

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

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CERTIFIED TRANSCRIPT  
(HEARING FOR THE FIRST PHASE ON THE MERITS)

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COURT OF ARBITRATION:

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

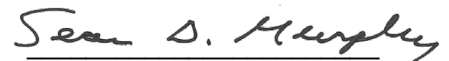
SECRETARIAT:

The Permanent Court of Arbitration

ON BEHALF OF THE COURT OF  
ARBITRATION:

CERTIFIED PURSUANT  
TO  
PARAGRAPH 19 OF ANNEXURE G

8 July 2024

  
\_\_\_\_\_  
Professor Sean D. Murphy  
Chairman

In the matter of an arbitration  
pursuant to Article IX and Annexure G  
of the Indus Waters Treaty 1960  
PCA Case No. 2023-01

Permanent Court of Arbitration  
Peace Palace  
The Hague  
The Netherlands

Day 1

Monday, 8 July 2024

Hearing of the First Phase on the Merits

Before:

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

---

BETWEEN:

THE ISLAMIC REPUBLIC OF PAKISTAN  
-and-  
THE REPUBLIC OF INDIA

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Transcript produced by Trevor McGowan  
Georgina Vaughn and Lisa Gulland

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Affairs

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MR PETER J RAE, Technical Advisor

THE REPUBLIC OF INDIA WAS NOT REPRESENTED

## FOR THE PERMANENT COURT OF ARBITRATION

MR GARTH SCHOFIELD, Deputy Secretary General

MR BRYCE WILLIAMS, Legal Counsel

MR SEBASTIAN KING, Assistant Legal Counsel

MS VILMANTE BLINK, Senior Case Manager

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<p>08:56 1 Monday, 8 July 2024 2 (9.33 am) 3 THE CHAIRMAN: Welcome to everyone. It's good to see you. 4 This is a proceeding of the Court of Arbitration 5 constituted in accordance with the Indus Waters Treaty 6 1960 between the Islamic Republic of Pakistan and the 7 Republic of India. 8 I take note of the presence of the delegation 9 representing Pakistan. In particular, I take note of 10 the presence of Mr Raja Naeem Akbar, the Pakistan Deputy 11 Agent, who is also Secretary of the Ministry of Law and 12 Justice. Mr Akbar, it's a great pleasure to see you 13 here. While I see many familiar faces in your 14 delegation, I invite you at this time to introduce your 15 delegation, if that's convenient. 16 MR AKBAR: Thank you very much. 17 Mr Syed Mehar Ali Shah: he is a commissioner, 18 Indus Waters. And then our lead counsel, Daniel 19 Bethlehem. And then we have our ambassador, 20 Mr Ambassador Tarar. And then Mr Zohair Waheed: he is 21 the Office of Attorney General legal representative. 22 SIR DANIEL: Mr Chairman, perhaps I will introduce the rest 23 of the team, with your permission. 24 We've got Professor Attila Tanzi, who is sitting on 25 the end of the row. Immediately behind me, we've got</p> <p style="text-align: center;">Page 1</p>	<p>09:36 1 a counter-memorial in this phase of the proceedings, but 2 the Court received no response. Similarly, India was 3 invited to confirm its appearance at this hearing by 4 22 May 2024, but again no response was received. 5 Even so, we have kept both parties equally apprised 6 of all the developments in this case, including access 7 to all relevant materials and evidence. Moreover, the 8 Court hopes that India will reconsider its 9 non-participation in this case. The door remains open 10 for it to do so. 11 India's non-participation has not and will not 12 preclude the work of this Court. Indeed, the Court 13 issued an Award on the Competence of the Court on 14 6 July 2023. Among other things, that Award explained 15 why non-participation by a party in a case before 16 an international court cannot, by itself, preclude the 17 court from acting within the scope of its competence. 18 That Award also systematically addressed points 19 conveyed by India to Pakistan and to the World Bank on 20 why India did not regard the Court as possessing 21 competence in this arbitration. The Court analysed 22 India's position, weighed it against Pakistan's 23 position, and reached the conclusion that the Court 24 possesses compétence de la compétence; and further, that 25 the Court was competent under the Treaty to consider and</p> <p style="text-align: center;">Page 3</p>
<p>09:35 1 Mr Stephen Fietta KC, then Laura Rees-Evans, 2 Professor Philippa Webb, Dr Cameron Miles. Then we've 3 got the legal advisor of the Pakistan Ministry of 4 Foreign Affairs, Mr Asad Khan Burki. 5 Looking to the back row, we've got Ms Megan Rippin, 6 we've got Mr Abdullah Tariq, Mr Peter Rae, 7 Dr Gregory Morris. I'm just looking at the back row. 8 Then we've got Mr Jamal Nasir and Ms Fatima Hamdia 9 Tanweer from the Pakistan Embassy here in The Hague. 10 THE CHAIRMAN: Very good. Thank you very much for that. 11 I believe that everyone is familiar with the members 12 of the Court and also the members of our Registry who 13 are here, and of our court reporter, so I won't take the 14 time introducing them. 15 (9.36 am) 16 Introductory remarks 17 THE CHAIRMAN: I note with regret the absence of 18 a delegation representing India. India has been kept 19 informed of all aspects of this proceeding, including 20 an invitation to submit written pleadings and to attend 21 this hearing, but has declined to engage with the Court 22 in that respect. 23 In particular, I note that India was invited, within 24 two weeks after the submission of Pakistan's Memorial of 25 22 March 2024, to indicate whether it intended to submit</p> <p style="text-align: center;">Page 2</p>	<p>09:38 1 determine the disputes set forth in Pakistan's Request 2 for Arbitration. 3 While India's absence does not preclude the Court 4 from proceeding with its work, it is equally the case 5 that India's non-participation does not result in 6 decisions by default in favour of Pakistan. Rather, 7 consistent with the Treaty and with our Supplemental 8 Rules of Procedure, the Court will closely scrutinise 9 the claims before it so as to determine whether 10 Pakistan's claims are well founded or not, and will only 11 find in Pakistan's favour with respect to claims that 12 are well founded. 13 I might add in this regard that to the extent that 14 the Court asks questions in this hearing designed to 15 draw out points that might have been made by India, were 16 it present, Pakistan should not assume from such 17 questions that the Court has made up its mind on any 18 particular issue, as the Court has not reached any 19 conclusions as to the issues before it. 20 In conjunction with deciding in July 2023 that the 21 Court was competent in this arbitration, the Court also 22 decided, in Procedural Order No. 6, to address the 23 merits of this case in phases. 24 The first phase, which is the subject of this 25 hearing, seeks to address questions of systemic</p> <p style="text-align: center;">Page 4</p>

09:40 1 interpretation and application of Article III and Part 3  
 2 of Annexure D of the Treaty. In particular, the Court  
 3 identified seven questions as the focus of this phase,  
 4 which are set forth at paragraph 35 of Procedural  
 5 Order No. 6.  
 6 After issuance of the Award on Competence and  
 7 Procedural Order No. 6, Pakistan requested leave to  
 8 amend its Request for Arbitration. That request was  
 9 granted, and the Amended Request for Arbitration was  
 10 filed on 28 July 2023. India made no objection to the  
 11 Amended Request for Arbitration.  
 12 Pakistan suggested, during the summer of 2023, that  
 13 the Court engage in a site visit to the region so as to  
 14 learn about the basic design and operation of  
 15 run-of-river hydroelectric plants. The Court indicated  
 16 an interest in doing so, and invited both parties to  
 17 propose visits to such plants under their  
 18 administration.  
 19 Pakistan proposed a visit to the Neelum-Jhelum  
 20 Hydroelectric Power Plant, while India did not respond.  
 21 As such, the Court proceeded with plans for a visit to  
 22 the Neelum-Jhelum Hydroelectric Power Plant. In  
 23 January 2024, however, by letter to the Court's  
 24 registrar, India expressed opposition to such a site  
 25 visit.

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09:41 1 After carefully considering India's objections and  
 2 Pakistan's response thereto, the Court decided, in  
 3 Procedural Order No. 9, to reject India's objections and  
 4 to proceed with the site visit. That site visit  
 5 occurred from 23 April to 29 April 2024, and was  
 6 undertaken pursuant to a Site Visit Protocol issued as  
 7 Procedural Order No. 10. India did not participate in  
 8 the site visit.  
 9 An independent observer, Mr Stephen Pomper,  
 10 accompanied the site visit and observed all of the  
 11 interactions of the Court with the representatives of  
 12 Pakistan and with the technical site experts. At the  
 13 end of the site visit, Mr Pomper certified that the Site  
 14 Visit Protocol was followed.  
 15 As previously noted, on 22 March 2024, Pakistan  
 16 filed its Memorial for the First Phase on the Merits,  
 17 which included appendices and exhibits. India did not  
 18 file a counter-memorial.  
 19 On 27 May 2024, the court ordered Pakistan to  
 20 produce certain papers and other evidence, which  
 21 Pakistan, with the leave of the Court, has done in part  
 22 prior to this hearing, and will complete after the  
 23 hearing. The objective of the Court in ordering such  
 24 production was, in large part, to understand fully the  
 25 positions advanced by India before the Permanent Indus

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09:43 1 Commission, before the Baglihar Neutral Expert and  
 2 before the Kishenganga Court of Arbitration on the  
 3 proper interpretation of the Indus Waters Treaty.  
 4 On 29 June 2024, the Court issued Procedural  
 5 Order No. 12, which addressed the organisation of this  
 6 hearing, including a basic outline of how the hearing  
 7 will proceed.  
 8 Further, on 5 July 2024, Pakistan requested leave to  
 9 submit additional documents into the record, which the  
 10 Court granted on 6 July 2024. India will be given  
 11 an opportunity to submit written comments with respect  
 12 to those records after the conclusion of this hearing.  
 13 That concludes my opening remarks. Are there any  
 14 matters that need to be addressed at this point, either  
 15 Mr Akbar or Sir Daniel?  
 16 SIR DANIEL: Mr Chairman, no, I don't think so. I think we  
 17 are ready to proceed, under your control.  
 18 THE CHAIRMAN: Very good. If that's the case, then I invite  
 19 to the podium Mr Akbar, the Deputy Agent, to make  
 20 Pakistan's opening statement.  
 21 (9.45 am)  
 22 Opening statement on behalf of  
 23 the Islamic Republic of Pakistan  
 24 MR AKBAR: Mr Chairman, members of the Court of Arbitration,  
 25 members of the Secretariat, good morning. My name is

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09:45 1 Raja Naeem Akbar. I am Federal Secretary at the  
 2 Ministry of Law and Justice, Islamic Republic of  
 3 Pakistan, and Deputy Agent of Pakistan in these  
 4 proceedings.  
 5 We met two months ago, when I had the honour of  
 6 welcoming you at the start of the Court's site visit to  
 7 the Neelum-Jhelum Hydroelectric Power Plant in Pakistan.  
 8 Mr Chairman, it is my honour to appear before you today  
 9 at the opening of this hearing on the first phase on the  
 10 merits of the Court's proceedings. Pakistan's Agent,  
 11 Mr Ahmad Irfan Aslam, has asked me to convey his deep  
 12 personal regret that he cannot be here today.  
 13 Mr Chairman, members of the Court, my statement will  
 14 be brief. I would like simply to situate these  
 15 proceedings in the broader arc of this dispute, and to  
 16 make important observations that are required to be  
 17 appropriately made in a Pakistani voice. Pakistan's  
 18 lead counsel, Sir Daniel Bethlehem, who will follow me,  
 19 will set out the contours of Pakistan's substantive case  
 20 and submissions that you will hear over the coming days.  
 21 Pakistan appreciates that the Chairman and the  
 22 members of the Court are working expeditiously since the  
 23 appointment of the Chair on 13 October 2022. However,  
 24 it is important to point out that it took more than  
 25 eight years to reach this point. The Request for

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09:47 1 Arbitration was initially made to India on  
 2 19 August 2016.  
 3 The pause imposed by the World Bank since  
 4 12 December 2016 was deeply damaging to Pakistan. One  
 5 of the hydroelectric plants that was addressed in the  
 6 Request for Arbitration, the Kishenganga plant, is now  
 7 long built and has been operational for more than  
 8 six years. Pakistan's request for interim measures to  
 9 restrain the construction of Kishenganga Hydroelectric  
 10 Plant, which had been included in its Request for  
 11 Arbitration, was swept aside and left irrelevant by the  
 12 World Bank's pause. The second hydroelectric plant  
 13 addressed in the Request for Arbitration, the Ratle  
 14 plant, is now well advanced in its construction. The  
 15 situation now is very different from where we should  
 16 have been in late 2016 or early 2017.  
 17 As is well known, the proceedings before you are  
 18 moving forward in parallel with a proceeding before  
 19 a Neutral Expert. In its Competence Award, the Court  
 20 affirmed that parallel proceedings are not, per se,  
 21 excluded by the Treaty. Having regard to Pakistan's  
 22 position that it is "resolved to participate in the  
 23 Neutral Expert process", subject to the caveat in  
 24 respect of the limited competence of the Neutral Expert,  
 25 the Court resolved to proceed with the first phase on

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09:50 1 scope of the first phase on the merits is set out in the  
 2 Court's Procedural Order No. 6, but the Court's  
 3 engagement does not end here. In its Award on  
 4 Competence, the Court confirmed its competence in  
 5 respect of Pakistan's entire case.  
 6 The Court, in Procedural Order No. 6, discussed "the  
 7 general duty of mutual respect and comity". This duty  
 8 applies to both how the Court handles its own proceeding  
 9 and how the Neutral Expert manages the proceeding within  
 10 his authority. Unlike the competence of the Court, the  
 11 competence of the Neutral Expert under the Treaty is  
 12 limited. And our lead counsel, Sir Daniel, will address  
 13 more fully the competence of the Neutral Expert in the  
 14 parallel proceedings.  
 15 Mr Chairman, members of the Court, there are three  
 16 main points that I must mention briefly, both to provide  
 17 a foundation for our lead counsel's submission and to  
 18 underline that these submissions on these issues are not  
 19 simply the submissions by the counsel, but reflect the  
 20 deep-held view of the Islamic Republic of Pakistan.  
 21 The first point concerns the cornerstone status of  
 22 the Indus Waters Treaty in relation between Pakistan and  
 23 India. The second point is the deep concern in Pakistan  
 24 about what we perceive to be the very real risk of the  
 25 weaponisation of water by India. The third point

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09:48 1 the merits.  
 2 Mr Chairman, in the first phase, the Court has  
 3 directed that seven questions should be addressed, going  
 4 to the application of Article III [and] Part 3 of  
 5 Annexure D of the Indus Waters Treaty, in addition to  
 6 the weight and binding authority of the decisions by  
 7 other Article IX settlement mechanisms under the Treaty.  
 8 Mr Chairman, members of the Court, Pakistan feels  
 9 that India's absence from these proceedings is  
 10 intentional, in order to frustrate the mutually agreed  
 11 Treaty provisions. Hence, India's absence is against  
 12 the cooperative spirit with which both parties committed  
 13 themselves when signing the Treaty. It is important to  
 14 point out that India cannot strengthen its case by being  
 15 absent from these proceedings. Therefore, you have  
 16 a difficult task to perform in India's absence in these  
 17 proceedings, but it is a task that must be performed  
 18 nonetheless.  
 19 Pakistan is committed to make the Treaty work, which  
 20 provides a well-defined platform for both countries to  
 21 address issues emanating from the Treaty. But the  
 22 future will need a clear affirmation of the rights and  
 23 duties to which the parties committed themselves in the  
 24 past.  
 25 Another important point I wish to make is that the

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09:52 1 concerns the waters of the Eastern Rivers. Mr Chairman,  
 2 starting with the last of these issues.  
 3 While the flow of the waters of the Eastern Rivers  
 4 is not before you in this dispute, the bargain that was  
 5 struck between Pakistan and India in 1960, agreed in the  
 6 Treaty, was a bargain pertaining to the rights and  
 7 obligations over the waters of both the Western and  
 8 Eastern Rivers. The Treaty provides the balance of  
 9 rights and obligations in which India was given let-flow  
 10 rights and right of use over the water of the Eastern  
 11 Rivers; and Pakistan was given let-flow rights and right  
 12 of use over the water of the Western Rivers. India has  
 13 both used and abused the rights over the Eastern Rivers.  
 14 As regards the Western Rivers, through its approach  
 15 to design, construction and operation of its  
 16 run-of-river hydroelectric plant on these rivers, India  
 17 is, we say, abusing the tightly constrained exceptions  
 18 afforded with regard to the use of water of those  
 19 rivers. India is therefore, in respect of both the  
 20 Western and the Eastern Rivers, proceeding in a manner  
 21 that is against the very much spirit of the Treaty.  
 22 Pakistan is acutely concerned about this.  
 23 Mr Chairman, this brings me to the cornerstone  
 24 status of the Treaty and issues of weaponisation of  
 25 water. Our lead counsel will develop both points

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09:53 1 through the lens of law and the provisions of the  
 2 mutually agreed Indus Waters Treaty.  
 3 Speaking as a senior official of the Government of  
 4 Pakistan, I must say that since the independence of the  
 5 Islamic Republic of Pakistan in 1947, Pakistan, being  
 6 the lower riparian, has lived in insecurity. India, as  
 7 upper riparian, has the power to use water as a leverage  
 8 point against Pakistan. The flow of the Eastern Rivers  
 9 has [been] almost completely cut off by India, in  
 10 a manner that we consider to be a violation of the  
 11 provisions of the bilateral Treaty.  
 12 The Indus Waters Treaty resulted directly from the  
 13 efforts made in response to the earlier water dispute  
 14 between the two countries following the events of 1948.  
 15 The Treaty aimed to regulate the divisions and use of  
 16 water resources in accordance with the 1947 boundary  
 17 delimitation. As [Sir] Daniel will explain, the Treaty  
 18 effectively served both as a boundary agreement and  
 19 a peace treaty in all but name. It stands as  
 20 a cornerstone of Pakistan's relations with India.  
 21 As the upper riparian, India has the ability to  
 22 restrict the flow of water, to affect the flow --  
 23 timing -- of the release of stored water, and thereby to  
 24 impact the lives of hundreds of millions of Pakistanis  
 25 living downstream, and leading to the negative

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09:55 1 environmental impact in Pakistan.  
 2 Mr Chairman, members of the Court, these proceedings  
 3 are not directly about the weaponisation of water. They  
 4 are about the seemingly narrow issue of interpretation  
 5 and application of the technical provisions of the  
 6 Treaty concerning the design of new run-of-river  
 7 hydroelectric plants by India on the Western Rivers.  
 8 This is the dispute [before] you, in which respect of  
 9 which Pakistan is seeking guidance. But the  
 10 interpretation and application of the technical design  
 11 criteria for new run-of-river hydroelectric plants on  
 12 the Western Rivers cannot be separated from the overall  
 13 balance established by the Treaty.  
 14 Mr Chairman, members of the Court, I will conclude  
 15 there. Pakistan's counsel will develop Pakistan's  
 16 substantive case by reference to the black-letter law of  
 17 the Treaty. The decisions which you are called upon to  
 18 make are not decisions of political appreciation; these  
 19 are the decisions of law rooted in an international  
 20 instrument that stands as a cornerstone of  
 21 Pakistan-India relations. Pakistan wishes you wisdom in  
 22 your task.  
 23 Mr Chairman, with that, may I ask you to call our  
 24 lead counsel to the podium to address Pakistan's  
 25 substantive case. As I am doing so, may I also

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09:56 1 preemptively tender my apologies for my absence from the  
 2 hearing room over the coming days, as I am required  
 3 urgently back in Pakistan. Thank you very much for  
 4 affording this opportunity.  
 5 THE CHAIRMAN: Thank you, Mr Akbar. Before you leave the  
 6 podium, let me just check to be sure there are no  
 7 questions that we have for you. But let me assure you  
 8 that your need to not be here [for] the entire course of  
 9 the hearing is fully understood by the Court, and please  
 10 have no concerns in that regard.  
 11 Any questions from this side?  
 12 (9.57 am)  
 13 Questions from THE COURT  
 14 THE CHAIRMAN: I just have one question for you, Mr Akbar,  
 15 and feel free to answer as you wish or to deflect the  
 16 question to those that are to follow. But at you said  
 17 at the outset, having a Pakistani voice to speak to  
 18 these issues is of some importance.  
 19 You mentioned the real risk of weaponisation of the  
 20 Western Rivers. And my question is whether Pakistan's  
 21 concern in that regard is a generalised concern that  
 22 India has control, or could have control, over the  
 23 Western Rivers, or whether there are specific types of  
 24 actions that you are concerned about that India might  
 25 take, in its position as the upper riparian.

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09:58 1 MR AKBAR: There are two aspects.  
 2 Because under the Treaty, sir, it was clearly  
 3 decided that the Eastern Rivers will -- Pakistan would  
 4 get water and everything. I mentioned in my statement  
 5 as well, these three rivers are almost -- there is no  
 6 water. Very little water is coming, and only in the  
 7 rainy season.  
 8 On the Western Rivers, when we say they are using  
 9 water as a weapon, they are smartly constructing dams  
 10 and they are controlling the flow of the water. So  
 11 that's why we are saying they are using it as a weapon.  
 12 So indirectly they are controlling the Western Rivers as  
 13 well.  
 14 THE CHAIRMAN: So the concern is that at a certain point in  
 15 time, they might cut off that flow or decrease that  
 16 flow in a significant way in order to achieve  
 17 a political objective? I'm just trying to understand,  
 18 as much as you're comfortable saying, what the specific  
 19 concerns are.  
 20 MR AKBAR: Thank you very much for providing this  
 21 opportunity. I think our lead counsel is in a better  
 22 position to take the position.  
 23 THE CHAIRMAN: In that case, we will let you go, Mr Akbar.  
 24 I appreciate very much your presentation. And  
 25 Sir Daniel can respond as he wishes in the course of his

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09:59 1 presentation. So thank you very much.  
 2 MR AKBAR: I'm grateful for providing this opportunity.  
 3 Thank you, sir.  
 4 THE CHAIRMAN: Sir Daniel, you have the floor.  
 5 SIR DANIEL: Thank you, Mr Chairman. (Pause)  
 6 Mr Chairman, members of the Court, it's an honour to  
 7 appear before you again in these proceedings.  
 8 The cadence of the proceedings brings both  
 9 familiarity and exhaustion, and we have an intensive  
 10 period before us. There is a special challenge  
 11 associated with appearing as counsel in proceedings in  
 12 which the Respondent is absent, as there is both nothing  
 13 to aim for -- there is no agreed circumference of the  
 14 dispute on the basis of an exchange of written  
 15 pleadings -- and there is also an appreciation that the  
 16 tribunal -- in this case, the Court -- will properly  
 17 take as its responsibility the close examination of  
 18 counsel -- I might even say the cross-examination of  
 19 counsel -- on their arguments, but in circumstances in  
 20 which counsel will not have had the benefit of any prior  
 21 airing of views. We hope that we will rise to the  
 22 challenge.  
 23 We appreciate also that the Court is faced with  
 24 hurdles of its own, particularly having regard to the  
 25 nature of the enquiry that is required by this first

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10:03 1 hefty core bundles; they are rather bigger than we had  
 2 anticipated. I think you should also have from us  
 3 a hyperlinked electronic version of those bundles;  
 4 a number of us will be referring you to the documents  
 5 there. You should also have available the electronic  
 6 record of the entire docket of the Court, and we may be  
 7 calling up additional documents.  
 8 I will, for purposes of my proceedings, I think only  
 9 be taking you principally to one document -- there may  
 10 be one or two other references to be made -- and that  
 11 will be to the Treaty. We will call it up on the  
 12 screen. But if you would like to have a hard copy  
 13 available to you in due course to mark up, that may be  
 14 convenient.  
 15 One last point of housekeeping. Mr Chairman,  
 16 perhaps just before, in due course, you rise for the  
 17 coffee break, there will be a brief point of  
 18 clarification and application to you regarding documents  
 19 before you, which I propose to make in the two minutes  
 20 before you rise for the coffee break, so that you will  
 21 have a chance to deliberate on those.  
 22 Mr Chairman, members of the Court, Pakistan is here  
 23 in these proceedings requesting from you clear, full and  
 24 binding guidance on the interpretation of the key  
 25 provisions of paragraph 8 of Annexure D of the Indus

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10:01 1 phase of the merits. While Pakistan and India are  
 2 clearly opposed on the key questions that you will be  
 3 required to address, both the nature of the enquiry and  
 4 India's absence will properly require that special care  
 5 is taken in addressing these issues.  
 6 Mr Chairman, I pause here from my scripted remarks  
 7 just to pick up a point that you made in your opening,  
 8 where you said very rightly and properly -- and we are  
 9 happy to hear that, as it's certainly the position that  
 10 we take -- that India's absence does not result in  
 11 decisions by default. And we are here to present our  
 12 case and to invite the closest of scrutiny.  
 13 As Pakistan's Deputy Agent has said though, I must  
 14 underline that India cannot strengthen what we regard to  
 15 be a weak case simply by a failure to present it. So  
 16 the fact that it is not in the room cannot somehow be  
 17 taken to strengthen that case. We have endeavoured --  
 18 as per our, as it were, self-imposed mandate, but also  
 19 with regard to the questions that the Court put to us in  
 20 advance of the hearing -- to set out as fully as we can  
 21 what we understand to be India's position, and we will  
 22 address India's position carefully.  
 23 Mr Chairman, let me perhaps also add one or two  
 24 points of housekeeping before I go back to my script.  
 25 You should have, I believe, in front of you two rather

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10:05 1 Waters Treaty, read together with Article III of the  
 2 Treaty and other relevant provisions. The  
 3 interpretative guidance is not requested in this phase  
 4 of the proceedings in respect of any particular  
 5 run-of-river hydroelectric plant but rather with regard  
 6 to the practical application of the provisions in  
 7 question to the design of any and all Indian  
 8 run-of-river plants on the Western Rivers of the  
 9 Indus Basin.  
 10 It is a big task, we appreciate, but it is necessary  
 11 in the context of the deeply rooted systemic dispute  
 12 between Pakistan and India on these issues, the scale of  
 13 India's Western Rivers HEP construction programme, and  
 14 the sense that it would be incomprehensible for these  
 15 issues to be left to be addressed on a plant-by-plant  
 16 basis in the absence of overarching interpretative  
 17 guidance.  
 18 As will have been evident from the length and detail  
 19 of Pakistan's Memorial, we consider that the  
 20 interpretative exercise of which you are seised cannot  
 21 properly be undertaken as a narrow task that is focused  
 22 simply on construing the relevant subparagraphs of  
 23 paragraph 8 of Annexure D.  
 24 We did consider carefully, before we presented you  
 25 with the 600-plus pages of the Memorial and the

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10:06 1 appendices, whether the Memorial might have been  
 2 confined in effect to the three chapters that make up  
 3 part IV of the Memorial, that deal just with the  
 4 interpretation of the relevant subparagraphs of  
 5 paragraph 8 -- that's 8(a), (c), (d), (e) and (f) of  
 6 Annexure [D] -- corresponding to the questions at  
 7 paragraph 35(c) to (g) of Procedural Order No. 6. But  
 8 we concluded that that approach would not suffice. The  
 9 provisions in question in paragraph 8 -- and indeed in  
 10 Article III -- stand at the core of the bargains that  
 11 were struck by the parties in 1960, and they can only  
 12 properly be construed in the context of the Treaty as  
 13 a whole.

14 Now this appreciation will not be a novelty for  
 15 international lawyers, as the interpretation of  
 16 treaties, based on the general rule of treaty  
 17 interpretation and the supplementary means of  
 18 interpretation which are applicable in these  
 19 circumstances, mandate reference to the object and  
 20 purpose of the Treaty, to the wider context of the  
 21 provisions in dispute -- that's the Treaty as a whole --  
 22 to the circumstances of the conclusion of the Treaty,  
 23 and to the Treaty's preparatory works. Professor Webb  
 24 will address you on these issues more fully tomorrow.  
 25 But the bottom line is that the proper construction

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10:09 1 I also anticipate that Dr Greg Morris will be addressing  
 2 this from an engineering perspective, precisely with  
 3 regard to the Western Rivers. So we will come to your  
 4 question rather fully, shortly.

5 So the purpose of these opening submissions is to  
 6 set the broad contours of Pakistan's case and to address  
 7 the issues with a relatively broad brush. My function  
 8 is to provide a framework for the filigree work that  
 9 will follow from others on Pakistan's advocacy team over  
 10 the coming days.

11 As before, I'm very happy to take questions as we go  
 12 along. It may be though, having a sense of what's to  
 13 follow, that I defer some of the answers -- or at least  
 14 some of the detailed answers -- to my colleagues to  
 15 follow in due course. And we are of course conscious  
 16 that particular questions that the Court may raise will  
 17 in fact form the basis of the second-round submissions.  
 18 So if there are questions that you raise which either  
 19 require much more detailed answers or a little bit of  
 20 research or clarification, we will also defer those to  
 21 the second round.

22 In the absence of the Respondent -- which, as  
 23 Mr Akbar has said, we very much regret -- we have  
 24 structured our oral submissions and allocated the  
 25 advocacy tasks in a manner that we hope will provide the

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10:08 1 of the terms of paragraph 8 of Annexure D requires  
 2 an appreciation of the wider context, the origins and  
 3 the purpose of the Treaty. And that's the reason for  
 4 the 600-plus pages, and that's the reason for the  
 5 lengthy submissions that we'll be making this week.

6 Mr Chairman, members of the Court, before proceeding  
 7 further, let me give you a little bit more of a roadmap  
 8 of my submissions this morning. And as I've said,  
 9 I will take you in particular to the terms of the  
 10 Treaty, but will also refer to other documents.

11 My submissions will take us through to the lunch  
 12 break today. It's a long session, but I hope it's not  
 13 going to be one that hurts any heads. The purpose of  
 14 these opening submissions is to set the broad contours  
 15 of Pakistan's case more generally and to address some  
 16 big issues which occupy the horizon with a relatively  
 17 broad brush.

18 Mr Chairman, you asked our Deputy Agent about the  
 19 question of weaponisation. His initial identification  
 20 of Pakistan's concerns as regards both the Western  
 21 Rivers and the Eastern Rivers scripts exactly the  
 22 concerns that we have. The reason why he deferred  
 23 a subsequent answer to me is that in fact this is  
 24 an issue that we're going to be addressing you on in  
 25 some detail, and I'll come to that in my submissions.

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10:10 1 Court with an interactive opportunity to fully and  
 2 rigorously test Pakistan's case, and to seek clarity on  
 3 the issues of fact, on the issues of law and on the  
 4 engineering issues that will be necessary to facilitate  
 5 your deliberations.

6 The engineering aspect is most evident in our  
 7 proffering submissions from Pakistan's engineering  
 8 advisors, Dr Gregory Morris and Mr Peter Rae, whom you  
 9 met on the site visit, although did not have a chance to  
 10 engage with.

11 Dr Morris is a veteran of the Kishenganga  
 12 proceedings and one of the world's leading authorities  
 13 on sediment management, including with wide experience  
 14 throughout the Himalayan region.

15 Mr Rae is a veteran of the Baglihar proceedings.  
 16 And relatively unusually for a dam engineer is that his  
 17 experience runs from the very conception of  
 18 hydroelectric plants, HEPs, all the way through to  
 19 [their] operation.

