could be said to be "dealing with" the difference of which they are seised. In this case, as of the date of submission of this Response, the Neutral Expert's Terms of Retainer have yet to be adopted.

[155] 21 December 2022 Explanatory Note, **Exhibit P-0001**, ¶ 23.
[156] *Id.*, ¶ 12.
[157] See ¶¶ 162-177 *supra.*

191. India's First Objection must fail. Article IX(6) has not been triggered because the Court was seised first in time, the matter concerns a dispute between the Parties, and at the time the Court was seised a Neutral Expert had not even been requested, still less was he "dealing with" any differences between the Parties.

B. India's Second Objection: the Court of Arbitration has not been validly seised because a dispute has not arisen

192. India's Second Objection hinges on the process by which a dispute emerges under Article IX(2). In India's view, having regard to that provision, a dispute arises in one of three circumstances only:

> 192.1 First, where "[b]oth parties agree that the difference does not fall within Part 1 of Annexure F";[158]
>
> 192.2 Second, where "[b]oth Commissioners, jointly [are] of the view that the difference may be deemed to be a dispute irrespective of whether the difference/question relates [to] Part 1 of Annexure F or not";[159] and
>
> 192.3 Third, where "[t]here is a disagreement between both parties as to whether the difference falls within Part 1 of Annexure F or outside of it, in which case, upon the request of either party, the matter shall be referred" to the Neutral Expert who may then determine "that the whole or part of the difference should be treated as a dispute".[160]

193. India goes on to say that (a) none of the above has occurred in the present case, (b) as a result, a dispute has not arisen, and (c) the Court is therefore not validly seised under the scheme of Articles IX(3)–(5).[161]

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[158] 21 December 2022 Explanatory Note, **Exhibit P-0001**, ¶ 7(i).
[159] *Id.*, ¶ 7(ii).
[160] *Id.*, ¶ 7(iii).
[161] *Id.*, ¶¶ 7–8, 18. See also (Draft) Transcript, Neutral Expert First Meeting (*Indus Waters*), Day 1, **Exhibit P-0040**, pp. 184-185, lines 21-7 (Shri Kumar).

194. The same thesis underpins India's 11 February 2023 Letter. In this letter, India claims:

> "[T]he Treaty very plainly puts in place a graded dispute resolution mechanism, in Article IX read together with Annexures 'F' and 'G'. This mechanism contemplates, in the first instance, the Commission reaching agreement on any question which may arise between the parties concerning the interpretation or application of the Treaty. Should such agreement not be forthcoming for any reason, and a 'difference' arise, if *either* Commissioner is of the view that the difference falls within Part 1 of Annexure 'F', it *shall* be dealt with by a Neutral Expert. The occasion for the establishment of a Court of Arbitration can only arise by the mutual consent of both Commissioners/Parties, or if the Neutral Expert decides that a question referred to him is really a 'dispute' which would have to be adjudicated by a Court of Arbitration. There is no other mechanism for considering the 'differences' as 'dispute[s]'."[162]

195. India's position that a Court of Arbitration cannot be seised without a dispute emerging between the Parties is right. The rest of its contention is wrong, however. A dispute has plainly arisen in this case.

196. India's Second Objection is based on its misreading of Article IX(2) and a consequent misapprehension that a dispute can only arise if both Commissioners agree, or a Neutral Expert determines that a difference before them can only be dealt with, in whole or in part, as a dispute.

197. But Article IX does not say this. What it says, rather, is:

> 197.1 Pursuant to Article IX(2)(b), a dispute will arise, in the first instance, "[i]f the difference does not come within the provisions of Paragraph 2(a)".
>
> 197.2 Article IX(2)(a) provides, in turn, that "[a]ny difference which, in the opinion of either Commissioner, falls within the provisions of Part 1 of Annexure F shall*, at the request of either Commissioner*, be dealt with by a Neutral Expert".
>
> 197.3 For Article IX(2)(a) to engage, therefore, and to disapply Article IX(2)(b), two things, cumulatively, must happen:

[162] 11 February 2023 Letter, **Exhibit P-0002**, ¶ 5 (emphasis original).

197.3.1 First, one of the Commissioners must identify a difference as falling within Part 1 of Annexure F and being capable of being dealt with under Part 2 of Annexure F; and

197.3.2 Second, one of the Commissioners must request that that difference be dealt with by a Neutral Expert.

197.4 Unless or until *both* of these criteria are met, pursuant to Article IX(2)(b), "a dispute will be deemed to have arisen which shall be settled in accordance with Paragraphs (3), (4) and (5)".

198. This analysis is confirmed by the reasoning of the *Kishenganga* Court's Partial Award (which is not mentioned in India's correspondence or in any other comment from India on this matter). In its Partial Award, the *Kishenganga* Court rejected an *identical* objection by India to the admissibility of the second dispute before it concerning the depletion of India's plants on the Western Rivers below Dead Storage Level. In that case, India had argued that:

> "[E]xcept when the Commissioners are in agreement to pursue an alternative course, the Treaty requires a neutral expert to make the initial determination of whether a matter arising between the Parties is a technical difference to be referred to a neutral expert or a dispute to be referred to a court of arbitration."[163]

199. As noted in **Section II** above, however, this reading of Article IX was rejected emphatically by the *Kishenganga* Court in the following terms:

> "[T]he conjunction within Article IX(2)(a) of both references manifests the Parties' intention for the Commissioners to exercise a dual role under that Article, both as the initiators of the neutral expert process and a part of a mechanism that requires recourse to a neutral expert in certain circumstances. Article IX(2)(a) thus requires that a difference be referred to a neutral expert if either Commissioner believes that it relates to one of the identified technical matters and prefers that it be resolved by a neutral expert. *This requirement only becomes effective, however, if a request for the appointment of a neutral expert is actually made. It is insufficient for a Commissioner merely to express the view that a difference would, at some point, be an appropriate matter for a neutral expert.*"[164]

[163] *Kishenganga* arbitration, Partial Award, **PLA-0003**, ¶ 475.
[164] *Id.*, ¶ 478 (emphasis added).

200. Put another way, the *Kishenganga* Court confirmed that either Commissioner can unilaterally confirm the existence of a dispute under Article IX(2)(b), in circumstances in which no reference under Article IX(2)(a) has been made, by commencing the reporting process envisaged in Article IX(3). On this basis, the *Kishenganga* Court held "[i]t is undisputed that neither the [Pakistani Commissioner] or [the Indian Commissioner] requested the appointment of a neutral expert in respect of the subject-matter of the Second Dispute. That suffices to dispense with India's … objection to admissibility".[165]

201. Beyond a misreading of Articles IX(2)(a) and (b), India's argument also appears to rest on the wording of the *chaussette* to Article IX(2). This states:

> "Provided that, at the discretion of the Commission, any difference may either be dealt with by a Neutral Expert in accordance with the provisions of Part 2 of Annexure F or be deemed to be a dispute to be settled in accordance with the provisions of Paragraphs (3), (4) and (5), or may be settled any other way agreed upon by the Commission."

202. To the extent that the *chaussette* is an element of India's argument, it goes nowhere. As the words "*[p]rovided that*" at the start of the *chaussette* clearly indicate, it is a default provision that allows the Commissioners jointly to decide that a difference may be resolved by a Neutral Expert, the process set out in Articles IX(3)–(5), or in any other way they may jointly agree upon. No such agreement exists here (and India does not contend otherwise), so the *chaussette* is inapplicable. In any event, the wording of the *chaussette* cannot undercut the plain words of Article IX(2)(b), which does apply and on which Pakistan relies. As shown above, that provision states that unless action is taken under Article IX(2)(a), a dispute "will be deemed to have arisen".

203. India's Second Objection therefore fails on the plain language of Article IX(2). But India also fails to grapple with the practical implications of its approach. If India is right, a dispute can never be identified by a Commissioner acting alone, but only by the Commissioners acting in concert, or by a Neutral Expert.[166] As with several of India's other objections, this would be a charter for obstructionism, enabling a Party that did not want to go to arbitration

[165] *Id.*, ¶ 480.
[166] The second possibility is envisaged by Art IX(2)(b) of the Treaty, viz: "or if a Neutral Expert, in accordance with the provisions of Paragraph 7 of Annexure F, has informed the Commissioner that, in his opinion, the difference, or a part thereof, should be treated as a dispute".

simply to instruct its Commissioner to refuse to recognise a dispute as having arisen, no matter how obvious that dispute may be. This would place the other Party in the situation of having to refer the matter to the Neutral Expert as a difference, and then wait for the Neutral Expert to notify the Commission under Article IX(2)(b) that it should be dealt with as a dispute, a process that could take many months to play out, if at all.

204. Not only would this be an absurd situation that could not have been intended by the Treaty's drafters but it takes on truly dangerous proportions when one considers that a Court of Arbitration, properly seised of a dispute, is the only body capable of awarding interim relief under Paragraph 28 of Annexure G. On this, India's interpretation would allow a Party to avoid binding provisional measures, at the very least for several months, by withholding recognition of a dispute, potentially causing irreparable damage to the interests of the other Party in the intervening period, or even rendering the dispute entirely moot. Again, such an outcome would offend both the text of the Treaty and its underlying object and purpose.

