

**IN THE NEUTRAL EXPERT PROCEEDINGS  
UNDER THE INDUS WATERS TREATY 1960  
IN RESPECT OF THE RATLE AND KISHENGANGA HYDROELECTRIC PLANTS  
(PCA CASE NO. 2023-14)**

**-between-**

**THE REPUBLIC OF INDIA**

**-and-**

**THE ISLAMIC REPUBLIC OF PAKISTAN**

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**DECISION ON CERTAIN ISSUES PERTAINING TO THE COMPETENCE OF THE  
NEUTRAL EXPERT**

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**Neutral Expert**

Mr. Michel Lino

**Technical Assistant to the Neutral Expert**

Mr. Luc Deroo

**Registry**

Permanent Court of Arbitration

**7 January 2025**

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**LIST OF DEFINED TERMS**

<b>2022 CoA</b>	Court of Arbitration empanelled under the Treaty in October 2022 in arbitration proceedings initiated by Pakistan against India on 19 August 2016 ( <i>Indus Waters Treaty Arbitration (Pakistan v. India)</i> , PCA Case No. 2023-01)
<b>Baglihar</b>	<i>Baglihar Hydroelectric Plant (Pakistan v. India)</i> , Neutral Expert Proceedings
<b>Baglihar Determination</b>	<i>Baglihar Hydroelectric Plant (Pakistan v. India)</i> , Neutral Expert Determination on Points of Difference Regarding the Baglihar Hydroelectric Plant Referred by the Government of Pakistan under the Provisions of the Indus Waters Treaty, dated 12 February 2007 ( <b>IN-EX-9</b> )
<b>Commission</b>	The Permanent Indus Commission established by Article VIII of the Treaty
<b>Commissioners</b>	The ICIW and the PCIW
<b>Competence Award</b>	<i>Indus Waters Treaty Arbitration (Pakistan v. India)</i> , PCA Case No. 2023-01, Award on the Competence of the Court, dated 6 July 2023
<b>DSL</b>	Dead Storage Level
<b>First Meeting</b>	First meeting convened by the Neutral Expert at the Peace Palace in The Hague on 27 and 28 February 2023
<b>Handover Meeting</b>	Meeting held with the Neutral Expert, representatives of the Parties and representatives of the World Bank at the World Bank's offices in Washington DC on 21 November 2022
<b>HEP</b>	Hydroelectric plant
<b>ICC</b>	International Chamber of Commerce
<b>ICIW or Indian Commissioner for Indus Waters</b>	Commissioner for Indus Waters appointed by India pursuant to Article VIII(1) of the Treaty
<b>ICSID</b>	International Centre for Settlement of Investment Disputes
<b>India</b>	The Republic of India
<b>Indian Commissioner for Indus Waters or ICIW</b>	Commissioner for Indus Waters appointed by India pursuant to Article VIII(1) of the Treaty
<b>India's Memorial or Memorial</b>	Memorial of the Republic of India, dated 31 August 2023

<b>India's Reply</b>	India's Statement on the Competence of the Neutral Expert under Article IX(2)(a) and Paragraph 7 of Annexure F to the Treaty, dated 14 June 2024
<b><i>Indus Waters Arbitration</i></b>	<i>Indus Waters Treaty Arbitration (Pakistan v. India)</i> , PCA Case No. 2023-01
<b>KHEP</b>	Kishenganga Hydroelectric Plant located on the Kishenganga/Neelum River in the Gurez Valley
<b><i>Kishenganga</i></b>	<i>Indus Waters Kishenganga Arbitration (Pakistan v. India)</i> , PCA Case No. 2011-01
<b><i>Kishenganga Court</i></b>	Court of Arbitration constituted in the <i>Kishenganga Arbitration</i>
<b><i>Kishenganga Partial Award</i></b>	<i>Indus Waters Kishenganga Arbitration (Pakistan v. India)</i> , Partial Award, dated 18 February 2013 ( <b>IN-EX-10</b> )
<b>MCM</b>	Million cubic meters
<b>Memorial or India's Memorial</b>	Memorial of the Republic of India, dated 31 August 2023
<b>MW</b>	Megawatt
<b>Neutral Expert</b>	Mr. Michel Lino, the Neutral Expert appointed by the World Bank in these Proceedings
<b>Pakistan</b>	The Islamic Republic of Pakistan
<b>Pakistan Commissioner for Indus Waters or PCIW</b>	Commissioner for Indus Waters appointed by Pakistan pursuant to Article VIII(1) of the Treaty
<b>Pakistan's Statement</b>	Pakistan's Statement on the Competence of the Neutral Expert under Article IX(2)(a) and Paragraph 7 of Annexure F to the Treaty, dated 1 February 2024
<b>Parties</b>	The Parties to these Proceedings, namely the Islamic Republic of Pakistan and the Republic of India
<b>PCA</b>	Permanent Court of Arbitration
<b>PCIJ</b>	Permanent Court of International Justice
<b>PCIW or Pakistan Commissioner for Indus Waters</b>	Commissioner for Indus Waters appointed by Pakistan pursuant to Article VIII(1) of the Treaty
<b>PCIW's Letter of 25 February 2016</b>	Letter from the PCIW to the ICIW dated 25 February 2016 ( <b>PK-5</b> )
<b>Points of Difference</b>	Points of Difference notified by India to the World Bank in a letter dated 4 October 2016