20 We have structured the sessions with Dr Morris and  
 21 Mr Rae, the sessions in which they will be addressing  
 22 you, to afford you an opportunity to fully engage with  
 23 them, including on issues that may have arisen in the  
 24 Neelum-Jhelum site visit, but which, for reasons of the  
 25 Site Visit Protocol and the structure of that site

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10:12 1 visit, you may not have had an opportunity to raise, and  
 2 certainly didn't have an opportunity to raise with them.  
 3 As noted in chapter 1 of our Memorial, we are also  
 4 conscious -- very conscious -- that the bench is  
 5 constituted by members with widely varying expertise,  
 6 ranging from public international law, through national  
 7 law and chemical engineering, and also to hydrology and  
 8 dam engineering. Given this, we have endeavoured in our  
 9 Memorial, and will further endeavour in our oral  
 10 submissions, to provide a baseline of information across  
 11 all of the interdisciplinary elements engaged by these  
 12 proceedings, so that you will have from us a common  
 13 frame of reference for purposes of your deliberations.  
 14 Having said that, let me offer preemptive apologies  
 15 if there are patches in our submissions that may seem  
 16 unnecessary to any one of you; it may be that we are  
 17 addressing your neighbour when it comes to those  
 18 submissions.  
 19 But this said, Mr Chairman, if we are either  
 20 skirting over particular issues or spending too much  
 21 time on them, please direct us, as we would like to  
 22 adjust accordingly and accommodate to the cadence of the  
 23 Court. We look forward to fielding questions from you  
 24 during the course of these first-round submissions, and  
 25 we will either respond to them in the course of those

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10:13 1 submissions or next week.  
 2 Mr Chairman, members of the Court, our oral  
 3 submissions will not simply repeat our written  
 4 submissions. We have endeavoured to focus our oral  
 5 submissions on the issues that are most likely to  
 6 require your attention for purpose of response to the  
 7 questions to which we were directed by Procedural Order  
 8 No. 6. To this end, we have also endeavoured to pick up  
 9 questions that arose during the Neelum-Jhelum site visit  
 10 and integrate them into our presentations.  
 11 Insofar as such questions engage their submissions,  
 12 each of the advocates addressing you will also integrate  
 13 into their submissions responses to the written  
 14 questions posed [by] the Court in advance of the  
 15 hearing. This mostly concerns the submissions by  
 16 Professor Webb and by Dr Miles, who will address you on  
 17 the interpretative issues concerning the subparagraphs  
 18 of paragraph 8. Dr Miles will also address you on  
 19 Friday on your "what if?" question regarding the  
 20 redesign of the Baglihar and Neelum-Jhelum HEPs in the  
 21 light of the parties' respective conceptions of the  
 22 paragraph 8 design criteria.  
 23 As you will know from our letter of 27 June, with  
 24 the details now reflected in the annexure to PO12, we  
 25 propose to call Pakistan's Commissioner for Indus

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10:15 1 Waters, Mr Shah, to give evidence immediately following  
 2 the lunch break today. Mr Chairman, we are grateful to  
 3 the Court for your willingness to accommodate this by  
 4 agreeing to sit until 6.00 pm today, if that is  
 5 necessary, and obviously that will be dependent on the  
 6 scale of Court's examination of Mr Shah. If, of course,  
 7 you wish to go beyond today in your examination of  
 8 Mr Shah, Mr Shah understands that he will have to be  
 9 sequestered overnight. But we will see how that goes.  
 10 Mr Chairman, another short practical point of  
 11 proceedings as we start this week. As also addressed in  
 12 our letter of 27 June, we have so arranged the scheme of  
 13 our submissions to avoid lengthy back-to-back  
 14 submissions on different topics by individual advocates.  
 15 With your indulgence, therefore, Mr Chairman, if we  
 16 conclude a projected tranche of submissions early on any  
 17 given day, perhaps because we go faster than we  
 18 anticipated or there may be fewer questions from the  
 19 Court than we have allowed for, with your indulgence, we  
 20 will seek an adjournment of the hearing for that day,  
 21 even if it leaves a little bit of fallow time.  
 22 Just to illustrate, Mr Shah will be introduced and  
 23 led in his direct evidence and his re-direct as  
 24 appropriate by Ms Laura Rees-Evans. She is also due to  
 25 address you on the travaux préparatoires and the history

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10:16 1 of the Treaty. I would like to avoid, if at all  
 2 possible, with your indulgence, Mr Chairman, that the  
 3 minute that she sits down from Mr Shah's evidence, that  
 4 she is asked to stand up to give her own submissions.  
 5 So we have planned that for tomorrow morning.  
 6 We think that the most likely point of fallow time  
 7 is likely to be on Wednesday afternoon. As you'll  
 8 recall, we had originally scheduled Wednesday afternoon  
 9 to be a sort of fallow day, and then came back to you  
 10 with a request that we be permitted to use that in the  
 11 light of the possibility that your examination of  
 12 Mr Shah might go on for more than just an hour. But at  
 13 the moment, on our projected schedule, that's likely to  
 14 be a fallow afternoon, or at least mostly. I think  
 15 Professor Webb is due to speak for an hour or so on  
 16 Wednesday afternoon on the current schedule.  
 17 But it may also depend on how much you would like to  
 18 engage with Dr Morris, because he will be here for two  
 19 and a half hours the day before, and depending on that,  
 20 we may wish to go over.  
 21 Mr Chairman, in case it may assist your monitoring,  
 22 we have a hand-up to give you which I think has been  
 23 provided both electrically and in hard copy, which is  
 24 just the scheme of our submissions. I don't know  
 25 whether that has been provided to you already or whether

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10:18 1 the ...  
 2 THE CHAIRMAN: Thank you, Sir Daniel. I believe it has been  
 3 provided to us already, so we have that.  
 4 We have discussed within the Court the issue of  
 5 perhaps ending early on any given day. The Court is  
 6 certainly amenable to that, the only caveat being  
 7 completion of the first round on Friday. And as  
 8 I understand it, even if we were to finish early on  
 9 certain days this week, the plan would still be to  
 10 complete the first round by Friday, in which case  
 11 I think we have no difficulty with the approach you're  
 12 suggesting.  
 13 SIR DANIEL: Yes, indeed. Thank you very much for that  
 14 clarification, Mr Chairman.  
 15 As you will see from this -- and I won't walk you  
 16 through the details, and in my submissions, I will take  
 17 you to some of the submissions that will follow -- but  
 18 you'll see where we've put in what we think is  
 19 contingency time. The yellow square-bracketed numbers  
 20 next to each submission is intended to be our working  
 21 estimate of the time that's required. This is simply so  
 22 that you can follow the trajectory of our submissions as  
 23 we go forward. So these timings are just indicative.  
 24 Mr Chairman, just as a matter of formality --  
 25 I don't anticipate that this will be an issue at all,

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10:21 1 purposes of the presentations.  
 2 SIR DANIEL: Thank you very much. And I'm grateful,  
 3 Mr Chairman, for your accommodation to be making these,  
 4 as it were, mini-case management applications on the  
 5 hoof.  
 6 I don't propose to go through the scheme in detail.  
 7 There are a number of aspects that I just should note,  
 8 though, very briefly, in case they are useful to orient  
 9 our submissions going forward.  
 10 The first is that the submissions planned for  
 11 tomorrow morning and early afternoon are intended to  
 12 provide a general foundation for the other submissions  
 13 that will follow: negotiating the Treaty, principles of  
 14 interpretation, water usage and sustainability. These  
 15 are, of course, immensely important submissions because  
 16 they provide the foundation, and indeed we anticipate  
 17 that there will be lots of interest and lots of  
 18 questions from members of the Court across the whole  
 19 range of the bench on these submissions.  
 20 Secondly, as you will see, we have allocated  
 21 significant blocks of time to the submissions by  
 22 Dr Morris and Mr Rae.  
 23 In particular, Dr Morris will be captive to your  
 24 enquiries for around two and a half hours tomorrow --  
 25 and as appropriate, if necessary, we can take that into

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10:19 1 but just make sure that it is properly addressed on the  
 2 record -- having regard to paragraph 2 of Procedural  
 3 Order No. 12, and in particular paragraph 2.3 of  
 4 Procedural Order No. 12, Pakistan proposes a very slight  
 5 variation in the scheme of its submissions from that  
 6 that's outlined in the annexure to PO12, beyond those  
 7 addressed in paragraph 5 of our letter of 1 July.  
 8 It is substantially utterly inconsequential. But in  
 9 the annexure to PO12, I think we have Dr Miles making  
 10 his submissions on freeboard, then to be followed by  
 11 Professor Webb making her submissions on outlets,  
 12 spillways and power intakes, and what we would like to  
 13 do is simply to reverse those. It makes sense for  
 14 Dr Miles, in his submissions on freeboard, to be able to  
 15 build on some of the submissions that Professor Webb  
 16 will make.  
 17 So that's reflected in this handout. It's not  
 18 entirely clear from paragraph 2.3 of PO12 whether we  
 19 need to request formal permission from you to make that  
 20 sort of slight adjustment, or whether that proposal in  
 21 our scheme of submissions is simply a matter that's left  
 22 to our own recognisance, but to draw to your attention.  
 23 So I raise it for those purposes.  
 24 THE CHAIRMAN: I think that the Court has no difficulty in  
 25 making that change, so why don't we plan on that for

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10:22 1 Wednesday as well -- addressing general run-of-river  
 2 design and operation issues. And he will again be  
 3 coming back on Thursday for an hour and a half or so,  
 4 again in a session which we will structure in a way  
 5 that's designed to provoke enquiry from you, where he  
 6 will address approaching paragraph 8 from an engineering  
 7 perspective.  
 8 Mr Rae, although he is projected to be on his feet  
 9 for a shorter time, will be picking up on a number of  
 10 the issues that arose during the Neelum-Jhelum site  
 11 visit when he speaks on Wednesday morning, as he will be  
 12 addressing the issue of the incorporation of  
 13 a run-of-river HEP into an integrated power system,  
 14 including wind and solar. We recall that there were  
 15 a number of questions in particular from Dr Blackmore  
 16 and Professor Buytaert about that, but also from other  
 17 members of the Court. So we wanted to provide  
 18 an opportunity to be responsive to that.  
 19 Third and finally, just on the scheme of the  
 20 submissions, as you will see, we have allowed almost  
 21 two full days for the detailed submissions on the  
 22 interpretation of the individual subparagraphs of  
 23 paragraph 8.  
 24 Mr Chairman, members of the Court, with this said,  
 25 let me just identify the more detailed roadmap for the

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10:23 1 submissions that I will be making for the rest of the  
 2 morning. And I propose to address you on four topics,  
 3 as follows.  
 4 First, I will make some preliminary observations on  
 5 the scope and the scheme of these proceedings and,  
 6 insofar as I am able to do so, the parallel proceedings  
 7 before the Neutral Expert. And there are limitations on  
 8 what I will be able to say there, but I will be able to  
 9 say something.  
 10 Second, I will address the origins of the Indus  
 11 Waters Treaty, its cornerstone character, as Mr Akbar  
 12 has referenced, the concern about India's weaponisation  
 13 of water -- going, Mr Chairman, to your question -- and  
 14 the relevance of these issues for the Court's task.  
 15 Third, I will address the three bargains at the  
 16 heart of the Treaty and make some preliminary  
 17 observations about the construction of Article III and  
 18 Annexure D of the Treaty. I will use that part of the  
 19 submissions, if I may, Mr Chairman just to refresh all  
 20 of our collective memories about the particular  
 21 provisions of the Treaty that are in issue, and this is  
 22 the point at which I will invite you to open your hard  
 23 copies or your electronic bundles and just walk you  
 24 through some of the provisions again.  
 25 Then, fourth, I will address the genesis of the

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10:26 1 proceedings. And I will say a little more about this  
 2 latter issue shortly.  
 3 Following the further directions on this issue, the  
 4 document disclosure issue, in your letter of 11 June, we  
 5 have submitted into the record all the documents from  
 6 the Kishenganga proceedings that are responsive to the  
 7 direction in paragraph 1.3 of PO11, and I understand  
 8 that the Registry has those available.  
 9 We have also submitted into the record all of the  
 10 documents that are in Pakistan's possession and control  
 11 from the Baglihar proceedings that are responsive to  
 12 your direction in paragraph 1.2 of PO11. We have had  
 13 some engagement with the Secretary-General and the  
 14 Secretariat of ICSID, that acted as the registry for the  
 15 Baglihar proceedings. There are, I think, one or two  
 16 documents that are still missing, and we are chasing  
 17 those up, but we will make sure that they are provided  
 18 expeditiously.  
 19 As regards the documents identified in  
 20 paragraphs 1.4, 1.5 and 1.6 of PO11 -- namely, that's  
 21 all the records of the Permanent Indus Commission, all  
 22 relevant correspondence between the Pakistan and Indian  
 23 Indus Waters Commissioners, and all relevant  
 24 intergovernmental communications -- the Islamabad team  
 25 has begun to search for and collect this material for

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10:25 1 present dispute, the opposition of the parties on the  
 2 key issues and the relevance of the Kishenganga and  
 3 Baglihar decisions.  
 4 Now in most instances, my observations will be  
 5 intended to provide a foundation for the more detailed  
 6 submissions to come from my colleagues. The intention  
 7 of these opening submissions is to endeavour to cast  
 8 a very broad net and to give you a sense of some of the  
 9 big issues on the horizon, with a view to orienting the  
 10 submissions that will follow.  
 11 Mr Chairman, before I -- there is always an  
 12 inevitable clearing-away of some of the administrative  
 13 issues at the start of these hearings -- but before  
 14 I turn to the first of my substantive topics, let me  
 15 also briefly address you on the progress that has been  
 16 made on the issues of your document disclosure  
 17 directions in Procedural Order No. 11. We indicated  
 18 that we would provide a little bit of an update in the  
 19 hearing.  
 20 As a preliminary matter, I note that since receipt  
 21 of PO11 on 27 May, both the Islamabad and the external  
 22 counsel teams have been very heavily preoccupied on  
 23 two case-related issues: the first, of course, is the  
 24 preparation for this hearing; the second is a site visit  
 25 to India as part of the parallel Neutral Expert

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10:28 1 purposes of both the digitisation of the records and for  
 2 a relevance review by the legal team.  
 3 As I understand it, many of these records -- which  
 4 go back to 1960, so 64 years of records -- were boxed in  
 5 storage, and have had to be -- and in some cases must  
 6 still be -- located and transferred to the office of the  
 7 PCIW. But these 64 years of records are not all  
 8 well-archived or in a good condition, so we are  
 9 undertaking that process at the moment. Once the  
 10 collation of these records has been achieved, Pakistan's  
 11 counsel team will review everything for relevance.  
 12 I note in this regard that the formulation that's  
 13 used in PO11, which is documents "that address matters  
 14 at issue before the Court in the First Phase on the  
 15 Merits", will, in effect, require that each document is  
 16 reviewed for relevance, and in some cases that  
 17 a judgment is made, as these issues -- particularly  
 18 pre-1988, when the first entrails, if you like, of the  
 19 Kishenganga dispute began to arise -- these issues are  
 20 unlikely to have been neatly addressed in a manner that  
 21 will allow relevance to be quickly and easily assessed.  
 22 There isn't a searchable heading, for example.  
 23 So once the documents have been identified, we will  
 24 have to undertake a review of those. We will of course  
 25 provide you with everything that looks even remotely

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10:29 1 relevant. But it may be that there are many thousands  
 2 of documents that will have to be reviewed.  
 3 We note that in PO11, you have raised the issue of  
 4 if this is unduly burdensome, and we will come back to  
 5 you if that is the case, but we are not, at the moment,  
 6 in a position to make such an assessment.  
 7 THE CHAIRMAN: Thank you, Sir Daniel.  
 8 First of all, let me say, on behalf of the Court,  
 9 how grateful we are to the Government of Pakistan for  
 10 the searching out and compiling together of the Baglihar  
 11 and Kishenganga materials, understanding that some of  
 12 the Baglihar materials aren't yet before us. It was  
 13 a relatively quick time period in which you did that and  
 14 presented it to the Court, and we're very grateful for  
 15 it. Indeed, members of the Court have already been  
 16 looking at those materials in preparation for this  
 17 hearing, so the timeliness was quite helpful.  
 18 With respect to the other materials that you are  
 19 referring to, the standard that we set forth in that  
 20 procedural order was an attempt to try to acknowledge  
 21 that there may well be a lot of materials that aren't  
 22 especially relevant. On the other hand, the Court is  
 23 not familiar with the degree of volume here. And so one  
 24 judgment call that Pakistan may wish to make is whether  
 25 doing that analysis of relevance is necessary, in the

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10:31 1 sense that if there is not too much volume, it's  
 2 possible all of the materials could be provided without  
 3 doing that analysis.  
 4 But we leave it to you to come back to us in due  
 5 course, as you work your way through the materials, to  
 6 see if there is some difficulty in complying with the  
 7 order as we've set it, and whether any adjustment is  
 8 possibly useful in that regard.  
 9 SIR DANIEL: Thank you very much, Mr Chairman, and  
 10 I'm grateful for that accommodation.  
 11 I have to say that at the moment, we -- at least the  
 12 external team and the Pakistani team that are here in  
 13 this room -- don't know what the volume of that material  
 14 is. For purposes of the preparation of this case, we  
 15 feel reasonably confident that we've had sight of and  
 16 been able to capture the key documents going back to  
 17 1988, because at least that's when the Kishenganga  
 18 dispute began to bubble up.  
 19 But if you take it back to 1960, we don't quite know  
 20 what's out there. Just to illustrate the point, there  
 21 is, for example, one document that's already in the  
 22 record which I will refer to, and I think others will as  
 23 well, in relation to an agreement between Pakistan and  
 24 India on the Salal plant, which goes back, if memory  
 25 serves me, to 1978. That we were able to locate because

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10:32 1 it's in sort of published form.  
 2 Subsequently, when the legal team has been in  
 3 Islamabad, we've been through documents. We've managed  
 4 to identify documents that seem on first blush to be  
 5 relevant, but then, as we've looked at them, they really  
 6 are not.  
 7 In fact, this brings me to a point that I was about  
 8 to come to, Mr Chairman. And that is that in our  
 9 correspondence to you following PO11, we proposed -- and  
 10 we're grateful to the Court for accepting this  
 11 timeline -- we proposed that we would submit these  
 12 documents by, I think, 30 September. We proposed that  
 13 we would do so under cover of what we described as  
 14 a "post-hearing submission".  
 15 You deferred the question, understandably, of  
 16 a post-hearing submission to the end of these  
 17 proceedings. But just to explain at this point, the  
 18 reason why we propose that we should do it under cover  
 19 of a post-hearing submission is that we would be able to  
 20 use the post-hearing submission to explain to you in  
 21 detail, in a written document, precisely what searches  
 22 have been undertaken, what relevance review was  
 23 undertaken, what judgment calls were made.  
 24 So I appreciate that we'll come back to the  
 25 post-hearing submission issue at the end of these

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10:33 1 proceedings, but that was the thinking of it. We didn't  
 2 want, as it were, just to submit a tranche of documents  
 3 with no context. So the post-hearing submission was to  
 4 provide you with context.  
 5 Mr Chairman, members of the Court, I'm just looking  
 6 to my colleagues to see whether they've got any updated  
 7 information: no.  
 8 As regards the more general catch-all category of  
 9 documents that are addressed in paragraph 1.7 of PO11,  
 10 this was addressed in paragraph 3(c) of Pakistan's  
 11 letter of 6 June. Insofar as this covers documents that  
 12 were submitted by India into the parallel Neutral Expert  
 13 proceedings, I will say a little bit more about this  
 14 shortly, insofar as I'm able to do so.  
 15 Beyond that, Pakistan's search for such materials,  
 16 the paragraph 1.7 materials, is proceeding in tandem  
 17 with the search for the documents addressed in  
 18 paragraphs 1.4, 1.5 and 1.6. But as we said in our  
 19 correspondence of 6 June, we don't have a sense that  
 20 there is a whole hinterland of other documents that will  
 21 be caught by the catch-all 1.7 request.  
 22 Mr Chairman, members of the Court, with the  
 23 administrative issues out of the way, let me turn to my  
 24 more substantive remarks, and start with some  
 25 preliminary observations on the scope and scheme of the

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10:35 1 proceedings and the parallel proceedings before the  
 2 Neutral Expert.  
 3 As an initial observation, I would like to take us  
 4 immediately beyond the Neelum-Jhelum site visit. You  
 5 have the point already, so perhaps forgive me for making  
 6 it. But I make it to underline the issue, as it forms  
 7 the basis of this entire proceedings.  
 8 The Neelum-Jhelum site visit was an exercise in  
 9 familiarising the Court with the general aspects of the  
 10 design and operation of run-of-river hydroelectric  
 11 plants along the Indus system of rivers. This purpose  
 12 was expressly stated in paragraph 1.1 of Procedural  
 13 Order No. 10, the Court's Site Visit Protocol. And  
 14 paragraph 1.2 of the Site Visit Protocol went on to  
 15 expressly differentiate between Indian run-of-river HEPs  
 16 on the Western Rivers, the design and operation of which  
 17 is expressly regulated by the Treaty, and Pakistani  
 18 run-of-river HEPs on the Western Rivers, such as the  
 19 Neelum-Jhelum plant, the design and operation of which  
 20 is not regulated by the Treaty.  
 21 As I say, you have this point: it arose in the  
 22 context not just of the Site Visit Protocol but the site  
 23 visit itself, from some of the questions and comments  
 24 made by the members of the Court; and of course it's at  
 25 the heart of the written questions that you put to us

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10:38 1 geological, they may be financial; there may be other  
 2 constraints. But there will always be constraints of  
 3 one kind or another. And faced with such constraints,  
 4 the task of an engineer charged with designing a HEP is  
 5 to do so within the applicable constraints. And there  
 6 is seldom such a thing as "can't". Dam engineers are  
 7 adept at finding design solutions: that is their job.  
 8 If the constraint, for whatever reason, is to design  
 9 a HEP with, for example, a certain configuration of  
 10 spillways, or that will be required to operate on the  
 11 basis of a restricted flow of water through the  
 12 turbines, that can be done. The task of the design team  
 13 is not to circumvent the constraints, but rather to  
 14 design the best possible HEP within the permissible  
 15 envelope of those applicable constraints.  
 16 And as you will hear again from Dr Morris and from  
 17 Mr Rae, there is nothing inherently problematical about  
 18 the run-of-river HEP design constraints in paragraph 8  
 19 of Annexure D of the Treaty. They are there for a wider  
 20 purpose, and the design engineers will be, in our view,  
 21 perfectly able and capable of navigating their way  
 22 around them to come up with a functioning and  
 23 satisfactory design.  
 24 Where issues of circumvention arise is not at the  
 25 engineering level but at the policy, political and

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10:37 1 before the hearing.  
 2 But the reason for emphasising the point is to  
 3 underscore the wider issue, namely that the design and  
 4 operation of Indian HEPs on the Western Rivers are  
 5 strictly regulated by the Treaty. This is an instrument  
 6 by design that regulates Indian HEPs on the Western  
 7 Rivers. All of these HEPs, the Annexure D, [Part] 3  
 8 HEPS, must be run-of-river plants; they must all be  
 9 designed and operated within the tight regulatory  
 10 constraints of Article III and Annexure D of the Treaty.  
 11 In other words, the Treaty does not give free rein  
 12 to India to design and operate a run-of-river HEP on the  
 13 Western Rivers as it may wish to do so. And this is by  
 14 intent: this is the very purpose of the Treaty. The  
 15 design and operation straitjacket -- for that is what it  
 16 is: a design and operation straitjacket -- in respect of  
 17 Indian run-of-river HEPs on Western Rivers is the pivot  
 18 around which the various bargains reflected in the  
 19 Treaty rotate.  
 20 As you will hear from Dr Morris and Mr Rae in due  
 21 course, and as I anticipate the engineering members of  
 22 the Court will well appreciate, constraints on the  
 23 design and operation of a hydroelectric plant are  
 24 standard fare for engineers. The constraints may be  
 25 regulatory, they may be topographical, they may be

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10:40 1 financial levels. Designing a HEP to accommodate  
 2 applicable constraints may entail costs. It may be that  
 3 cutting corners on costs would enable the cheaper  
 4 generation of electricity. It may be that throwing off  
 5 constraints would enable a HEP to be constructed at  
 6 a different location. It may be that disregarding  
 7 constraints would allow a greater generating head to be  
 8 achieved without the need for lengthy tunnelling. It  
 9 may be that ignoring constraints would allow costs to be  
 10 saved on turbine abrasion and replacement, rather than  
 11 coating the turbines. It may be that circumventing  
 12 constraints would enable a HEP to operate for  
 13 uninterrupted periods, rather than as a peaking plant.  
 14 But where constraints are given, they cannot simply  
 15 be discarded or disregarded; they must be complied with.  
 16 The reality at the heart of the dispute between Pakistan  
 17 and India is that India, we say, wants to read down or  
 18 read out the regulatory constraints of the Treaty from  
 19 the design and operation of its Western Rivers  
 20 run-of-river HEPs.  
 21 Mr Chairman, members of the Court, based on India's  
 22 own figures, it has somewhere in the region of 5,264  
 23 completed large dams on its rivers. You will find this  
 24 figure at Exhibit P-562, which is at tab 14 of your core  
 25 bundle. I don't invite you to turn it up because I'm

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10:42 1 just drawing attention to a figure. The reason why  
 2 I say "somewhere in the region" is because this figure  
 3 comes from a scholarly article published by an Indian  
 4 dam engineer from the Central Water Commission, and the  
 5 headline figure that he quotes in 2022 is 5,264 large  
 6 dams in India.  
 7 The number of planned Indian run-of-river HEPs on  
 8 the Western Rivers of the Indus Basin, of around about  
 9 200, is less than 4% of this total. While the cascading  
 10 effects of these dams for Pakistan's water supply is  
 11 very significant, and potentially catastrophic for  
 12 Pakistan, they are quite literally a drop in the bucket  
 13 for India: less than 4% of the total of Indian large  
 14 dams.  
 15 The design, construction and operation of large dams  
 16 on a national scale in a country the size of India is  
 17 undertaken by reference to template standards and  
 18 guidelines which are informed by a design configuration  
 19 that is focused on the general, on the 5,264 large dams  
 20 nationally, rather than on the particular, the 201  
 21 planned or operational HEPS on the Western Rivers. And  
 22 the result of this is that there is quite evidently  
 23 a strong national imperative on India's part to design  
 24 its Western Rivers run-of-river HEPs by reference to its  
 25 Treaty-unconstrained design criteria that are used for

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10:43 1 the country as a whole.  
 2 While this works for India, however, it does not  
 3 work for Pakistan. And more importantly, it is at  
 4 odds -- we say starkly at odds -- with the design  
 5 constraints and the object and purpose of the Indus  
 6 Waters Treaty by which India is bound.  
 7 Mr Chairman, members of the Court, I highlight this  
 8 point in opening Pakistan's substantive submissions as  
 9 it goes to the very heart of the dispute between  
 10 Pakistan and India of which you are seised. India wants  
 11 to proceed on the basis of a one-size-fits-all approach  
 12 to HEP design. Pakistan, however, insists that Western  
 13 run-of-river HEP design must conform to the Treaty in  
 14 order to safeguard Pakistan's rights to the waters of  
 15 those rivers. Pakistan says, further, that there is no  
 16 overriding reason of principle or practicality, from  
 17 an engineering position, why this can't be achieved, and  
 18 this is the core of the dispute between the parties.  
 19 Let me turn from this preliminary point to address  
 20 the scope and scheme of the proceedings before the Court  
 21 and the parallel proceedings before the Neutral Expert.  
 22 The scope and scheme of the first phase on the  
 23 merits is defined by the terms of Procedural Order  
 24 No. 6, which you handed down on 6 July 2023, alongside  
 25 your Award on Competence. The key questions that we

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10:45 1 were directed to address in that order are set out in  
 2 paragraph 35 of the order, which references --  
 3 Mr Chairman, as you recalled in your opening  
 4 observations -- which references Article III and  
 5 Annexure D, subparagraphs 8(a), (c), (d), (e) and (f) of  
 6 the Treaty.  
 7 The scope of this phase of the proceedings, however,  
 8 is addressed elsewhere in PO6, in the context of the  
 9 Court's decision of the general duty of mutual respect  
 10 and comity that you, the Court, concluded applies both  
 11 to your organisation of the proceedings, in respect of  
 12 the dispute of which you are seised, and to the Neutral  
 13 Expert's organisation of the parallel proceedings, in  
 14 respect of the differences that may properly fall within  
 15 his scope of competence under Part 1 of Annexure F of  
 16 the Treaty.  
 17 Now I use the conditional "may properly fall" with  
 18 respect to the scope of the competence of the Neutral  
 19 Expert for three reasons.  
 20 First, the Neutral Expert has not himself yet  
 21 addressed his competence. As will be evident from  
 22 paragraph 2.3 of the Neutral Expert's Supplementary  
 23 Rules of Procedure, which are published and publicly  
 24 available on the PCA website, and which we have also put  
 25 in at Exhibit P-549 at core bundle tab 1, the Neutral

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10:46 1 Expert -- there's no need for you to turn them up, but  
 2 if you're looking at them in any event -- as you will  
 3 see from paragraph 2.3, the Neutral Expert has mandated  
 4 a procedure under paragraph 7 of Annexure F of the  
 5 Treaty.  
 6 I don't know, Mr Chairman, whether you would find it  
 7 convenient to have a look at paragraph 7 of Annexure F.  
 8 There's no particular reason to do so. But if you would  
 9 find it helpful, it is at page 208, and I will ask my  
 10 colleague to project that on the screen. It's page 208  
 11 of the United Nations Treaty Series document. (Pause)  
 12 While we're waiting for the AV just to respond,  
 13 you have the hardcopy documents in front of you.  
 14 The paragraph 7 procedure of Annexure F is  
 15 a procedure by which the Neutral Expert is required to  
 16 decide whether a difference of which he is purportedly  
 17 seised properly falls within the scope of [Part] 1 of  
 18 Annexure F. And I think I've addressed this to you in  
 19 the past. Part 1 of Annexure F is the enumeration of  
 20 a whole series of items which a Neutral Expert is  
 21 competent to address; and paragraph 7 of Annexure F is  
 22 the procedure by which, where there is a dispute, the  
 23 competence of the Neutral Expert with respect to that  
 24 Part 1 is tested.  
 25 As the Neutral Expert's revised programme of work

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10:49 1 for 4 June 2024 -- which is also on the PCA website, and  
 2 you can find it at Exhibit P-550, at tab 2 of the core  
 3 bundle -- indicates -- so this is another public  
 4 document -- Pakistan, as the moving party, filed its  
 5 statement under paragraph 7 of Annexure F on 1 February  
 6 this year; India filed its paragraph 7 reply on 14 June  
 7 this year; and the third meeting of the Neutral Expert,  
 8 at which the parties will present oral submissions on  
 9 the paragraph 7 issue, is scheduled for 10 and  
 10 11 September this year. After that, the Neutral  
 11 Expert -- there we have it on the screen -- after that,  
 12 the Neutral Expert will issue his decision on the  
 13 paragraph 7 competence issues.

14 So as we stand here before you today, at the  
 15 beginning of July, the Neutral Expert has yet to address  
 16 his own competence. And this is a matter which  
 17 necessarily also includes the organisation of his  
 18 proceedings in accordance with the general duty of  
 19 mutual respect and comity.

20 So that's one of the reasons why I use the  
 21 conditional language in reference to issues that "may  
 22 properly fall" within the Neutral Expert's competence.

23 The second reason for using conditional language  
 24 when addressing the competence of the Neutral Expert is  
 25 that Pakistan maintains the caveat that we expressed in

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10:52 1 attention of the Court in reliance, inter alia, on  
 2 paragraph 13 of Annexure F and on the duty of mutual  
 3 respect and comity addressed in PO6; and also, I add for  
 4 completeness, on the basis of your competence decision,  
 5 where you have affirmed that you have competence over  
 6 the whole of the dispute that is contained in now  
 7 Pakistan's Amended Request for Arbitration. We hope  
 8 that there will be no need to adopt such a course, but  
 9 that remains to be seen.

10 Then the third reason for using conditional language  
 11 when addressing the competence of the Neutral Expert is  
 12 that we recall that the Court has itself expressly  
 13 reserved its position on this issue in PO6, and that's  
 14 at paragraph 28 of PO6, where you say:

15 "Accordingly -- although the Court expressly  
 16 reserves ... any position on the status of the Neutral  
 17 Expert proceeding -- it may be the case that both the  
 18 Court of Arbitration and the Neutral Expert are  
 19 presently competent ..."

20 THE CHAIRMAN: Sir Daniel, since you have raised these  
 21 issues in the course of your presentation, I'm curious  
 22 whether Pakistan has taken a position with respect to  
 23 that paragraph 13 that you drew our attention to.

24 Is it your view that if the current Neutral Expert  
 25 decides that a matter is outside of his competence, that

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10:51 1 respect of the Neutral Expert proceedings in the course  
 2 of your hearing on competence, and that is recorded as  
 3 paragraph 26 of Procedural Order No. 6: namely that,  
 4 quite apart from the procedure under paragraph 7 of  
 5 Annexure F, Pakistan reserves its position regarding the  
 6 possibility of a challenge to the competence of the  
 7 Neutral Expert by reference to paragraph 13 of  
 8 Annexure F.

9 Paragraph 13 of Annexure F is there on the screen in  
 10 front of you. It says:

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

18 So we maintain our reservation of position set out  
 19 in paragraph 26 of PO No. 6 -- paragraph 13, addressing  
 20 questions which arise from a decision of the Neutral  
 21 Expert that are not within his or her competence.

22 Now, Mr Chairman, members of the Court, I note for  
 23 the record that Pakistan remains acutely alert to the  
 24 proper boundaries of the Neutral Expert's competence,  
 25 and we reserve the right to bring any such matter to the

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10:54 1 you then enter paragraph 13? And if so, is it  
 2 necessarily the case that that matter comes to this  
 3 Court, or whether one follows procedures for the  
 4 constitution of a new court to address that matter?

5 SIR DANIEL: Mr Chairman, we have considered that very  
 6 carefully. And indeed, if memory serves me -- but  
 7 memory may not be serving me, because there are  
 8 comminglings of all sorts of things in my mind on these  
 9 issues -- but if memory serves me, I think this was  
 10 an issue that we addressed in the competence hearing.

11 I think the issue is a little bit different from  
 12 what you've just described. Because we accept that the  
 13 Neutral Expert has -- not quite in terms of compétence  
 14 de la compétence, because that's not addressed in  
 15 Annexure F in the way that it's addressed, for example,  
 16 in Annexure G -- but we accept that the Neutral Expert  
 17 must be capable of determining whether a matter falls  
 18 within Part 1 of Annexure F; whether the design of  
 19 a particular plant has been properly raised before him.  
 20 So that's not the issue.

21 Where our reservation of position with regard to  
 22 paragraph 13 arises is that in the event that the  
 23 Neutral Expert makes a decision within his competence,  
 24 formally within his competence -- "I, Neutral Expert, am  
 25 entitled to say that this is within my remit" -- but it

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10:55 1 is our appreciation that in fact that that decision  
 2 raises questions which take him outside of his  
 3 competence -- for example, let's take a hypothetical --  
 4 I don't assume this to be the case, but just to  
 5 illustrate the point, let's say that a neutral expert  
 6 were to say in a paragraph 7 decision that, "I, Neutral  
 7 Expert X, have concluded that I am entitled to make  
 8 determinations of systemic interpretation of the Treaty  
 9 that apply beyond the particular plant of which I am  
 10 seised, to all run-of-river plants". We would say that  
 11 that goes beyond his or her competence. And we would  
 12 also say that the consequence of the decision, which is  
 13 procedurally formally appropriate -- that he or she is  
 14 entitled to make that determination of competence --  
 15 then takes him into the paragraph 13 space, because  
 16 it says:  
 17 "Without prejudice to the finality of the Neutral  
 18 Expert's decision, if any question ... which is not  
 19 within the competence of a Neutral Expert should arise  
 20 out of his decision ..."  
 21 Then that takes you into the other Article IX  
 22 processes.  
 23 So [if] the Neutral Expert makes a decision which he  
 24 or she is procedurally entitled to make, [and] the  
 25 substantive content of that decision takes him or her

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10:57 1 outside of their competence, we say that gives rise to  
 2 the possibility of a paragraph 13 proceedings.  
 3 Then to your question about whether we then get  
 4 drawn into the vortex of having to go back to the  
 5 Permanent Indus Commission, go through the process of  
 6 raising this as a dispute and all the proceedings under  
 7 Article IX, paragraphs (3), (4) and (5), we say that  
 8 that's not required, for the very straightforward reason  
 9 that you, the Court, have determined that you are  
 10 competent in respect of the whole of the dispute; and  
 11 you have also decided, in PO6, that there is a duty of  
 12 comity that applies in respect of both your proceedings  
 13 and the Neutral Expert proceedings. And therefore we  
 14 say that we can actually bring that matter directly to  
 15 you, because you are already seised of that wider  
 16 dispute.  
 17 Now, I'm not expecting that this issue will arise;  
 18 I hope that it does not arise. If it does arise, no  
 19 doubt you will wish to schedule a hearing which will  
 20 address exactly the procedures and the competence and  
 21 the jurisdiction of those issues. But that would be, in  
 22 a nutshell, our thinking on that point.  
 23 MR MINEAR: Sir Daniel, does the same process apply if the  
 24 Neutral Expert concludes that something is outside his  
 25 competence under paragraph 7? Does that matter then

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10:58 1 come to this Court, or do you begin a new process  
 2 through Article --  
 3 SIR DANIEL: Our position would be: no, that does not, as it  
 4 were, start a fresh process. It may be that under the  
 5 terms of Article IX of the Treaty, if we just had  
 6 a Neutral Expert process and not a parallel Court  
 7 process, then we would have to go back, because  
 8 essentially that's what Article IX and paragraph 7 say.  
 9 But the fact that you, this Court, are already  
 10 seised of those disputes would simply mean that your  
 11 proceedings -- which at the moment are structured around  
 12 a first phase on the merits, the systemic questions of  
 13 interpretation, Mr Chairman, that you've addressed --  
 14 would then simply, we say, move to a second phase on the  
 15 merits, which would then address the particular  
 16 dam-related disputes, so whatever the Neutral Expert has  
 17 decided is not within his remit, because it is within  
 18 your remit.  
 19 The only reason why the Kishenganga and the Ratle  
 20 issues are not being addressed in the context of, for  
 21 example, these proceedings is because of the general  
 22 duty that you have identified in relation to the way in  
 23 which you are organising your proceedings and the way in  
 24 which the Neutral Expert must organise his proceedings.  
 25 MR MINEAR: Thank you.