205. Applying the correct interpretation of Article IX(2) to the facts, India's Second Objection must fail. At the point at which Pakistan's Commissioner notified India's Commissioner that, in his view, a dispute had arisen between them, and requested the preparation of a joint report under Article IX(3), there was no active request by either Commissioner for the appointment of a Neutral Expert under Article IX(2)(a).[167] Nor was there any such a request at the point at which Pakistan requested the empanelling of a Court of Arbitration under Article IX(5).[168] India's Neutral Expert Request was not made until 4 October 2016, over six weeks after Pakistan's request under Article IX(5). At all material times, therefore, and by automatic operation of Article IX(2)(b), there existed a dispute between the Parties on the basis of which the Court of Arbitration could properly be seised.

206. As is clear from the preceding, India's Second Objection must fail. There was no active request for a Neutral Expert under Article IX(2)(a) at the time that (a) Pakistan's Commissioner identified a dispute under Article IX(3), and (b) at the point at which Pakistan referred that

[167] Pakistan's prior request for Neutral Expert determination having been revoked in an earlier paragraph of the same letter: Letter No. WT(132)/(7531-A)/PCIW (with enclosure) from the PCIW to the ICIW dated 25 February 2016 (see Appendix B, Document 9), **Exhibit P-0023**, ¶¶ 4, 8.
[168] Request for Arbitration (19 August 2016).

same dispute to the Court of Arbitration under Article IX(5). It follows that, at all material times, a dispute between the Parties existed by operation of Article IX(2)(b).

C. India's Third Objection: the disputes raised by Pakistan's Request for Arbitration are "identical" to those raised as differences with the Neutral Expert, are "technical" in nature, and fall within the competence of the Neutral Expert, such that there is no "necessity" for a Court of Arbitration

207. India's Third Objection arises from several paragraphs of its 21 December 2022 Explanatory Note with respect to Paragraph 1 of Annexure G, which provides that "[i]f the necessity arises to establish a Court of Arbitration under the provisions of Article IX, the provisions of this Annexure apply". In essence, India contends that, as a Neutral Expert was already seised of the differences concerning the KHEP and the RHEP, there was no "necessity" to establish a Court. As follows below, this objection too is without foundation.

1. India's interpretation of Paragraph 1 of Annexure G is unsustainable

208. By its Third Objection, India argues that the word "necessity" in Paragraph 1 of Annexure G means that a Court of Arbitration can only be convened following "exhaustion of the first stages of resolution" – which is assumed to mean satisfaction of the procedures in Articles IX(1)–(4) – or "where both parties agree that recourse to arbitration will be ideally suitable or necessary for determination of the issues between them". India goes on to assert that "[it] is evident from the above the recourse to arbitration may not be treated as a matter of course, and, thus, not even a matter of unilateral discretion".[169]

209. India's Third Objection is parasitic on its Second and Fourth Objections. As Pakistan observes in relation to those objections,[170] Article IX does indeed contemplate a unilateral reference of a dispute to a Court of Arbitration provided that certain prerequisites have been met, which is the case here. Even if India is correct as to the proper interpretation of Paragraph 1 of Annexure G, therefore, the contention goes nowhere.

[169] 21 December 2022 Explanatory Note, **Exhibit P-0001**, ¶ 13.
[170] See above **Part IV.B**; see below **Part IV.D**.

210. But India's interpretation of Paragraph 1 of Annexure G is wrong in any event. Properly interpreted, Paragraph 1 of Annexure G links Article IX(5), which addresses the circumstances in which a Party may file a request for arbitration, to the provisions of Annexure G, which sets out with granularity the process for empanelling a Court of Arbitration and its functions and procedures thereafter. Read in this context, as must be done, the "necessity" to establish a Court of Arbitration arises at the point at which a request for arbitration is filed in accordance with the Treaty. This is also made clear by Paragraph IX(5)(b) (the relevant applicable provision in this case), which provides in mandatory terms that (emphasis added):

> "A Court of Arbitration ***shall be established*** *to resolve the dispute in the manner provided by Annexure G …* ***at the request of either Party***, if, after negotiations have begun pursuant to Paragraph (4), in its opinion the dispute is not likely to be resolved by negotiation or mediation[.]"

211. The necessity to establish a Court of Arbitration, moreover, is undimmed even if a Court of Arbitration ultimately finds that it lacks jurisdiction over the matter before it or has been improperly seised, given that, pursuant to Paragraph 16 of Annexure G, "the Court shall decide all questions relating to its competence". Once a request for arbitration has been filed, therefore, it is necessary for a Court of Arbitration to be established if for no other reason than to determine the question of its competence. Indeed, that is precisely what the Court is presently doing, having directed, by its Procedural Order No 1 of 2 February 2023, that a preliminary procedure on its competence is required.

2. India makes multiple misstatements of fact and law

212. Distinct from (although related to) the preceding, Pakistan apprehends that India seeks to raise a further objection related to Paragraph 1 of Annexure G, and the word "necessity", arising from the overlapping competences of a Neutral Expert and Court of Arbitration. It says:

> "The letter dated 25.02.2016 from [Pakistan's Commissioner], claiming that a dispute had arisen and a [Court of Arbitration] should be constituted to resolve the issues, does not satisfy the threshold of 'necessity' having arisen. By his earlier letters of 03.07.2015 and 12.11.2015, the [Pakistani Commissioner] had sought the appointment of a Neutral Expert. The narration of the questions that the [Pakistani Commissioner] believed had arisen between the parties remained identical in these sets of letters, i.e.

> in the letters seeking appointment of the [Neutral Expert] as well as the letter seeking a [Court of Arbitration]. The mere passage of seven months between July, 2015 and February, 2016 cannot render the technical questions raised by [Pakistan's Commissioner] into legal issues. Therefore, the very inception of Pakistan's position that a 'dispute' has arisen necessitating the establishment of a [Court of Arbitration] is in the teeth of the express provisions of the Treaty, and the intention of the Treaty that a [Court of Arbitration] ought to be established only if the *necessity* so arises."[171]

213. By this passage, India seems to be saying that because some of the issues presently before the Court of Arbitration *could* have been put before the Neutral Expert, there is no "necessity" for the Court of Arbitration to be established and the Court therefore lacks competence and/or is invalidity constituted. If that is indeed what is being said, then the short answer is provided by the proper interpretation of Paragraph 1 of Annexure G, as set out above, namely, the "necessity" to establish a Court of Arbitration arises whenever a request for arbitration requires it because, at a minimum, the Court of Arbitration will need to determine whether it has been validly seised.

214. To the extent that a longer response to India's point is required, the passage from the 21 December 2022 Explanatory Note quoted above contains several misstatements of fact and law that undermine the objection.

(a) The Pakistani Commissioner's "narration" of the issues was not "identical" to India's Neutral Expert Request

215. India claims that "[t]he narration of the questions that the [Pakistani Commissioner] believed had arisen between the parties remained identical" between his letter of 3 July 2015 (by which he requested appointment of a Neutral Expert with respect to the KHEP and RHEP) and his letter of 25 February 2016 (by which he withdrew his 3 July 2015 request, noted the existence of a dispute, and requested that the Indian Commissioner collaborate in the preparation of a joint report under Article IX(3)). This is demonstrably wrong on the face of the evidence, including the correspondence set out in **Appendix B**.

216. For example, in his 3 July 2015 letter to the Indian Commissioner, notifying him of the Pakistani Commissioner's intention to request a Neutral Expert, Pakistan's Commissioner

[171] 21 December 2022 Explanatory Note, **Exhibit P-0001**, ¶ 15 (emphasis original).

framed the question of pondage and power intakes at the KHEP in the Draft Joint Statement of Points of Difference as follows:

> "Pakistan is of the considered view that the Pondage of 7.55 Mm^3 (million cubic meters) provided in the design exceeds the maximum Pondage permitted, which according to the Treaty is twice the Pondage required for Firm Power. As per the procedure specified in the Treaty, maximum Pondage permitted comes to 1 Mm^3 (0.77 Mm^3 to be exact). Thus the Pondage provided in the design is in contravention of Paragraph 8(c) of Annexure D to the Treaty. The reduction in Pondage would cause raising of the sill level of the intakes about 4 meters, thus the intakes of the turbines of the Plant as provided in the design, are not located at the highest level making the[m] in contravention of Paragraph 8(f) of Annexure D to the Treaty."[172]

217. By contrast, in his letter of 25 February 2016 identifying the existence of a dispute and requesting that the Indian Commissioner engage in preparing a joint report under Article IX(3), Pakistan's Commissioner addressed the issues as follows:

> "Pakistan is of the considered view that the Pondage of 7.55 Mm^3 (million cubic meters)provided in the design of the [KHEP] exceeds the maximum Pondage permitted, which according to the Treaty is twice the Pondage required for Firm Power. As per the procedure specified in the Treaty, maximum Pondage permitted comes to 1 million Mm^3 (0.77 million $Mm^3$to be exact). Thus the Pondage provided in the design is in contravention of para 8(c) of Annexure D to the Treaty.
>
> *Subsumed in this project-specific dispute is the more general question of what is the appropriate method under the Treaty for calculating maximum Pondage for Run of River HEPs on the Western Rivers. Pakistan considers that the method specified in para 8(c) of Annexure D to the Treaty requires India to account for Minimum Mean Discharge (MMD) constantly passing through the turbines for continuous generation of Firm Power (as defined in the Treaty), while inflows to the reservoir exhibit their natural variation pattern. In accordance with para 8(c), Pondage is calculated to insure that Firm Power is generated at all times, and then it may be as much as doubled to determine a 'maximum Pondage' value.*
>
> A proper calculation of Pondage would result in raising the sill level of the intakes by about 4 meters (or 7 meters if an open surface intake configuration is used). Thus the intakes of the Plant turbines as provided in the design are not located at the highest level, in contravention of para 8(f) of Annexure D to the Treaty.