<b>Points of Dispute</b>	Points of Dispute attached to the PCIW's Letter dated 25 February 2016
<b>Proceedings</b>	These Neutral Expert Proceedings under the Indus Waters Treaty in Respect of the Ratle and Kishenganga Hydroelectric Plants (PCA Case No. 2023-14)
<b>RHEP</b>	Ratle Hydroelectric Plant located on the Chenab River in the Chenab Valley
<b>Second Meeting</b>	Second meeting convened by the Neutral Expert at the Imperial Hofburg Palace in Vienna on 20 and 21 September 2023
<b>Site Visit Protocol</b>	Site Visit Protocol signed by the Parties on 17 May 2024
<b>Supplemental Rules</b>	Supplemental Rules of Procedure adopted by the Neutral Expert on 1 June 2023
<b>Technical Assistant</b>	Mr. Luc Deroo, the technical assistant to the Neutral Expert appointed by the Neutral Expert pursuant to section 2 of the Terms of Retainer
<b>Terms of Retainer</b>	Terms of Retainer of Mr. Michel Lino – Neutral Expert under the Indus Waters Treaty in Respect of the Ratle and Kishenganga Hydroelectric Plants
<b>Third Meeting</b>	Third meeting convened by the Neutral Expert at the Imperial Hofburg Palace in Vienna on 10 and 11 September 2024
<b>Treaty</b>	<i>Indus Waters Treaty 1960 Between the Government of India, the Government of Pakistan and the International Bank for Reconstruction and Development, signed at Karachi on 19 September 1960</i>
<b>World Bank</b>	International Bank for Reconstruction and Development

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## I. INTRODUCTION

1. These neutral expert proceedings (the “**Proceedings**”) between the Republic of India (“**India**”) and the Islamic Republic of Pakistan (“**Pakistan**”, and together with India, the “**Parties**”) arise under the Indus Waters Treaty 1960 concluded by the Parties, and also signed by the International Bank for Reconstruction and Development (the “**World Bank**”), on 19 September 1960 (the “**Treaty**”). They concern India’s Kishenganga Hydroelectric Plant (the “**KHEP**”), located on the Kishenganga/Neelum River in the Gurez Valley, and its Ratle Hydroelectric Plant (the “**RHEP**”), located on the Chenab River in the Chenab Valley.
2. The Treaty governs the Indus system of rivers and sets forth the mutual rights and obligations of the Parties concerning the use of the waters of these rivers. Article IX of the Treaty also sets forth a system for the settlement of questions, differences and disputes that may arise under the Treaty, which may be resolved by the Parties themselves, a neutral expert appointed under Annexure F to the Treaty or a court of arbitration constituted under Annexure G to the Treaty.
3. The Neutral Expert in these Proceedings was appointed by the World Bank on 13 October 2022, pursuant to Article IX and Annexure F to the Treaty.
4. The mission of the Neutral Expert is defined by the Treaty and the “Points of Difference” notified by India to the World Bank in a letter dated 4 October 2016 (the “**Points of Difference**”). The Points of Difference are as follows:

### A. KISHENGANGA HYDROELECTRIC PLANT

- i. India is of the considered view that the pondage of 7.55 million cubic metre (MCM) provided in the design is within the limits of the maximum pondage permitted in accordance with paragraph 8(c) of Annexure D and does not exceed twice the pondage required for Firm Power. The pondage provided by India is also in accordance with paragraph 2(c) of Annexure D i.e. Live Storage of only sufficient magnitude to meet fluctuations in the discharge of the turbines arising from variations on the daily and the weekly loads of the plant. The pondage provided by India meets the operational restriction imposed by Paragraph 15 of Annexure D.