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11:00 1 THE CHAIRMAN: We probably don't need to go too deeply into  
 2 this issue --  
 3 SIR DANIEL: Yes.  
 4 THE CHAIRMAN: -- given where we are in this particular part  
 5 of the proceeding. But I suppose I was wondering  
 6 whether one even necessarily gets to paragraph 13 in  
 7 these possible scenarios. We currently have a situation  
 8 where, from the Court's perspective, you've got issues  
 9 that are equally before the Neutral Expert and the Court  
 10 of Arbitration. And to the extent that issues are  
 11 determined to be outside the scope of the Neutral  
 12 Expert's competence, then the issue is before the Court  
 13 and doesn't necessarily require invoking paragraph 13.  
 14 Or to put it another way, if I understand correctly,  
 15 Pakistan has consented to the procedure before the  
 16 Neutral Expert based on the Neutral Expert having  
 17 a certain competence; and once it is determined, in some  
 18 fashion, that it's outside that competence, then the  
 19 matter is already before the Court of Arbitration, such  
 20 that one doesn't necessarily get to paragraph 13.  
 21 But that's just speculation on my part. I'm not  
 22 particularly well informed by any submissions made on  
 23 the issue. So perhaps if you want to respond to that,  
 24 you can, but perhaps we just continue to mull over the  
 25 matter for decision in due course.

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11:02 1 SIR DANIEL: Mr Chairman, let me respond to it briefly,  
 2 because again, my recollection is -- but it may be  
 3 faulty or off-mark -- my recollection is that we have  
 4 skirted around this issue in the competence hearing.  
 5 As I say, I hope we don't get to it, I hope that  
 6 we don't have to get to it; and it may very well be  
 7 that, as you say quite correctly, we never get to  
 8 paragraph 13. It may be that we never get to  
 9 paragraph 13 in these proceedings, but it may be that we  
 10 get to paragraph 13 in other proceedings.  
 11 But the reason why paragraph 13 is important is  
 12 because of two other provisions in the Treaty, with at  
 13 least one of which you will be very familiar. The first  
 14 one is Article IX, paragraph 6:  
 15 "The provisions of Paragraphs (3), (4) and (5) shall  
 16 not apply to any difference while it is being dealt with  
 17 by a Neutral Expert."  
 18 And then paragraph 11 of Annexure F, if I can call  
 19 it up, says:  
 20 "The decision of the Neutral Expert on all matters  
 21 within his competence shall be final and binding, in  
 22 respect of the particular matter on which the decision  
 23 is made, upon the parties and upon any Court of  
 24 Arbitration ..."  
 25 The reason why we are focused very much on

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11:03 1 paragraph 13 is because paragraph 13, if you like,  
 2 operates beyond paragraph 11. So if some hypothetical  
 3 Neutral Expert were to simply decide, "I, Neutral  
 4 Expert, decide that I have the competence of a Court of  
 5 Arbitration", and you were simply to look at  
 6 paragraph 11 of Annexure F, there would be almost  
 7 a presumption that that decision of the Neutral Expert  
 8 is binding on the Court of Arbitration itself.  
 9 Now the reason why that cannot be is because of  
 10 paragraph 13. Paragraph 13 is the backstop that says:  
 11 a Neutral Expert cannot take decisions which go beyond  
 12 his or her competence, because that then is a matter  
 13 that gets brought back into the Article IX procedures.  
 14 And we say that because the Court is competent in  
 15 respect of the whole dispute, it would come back to you.  
 16 So it's an intricate web of provisions; we hope we  
 17 don't get there. But we think that paragraph 13 is, if  
 18 you like, the competence backstop in circumstances in  
 19 which we may have a concern that the competence of  
 20 another procedure is unwarranted.  
 21 THE CHAIRMAN: I would just note that paragraph 11 does say  
 22 "on all matters within his competence".  
 23 SIR DANIEL: Yes.  
 24 THE CHAIRMAN: But as I say, perhaps we will leave this for  
 25 now.

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11:04 1 SIR DANIEL: Indeed.  
 2 Mr Chairman, the third and last reason for using the  
 3 conditional language when addressing the competence of  
 4 the Neutral Expert is that the Court itself expressly  
 5 reserved its position on this issue, leaving this open  
 6 with regard to what the Court described as the Neutral  
 7 Expert's "axiomatic" duty of mutual respect and comity  
 8 in the organisation and conduct of his proceedings.  
 9 So these matters are all kind of "watch this space".  
 10 Mr Chairman, I have just one more brief point to  
 11 make -- or maybe not. Maybe, Mr Chairman, if this is  
 12 a convenient point for you to take the break, I'll come  
 13 back. I've got more than just a minute or two on this  
 14 issue, but I can deal with that after the break.  
 15 THE CHAIRMAN: Very well. Let's take our break and resume  
 16 at 11.35.  
 17 SIR DANIEL: Thank you.  
 18 (11.06 am)  
 19 (A short break)  
 20 (11.35 am)  
 21 THE CHAIRMAN: Very good. I think that we are reassembled.  
 22 So, Sir Daniel, whenever you're ready, please proceed.  
 23 SIR DANIEL: Thank you very much, Mr Chairman.  
 24 Mr Chairman, just before the break, I was addressing  
 25 the reasons why I had been using conditional language

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11:35 1 when addressing the issue of the Neutral Expert, and we  
 2 got so taken up with the exchanges about paragraphs 11  
 3 and 13 that I forgot to make the small application and  
 4 clarification regarding documents that I was intending  
 5 to do just before the coffee break. I won't burden you  
 6 with it now, but just before the lunch break I will do  
 7 so, so that you have an opportunity to give us guidance  
 8 just after that. It's not a big point; it just relates  
 9 mostly to a correction of a document that we put in, and  
 10 one or two small other points.  
 11 Mr Chairman, members of the Court, but for one brief  
 12 point which I will come on to momentarily, I will say  
 13 only a little more about the Neutral Expert proceedings.  
 14 The reason for this is that, having regard to  
 15 paragraph 14.3 of the Neutral Expert's Supplementary  
 16 Rules of Procedure -- which are on the record, I've  
 17 already referred you to them: they are at Exhibit P-549,  
 18 at core bundle tab 1 -- the parties are directed to  
 19 maintain "strict confidentiality" of those proceedings,  
 20 save in circumstances in which the Neutral Expert  
 21 directs otherwise.  
 22 Now the Neutral Expert has not so directed  
 23 otherwise. And as you will see in due course from  
 24 recital 14 and paragraph 9.3 of the Neutral Expert's  
 25 Site Visit Protocol, which have, just in the course of

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11:36 1 the coffee break, I understand, been posted on the PCA  
 2 website -- so one of the applications that we will be  
 3 making to you is to actually put those documents into  
 4 the record, although they are publicly available -- as  
 5 you will see from recital 14 and paragraph 9.3 of the  
 6 Neutral Expert's Site Visit Protocol, which have just  
 7 been posted on the PCA website along with the press  
 8 release of the site visit, Pakistan considered it  
 9 necessary to adopt a self-denying ordinance in respect  
 10 of any applications to the Neutral Expert under  
 11 paragraph 14.3 of his Supplemental Rules with the  
 12 purposes of facilitating the Neutral Expert's site visit  
 13 and his competence process. And this self-denying  
 14 ordinance in respect of paragraph 14.3 of the Neutral  
 15 Expert's Supplemental Rules is relevant also to  
 16 Pakistan's response to paragraph 1.7 of PO11 concerning  
 17 document production.

18 So I hope that that just draws some of the threads  
 19 together. We are subject to a pretty firm ruling on  
 20 confidentiality. We made a self-denying ordinance that  
 21 we would not make any applications to disclose documents  
 22 into these proceedings. That's evident on the public  
 23 record of the Neutral Expert proceedings now. But that,  
 24 I hope, explains the position.

25 Mr Chairman, members of the Court, the remaining

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11:39 1 Pakistan to the KHEP and the RHEP sites in the period  
 2 from 12 August 2014. And in that context, the recent  
 3 site visit was the first time that Pakistan had had  
 4 an opportunity to inspect the KHEP site since the KHEP  
 5 became operational in 2018, and the first opportunity  
 6 that Pakistan had to inspect the RHEP since construction  
 7 commenced.

8 But I am, unfortunately, precluded by the Site Visit  
 9 Protocol and by the Neutral Expert's Supplemental Rules  
 10 from addressing any more detail of that in these  
 11 proceedings.

12 Mr Chairman, members of the Court, before I leave  
 13 this issue, there's also one other point, for clarity  
 14 and completeness, that I need to note. Again, it's  
 15 a point that you all have, but I underline it for the  
 16 record, and that is that the present phase of the  
 17 proceedings before the Court concerns systemic issues of  
 18 Treaty interpretation rather than any question going to  
 19 the application of the Treaty to the KHEP and the RHEP,  
 20 and we haven't put before you in the Memorial details  
 21 relating to the KHEP and the RHEP. So we are proceeding  
 22 on the basis that those issues will be addressed,  
 23 subject to issues of competence, by the Neutral Expert  
 24 or by you in due course.

25 But given this, Pakistan has not been hamstrung in

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11:38 1 brief point regarding the Neutral Expert proceedings  
 2 that I will mention is simply to fill out the picture  
 3 for you, and it is very much in the public domain, and  
 4 that is that the Neutral Expert recently undertook  
 5 a site visit to the Kishenganga and Ratle plants. The  
 6 details of that site visit are now addressed in the Site  
 7 Visit Protocol and the press release that are published  
 8 on the Neutral Expert PCA website, to which I referred  
 9 a moment ago.

10 Also illuminating, and again very much in the public  
 11 domain, are the numerous real-time press reports by the  
 12 Indian media covering the site visit. I don't invite  
 13 you to turn them up, but we have included a selection of  
 14 those media reports in the core bundle for your  
 15 information, and these are at Exhibits P-551 to P-556  
 16 and are at the core bundle tabs 3 to 8.

17 There is nothing material at all that turns on this.  
 18 It is public domain information. I just wanted to make  
 19 sure that you were aware of what was going on in those  
 20 proceedings.

21 Mr Chairman, members of the Court, recalling  
 22 Pakistan's explanatory note of 9 May 2023 on site visit  
 23 correspondence, which was submitted to you in the  
 24 context of the preliminary phase on competence, that  
 25 explanatory note documented India's denial of access by

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11:41 1 our submissions to you by the confidentiality  
 2 constraints under which it is required to operate in the  
 3 Neutral Expert proceedings. We have developed our  
 4 Memorial and pleadings to you as fully as we felt  
 5 necessary to do in order to illuminate all of the  
 6 issues.

7 Mr Chairman, members of the Court, I turn to the  
 8 second part of my topics, and that is the origins of the  
 9 Indus Waters Treaty, its cornerstone character, the  
 10 concern about India's weaponisation of water, and the  
 11 relevance of these issues for the Court's task. And  
 12 I imagine that you will have lots of interesting  
 13 questions about these issues, given, Mr Chairman, your  
 14 opening question to Mr Akbar.

15 The origins of the Indus Waters Treaty have been  
 16 addressed at length in Pakistan's Memorial and also in  
 17 its accompanying Appendix A. Ms Rees-Evans will make  
 18 further submissions on this tomorrow morning. My  
 19 purpose is not to anticipate her remarks, but simply to  
 20 pick up and elaborate on the point made by Pakistan's  
 21 Deputy Agent this morning.

22 It's a matter of common record, but also addressed  
 23 in our Memorial fully, that the Indian subcontinent was  
 24 partitioned by an act of the British Parliament of  
 25 18 July 1947. The act divided the land but it failed to

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11:42 1 delimit the rights and obligations of the two emergent  
 2 states that respect of the water that flowed across that  
 3 land. This failure to delimit the parties' entitlements  
 4 to water had virtually immediate and near-catastrophic  
 5 consequences when, only eight short months after  
 6 independence, Indian East Punjab cut off the flow of  
 7 water to Pakistani West Punjab.  
 8 The Inter-Dominion Water Agreement of 4 May 1948  
 9 that settled the Punjab water dispute was the precursor  
 10 of the Indus Waters Treaty, the painstaking negotiation  
 11 of which took another 12 years to complete. Indeed, it  
 12 was in the context of the Inter-Dominion Water Agreement  
 13 that the parties got together with their legal teams and  
 14 discovered, or decided, that there were many other  
 15 issues that they needed to address. And that led to the  
 16 negotiating process, which the World Bank shepherded  
 17 along, that led to the Indus Waters Treaty. So the  
 18 Indus Waters Treaty is a -- no puns intended -- but is  
 19 a direct outflow of the Punjab water dispute of 1948.  
 20 The Treaty delimited the rights to the water of the  
 21 Indus Basin between the two sides by a division of  
 22 rights in respect of the six major rivers of the Indus  
 23 Basin that are shared by the two states: the Eastern  
 24 Rivers -- the Beas, the Ravi and the Sutlej -- the  
 25 unrestricted use of which, subject to limited exception,

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11:44 1 was accorded to India; and the Western Rivers -- the  
 2 Chenab, the Jhelum and the Indus -- the unrestricted use  
 3 of which, subject to limitation, was accorded to  
 4 Pakistan.  
 5 It's, I think, also important to appreciate -- and  
 6 Mr Fietta will have more to say about this in his  
 7 submissions tomorrow -- that this was not a Solomonic  
 8 exercise of simply cutting the baby in half: "You get  
 9 three; you get three". It reflected, rather, the  
 10 geographic balance of the catchment of the respective  
 11 rivers, as well as wider considerations of substance.  
 12 And Mr Fietta will go into those details. So it wasn't  
 13 simply a division of six rivers, three by three, but  
 14 rather driven by substantive considerations.  
 15 The Treaty delimited in close and careful detail the  
 16 rights and the entitlements and the duties and  
 17 obligations of both parties in respect of the waters of  
 18 these six rivers, and a balance was struck and a bargain  
 19 was reached. The threat of a further rupture between  
 20 the two partitioned states over the use of the  
 21 transboundary water resources of the Indus Basin was  
 22 thus addressed by the Treaty, and the immediate concerns  
 23 about a rupture were averted. And the Treaty  
 24 complemented and completed the delimitation of the  
 25 boundary that had taken place between the two

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11:45 1 now-independent states.  
 2 Given the history of the dispute over water between  
 3 Pakistan and India, and the wider territorial dispute  
 4 between the two states over Kashmir, divided by the  
 5 Line of Control, the Indus Waters Treaty was and remains  
 6 a cornerstone instrument of settlement between Pakistan  
 7 and India, defining a critical element of their  
 8 relationship. It did not declare peace: there's no  
 9 language in the Treaty declaring peace. But it settled  
 10 an issue that had caused a rapture of seismic  
 11 proportions in an area that had been beset by conflict.  
 12 It did not itself draw a line on the ground, but it  
 13 delimited the entitlement to the water that flowed on  
 14 the ground that had been divided.  
 15 So while not in name either a boundary treaty or  
 16 a treaty of peace, the Indus Waters Treaty is akin to  
 17 both. And most significantly, it completed a critical  
 18 element that had been left undone by the British  
 19 Parliamentary Act of Partition of 1947, where the land  
 20 had been divided, but not the water that flowed  
 21 across it.  
 22 The Treaty is not subject to temporal limitation and  
 23 it contains no provisions for modification or  
 24 termination other than "by a duly ratified treaty  
 25 concluded for that purpose" by the parties. This is the

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11:47 1 language of Article XII, paragraphs (3) and (4) of the  
 2 Treaty. So it is in every way a cornerstone instrument  
 3 governing a fundamental aspect of the relationship  
 4 between the parties.  
 5 Mr Chairman, members of the Court, I make  
 6 an observation which will be immediately familiar to the  
 7 public international lawyers on the panel but perhaps  
 8 not otherwise familiar to other members of the Court,  
 9 and that is that treaties delimiting boundaries have  
 10 an almost uniquely special status in international law.  
 11 It is the one category of international instruments in  
 12 respect of which withdrawal or termination is expressly  
 13 precluded on grounds of fundamental change of  
 14 circumstance.  
 15 Whereas a fundamental change of circumstance which  
 16 has occurred with regard to the circumstances that  
 17 existed at the time of the conclusion of [a] treaty, but  
 18 which was not foreseen by the parties to that treaty,  
 19 while that fundamental change of circumstances may, in  
 20 certain tightly limited circumstances, be invoked as  
 21 a ground for withdrawing from or terminating a treaty,  
 22 this is expressly excluded in the case of boundary  
 23 treaties.  
 24 The principle in question is stated in  
 25 Article 62(2)(a) of the Vienna Convention on the Law of

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11:48 1 Treaties, a provision which is widely accepted as  
 2 reflecting customary international law. And it provides  
 3 expressly that a fundamental change of circumstance may  
 4 not be invoked as a ground for termination or withdrawal  
 5 if the treaty establishes a boundary.  
 6 The principle of the stability of boundary treaties  
 7 was expressed by the International Court of Justice, in  
 8 the Great Hall of Justice just across the way, in a 1962  
 9 judgment in the Temple of Preah Vihear case between  
 10 Cambodia and Thailand. The frequently cited passage  
 11 from that judgment addressing this issue could readily  
 12 have been addressing the Indus Waters Treaty. The same  
 13 principle applies.  
 14 The court said as follows -- and this is at PLA-101  
 15 at page 34. There is no need to turn it up, but I will  
 16 read the passage into the record. The court said as  
 17 follows:  
 18 "In general, when two countries establish a frontier  
 19 between them, one of the primary objects is to achieve  
 20 stability and finality. This is impossible if the line  
 21 so established can, at any moment, and on the basis of  
 22 a continuously available process, be called in question,  
 23 and its rectification claimed, whenever any inaccuracy  
 24 by reference to a clause in the parent treaty is  
 25 discovered. Such a process could continue indefinitely,

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11:50 1 and finality would never be reached so long as possible  
 2 errors still remained to be discovered. Such  
 3 a frontier, so far from being stable, would be  
 4 completely precarious."  
 5 Of course, the circumstances that the Temple of  
 6 Preah Vihear case was addressing were different: it was  
 7 addressing a boundary treaty and it was addressing  
 8 claims to rectification of that treaty. But the  
 9 principle of stability and finality that applies to  
 10 boundary treaties could be read across without change,  
 11 we say, into the Indus Waters Treaty, not only for its  
 12 division of the waters and the rights of use of the  
 13 waters of these transboundary rivers, but because of the  
 14 origin of the Treaty and the dispute between the  
 15 parties, which turned on, arose from, the 1947 partition  
 16 of the land, but a partition of the land that failed to  
 17 divide the use of the waters that flowed across that  
 18 land.  
 19 So, Mr Chairman, members of the Court, the Indus  
 20 Waters Treaty is not simply akin to a treaty  
 21 establishing a boundary. Its very essence is the  
 22 delimitation of the territorial rights of the parties  
 23 across a divided land. It has a unique and special  
 24 status. Its purpose was to achieve stability and  
 25 finality with respect to an issue that was the source of

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11:51 1 the highest contention between the two sides.  
 2 THE CHAIRMAN: Sir Daniel, this is a question that others  
 3 may want to address in due course, including Ms Webb,  
 4 when we get to her presentation about treaty  
 5 interpretation. But it seems to me that the issue of  
 6 the Treaty seeking stability is one point; it's  
 7 a different point whether it is then taken to the level  
 8 of saying there can't be interpretations of the Treaty  
 9 that account for changes over time.  
 10 I can see the argument that perhaps you're making  
 11 that there should be a reason why one can't withdraw,  
 12 let's say, from the Indus Waters Treaty. It seems less  
 13 obvious that one would extend the Temple of Preah Vihear  
 14 concept to a treaty that is not in fact a boundary  
 15 treaty, but instead is seeking to allocate rights in  
 16 an area of a boundary, because we certainly have seen  
 17 cases from the International Court of Justice that has  
 18 looked at those kinds of treaties and viewed them as  
 19 ones that are susceptible to an interpretation that  
 20 doesn't fix things as of the date the treaty was  
 21 adopted.  
 22 So that's maybe more of an observation than  
 23 a question, although maybe the question would be: how  
 24 far do we go in this idea that it's a Treaty designed  
 25 for stability?

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11:53 1 SIR DANIEL: Mr Chairman, thank you for that. I have no  
 2 doubt that Professor Webb will come back to that point,  
 3 and maybe she will disavow what I'm about to say when  
 4 she does so, but let me say it in any event.  
 5 There's obviously an important element of truth and  
 6 accuracy in what you say. For example, it cannot be  
 7 that aspects of a treaty that, for example, require the  
 8 allocation of a particular quantum of water,  
 9 a particular volume of water, will all of a sudden be  
 10 set in stone, such that if there was a change in the  
 11 volume of water, there could be no adjustment made.  
 12 I think the point that we're making about stability  
 13 and finality is perhaps slightly different, and would  
 14 not get us into, perhaps, the mangle that you're sort of  
 15 anticipating: is this something that has simply  
 16 crystallised the words on the page? And that is that  
 17 you get many treaties which are, to use the jargon,  
 18 characterised as living instruments: they evolve with  
 19 the changing circumstances of the day.  
 20 What we say is that this is not a living instrument.  
 21 There may be elements of the Treaty that, quite  
 22 properly, have to evolve through an interpretative  
 23 approach, and we saw this, for example, by the  
 24 Kishenganga Court. If memory serves me -- it's a point  
 25 that we'll come back to in due course -- paragraph 112

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11:54 1 of the final award of the Kishenganga Court, there were  
 2 elements of this that were addressed.  
 3 So it may be that a treaty evolves through a process  
 4 of clarification and interpretation of its particular  
 5 provisions. But the Indus Waters Treaty is not, we say,  
 6 in other circumstances, a living instrument that can  
 7 simply be construed as something which rather generally  
 8 divides the waters between the two states, but nothing  
 9 more. It does have a special character.  
 10 To make this real, let me take a hypothetical. In  
 11 the event of a boundary treaty, were one state to come  
 12 along to a court, or to the other state, and say, "Well,  
 13 in fact the town or village on the other side of the  
 14 boundary is in fact a town or village of people who have  
 15 a ethnic and linguistic and religious association with  
 16 our state, and therefore we want to move the boundary to  
 17 incorporate the village, even though the boundary line  
 18 was drawn elsewhere", in the context of the Temple of  
 19 Preah Vihear principle, the rule of international law  
 20 would say that you don't adjust the boundary just  
 21 because the changing circumstances on each side of the  
 22 boundary may allow a case to be made. And we say that  
 23 that's a principle that applies to the Indus Waters  
 24 Treaty as well.  
 25 If, for example -- this is not part of the dispute

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11:56 1 and India is not saying that -- but if, for example,  
 2 India were to come along and say, "Let's have a look at  
 3 the population density in the area of the Indus Basin",  
 4 and the population density has changed dramatically in  
 5 India's favour -- much greater population -- since 1960,  
 6 "therefore we want more water, the Treaty should be  
 7 adjusted for those purposes", we say they can't do that.  
 8 The principle of stability and finality that applies to  
 9 the Indus Waters Treaty requires that the bargain that  
 10 was agreed in that Treaty is respected.  
 11 We'll come to the reasons for that in just a moment,  
 12 when I talk about the bargains and when Stephen Fietta  
 13 addresses you more on the wider circumstances of the  
 14 Indus Basin. We are not intent on driving the principle  
 15 of stability and finality to, as it were, the nth  
 16 degree. We just want to make clear that the Indus  
 17 Waters Treaty is not like any other treaty which can  
 18 simply evolve over time. It is a cornerstone instrument  
 19 in relations between the parties.  
 20 MR MINEAR: I don't want to belabour this point, and perhaps  
 21 this is better addressed by Professor Webb when we get  
 22 into treaty interpretation. But what about new  
 23 information that comes that changes the context of  
 24 the Treaty?  
 25 I'm thinking of the experience in the United States

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11:57 1 of equitable apportionment between two states, where the  
 2 surface water was apportioned, and it was later found  
 3 that groundwater withdrawals affect surface flow, and  
 4 those apportionments had to be, basically, redone to  
 5 take into account information that was not known.  
 6 Is international treaty law consistent with that  
 7 idea?  
 8 SIR DANIEL: Mr Minear, I will again leave Professor Webb to  
 9 address this in a little bit more detail. I think there  
 10 are going to be limits when it comes to, as it were,  
 11 reopening an evolution of this particular Treaty for  
 12 those purposes.  
 13 And the example that you give may very well be  
 14 an example which is characterised in other ways. What  
 15 happens if all of a sudden there is now an appreciation  
 16 of different environmental concerns, or climate change  
 17 concerns: do we open up the Treaty to address that?  
 18 The paragraph of the Kishenganga Court's final award  
 19 that I referred to a moment ago, paragraph 112, in fact  
 20 sort of addresses that in the context of the applicable  
 21 law provision, paragraph 29 of Annexure G, and drew  
 22 quite a clear line between what a Court of Arbitration  
 23 may do, through its interpretative process, to draw in  
 24 new principles, emerging concerns -- for example,  
 25 concerns around the mitigation of significant

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11:59 1 environmental harm -- which the Court of Arbitration in  
 2 Kishenganga said the Court could do, and, a little  
 3 further along the spectrum, the rewriting of the Treaty,  
 4 or the writing-out of particular clauses of the Treaty.  
 5 So I think at the end of the day there is obviously  
 6 going to be a balance to be struck between the extent to  
 7 which you can, as it were, properly insulate the Treaty  
 8 from any subsequent developments, or whether you simply  
 9 allow developments in customary international law or  
 10 facts on the ground to be read into the Treaty so that  
 11 the character of the Treaty changes incomprehensibly.  
 12 And we say that there is a very clear line between those  
 13 two divides.  
 14 MR MINEAR: Thank you.  
 15 THE CHAIRMAN: Just to follow up on that. As I understand,  
 16 what the Kishenganga Court was saying is that this was  
 17 just a matter of standard treaty interpretation: that  
 18 when you had a treaty in front of you with particular  
 19 provisions, there is a certain range in which maybe  
 20 customary international law would help us understand the  
 21 contours of those provisions, but the objective of the  
 22 Court, the mandate of the Court is to interpret that  
 23 treaty. It didn't turn so much on the idea that the  
 24 treaty was a particular type of treaty akin to a peace  
 25 treaty or akin to a boundary treaty.

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12:00 1 Therefore that's why I was pressing you a little bit  
 2 on: just how far is this point being taken? But I think  
 3 you answered it in saying that you don't think it's  
 4 answering some of these very specific questions; it's  
 5 simply the backdrop on which the Court is approaching  
 6 the matter.  
 7 SIR DANIEL: I think that that's right. I recall as well  
 8 though that the Kishenganga Court -- and I think this is  
 9 probably in the interim award, but I don't recall the  
 10 paragraphs -- in fact made reference to an argument that  
 11 was perhaps put before them at that stage by  
 12 Professor Crawford, acting for Pakistan, that it was  
 13 akin to a treaty of peace. We don't detect from the  
 14 submissions that were made to the Kishenganga Court that  
 15 this point was developed in the way that we've developed  
 16 it. So we do think that it is an important point.  
 17 And going, Mr Chairman, to your interpretation of  
 18 the Kishenganga Court in that paragraph 112, and  
 19 customary international law, again, perhaps my reading  
 20 of it is slightly different, because the Court, as  
 21 I recall from that paragraph, was quite clear in saying,  
 22 "There are some things that we can do by way of  
 23 interpretation because they are inherent in the Treaty".  
 24 So the mitigation of significant environmental harm is  
 25 one. And that's where they spoke about minimum flow and

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12:03 1 periodically made public statements that have caused  
 2 concern in Pakistan that India may seek to use water as  
 3 a weapon.  
 4 The acuteness of these concerns is illustrated by  
 5 the fact that indeed this has risen to the level of the  
 6 United Nations Security Council. Pakistan, for example,  
 7 in February 2019, communicated, in letters to the UN  
 8 Secretary-General and the President of the Security  
 9 Council, at a point of heightened tension between the  
 10 two countries, its concern about the weaponisation of  
 11 water.  
 12 There are two documents in the core bundle and the  
 13 exhibits which reference this. I don't invite you to  
 14 turn them up because the point is small, but I make it  
 15 in any event. These are Exhibits P-565 and P-566, which  
 16 are at core bundle tabs 17 and 18.  
 17 When you come to look at those documents, you will  
 18 see -- and I'm here referencing P-566 at tab 18 -- you  
 19 will see that Pakistan notes that:  
 20 "... senior members of the Indian Government are  
 21 threatening to use water as a weapon."  
 22 And that:  
 23 "... [the] long-standing legal arrangements agreed  
 24 under the Indus Waters Treaty are ... being imperilled."  
 25 That's document S/2019/172, Exhibit P-566.

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12:02 1 environmental flow, and it's a point that I'll come  
 2 back to.  
 3 But the Court was also quite clear that customary  
 4 international law cannot simply be read into the Treaty  
 5 to change the very status of the Treaty or the character  
 6 of the Treaty. But again, Professor Webb will either  
 7 build on what I have said or disavow me much more  
 8 eloquently tomorrow.  
 9 Mr Chairman, members of the Court, the dispute of  
 10 which you are seised in the current phase of the  
 11 proceedings is not about the withdrawal from or the  
 12 termination of the Treaty. India has periodically made  
 13 posturing noises to this effect, but these are not  
 14 a subject that you are called upon to address. But the  
 15 special character of the Treaty is something I will come  
 16 back to in just a moment.  
 17 But before I do so, let me come to, Mr Chairman, the  
 18 question that you put to Mr Akbar at the end of his  
 19 submissions: the risk of India's weaponisation of water,  
 20 and Pakistan's concerns about this.  
 21 The weaponisation of water was most acutely  
 22 demonstrated by the Punjab water dispute of 1948, when  
 23 the supply of water from East Punjab to West Punjab was  
 24 entirely cut off at a critical juncture in the Pakistani  
 25 cropping season. Since then, Indian officials have

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12:05 1 And this anxiety about the weaponisation of water  
 2 runs very deep in Pakistan, as Mr Akbar noted. As  
 3 a downstream riparian, Pakistan is acutely and  
 4 consistently vulnerable.  
 5 Although this is not an issue of which you are  
 6 seised, and therefore I address it simply for purposes  
 7 of shining a light onto the wider context, you will also  
 8 see in your core bundle a number of press reports from  
 9 February this year reporting on the barrage that India  
 10 has erected on the Ravi River, one of the Eastern  
 11 Rivers, that has the effect of completely stopping the  
 12 flow of the Ravi River into Pakistan. And you will find  
 13 these reports at Exhibits P-557 to P-561, at the core  
 14 bundle tabs 9 to 13.  
 15 For orientation purposes, you will find various maps  
 16 showing the rivers of the Indus Basin in our Memorial at  
 17 page 51 and following. But Mr Fietta is going to be  
 18 taking you to this aspect in a little bit more detail,  
 19 so again there is no need to turn up those maps. I just  
 20 make two observations.  
 21 The first observation is that it is, in our view, at  
 22 the very least questionable whether India's complete  
 23 stopping of the flow of the waters of the Ravi into  
 24 Pakistan is consistent with the Treaty.  
 25 India asserts, in justification of its actions, that

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12:06 1 the waters of the Eastern Rivers are allocated  
 2 exclusively to India, and that India is therefore  
 3 permitted by the Treaty to stop all flow of the waters  
 4 of these rivers into Pakistan.  
 5 Pakistan reads the Treaty and the obligations under  
 6 the Treaty differently. I note, for example -- and this  
 7 brings me back to the Kishenganga award, although this  
 8 addressed the Western Rivers, the Neelum-Kishenganga  
 9 River -- that the Kishenganga Court endorsed the  
 10 principles of "environmental flow" and "minimum flow",  
 11 to require that India ensure a minimum flow along the  
 12 Kishenganga River after the diversion of that river as  
 13 part of the Kishenganga HEP project.  
 14 The purpose of that minimum flow requirement was to  
 15 mitigate significant harm to the downstream environment  
 16 of Pakistan, which otherwise would be cut off by the  
 17 diversion of the waters from the Kishenganga River into  
 18 what became the Neelum River. You will find this  
 19 addressed by the Kishenganga Court in its final award at  
 20 paragraphs 112 and 115, and there is also an important  
 21 discussion about the distinction between minimum flow  
 22 and environmental flow in footnote 151 of that final  
 23 award.  
 24 I interpolate here, just for a moment, that our  
 25 reading of the partial award and the final award on this

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12:09 1 between India and Pakistan under the Treaty, and that is  
 2 that India's assertive use of the waters of the Eastern  
 3 Rivers, without regard to downstream consequences, is  
 4 rooted in India's appreciation that the Treaty accords  
 5 to India possessory rights of some sort over the waters  
 6 of the Eastern Rivers, even to the extent of damming  
 7 them up completely. India thus takes an absolutist  
 8 approach to its rights under Article II. India,  
 9 however, is rather more permissive when it comes to  
 10 Pakistan's rights under Article III.  
 11 This plays into Pakistan's concerns about the  
 12 weaponisation of water, a concern that is rooted in what  
 13 Pakistan sees as an inclination by India to rest  
 14 relatively heavily on the rights that will avail India  
 15 under the Treaty, but to undermine the rights that will  
 16 avail Pakistan under the Treaty. And this goes to the  
 17 issue of the bargains at the heart of the Treaty, which  
 18 I will come to in a moment.  
 19 Mr Chairman, members of the Court, I appreciate that  
 20 this may all seem rather abstract in the context of what  
 21 you may perceive as a dispute simply about the  
 22 engineering HEP design issues. But I hope, with your  
 23 indulgence, to draw the threads of this together shortly  
 24 and to show why these issues are central to the  
 25 interpretative task of which you are engaged.