[172] Letter No. WT(132)/(7493-A)/PCIW (with enclosure) from the PCIW to the ICIW dated 3 July 2015, **Exhibit P-0010**, Annex B, ¶ 1(i).

> *This point of dispute presents questions that will inevitably recur as India proceeds with other HEP projects on the Western Rivers. We observe that, in addition to resolving the issue as to the [KHEP], the Court's award will be (a) of general applicability and (b) 'binding on the general question presented' (Partial Award, ¶ 470).*"[173]

218. The italicised text in these passages – which did not feature in the Pakistani Commissioner's request for a Neutral Expert – makes it abundantly clear that his Request for Arbitration narration was *not* "identical" to that set out in the earlier request for a Neutral Expert (contrary to India's argument). It is also clear that the substantial additions were specifically tailored to bring to the fore the legal and Treaty-systemic nature of the dispute, issues that could only come within the competence of a Court of Arbitration.

219. Similarly, with respect to the issue of the size and placement of outlets at the KHEP, Pakistan's Commissioner, in his letter of 3 July 2015, addressed the issue as follows:

> "Pakistan is of the considered view that outlets below the Dead Storage Level provided in the design of the Plant are in contravention of Paragraph 8(d) of Annexure D to the Treaty, which requires these to be of a minimum size and located at the highest level. India has proposed spillway as outlet for sediment control with design discharge of 2000 cumecs and placed it deep in the reservoir with crest 20m below the Full Pond[age] Level, which contravenes the criterion."[174]

220. In his letter of 25 February 2016, however, the Pakistani Commissioner addressed the issues as follows:

> "Pakistan is of the considered view that outlets below the Dead Storage Level provided in the design of the Plant are in contravention of Paragraph 8(d) of Annexure D to the Treaty, which requires these to be of minimum size, and located at the highest level. India has proposed using a spillway as an outlet for sediment control with design discharge of 2000 cumecs and placed it deep in the reservoir with crest 20 metres below the Full Pond Level, which contravenes the criterion. *Although the Court of Arbitration in the Kishenganga case ruled that drawdown flushing is not permitted under the Treaty, India has presented designs that can only be effective if drawdown flushing is contemplated. This dispute over the binding nature of the prior award of the Court of*

[173] Letter No. WT(132)/(7531-A)/PCIW (with enclosure) from the PCIW to the ICIW dated 25 February 2016 (see Appendix B, Document 9), **Exhibit P-0023**, Annexure, ¶ 1(i) (emphasis added).
[174] Letter No. WT(132)/(7493-A)/PCIW from the PCIW to the ICIW dated 3 July 2015, **Exhibit P-0010**, Annex B, ¶ 1(ii).

> *Arbitration presents a question that will inevitably recur as India proceeds with other HEP projects on the Western Rivers; therefore, the parties need a binding determination that, in addition to resolving the issue as to the Kishenganga project, is of general applicability for the same reasons discussed under Dispute 1(i) above.*"[175]

221. Again, the addition of the italicised text above by Pakistan's Commissioner makes it plain that his "narration" of the issues was *not* "identical" in the two requests but rather materially and substantively different, taking into account the disagreements that had emerged between the Commissioners in correspondence concerning the effect of the *Kishenganga* Court's Partial Award and the need for a statement of general Treaty-systemic applicability as a consequence.

222. With respect to the issue of gated spillways at the KHEP, Pakistan's Commissioner addressed this issue in his 3 July 2015 letter as follows:

> "Pakistan is of the considered view that the design of the Plant does not conform to the design criterion specified in Paragraph 8(e) of Annexure D to the Treaty which specifies that gated spillway[s] can only be provided if the conditions at the site of the Plant make it necessary and if this requirement is established the bottom level of the gates in normal closed position shall be at the highest level consistent with sound and economic design and satisfactory operation and construction of the works. As mentioned above, India has provided a gated spillway in the design with bottom level of the gates in normal closed position 20 meter[s] below the Full Pondage Level. Pakistan is of the view that the site conditions do not make it necessary to have a gated spillway and, even if a gated spillway is considered necessary its crest level can be raised by about 9 meters. Pakistan, therefore, considers that the design of the spillway provided by India is in contravention of the Treaty."[176]

223. In his 25 February 2016 letter, Pakistan's Commissioner addressed the issue as follows:

> "Pakistan is of the considered view that the design of the Plant does not confirm with the design criterion specified in Paragraph 8(e) of Annexure D of the Treaty, which specifies that a gated spillway can only be provided if conditions at the site of the Plant make it necessary and, if this requirement is established, then the bottom level of the gates in normal closed position must be at the highest level consistent with sound and

[175] Letter No. WT(132)/(7531-A)/PCIW (with enclosure) from the PCIW to the ICIW dated 25 February 2016 (see Appendix B, Document 9), **Exhibit P-0023**, Annexure, ¶ 1(ii) (emphasis added).
[176] Letter No. WT(132)/(7493-A)/PCIW (with enclosure) from the PCIW to the ICIW dated 3 July 2015, **Exhibit P-0010**, Annex B, ¶ 1(iii).

> economical design and satisfactory construction and operation of the works. As mentioned above, India has provided a gated spillway in the design with the bottom level of the gates in closed position 20 metres below the Full Pondage Level. Pakistan is of the view that the site conditions do not make it necessary to have a gated spillway and, even if a gated spillway can be considered necessary, its crest level can be raised by about 9 metres. Pakistan therefore considers the design of the spillway provided by India is in contravention of the Treaty. *This dispute presents a question that will inevitably recur as India proceeds with other HEP projects on the Western Rivers; therefore, the parties need a binding determination that, in addition to resolving the issue as to the [KHEP], is of general applicability for the same reasons discussed under Dispute 1(i) above.*"[177]

224. Once again, the italicised language in the Pakistani Commissioner's 25 February 2016 letter makes clear that he had apprehended that the issue between the Parties on spillway gating was one that would be repeated as India continued to design and build other Plants on the Western Rivers. A once-and-for-all determination of this issue was therefore, in his view, required, and a dispute had arisen as a consequence. His "narration" of this issue, once again, therefore, was not "identical" with that set out in his 3 July 2015 letter – to the contrary, it was materially different.

225. So far as the Pakistani Commissioner's understanding of the issues concerning the RHEP is concerned, it is correct to say that these did not change materially between his 3 July 2015 and 25 February 2016 letters.[178] However, the design features of the RHEP materially replicated the questions that the PCIW had raised with respect to the KHEP – which were themselves clearly identified as being as of legal, Treaty-systemic importance. Put another way, both the KHEP and the RHEP were merely Plant-specific illustrations of the Parties' wider disputes, and thus subsumed within the general questions that Pakistan's Commissioner identified as requiring settlement by a Court of Arbitration. The sole exception to this was the RHEP freeboard, which was portrayed by Pakistan's Commissioner in both of his letters as being of a technical character.[179]

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[177] Letter No. WT(132)/(7531-A)/PCIW (with enclosure) from the PCIW to the ICIW dated 25 February 2016 (see Appendix B, Document 9), **Exhibit P-0023**, Annexure, ¶ 1(iii) (emphasis added).
[178] See Letter No. WT(132)/(7493-A)/PCIW (with enclosure) from the PCIW to the ICIW dated 3 July 2015, **Exhibit P-0010**, Annex B, ¶ 2; Letter No. WT(132)/(7531-A)/PCIW (with enclosure) from the PCIW to the ICIW dated 25 February 2016 (see Appendix B, Document 9), **Exhibit P-0023**, Annexure, ¶ 2.
[179] See Letter No. WT(132)/(7493-A)/PCIW (with enclosure) from the PCIW to the ICIW dated 3 July 2015, **Exhibit P-0010**, Annex B, ¶ 2; Letter No. WT(132)/(7531-A)/PCIW (with enclosure) from the PCIW to the ICIW dated 25 February 2016 (see Appendix B, Document 9), **Exhibit P-0023**, Annexure, ¶ 2(i).

226. From the above, it is clear that India's attempt to characterise the Pakistani Commissioner's 3 July 2015 and 25 February 2016 narrations of the issues between the Parties as "identical" is simply, and visibly, a misrepresentation.

(b) The legal and Treaty-systemic nature of the disputes particularised by Pakistan's Commissioner are apparent

227. India's next claim is that "[t]he mere passage of seven months between July, 2015 and February, 2016 cannot render the technical questions raised by [Pakistan's Commissioner] into legal issues". Whether, however, an issue is "legal" or "technical" in character is not established by the time that issue takes to crystallise. It is established by the identification and framing of the issue. As the analysis above,[180] has already shown, the issues particularised by Pakistan's Commissioner in his 25 February 2016 letter were legal and Treaty-systemic in character.

228. To the extent that the gestation of an issue is relevant to its character (which it is not), India's argument still fails. From 3 July 2015 to 25 February 2016, the Pakistani and Indian Commissioner's exchanged **13 letters,** covering **44 pages**, almost all of which addressed detailed issues of substantive disagreement between the Parties.[181] A review of that correspondence[182] shows quite clearly that what had previously been seen by Pakistan's Commissioner as a set of technical issues, amenable to determination by a Neutral Expert,

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[180] See ¶¶ 56-57, 98 *supra*.