India is also of the view that the intakes for the turbines are located at the highest level consistent with satisfactory and economical construction and operation of the Plant in accordance with Paragraph 8 (f) of Annexure D.

Pakistan side does not agree with India’s position.

- ii. India is of the considered view that the outlets below the Dead Storage Level provided in the design of the Plant are in accordance with Paragraph 8(d) of Annexure D to the Treaty, and are of minimum size and located at the highest level. The proposed spillway configuration to pass the design discharge of 2000 cumec and also for sediment sluicing is the optimal configuration within the topographical constraints.

Pakistan side does not agree with India’s position.

- iii. India is of the considered view that the design of the Plant conforms to the design criterion specified in Paragraph 8(e) of Annexure D to the Treaty as the conditions at the site of the Plant make it necessary to provide a gated spillway. Moreover, the bottom level of the gates in normal closed position is at the highest level consistent with sound and economical design and satisfactory construction and operation of the works.

Pakistan side does not agree with India's position.

**B. RATLE HYDROELECTRIC PLANT**

- i. India is of the considered view that 2 meters freeboard provided in the design of the Plant is in accordance with Paragraph 8(a) of Annexure D and does not make the works themselves capable of raising artificially the water level in the Operating Pool above the Full Pondage Level (FPL) specified.

Pakistan side does not agree with India's position.

- ii. India is of the considered view that the pondage of 23.86 million cubic metre (MCM) provided in the design is within the limits of the maximum pondage permitted in accordance with paragraph 8(c) of Annexure D and does not exceed twice the pondage required for Firm Power. The pondage provided by India is also in accordance with paragraph 2(c) of Annexure D of the Treaty i.e. Live Storage of only sufficient magnitude to meet fluctuations in the discharge if the turbines arising from variations in the daily and the weekly loads of the plant. The pondage provided by India meets the operational restriction imposed by Paragraph 15 of Annexure D.

India is also of the view that the intakes for the turbines are located at the highest level consistent with satisfactory and economical construction and operation of the Pant in accordance with Paragraph 8(f) of Annexure D.

Pakistan side does not agree with India's position.

- iii. India is of the considered view that outlets below the Dead Storage Level provided in the design of the Plant are in accordance with Paragraph 8(d) of Annexure D to the Treaty, and are of minimum size and located at the highest level. The proposed spillway configuration to pass the design discharge of 13814 cumec and also for sediment sluicing is the optimal configuration within the topographical constraints at site.

Pakistan side does not agree with India's position.

- iv. India is of the considered view that the design of the Plant conforms to the design criterion specified in Paragraph 8(e) of Annexure D to the Treaty as the conditions at the site of the Plant make it necessary to provide a gated spillway. Moreover, the bottom level of the gates in normal closed position is at the highest level consistent with sound and economical design and satisfactory construction and operation of the works.

Pakistan side does not agree with India's position.

- 5. Pursuant to Paragraph 7 of Annexure F to the Treaty and Article 2(3) of the Supplemental Rules of Procedure adopted by the Neutral Expert after consulting the Parties (the “**Supplemental Rules**”), the Neutral Expert is empowered to resolve certain issues pertaining to his competence. This Decision addresses exclusively such issues.

## II. DISPUTE RESOLUTION PROVISIONS OF THE TREATY

6. As the dispute resolution provisions of the Treaty form the critical framework for this Decision, including the Parties' submissions as summarized further below, it is useful to reproduce certain of their key sections from the outset.
7. Article IX of the Treaty provides as follows:

### SETTLEMENT OF DIFFERENCES AND DISPUTES

- (1) Any question which arises between the Parties concerning the interpretation and application of this Treaty or the existence of any fact which, if established, might constitute a breach of this treaty shall first be examined by the [Permanent Indus] Commission, which will endeavour to resolve the question by agreement.
- (2) If the Commission does not reach agreement on any of the questions mentioned in Paragraph (1), then a difference will be deemed to have arisen, which shall be dealt with as follows:
  - (a) Any difference which, in the opinion of either Commissioner, falls within the provisions of Part 1 of Annexure F shall, at the request of either Commissioner, be dealt with by a Neutral Expert in accordance with the provisions of Part 2 of Annexure F;
  - (b) If the difference does not come within the provisions of Paragraph (2) (a), or if a Neutral Expert, in accordance with the provisions of Paragraph 7 of Annexure F, has informed the Commission that, in his opinion, the difference, or a part thereof should be treated as a dispute, then a dispute will be deemed to have arisen which shall be settled in accordance with the provisions of Paragraphs (3), (4) and (5):