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12:08 1 issue is that there was some evolution in the Court's  
 2 thinking between the partial award, which was very  
 3 conditional, and the final award, which in paragraph 112  
 4 made a much clearer determination about the extent to  
 5 which the Court was competent to read non-Treaty  
 6 practices into the Treaty by reference to  
 7 an interpretation mandate.  
 8 So in Pakistan's view, while the Treaty is clear  
 9 that India has a right of unrestricted use of the waters  
 10 of the Eastern Rivers, it does not accept that India is,  
 11 per se, permitted to simply stop the flow of those  
 12 waters altogether.  
 13 Mr Chairman, members of the Court, that's at a very  
 14 high level, kind of a legal appreciation. We disagree  
 15 with India's interpretation of the Treaty. When you  
 16 have a look at the media reports both on the Indian and  
 17 the Pakistani side, which have been put into the record,  
 18 they are cast in much more hyperbolic terms: they are  
 19 cast in terms of "water terrorism". These are not  
 20 issues before you in these proceedings, and I stress  
 21 that I note them simply to provide relevant context and  
 22 also because they are current developments: this has  
 23 just been happening over the course of the last months.  
 24 My second observation in respect of this issue  
 25 perhaps goes more to the appreciation of the bargain

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12:11 1 I have so far painted the weaponisation concern with  
 2 a very broad brush: the Punjab water dispute of 1948,  
 3 concerns about statements by Indian leaders about using  
 4 water as a weapon, the stopping of the flow of the Ravi.  
 5 But the reality of the weaponisation issue is far more  
 6 nuanced, and it takes us to the heart of the issues in  
 7 dispute between the parties. And it was a point to  
 8 which Mr Akbar alluded, leaving me to develop.  
 9 India is planning to construct over 200 HEPs on the  
 10 Western Rivers. While that is a small number of dams by  
 11 reference to the overall number of large dams in  
 12 India -- 5,000-plus -- it is a very large number of dams  
 13 on relatively short stretches of the three Western  
 14 Rivers that flow, with very little distance, into  
 15 Pakistan. And on India's Western Rivers HEP programme,  
 16 there will be cascades of dams on the Western Rivers  
 17 which are almost within touching distance of one  
 18 another.  
 19 The control of water by an upstream riparian allows  
 20 the manipulation of water to potential destabilising and  
 21 damaging effects downstream. Dams are a means of  
 22 controlling water. A cascade of HEPs upstream affords  
 23 India a large amount of control over water that is  
 24 essential to Pakistan, as the downstream riparian.  
 25 The storage of water, the time it takes to

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12:12 1 accumulate that stored water, has downstream  
 2 consequences; in the agricultural in the irrigation  
 3 season, for example. The release of water and its  
 4 volume and timing, particularly when you have a cascade  
 5 of dams, has downstream consequences. The flushing of  
 6 sediment, rather than sluicing or other approaches to  
 7 sediment management, has downstream consequences. And  
 8 a coordinated approach across a cascade of upstream dams  
 9 on relatively short stretches of river multiplies these  
 10 potential downstream effects manifold.

11 Mr Chairman, members of the Court, this is the real  
 12 heart of the weaponisation concern. Dams are a means of  
 13 controlling water. How dams are designed and  
 14 constructed gives the operator possibilities to  
 15 manipulate the flow of water downstream, by the timing  
 16 and cadence of that flow, in a manner that could, with  
 17 a less than benign intent, cause downstream disaster.

18 The current and contemplated cascade of HEPs along  
 19 the Chenab River, for example, could potentially be  
 20 operated in a manner that would enable the flow of water  
 21 to be so controlled by India that the resulting storage  
 22 of water, by all of these large dams, and the release of  
 23 water could have significant damaging downstream  
 24 effects. Coordinated release could cause downstream  
 25 flooding. Coordinated storage, and the refilling

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12:16 1 information relating to the construction of its Western  
 2 Rivers run-of-river HEPs. This only heightens  
 3 Pakistan's concern about the potential use of India's  
 4 HEP programme to threaten, or even exercise, control  
 5 over the Western Rivers.

6 India advances a permissive approach to the  
 7 interpretation of the design criteria of paragraph 8 of  
 8 [Annexure D of] the Treaty. It seeks to store greater  
 9 volumes of water in the operating pools of its HEPs, in  
 10 the form of pondage, than the Treaty allows. It seeks  
 11 to construct HEPs with outlets, spillways and power  
 12 intakes located in a manner that would enable it to  
 13 manipulate the use of the water in its reservoirs to  
 14 damming downstream effects. India says that it is  
 15 permitted to do so, and it refuses to engage with  
 16 Pakistan on alternative designs, on designs that  
 17 Pakistan says would be both efficient and  
 18 Treaty-compliant.

19 India wishes to proceed with the design,  
 20 construction and operation of its Western Rivers HEPs by  
 21 reference to its off-the-shelf design and construction  
 22 regulations applicable to the other 5,000 large dams,  
 23 rather than by reference to the bespoke requirements of  
 24 the Treaty that were put in place precisely to address  
 25 and accommodate critical downstream concerns of

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12:14 1 reservoirs after release, could cause downstream  
 2 shortages of water at sensitive moments. Approaches to  
 3 sediment management that were not attentive to  
 4 downstream effects, or were intentionally blind or  
 5 reckless to them, could have significant deleterious  
 6 downstream effects.

7 Mr Chairman, members of the Court, Dr Morris has  
 8 done some modelling to assess this, and he will address  
 9 this further from an engineering perspective. My point  
 10 from a legal perspective is simple: the Treaty imposes  
 11 constraints on Indian Western run-of-river HEP design,  
 12 construction and operation. The only meaningful  
 13 verification that the Treaty contemplates is at the  
 14 design stage, as the construction that is built  
 15 thereafter will either allow abuse or it will constrain  
 16 abuse. Apart from the Treaty's Article IX settlement  
 17 mechanisms, the Treaty does not establish robust  
 18 verification, policing or enforcement mechanisms.

19 India is absent from these proceedings and it has  
 20 set its face against the competence of the Court. For  
 21 ten years, India frustrated Pakistan's requests to  
 22 undertake tours of inspection of the Kishenganga and  
 23 Ratle sites, even though such tours of inspection are  
 24 expressly mandated in the Treaty. India has  
 25 systematically failed to provide Pakistan with key

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12:17 1 Pakistan. And this approach comes against the  
 2 background of stoppages in the flow of water, of threats  
 3 to weaponise water, and of non-compliance with the key  
 4 cooperation obligations of the Treaty.

5 Mr Chairman, members of the Court, I hope this makes  
 6 my previously abstract observations a little bit more  
 7 real. The concern over weaponisation, although it is  
 8 rooted in the Punjab water dispute of 1948 and  
 9 statements that have been made subsequently, is  
 10 a dispute that is acutely concerned at the way in which  
 11 India is interpreting the design elements of the Treaty.  
 12 Because the way that it does so would allow it  
 13 potentially to store more water than we say it is  
 14 entitled to, to flush when we say and the Kishenganga  
 15 Court says it was not entitled to, to flush its dams,  
 16 all with downstream consequences, and against the  
 17 backdrop of a political imperative that is sometimes  
 18 articulated in India about these issues. That's the  
 19 real concern of weaponisation with which we are  
 20 concerned.

21 THE CHAIRMAN: Sir Daniel, you've mentioned a couple of  
 22 times the 1948 incident, and the Memorial of Pakistan  
 23 also refers to it on several occasions. My impression  
 24 is that India has a different approach to that incident.  
 25 In particular, as I looked at India's counter-memorial

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12:19 1 in the Kishenganga case at paragraph 2.31, it made  
 2 several points that I'd be interested in your reaction  
 3 to, or others', in the course of the week.  
 4 India notes that the incident occurred after  
 5 an agreement between East and West Punjab had expired.  
 6 And according to India, it was West Punjab that was not  
 7 taking any initiative to renew that agreement, which was  
 8 creating a problem between the provinces. According to  
 9 India, the cut-off of the water was then decided at the  
 10 Indian provincial level and did not involve the central  
 11 government. The cut-off, according to India, only  
 12 involved supplies to two canals, and therefore the claim  
 13 that it cut off in the entirety flows is not correct.  
 14 The stoppage, according to India, was disapproved by the  
 15 Indian central government, and after that government  
 16 became involved, the stoppage was lifted. And all of  
 17 this should be understood in the context of the general  
 18 disruption that partition created that, according to  
 19 India, would naturally have certain consequences that  
 20 one would have to just work past.  
 21 All to say that I think from India's perspective, at  
 22 least as I understand it, this was a relatively  
 23 localised one-off incident that should not be viewed as  
 24 a basis for a systematic understanding of what the 1960  
 25 Treaty is all about; and further, shouldn't be viewed as

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12:22 1 and each of those different narratives may have  
 2 an element of truth in them. I suppose there are only  
 3 two points that are critical for our purposes that arise  
 4 out of the Punjab water dispute.  
 5 One is that that is, if you like, the fons et origo,  
 6 that is the provenance of this Treaty, because what it  
 7 showed was that there was a water dispute between the  
 8 two states that had been left undelimited by the  
 9 partition of the land.  
 10 The second point is, I think, perhaps even more  
 11 important, and that is: whether this was a mistake or  
 12 a misstep of a provincial government which the Federal  
 13 Government in Delhi disavowed or not, what it does  
 14 illustrate, absolutely clearly and unarguably, is that  
 15 an upper riparian can deny water to the lower riparian  
 16 almost at the press of a button, and that they did so in  
 17 the course of the cropping season. It was for a period  
 18 of a month or a number of weeks, but it had dramatic  
 19 downstream effects.  
 20 The Treaty allocates divisions of water. We say  
 21 India cannot just cut off water. There are  
 22 vulnerabilities for a downstream riparian which are  
 23 addressed by the Treaty. The Treaty is set in stone.  
 24 This is why we come back to the stability and the  
 25 finality of it.

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12:21 1 a basis for understanding India's general posture in  
 2 terms of allowing water to flow into Pakistan.  
 3 So I welcome any reactions to that, now or later.  
 4 SIR DANIEL: Thank you, Mr Chairman. To the extent that  
 5 there is a more substantive reaction that needs to be  
 6 made, I think Mr Fietta will make that tomorrow, because  
 7 he is in fact addressing all of this. But I do have  
 8 some immediate reaction, and I appreciate the  
 9 opportunity to address this.  
 10 With the greatest of respect to our friends  
 11 opposite, they should be here to be making that  
 12 argument. And I think we, on our side of the room,  
 13 would be very interested to hear whether they would be  
 14 making that argument now, as it were, 14 years after  
 15 they first made that point in the Kishenganga  
 16 proceedings. The very fact that they are not here calls  
 17 into question, we say, their good faith in the  
 18 participation of the dispute settlement mechanisms.  
 19 From the way in which you've characterised it, and  
 20 I recall it, this sounds like mitigation and excuse  
 21 rather than anything else.  
 22 But the point is a different one. We do not need,  
 23 on our side of the room, to relitigate the rights and  
 24 wrongs of the 1948 Punjab water dispute. That's in the  
 25 past. There may be competing and different narratives,

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12:24 1 But as I say, we don't need to relitigate the rights  
 2 and wrongs of the 1948 dispute because the two  
 3 unarguable points -- the provenance of the Treaty and  
 4 the power of the upstream riparian -- are evident  
 5 despite the rights and wrongs of it.  
 6 So, Mr Chairman, members of the Court, this is the  
 7 context in which the questions of construction of  
 8 Article III and paragraph 8, of which you are seized,  
 9 arise. India, we say, seeks to diminish the primary  
 10 rule in Article III -- let flow, unrestricted use,  
 11 non-interference, no storage -- and to enlarge the scope  
 12 of the hydroelectric power exception, and it seeks to do  
 13 so by construing the design criteria in paragraph 8  
 14 permissibly, flexibly and without rigour, in a manner  
 15 that would materially increase the volume of water that  
 16 India is permitted to store, and enable India to operate  
 17 its HEPs in a manner that has no regard for the  
 18 downstream effects of that operation on the people of  
 19 Pakistan.  
 20 On the basis of permissive designs, thereafter set  
 21 in concrete and operating in a cascade, the scope for  
 22 India to weaponise water would be considerable.  
 23 Pakistan would be living constantly in the shadow of  
 24 risk.  
 25 We do not want, on our side of the room, to deny to

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12:26 1 India what it is entitled [to] under the Treaty:  
 2 hydroelectric run-of-river plants on the Western Rivers.  
 3 It is entitled to that under the Treaty. What we want  
 4 to do is to hold them to the mandatory design criteria  
 5 in paragraph 8, and to not treat the paragraph 8  
 6 provisions as ambulatory provisions that can be read in  
 7 any way in order to enlarge India's storage of water, to  
 8 allow the flushing of the reservoirs, with damaging  
 9 downstream effects and so on. We want to stand on the  
 10 black letter of the Treaty.  
 11 The Treaty is not a water-sharing agreement that is  
 12 open to evolution in favour of the interests of the  
 13 upper riparian on the basis of a unilateral and  
 14 permissive construction of the HEP design criteria.  
 15 It is a delimitation of rights and obligations in  
 16 respect of divided rivers that straddle a boundary,  
 17 a delimitation that settled a deep and pervasive dispute  
 18 over water across contested territory. It is a Treaty  
 19 that is not open, we say, it is not open or amenable to  
 20 modification, other than by agreement of the parties,  
 21 even in the face of claims -- false, but asserted -- of  
 22 a fundamental change of circumstances. The terms of the  
 23 Treaty are not ambulatory in character, changing over  
 24 time.  
 25 As the Kishenganga Court held in the context of its

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12:29 1 forcefully stated, is that design innovation, in  
 2 accordance with engineering best practices, is not  
 3 simply permitted by the Treaty, but is required by the  
 4 Treaty in the service of the Treaty. The design of  
 5 India's run-of-river HEPs on the Western Rivers must be  
 6 "sound" and be capable of "satisfactory" operation.  
 7 Best engineering practices in the service of the Treaty  
 8 is required. And Professor Webb and Dr Miles will  
 9 return to these issues.  
 10 This brings me to my third topic: the bargains at  
 11 the heart of the Treaty, and the constructions of  
 12 Article III and paragraph 8.  
 13 Much as I was hoping that I would get finished  
 14 today, it becomes apparent to me that in fact I'm not  
 15 going to be finishing by lunchtime. I will go as far as  
 16 I can to the lunch break and then probably reconvene  
 17 tomorrow morning, so that we have a clear run for  
 18 Mr Shah's evidence.  
 19 You will know from our Memorial our submission that  
 20 there are three bargains between the parties that are  
 21 embodied by the Treaty. And these three bargains are  
 22 all fundamental to the settlement that was reached  
 23 between the parties in 1960, and their various moving  
 24 parts are integral to the agreement of each party to the  
 25 Treaty as a whole.

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12:27 1 conclusions on the issue of environmental flow in the  
 2 case of the Kishenganga HEP, the rights expressly  
 3 granted by the Treaty cannot be read down by reference  
 4 to non-Treaty considerations. This is at the  
 5 Kishenganga final award, paragraph 112. And  
 6 Professor Webb will address these issues more fully in  
 7 her submissions tomorrow.  
 8 Mr Chairman, members of the Court, that's a useful  
 9 segue to my next topic: the three bargains at the heart  
 10 of the Treaty. Before I come to this though, let me  
 11 underscore the relevance of the character of the Treaty,  
 12 its origins, and the perceived risks of weaponisation to  
 13 your interpretative task.  
 14 The applicable law clause by which your task is  
 15 framed, paragraph 29 of Annexure G, accords primacy to  
 16 the Treaty and imposes limitations on an evolutionary  
 17 approach to the interpretation or application of the  
 18 Treaty. The rights and obligations agreed by the  
 19 parties in 1960 remain controlling today.  
 20 As will be addressed by both Professor Webb and  
 21 Dr Miles in the context of their submissions on the  
 22 interpretation of the various subparagraphs of  
 23 paragraph 8, Pakistan's position is not that the design  
 24 criteria stunt or restrict engineering innovation and  
 25 best practice. On the contrary, Pakistan's position,

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12:30 1 The importance of identifying these distinct  
 2 bargains is that while the dispute between the parties  
 3 of which you are seised may appear on first review to be  
 4 a dispute confined to the interpretation of the  
 5 paragraph 8 design criteria with respect to Indian  
 6 run-of-river HEPs, it is in reality a broader dispute,  
 7 and one that engages considerations of each of the  
 8 interlocking bargains embodied in the Treaty.  
 9 Once again, this appreciation will not be unfamiliar  
 10 to the international lawyers amongst you, but may be  
 11 less intuitive to those coming from other disciplines.  
 12 The general rule of treaty interpretation, reflected in  
 13 Article 31 of the Vienna Convention on the Law of  
 14 Treaties, requires that, for interpretative purposes, it  
 15 is the Treaty as a whole that must be construed; in  
 16 other words, the Treaty in its wider context. That  
 17 includes the preamble, it includes the annexes. The  
 18 object and purpose of the Treaty is also relevant to the  
 19 construction of its moving parts. And the rules on  
 20 reference to supplementary materials mandate reference  
 21 to preparatory works and the circumstances of conclusion  
 22 of the Treaty.  
 23 Professor Webb will address this further in her  
 24 submissions on treaty interpretation tomorrow; and  
 25 Ms Rees-Evans will address this in her submissions on

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12:32 1 the travaux préparatoires and the origins of the Treaty,  
 2 also tomorrow morning.  
 3 Mr Chairman, members of the Court, on the basis of  
 4 these principles, the exercise of construing the design  
 5 criteria in paragraph 8 is to be undertaken  
 6 holistically, looking not simply at the terms of  
 7 paragraph 8 but also more broadly. This is where the  
 8 three interlocking bargains of the Treaty are engaged.  
 9 And it is the picture painted by the interaction of each  
 10 of these bargains that will inform the interpretative  
 11 outcome.  
 12 We've addressed these bargains in some detail in  
 13 Pakistan's Memorial, and I won't go over them closely.  
 14 This is notably in chapter 1, at paragraphs 1.10 and  
 15 following, and then in chapters 7 and 9.  
 16 Professor Webb will have more to say on one of these  
 17 bargains, the Western Rivers hydro bargain, in due  
 18 course. My purpose at this point is simply to embed the  
 19 bargains in our consciousness.  
 20 The first of the bargains is what we have described  
 21 as the "peace bargain", and that is the once-and-for-all  
 22 settlement of the parties' dispute about the allocation  
 23 of the rights of the use of waters across the 1947  
 24 partition boundary. I've already addressed that;  
 25 I don't propose to say anything more about that now.

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12:35 1 just walk through these provisions.  
 2 You'll find Article III at page 134 if you're  
 3 looking at it on your electronic versions. It contains  
 4 four subparagraphs.  
 5 Paragraph (1) is the right of unrestricted use:  
 6 "Pakistan shall receive for unrestricted use all  
 7 those waters of the Western Rivers which India is under  
 8 obligation to let flow under the provisions of  
 9 Paragraph (2)."  
 10 So we see the reference to "unrestricted use" and  
 11 "let flow" in paragraph (1).  
 12 We then move to paragraph (2). And the chapeau of  
 13 paragraph (2) again reinforces the paragraph (1)  
 14 obligation and right:  
 15 "India shall be under an obligation to let flow all  
 16 the waters of the Western Rivers, and shall not permit  
 17 any interference with these waters, except for ..."  
 18 And then we have a number of exceptions, including  
 19 hydropower, which I'll come back to in just a moment.  
 20 So that's the chapeau.  
 21 Then we have the generation of hydroelectric power  
 22 as per Annexure D. So it's III(2)(d), the generation of  
 23 hydroelectric power as an exception.  
 24 I think I should take you, at this point, back -- so  
 25 you'll see in [Article] III(2):

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12:33 1 The second bargain is what we have termed the  
 2 "Treaty bargain", and that's the broader quid pro quo  
 3 reflected in the terms of the Treaty as a whole. This  
 4 is the agreement between the parties that is most  
 5 visible in the balance struck between the parties'  
 6 rights and obligations in respect of the Eastern Rivers  
 7 and the Western Rivers: unrestricted rights of use,  
 8 subject to exception, to India in respect of the Eastern  
 9 Rivers; unrestricted rights of use, subject to  
 10 exception, to Pakistan in respect of the waters of the  
 11 Western Rivers. And this bargain is captured,  
 12 essentially, by the terms of Articles II and III of the  
 13 Treaty, supplemented of course by other provisions.  
 14 The third bargain is the one with which we are most  
 15 directly engaged, but it cannot be detached from the  
 16 other two. This is what we have described as the  
 17 "Western Rivers run-of-river hydro bargain", or simply  
 18 the "hydro bargain" for short, which Professor Webb will  
 19 address. And this bargain is rooted in the rule and the  
 20 exception that is found in Article III and Part 3 of  
 21 Annexure D of the Treaty.  
 22 You will already be very familiar with these  
 23 provision, but if I may, I'd like to ask you to call  
 24 this up, or otherwise we can just look at it on the  
 25 screen. I hope we have control of the screen so we can

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12:37 1 "India shall be under an obligation to let flow all  
 2 the waters of the Western Rivers, and shall not permit  
 3 any interference with those waters ..."  
 4 If I take you back to Article I, paragraph (15) of  
 5 the Treaty, which is a definitional section. You will  
 6 see that on page 130. And it there defines:  
 7 "The term 'interference with the waters' means:  
 8 (a) Any act of withdrawal therefrom; or  
 9 (b) Any man-made obstruction to their flow which  
 10 causes a change in the volume (within the practical  
 11 range of measurement) of the daily flow of the waters:  
 12 Provided however that an obstruction which involves only  
 13 an insignificant and incidental change in the volume of  
 14 the daily flow, for example, fluctuations due to afflux  
 15 caused by bridge piers or a temporary by-pass ... shall  
 16 not be deemed to be an interference ..."  
 17 We are going to be coming back to Article I(15)  
 18 quite a lot over the course of these submissions. It's  
 19 critically important, the definition of interference, in  
 20 particular in 15(b):  
 21 "Any man-made obstruction to [the] flow ..."  
 22 Any withdrawal of water:  
 23 "... which causes a change in the volume ... of the  
 24 daily flow of the waters ..."  
 25 And if I may, just to embed in your consciousness,

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12:38 1 just point out the reference to "the daily flow of  
2 water", which is a rather important consideration.  
3 I then take you back again to Article III.  
4 Article III, paragraph (3) is a rather important  
5 provision because Article III, paragraph (3) actually  
6 deals with Eastern Rivers as well:  
7 "Pakistan shall have the unrestricted use of all  
8 waters originating from sources other than the Eastern  
9 Rivers which are delivered by Pakistan into The Ravi or  
10 The Sutlej, and India shall not make use of these  
11 waters."  
12 So this is a rather interesting provision which goes  
13 back to our concerns around the Eastern Rivers issue:  
14 that Pakistan shall have unrestricted use of all the  
15 waters from sources other than the Eastern Rivers which  
16 are delivered by Pakistan into the Ravi and Sutlej,  
17 which are both Eastern Rivers, and India shall not make  
18 use of the waters. I don't need to make any submissions  
19 on them unless you have questions, but it's  
20 an interesting provision to highlight.  
21 Then paragraph (4) is also rather important:  
22 "Except as provided in Annexures D and E, India  
23 shall not store any water of, or construct any storage  
24 works on, the Western Rivers."  
25 So the general rule is: no storage. The only

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12:39 1 exception to the "no storage" provisions are either in  
2 Annexure D or Annexure E. Annexure E addresses storage  
3 dams; Annexure D deals with our run-of-river dams.  
4 Now, if I may then invite you to turn to Annexure D,  
5 which you will find at page 170 of your electronic  
6 version. It's on the screen; you have it in hard copy  
7 as well. I don't propose to go through these provisions  
8 in detail, largely because it would take much too much  
9 time to do so, and because this is what we will be doing  
10 a lot of over the course of the next few days. But  
11 I would like just to quickly orientate us all to them.  
12 So we have the title [above] paragraph 1, which  
13 addresses the scope of application: the "Generation of  
14 Hydro-Electric Power by India on the Western Rivers".  
15 Then there is the subheading "Article III (2)(d)". So  
16 this is linked to Article III, paragraph (2)(d), the  
17 hydro exception: rather important.  
18 Then we have paragraph 1:  
19 "The provisions of this Annexure shall apply with  
20 respect to the use by India of the waters of the Western  
21 Rivers for the generation of hydro-electric power under  
22 the provisions of Article III (2)(d) and, subject to the  
23 provisions of this Annexure, such use shall be  
24 unrestricted ..."  
25 So once again, this is the affirmation that Pakistan

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12:41 1 has unrestricted use, subject to the provisions of  
2 Annexure D.  
3 Let me just highlight a point that Professor Webb  
4 will come back to. We see already, by reference to  
5 Article III and to Annexure D, that we've got  
6 a statement of the rule and we have a statement of  
7 an exception. And this is going to be very important  
8 when it comes to the interpretative approach to the  
9 interpretation of the rule and of the exception. But  
10 I will leave Professor Webb to address those rather more  
11 fully.  
12 We then have paragraph 2 of Annexure D, which  
13 contains a number of definitions, many of which will be  
14 critical for our purposes. I note that there are some  
15 definitions that are not given. So, for example,  
16 paragraph 2 does not define "settled headwork features"  
17 of the dams, there is no definition of "freeboard",  
18 there is no definition of "outlets", there is no  
19 definition of "spillways" or "intakes", et cetera.  
20 I note also that there are other concepts that are  
21 also not defined because they are evidently intended to  
22 permit design appreciations to be made. And this comes  
23 back, Mr Chairman, to your question of the scope of the  
24 interpretive exercise.  
25 So, for example, terms or phrases that you will be

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12:43 1 already be familiar with: "sound and economical design",  
2 there is no definition of "sound and economical" here;  
3 "satisfactory construction and operation of the works",  
4 there is no definition of that here.  
5 I note, just for completeness, that the term  
6 "works", with a lower-case W, is also not defined,  
7 although "Storage Works" is defined elsewhere in the  
8 Treaty, but we are not here concerned with storage  
9 works. You can see, for example, if you have a look at  
10 Appendix D.II -- I don't invite you to do so at the  
11 moment; this is a transcript point -- but if you have  
12 a look at Appendix D.II at paragraph 4, you will see  
13 reference to lots of different kinds of works. So there  
14 is no magic in the term "works".  
15 But looking at the definitions in paragraph 2,  
16 I note -- and again, this is something that  
17 Professor Webb will come back to -- I note that these  
18 are often bespoke definitions for purposes of the  
19 Treaty. So terms such as "Dead Storage Level", defined  
20 here, "Dead Storage" and "Dead Storage Level" in  
21 paragraph 2(a), or "Pondage", defined in paragraph 2(c),  
22 or, very importantly, "Firm Power", described in  
23 paragraph 2(i), these are bespoke terms of the Treaty.  
24 They are different from the normal engineering use of  
25 these terms.

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12:44 1 I will leave Professor Webb to address this. But  
 2 I note simply, again as a transcript reference, that if  
 3 you have a look at our Memorial at paragraph 8.12, or  
 4 9.34 to 9.36, and again at paragraph 11.8, you will see  
 5 that this issue of the bespoke terms is addressed there.  
 6 I run through just quickly, to identify important  
 7 terms which my colleagues will come back to, the  
 8 definition of "Dead Storage" in paragraph (a); the  
 9 definition of "Live Storage" in paragraph (b); the  
 10 definition of "Pondage" in paragraph (c).  
 11 I note here that this defines "Pondage" and what  
 12 it's for. But there is an important question, which  
 13 Dr Miles will come on to deal with, and that is: what  
 14 role, if any, does this definitional provision have to  
 15 do with the calculation of the maximum allowable pondage  
 16 under paragraph 8(c)? So we've got an important  
 17 question of the interaction between the definitional  
 18 provision in 2(c) and the calculation matrix in  
 19 paragraph 8(c).  
 20 We've then got the definition of "Full Pondage  
 21 Level" in 2(d); "Surcharge Storage" -- which you will  
 22 hear a little bit about in the context of freeboard from  
 23 Dr Miles -- in paragraph (e). Other provisions: (f),  
 24 "Operating Pool"; the definition of a "Run-of-River  
 25 Plant" as a plant "without Live Storage ... except for

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12:46 1 Pondage", for our purposes, in paragraph (g); the issue  
 2 of the "Regulating Basin" in paragraph (h), which is not  
 3 relevant for our purposes.  
 4 And then, just so you can underline it or put a mark  
 5 against it now, there is the definition of "Firm Power"  
 6 in paragraph 2(i). You will hear a lot about this. And  
 7 the definition of "Firm Power" is integral to the  
 8 calculation of pondage because that is written into the  
 9 very core of paragraph 8(c): it says "for [the purposes  
 10 of] Firm Power". So you will have from Dr Miles, and  
 11 perhaps from others, a quite close look at the  
 12 definition of "Firm Power", and how it is to be  
 13 calculated, and you will see that at the heart of our  
 14 arguments on pondage.  
 15 Dr Blackmore, I wasn't sure whether you are itching  
 16 to come in on that point, or whether I just note your  
 17 elevated interest, and you will come back with Dr Miles  
 18 in due course.  
 19 DR BLACKMORE: (Inaudible) ... firmly in my seat!  
 20 SIR DANIEL: I think that that is an example of firm power,  
 21 is it?! Yes.  
 22 There are a couple of points that I would note just  
 23 about firm power, apart from the fact that it's at the  
 24 heart of the calculation of maximum allowable pondage.  
 25 I'm going to leave others to unpack the concept of the

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12:48 1 minimum mean discharge as the formula for calculation  
 2 and how it relates to the average discharge on the basis  
 3 of the given formula.  
 4 One point that I would, though, like to note is that  
 5 it rests on data from the longest available period. You  
 6 see this towards the end of that subparagraph:  
 7 "The studies will be based on data for as long  
 8 a period as available but may be limited to the latest  
 9 5 years in the case of Small Plants ..."  
 10 We are not concerned with that:  
 11 "... and to the latest 25 years in the case of other  
 12 Plants ..."  
 13 We are concerned with other plants. So in  
 14 principle, the firm power calculation is to be based on  
 15 the latest 25 years of data, or in fact the longest  
 16 period for which data is available. And again, Dr Miles  
 17 will come back to that.  
 18 Then in paragraph (j), we've got the definition of  
 19 "Secondary Power".  
 20 Now, I would like from that, in this rapid canter  
 21 through, to jump to Part 3, which is paragraph 8:  
 22 paragraph 8 heads up Part 3. And you will see that the  
 23 heading of Part 3 is "New Run-of-River Plants". So  
 24 that's what we are concerned with: new run-of-river  
 25 plants. And the chapeau of paragraph 8 is the essential

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12:49 1 starting point:  
 2 "Except as provided for in Paragraph 18 ..."  
 3 We are not concerned with paragraph 18:  
 4 "... the design ..."  
 5 And just to draw your attention, this is focused on  
 6 the design of the plant. This is not focused on the  
 7 construction or on the operation; this is at the nascent  
 8 stage.  
 9 "... the design of any new Run-of-River Plant ...  
 10 shall conform to the following criteria: ..."  
 11 These are mandatory criteria: not "may conform" or  
 12 not "shall be informed by", but "shall conform". So the  
 13 chapeau to paragraph 8 makes it quite clear that the  
 14 design of a new run-of-river plant "shall conform" to  
 15 the new enumerated criteria.  
 16 Just to identify what the shape of Part 3 is, and  
 17 then I'll come back to paragraph 8, it deals with  
 18 a number of different elements. So we've got  
 19 [paragraph] 8, which is the mandatory design criteria.  
 20 We've got then exchange of information and disputes  
 21 about conformity, which are addressed in paragraphs 9 to  
 22 12. We've got a provision on emergency repairs in  
 23 paragraph 13. We've then got a number of paragraphs in  
 24 Part 3 which are focused on operation: that's  
 25 paragraphs 14 to 17. And then we've got the provisions

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12:51 1 dealing with small plants: that's at paragraphs 18  
 2 to 23.  
 3 But our focus is mostly going to be on paragraph 8.  
 4 There will be some important discussion to be had about  
 5 paragraph 15 and the operational dimension, and how  
 6 that's relevant to design.  
 7 If we have a look again though at paragraph 8, just  
 8 to canter through them. So the mandatory design  
 9 criteria are set out in 8(a) through to (g), and (a),  
 10 (c), (d), (e) and (f) are the subject of particular  
 11 enquiry by the Court. As you will have seen from our  
 12 Memorial, paragraph (b) is also relevant to the  
 13 interpretation of paragraph (a), we say.  
 14 Very quickly, just to run through paragraph (a):  
 15 "The works themselves shall not be capable of  
 16 raising artificially the water level in the Operating  
 17 Pool ..."  
 18 This is particularly relevant to the issue of  
 19 freeboard, but it's more widely relevant to the  
 20 philosophy behind paragraph 8, which I will come to in  
 21 just a moment.  
 22 Paragraph (b) provides that:  
 23 "The design of the works shall take account of the  
 24 requirements of Surcharge Storage and Secondary Power."  
 25 We then have paragraph (c), which is going to be