[181] Letter No. WT(132)/(7493-A)/PCIW (with enclosure) from the PCIW to the ICIW dated 3 July 2015, **Exhibit P-0010**; Letter No. WT(132)/(7495-A)/PCIW from the PCIW to the ICIW dated 13 July 2015, **Exhibit P-0011**; Letter No. Y-20014/1/2015-16/2152 from the ICIW to the PCIW dated 16 July 2015, **Exhibit P-0012**; Letter No. WT(132)/(7496-A)/PCIW from the PCIW to the ICIW dated 24 July 2015 (see Appendix B, Document 2), **Exhibit P-0014**; Letter No. WT(132)/(7497-98-A)/PCIW (with enclosure) from the PCIW to the Secretary, Ministry of Water and Power, Government of Pakistan and Secretary, Ministry of Water Resources, Government of India dated 24 July 2015 (see Appendix B, Document 1), **Exhibit P-0013**; Letter No. Y-11017/2/2015-IT/2155 from the ICIW to the PCIW dated 21 August 2015 (see Appendix B, Document 3), **Exhibit P-0016**; Letter No. Y-20017/2/2014-IT/2159 from the ICIW to the PCIW dated 1 September 2015, **Exhibit P-0017**; Letter No. WT(132)/(7505-A)/PCIW from the PCIW to the ICIW dated 11 September 2015 (see Appendix B, Document 4), **Exhibit P-0018**; Letter No. Y-11017/2/2015-IT/2162 from the ICIW to the PCIW dated 13 October 2015 (see Appendix B, Document 5), **Exhibit P-0019**; Letter No. WT(132)/(7513-A)/PCIW from the PCIW to the ICIW dated 4 November 2015 (see Appendix B, Document 6), **Exhibit P-0020**; Letter No. Y-11017/2/2015-IT/2169 from the ICIW to the PCIW dated 27 November 2015 (see Appendix B, Document 7), **Exhibit P-0021**; Letter No. WT(132)/(7523-A)/PCIW from PCIW to ICIW dated 5 February 2016 (see Appendix B, Document 8), **Exhibit P-0022**; Letter No. WT(132)/(7531-A)/PCIW (with enclosure) from the PCIW to the ICIW dated 25 February 2016 (see Appendix B, Document 9), **Exhibit P-0023**.

[182] The key correspondence from 24 July 2015, the date on which Pakistan's Commissioner requested the appointment of a Neutral Expert, to 25 February 2016, the date on which that request was formally revoked, is provided in **Appendix B** to this Response.

crystallised into a series of wider disputes between the Parties of legal and Treaty-systemic importance. This can be seen (*inter alia*) from the following:

228.1 In his letter of 16 July 2015, India's Commissioner stated that the Pakistani Commissioner's position on the calculation of pondage "had already been rejected by Neutral Expert appointed under the provisions of the Treaty in respect of Baglihar HEP", and "the Commission may deliberate pondage provided for the above projects as per the guidelines/views of Neutral Expert in [*Baglihar*]". From this, it is evident that the Indian Commissioner is purporting to assign some kind of general *res judicata* effect to the *Baglihar* Determination that is not supported by the Treaty.[183]

228.2 India's Commissioner reiterated the supposed precedential effect of the *Baglihar* Determination in his letter of 21 August 2015, while also arguing that:

228.2.1 the *Kishenganga* Court's finding that the *Baglihar* Determination had no precedential value was not applicable to pondage;[184] and

228.2.2 the *Kishenganga* Court's finding that the Treaty prohibits drawdown flushing "imposes operational restriction [on the KHEP] and does not require any design change".[185]

228.3 In his letter of 11 September 2015, Pakistan's Commissioner observed that:

228.3.1 the *Kishenganga* Court had expressly held that the *Baglihar* Determination had no *res judicata* effect beyond the Baglihar Plant;[186]

228.3.2 the *Kishenganga* Court's comments on the proper approach to interpreting the Treaty were of general application;[187] and

[183] Letter No. Y-20014/1/2015-16/2152 from the ICIW to the PCIW dated 16 July 2015, **Exhibit P-0012**, p. 2.
[184] Letter No. Y-11017/2/2015-IT/2155 from the ICIW to the PCIW dated 21 August 2015 (see Appendix B, Document 3), **Exhibit P-0016**, ¶ 9.
[185] *Id.*, ¶ 13.
[186] Letter No. WT(132)/(7505-A)/PCIW from the PCIW to the ICIW dated 11 September 2015 (see Appendix B, Document 4), **Exhibit P-0018**, ¶ 11.
[187] *Id.*, ¶ 12.

228.3.3 the *Kishenganga* Court had stated on multiple occasions in its Partial Award that its conclusions on drawdown flushing could require modification of the KHEP's design.[188]

228.4 India's Commissioner, in his letter of 13 October 2015, refused to shift from his position of 21 August 2015.[189]

229. This correspondence, and the legal and Treaty-systemic implications that Pakistan's Commissioner drew from it, were set out in detail in the Pakistani Commissioner's letter of 25 February 2016. By that letter:

229.1 First, Pakistan's Commissioner explained that his correspondence with India's Commissioner subsequent to his 25 July 2015 request for a Neutral Expert had caused him to reassess the questions between them as "substantially, if not predominantly, legal in nature",[190] including by reference to the issues set out in the correspondence canvassed above. He continued:

> "You continue to insist, for instance, that the pondage calculation for the [KHEP] and [RHEP] should be resolved by reference to the Neutral Expert's pondage determination in the *Baglihar* case, notwithstanding the fact that the Partial Award issued by the Court of Arbitration in the *Kishenganga* case (i) rejected the 'best practices' interpretation of the Treaty that led to the Neutral Expert's final determination on pondage and other issues in the *Baglihar* case and (ii) declared that the Neutral Expert's determinations do not have general precedential value beyond the specific hydro-electric plant before him.
>
> Similarly, although the Court of Arbitration in the *Kishenganga* case ruled that drawdown flushing is not permitted under the Treaty, India insists on maintaining a design with deep orifice spillways for sediment control in both the [KHEP] and [RHEP] configurations that would not be effective unless water can be drawn down to or near the streambed.

[188] *Id.*, ¶ 22.
[189] Letter No. Y-11017/2/2015-IT/2162 from the ICIW to the PCIW dated 13 October 2015 (see Appendix B, Document 5), **Exhibit P-0019**.
[190] Letter No. WT(132)/(7531-A)/PCIW (with enclosure) from the PCIW to the ICIW dated 25 February 2016 (see Appendix B, Document 9), **Exhibit P-0023**, ¶ 5.

> Your positions on these and related issues, which Pakistan rejects, present legal questions of Treaty interpretation which will inevitably recur as India proceeds with other HEP projects on the Western Rivers."[191]

229.2 Second, Pakistan's Commissioner indicated Pakistan's intention that "the legal and technical aspects of the disputes over the [KHEP] and [RHEP]" should be resolved by a Court of Arbitration under Article IX(5) of the Treaty "in the interests of efficiency, economy and finality", given that a Court of Arbitration "comprised of experts trained in both law and engineering … can render an award of general applicability for the parties future guidance and … binding on the general question presented".[192]

229.3 Third, Pakistan's Commissioner attached a Draft Statement of Points of Dispute, forming the basis of a joint report as required by Article IX(3) of the Treaty, and noted that it would be forwarded to the Pakistani and Indian Governments for their consideration under Article IX(4) in 14 days' time if the Indian Commissioner failed to complete the relevant portion.[193]

230. It is clear from the preceding that – contrary to India's suggestion – the seven months between the Pakistani Commissioner's letter of 3 July 2015 and that of 25 February 2016, and the intensive exchanges between the two Commissioners during that period, were more than adequate for the legal and Treaty-systemic character of the dispute between the Parties to have crystallised and become ripe for submission to a Court of Arbitration under the Treaty.

(c) The "disputes" referred to arbitration before the Court could not have been submitted to a Neutral Expert as "differences"

231. Furthermore, if India is suggesting that the issues before the Court could have been put before the Neutral Expert, there is additional reasoning why India is wrong. As the above analysis shows, the Plant-specific issues that Pakistan has raised with respect to the KHEP and the RHEP were and are subsumed within wider and Treaty-systemic questions in respect of which Pakistan seeks "an award of general applicability for the parties' future guidance and …

[191] *Id.*, ¶¶ 5–7.
[192] *Id.*, ¶ 7 (cleaned up).
[193] *Id.*, ¶ 8.

binding on the general question presented".[194] The dividing line between the Treaty-systemic issues that Pakistan seeks resolved and the KHEP and RHEP-specific matters that are subsumed within them is addressed in Pakistan's Division of Competence Statement.[195]

232. Questions of a Treaty-systemic character cannot be answered by a Neutral Expert. By Paragraph 11 of Annexure D, "[i]f a question arises as to whether or not the design of *a Plant* conforms to the criteria set out in Paragraph 8, then either Party may proceed to have the question resolved in accordance with the provisions of Article IX(1) and (2)" (emphasis added).[196] Similarly, by Paragraph 11 of Annexure F, "[t]he decision of a Neutral Expert … shall be final and binding, *in respect of the particular matter on which the decision is made*" (emphasis added). As these provisions indicate, when dealing with the design of *a particular Plant*, any observations by a Neutral Expert are confined to that Plant alone, he or she not being competent to determine any matter of wider application.[197]

233. This appreciation is further underlined by:

233.1 The requirement of Paragraph 4 of Annexure F that a Neutral Expert "shall be a highly qualified engineer", who should be well-equipped to resolve Plant-specific technical disputes, but not systemic questions of interpretation or application of the Treaty;

233.2 Paragraph 7 of Annexure F and Article IX(2)(b), which expressly contemplates the possibility that a Neutral Expert may conclude that a matter addressed to him or her constitutes a dispute, rather than a difference, to be addressed through some other Article IX mechanism, and

233.3 Paragraph 13 of Annexure F, which states explicitly that matters "not within the competence of a Neutral Expert" shall be settled through some other Article IX mechanism, of which a Court of Arbitration is at the apex.