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

- (3) As soon as a dispute to be settled in accordance with this and the succeeding paragraphs of this Article has arisen, the Commission shall, at the request of either Commissioner, report the fact to the two Governments, as early as practicable, stating in its report the points in on which the Commission is in agreement and the issues in dispute, the views of each Commissioner on these issues and his reasons thereof.
- (4) Either Government may, following receipt of the report referred to in Paragraph (3), or if it comes to the conclusion that this report is being unduly delayed in the Commission, invite the other Government to resolve the dispute by agreement. In doing so, it shall state the names of its negotiators and their readiness to meet with the negotiators to be appointed by the other Government at a time and place to be indicated by the other Government. To assist in these negotiations, the two Governments may agree to enlist the services of one or more mediators acceptable to them.
- (5) A court of Arbitration shall be established to resolve the dispute in the manner provided by Annexure G
  - (a) upon agreement between the Parties to do so; or
  - (b) at the request of either Party, if, after negotiations have begun pursuant to Paragraph (4), in its opinion the dispute is not likely to be resolved by negotiation or mediation; or

- (c) at the request of either Party, if, after the expiry of one month following receipt by the other Government of the invitation referred to in Paragraph (4), that Party comes to the conclusion that the other Government is unduly delaying the negotiations.
  - (6) The provisions of Paragraphs (3), (4) and (5) shall not apply to any difference while it is being dealt with by a Neutral Expert.
- 8. Part 1 of Annexure F to the Treaty is titled “Questions to be Referred to a Neutral Expert”. It provides as follows:
  - 1. Subject to the provisions of Paragraph 2, either Commissioner may, under the provisions of Article IX(2)(a) [of the Treaty], refer to a Neutral Expert any of the following questions:
    - (1) Determination of the component of water available for the use of Pakistan
      - (a) in the Ravi Main, on account of the deliveries by Pakistan under the provisions of Article II(4), and
      - (b) at various points on The Ravi or The Sutlej, on account of the deliveries by Pakistan under the provisions of Article III (3).
    - (2) Determination of the boundary of the drainage basin of The Indus or The Jhelum OR The Chenab for the purposes of Article III (2).
    - (3) Whether or not any use of water or storage in addition to that provided under Article III is involved in any of the schemes referred to in Article IV (2) or in Article IV (3)(b) and carried out by India on the Western Rivers.
    - (4) Questions relating to
      - (a) obligations with respect to construction or remodelling of, or pouring of waters into, any drainage or drain as provided in Article IV (3)(c) and Article IV(2)(D); and
      - (b) maintenance of drainages specified in Article IV (4).
    - (5) Questions arising under Article IV(7) as to whether any action taken by either Party is likely to have the effect of diverting the Ravi Main between Madhopur and Lahore, or the Sutlej Main between Harike and Suleimanke, and its natural channel between high banks.
    - (6) Determination of facts relating to questions arising under Article IV (11) or Article IV (12).
    - (7) Whether any of the data requested by either Party falls outside the scope of Article VI (2).
    - (8) Determination of withdrawals to be made by India under proviso (iii) to Paragraph 3 of Annexure C.
    - (9) Determination of schedule of releases from Conservation Storage under the provisions of Paragraph 8 of Annexure C.
    - (10) Whether or not any new Agricultural Use by India, on those Tributaries of The Jhelum on which there is any Agricultural Use or hydro-electric use by Pakistan, conforms to the provisions of Paragraph 9 of Annexure C.
    - (11) Questions arising under the provisions of Paragraph 7, Paragraph 11 or Paragraph 21 of Annexure D.
    - (12) Whether or not the operation by India of any plant constructed in accordance with the provisions of Part 3 of Annexure D conforms to the criteria set out in Paragraphs 15, 16 and 17 of that Annexure.