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12:52 1 absolutely critical to your task, which addresses the  
 2 calculation of:  
 3 "The maximum [allowable] Pondage ... shall not  
 4 exceed twice the Pondage required for Firm Power."  
 5 And this is a reference back to the definition of  
 6 "Firm Power" in paragraph 2(i).  
 7 Then we have paragraph (d):  
 8 "... no outlets below ... Dead Storage ..."  
 9 As you will have seen from our written Memorial, and  
 10 as Professor Webb will address in her submissions, the  
 11 paragraph (d) provision is a headline provision which  
 12 addresses outlets generally, and provides controlling  
 13 context for the interpretation of paragraphs (e) and (f)  
 14 as well. Paragraph (e) deals with gated spillways;  
 15 paragraph (f) with power intakes; and then paragraph (g)  
 16 with special site requirements, which we don't need to  
 17 address.  
 18 Then just very briefly -- as you will hear some more  
 19 about this in due course, and I think it's in the  
 20 witness statement that's been provided -- paragraphs 9  
 21 to 11 deal with the provision of information in respect  
 22 of these design criteria and objection in the case of  
 23 concerns about non-conformity.  
 24 Paragraph 15 deals with the operation of the works,  
 25 and a rather important provision, but focused on

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12:54 1 operation.  
 2 I pause on paragraph 16 simply to underscore,  
 3 as I've done with respect to paragraph 15, the reference  
 4 to the period of 24 hours there, because these are  
 5 peaking plants that operate on the basis of a 24-hour  
 6 cycle. And I note also some of the various flexibility  
 7 provisions in paragraph 15, which amount to exceptions,  
 8 or operational latitude.  
 9 Mr Chairman, members of the Court, that's all  
 10 I propose to say about the detail of these provisions.  
 11 You're going to hear a lot more about them in due  
 12 course. My purpose here is simply to focus on  
 13 orientation at the moment, and to refresh our memories,  
 14 but we will be returning to all of this.  
 15 With that said, let me, just in the last few moments  
 16 that I have for this morning's session, come back to the  
 17 third of the bargains that is at the heart of the  
 18 Treaty: the Western Rivers hydro bargain.  
 19 This is where the Western Rivers hydro bargain is  
 20 located: in Article III, paragraphs (1), (2) and (4) of  
 21 the Treaty, which establishes the general rule -- let  
 22 flow, unrestricted use, non-interference, no storage --  
 23 and the exceptions in Article III, paragraphs (2)(d) and  
 24 (4), which look forward to Annexure D. The general  
 25 rule, III(1), III(2) and III(4): let flow, unrestricted

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12:55 1 use, non-interference, no storage; the exception for  
 2 hydropower and limited pondage in III(2)(d) and  
 3 subparagraph (4).  
 4 Mr Chairman, members of the Court, I noted at the  
 5 start of my discussion that these issues, the  
 6 identification of the three interlocking bargains -- the  
 7 peace bargain, the Treaty bargain and the hydro  
 8 bargain -- is central to the interpretative exercise of  
 9 which you are seised. An appreciation of each of the  
 10 bargains is required by the general rule of treaty  
 11 interpretation and the principles of supplementary means  
 12 of interpretation. It is not simply that the provisions  
 13 of paragraph 8 of Annexure D are not hermetically sealed  
 14 from other parts of the Treaty: it is that the mandatory  
 15 design criteria of paragraph 8 are a cog, a moving cog,  
 16 in the wider mechanism of the Treaty and the balance  
 17 that was struck between the parties when they signed the  
 18 Treaty in 1960.  
 19 Mr Chairman, I have got another big substantive part  
 20 to go, which I think I will commence tomorrow morning.  
 21 Obviously I'm happy to take any questions that you may  
 22 have now. But as you will have me back at the  
 23 microphone tomorrow morning -- I say this to my own  
 24 dismay -- you may wish to reflect overnight and come  
 25 back to me with any more questions on this. But I'm

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12:57 1 happy to take questions on this now before we break for  
 2 the lunch break.  
 3 THE CHAIRMAN: Thank you, Sir Daniel. I don't think I see  
 4 any questions from the members, but I have two questions  
 5 that aren't substantive really in nature.  
 6 One is: this afternoon we do have Mr Shah. It's  
 7 possible that we use the entire time; it's possible we  
 8 don't, and that there is some time left on the table.  
 9 So one question is whether you would want to take that  
 10 opportunity to complete your presentation.  
 11 Then the second question is: I think you were going  
 12 to make an application with respect to the documents.  
 13 SIR DANIEL: Yes. Thank you very much, Mr Chairman, for  
 14 reminding me of my fallible memory on the application.  
 15 Insofar as the examination of Mr Shah does not take  
 16 up the whole of the afternoon, I would be very happy to  
 17 come back this afternoon to complete the submissions,  
 18 and that will keep us back on track, so thank you very  
 19 much for that.  
 20 In respect of the application, let me say that we  
 21 would be very happy to make this formally and in  
 22 writing. My recollection though is that in the  
 23 competence hearing we dealt with some of these things by  
 24 way of directions from the Chair, once you'd had an  
 25 opportunity to deliberate. So in a spirit of avoiding

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13:00 1 should be given an opportunity to respond to this in  
 2 writing after the hearing. But there is a document that  
 3 we would like to admit there.  
 4 I note also, as I mentioned in my submissions, that  
 5 it has just become apparent this morning that the  
 6 Neutral Expert has posted on the website two documents  
 7 from the Neutral Expert proceedings. They are public  
 8 documents. India of course is comprehensively aware of  
 9 them, as it was part of the site visit. But that's the  
 10 Neutral Expert's Site Visit Protocol and the press  
 11 release. We think that it would be helpful for you to  
 12 have those on the record, so we would like to make  
 13 a request to include those as well.  
 14 Then there is one last point, and that is that  
 15 a number of my colleagues will be making submissions  
 16 this week in reference to a number of legal authorities  
 17 that are in the public domain and are easily accessible,  
 18 but they're not formally on the record of these  
 19 proceedings.  
 20 We had some discussion of precisely this issue in  
 21 the competence hearing. We have not made an application  
 22 formally to admit these new legal authorities, publicly  
 23 available legal authorities, into the proceedings, in  
 24 reliance, Mr Chairman, on the direction that you gave in  
 25 the competence hearing, where you determined that "to

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12:58 1 a flurry of correspondence, I raise them now.  
 2 We made an application for new materials, which you  
 3 granted, and we've put those new materials in. In  
 4 respect of one of those exhibits, I think that there is  
 5 an error or an incompleteness in one of the exhibits, so  
 6 we would like to correct that. That is -- I don't seem  
 7 to have the exhibit reference here, or I'm not gathering  
 8 it. But it's an article by UZ Alam, "Water Rationality:  
 9 Mediating The Indus Waters Treaty", and I think we've  
 10 put in extracts of a number of pages and we omitted to  
 11 put in some additional extracts.  
 12 So one question is: do we need to apply in writing  
 13 or can we treat this as an application to correct that  
 14 exhibit?  
 15 Second, there is one new exhibit that we would seek  
 16 permission to introduce, and that is simply an oversight  
 17 on our part. I think for purposes of Dr Morris's  
 18 presentation tomorrow, he would like to be able to refer  
 19 to a US Army Corps of Engineers regulatory guidance  
 20 letter of 19 August 2005. This is a publicly available  
 21 document. There would be no hardship at all to India in  
 22 having that document admitted. We simply overlooked it.  
 23 We of course appreciate, both in terms of, Mr Chairman,  
 24 the Court's directions, but also in terms of the  
 25 practice arising from the competence hearing, that India

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13:02 1 the extent that the jurisprudence is in the public  
 2 domain and easily accessible", there should be no  
 3 "difficulty in not introducing it into the record  
 4 formally". This is at transcript Day 3, page 5, line 17  
 5 to page 6, line 2.  
 6 My question, Mr Chairman, members of the Court is  
 7 whether you are content for us to proceed on the basis  
 8 of that direction from the competence hearing -- that  
 9 where there are legal authorities that are in the public  
 10 domain, we are simply permitted to make reference to  
 11 them -- or whether you will direct us to make a formal  
 12 written application. You might also be happy to treat  
 13 my application on my feet here as a formal application,  
 14 but it's not a formal application by reference to  
 15 individual legal authorities.  
 16 THE CHAIRMAN: Thank you, Sir Daniel.  
 17 On all four of those points, we will get back to you  
 18 in the afternoon with the Court's decision. If you  
 19 could, in the meantime, provide to the Permanent Court  
 20 of Arbitration the number of the exhibit that you  
 21 indicated is not complete and that you'd like to  
 22 complete; and also the title of the exhibit relating to  
 23 the Corps of Engineers, if you could provide that as  
 24 well.  
 25 SIR DANIEL: We will do so. That in fact, I have it in

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13:03 1 front of me, but it will be easier to provide them to  
 2 Mr Schofield, I think.  
 3 THE CHAIRMAN: That's fine.  
 4 Okay, then I think we are done for this morning.  
 5 SIR DANIEL: Mr Chairman, perhaps I might just say -- this  
 6 may have been a matter that you've addressed with the  
 7 Registry -- as you've granted permission for Mr Shah to  
 8 make a presentation, he has requested permission to be  
 9 able to make the presentation from the podium, standing  
 10 up. And then I believe that there will be  
 11 an opportunity for a very brief reorganisation of the  
 12 room, so that for purposes of your examination, he can  
 13 be seated, in case he needs to be seated.  
 14 THE CHAIRMAN: Yes, we understood that that was the  
 15 preference and we have no problem with that approach.  
 16 So we will do that in due course.  
 17 SIR DANIEL: Thank you very much.  
 18 THE CHAIRMAN: So we will break for lunch and we will resume  
 19 at our usual time, which I believe is at 2 o'clock.  
 20 SIR DANIEL: Perfect. Thank you very much.  
 21 THE CHAIRMAN: Thank you, Sir Daniel.  
 22 (1.04 pm)  
 23 (Adjourned until 2.00 pm)  
 24 (2.02 pm)  
 25 THE CHAIRMAN: Welcome back to everyone. I hope you had

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14:03 1 We will then allow Mr Shah to make an opening  
 2 presentation of not more than 45 minutes as part of his  
 3 evidence-in-chief, in which he can elaborate on issues  
 4 from his witness statement, including any subsequent  
 5 developments since that witness statement was submitted,  
 6 and [he] can make use of hearing materials during [his]  
 7 presentation, subject to the provisions set forth in  
 8 Procedural Order No. 12.  
 9 After that, the Court will examine Mr Shah. And  
 10 following that examination, Pakistan can undertake  
 11 a re-examination of Mr Shah, confined to the issues  
 12 arising from the Court's examination.  
 13 With that in mind, Mr Shah and Ms Rees-Evans, please  
 14 proceed.  
 15 MS REES-EVANS: Thank you, Mr Chairman. Good afternoon  
 16 members of the Court.  
 17 (2.04 pm)  
 18 Direct examination by MS REES-EVANS  
 19 Q. Good afternoon, Mr Shah.  
 20 A. Good afternoon.  
 21 Q. Please could you confirm for the Court your full name?  
 22 A. Yes. Thank you, Ms Rees-Evans. Thank you, Mr Chairman  
 23 and the members of the Court. My full name is  
 24 Syed Muhammed Mehar Ali Shah.  
 25 Q. And please could you confirm what you have in front of

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14:02 1 a nice lunch break.  
 2 Before we begin with Mr Shah, I wanted to indicate  
 3 to the Government of Pakistan that the Court is  
 4 essentially agreeable on all four of the points that  
 5 Sir Daniel raised before the lunch break. That is, the  
 6 exhibit that you'd like to resubmit in a more complete  
 7 form is agreeable; the new exhibit on the Corps of  
 8 Engineers document, also agreeable; including in the  
 9 official record the Neutral Expert documents that are  
 10 now publicly available is fine; and reference to legal  
 11 authorities that are in the public domain throughout the  
 12 proceedings without them actually being in evidence is  
 13 agreeable as well.  
 14 There is no need for a more formal application. You  
 15 can take that as having been decided by the Court.  
 16 SIR DANIEL: Thank you very much, Mr Chairman.  
 17 THE CHAIRMAN: So we turn now to the testimony of Mr Shah.  
 18 (2.03 pm)  
 19 MR SYED MUHAMMAD ALI MEHAR SHAH (called)  
 20 THE CHAIRMAN: I would just like to recall that it was  
 21 decided in Procedural Order No. 12 (paragraph 4.1) that  
 22 Pakistan may conduct a brief direct examination of not  
 23 more than five minutes, limited to introducing Mr Shah,  
 24 confirming his written evidence, and identifying any  
 25 corrections that Mr Shah may wish to make.

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14:05 1 you on the stand?  
 2 A. So right in front of me is a declaration for the fact  
 3 witness and the PowerPoint presentation which I am going  
 4 to make, along with a script and also my statement.  
 5 Q. And that is your witness statement submitted with  
 6 Pakistan's Memorial, Appendix B?  
 7 A. Yes, that's correct.  
 8 MS REES-EVANS: Thank you, Mr Shah.  
 9 Mr Chairman, I'm assuming it's okay to proceed on  
 10 the basis of the materials that Mr Shah has in front of  
 11 him?  
 12 THE CHAIRMAN: Yes, it is.  
 13 MS REES-EVANS: Thank you.  
 14 Please could you confirm, Mr Shah, whether you have  
 15 any corrections to make to your written statement?  
 16 A. Yes, two small corrections.  
 17 So the first correction is concerning paragraph 71  
 18 of my statement, wherein I said that the frequency of  
 19 the meetings of the Permanent Indus Commission was  
 20 discontinued after 2018 at a rate of -- so less than  
 21 twice a year, every year. So while preparing for my  
 22 oral testimony today, I have gone back over the record  
 23 of the Permanent Indus Commission and confirmed that the  
 24 frequency of the meetings of the Permanent Indus  
 25 Commission were disrupted or deteriorated since 2014 and

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14:06 1 2015, rather than 2018.  
 2 And the second correction is concerning the  
 3 paragraph 73 of my written statement, in which, again,  
 4 I said in my statement that the frequency of the general  
 5 tours of inspection was reduced from every five years to  
 6 one per five years since 2018. So the same was also  
 7 reduced. Rather, I would say that it would be correct  
 8 to say that since 2014 to 2019, there has been only one  
 9 general tour of inspection. So we should consider it  
 10 the year 2014/2015 instead of the year 2018 since when  
 11 the frequency of the general tours of inspection was  
 12 reduced from five to one per five years.  
 13 MS REES-EVANS: Thank you, Mr Shah. I have no further  
 14 questions on direct examination.  
 15 But I wanted to ask, Mr Chairman, whether this would  
 16 be a good opportunity for Mr Shah to give the  
 17 declaration foreseen in paragraph 1 of Procedural Order  
 18 No. 12, to cover the evidence that he has just given by  
 19 way of direct examination, before proceeding to his  
 20 presentation.  
 21 THE CHAIRMAN: Yes, it is.  
 22 In accordance with Procedural Order 12 at  
 23 paragraph 4.1.1, prior to you giving evidence here  
 24 before the Court, we are to administer the declaration  
 25 that I believe you have before you there on the podium.

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14:10 1 Pakistan.  
 2 All told, I have amassed nearly 20 years of  
 3 experience in the field of water resources engineering,  
 4 and within the framework of the Indus Waters Treaty.  
 5 I set out my experience more fully in paragraphs 3 to 5  
 6 of my written statement.  
 7 As the members of the Court of Arbitration are  
 8 aware, my purpose in making this presentation is  
 9 twofold: first, to elaborate on the issues presented in  
 10 my written statement, before I am handed over to you for  
 11 examination; and second, to address the developments  
 12 relevant to my written statement that would be  
 13 appropriate for me to address, the developments that  
 14 I have already alluded to in my direct examination just  
 15 now by Ms Rees-Evans.  
 16 As you will recall, my written statement is in part  
 17 a statement of expert opinion describing the relevant  
 18 parts of the Treaty and in part a witness statement of  
 19 fact, addressing the gap between what was intended by  
 20 the Treaty and how the Treaty has operated in practice.  
 21 My presentation is divided upon the same lines.  
 22 Slide 2. So in that respect, my presentation will  
 23 take the structure now shown on the slide, divided into  
 24 six topics.  
 25 I will be brief on the first topic, of an overview

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14:08 1 So if you could read that out now, I would be very  
 2 grateful.  
 3 MR SHAH: Thank you, Mr Chairman.  
 4 I solemnly declare upon my honour and conscience  
 5 that I shall speak the truth, the whole truth, and  
 6 nothing but the truth.  
 7 THE CHAIRMAN: Very good. Thank you, Mr Shah.  
 8 Then, Ms Rees-Evans, if you're completed, then we  
 9 will proceed to your presentation.  
 10 MR SHAH: Thank you, Mr Chairman. Can you please display  
 11 the PowerPoint presentation slides, yes. (Pause)  
 12 (2.09 pm)  
 13 Presentation by MR SHAH  
 14 MR SHAH: Thank you, Mr Chairman, members of the Court of  
 15 Arbitration. So I would like to invite your attention  
 16 on the first slide of my PowerPoint presentation. It is  
 17 an honour indeed to appear before you again as a member  
 18 of Pakistan's delegation in these proceedings.  
 19 I have been Pakistan's Commissioner for Indus Waters  
 20 since 9 February 2018, prior to becoming the PCIW,  
 21 I worked as a water resources engineer. I qualified as  
 22 a water resources engineer in the year 2004, with  
 23 a master's degree in water resources engineering from  
 24 the Centre of Excellence in Water Resources Engineering,  
 25 University of Engineering and Technology, Lahore,

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14:11 1 of the Indus Basin and the Indus Waters Treaty, since my  
 2 first presentation to the Court outlined these issues,  
 3 and the Court will by now be familiar with them.  
 4 On the topics other than my final topic, India's  
 5 frustration of the Treaty provisions, I express my  
 6 expert opinion in my oral testimony. On the topic of  
 7 India's frustration of the Treaty provisions, on which  
 8 I will spend some time as part of my presentation,  
 9 I will be presenting statements of fact, addressing my  
 10 views and experience on how the Treaty is working in  
 11 practice.  
 12 Slide 3. I begin with a brief introduction to the  
 13 Indus Basin and the Treaty.  
 14 Mr Chairman and members of the Court, the Treaty is  
 15 concerned with the waters of the Indus system of rivers.  
 16 It identifies six rivers that make up the Indus system  
 17 of rivers in the Indus Basin for the purposes of the  
 18 Treaty. It divides these rivers into two groups: the  
 19 Eastern and the Western Rivers.  
 20 The Eastern Rivers comprise the Ravi, the Beas and  
 21 the Sutlej, whereas the Western Rivers are the Indus,  
 22 the Jhelum and the Chenab. Each of these flows through  
 23 India, or Indian-administered Kashmir, and flows in due  
 24 course into Pakistan, before emptying into the  
 25 Arabian Sea.

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<p>14:13 1 A further major tributary of the Indus system of 2 rivers is the Kabul River, which rises in Afghanistan 3 and then eventually joins the River Indus in Pakistan. 4 It is not regulated by the Treaty, however. 5 Slide 4. The Treaty is made up of three principal 6 components: the preamble, twelve articles and 7 eight annexures, Annexures A to H. These are listed on 8 this screen and the following slide, and at paragraph 13 9 of my statement. 10 Slide 5. As the Court will well know by now, among 11 the annexures, the most important for present purposes 12 is Annexure D, which sets out detailed provisions 13 regulating the generation of hydroelectric power by 14 India on the Western Rivers. I will return to this in 15 the second half of my presentation today. 16 Before doing so, I now turn to elaborate on the 17 provisions of the Treaty relevant to two of the common 18 themes that permeate it: (1) the requirements of 19 cooperation and transparency; (2) the importance of 20 information-sharing. 21 Slide 6. Turning first to the requirement of 22 cooperation and transparency. 23 One of the central principles of the Treaty, the 24 preamble recognises the commitment by both the 25 parties -- so that is Pakistan and India -- that the</p> <p style="text-align: center;">Page 125</p>	<p>14:16 1 and the Commission will endeavour to resolve the 2 questions by agreement. 3 Slide 8. Article VII of the Treaty records the 4 parties' intentions to cooperate to the fullest extent 5 possible. While the intention to cooperate referred to 6 in this provision applies to both parties, in most 7 circumstances successful implementation of the Treaty 8 depends upon action taken -- or, for that matter, not 9 taken -- by India, as the upstream riparian. 10 The nature of the cooperation required between the 11 parties is set out in Article VII(1). There are several 12 important aspects to this cooperation. In particular, 13 Article VII(1) records the parties' "intention to 14 co-operate, by mutual agreement", to achieve the optimum 15 development of the rivers. 16 This extends, under subparagraph (c), to cooperation 17 "in undertaking engineering works on the Rivers", 18 defined in the Treaty. As I said in my written 19 statement, this provision is very broad in scope. 20 Slide 9. I will now address the importance of 21 information-sharing under the Treaty. The obligations 22 set out in the Treaty in relation to information-sharing 23 lie at the heart of the Treaty and the parties' 24 obligation to cooperate. Both parties are under 25 an obligation to share information.</p> <p style="text-align: center;">Page 127</p>
<p>14:14 1 Treaty be implemented "in a spirit of goodwill and 2 friendship" and in a cooperative spirit. The Permanent 3 Indus Commission has a critical role in this respect. 4 As Article VIII(4) states: 5 "The purpose and functions of the Commission shall 6 be to establish and maintain co-operative arrangements 7 for the implementation of [the] Treaty, [and] to promote 8 co-operation between the Parties in the development of 9 the waters of the Rivers ..." 10 As part of that function, the Treaty places 11 extensive information-sharing and cooperation 12 responsibilities on the parties and their respective 13 representatives, the two Commissioners. These are set 14 out in Article VIII of the Treaty. 15 Slide 7. The key responsibilities of the Commission 16 include, most notably, the obligation to facilitate 17 general and special tours of inspection; to meet 18 "regularly"; to "report on its work", and submit its 19 reports to the two Governments of Pakistan and India; 20 and overall, to "promote cooperation". 21 The Commission also has an important role in 22 relation to the resolution of disputes -- or, to 23 paraphrase the Treaty, "questions which arise between 24 the Parties" -- under Article IX. The Commission is the 25 first forum in which such questions must be examined,</p> <p style="text-align: center;">Page 126</p>	<p>14:17 1 Slide 10. So I set out in my statement a number of 2 examples of information-sharing obligations under the 3 Treaty. They are listed on this slide. They address 4 a range of matters arising from the management and 5 utilisation of the Indus Rivers. 6 Article VII(1)(a) recognises the importance of 7 hydrological observation, and provides for 8 information-sharing in relation to it. 9 Article VI(1) provides for the regular exchange of 10 data with respect to the flow in and utilisation of the 11 waters of the rivers. It provides that each party must 12 collate certain data on a daily basis, and transmit it 13 monthly to the other party. 14 The provision of the data envisaged by Article VI(1) 15 enables both parties to ascertain the natural pattern of 16 flows. It also facilitates monitoring of alterations to 17 the natural flows of these rivers, including any 18 significant extractions of water from the river flows, 19 for example as a result of interventions by the other 20 party. This information is particularly important for 21 Pakistan, as the downstream riparian. 22 Article VI(2), Chairman and members of the Court, 23 enables a party to request further data about the 24 hydrology of any of the rivers, or the canal or the 25 reservoir operations connected with these rivers, which</p> <p style="text-align: center;">Page 128</p>

14:19 1 is not expressly addressed in Article VI(1).  
 2 Snow and rainfall data are a good example of the  
 3 type of data that are not specifically envisaged in  
 4 Article VI(1), but could be requested by a party under  
 5 the second paragraph of Article VI. An example of when  
 6 Pakistan requested rainfall data from India is set out  
 7 in my predecessor's letter of 31 May 2017, which is at  
 8 Exhibit P-0567 and is in your core bundle. I don't  
 9 propose to take you to it for now.  
 10 Paragraphs 5 and 6 of Annexure B set out certain  
 11 information which Pakistan must provide to India on  
 12 an annual basis, where the waters of the Eastern Rivers  
 13 are being used for agricultural use, as specified in  
 14 Annexure B to the Treaty. To the best of my knowledge,  
 15 Pakistan has provided this information as required since  
 16 1960, without fail.  
 17 Article IV(8) imposes an obligation of communication  
 18 on both India and Pakistan in relation to the provision  
 19 of information about extraordinary discharges of water  
 20 from reservoirs and flood flows which may affect the  
 21 other party. This information should be communicated as  
 22 far in advance as practicable. This is a particularly  
 23 important provision for Pakistan, as downstream  
 24 riparian. I will return to this provision later in my  
 25 presentation, in relation to one of the two updates

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14:21 1 I wish to make to my written statement.  
 2 Slide 11. In addition to the more general  
 3 information-sharing obligations under the Treaty, some  
 4 of which I have just highlighted, there are also  
 5 extensive information-sharing obligations on India in  
 6 relation to its use of the Western Rivers for  
 7 hydroelectric power generation. These arise under  
 8 Annexure D of the Treaty.  
 9 Slide 12. As the Court will recall, Annexure D  
 10 addresses four categories of run-of-river plants, shown  
 11 now on the slide. Information-sharing lies at the heart  
 12 of Annexure D, again, in relation to each of the four  
 13 categories of plant. This is critical to ensure that  
 14 Pakistan can check that the design of a proposed  
 15 run-of-river plant meets the applicable requirements.  
 16 In turn, the provision of information enables Pakistan,  
 17 if necessary, to object to such designs.  
 18 Slide 13, which is concerning the  
 19 information-sharing in relation to planned works. And  
 20 now I move to slide 14.  
 21 So what does the Treaty require in relation to  
 22 planned works? There are four main aspects to this.  
 23 First, information-sharing in the event of planned  
 24 interference with the waters, under Article VII(2).  
 25 Second, information-sharing under paragraphs 5 and 6 of

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14:22 1 Annexure D, hydroelectric plants in operation or under  
 2 construction as on the effective date being one of the  
 3 four categories of the hydroelectric plants, as we saw  
 4 just on the previous slides. Third is concerning the  
 5 information-sharing under paragraphs 9, 12 and 13 of  
 6 Annexure D, new run-of-river plants. And fourth, the  
 7 information-sharing under paragraph 19 of Annexure D,  
 8 concerning the small plants.  
 9 The information-sharing under paragraphs 5 and 6 of  
 10 Annexure D is addressed in my statement at paragraphs 54  
 11 to 57, and information-sharing relating to small plants  
 12 is addressed at paragraphs 67 to 68. I will focus in  
 13 this presentation on information-sharing in respect of  
 14 planned interference with the waters and in relation to  
 15 new run-of-river plants, which are of most direct  
 16 relevance in the context of the present dispute.  
 17 Slide 15. The term "interference with the waters"  
 18 appears in a number of places in the Treaty, most  
 19 notably in Article II, subparagraph (2) and Article III,  
 20 subparagraph (2), regarding the Eastern and the Western  
 21 Rivers, respectively, and Article VII(2), regarding  
 22 plans to construct engineering works on the rivers.  
 23 Chairman, members of the Court, Article I,  
 24 paragraph (15) defines the "interference with the  
 25 waters" to mean "Any act of withdrawal [of water]" or

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14:24 1 "Any man-made obstruction to [the] flow [of water] which  
 2 causes a change in the volume ... of the daily flow of  
 3 ... water[]" which is other than "insignificant and  
 4 incidental".  
 5 An obvious example of an activity that would cause  
 6 interference with the waters is the construction work of  
 7 a new run-of-river hydroelectric plant.  
 8 The obligations to share information in the event of  
 9 planned interference with the waters are set out in  
 10 Article VII(2) of the Treaty. It requires India to  
 11 consider whether any planned engineering works would  
 12 cause interference with the waters. It requires India  
 13 to consider whether such interference would affect  
 14 Pakistan materially. If it so considers, India is under  
 15 a general obligation to notify Pakistan of its plans.  
 16 It must supply available information to enable Pakistan  
 17 to assess the nature, magnitude and effect of the work.  
 18 And importantly, Mr Chairman and members of the  
 19 Court, if certain works would cause interference, but  
 20 India considers that such interference would not affect  
 21 Pakistan materially, Pakistan can still request data  
 22 from India, and it can request data regarding the  
 23 nature, magnitude and effect of the work, according to  
 24 the second sentence of Article VII, paragraph (2).  
 25 So India is therefore, once again, under

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<p>14:26 1 an obligation at the planning stage to supply Pakistan 2 with information regarding the planned interferences. 3 The only constraints on the data which must be provided 4 to Pakistan in such cases are that the data is available 5 and that it would enable Pakistan to assess the nature, 6 magnitude and effect of the work. 7 I turn now to information-sharing under Annexure D. 8 Part 3 of Annexure D lays down restrictions on the 9 design, operation and construction of new run-of-river 10 plants. It also sets out India's obligations to provide 11 data to Pakistan in relation to its designs of such 12 plants. 13 There is an extensive list of information-sharing 14 requirements on India as regards its use of the 15 Western Rivers for the purposes of the generation of 16 hydroelectric power. The most relevant requirements for 17 present purposes are found in paragraphs 9, 12 and 13 of 18 Annexure D. These are the provisions applicable to new 19 run-of-river hydroelectric plants. 20 Slide 16. Paragraph 9 of Annexure D identifies 21 India's obligation to share information about the design 22 of any new run-of-river plant on the Western Rivers. As 23 paragraph 9 explains, the purpose of this 24 information-sharing is: 25 "To enable Pakistan to satisfy itself that the</p> <p style="text-align: center;">Page 133</p>	<p>14:29 1 result in a material change in the information which was 2 previously provided to Pakistan, whether before or after 3 the plant comes into operation, paragraph 12; second, 4 where it has been necessary for India to carry out 5 repairs or alterations in the event of an emergency, 6 like in paragraph 13. So even immaterial alterations 7 must be communicated to Pakistan, albeit that they do 8 not have to be communicated before being made, as in 9 paragraph 25. 10 Slide 18. The architecture of information-sharing 11 under Annexure D, as I said before, enables Pakistan to 12 check that the design of India's proposed run-of-river 13 plant meets the applicable requirements and, if 14 necessary, to object to such designs. 15 Paragraphs 10 and 11 of Annexure D define the way 16 that disagreements regarding India's proposed 17 construction of a new run-of-river plant should be 18 resolved. Pursuant to paragraph 10, Pakistan has 19 three months to identify and communicate any objections 20 which it might have in relation to the information 21 received from India under paragraphs 9 or 13, and 22 two months in relation to any objections arising from 23 information received from India under paragraph 12. 24 Where Pakistan raises an objection, paragraph 11 25 applies. And in that case, either party may proceed to</p> <p style="text-align: center;">Page 135</p>
<p>14:27 1 design of a Plant conforms to the criteria mentioned in 2 paragraph 8 [of Annexure D to the Treaty] ..." 3 There are five categories of information that must 4 be supplied by India. They are defined in Appendix II 5 to Annexure D. They are: (1) the location of the plant; 6 (2) the hydrologic data; (3) the hydraulic data; (4) 7 particulars of design; and (5) general information. 8 The Treaty requires India to provide this 9 information to Pakistan at least six months in advance 10 of the beginning of construction of river works 11 connected with the plant. However, as I explained in my 12 statement, India's practice is to delay the provision of 13 such information, as opposed to being proactively 14 transparent. It does not give the Commission adequate 15 opportunity to examine the question which may 16 potentially arise out of the information it provides. 17 So in my view, this has been one of the important 18 contributing factors in the differences or disputes that 19 have arisen between the parties. 20 Slide 17. Paragraphs 12 and 13 of Annexure D also 21 impose a continuing obligation on India to furnish 22 information to Pakistan in the event of any changes in 23 the information previously provided to Pakistan. 24 This is required in two cases: first, if any 25 proposed design alterations to a run-of-river plant</p> <p style="text-align: center;">Page 134</p>	<p>14:30 1 have the question resolved, in accordance with the 2 dispute settlement provisions of Article IX. 3 Slide 19. I now turn to my final topic: India's 4 frustration of the Treaty provisions. As part of this 5 topic, I will provide my views and experience on how the 6 Treaty has been implemented in practice, and the ways in 7 which India's failure to comply with the terms of the 8 Treaty has eroded the effectiveness of the Commission 9 and the Treaty itself. In this respect, I will be 10 setting out the two updates that I have to my written 11 statement, based on recent developments. 12 Slide 20. Turning first to the impact of India's 13 conduct on the functioning of the Permanent Indus 14 Commission. 15 As I see it, there have been four main ways in which 16 India has impeded the function of the Commission in 17 recent years: (1) through a reduction in the nature and 18 frequency of the Commission meetings; (2) through 19 a dramatic reduction in the frequency of the general 20 tours of inspection; (3) through ignoring or providing 21 spurious excuses for failing to facilitate special tours 22 of inspection; and (4) through frustrating the 23 resolution of questions at the level of the 24 Permanent Indus Commission. 25 Slide 21. Commission meetings must be held</p> <p style="text-align: center;">Page 136</p>

14:32 1 regularly, and at least annually, under paragraph 5 of  
 2 Article VIII of the Treaty. Since the Treaty entered  
 3 into force, the Commissioners have been meeting  
 4 regularly, twice a year, almost every year. This  
 5 practice was discontinued around 2015/2016. Meetings  
 6 are limited to just once a year, and last not more than  
 7 two days. Meanwhile, India is engaged in more HEP  
 8 construction on the Western Rivers than ever before.  
 9 I cited correspondence in footnote 5 of my written  
 10 statement showing the most recent example of how India's  
 11 conduct has led to the parties' failure to hold regular  
 12 Commission meetings on at least an annual basis.  
 13 The last Commission meeting was held in India at the  
 14 end of May 2022. Two months later, I wrote to my Indian  
 15 counterpart to propose dates in August and an agenda for  
 16 the 119th PIC meeting, to be held in Pakistan. That is  
 17 in Exhibit P-0218.  
 18 I received no response. And I wrote again at the  
 19 beginning of September 2022 emphasising that it was  
 20 essential to meet frequently to resolve the outstanding  
 21 issues. That is in Exhibit P-0219. I once again urged  
 22 my counterpart to indicate dates in October 2022 for  
 23 holding the 119th meeting.  
 24 In the face of ongoing silence from India, I wrote  
 25 again in mid-November 2022, which is at Exhibit P-0220;