[194] *Id.*, ¶ 7 (cleaned up).
[195] Division of Competence Statement, ¶¶ 11–35.
[196] Which is within the competence of a Neutral Expert per Treaty, **PLA-0001**, Annexure F, Paragraph 1(11).
[197] See ¶¶ 140-143 *supra.*

234. This interpretation echoes that of the *Kishenganga* Court. Having regard to Paragraph 11 of Annexure F in the context of the *Baglihar* Determination, the Court noted:

> "The effect of a neutral expert's determination is restricted to the elements of that design and operation of the specific hydro-electric plant considered by that Expert. Although India has urged the Court to consider the Second Dispute [concerning drawdown flushing] to have been effectively resolved by *Baglihar*, the Court does not see in Annexure F any indication that the Parties intended a neutral expert's determination to have a general precedential value beyond the scope of a particular matter before him. *Baglihar* is binding on the Parties in relation to the Baglihar project; the present decision, by contrast, is binding in respect of the general question presented."[198]

235. This passage also makes clear that the Court is the only Article IX body capable of resolving the wider issues raised by Pakistan's Commissioner in his letter of 25 February 2016, as the Commissioner expressly noted.[199] And the *Kishenganga* Court's reasoning on this point is clearly rooted in the plain words of the Treaty. By Article IX(5), a Court of Arbitration is capable of resolving a dispute, and by Articles IX(1) and (2)(b), a dispute may emerge out of "[a]ny question that arises between the Parties concerning the interpretation or application of the Treaty".[200] The Court's writ therefore runs the length and breadth of the Treaty, and includes Treaty-systemic disputes of the kind that Pakistan has raised. For them to be resolved, it was therefore necessary for Pakistan to refer them to arbitration before the Court.

(d) The Court of Arbitration can deal with technical issues

236. Even assuming, *arguendo*, that the issues identified in the Pakistani Commissioner's letter of 25 February 2016, and later reflected in Pakistan's Request for Arbitration, could be considered technical, Plant-specific matters, India's Third Objection must still fail. This is because a Court of Arbitration is clearly competent to decide technical disputes of a kind that could also be referred to a Neutral Expert as a difference.

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[198] *Kishenganga* arbitration, Partial Award, **PLA-0003**, ¶ 470.
[199] Letter No. WT(132)/(7531-A)/PCIW (with enclosure) from the PCIW to the ICIW dated 25 February 2016 (see Appendix B, Document 9), **Exhibit P-0023**, ¶ 7.
[200] See ¶¶ 157-161 *supra.*

237. Although India unaccountably does not reference this, the *Kishenganga* Court considered this very issue, holding as following:

> "[T]he Court can identify no Treaty provision that would bar it from considering a technical question, unless a Party had in fact requested the appointment of a neutral expert. Article IX(2)(b), establishing the circumstances in which a "difference" will be deemed a "dispute" operates by reference to the provision preceding it and the existence of a request for the appointment of an expert—and not by reference to Part 1 of Annexure F. Had the Parties so desired, the establishment of a Court could readily have been conditioned on a purely objective test of whether a dispute fell outside the list of identified technical questions; yet the Treaty does not adopt this approach. Similarly, whereas Annexure F includes Paragraph 7 (directing a neutral expert to evaluate his competence against the list of technical questions), no comparable provision is found in Annexure G. The Court is not required to conduct an analysis of its competence or, potentially, to inform the Commission that a dispute involving technical matters should, in fact, be referred to a neutral expert.
>
> The very composition of a court of arbitration also points to its competence in technical matters. In general, the skills or qualifications required of the members of a commission or tribunal represent a probative indication of the role the Parties intended that body to perform. Here, one of the Court's umpires is required to be a 'highly qualified engineer' and, indeed, nothing would stop the Parties from appointing engineers as their Party-appointed arbitrators or as the Chairman of the Court."[201]

238. Given the Court's competence in respect of technical matters, India's Third Objection boils down to an argument that, despite the Court having the jurisdiction to deal with a Plant-specific and technical matter, it should refuse to exercise that jurisdiction in this case because these points could have been referred to a Neutral Expert, such that there is no "necessity" for a Court of Arbitration. For all of the reasons already given, this is simply unsustainable. Even if it was not, India's Third Objection must fail because India has misunderstood the meaning of the term "necessity" in Paragraph 1 of Annexure G.

239. On India's view, the term "necessity" is understood as "the state of being required or indispensable", or "a situation enforcing a particular course".[202] Both of these appear to be dictionary definitions, though India does not say from which dictionary it has sourced them. That does not matter in an event. It is trite that no interpreter of the Treaty could sensibly apply

[201] *Kishenganga* arbitration, Partial Award, **PLA-0003**, ¶¶ 485–486.
[202] 21 December 2022 Explanatory Note, **Exhibit P-0001**, ¶ 14.

the general rule of treaty interpretation reflected in Article 31(1) of the VCLT (via Paragraph 29 of Annexure G) "merely by sitting in his armchair looking up the meanings of words in a dictionary".[203] This much was made clear by the *Kishenganga* Court – in another pertinent passage, this time rejecting an interpretation advanced by Pakistan, to which India does not refer – when it gave a different meaning to the word "necessity" as it appeared in Paragraph 15(iii) of Annexure D, and expressly rejected the construction for which India now contends:

> "Turning to the threshold for necessity, the Court sees no need to associate this term with indispensability or emergency action, as argued by Pakistan. The concept of necessity appears elsewhere in the Treaty without such connotations, including the provisions of Annexure G interpreted by the Court in its Order on Interim Measures. *The Court sees no reason, for purposes of the Treaty, to ascribe to it any special meaning beyond the normal use of the term to describe action that is 'required, needed or essential for a particular purpose'.* The Court considers inapposite the concepts of necessity developed in international trade law, investment law and other special areas. Likewise, the Court finds it inappropriate to import the understanding of necessity as a circumstance precluding wrongfulness under the law of State responsibility."[204]

240. This passage – together with the usual presumption in treaty interpretation that the same word appearing more than once in the same agreement should bear the same meaning unless otherwise indicated[205] – is a complete answer to India's Third Objection. "Necessity" in the context of the Treaty does not mean "indispensable", but merely "required" or "needed". Upon the emergence of the issues between the Parties in this case, even were they wholly technical in character, there arose a need for their resolution. As one of the bodies capable of resolving these matters is a Court of Arbitration, and as Pakistan had made a request for arbitration, it follows that there was a "necessity" that a Court be constituted.

241. As is clear from the preceding, India's Third Objection must fail. Properly understood, the "necessity" for a Court of Arbitration arises at the point for which a Request for Arbitration is received by the other Party. Even were this not to be so: (a) the issues before the Court in

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[203] JG Merrills, 'Two Approaches to Treaty Interpretation' (1968-1969) 4 Australian Yearbook of International Law 55, **PLA-0015**, pp. 56–57.
[204] *Kishenganga* arbitration, Partial Award, **PLA-0003**, ¶ 397 (emphasis added).
[205] *Auditing of Accounts between the Netherlands and France pursuant to the Additional Protocol of 25 September 1991 to the Convention on the Protection of the Rhine against Pollution by Chlorides of 3 December 1976 (Netherlands/France)*, Award (2014) 144 ILR 259, **PLA-0016**, ¶ 91 ("Naturally, each treaty is presumed to be consistent in the way it uses its terms, but this presumption cannot be regarded as an absolute rule"). See also R Gardiner, *Treaty Interpretation* (OUP, 2nd ed. (2017)), **PLA-0017**, p. 209.

this case include within them Treaty-systemic matters that cannot be addressed by the Neutral Expert; (b) the Court has full jurisdiction and competence to consider technical matters that could also be put to a Neutral Expert; and (c) "necessity" for the purposes of the Treaty does not mean "indispensable" but merely "needed" or "required".

D. India's Fourth Objection: the Court of Arbitration has not been validly seised because Article IX(3), (4) and (5) have not been triggered and Pakistan has not complied with these provisions in any event

242. India's Fourth Objection concerns the fulfilment of Article IX(3), (4) and (5). Its contention is twofold: (a) that these provisions have not been triggered; and (b) that in any event, Pakistan has not complied with the conditions in the provisions.

243. India asserts that:

> "[T]he arbitration provisions [Paragraphs (3), (4) and (5) of Article IX, as well as Annexure 'G' to the Treaty] have not been triggered at all. Since no 'dispute' can be said to have arisen yet, in terms of the Treaty, the procedure for resolving it under Paragraphs (3), (4) and (5) cannot be applied."

244. As set out in Pakistan's response to India's Second Objection above,[206] Articles IX(3), (4) and (5) have been engaged because there is a dispute between the Parties, a dispute arising by operation of Article IX(2)(b).

245. As regards Pakistan's compliance with the provisions, the factual record is clear that Pakistan has meticulously fulfilled the relevant and applicable procedural requirements of the Treaty.

246. As regards Article IX(3), India asserts that:

> "[A]s soon as a 'dispute' arises, the Commission shall, at the request of either Commissioner, report the fact to the two Governments stating in its report the points on which the Commission is in agreement and the issues in dispute, the views of each

[206] ¶¶ 192 – 206 *supra*.

> Commissioner on these issues and his reasons therefor … No report under Paragraph (3) was ever prepared by the Commissioners."[207]

247. India's position is legally and factually inaccurate. The Treaty does not require a joint report in order for a Court of Arbitration to be seised of the dispute. The Treaty permits the process to advance even if one party fails to cooperate. Article IX(4) expressly notes that if "this report is being unduly delayed in the Commission", either Government may invite the other to resolve the dispute by agreement.

248. On the facts of this case, in his letter of 25 February 2016 Letter, Pakistan's Commissioner presented his statement of points of dispute, which set out in detail the disputes as he then saw them, and sought the Indian Commissioner's views "pursuant to Article IX(3) of the Indus Waters Treaty".[208] When India's Commissioner made it clear – in his letter of 14 March 2016 – that he considered the 25 February 2016 letter to be "improper and invalid",[209] Pakistan's Commissioner was left with the clear and unambiguous (and correct) understanding that a joint report would not be produced. Given this, pursuant to Article IX(4), Pakistan was entitled to commence inter-State negotiations as it had come "to the conclusion that this report is being unduly delayed in the Commission".

249. Precisely that conclusion was expressed by Pakistan in its Note Verbale to India on 29 March 2016, viz: "As three weeks have elapsed and the ICIW has failed to provide India's position in the Statement of Points of Dispute, the Report of the Commission, as provided in Article IX(3), is being unduly delayed".[210] India's Note Verbale of 28 April 2016 did not challenge this assessment.[211]

250. As regards Article IX(4) and 5(b), India asserts that the Treaty "envisages a genuine attempt by the [sic] both governments of Pakistan and India to settle the 'dispute' which has arisen in a cooperative spirit, including by utilizing the services of mediators acceptable to them".[212] India says that it genuinely engaged in the negotiations, but that Pakistan did not:

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[207] 21 December 2022 Explanatory Note, **Exhibit P-0001**, ¶¶ 8, 19.
[208] Letter No. WT(132)/(7531-A)/PCIW (with enclosure) from the PCIW to the ICIW dated 25 February 2016 (see Appendix B, Document 9), **Exhibit P-0023**, ¶ 8, Annexure.
[209] Letter No. Y-11017/2/2015-IT/2181 from the ICIW to the PCIW dated 14 March 2016 (see Appendix B, Document 10), **Exhibit P-0027**, ¶ 2**.**
[210] Note Verbale No. KA(II)-2/11/16 from Pakistan to India dated 29 March 2016, **Exhibit P-0028**.
[211] Note Verbale No. ISL/112/1/2016 from India to Pakistan dated 28 April 2016, **Exhibit P-0029**.
[212] 21 December 2022 Explanatory Note, **Exhibit P-0001**, ¶ 9.

> "In good faith and to resolve the issue bilaterally, India accepted and participated in the negotiations without 'prejudice to India's stand on inadmissibility of taking the matters to the Court of Arbitration which are under the purview of the Commission or at most of Neutral Expert'. However because of Pakistan's non-cooperation the negotiations could not have a positive outcome."[213]

251. India then claims that Article IX(4) and 5(b) were not fulfilled because:

> "The Parties have never arrived at any agreement to refer the outstanding differences to arbitration. India's willingness to discuss this matter at the Government level, purely in the interest of good neighborly relations, can never be construed to mean that a 'dispute', as defined in Article IX of the Treaty, is deemed to have arisen."[214]

252. By this, India appears to contend that its participation in the 14–15 July 2016 Secretary-level discussions in New Delhi – at which India stated that it considered any reference of the questions to the Court of Arbitration would be inadmissible and its participation in the discussions was without prejudice to that position[215] – was not sufficient for Pakistan to have satisfied the negotiation requirement of Article IX(4), such that Pakistan could not then refer the matter to the Court of Arbitration under Article IX(5)(b).

253. Once again, India misconstrues the Treaty's plain words and distorts the facts. Pursuant to Article IX(4), either Party "may" invite the other to engage in inter-State negotiations. The two Parties "may agree" to enlist the services of mediators. It is not for one party to decide what qualifies as an Article IX(4) negotiation – that is a matter for objective determination. Conversely, under Article IX(5)(b) it *is* a matter for one party to decide whether "*in its opinion* the dispute is not likely to be resolved by negotiation or mediation" (emphasis added).

254. On the facts of this case, Pakistan initiated and engaged in good faith in inter-State negotiations. It also reached the conclusion that the Parties could not agree to resolve the dispute and, accordingly, that it needed to be referred to a Court of Arbitration.

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[213] *Id.*, ¶ 10.
[214] *Id.*, ¶ 19.
[215] Minutes of Secretary Level Meeting on Kishenganga and Ratle Hydroelectric Plants held in New Delhi, 14-15 July 2016, dated 15 July 2016 (see Appendix B, Document 12), **Exhibit P-0031**, ¶ 2. See also Note Verbale No. ISL/112/1/2016 from India to Pakistan dated 28 April 2016, **Exhibit P-0029**, ¶ 2.

255. On 29 March 2016, Pakistan sent a Note Verbale to India indicating that it considered, in the light of the Indian Commissioner's failure to engage with Pakistan's Commissioner on the points of difference, that "the Report of the Commission, as provided in Article IX(3), [has been] unduly delayed". Pakistan accordingly invited India to engage in negotiations under Article IX(4), nominated its own representatives, and noted that if India did not set a time and for the meeting within 30 days "the Government of Pakistan reserves the right to establish a Court of Arbitration pursuant to Article IX(5)(c) of the Treaty".[216]

256. On 28 April 2016, India agreed to negotiations and named its negotiators, while noting that this was without prejudice to "India's stand on inadmissibility of taking the matters to Court of Arbitration (CoA) that are under the purview of Neutral Expert".[217] The details of the negotiations were finalised on 28 June 2016.[218] On 14–15 July 2016, Secretary-level discussions were held between the Parties in New Delhi. The Minutes of the negotiations show a good faith effort by both sides, but to no avail.

256.1 The meeting opened in plenary with "detailed broad-based discussions" between the Parties' technical experts, with the various issues "discussed in exhaustive detail".[219]

256.2 India offered a small concession on pondage, but this was rejected by Pakistan.[220]

256.3 The Secretaries took express note of "the flexibility shown by both sides but regretted lack of adequate convergence".[221]

256.4 At the conclusion of the negotiations, India offered a further meeting. Pakistan, however, "reiterated its stance that the broad divergence … is unlikely to be bridged in another meeting" and noted "the urgent importance of resolving all outstanding disputes

[216] Note Verbale No. KA(II)-2/11/16 from Pakistan to India dated 29 March 2016, **Exhibit P-0028**.
[217] Note Verbale No. ISL/112/1/2016 from India to Pakistan dated 28 April 2016, **Exhibit P-0029**, ¶ 2.
[218] Note Verbale No. ISL/112/1/2016 from India to Pakistan dated 28 June 2016, **Exhibit P-0030**.
[219] Minutes of Secretary Level Meeting on Kishenganga and Ratle Hydroelectric Plants held in New Delhi, 14-15 July 2016, dated 15 July 2016 (see Appendix B, Document 12), **Exhibit P-0031**, ¶ 4.
[220] *Id.*, ¶ 5.
[221] *Id.*, ¶ 7.

relating to [the KHEP] and [RHEP] through referral to an impartial forum as provided for in the Indus Waters Treaty 1960".[222]

257. On 11 August 2016, India's Commissioner wrote to Pakistan's Commissioner noting the apparent failure of the Secretary-level negotiations. Despite noting that India was open to another meeting "to resolve the issues bilaterally", India's Commissioner purported to invoke Article IX(2)(a) of the Treaty, signalling his intention to refer the issues to a Neutral Expert.[223]

258. On 12 August 2016, the Indian Commissioner wrote to Pakistan's Commissioner to inform him that the KHEP's reservoir was being filled to Dead Storage Level, a clear indication that the construction phase of the KHEP was nearing completion and that the Plant would soon be ready to become operational.[224]

259. On 19 August 2016, Pakistan transmitted its Request for Arbitration (including its request for interim measures to restrain India from completing the KHEP) to India under cover of a Note Verbale, expressly noting the failure of the 14–15 July 2016 negotiations and stating that "Pakistan has come to the conclusion that the Disputes are not likely to be resolved by further negotiation per Article IX(5)(b)".[225]

260. As is clear from the preceding, India's Fourth Objection cannot succeed. Article IX(3), (4) and (5) have been triggered by the existence of a dispute between the Parties. A joint report was not required under Article IX(3). Pakistan initiated and engaged in negotiations with India under Article IX(4) before concluding, in accordance with Article IX(5)(b), that in its opinion the dispute was not likely to be resolved by negotiation. Under the Treaty, it was thereafter open to Pakistan to request the establishment of a Court of Arbitration, which Pakistan did on 19 August 2016.

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[222] *Id.*, ¶¶ 7-8.
[223] Letter No. Y-11017/2/2015-IT/2202 (with enclosure) from the ICIW to the PCIW dated 11 August 2016 (see Appendix B, Document 13), **Exhibit P-0032**, ¶ 4.
[224] Letter No. Y-11017/2/2015-IT/2203 from the ICIW to the PCIW dated 12 August 2016, **Exhibit P-0033**.
[225] Note Verbale No. KA(II)-2/11/2016 from Pakistan to India dated 19 August 2016, **Exhibit P-0034**.