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14:34 1 in May 2023, which is at Exhibit P-0328; and  
 2 February 2024, which is at Exhibit P-0329.  
 3 It is in this respect that I would like to provide  
 4 the first update to my statement.  
 5 Slide 22. After two years of silence from India in  
 6 the face of my requests to fix the date for the 119th  
 7 PIC meeting, I wrote again to India on 29 May 2024.  
 8 That is at Exhibit P-0568.  
 9 India's failure, Mr Chairman and members of the  
 10 Court, to agree dates for the 119th PIC meeting meant  
 11 that the Commission had not finalised the annual report  
 12 for the year starting from 1 April 2023 and ending at  
 13 31 March 2024. Such annual reports are usually  
 14 finalised and signed during the annual meetings of the  
 15 Commission. My 29 May letter was therefore an attempt  
 16 to seek to finalise the annual report over email,  
 17 because we were not being allowed to meet at the level  
 18 of the PIC.  
 19 The Indian Commissioner responded on 31 May 2024.  
 20 That is at Exhibit P-0569. Instead of offering any  
 21 dates for the 119th PIC meeting or indicating the Indian  
 22 Commissioner's comments on or agreement to the annual  
 23 report, a draft of which was shared by me with him,  
 24 Mr Pal referred only to India's notices to Pakistan to  
 25 enter into government-to-government negotiations to

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14:36 1 review and modify the Treaty according to Article XII,  
 2 paragraph 3.  
 3 A few days later, on 10 June, The Times of India  
 4 reported that "India may host a Pakistan delegation this  
 5 month for a meeting of the Permanent Indus Commission",  
 6 and that "The 2 countries are currently in touch to  
 7 finalise the dates for the proposed visit in the third  
 8 week of this month". That is at Exhibit P-570. This  
 9 came as a surprise to me, as I had heard nothing from  
 10 the Indian Commissioner formally through correspondence  
 11 to suggest that he was ready imminently to hold the  
 12 119th meeting of the Commission.  
 13 Still no dates have been agreed for the 119th  
 14 meeting. The annual report for the year 1 April 2023 to  
 15 31 March 2024 has still not been finalised.  
 16 Slide 23. The practice of undertaking general tours  
 17 of inspection pursuant to Article VIII(4)(c) has also  
 18 fallen apart, and is no different from the previous  
 19 situation of the meetings of the Commission.  
 20 General tours of inspection used to happen  
 21 frequently, even multiple times per year. The  
 22 Commission used to inspect at least one or sometimes  
 23 two rivers every year, so that over five years it would  
 24 visit each river in the Indus Basin. However, after  
 25 2014 and 2015, there has only been one general tour of

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14:38 1 inspection, and that tour was conducted in 2019.  
 2 My predecessor and I sent multiple letters to our  
 3 Indian counterparts in an attempt to persuade them to  
 4 fulfil India's obligation under the Treaty and allow us  
 5 to carry out the tours of inspection. For example, in  
 6 my letter of 5 June 2018, which is at Exhibit P-0184,  
 7 I observed that tours of inspection stood disrupted  
 8 since the last four years -- that is September 2014 --  
 9 despite Pakistan's various requests.  
 10 In my letter of 9 July 2018, Exhibit P-0185,  
 11 I observed that the Commission had not undertaken "any  
 12 Tours of Inspection either General or Special on both  
 13 the sides of the Indus Basin", and that this was  
 14 "an unprecedented state of affairs". I emphasised that:  
 15 "Holding of Meetings and Tours of Inspection are  
 16 considered to be one of the main indicators of [the  
 17 successful] implementation of the Treaty; any disruption  
 18 [to them, I said] ... would lead to believe that the  
 19 implementation of the Treaty has become stand still ...  
 20 [and would therefore be] a very serious matter of  
 21 concern [to Pakistan]."  
 22 India subsequently proposed a general tour of  
 23 inspection that has been scheduled to take place on the  
 24 River Chenab in October 2018. Its letter is at  
 25 Exhibit P-0190. India claimed that local elections

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<p>14:39 1 necessitated the postponement. India subsequently 2 postponed, yes. So this was concerning the postponement 3 of their communicated date of the tour of inspection in 4 October 2018. 5 I expressed my disappointment in my response of 6 28 September 2018 and asked for the tour to be 7 rearranged as soon as possible. My letter is at 8 Exhibit P-0192. 9 The general inspection of the Chenab Basin finally 10 took place at the end of January 2019, and that remains 11 the last general tour. So it lasted just four days, and 12 related only to certain sites and works on the Chenab, 13 as detailed in Exhibit P-0201. 14 Our inspection of three out of the four HEPs we 15 looked at during the inspection -- that is the dam sites 16 of Ratle, Lower Kalnai and Baglihar Dam itself -- all 17 took place within the space of a single day. The 18 correspondence on this matter is detailed in 19 paragraphs 26 to 27 of Pakistan's explanatory note on 20 site visit correspondence for the Kishenganga and Ratle 21 Hydroelectric Plants 2014 to 2023, sent to the Court on 22 9 May 2023. 23 Article VIII(4)(b) imposes a separate obligation to 24 undertake promptly, at the request of either 25 Commissioner, a tour of inspection, or what we call</p> <p style="text-align: center;">Page 141</p>	<p>14:43 1 effort to settle disputes promptly. Unfortunately, as 2 you can see from the table on the slide, which provides 3 eight different cases concerning the time which was 4 consumed in the resolution of the disputes, or some are 5 still lingering, efforts to settle have been far from 6 prompt. 7 The parties' dispute over the KHEP has lasted for 8 several years now. Their dispute over Wullar Barrage 9 has lasted even longer. Disputes over the other HEPs, 10 like Dul Hasti and Baglihar, have taken over ten years 11 to resolve. 12 India attempts to buy time and procrastinate by 13 avoiding holding regular meetings and regular tours of 14 inspection; and as I will go on to explain in the next 15 part of my presentation, it has also done so by failing 16 to provide data in a timely manner. These tactics have 17 intensified over the past decade. 18 Slide 25. I now turn to the second way in which 19 India's conduct has frustrated the functioning of the 20 Treaty; that is, by its approach to its 21 informing-sharing obligations beyond Article VIII. 22 Mr Chairman and members of the Court, India's 23 failure to provide timely information to Pakistan 24 regarding the design of a new run-of-river hydropower 25 plant is one of the main reasons why disputes have</p> <p style="text-align: center;">Page 143</p>
<p>14:41 1 a "special tour of inspection". India has a very poor 2 record in relation to these inspection requests again. 3 Even when such tours have taken place, Pakistan has not 4 always been able to properly inspect the site. In 5 recent years, my requests for inspections have either 6 been ignored by India or been met with spurious excuses 7 again to avoid inspections taking place. 8 Pakistan detailed such requests in the explanatory 9 note to which I just referred. In that note, Pakistan 10 observed that I sent 16 letters to the Indian 11 Commissioners between 30 May 2019 and 18 November 2022, 12 seeking access to the KHEP in accordance with 13 Article VIII(4)(d) of the Treaty. 14 The only time I received an answer to this topic 15 from the Indian Commissioner was during meetings of the 16 Commission. In that context, he has claimed that there 17 is no hesitation on India's part to have meetings and 18 tours, and that's it. 19 Despite repeated requests, there have been no 20 inspections, general or special, since 2019. The PCIW's 21 request for a special tour of inspection of the 22 Kishenganga Hydroelectric Plant has been pending since 23 2014. 24 Slide 24. Article VIII(4)(b) makes it clear that 25 one of the functions of the Commission is to make every</p> <p style="text-align: center;">Page 142</p>	<p>14:44 1 arisen under the Treaty. Part of the reason for this is 2 that by the time India shares any information with 3 Pakistan about the construction of a new plant on the 4 Western Rivers, its design is already far advanced. In 5 some cases, the preliminary works, such as construction 6 of access roads, stockpiling of construction material, 7 construction of contractor camps, et cetera, may be 8 substantially completed. And essentially India delays 9 providing Pakistan with information until it is in 10 a position to present a fait accompli, or a near 11 fait accompli, if I may say so. 12 There are two main problems with the delayed 13 provision of information. First, it leaves Pakistan, 14 and the Commission itself, with very limited time to 15 discuss that information with India. 16 Second, even if India generally considers that 17 Pakistan has valid concerns about the design, India 18 refuses to consider any of Pakistan's concerns with 19 an open mind. This is because at the stage at which 20 Pakistan objects, the whole construction schedule has 21 already been agreed and things have moved forward. By 22 that point, changes in the design will involve huge 23 additional construction costs, and for that matter, 24 other similar issues. 25 In short, India's own conduct in failing to provide</p> <p style="text-align: center;">Page 144</p>



14:46 1 timely information reduces the chance that the  
 2 Commission will be able to reach agreement. That comes  
 3 at the detriment not only of Pakistan, but also of the  
 4 Treaty and its spirit.  
 5 I am firmly of the view that the parties should be  
 6 afforded an early opportunity to consider information  
 7 and start engaging with each other, even if a project  
 8 might not ultimately go ahead. One of the main reasons  
 9 for this view is that certain aspects of the design of  
 10 a river plant which are fixed at an early stage in the  
 11 design process can generate substantial points of  
 12 contention.  
 13 Sharing information at an early stage would ensure  
 14 that Pakistan would not be caught by surprise before  
 15 construction of river works is due to commence. In my  
 16 opinion, information needs to be received much earlier,  
 17 and not just six months before the beginning of the  
 18 construction of the river works connected with the  
 19 plant. I believe that were India to accept this view  
 20 and cooperate more openly, there would be much less  
 21 scope for discord.  
 22 Another factor that contributes to the impairment of  
 23 the Treaty's functioning is that the information that is  
 24 ultimately provided by India under paragraph 9 and  
 25 Appendix II of Annexure D for new run-of-river HEPs is

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14:47 1 not sufficiently detailed to enable Pakistan to satisfy  
 2 itself about the conformity of the design with the  
 3 criteria set out in paragraph 8 of Annexure D to the  
 4 Treaty. Again, this compromises the Treaty's ability to  
 5 minimise conflicts between the parties over the use of  
 6 the waters.  
 7 As I already explained, the purpose of Article VI of  
 8 the Treaty is to ensure that the parties exchange data  
 9 on a contemporaneous basis, and where requested by the  
 10 other party. India does not comply with these  
 11 requirements also.  
 12 The information received from India under  
 13 Article VI(1) is usually incomplete. I have provided  
 14 some recent examples in Exhibits P-0571, P-0572, P-0573  
 15 and P-0574. Those exhibits are all letters that I sent  
 16 to my Indian counterpart between 2021 and 2022,  
 17 highlighting all of the data that were not initially  
 18 provided and requesting that the missing data be  
 19 provided.  
 20 In the course of finalising my presentation to you  
 21 today, India has just responded to the first of these  
 22 letters, dated 11 March 2021, which is at P-0571, and  
 23 now, three years on, has purported to provide the  
 24 missing data referenced in that and my subsequent letter  
 25 of 11 June 2021, which is at P-0572. India's response

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14:49 1 is not on the record, but Pakistan would be happy to  
 2 share it with the Court.  
 3 Under Article VI(2), each party is entitled to  
 4 request any data relating to the hydrology of the river,  
 5 to canal or reservoir operation connected with the  
 6 rivers, or to any provision of this Treaty. The other  
 7 party is required to supply that data, to the extent  
 8 that these are available.  
 9 In 2007, for example, when I was a technical advisor  
 10 to Pakistan's then Commissioner, Pakistan requested  
 11 information about sediment concentrations. You can see  
 12 that at Exhibit P-0058. This is one of the types of  
 13 data related to the hydrology of the river. India has  
 14 never provided this information to Pakistan.  
 15 Article IV(8) requires India to provide Pakistan  
 16 with information regarding flood flows as far in advance  
 17 as practicable, in order to enable Pakistan to determine  
 18 the likely impact of the flood and to make preparations  
 19 to mitigate the flood damages.  
 20 The obligation to communicate flood information  
 21 under Article IV(8) has been the subject of  
 22 correspondence with the ICIW in recent years. It shows  
 23 the change in India's approach to cooperation under the  
 24 Treaty over the years. And when I say "the change ...  
 25 over the years", I would like to refer to 1989, when the

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14:50 1 Commissioners for India and Pakistan entered into  
 2 an agreement on the supply of flood information, which  
 3 is called the 1989 Flood Agreement. This is at  
 4 Exhibit P-0331.  
 5 The 1989 agreement was subsequently renewed every  
 6 year for the following two decades, almost. It  
 7 established detailed arrangements for the parties to  
 8 share advanced information about river flows between  
 9 July and October. The practice remained in place until  
 10 the year 2001 initially.  
 11 In 2001, the Indian Commissioner modified, to  
 12 a certain extent, the 1989 agreement arrangements, by  
 13 excluding information regarding the inflows and outflows  
 14 and water levels of Bhakra and Pong Dams on the Sutlej  
 15 and Beas Rivers respectively. That modified arrangement  
 16 remained in place until 2018, however, as I explained in  
 17 my letter to India of 3 July 2020, which is at  
 18 Exhibit P-0346, and on page 2 of that three-page letter.  
 19 In 2019, India refused my request to resume the  
 20 supply of flood information according to the 1989  
 21 agreement and Article IV(8). Since 2019, India has only  
 22 provided flood information to the extent that it  
 23 considers there to have been an extraordinary quantity  
 24 of flow. That information is not provided in real time  
 25 again, and the delay could in some circumstances be

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14:52 1 significant, even leading to loss of life or damage to  
 2 property, particularly in the rivers where we do not  
 3 receive flows, and those are the Ravi and the Sutlej,  
 4 where the populations have already encroached the  
 5 floodplain because of non-availability of the flow.  
 6 As I explained to the Indian Commissioner in  
 7 a letter of 3 July 2020, at Exhibit P-0346, and on its  
 8 page 2, the result of India's decision to provide  
 9 information only on discharges India considers to be  
 10 extraordinary deprives Pakistan of its right to receive  
 11 information and creates a risk of flood damages in  
 12 Pakistan, because Pakistan has been left with no option  
 13 in terms of configuring its response on the basis of the  
 14 advance information concerning the floods. This is  
 15 contrary to the overall spirit of goodwill and  
 16 cooperation under the Treaty, and also according to the  
 17 provision which is at paragraph 8 of Article IV.  
 18 Slide 26. I wish at this juncture to make the  
 19 second and final update to my statement concerning  
 20 a recent flushing operation that took place in India,  
 21 which risked serious downstream consequences for  
 22 Pakistan.  
 23 On 28 May 2024, India carried out a flushing  
 24 operation on the Salal Hydroelectric Plant on the River  
 25 Chenab, which you can see on the slides. Pakistan found

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14:54 1 out about the operation from the public sources,  
 2 including a video report from JKUpdate, which is at  
 3 Exhibit P-0575, which I have included in the slide and  
 4 which I would invite you to view.  
 5 As I wrote in my letter to India of 28 May, at  
 6 Exhibit P-0576, not only did India fail to share  
 7 information with me about the extraordinary releases  
 8 from Salal HEP, pursuant to Article IV(8), but the  
 9 operation itself is prohibited. The reason why it is  
 10 prohibited is not because of the Treaty itself, perhaps.  
 11 However, Salal is the subject of a special agreement  
 12 between the two states of India and Pakistan, which is  
 13 at legal authority PLA-0053.  
 14 Mr Chairman, if you may allow me to move on to the  
 15 next slide -- that is slide 27 -- Article I(ix) of the  
 16 1978 agreement is on the slide. It provides that:  
 17 "The Dead Storage shall not be depleted except in  
 18 an unforeseen emergency endangering the safety of the  
 19 earth or the concrete dams."  
 20 And that is concerning the Salal Dam.  
 21 "In that event, India shall give immediate  
 22 information to the Government of Pakistan of the nature  
 23 of the emergency ..."  
 24 The recent flushing of Salal was undertaken for  
 25 sediment management purposes. This is plainly not

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14:55 1 an emergency endangering the HEP. Moreover, and as  
 2 I have said, no formal notification of the flushing was  
 3 given to Pakistan. The flushing operation was therefore  
 4 in plain disregard of Article I[ix] of the 1978  
 5 Agreement on Salal.  
 6 Slide 28 is concerning my concluding remarks. So  
 7 I would like to say a couple of words by way of  
 8 conclusion to my presentation.  
 9 Mr Chairman and members of the Court, I have spent  
 10 many years involved with the issues concerning the Indus  
 11 Waters Treaty. I believe in the Treaty and I believe in  
 12 its mission. It has prevented conflict between Pakistan  
 13 and India, two nuclear armed states, over water rights  
 14 in a part of the world where water is scarce, and  
 15 becoming scarcer.  
 16 It has been a source of grave concern to me that  
 17 since the end of the Kishenganga arbitration,  
 18 cooperation under the Treaty has begun to falter. It is  
 19 my evidence to you that India is not complying with the  
 20 provisions of the Treaty in terms of cooperation and  
 21 coordination, and it is calling into question the  
 22 functionality of the Treaty and the Permanent Indus  
 23 Commission itself.  
 24 I am not here to make political or legal arguments  
 25 to you; that will be for Pakistan's Deputy Agent and the

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14:57 1 counsel team. I can merely give evidence as to what I,  
 2 as Pakistan's Commissioner, have observed. And I have  
 3 observed a failure of India to comply with its  
 4 obligations under the Treaty. Were I not to draw it to  
 5 your attention, I would be remiss in my duty both to my  
 6 country and to the Treaty, to which I have devoted  
 7 a large part of my professional life.  
 8 Thank you, Mr Chairman and members of the Court.  
 9 THE CHAIRMAN: Thank you very much, Mr Shah, for your  
 10 presentation. I believe we transition now to questions  
 11 from the Court, but I believe we are taking a very short  
 12 break to perhaps rearrange things, so that you can be  
 13 seated while we are asking those questions.  
 14 So why don't we proceed in the next few minutes to  
 15 do that, and the Court will consider the questions it  
 16 wishes to make. (Pause)  
 17 SIR DANIEL: Mr Chairman, would you like to just give the  
 18 witness an admonition that he is sequestered, so that it  
 19 is quite clear on the record?  
 20 THE CHAIRMAN: Yes. So since we are going to depart from  
 21 the room, Mr Shah, I think you know that you are to be  
 22 sequestered, which means you shouldn't have contact with  
 23 counsel or representatives from Pakistan. I believe  
 24 there's even a separate room for you to go to, if need  
 25 be. But I hope you will follow that admonition, and

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14:59 1 we will see you in just a few minutes.  
 2 (2.59 pm)  
 3 (A short break)  
 4 (3.08 pm)  
 5 THE CHAIRMAN: Alright, Mr Shah, I think we have rearranged  
 6 the furniture and we are now back in session. Again,  
 7 thank you for your testimony.  
 8 At this point in the process, we will proceed with  
 9 questions from the members of the Court, and in that  
 10 regard I'll begin with Dr Blackmore.  
 11 Questions from THE COURT  
 12 DR BLACKMORE: Thank you, Chairman.  
 13 Just for my clarification, I just wanted to know  
 14 what the 1978 Salal treaty with -- is it "Salal"? How  
 15 do you pronounce it?  
 16 A. Yes, Salal Hydroelectric Plant.  
 17 DR BLACKMORE: Yes. So what is that treaty and under what  
 18 umbrella does it exist?  
 19 A. Basically, Salal Agreement, which was signed in the year  
 20 1978, was, so I would say, under the auspices of the  
 21 Indus Waters Treaty, in which, you know, according to  
 22 the provisions of Article IX, the Permanent Indus  
 23 Commission was basically engaged in the first instance  
 24 to resolve the questions; and subsequently, at the  
 25 government level, Pakistan's objections were resolved,

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15:10 1 and then consequently this 1978 agreement was signed.  
 2 So I would say that is under the auspices of the  
 3 Indus Waters Treaty, not a separate something which is  
 4 outside of the Indus Waters Treaty.  
 5 DR BLACKMORE: I just have a general question around the  
 6 information that's available to Pakistan: that you can  
 7 look at the whole of your basin, including the  
 8 Kabul River and the six rivers we are talking about  
 9 here, the Indus Treaty.  
 10 I notice that you have a model of the Indus River.  
 11 I'm just trying to understand what you're using that --  
 12 are you using that model?  
 13 A. Yes, we are.  
 14 DR BLACKMORE: And what information is that starting to show  
 15 Pakistan around climate change and future hydrology of  
 16 the region?  
 17 A. Thank you, Mr Blackmore. So I would like to clarify  
 18 that.  
 19 So we have developed a model, the Government of  
 20 Pakistan has developed a model, in collaboration with  
 21 the CSIRO of the Government of Australia. And that  
 22 model is basically an operational model; it is not kind  
 23 of a long-term forecasting model. And that model is  
 24 used for the purposes of the implementation of the Water  
 25 Apportionment Accord which we have in Pakistan, in order

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15:11 1 to perform two or three main functions.  
 2 The first function is to forecast on the seasonal  
 3 basis the water availability, like the cropping season  
 4 water availability. So in Pakistan we have generally  
 5 two cropping seasons: one is the winter crop season,  
 6 which we call the Rabi season; and the summer crop  
 7 season, which we call the Kharif season. So during  
 8 these two cropping seasons, the model basically  
 9 forecasts the water availability on the basis of the  
 10 snow cover and the anticipated rainfall, as well as the  
 11 water which is available in the storage reservoirs, and  
 12 that water availability is distributed at least on  
 13 a ten-day interval during the coming cropping season.  
 14 Once that is done -- so that model basically,  
 15 I would say, apportions or, I would say, allocates, as  
 16 per the apportionment defined in the Water Accord,  
 17 the water during the coming crop season to the four  
 18 provinces, and then it basically provides the  
 19 distribution of that water to the four provinces, along  
 20 with the shortages.  
 21 So as a matter of fact, this operational model does  
 22 not deal in the long-term forecasted water availability  
 23 which is connected with the climate change or those  
 24 factors.  
 25 DR BLACKMORE: So given how critical it is in the Himalayan

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15:13 1 region for climate change and the future hydrology of  
 2 everybody that benefits from water that flows off the  
 3 Himalayas in all directions, I'm just wondering: is  
 4 there any plan in Pakistan to develop a predictive model  
 5 that would take into account the climate change impacts?  
 6 A. Yes, the Government of Pakistan is also cognisant of  
 7 taking into account any potential climate change  
 8 impacts, particularly with respect to the rivers which  
 9 are flowing in Pakistan and are the mainstay for the  
 10 people of Pakistan.  
 11 So in this regard, the Government of Pakistan is  
 12 presently operating a network of gauging stations, which  
 13 are the snow and ice gauging stations, in the upper  
 14 catchments of particularly the Indus, the area which  
 15 lies within the territory of Pakistan or the area of  
 16 Gilgit-Baltistan. So this network is in operation since  
 17 year 1995, and now the government is also modernising  
 18 that network on the basis of the data which becomes  
 19 available from that network.  
 20 For now, for the purpose of water distribution,  
 21 we use those data to forecast the water availability  
 22 particularly for the summer season. And the Government  
 23 of Pakistan has a dedicated outfit called the Global  
 24 Change Impact Study Centre, which is one of the outfits  
 25 of the Ministry of Climate Change, that is also

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15:15 1 entrusted to look into the long-term variations,  
 2 particularly on the flows, and also the other aspects,  
 3 like migration and agriculture, et cetera, related to  
 4 the climate change.  
 5 So they are also doing some work, but that is still  
 6 going on and is not finalised. But we believe that we  
 7 need more resilience in terms of any potential  
 8 alteration in the flows of the Indus system of rivers.  
 9 And for that matter, the Government of Pakistan is  
 10 paying full attention, serious attention in terms of  
 11 construction of the water storages, because the water  
 12 storages in Pakistan have been depleted over the years,  
 13 so during the past five decades, because of the  
 14 sedimentation.  
 15 So now is the time when we feel that we need more  
 16 water storages so that we can have, I would say,  
 17 adequate resilience against any potential climate change  
 18 impact, and we are constructing some water storages in  
 19 the country. Thank you.  
 20 THE CHAIRMAN: Thank you.  
 21 Dr Buytaert.  
 22 PROFESSOR BUYTAERT: Thank you very much, Mr Shah, both for  
 23 your statement and for the clear presentation. I've got  
 24 a couple of questions as well.  
 25 I would like to start with the arrangements for

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15:18 1 And I would also briefly explain or share with you  
 2 now that in the 1989 agreement, number one -- so that  
 3 provides the sharing of the data under the three  
 4 different modes of communication: first one was the  
 5 radio broadcasts, and the second one was through  
 6 telegrams, and the third one was telephonic  
 7 communication. So these were the three modes of  
 8 communication which were agreed upon in the 1989  
 9 agreement. And the most extensive mode which was used  
 10 in the 1989 agreement was the telephonic communication,  
 11 in which the gauging stations were defined on every  
 12 river except for the River Indus, and then the flood  
 13 limits were also defined.  
 14 So for that matter, just briefly if I may share with  
 15 you concerning the River Ravi and River Sutlej. So it  
 16 was agreed that when the flood flows would increase  
 17 beyond a little less than 1,000 cubic metres per second,  
 18 or 30,000 cusecs, India would start sharing the  
 19 information, starting from 1 July, all along until  
 20 10 October, seamlessly at six-hour intervals, so  
 21 regardless that would create a flood in Pakistan or not,  
 22 so that Pakistan can configure its response; and then  
 23 the frequency of the sharing of the information would  
 24 reduce when the floods would [de]crease.  
 25 And it comes to: when the flood flows would reach or

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15:16 1 data-sharing. I think you give a very clear view of how  
 2 the data-sharing as part of the Indus Waters Treaty  
 3 broke down. You mentioned the 1989 Flood Agreement,  
 4 which also, if I understand you, stopped in 2018.  
 5 Are there any other data-sharing agreements between  
 6 Pakistan and India, or are those the only two that  
 7 exist?  
 8 A. Basically there is only one, rather, I would say, and  
 9 that was of 1989. I would like to explain a little bit  
 10 about that, and then how the two countries went about  
 11 that.  
 12 Basically, the 1989 agreement was a consequence of  
 13 a great flood in Pakistan in the year 1988. So I would  
 14 say the 1989 agreement was an example of the Permanent  
 15 Indus Commission when it was working with a relatively  
 16 and significantly good spirit of cooperation, that the  
 17 two Commissioners did not feel it as a constraint under  
 18 the provisions of the Indus Waters Treaty to come up  
 19 with a certain agreement, or certain, I would say,  
 20 arrangements through which the flood information can be  
 21 shared by India to Pakistan, with Pakistan.  
 22 And then when we see the 1989 agreement -- so  
 23 I would like to make a request that you can see the  
 24 details of Pakistan's position in my letter of  
 25 3 July 2020, in which I have explained these facts.

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15:20 1 would exceed 200,000 cusecs for the case of Ravi River  
 2 at Madhopur and Sutlej River at the Ropar headworks, so  
 3 India would start providing this information on one-hour  
 4 intervals. And the flood flows would increase beyond  
 5 150,000 at some other points, so India would provide  
 6 again at one-hour intervals.  
 7 And the other important clause of that agreement was  
 8 that that 1989 agreement was only for one year. So that  
 9 continued for almost two decades subsequently, on the  
 10 basis of annual renewal of the same agreement between  
 11 the two Commissioners. And all of a sudden, in 2018 or  
 12 maybe 2019, the Indian side chose not to renew the 1989  
 13 agreement, and conveyed to Pakistan that, according to  
 14 their understanding of the Treaty, they would provide  
 15 Pakistan only when they would feel that the floods have  
 16 reached the level of extraordinary discharge. And in  
 17 the absence of that extraordinary [discharge], they will  
 18 not, basically, share.  
 19 So this is a brief of the 1989 agreement. And  
 20 subsequently there has been no agreement.  
 21 PROFESSOR BUYTAERT: But have they continued to share data?  
 22 A. Yes, they continued providing data, but not in  
 23 a continuous manner, just in a sporadic manner, when  
 24 they feel that the flows have exceeded a certain limit,  
 25 their own defined limit, on which Pakistan has conveyed

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15:22 1 its concerns that this is not a correct way of  
 2 implementation of the Treaty.  
 3 PROFESSOR BUYTAERT: Thank you.  
 4 Is there any other hydrological data-sharing between  
 5 the two countries as part of different agreements or  
 6 other activities, as far as you are aware?  
 7 A. Yes, there are other arrangements of data-sharing, as  
 8 I said in my presentation. So the flood data-sharing  
 9 comes under Article IV, paragraph 8. And then there is  
 10 another provision, or a specific article of the Treaty:  
 11 that is the Article VI, Exchange of Data.  
 12 So under Article VI, India provides the daily data  
 13 of the gauging stations and canals and its reservoir  
 14 operations on a monthly basis. But that has also been  
 15 stopped for quite a few months from now. And you will  
 16 see in Pakistan's Memorial and in my statement and the  
 17 relevant exhibits that although we receive those years  
 18 from India -- and we also provide in a similar way, on  
 19 a contemporaneous basis, to each other the data of our  
 20 gauging stations -- but when we see in detail, we see  
 21 that continuous long strings of "NR", which stands for  
 22 "not received", would be the data -- or so-called  
 23 "data" -- which we receive from India.  
 24 PROFESSOR BUYTAERT: Thank you for your answer.  
 25 So as I understand it, the process of -- call it

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15:26 1 and the design of the hydropower dams. Does the lack of  
 2 data also have a broader impact on water management in  
 3 Pakistan: for example, the ability to issue early flood  
 4 warnings or to mitigate floods in the Indus rivers?  
 5 A. Indeed, it is quite a serious thing, you know. So I, as  
 6 Pakistan's Commissioner for Indus Waters, strongly  
 7 believe on the wisdom of the framers of the Treaty that  
 8 they thought it very important to make it as part of the  
 9 Indus Waters Treaty, this data exchange. And it is for  
 10 a certain purpose.  
 11 And as you said, if we just take one of the many  
 12 possible uses of the data, as the flood early warning  
 13 and issuance of that, so Pakistan is a populous country  
 14 and we need these data in order to configure our  
 15 response. Now we have to rely on the other sources  
 16 which are available in public domain.  
 17 So as a practice, I would just like to share with  
 18 you that despite the fact that we do not have that 1989  
 19 agreement renewed, but we still develop a flood warning  
 20 cell in the office of Pakistan Commissioner for Indus  
 21 Waters, officially notified with effect from 1 July  
 22 every year. And we depute the officials who work in  
 23 that cell for 24/7, in order to avoid any possibility to  
 24 miss any call from Indian side to receive the data.  
 25 And since we are not receiving the data, so the

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15:24 1 "deterioration" of data exchange started before you  
 2 became Commissioner; I think as early as 2014.  
 3 I understand that that obviously has been the remit of  
 4 your predecessor. But do you have an appreciation of  
 5 the dynamic with which that deterioration starts, and  
 6 basically what was happening, what were the main reasons  
 7 that from 2014 onwards the data exchange broke down?  
 8 Was that a direct consequence of the Kishenganga  
 9 proceedings, or was it a combination of factors?  
 10 A. Professor Buytaert, I would prefer to speak in  
 11 accordance with what is available on record, rather than  
 12 to conjecture on my own understanding. And when we see  
 13 the records, which have been fairly shared for the  
 14 benefit of the Court, there is a simple refusal, without  
 15 providing any reason why this is. So there is a change  
 16 of heart or a change of pattern, despite Pakistan's  
 17 repeated requests and conveying its concerns that it is  
 18 something which is very, very important and it is part  
 19 of the implementation of the Treaty, as well as the  
 20 obligation of India. But you can just appreciate that  
 21 the record is simply silent, except that it basically  
 22 exhibits straight "no", or straight refusal from India.  
 23 PROFESSOR BUYTAERT: Thank you.  
 24 So obviously the data exchange has an impact for  
 25 your ability, as Commissioner, to evaluate the impact

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15:27 1 officials who were working in that flood cell have been  
 2 advised or have been instructed to continuously check on  
 3 the websites of the Indian concerned departments. But  
 4 I can share with you what I saw: that in the normal  
 5 course I would say using the normal means of the  
 6 internet access, we cannot access those websites and we  
 7 cannot get the data. So that is quite a big challenge.  
 8 And then we have to rely on the other internet resources  
 9 in order to configure our flood early warning response.  
 10 PROFESSOR BUYTAERT: Thank you.  
 11 You mentioned internet and websites. Does that mean  
 12 that some of the data are in the public domain, simply  
 13 available -- or potentially available -- on websites, so  
 14 that Pakistan, as well as anyone else, can consult them?  
 15 A. Yes, as I said, we tried to access the websites from  
 16 where we can get the data from the Indian departments --  
 17 like they have the Bhakra Beas Management Board, so they  
 18 basically maintain their website -- but at times we feel  
 19 that we cannot get the internet access of that site, and  
 20 at times we see that the specific data is not updated on  
 21 that website.  
 22 PROFESSOR BUYTAERT: Thank you.  
 23 Has Pakistan taken any specific measures to  
 24 safeguard itself or to reduce the reliance on Indian  
 25 data; for example, more measurement stations close to

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15:29 1 the border, or any other way to compensate for the lack  
 2 of data or the risk that data don't come through from  
 3 India?  
 4 A. Yes. So Pakistan has a Pakistan Meteorological  
 5 Department, which has a specific outfit with the name of  
 6 the Flood Forecasting Division. So Flood Forecasting  
 7 Division has been basically entrusted with the mandate  
 8 to prepare the forecasts and then to disseminate, and  
 9 they rely on the synoptic charts.  
 10 So we have our own weather Doppler radars, which are  
 11 installed at the points closer to the boundary, to the  
 12 international boundary with India or the Line of  
 13 Control, and we get -- so when I say -- basically what  
 14 we do is that we have, basically, the three-tiered  
 15 set-up in Pakistan in terms of preparation of the flood  
 16 forecasts.  
 17 First is to get the weather information and have  
 18 a forecast of the rainfall precipitation in the upper  
 19 catchments, as well as the catchments in Pakistan, so  
 20 that we can have a considerably long lag time by way of  
 21 simulating the rainfall into the runoff, and then have  
 22 that runoff hydrograph routed throughout our catchments,  
 23 so that we can get a forecast of at least 18 days before  
 24 the happening of the event.  
 25 Then on the second tier, we rely on our weather

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15:31 1 Doppler radars, which provide us a real-time  
 2 precipitation, so when that is happening in the upper  
 3 catchments. So those weather Doppler radars are  
 4 connected or have been integrated with our early flood  
 5 warning system, which is a model which basically  
 6 simulates.  
 7 On the third tier, we have the stream gauging  
 8 station, which are basically the automatic gauging  
 9 stations which are installed right at the entry points  
 10 of the rivers which are coming from India, so that we  
 11 can get that information.  
 12 So by way of moving from the first tier to the third  
 13 tier, the consequence is that the reliability and,  
 14 I would say, the accuracy would increase, but the lag  
 15 time would decrease.  
 16 PROFESSOR BUYTAERT: Thank you very much.  
 17 Sir Daniel mentioned this morning [that] one of the  
 18 main concerns of Pakistan is the potential catastrophic  
 19 consequences of the building of hydropower plants on the  
 20 Western Rivers. Can I ask for your view on what these  
 21 consequences are from your perspective, from water  
 22 resources and flood risk? Can you elaborate on how you  
 23 see those catastrophic consequences pan out? Where are  
 24 the main risks that you're concerned about?  
 25 A. Thank you, Professor Buytaert.