E. India's Fifth Objection: the Court of Arbitration has been illegally constituted and is not competent to rule on its jurisdiction and competence

261. India's Fifth Objection is that the Court has been illegally constituted and does not have *compétence de la compétence*. There are three aspects to this contention.

261.1 First, the Court has been "illegally constituted" because it emerged "through clear deviation from the Treaty mandates"[226] and its constitution "is not even in consonance with the provisions and the procedures set out in Annexure G". Accordingly, India states that the "question of India notifying the names of Arbitrators to be appointed by it, does not arise, in view of the fundamental flaws and discrepancies in the process so far adopted".[227]

261.2 Second, India states that the "principle of *kompetenz-kompetenz* … and objection to arbitral proceedings will arise when the arbitral institution is duly constituted … which is not the case here".[228]

261.3 Third, India states that its "non-acceptance of the validity of the Court of Arbitration is as [sic] assertion of the right of a sovereign nation to fairly interpret a Treaty to which it is a party".[229] India claims the Court is "being used to arrive at *ex parte* decisions" since India "has not accepted its validity"[230] and "any orders or directions sought from or issued by [the Court], including any preliminary rulings or interim awards, will have no relevance".[231]

262. India's Fifth Objection is based on a flawed interpretation of Annexure G and the role of the Court in the framework of the Treaty. The Court has been properly established. India's non-acceptance, manifested through its failure to appoint arbitrators and failure to appear before the Court, cannot invalidate the existence or powers of the Court, nor the binding nature

[226] 11 February 2023 Letter, **Exhibit P-0002,** ¶ 9.
[227] 21 December 2022 Letter, **Exhibit P-0001**, ¶ 12.
[228] *Id.*, ¶ 14.
[229] 21 February 2023 Letter, **Exhibit P-0003**, ¶ 7.
[230] 11 February 2023 Letter, **Exhibit P-0002**, ¶ 8.
[231] 21 December 2022 Letter, **Exhibit P-0001**, ¶ 15.

of its decisions and awards in due course with regard to any particular dispute, having regard (*inter alia*) to Paragraph 23 of Annexure G.

263. As regards the first aspect of India's Fifth Objection, the Court has been established in compliance with the Treaty. As addressed in Pakistan's response to India's Second and Third Objections above,[232] a dispute arose under Article IX(2)(b). Pakistan complied with Articles IX(3) and (4) and referred that dispute to the Court under Article IX(5).[233] This is how disputes under the Treaty are to be resolved, according to the plain words of Article IX.[234]

264. The Court has been properly constituted in accordance with Annexure G. Paragraph 4 of Annexure G provides that the Court will be constituted by:

> "(a) Two arbitrators to be appointed by each Party in accordance with Paragraph 6; and
>
> (b) Three arbitrators (hereinafter sometimes called the umpires) to be appointed in accordance with Paragraph 7."

265. As regards Pakistan's arbitrators, pursuant to Paragraphs 4 and 6 of Annexure G, on 19 August 2016, Pakistan appointed Judge Bruno Simma and Dr Donald Blackmore as arbitrators.[235] India failed to make its appointment of arbitrators within the mandated 30-days after receipt of the Request for Arbitration, as required by Paragraph 6 of Annexure G. On 12 December 2016, the President of the World Bank wrote to state that "after much thought and deliberation, I have decided to pause the process of appointing the Chairman of the Court of Arbitration and the Neutral Expert."[236] This Pause remained in place until Mr Christopher Stephens, the Senior Vice President and Group General Counsel of the World Bank Group, wrote to the Parties on 19 September 2022 recalling the World Bank's stated intention, earlier in 2022, to "resume the process of appointing a Neutral Expert and the Chair of the Court of Arbitration".[237] On 20 October 2022, Pakistan transmitted to the Bank, and to India, a communication from Judge Simma indicating that he was no longer in a position to sit as

[232] See ¶¶ 192-206 and 207-241 *supra*.
[233] See ¶¶ 242-260 *supra*.
[234] See ¶¶ 157-161 *supra*.
[235] Request for Arbitration, ¶ 98; Administrative Order No. 1 of the Court, ¶¶ 2.2 and 2.3.
[236] Letter from the World Bank to Pakistan dated 12 December 2016, **Exhibit P-0008**.
[237] Letter from the World Bank to the Parties dated 19 September 2022, **Exhibit P-0009**.

arbitrator. Given this, Pakistan proceeded to appoint Judge Awn Shawkat Al-Khasawneh as arbitrator. By the same letter, Pakistan confirmed Dr Blackmore's appointment as arbitrator.[238]

266. As regards the umpires, India failed to cooperate in the selection of the umpires under Paragraph 7(b)(i) of Annexure G. Accordingly, under Paragraphs 7(b)(ii) and 9 of Annexure G, a default mechanism was triggered which led to the appointment of the umpires. The Parties were notified in writing on 19 September 2022 that the President of the World Bank had decided on the appointment of Professor Sean D. Murphy as umpire and Chairman of the Court.[239] On 28 September 2022, the President of Imperial College London appointed Professor Wouter Buytaert as umpire, in accordance with Paragraphs 4(b)(ii) and 7 of Annexure G.[240] On 13 October 2022, the Chief Justice of the United States of America appointed Mr. Jeffrey P. Minear in accordance with Paragraphs 4(b)(iii) and 7 of Annexure G.[241]

267. Once the umpires had accepted their appointments, in accordance with Paragraph 11 of Annexure G (emphasis added):

> "[T]hey together with such arbitrators as have been appointed by the two Parties under Paragraph 6 shall form the Court of Arbitration. Unless the Parties otherwise agree, *the Court shall be competent to transact business only when all the three umpires and at least two arbitrators are present.*"

268. The plain words of Paragraph 11 confirm that the failure of one party to appoint arbitrators does not prevent the Court being "formed" and being "competent to transact business". Any alternative conclusion would allow a Party to frustrate the settlement of a dispute merely by refusing to appoint arbitrators. That is exactly what India is attempting to do here. Such an outcome would offend both the text of the Treaty and its underlying object and purpose.

269. While maintaining its position that Court has been legally constituted, Pakistan observes, as it did in the First Meeting of the Court, that the process is somewhat "unmoored"

[238] Administrative Order No. 1 of the Court, ¶¶ 2.2 and 2.3.
[239] Letter from the World Bank to the Parties dated 19 September 2022, **Exhibit P-0009**, ¶ 2.4.
[240] Administrative Order No. 1 of the Court, ¶ 2.5.
[241] *Id.*, ¶ 2.6.

from the black letter of the Treaty, notably with respect to the extension of time given to India to make its arbitral appointments.

> "India was required to appoint its arbitrators within 30 days [of the request under Paragraph 2(b) of Annexure G]. Those 30 days have long since gone, but we are still contemplating the possibility that India might appoint. So the observation I am making here is that … we are having to approach the black letter of the Treaty with a degree of appreciation that we are unmoored from the black letter of the Treaty."[242]

270. As regards the second aspect of India's First Objection, it follows from the valid establishment of the Court that it has *compétence de la compétence*, as expressly provided in paragraph 16 of Annexure G: "the Court shall decide *all questions* relating to its competence" (emphasis added).[243] Absent such a principle, a recalcitrant party would be able to paralyse international justice, despite its prior commitment to resolve disputes peacefully through specified mechanisms.

271. The Court is the mechanism with general interpretative competence under the Treaty as indicated, *inter alia,* by the fact it is composed of highly qualified legal and technical experts (pursuant to Paragraph 4 of Annexure G), its power to specify interim measures (pursuant to Paragraph 28 of Annexure G), its competence to engage in Treaty interpretation writ large (pursuant to Paragraph 29 of Annexure G), and its competence in respect of remedies (pursuant, *inter alia*, to Paragraph 23 of Annexure G and Paragraph 13 of Annexure F).[244]

272. As regards the third aspect of India's Fifth Objection, India's non-acceptance and non-appearance does not prevent the Court from performing its role under the Treaty, in particular its role in resolving disputes under Article IX(5) and Annexure G. Pakistan and India are both equally sovereign nations, and both entered into the Treaty in the exercise of their sovereignty. The Treaty is binding on both Parties and is to be performed by each of them in good faith.[245] The failure of one party to appear before a court or tribunal does not prevent proceedings from advancing, nor does it undermine the authority of the court or tribunal to issue orders and to reach decisions, culminating in one or more binding judgments or awards. This point was

[242] Transcript of the First Meeting of the Court of Arbitration, Day 1, pp. 64-65, lines 25-9 (Sir Daniel Bethlehem KC).
[243] *Kishenganga* arbitration, Partial Award, **PLA-0003**, ¶ 474.
[244] See ¶ 146 *supra.*
[245] VCLT, **PLA-0005**, Art. 26.

made abundantly clear by the ICJ in its *Military and Paramilitary Activities* judgment in the following terms:

> "[T]he Court is bound to emphasize that the non-participation of a party in the proceedings at any stage of the case cannot, in any circumstances, affect the validity of its judgment. Nor does such validity depend upon the acceptance of that judgment by one party. The fact that a State purports to 'reserve its rights' in respect of a future decision of the Court, after the Court has determined that it has jurisdiction, is clearly of no effect on the validity of that decision. … A State which decides not to appear must accept the consequences of its decision, the first of which is that the case will continue without its participation; the State which has chosen not to appear remains a party to the case, and is bound by the eventual judgment in accordance with Article 59 of the Statute. There is however no question of a judgment automatically in favour of the party appearing, since the Court is required, as mentioned above, to 'satisfy itself' that that party's claim is well founded in fact and law."[246]

273. Moreover, the power of the Court to proceed in India's absence is implied by Paragraph 11 of Annexure G, which allows the Court to be constituted and competent with five arbitrators. There is no provision in Annexure G precluding the Court from proceeding in a Party's absence. Indeed, in such a case, as here, the Court is duty-bound to proceed and resolve the disputes of which it is seised, as is clear from Paragraph 23 of Annexure G.[247]

274. Finally, the Court (through correspondence from its Chair) has repeatedly invited India to participate in the proceedings, by appointing arbitrators and by attending the First Meeting.[248] Having received India's indirectly transmitted objections to its competence of 21 December 2022, the Court decided to hold an expedited procedure on competence pursuant to Paragraph 16 of Annexure G.[249] The Court invited India to advance its objections to competence in these proceedings.[250] It is India that has undermined its own position by refusing to engage.

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[246] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Merits, Judgment [1986] ICJ Rep 14, **PLA-0018**, ¶¶ 27-28.
[247] Paragraph 23 also confirms that its Award shall be final and binding upon the Parties.
[248] See e.g. Letter from the Chairman of the Court of Arbitration to India dated 24 November 2022; Letter from the Chairman of the Court of Arbitration to India dated 4 December 2022; Letter from the Chairman of the Court of Arbitration to the Parties (with enclosure) dated 12 January 2023.
[249] Procedural Order No. 1.
[250] Letter from the Chairman of the Court of Arbitration to India dated 24 November 2022; Procedural Order No. 1.

275. As is clear from the preceding, India's Fifth Objection must fail. The Court has been properly constituted in accordance with Article IX and Annexure G. It is competent to transact business with five members, including to decide on its own *compétence de la compétence*. India's failure to participate does not and cannot prevent proceedings from advancing, nor the Court from issuing orders, directions and decisions, culminating in Awards with final and binding effect on both Parties.

* * *

V. CONCLUDING OBSERVATIONS AND FINAL SUBMISSIONS

A. Concluding observations

276. The issues engaged by this preliminary phase of proceedings are whether the Court is competent and was validly seised and constituted, and the interpretation and application of Article IX (and the related provisions of Annexures F and G), in the context of India's challenge to legitimacy of the Court. While that challenge has been advanced in absolute terms, it also has a significant binary dimension, in the sense that India's case turns in large part on its contention that its Neutral Expert Request was first in time and occupied the adjudicatory space to the exclusion of the competence of the Court. A determination of the Court's competence cannot therefore escape the necessity for an assessment of (a) when India's request for the appointment of a Neutral Expert was actually made, and (b) whether, either at the point of that request or subsequently, it had the effect of precluding or ousting or staying the competence of the Court, whether by operation of Article IX(6) of the Treaty or for some other reason. Given the challenging dynamics of the parallel proceedings before the Court and the Neutral Expert, and the need for clear and effective settlement of the Parties' disagreements under the Treaty with respect to India's conduct on the Western Rivers, Pakistan requests the Court not to shy away from a determination of these issues. An economy of reasoning approach to a determination of questions squarely before the Court in this phase of the proceedings, with its consequential uncertainty for the Parties' disagreements as a whole, would not bring the clarity that is desperately needed on systemic issues on which the Parties are sharply divided.

277. While an assessment of the binary dimension of the enquiry into the Court's competence cannot be avoided, with the result that the Court will have to reach a conclusion on whether India's 11 August 2016 letter (indicating an intention to request the appointment of a Neutral Expert) constituted an "actual request", or a request that was "actually made", for the appointment of a Neutral Expert, Pakistan considers that there is no need at this point for the Court to address the wider issue of the *validity* of the Neutral Expert's appointment. Pakistan readily acknowledges that India's subsequent 4 October 2016 correspondence to the President of the World Bank, requesting the appointment of a Neutral Expert, did amount to an "actual request" for the appointment of a Neutral Expert. At that point, however, by operation of Paragraph 3 of Annexure G, arbitration proceedings had already been instituted. A *post hoc* request for the appointment of a Neutral Expert could not therefore, at that point,

oust the competence of the Court, which had already crystallised with the transmittal of Pakistan's Request for Arbitration on 19 August 2016.

278. The implications of this sequencing of events for the validity of India's purported *post hoc* endeavour to seise the Neutral Expert of differences that are a subset of the disputes in respect of which the Court had already been seised are unavoidable. Pakistan nevertheless considers that this issue may at this point be passed over in silence in favour of a pragmatic accommodation between the work of the Court and the work of the Neutral Expert going forward. Having regard to, and relying expressly on, the Neutral Expert's clear statement, on the record of his proceedings, that, as an engineer, he has "no competence to interpret any part of the Treaty", Pakistan considers that it would serve the interests of safeguarding the integrity of the Treaty for the Court to make clear that to it will fall the task of providing dispositive interpretations of the Treaty on the issues engaged by Pakistan's Request for Arbitration, and that it will leave for determination by the Neutral Expert questions of technical design specifications in respect of the KHEP and the RHEP that are addressed in India's 4 October 2016 Neutral Expert Request. On this basis, the Neutral Expert's technical determinations would await, and turn upon, the Court's prior interpretations of law. In this regard, Pakistan recalls the structural approach to coordination and the division of competence between the Court and the Neutral Expert set out at paragraph 15 of its Division of Competence Statement. As with other issues of sharp dispute between the Parties that are engaged by this preliminary phase of proceedings, Pakistan requests the Court not to shy away from a firm determination on this point in its decision on competence in due course.

279. Further, while Pakistan considers that the Court need not at this point address the issue of the validity of the Neutral Expert's appointment, *it is essential* that the Court address, clearly and explicitly, the interpretation and application of Article IX(6) and Paragraph 11 of Annexure F. In so doing, the Court must make clear beyond contention that Article IX(6) does not and cannot preclude the competence of the Court *in these proceedings* in respect either of questions of the systemic interpretation and application of the Treaty or of the remedies that may follow from any determinations that the Neutral Expert may make in due course. Pakistan also invites the Court to affirm clearly and explicitly that the duty of cooperation in the Treaty carries through to the Court and the Neutral Expert, with the result that both are required to adopt an approach of pragmatic coordination between them.

280. On the assumption that the Court affirms its competence in respect of the disputes engaged by Pakistan's Request for Arbitration – as Pakistan respectfully submits it must do, having regard to the compelling considerations of fact, evidence and law advanced in this Response – it is essential that the outcome of this Preliminary Phase on Competence be that the Court, the Neutral Expert, and both Parties, and indeed the watching world, are clear beyond doubt about the balance of competence between the Court and the Neutral Expert in the unusual and challenging circumstances of these proceedings. With the Decision of the Court on these issues, there must be no room for doubt about the basis on which the Court and Neutral Expert proceedings should then properly unfold, about the carefully considered legitimacy of the Court, and about the scope of competence of the Neutral Expert.

B. Final submissions

281. Having regard to the preceding, and to the submissions advanced in this Response, Pakistan respectfully requests that the Court, having regard to Article IX and Annexures F and G of the Treaty, and to the facts, evidence and law adduced by the Parties, adjudge and declare that:

(a) India's letter of 11 August 2016 did not constitute an actual request for the appointment of a Neutral Expert and as such could not, did not and does not preclude, whether by operation of Article IX(6) of the Treaty or otherwise, Pakistan's Request for Arbitration under Article IX(5) of the Treaty on 19 August 2016;

(b) having been seised by a Request for Arbitration by Pakistan transmitted to and received by India on 19 August 2016, the Court is competent in respect of all questions and matters addressed therein;

(c) the three umpires have been validly appointed in accordance with the terms of Paragraphs 4, 7, 8 and 9 of Annexure G, Pakistan has validly appointed two arbitrators in accordance with the terms of Paragraphs 6 and 10 of Annexure G, and (without prejudice to any issue concerning or in consequence of the Pause instituted by the World Bank on 12 December 2016) the Court was and is validly constituted;

(d) having regard to Paragraph 11 of Annexure G of the Treaty, the Court is competent to transact business when all three umpires and at least two arbitrators are present;

(e) taking note and in the light of the statement by the Neutral Expert, on the record of the parallel proceedings before him, that, as an engineer, he has "no competence to interpret any part of the Treaty", there is no need for the Court to address the validity of the appointment of the Neutral Expert in the present phase of the proceedings;

(f) having regard to the parallel proceedings before the Court and the Neutral Expert on overlapping issues, the role and function of the Court will properly be to provide dispositive interpretations of the Treaty on the issues engaged by Pakistan's Request for Arbitration, leaving for subsequent determination by the Neutral Expert questions of technical design specifications in respect of the KHEP and the RHEP that are addressed in India's 4 October 2016 Neutral Expert Request;

(g) having regard to the determination in subparagraph (f) above, the Neutral Expert's technical determinations must await, and take full cognisance of, the Court's interpretations of law;

(h) having regard to the preceding findings and determinations, the competence of the Court in the present proceedings encompasses both questions of the systemic interpretation and application of the Treaty and any question of the remedies that may follow from any determinations that the Neutral Expert may make in due course;

(i) having regard to the parallel proceedings before the Court and the Neutral Expert on overlapping issues, the duty of cooperation upon the Parties under the Treaty applies equally to the exercise of competence of the Court and the Neutral Expert with the consequence that the Court and the Neutral Expert are required to adopt an approach of pragmatic coordination between them; and

(j) reserves any issue of costs in respect of the present phase of the proceedings for decision in due course.

Respectfully submitted,

(AHMAD IRFAN ASLAM)
Agent of the Islamic Republic of Pakistan

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