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15:32 1 The scheme of preparation according to which the  
 2 Pakistan team which is now present before the Court is  
 3 such that we have divided the tasks. So I feel that  
 4 Court can take more benefit if you can get a detailed  
 5 answer from Dr Morris, sir, during his presentation in  
 6 due course in the current hearing. So he would be  
 7 providing you the details on this aspect.  
 8 PROFESSOR BUYTAERT: Thank you very much. I'll stop for now  
 9 and give my colleagues a chance as well. I might come  
 10 back later with more questions.  
 11 THE CHAIRMAN: Mr Minear.  
 12 MR MINEAR: Thank you, Mr Shah for your presentation, I just  
 13 have a few short questions.  
 14 First, under Article VII(2), does Pakistan, as  
 15 a downstream riparian, ever have occasion or obligation  
 16 to notify India of its engineering works that might  
 17 materially affect India?  
 18 A. I don't think so.  
 19 MR MINEAR: Okay.  
 20 Second, under Annexure D, Appendix II, does India  
 21 provide load curves as part of its hydraulic data when  
 22 providing new dam information?  
 23 A. About what?  
 24 MR MINEAR: Does India provide load curves --  
 25 A. Load curves?

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15:34 1 MR MINEAR: -- load curves -- when providing hydraulic data?  
 2 A. No, never.  
 3 MR MINEAR: As a partial explanation of India's failure to  
 4 provide information, has India ever offered the Covid  
 5 epidemic or other factors such as that as an explanation  
 6 for its failure to provide information or provide  
 7 meetings or tours of facilities?  
 8 A. Yes, [Mr] Minear. So I believe that that is part of the  
 9 record which Pakistan has shared with the Court.  
 10 So it was again during my tenure as Pakistani  
 11 Commissioner for Indus Waters when I have been asking my  
 12 counterpart, before the onset of the Covid-19 pandemic,  
 13 to hold a meeting, and that meeting was also agreed in  
 14 the previous meeting that we are going to hold that  
 15 meeting in a shorter time. So this was in 2019,  
 16 I believe, if my memory serves me correctly: that I have  
 17 been asking before the onset of Covid-19, by way of  
 18 writing almost ten or eleven letters in a period of  
 19 eight to nine months, to convey me the dates, and India  
 20 side did not convey me.  
 21 And eventually this pandemic broke and the meeting  
 22 could not take place. And that was perhaps the only  
 23 occasion when the annual meeting of the Commission could  
 24 not take place until then. So the current year has  
 25 become the second year in which the Commission could not

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15:36 1 meet.  
 2 So, yes, basically India refused once on account of  
 3 Covid-19 that they could not hold the meeting of the  
 4 Indus Commission, but not concerning the tours.  
 5 MR MINEAR: Thank you.  
 6 Were you involved in the Baglihar proceeding?  
 7 A. Yes, I was involved in Baglihar. While in my previous  
 8 life -- now I work for the government, so at that time  
 9 I was working with one of the state-owned consultancy  
 10 firms, NESPAK. So I was a young engineer in that  
 11 consultancy firm and I was doing some work concerning  
 12 sediment simulation in Baglihar.  
 13 MR MINEAR: Okay. This might be a question that goes beyond  
 14 your experience in that proceeding, but there is  
 15 a statement in the Neutral Expert's determination  
 16 (PLA-0002) -- this appears at 5.1.1 -- on treaty  
 17 interpretation. And the sentence is that -- let me read  
 18 it in context (paragraph 6):  
 19 "The Treaty also gives a clear indication of the  
 20 rights and obligations of both Pakistan and India.  
 21 Sovereign rights cannot be exercised without  
 22 consideration of the limits imposed by the Treaty. In  
 23 this context, it is not appropriate for the NE [the  
 24 Neutral Expert] to qualify the Treaty as, inter alia,  
 25 a 'delimitation' or a 'boundary' Treaty."

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15:39 1 So it is my opinion.  
 2 MR MINEAR: Thank you.  
 3 And then one last question: does Pakistan view  
 4 India's failure to provide adequate information as  
 5 presenting a dispute under Article IX?  
 6 A. Sorry, I could not ... Pakistan ...  
 7 MR MINEAR: Let me repeat that again.  
 8 A. Yes.  
 9 MR MINEAR: Does Pakistan view India's failure to provide  
 10 adequate information, does that rise to the level of  
 11 a dispute under Article IX?  
 12 A. Yes. So as Pakistan Commissioner for Indus Waters,  
 13 I believe that there are a few dimensions to this  
 14 question. So when I would like to respond to that, as  
 15 I already explained in my statement, that how Pakistan  
 16 feels.  
 17 So I generally believe, as a practising engineer,  
 18 that at times you can also have the differences on  
 19 designs or the approach of design. But those  
 20 differences can be resolved, or cannot be resolved,  
 21 provided that a sufficient adequate time is provided.  
 22 For example, if something has been started, the  
 23 construction of a project has been started, and then --  
 24 so we start discussion as whether or not the design is  
 25 correct or not in accordance with the given criteria, so

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15:37 1 Would you know what the basis for that statement  
 2 was? Was the Neutral Expert responding to a position  
 3 stated by Pakistan, or what was the context for it  
 4 rejecting that view?  
 5 A. Professor Minear, so as I explained, my role in the  
 6 Baglihar proceeding was strictly limited to providing  
 7 the [...] technical expertise or the technical input, so  
 8 of course I cannot recollect it from my memory.  
 9 So far as your particular question is concerned,  
 10 I believe that of course it is a very important  
 11 question, so Pakistan's counsel may like to respond to  
 12 you in due course of this hearing.  
 13 MR MINEAR: That would be fine, thank you.  
 14 And one other question concerning Baglihar. The  
 15 approach that the Pakistan Memorial sets out for  
 16 calculating maximum pondage, was that approach used in  
 17 the Baglihar proceeding?  
 18 A. Well, in Baglihar proceeding it was quite different. So  
 19 again I would like to state that on pondage, the scheme  
 20 of things is such that we are going to place before the  
 21 Court a detailed account of all the previous history of  
 22 the pondage, as well as its Treaty legal interpretation,  
 23 by way of presenting Pakistan's legal and technical  
 24 experts in due course of this. So I believe that would  
 25 be a better opportunity for the members of the Court.

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15:41 1 definitely it will be too late in time on the timeline.  
 2 So it is one of the concerns which Pakistan  
 3 genuinely feels: that the information which is provided  
 4 by India to Pakistan, while referring to at least  
 5 six months before start of construction of river works,  
 6 so it can be a literal reading of -- or too much literal  
 7 reading of the provisions of the Treaty. But then if  
 8 there is a desire to cooperate and to demonstrate  
 9 goodwill, so basically nothing stops, we feel genuinely  
 10 to India to share that information at a much earlier  
 11 stage, as compared to at least six months before the  
 12 start of construction of river works.  
 13 For example, we feel that -- so there are different  
 14 stages in a project construction or project development.  
 15 So you can plan, but that would remain a plan.  
 16 Following that plan, you do the feasibility study. And  
 17 after the feasibility study, in which you calculate the  
 18 costs and benefits of a project, once that is done, then  
 19 you enter into a detailed engineering design in which  
 20 you calculate to the level of the nuts and bolts.  
 21 And once that is done, and it is decided that -- so  
 22 we have the financing available, we have the government  
 23 approvals available for the project, so we move towards  
 24 the construction stage. And the first step in the  
 25 construction stage is to prepare the tender drawings so

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15:42 1 that the project tender can be floated in order to  
 2 procure the contractors. And once the tender drawings  
 3 are formed, then the employer or the owner of the  
 4 project floats the tender and receives the bid.  
 5 And it is not, you know, always the case that you  
 6 receive the competitive bids, or you receive the bids at  
 7 all; or at times you receive the bids which you know  
 8 appears non-responsive, may that be on account of the  
 9 financial health of the prospective bidder or on account  
 10 of its technical skill. So the procurement of  
 11 a contractor also takes a good time.  
 12 And once you have procured the contractor, then you  
 13 award the contract to the contractor. And when it comes  
 14 to these big projects, so the award of the contract  
 15 again is something which takes some time, because the  
 16 contractor has to submit a bank guarantee and to get the  
 17 mobilisation advance and these sort of things.  
 18 Once that is done, the contractor comes on the site  
 19 and basically establishes himself on the site. So first  
 20 of all, it basically takes the possession of the site,  
 21 the clear possession of the site, subsequent to which  
 22 the contract provisions start and the obligations of the  
 23 contractor start.  
 24 So at times, the experience we have in Pakistan, so  
 25 getting the possession of the site is again something

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15:46 1 MR MINEAR: Thank you.  
 2 THE CHAIRMAN: Mr Blackmore.  
 3 DR BLACKMORE: Mr Shah, I'm interested in starting  
 4 a conversation about sediment, trying to make a very  
 5 complex subject relatively simple for the Chairman,  
 6 otherwise he'll be angry with me!  
 7 When I look at the number of storage facilities in  
 8 Pakistan and in India on the Himalayas, they are all  
 9 sediment storage facilities, one way or another. They  
 10 all have a finite life that will be dominated by  
 11 sediment, nothing else. So Tarbela, 48% full of  
 12 sediment: have to change the outlet works so that you  
 13 can continue to operate it as an active storage.  
 14 I'm just wondering how you think about sediment  
 15 storage in Indian dams upstream, and whether there are  
 16 sites that would be attractive, from a Pakistani  
 17 perspective, for India to store sediment, not just in  
 18 a valley, but something that had a large storage  
 19 capacity that would deflect sediment from being stored  
 20 in Tarbela or other Pakistani facilities.  
 21 So at the moment we're all talking about sediment  
 22 transport through run-of-river facilities. But if you  
 23 flip that and say, "Okay, we want to lengthen the life  
 24 of Pakistan facilities", is there any way we can store  
 25 sediment in these other dams that is a benefit to

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15:44 1 which takes time, because of the land acquisition,  
 2 because of the resettlement of the people. And once  
 3 that is done successfully, the contractor basically  
 4 starts construction of its camp, bringing its resources,  
 5 its manpower, its machinery, its batching plants, and  
 6 then it starts construction of the preparatory works.  
 7 So until now, the six months before the start of  
 8 construction of the river works connected with the  
 9 plant, that stage has not arisen. So everything is  
 10 being done. And so whatever steps I have shared after  
 11 completion of the detailed engineering design, all along  
 12 up to the start of the construction of the river works,  
 13 so that is the stage at which the project owner has made  
 14 a firm decision that he is going to construct the  
 15 project.  
 16 And that is the time at which, if we feel that the  
 17 project information could be shared with Pakistan, so  
 18 there would have been a brighter chance to converge on  
 19 the designs or on the objections raised by Pakistan,  
 20 rather than giving just six months to Pakistan and then  
 21 expecting that, "Either Pakistan will accept our stance  
 22 or we will go ahead". And by the time Pakistan reaches,  
 23 after completing the steps of Article IX, so the project  
 24 construction had already entered into an advanced stage.  
 25 So that is a concern on the part of Pakistan.

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15:48 1 Pakistan?  
 2 Now, I know you're building Diamer-Basha, which will  
 3 be a massive sediment trap. But I'm wondering whether  
 4 you've thought through whether there are those  
 5 opportunities within the Indian-controlled part of the  
 6 catchment.  
 7 A. Thank you, Dr Blackmore. Again, I think that Dr Morris  
 8 will be providing you more detail. But I would also  
 9 like to share some of the aspects which are more  
 10 relevant to the Pakistani projects vis-à-vis sediments.  
 11 I just want to share with you that if we talk about  
 12 Tarbela, to the best of my knowledge, there are hardly  
 13 any sites in the Indian-Occupied Kashmir on Indus main  
 14 stem to construct any storage which can reduce the  
 15 sediment transport to Pakistan. It is number one.  
 16 And the second point is that, you know, it is just  
 17 a matter of time. So even if you develop a storage  
 18 upstream, so there will be a time when that would also  
 19 get filled with the sediments, and eventually that  
 20 sediment would start flowing downstream.  
 21 And third is that: yes, the water storage sites are  
 22 limited and you are confronted with a sediment issue.  
 23 For example, if we see in Jhelum, there is the  
 24 Wullar Lake, so that also acts as a sediment trap. So  
 25 that is a natural lake. But in case of Chenab, when we

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15:49 1 see, that is a river with steep slopes. And if we  
 2 construct a run-of-river hydroelectric plant,  
 3 prima facie one can see that those hydroelectric plants  
 4 are getting silted up or getting filled with the  
 5 sediments.  
 6 But on the other hand, we also know that those are  
 7 the run-of-river hydroelectric plants where the primary  
 8 requirement is the head, or primary purpose of the  
 9 construction of a large dam is to create a head, not  
 10 a storage. Therefore, you know, at times we see that we  
 11 can always construct, we can always go for a choice of  
 12 a low-height dam with a long tunnel, by way of which we  
 13 can gain the head, because the storage is not a concern.  
 14 So for the run-of-river hydroelectric plants on  
 15 steeper slopes, these dams cannot provide the relief.  
 16 And even with the water storage, as I explained, that is  
 17 again a matter of time: so perhaps a little later, but  
 18 again then you would start receiving the sediments  
 19 downstream.  
 20 THE CHAIRMAN: I have a few questions for you, Mr Shah, one  
 21 of which builds on a question I think Mr Minear was  
 22 asking to you.  
 23 Certainly in your written statement and in your  
 24 testimony today, you have spoken about India frustrating  
 25 the various provisions of the Treaty dealing with the

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15:53 1 a little bit further, in that in your statement and  
 2 today, you've indicated it would be better for India to  
 3 share with Pakistan well in advance of six months of  
 4 construction various information. And my question is:  
 5 do you view that as something that's compelled by the  
 6 Treaty, or is it just: this would be a good practical  
 7 way of heading off disputes before they arise? Is this  
 8 a desire, a preference on your part, or is it your view  
 9 that the Treaty actually requires India to share on  
 10 an earlier basis?  
 11 A. Thank you, Mr Chairman. So perhaps my counsel team will  
 12 not be very thankful if I share my views, but still  
 13 I would like to share some of my views on that.  
 14 And that is, you know, since the Government of  
 15 Pakistan has basically entrusted me the duty to  
 16 implement the Indus Waters Treaty as part of the  
 17 Permanent Indus Commission, so as I shared -- and you  
 18 can see in the transcript perhaps -- [in] response [to]  
 19 one of the questions by Professor Minear, basically,  
 20 I strongly believe that this Treaty is such a treaty  
 21 which is so robust in its nature that as long as the two  
 22 states are there, this Treaty can perform.  
 23 And when I say so, it means that the 1989 Flood  
 24 Agreement is one of the examples, when we see that there  
 25 was a need and both sides felt that there is a scope of

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15:51 1 functioning of the Commission and with provision of  
 2 information. Indeed, I think you say that India has  
 3 failed to comply with the Treaty.  
 4 The question that Mr Minear put to you was whether  
 5 this is a dispute that's before this Court. Now, you  
 6 may want to deflect this to your counsel. But I think  
 7 what he might have been asking was: when we look at the  
 8 seven disputes identified in Pakistan's Amended  
 9 Request for Arbitration, there is not a dispute about  
 10 information-sharing. And similarly, when you look at  
 11 our order on the first phase of the merits, there is not  
 12 a subparagraph in paragraph 35 that talks about  
 13 a dispute or a question relating to information-sharing.  
 14 So feel free to deflect this question. But I think  
 15 what he was trying to get at is: is this actually  
 16 a matter before this Court, as opposed to background  
 17 information that you thought important for us to have?  
 18 A. So I just would like to share my concluding remarks  
 19 which I just shared with this Court, which can be seen  
 20 in the transcript, in which I tried to respond to this  
 21 question. And beyond that, I would definitely like  
 22 Pakistan's counsel, Sir Daniel, to respond to the Court  
 23 on this matter.  
 24 THE CHAIRMAN: Yes, that's fine.  
 25 Let me pursue the issue of information-sharing

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15:55 1 going forward in terms of preparing more elaborate  
 2 arrangements so that the spirit of cooperation and  
 3 goodwill can be demonstrated, which is part and parcel  
 4 of the Treaty, part of the preamble of the Treaty. So  
 5 they did that. And that worked for two decades.  
 6 And I just want to bring it on record, for the  
 7 benefit of the Court, that so long as -- so I have  
 8 reviewed the record of the correspondence which is  
 9 available in the Commission. So almost invariably,  
 10 every year Pakistani Commissioner thanked to his  
 11 counterpart at the conclusion of the flood season every  
 12 year. So on the same, I would say, precedence, I feel  
 13 that this is covered under the Treaty, and then it is  
 14 just a matter of demonstrating cooperation and goodwill.  
 15 And as long as both sides fully appreciate that we  
 16 have to resolve the disputes at the Commission level --  
 17 I would say only up to the Commission level, bilateral  
 18 Commission level -- so we need to be proactive, we need  
 19 to follow the realistic dimensions of the project  
 20 lifecycle. And as I explained shortly before, these are  
 21 the steps at various stages of the project lifecycle  
 22 which need to be understood and appreciated, and  
 23 endeavour to resolve the objections on the design must  
 24 be made keeping in view these timelines and these  
 25 stages.

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15:57 1 So I believe that the Treaty provides a sufficient  
 2 room, and therefore Pakistan feels that it is something  
 3 which needs to be put in place.  
 4 THE CHAIRMAN: Thank you very much.  
 5 At paragraph 72 of your statement, and at slide 24  
 6 today, you had the list of eight projects where  
 7 questions have arisen that remain unsettled or that were  
 8 settled. And that, to me, raises the general issue of  
 9 how Pakistan and India have interpreted the Treaty over  
 10 time, from 1960 to the present.  
 11 So prior to the point where we get to, say, the  
 12 Baglihar proceeding, was there a common interpretation  
 13 by the two countries with respect to the main issues  
 14 that we're talking about in this proceeding? In other  
 15 words, was there eventually an acceptance, in the course  
 16 of those particular eight projects or others, about  
 17 where outlets should be located, how pondage should be  
 18 calculated, and so on?  
 19 A. So if you ask me as Pakistan Commissioner for Indus  
 20 Waters, I can only cite one instance, and in that  
 21 instance also the common understanding existed only on  
 22 one dimension. That was the placement of the spillways  
 23 concerning the Salal Dam. And that was also something  
 24 which was done after a period of nine years. And  
 25 eventually the Indian side accepted that perhaps the

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15:59 1 correct application of the Treaty is not to have the  
 2 outlets at the bottom, and eventually they plugged those  
 3 outlets and raised the heights of the gates.  
 4 And beyond that, so we could see from the record  
 5 that invariably both the sides were at loggerheads, and  
 6 they did not agree each other's position.  
 7 THE CHAIRMAN: Part of the reason I ask is that in the  
 8 Indian Counter-Memorial in the Baglihar proceeding,  
 9 India points to several hydroelectric plants that were  
 10 constructed prior to Baglihar, and I think it was from  
 11 1968 to 1990, where India says it used the same method  
 12 of pondage calculation that was at issue in Baglihar,  
 13 and according to India, Pakistan never protested in  
 14 those prior instances.  
 15 So again, this may be outside your prepared  
 16 knowledge, and if you want to deflect the question,  
 17 that's no problem at all. But looking at India's  
 18 position, at least in the Baglihar proceeding, it seemed  
 19 to be saying that there had been prior plants where the  
 20 same approach they were advocating for had been used and  
 21 was acquiesced to by Pakistan, and that's why I was  
 22 wondering if you had any insights into that.  
 23 A. Thank you, Mr Chairman.  
 24 So as I already explained, my contributions have  
 25 already been provided to Pakistan's counsels and

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16:01 1 Pakistan's technical experts and they are fully  
 2 prepared. So today is the first day, and a lot has yet  
 3 to come for the benefit of the Court. So I would  
 4 generally prefer that the Court may wait until those  
 5 experts stand up on their feet before the Court and  
 6 provide you, in a systematic manner, the complete  
 7 account of all the history, the bases, what was said by  
 8 India, what was responded by Pakistan, and what are its  
 9 legal dimensions. And so I think that would be more  
 10 beneficial for the Court, rather than for me to respond  
 11 to this question.  
 12 THE CHAIRMAN: That's absolutely fine. Indeed, some of the  
 13 value of asking these questions on the first day may be  
 14 precisely to allow counsel to think about them and  
 15 respond in due course.  
 16 Let me pursue it just a little bit further, to ask  
 17 you whether you think the difficulties you have been  
 18 experiencing in the Commission have anything to do with  
 19 the parties -- either one of them -- changing their view  
 20 as to issues such as location of outlets, spillways,  
 21 calculation of pondage. Is that part of the problem at  
 22 all, or have the parties been consistent in their  
 23 positions over time?  
 24 A. Perhaps I missed the point between the two. So if you  
 25 can come again, or I can go through the transcript.

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16:02 1 THE CHAIRMAN: That's fine, I'll ask it again. It's really  
 2 just a general question.  
 3 You've explained difficulties in the Commission over  
 4 the recent years, and I'm just wondering: does it have  
 5 anything to do with either side changing its position  
 6 about the key issues that have arisen, whether it's  
 7 spillways or pondage or outlets or freeboard? Is that  
 8 part of the problem, that there have been changes that  
 9 have occurred?  
 10 A. No. I believe no. I believe that both the parties are  
 11 basically sticking to their position. They have their  
 12 own way of understanding things, and that is basically  
 13 not a part of the problem, or that is not the underlying  
 14 reason that the parties are changing their positions.  
 15 Rather, the parties are basically sticking to their  
 16 position.  
 17 THE CHAIRMAN: In the aftermath of the Kishenganga Court of  
 18 Arbitration, I imagine that Pakistan was keeping track  
 19 of what was going on at Kishenganga as the plant was  
 20 moving forward. I understand that you have incomplete  
 21 information. But could you just say a few words about  
 22 whether or not you think India has acted consistently  
 23 with the Kishenganga Court of Arbitration's decision as  
 24 it related to the KHEP?  
 25 A. There were two particular awards: one was concerning the

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16:04 1 drawdown flushing, and the other was allowing Pakistan  
 2 a minimum environmental flow.  
 3 So far as the implementation of minimum  
 4 environmental flow is concerned, India just informed  
 5 Pakistan immediately after the KHEP award that they have  
 6 made provisions in their structure to release the  
 7 9 cumecs flow on which Pakistan had been asking them to,  
 8 "Please afford us an opportunity, as a special tour of  
 9 inspection under Article VIII(4)(d) of the Treaty, so  
 10 that we can go and satisfy ourselves that those  
 11 arrangements, as you are informing us, have been put in  
 12 place". That visit could not take place as of today,  
 13 when I am speaking before you, under Article VIII(4)(d).  
 14 So far as the prohibition of drawdown below the DSL  
 15 is concerned, that is something which Pakistan's counsel  
 16 will explain to you, to which extent that has been  
 17 implemented or not.  
 18 THE CHAIRMAN: Okay, very good.  
 19 You had a bit of an exchange, I think, with  
 20 Dr Blackmore at the outset about the Salal Agreement of  
 21 1978, and then you also discussed a bit the data-sharing  
 22 agreement of 1989. Maybe I missed what you said in that  
 23 context, but are there other agreements relating to the  
 24 1960 Treaty in addition to those two agreements, or are  
 25 those two the only ones that have been concluded?

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16:07 1 about the subsequent agreements that were concluded, is  
 2 that one element of treaty interpretation, which  
 3 I believe Professor Webb will be dealing with, does deal  
 4 with the subsequent agreement and subsequent practice of  
 5 the parties in the interpretation of the Treaty. So  
 6 having as much clarity as possible on those issues is of  
 7 great help to the Court.  
 8 I will finish by noting that you had indicated that  
 9 it might be of value to the Court to have India's  
 10 response to the two letters that were sent by Pakistan  
 11 in March and June of 2021. I do think it would be  
 12 helpful. I would note that in the decision we took with  
 13 respect to production of documents, we essentially  
 14 welcomed all communications between the Commissioners  
 15 that are of relevance to the Court. So we certainly  
 16 would be happy to receive that at any point in time up  
 17 until, I suppose, September 30. So that would be fine.  
 18 Follow-up questions by anyone here? Seeing none,  
 19 then let me turn to Ms Rees-Evans and ask her whether  
 20 she has re-direct; if she does have re-direct, how much  
 21 time she thinks she might need for that re-direct; and  
 22 whether she would prefer to have a break before doing  
 23 the re-direct.  
 24 MS REES-EVANS: Thank you, Mr Chairman. If you can just  
 25 give me one minute, we may have one or two questions by

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16:06 1 A. Yes, that is correct. So those are the [only two] which  
 2 were concluded, out of which the 1989 Flood Agreement is  
 3 practically no more there, because that was meant for  
 4 only one year, and that was up to the parties to renew  
 5 that. So subsequent to 2018, that renewal could not  
 6 take place.  
 7 But so far as the Salal Agreement is concerned, so  
 8 that was of such a nature that once that was  
 9 implemented, now that is in place.  
 10 THE CHAIRMAN: And were these agreements concluded in order  
 11 to provide greater specificity to the obligations under  
 12 the Treaty, or did they add new obligations beyond what  
 13 were in the Treaty?  
 14 A. Mr Chairman, I think your question is quite legal in  
 15 nature, so I would prefer Pakistan's counsel to respond  
 16 to this question. So far as my understanding is  
 17 concerned, I can only appreciate that it is a very  
 18 important question for the purposes of the Court. So  
 19 I would prefer that Pakistan's counsel should respond to  
 20 that.  
 21 THE CHAIRMAN: You speak so, well, Mr Shah, I think I forget  
 22 that you are not a lawyer, perhaps!  
 23 Yes, and I will perhaps wind up by noting that one  
 24 reason why I'm asking about the conduct of the parties,  
 25 the practice of the parties from 1960 onward, and also

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16:09 1 way of re-direct, thank you.  
 2 THE CHAIRMAN: That sounds fine. Thank you. (Pause)  
 3 MS REES-EVANS: We have just two points by way of re-direct.  
 4 The first relates to Mr Minear's question about the  
 5 Covid pandemic and how India has cited that as  
 6 a response to Pakistan's requests to hold a meeting and  
 7 to hold special and general tours.  
 8 If we have the ability to project some of these  
 9 correspondence, we can do that, or Pakistan can provide  
 10 the Court with references to the specific letters that  
 11 Mr Shah referenced in his answer to your question. It  
 12 may be just a simple case of providing you with the  
 13 references will be sufficient, if you would like us to  
 14 do that.  
 15 MR MINEAR: That would be fine, thank you.  
 16 MS REES-EVANS: Thank you. So that was our first point.  
 17 The second question that we have is just in relation  
 18 to Professor Murphy's final question, I think.  
 19 (4.12 pm)  
 20 Re-direct examination by MS REES-EVANS  
 21 Q. Professor Murphy's question to you was: are there any  
 22 other agreements relating to the Indus Waters Treaty,  
 23 other than the 1989 Flood Agreement or the Salal  
 24 Agreement?  
 25 Do you recall that there was one other agreement,

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16:12 1 pursuant to Article IX of the Treaty --  
 2 A. Yes.  
 3 Q. -- which was concluded very early on?  
 4 A. Yes. Yes, thank you, Ms Rees-Evans. So, yes, somehow  
 5 that skipped my memory. And I stand corrected. Yes, so  
 6 there was one.  
 7 MS REES-EVANS: Thank you, Mr Shah. We have not put that  
 8 agreement on the record to date, but Pakistan can do  
 9 that in response to the question, Professor Murphy, that  
 10 you've raised today.  
 11 THE CHAIRMAN: Yes, please do put it on the record. And can  
 12 you indicate the year in which that agreement was done?  
 13 MS REES-EVANS: We think it was 1976, but we'll need to  
 14 confirm.  
 15 THE CHAIRMAN: That's fine.  
 16 So I understand then you are finished with your  
 17 re-direct?  
 18 MS REES-EVANS: Yes, we have no further questions.  
 19 THE CHAIRMAN: Okay. Thank you very much.  
 20 Then it falls for me to thank you, Mr Shah, for your  
 21 very helpful testimony today before us. Now that you've  
 22 completed your testimony, you are no longer sequestered.  
 23 I believe we should go ahead and take a break,  
 24 a true coffee break, but let me turn to Sir Daniel and  
 25 ask him how much time he thinks he may need to complete

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16:36 1 There was the issue of sediment, for example, which  
 2 Dr Blackmore raised: I think Dr Morris will spend some  
 3 time on this. There were quite a number of questions,  
 4 I think, that go to Professor Webb on treaty  
 5 interpretation and subsequent practice. There are some  
 6 shortform answers that I could give you now, but I'm  
 7 going to refrain from doing so and defer to her.  
 8 There are, though, one or two questions that it  
 9 might be useful for me just to at least begin to respond  
 10 to, because while this is live in the minds of the  
 11 members of the Court, it may provide a little bit of  
 12 further context.  
 13 Just on the various agreements that have been  
 14 reached since 1960 within the framework or under the  
 15 framework, or however one might put it, of the Treaty,  
 16 we've got, I think, now three that we've identified.  
 17 And I should say: in at least one case, it's something  
 18 that we stumbled upon after the competence hearing, and  
 19 it may be that in the document review that we're  
 20 undertaking at the moment that we stumble upon others.  
 21 But there are these three agreements.  
 22 The 1989 agreement, just to be clear, our reading of  
 23 the 1989 agreement is that it was an agreement in  
 24 implementation of the Treaty.  
 25 The 1978 Agreement on Salal was a dam-specific

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16:13 1 his presentation from this morning.  
 2 SIR DANIEL: Mr Chairman, subject to the detail of the  
 3 questions that I might get, I am pretty confident that  
 4 I will finish them by -- if you are prepared to sit  
 5 until 6 o'clock, I will certainly finish them by  
 6 6 o'clock. I expect that I will need another about  
 7 45 minutes; but as I say, if I'm going to be responsive  
 8 to questions, it may be a little bit longer.  
 9 THE CHAIRMAN: Okay. So why don't we take a 20-minute  
 10 coffee break and come back at 4.35. And hopefully we'll  
 11 work our way through your presentation; and if not,  
 12 we'll resume with it in the morning. Thank you.  
 13 (4.15 pm)  
 14 (A short break)  
 15 (4.35 pm)  
 16 THE CHAIRMAN: Alright, we are back in session. So,  
 17 Sir Daniel, please continue with your presentation.  
 18 SIR DANIEL: Thank you very much, Mr Chairman.  
 19 Opening statement on behalf of  
 20 the Islamic Republic of Pakistan (continued)  
 21 SIR DANIEL: Mr Chairman, before I continue with my  
 22 presentation, I think the Pakistan Commissioner for  
 23 Indus Waters was happy enough to defer lots of questions  
 24 to counsel. There are a lot of questions, of course,  
 25 which require a little bit more detail of unpacking.

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16:37 1 agreement. The Salal Agreement, which is on the  
 2 record -- I don't have the exhibit number in my head,  
 3 but we've already referred to it (PLA-0053) -- from  
 4 recollection, it actually says quite specifically, both  
 5 in the preambular paragraphs and in one of the operative  
 6 provisions, that it again is an agreement that is made  
 7 in the context of the Indus Waters Treaty. And if  
 8 I recall correctly, Article III of that agreement then  
 9 says quite specifically: insofar as there are issues  
 10 that are not covered by this agreement, they will be  
 11 covered by the Indus Waters Treaty more generally. So  
 12 it was an agreement that was made, a dam-specific  
 13 agreement, in the context of the 1960 Treaty.  
 14 And then there is the last of the agreements that we  
 15 have been able to identify. As I say, we stumbled  
 16 across it in our document review in Islamabad after you  
 17 handed down your Competence Award. And I have to say,  
 18 when I saw this, I immediately thought: is this  
 19 something which should have been drawn to your  
 20 attention, because it might have been relevant to the  
 21 Competence Award, but I think on review it wasn't.  
 22 But it's a 1978 agreement which we've just got in  
 23 a rather sort of unsatisfactory typed-up state, and it's  
 24 an agreement on a clarification of the role of the  
 25 Commission under Article IX of the Treaty,

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16:38 1 paragraph (1). And the reason why I think it was not  
 2 relevant to your Competence Award is because it focuses  
 3 specifically on the role of the Commission under  
 4 Article IX(1). As I say, we stumbled upon this after  
 5 your Award last year.  
 6 But we will put that into the record. And of  
 7 course, if there are any other agreements that we come  
 8 across, we will make sure that they are disclosed as  
 9 part of your PO9 set of issues.  
 10 THE CHAIRMAN: Thank you, Sir Daniel. That's very helpful.  
 11 And perhaps to carry it a little bit further, the  
 12 interest is not just in agreements that we would view as  
 13 treaties between the two countries, but other kinds of  
 14 agreements that might be reached, to the extent that  
 15 they might be viewed as expressing an interpretation of  
 16 the Treaty, would be extremely helpful. That of course  
 17 makes your task perhaps even harder, to try to capture  
 18 any of those sorts of arrangements that are not treaties  
 19 or international agreements. But to the extent that  
 20 they are there, we are interested in them.  
 21 SIR DANIEL: Thank you, Mr Chairman.  
 22 That brings me to my next point, because we of  
 23 course are very alive to the issue of subsequent  
 24 practice and subsequent agreement. For those in, as it  
 25 were, the zone of the Vienna Convention on the Law of

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16:41 1 with the provisions of this Treaty, that Party shall not  
 2 acquire by reason of such use any right, by prescription  
 3 or otherwise, to a continua[ti]on of such use."  
 4 That's obviously going to be relevant to the  
 5 question of whether subsequent practice or subsequent  
 6 agreement, or just conduct and acquiescence,  
 7 crystallises into a changing interpretation. But I'm  
 8 going to leave that, Mr Chairman, with your permission,  
 9 to Professor Webb to develop in a little bit more  
 10 detail.  
 11 A further point that I think that I should  
 12 clarify -- and I hope we won't need to come back to  
 13 this, because I think the point is absolutely clear --  
 14 it goes to a question that both you, Mr Minear, and you,  
 15 Chairman, asked, which is whether the problems that  
 16 Pakistan has with India's failure to provide information  
 17 amount to a dispute. And then I think,  
 18 Professor Murphy, you clarified: whether it amounts to  
 19 a dispute within the framework of the current disputes  
 20 of which you are seised.  
 21 I think I must state absolutely clearly that  
 22 Pakistan did not, in its Request for Arbitration on  
 23 19 August 2016, raise a dispute about  
 24 information-sharing. It didn't do so then. Of course,  
 25 we haven't therefore included it in the Amended Request

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16:40 1 Treaties, Article 31, paragraph 2 and paragraph 3, which  
 2 deals with some of these issues, I'm going to leave them  
 3 to Professor Webb. I suppose I'd just make two  
 4 observations, which then can be built upon or disavowed  
 5 by those who follow me.  
 6 The first observation is that, as was apparent from  
 7 Mr Shah's evidence and that table that he put on about  
 8 some of the disputes over dams that had reached  
 9 agreement, or taken a long period to reach agreement, or  
 10 some that remained outstanding, when we have looked at  
 11 this issue, it's apparent -- and the Dul Hasti Dam is  
 12 one that comes most clearly to mind -- that there was  
 13 a lot of discussion within the Commission, and there  
 14 came a point at which, whether or not there was  
 15 agreement, Pakistan concluded that they would just let  
 16 the matter pass, and the Dul Hasti Dam was then  
 17 constructed.  
 18 But in this context, I draw to your attention --  
 19 because it's going to be very relevant to the issue of  
 20 subsequent practice -- paragraph (14) of Article IV of  
 21 the Treaty. I don't know whether you can call that up,  
 22 please. It's on page 140. And you'll see that it says  
 23 there, paragraph (14):  
 24 "In the event that either Party should develop a use  
 25 of the waters of the Rivers which is not in accordance

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16:43 1 for Arbitration, which hewed to the terms of the  
 2 original interest. Nor, as will be abundantly clear,  
 3 did we include that as part of the request for relief in  
 4 our Memorial. So it's not part of the petitum of the  
 5 case and you haven't addressed it in PO6, Mr Chairman,  
 6 as you noted.  
 7 So the issue of Pakistan's dispute/disagreement with  
 8 India over what we perceive to be India's failure to  
 9 comply with its information-sharing obligations is not  
 10 a dispute with which you are seised and it's not  
 11 a dispute that is currently waiting in the wings to go  
 12 to another court of arbitration.  
 13 That being said, we have addressed it, and we will  
 14 come back to address some of the issues of  
 15 informing-sharing for, I suppose, a couple of reasons:  
 16 first of all, because it's a very important part of the  
 17 context of how the Treaty is working; and this was the  
 18 evidence that Mr Shah gave, so it's relevant context to  
 19 the operation of the Treaty.  
 20 Second, it goes to the issue of the workability of  
 21 the Treaty.  
 22 But third, it goes perhaps to a wider issue. And  
 23 here perhaps I can simply take you to paragraph 9 of  
 24 Annexure D for just a moment, which I think is on  
 25 page 176.

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16:45 1 Paragraph 9 of Annexure D, which Mr Shah referenced,  
 2 says -- and this is in the context of the design  
 3 constraints on run-of-river plants:  
 4 "To enable Pakistan to satisfy itself that the  
 5 design of a Plant conforms to the criteria mentioned in  
 6 Paragraph 8, India shall, at least six months in advance  
 7 of the beginning of construction of river works  
 8 connected with the Plant, communicate to Pakistan, in  
 9 writing, the information specified in Appendix II to  
 10 this Annexure."  
 11 So it's at least six months, and it relates to the  
 12 conformity with the design of the plant.  
 13 Paragraph 10 then affords Pakistan:  
 14 "Within three months of the receipt ... of ...  
 15 information specified in Paragraph 9, Pakistan shall  
 16 communicate to India, in writing, any objection ..."  
 17 Viewed in the light of the very considerable  
 18 complexity of the engineering documentation that is  
 19 provided in respect of these dams, this is quite  
 20 a remarkable timetable: that one state has to provide  
 21 everything six months in advance, or at least  
 22 six months; but as Mr Shah has indicated, if India  
 23 provides that information at all, it's up to the  
 24 deadline. Pakistan then has an opportunity of only  
 25 three months in which it's got to assess all of the

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16:46 1 technical drawings, absolutely everything, and then go  
 2 back to raise an objection under paragraph 10. And then  
 3 paragraph 11 deals with the dispute settlement  
 4 arrangements.  
 5 And if you scroll down, or if my colleague can  
 6 scroll down to take you to Appendix II, you will see  
 7 there the detail of the information that's to be  
 8 provided at least six months beforehand. And Mr Shah  
 9 mentioned this in his evidence, identifying the four  
 10 categories.  
 11 But if you have a look at Appendix II, there is  
 12 a lot of detail that needs to be provided: location,  
 13 pretty straightforward; the hydrologic data, if you just  
 14 have a look through those provisions; the hydraulic  
 15 data. And then we've got the particulars of the design:  
 16 "(a) Dimensioned plan showing dam, spillway, intake  
 17 and outlet works ...  
 18 (b) Type of dam, length and height above mean bed of  
 19 river.  
 20 (c) Cross-section ...  
 21 (d) Type of spillway, length ...", and so on.  
 22 So there is a great deal of information that needs  
 23 to be provided.  
 24 I think one of the points that Mr Shah was making is  
 25 that this is the Treaty that we've got. We are not

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16:48 1 asking you to rewrite the language of paragraph 9 to  
 2 say, "This should be provided eight months or  
 3 twelve months" -- we can't ask you to rewrite the  
 4 Treaty.  
 5 But the reason why the appreciation of this issue  
 6 I think is rather important is: if I may take you back  
 7 to Article VII, paragraph (2), which you will find on  
 8 page 146, the heading of that is "Future Co-operation".  
 9 And Article VII, paragraph (2) says:  
 10 "If either Party plans to construct any engineering  
 11 works which would cause interference with the waters of  
 12 any of the Rivers, and which, in its opinion, would  
 13 affect the other Party materially, it shall notify the  
 14 other Party of its plans and ... supply such data  
 15 relating to the work as may be available and as would  
 16 enable the other Party to inform itself of the nature,  
 17 magnitude and effect of the work."  
 18 Our position, plain and simple -- it's not  
 19 a position which engages any of the disputes that you're  
 20 involved in directly, but it may engage questions about  
 21 the ability of the parties to actually have a dialogue  
 22 about the design criteria in paragraph 8 -- is that  
 23 paragraph 9 of Annexure D does not somehow trump and  
 24 write out of the Treaty Article VII, paragraph (2),  
 25 which is also an information-sharing obligation.

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16:49 1 So India may say to itself, "Well, we can leave [it]  
 2 up until the last moment, up until the six months  
 3 deadline and the provision of the final design  
 4 specifications or whatever on the dam before the works  
 5 start", but it is still under an obligation, under  
 6 VII(2), to provide information in relation to any  
 7 engineering works that would cause "interference with  
 8 the waters of". And you'll recall I took you to the  
 9 definition of that phrase, "interference with the waters  
 10 of", in [Article] I(15), and these HEPs are undoubtedly  
 11 an "interference with the waters of".  
 12 So, once again, we are providing it for purposes of  
 13 context. It may also become relevant to the way in  
 14 which you come to view the implementation of the  
 15 obligations in paragraph 8, the design obligations. So  
 16 we are trying, particularly in the absence of our  
 17 friends opposite, to give you as holistic a view of the  
 18 workability of the Treaty as we can possibly do.  
 19 There is a further point, which I will come on to  
 20 address; Mr Minear, it goes to your question. But I'm  
 21 going to defer it until I come to it in my, as it were,  
 22 scripted remarks, because in fact this question of  
 23 whether the parties had changed their position following  
 24 Baglihar is exactly one which we have on our agenda to  
 25 deal with, and I will come to it shortly, and we will

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16:51 1 come to it again on Thursday and Friday. But I'll come  
 2 back to that.  
 3 So I think with that, Mr Chairman, unless you or the  
 4 members of the Court have any questions arising from  
 5 what I've just said, I will go back to my scripted  
 6 remarks.  
 7 THE CHAIRMAN: Please continue.  
 8 SIR DANIEL: My last substantive topic held over from the  
 9 morning is the genesis of the present dispute, the  
 10 opposition of the parties on key issues, and the  
 11 Kishenganga and Baglihar decisions. You will already  
 12 have a good appreciation of these issues, as they were  
 13 at the core of the competence phase, and your Competence  
 14 Award indeed traced the history of the disagreement  
 15 between the parties.  
 16 Insofar as is relevant for this phase of the  
 17 proceedings, these issues were revisited in chapter 2 of  
 18 Pakistan's Memorial in this phase of the case. Having  
 19 regard to question 35(a) of Procedural Order No. 6,  
 20 Mr Fietta will address you on Wednesday on the  
 21 interpretative issues arising out of the Baglihar  
 22 determination and the Kishenganga awards.  
 23 For present purposes, I would like, at this point,  
 24 simply to recall a number of points about the origins of  
 25 the present dispute and the opposition of the parties on

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16:52 1 the key issues of which you are seised. Of course,  
 2 everything that I'm going to say is buried away in the  
 3 documents on the record; I'm not sure that we've said it  
 4 in quite the same directness as I'm about to say,  
 5 boiling down some of the issues that have arisen. And  
 6 then I will conclude my submissions with a brief  
 7 observation to the relevance of the Baglihar  
 8 determination and the Kishenganga awards for these  
 9 proceedings.  
 10 As I've already said today, the parties' dispute  
 11 over water use goes back to the earliest days of their  
 12 independence in August 1947. The Treaty established  
 13 an allocation of rights of use of water and a framework  
 14 for the settlement of differences going forward. After  
 15 the initial period following the Treaty's conclusion,  
 16 the framework of the Treaty enabled the parties to  
 17 address the differences that arose on a cooperative  
 18 basis. And you've heard from Mr Shah about the  
 19 cooperation between the parties that was evident in the  
 20 early days.  
 21 An example of this indeed was the agreement between  
 22 the parties of 14 April 1978 regarding the Salal plant  
 23 constructed on the Chenab River. This is at  
 24 Exhibit PLA-53, I think Mr Shah mentioned that;  
 25 fortuitous that my submissions have been held over to

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16:54 1 the afternoon. And the title of this agreement was  
 2 an agreement "taking into consideration the provisions  
 3 of the Indus Waters Treaty, 1960, to which both  
 4 Governments are parties", or that was one of the  
 5 headline provisions.  
 6 By that Salal Agreement, the parties agreed on the  
 7 "salient features" of the Salal HEP, including the full  
 8 pondage level, the dead storage level, the operating  
 9 pool, the dead storage capacity, the immovable crest  
 10 level of the spillway, the spillway gates, the level of  
 11 power intakes and the outlet works. It's a pretty short  
 12 agreement, and in one paragraph, Article II, it lists  
 13 all of these and then it indicates the agreement of the  
 14 parties, taking into consideration the provision of the  
 15 Indus Waters Treaty.  
 16 Now, there were other issues or differences between  
 17 the parties during this early period. And I'm taking  
 18 sort of latitude when I describe the "early period".  
 19 It's really a period that runs from, I suppose, 1960  
 20 through to about 1988, through to the beginnings of the  
 21 Kishenganga dispute.  
 22 Material differences between the parties, however,  
 23 began to emerge from, at the very least, 1988, when  
 24 Pakistan first raised questions within the Permanent  
 25 Indus Commission regarding the Indian "scheme envisaging

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16:55 1 diversion of the waters of the Kishenganga River". And  
 2 this is the origin of the dispute that was subsequently  
 3 referred to the Kishenganga Court of Arbitration, the  
 4 detail of which is recounted in its partial award at  
 5 paragraph 140 and following. So when I take this  
 6 reference of 1988 and quote to you the question raised  
 7 concerning the "scheme envisaging diversion of the  
 8 waters of the Kishenganga River", I am referencing the  
 9 way in which the Kishenganga Court addressed that.  
 10 After much back-and-forth in the Commission, so from  
 11 1988 and following, that dispute crystallised on  
 12 7 February 2006. So we have a period of 18 years. And  
 13 on 7 February 2006, the PCIW notified the ICIW of the  
 14 existence of a dispute with respect to the KHEP.  
 15 Subsequently, by correspondence of 4 February 2008  
 16 from the PCIW to the ICIW, Pakistan identified six  
 17 composite questions -- they were composite questions  
 18 because there were a number of different parts to each  
 19 of the six question that were identified -- six  
 20 composite questions in dispute between the two parties.  
 21 Two of those composite questions were subsequently  
 22 referred to the Kishenganga Court of Arbitration. The  
 23 remaining four composite questions remained unaddressed  
 24 and unresolved, and in large part this is why we are  
 25 here.

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16:57 1 If you have a look at Pakistan's Amended Request for  
 2 Arbitration at paragraph 18 -- I don't invite you to do  
 3 so at the moment -- this reflects Pakistan's original  
 4 Request for Arbitration of 2016 -- these included  
 5 disputes relating to the calculation of pondage, the  
 6 placement of the power intakes and the design and height  
 7 of the sediment outlets and spillways. It is these  
 8 disputes of systemic interpretation that are the subject  
 9 of the present dispute of the proceedings.  
 10 So the genesis of this is in fact around about 1988,  
 11 when the first disputes arose over Kishenganga. They  
 12 went through a fairly lengthy process of evolution and  
 13 crystallisation until 2006-2008, then went to the  
 14 arbitral proceedings in respect of two of the disputes,  
 15 and the remaining Kishenganga disputes, in some shape or  
 16 form, have come to you.  
 17 But while these are the direct origins of the  
 18 present dispute, the parties' wider dispute over the  
 19 interpretation of the paragraph 8 design criteria was in  
 20 fact crystallised much before this, in the early 1990s,  
 21 following India's first proposal of the Baglihar HEP.  
 22 The cause of the Baglihar dispute was that India's  
 23 Baglihar design proposed a significantly increased  
 24 operating pool on the basis of a pondage calculation  
 25 that Pakistan contested. So this goes back to the early

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16:58 1 1990s. And by correspondence from the PCIW to the ICIW  
 2 of 12 August 1992, Pakistan objected to India's Baglihar  
 3 design by reference to paragraphs 8(a), 8(b), 8(c), 8(e)  
 4 and 8(f) of the Treaty. And you will find this  
 5 correspondence at Exhibit P-586.  
 6 In a sense, that is the real genesis of the  
 7 paragraph 8 dispute that you have before you.  
 8 Mr Chairman, members of the Court -- and again,  
 9 I think that this goes, Mr Chairman, perhaps to one of  
 10 the questions that you put to Mr Shah -- since at least  
 11 that point, since at least 12 August 1992, Pakistan and  
 12 India have been in formal and fundamental dispute about  
 13 the key questions of interpretation of paragraph 8 of  
 14 Annexure D of the Treaty.  
 15 While the Baglihar Neutral Expert determination of  
 16 12 February 2007 drew a line under the parties'  
 17 differences in respect of the Baglihar HEP, it did not  
 18 resolve the dispute between the parties over the wider  
 19 systemic questions of interpretation of paragraph 8 as  
 20 they applied to other Indian run-of-river HEPs on the  
 21 Western Rivers. And here I come, Mr Minear, to your  
 22 question and, Professor Murphy, to your follow-on.  
 23 While there have been some adjustments to the detail  
 24 of the parties' respective positions on the paragraph 8  
 25 criteria over the years -- for example, on the precise

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17:00 1 methodology of the calculation of maximum allowable  
 2 pondage -- the parties have remained far apart and  
 3 opposed on all of these headline issues, including on  
 4 the approach to the calculation of pondage.  
 5 As an aside, I note that the adjustment in the  
 6 parties' approach to the calculation of pondage occurred  
 7 largely in consequence of the Baglihar pondage  
 8 determination, which India moved very quickly to  
 9 embrace, and the position that India takes today is  
 10 largely a Baglihar determination position.  
 11 You will recall that in the Baglihar determination,  
 12 the Neutral Expert disagreed with both parties, provided  
 13 his own methodology -- that methodology was  
 14 a methodology which we contest, very heavily contest --  
 15 but reached a conclusion which provided pondage to India  
 16 for Baglihar which was very, very significantly greater  
 17 than the position that Pakistan contended for and  
 18 approached the position that India advanced.  
 19 Now, the Baglihar determination, over a period of  
 20 time -- including, I have to say, in the context of the  
 21 preparation of these submissions, but really from the  
 22 earliest times -- also caused Pakistan to revisit and to  
 23 slightly modify the approach that it had been taking in  
 24 the Baglihar proceedings, acknowledging the complexity  
 25 and the variability of the outcome that its Baglihar

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17:02 1 approach posed.  
 2 Just to unpack that a little. You will hear this --  
 3 you've seen it in our written submissions, but you will  
 4 hear this in some detail from Dr Miles.  
 5 One of the, as it were, guiding principles that we  
 6 have taken when we've come to present our approach on  
 7 the pondage calculation is that this must have been  
 8 a pondage calculation that was capable of being  
 9 undertaken in 1960, in the period up until 1960; it  
 10 can't be a pondage calculation that has to be driven by  
 11 supercomputers, or by engineers sitting with laptops  
 12 that were not yet invented. It really needed to be  
 13 a pondage [calculation] that was undertaken with a slide  
 14 rule, or with the maths of the engineers sitting and  
 15 undertaking that calculation.  
 16 In the light of Baglihar and subsequently, as  
 17 Pakistan has come to look at these issues, I think the  
 18 appreciation that we came to was that there was too  
 19 great a complexity in the calculation that Pakistan was  
 20 advancing, and that it also did not arrive at a number  
 21 certain. And if you want to provide an interpretation  
 22 of the Treaty, of paragraph 8(c), you have to be able to  
 23 arrive at a number certain for any particular plant.  
 24 You can't say, "It's between this range", because those  
 25 who are designing and constructing and operating need to

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17:04 1 know how the plant works.  
 2 So the position that we have advanced to you in our  
 3 Memorial, and you will hear this from Dr Miles, is  
 4 almost essentially the same position that Pakistan has  
 5 been advancing previously, subject to some modification  
 6 which he will address.  
 7 But where the parties remain very far apart -- and  
 8 this is evident on the face of India's statement of  
 9 difference in the Neutral Expert proceedings, which you  
 10 will see because they are annexed to the Supplementary  
 11 Rules of Procedure in the Neutral Expert proceedings,  
 12 I drew those to your attention, and to Pakistan's  
 13 statement of position -- is that Pakistan says that the  
 14 calculation of maximum allowable pondage has to be  
 15 undertaken by reference to the formula in  
 16 paragraph 8(c). And that formula in paragraph 8(c)  
 17 refers to the calculation of firm power and the minimum  
 18 mean discharge in paragraph 2(i). And the reason why  
 19 you look at the 2(i) MMD, minimum mean discharge, and  
 20 firm power, is because 8(c) expressly requires you to do  
 21 so: it has an express renvoi back. So Pakistan's  
 22 approach is driven by paragraph 8(c) and the firm power  
 23 MMD formula in 2(i).  
 24 India's approach, as we understand it over the  
 25 years, is to -- if I can put it in terms that are not

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17:08 1 has addressed that aspect of your question. We will be  
 2 coming back to this in some considerable detail. You  
 3 will see on the outline of the submissions that there is  
 4 a segment that is put down for my attention at  
 5 number 17 -- this is the closing segment on Thursday --  
 6 situating the calculation of pondage within the scheme  
 7 of the Treaty. It was my intention, in fact, to  
 8 elaborate on what I've been saying now, and I will do so  
 9 in rather more detail. And then Dr Miles, when he comes  
 10 to spend two and a half hours with you on pondage on  
 11 Friday morning, will look into the detail of the  
 12 Baglihar arguments, how these arguments evolved,  
 13 including by Pakistan and by India.  
 14 So I hope that, in a sense, I've given you the  
 15 taster menu, but you'll come to the real stuff a little  
 16 bit later on. But if there's anything on that that  
 17 I can help you with at this stage, I'd be happy to try.  
 18 Otherwise I will move on to the scheme of my  
 19 submissions.  
 20 THE CHAIRMAN: It's a very good taster menu.  
 21 Let me just note -- and you may wish to just leave  
 22 it to Dr Miles, as we will hear more about this -- that  
 23 in my understanding, what Pakistan advanced in the  
 24 Baglihar proceeding was that when we try to figure out  
 25 the time period to be thinking about fluctuations in

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17:06 1 intended to be disparaging, but it's a little bit more  
 2 of a m lange. It's looking at paragraph 8(c) and the  
 3 calculation, then going back to the definition in  
 4 paragraph 2(c), which talks about satisfaction of the  
 5 load, and to read that into the calculation of pondage,  
 6 and also to rely on the operating provisions in  
 7 paragraph 15 for purposes of its calculation of pondage.  
 8 Forgive me, because there's a lot to be unpacked  
 9 here; we'll come back to that in some detail in due  
 10 course. But in a sense, that divide between Pakistan's  
 11 approach, resting on 8(c) and 2(i), and India's  
 12 approach, resting on an amalgam of 2(c), 8(c) and 15,  
 13 that divide has not changed and the essence of those  
 14 calculations have not changed.  
 15 We thought very carefully as to whether the dispute  
 16 that we were bringing to you on pondage was a dispute  
 17 between the parties that had been aired between the  
 18 parties, and we had no difficulty, I have to say, at  
 19 all, in concluding that it was. And if you have a look  
 20 at paragraphs 11.1 to 11.3 of our Memorial -- those are  
 21 the opening paragraphs of the pondage chapter -- you  
 22 will see quite clearly how it sets out both the  
 23 consistency in the arguments, but also the divide  
 24 between the parties.  
 25 So I hope, Mr Minear, Professor Murphy, that that

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17:09 1 firm power, that actually you would look at a weekly  
 2 time period; as opposed to now, Pakistan is maintaining  
 3 that it should be a daily time period.  
 4 So that just struck me as one kind of change that  
 5 might have something to do with disagreements within the  
 6 Commission, although it sounds like, from what you've  
 7 said, the parties are so far apart that, no, it doesn't.  
 8 But it does raise a different issue, which could be: is  
 9 Pakistan in agreement that there is no definitive way of  
 10 determining maximum pondage under the Treaty if there is  
 11 this possibility of variations in the way it's properly  
 12 calculated?  
 13 SIR DANIEL: Mr Chairman, let me give you an immediate  
 14 response, and that will be unpacked and developed by  
 15 Dr Miles in due course.  
 16 I think in the first instance you are absolutely  
 17 correct, if I may say so, to put your finger on this  
 18 question of daily and weekly, because the issue of the  
 19 daily and weekly, the time period for purposes of firm  
 20 power, is something that we have grappled with in our  
 21 thinking about these issues.  
 22 The conclusion that we've come to -- and you've seen  
 23 this in chapter 11 of our Memorial -- is that, having  
 24 been through the Treaty now pretty systematically, the  
 25 conclusion that we have come to is that there is only

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17:11 1 one time period which jumps out as being the appropriate  
 2 time period for the calculation, and that's the 24-hour  
 3 period, when you look across all the various provisions  
 4 of the Treaty. And you will recall in the context of  
 5 the site visit that there were some exchanges -- and if  
 6 memory serves me, Professor Murphy, you were in the lead  
 7 of those exchanges on the part of the Court -- about the  
 8 peaking nature of the plant, and that it was operating  
 9 on a 24-hour cycle.

10 Now, we accept, as we must, I suppose, two things:  
 11 first of all, that there is no time period that's  
 12 written into the Treaty specifically on this in  
 13 paragraph 2(i) or in paragraph 8(c). It doesn't say,  
 14 "You must use a 24-hour cycle" or, "You must use  
 15 a seven-day cycle". We also accept that there are  
 16 provisions of daily and 24 hours and weekly written into  
 17 the Treaty.

18 At the end of the day, it's going to depend on  
 19 whether you are persuaded by our treaty interpretation  
 20 point: that the 24-hour period is a period that must  
 21 necessarily be implied into the Treaty, and indeed that  
 22 it is the only period that could have been intended by  
 23 the drafters of the Treaty.

24 Now, coming to your, as it were, sort of dangling  
 25 conclusion, which is: would we accept that there is no

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17:12 1 algorithm, that there is no fixed method, I think -- but  
 2 I'm going to say this in a very sort of conditional and  
 3 tentative way -- I don't think that we would agree with  
 4 that, because I think that we have been now through such  
 5 a process of examination that we have concluded that,  
 6 whatever other methods of calculation of pondage we have  
 7 been able to come up with -- looking also at India's,  
 8 looking at Creager & Justin, and looking at all of the  
 9 wisdom that has been collected in this field -- that any  
 10 other method of calculation of pondage fails for one  
 11 reason or another: it couldn't have been a method  
 12 undertaken in 1960, it would have turned the plant into  
 13 a storage plant, or something of that nature.

14 Now, we of course are very content -- and indeed,  
 15 this is why the reason why we're here and we're offering  
 16 our submissions in so much detail -- we are very content  
 17 to have our feet held to the flames, and no doubt our  
 18 engineering members will do so. And Dr Miles will  
 19 attempt to assist in any of the questions that are  
 20 raised; then of course we've got Dr Morris and we've got  
 21 Mr Rae.

22 You will have seen that there is a mathematical  
 23 appendix. I see that Dr Blackmore is nodding with  
 24 a smile on his face. The mathematics caused a great  
 25 deal of concern to people like me, but there are

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17:14 1 a number of accomplished mathematicians, I think, on the  
 2 panel. But we will put all of these issues to you and  
 3 invite you to explore them further.

4 MR MINEAR: Sir Daniel, I hate to give more assignments to  
 5 your team, but when we get to the question of pondage,  
 6 it would be useful for me to know what variations there  
 7 have been in India's approach to pondage over time, and  
 8 also to go to the travaux. I think Pakistan initially  
 9 suggested a pondage determination based on a minimum  
 10 load factor, and I would be interested in knowing what  
 11 relevance that might have to the position that was  
 12 ultimately formulated in the Treaty.

13 SIR DANIEL: Mr Minear, thank you very much for the homework  
 14 to my team. I'm glad that that's not going to be my  
 15 homework this evening, but it is going to be homework  
 16 for the team. But I have to say I think that that's  
 17 homework that has already been done, so it will be  
 18 a question of focusing the answers in response to your  
 19 question.

20 I do note, as an aside, that there has been a very  
 21 heavy component over the years of hewing India's  
 22 calculation of pondage to the load curve. And we were  
 23 struck by the question that you asked Mr Shah, "Does  
 24 India ever provide this load data?", and his response,  
 25 "No, they don't".

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17:16 1 But we take your question very much to heart and  
 2 it will be something that is addressed as we go on.

3 MR MINEAR: Thank you.

4 THE CHAIRMAN: Sir Daniel, just since we've had a little bit  
 5 of a break here, I note that we're about 15 minutes away  
 6 from our normal breaking time. I don't know how much  
 7 more you have, but I did want to signal that it's my  
 8 intention that we stop at half past the hour. If it  
 9 were to run an extra minute or two, that's not  
 10 a problem, but I think that if it's more than that, it's  
 11 best to continue with you tomorrow morning as well.

12 Even though that breaks up your presentation, I think it  
 13 would probably be best for us to proceed in that manner.

14 SIR DANIEL: Thank you, Mr Chairman. I suspect that I will  
 15 go on tomorrow, and that's fine. You've already got me  
 16 on the schedule as being the MC for tomorrow's  
 17 submissions. But I will try and use the next 15 minutes  
 18 just to complete one aspect of what I have to say.

19 Mr Chairman, members of the Court, reduced to its  
 20 essentials, the present dispute between the parties is  
 21 about two key issues.

22 The first is about Treaty-consistent approaches to  
 23 the management of sediment. This goes to the  
 24 interpretation and application of subparagraphs (d), (e)  
 25 and (f) of paragraph 8.

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17:17 1 The second is about the permissible size of a HEP's  
 2 operating pool, including, principally, the storage of  
 3 water by way of pondage, but also the height of the  
 4 freeboard. The higher the freeboard, the more potential  
 5 there is to store water. And this goes to the  
 6 interpretation and application of subparagraphs (c) and  
 7 (a) of paragraph 8.  
 8 These disputes of systemic interpretation go to the  
 9 heart of the application of the Treaty.  
 10 So I come back to a point that I've made already but  
 11 I think is worth underlining here, and that is that in  
 12 my submissions a little bit earlier today, I drew  
 13 attention to the fact that India has somewhere around  
 14 5,264 completed large dams on its rivers, less than 4%  
 15 of which are located on or planned for the Western  
 16 Rivers. And I noted that there is an evidently strong  
 17 national imperative on India's part to design its  
 18 Western Rivers run-of-river HEPs by reference to its own  
 19 Treaty-unconstrained design criteria that it uses for  
 20 the rest of the country.  
 21 Indeed, India said as much expressly in the course  
 22 of the 90th meeting of the Commission in January 2004,  
 23 which was convened in an attempt to reach  
 24 an understanding between the two sides on the  
 25 differences between them with respect to the Baglihar

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17:19 1 HEP. The record of this meeting is at Exhibit P-544;  
 2 I don't invite you to call it up. But in response to  
 3 questions from Pakistan's Commissioner, the Indian  
 4 Commissioner is recorded as having said that:  
 5 "... most of the hydro-electric plants in the  
 6 Himalayan Rivers have design provisions similar to that  
 7 of the Baglihar Plant. The design has taken into  
 8 account national and international practices for  
 9 run-of-river developments and is in [accordance] with  
 10 the obligations of the Treaty to follow sound and  
 11 economical design and satisfactory construction and  
 12 operation of the works."  
 13 That's at paragraph 6.2.3 of the minutes of the  
 14 record of the 90th meeting.  
 15 Pakistan's Commissioner is recorded as having  
 16 responded to India's statement of position as follows:  
 17 "To the Indian Commissioner's statement that all  
 18 hydroelectric plants on the Himalayan rivers have the  
 19 same design and Baglihar Plant is not an exception,  
 20 Pakistan Commissioner states that the Treaty has placed  
 21 certain restrictions on the design and operation of  
 22 run-of-river plants on the Western Rivers. Therefore,  
 23 a standard design of other plants on the Himalayan  
 24 River[s] without consideration to the design criteria  
 25 given in paragraph 8 of Annexure D to the Treaty cannot

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17:20 1 be applied to new power plants under the Treaty."  
 2 That's at paragraph 6.1.3.  
 3 So this philosophical approach to the design of  
 4 run-of-river plants on the Western Rivers was  
 5 crystallised in that exchange in January 2004 in respect  
 6 of the Baglihar Plant.  
 7 Mr Chairman, members of the Court, this is the nub  
 8 of the dispute between the parties: India couldn't be  
 9 bothered. For India, the 200 or so HEPs planned for the  
 10 Western Rivers are an afterthought. India approaches  
 11 HEP design and construction on a colossal scale by  
 12 reference to template design standards that are focused  
 13 on the more than 96% of its dam construction programme.  
 14 Recalibrating India's template standards to accommodate  
 15 the bespoke design criteria of the Treaty is, for India,  
 16 too much of an irritant. It is easier for India simply  
 17 to ignore, we say to dissemble, to play long, to fail to  
 18 engage, to contest competence, and all the while to  
 19 build, build, build. That is what India is doing.  
 20 Now for Pakistan, however, those 200 or so Indian  
 21 HEPs planned for the Western Rivers pose risks akin to  
 22 arteriosclerosis in the arteries of the heart. Pakistan  
 23 is totally dependent on the waters of these rivers. As  
 24 Mr Fietta will address tomorrow, these rivers are  
 25 Pakistan's lifeblood.

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17:22 1 India's template design standards that are focused  
 2 on its 5,000 non-Western River dams do not reflect the  
 3 design criteria of paragraph 8 of the Treaty. India's  
 4 default approach to sediment management through drawdown  
 5 flushing, which drives its approach to the placement of  
 6 outlets and intakes and the design of spillways, is  
 7 inconsistent with both the Treaty and with the  
 8 dispositive findings of the Kishenganga Court.  
 9 As you will hear from Dr Morris, whose experience in  
 10 this field is unmatched, there are a range of  
 11 Treaty-compliant approaches to sediment management that  
 12 would be sound, economical, satisfactory. The divide  
 13 between the parties on this issue is absolutely  
 14 fundamental. India is driven by the 5,000; Pakistan is  
 15 driven by the Treaty and the 200. That is the issue  
 16 that needs to be addressed.  
 17 India's approach to the calculation of pondage is  
 18 designed to maximise the storage of water, both for  
 19 power generation and for passive sediment management  
 20 purposes. And I think this goes to a question that  
 21 Dr Blackmore put, and which Dr Morris will address.  
 22 In this, India is, we say, intentionally blurring  
 23 the lines between Annexure D, Part 3, run-of-river  
 24 peaking plants and Annexure E, storage works. In  
 25 seeking to maximise pondage, India is impermissibly

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17:24 1 basing its pondage calculations on elements that are  
2 extraneous to the pondage design criterion of  
3 paragraph 8(c). Again, the divide between the parties  
4 is fundamental.  
5 Mr Chairman, members of the Court, Professor Webb  
6 and Dr Miles will develop these contentions fully in  
7 their submissions on paragraph 8 on Thursday.  
8 Mr Chairman, that's perhaps a good point to stop, if  
9 you are content to do so, because I have a very brief  
10 little while to go, but it is to address a topic that's  
11 a little bit discrete: it's on the relevance of the  
12 Baglihar determination and the Kishenganga award for  
13 these proceedings. But that's something I can  
14 conveniently do tomorrow morning.  
15 THE CHAIRMAN: Very good. Let's plan on you starting out  
16 tomorrow morning with that, and then setting the table,  
17 I suppose, for the presentations to follow tomorrow.  
18 So why don't we adjourn for the day, and see you all  
19 tomorrow morning at 9.30 am. Thank you very much.  
20 SIR DANIEL: Thank you very much.  
21 (5.25 pm)  
22 (The hearing adjourned until 9.30 am the following day)  
23  
24  
25

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