- (13) Whether or not any new hydro-electric plant on an irrigation channel taking off the Western Rivers conforms to the provisos to Paragraph 24 of Annexure D.
- (14) Whether or not the operation of a Storage Work which was in operation as on the Effective Date substantially conforms to the provisions of Paragraph 3 of Annexure E.
- (15) Whether or not any part of the storage in a Connecting Lake is the result of man-made works constructed after the Effective Date (Paragraph 8 (b) of Annexure E).
- (16) Whether or not any flood control work constructed on the Jhelum Main conforms to the provisions of Paragraph 9 of Annexure E.
- (17) Whether or not any Storage Work to be constructed on a Tributary of The Jhelum on which Pakistan has any Agricultural Use or hydro-electric use conforms to the provisions of Paragraph 10 of Annexure E.
- (18) Questions arising under the provisions of Paragraph 6 or 14 of Annexure E.
- (19) Whether or not the operation of any Storage Work constructed by India, after the Effective Date, conforms to the provisions of Paragraphs 17, 18, 19, 21 and 22 of Annexure E and, to the extent necessary, to the provisions of Paragraph 8 of Annexure C.
- (20) Whether or not the storage capacity proposed to be made up by India under Paragraph 23 of Annexure E exceeds the storage capacity lost by sedimentation.
- (21) Determination of modifications to be made in the provisions of Parts 2, 4 or 5 of Annexure H in accordance with Paragraphs 11, 31 or 38 thereof when the additional supplies referred to in Paragraph 66 of that Annexure become available.
- (22) Modification of Forms under the provisions of Paragraph 41 of Annexure H.
- (23) Revision of the figure for the conveyance loss from the head of the Madhopur Beas Link to the junction of the Chakki Torrent with the Beas Main under the provisions of Paragraph 45 (c) (ii) of Annexure H.

2. If a claim for financial compensation has been raised with respect to any question specified in Paragraph 1, that question shall not be referred to a Neutral Expert unless the two Commissioners are agreed that it should be so referred.

3. Either Commissioner may refer to a Neutral Expert under the provisions of Article IX (2)(a) any question arising with regard to the determination of costs under Article IV (5), Article IV (11), Article VII (1)(a) or Article VII (1)(b).

9. Part II of Annexure F is titled “Appointment and Procedure”. In that Part, Paragraph 6 provides:

The procedure with respect to each reference to a Neutral Expert shall be determined by him, provided that (a) he shall afford to each Party an adequate hearing; (b) in making his decision, he shall be governed by the provisions of this Treaty and by the compromis, if any, presented to him by the [Permanent Indus] Commission; and (c) without prejudice to the provisions of Paragraph 3, unless both Parties so request, he shall not deal with any issue of financial compensation.

10. Further, Paragraph 7 of Annexure F provides:

Should the [Permanent Indus] Commission be unable to agree that any particular difference falls within Part 1 of this Annexure, the Neutral Expert shall, after hearing both Parties, decide whether or not it so falls. Should he decide that the difference so falls, he shall proceed to render a decision on the merits: should he decide otherwise, he shall inform the Commission that, in his opinion, the difference should be treated as a dispute. Should the Neutral Expert decide that only a part of the difference so falls, he shall, at his discretion, either:

- (a) proceed to render a decision on the part which so falls, and inform the Commission that, in his opinion, the part which does not so fall should be treated as a dispute, or
- (b) inform the Commission that, in his opinion, the entire difference should be treated as a dispute.

### III. PROCEDURAL HISTORY

11. This section sets out the procedural history of the Proceedings in some detail. Although not all the procedural steps recounted below are directly relevant to the issues of competence addressed in this Decision, the Neutral Expert considers it important to provide the full context, including with respect to the Parties' submissions on the merits and the first site visit conducted by the Neutral Expert.

#### A. APPOINTMENT OF THE NEUTRAL EXPERT

12. Paragraphs 4 and 5 of Annexure F to the Treaty provide as follows:

4. A Neutral Expert shall be a highly qualified engineer, and, on the receipt of a request made in accordance with Paragraph 5, shall be appointed, and the terms of his retainer shall be fixed as follows:
- (a) During the Transition Period, by the Bank.
  - (b) After the expiration of the Transition Period,
    - (i) jointly by the Government of India and the Government of Pakistan, or
    - (ii) if no appointment is made in accordance with (i) above within one month after the date of the request, then by such person or body as may have been agreed upon between the two Governments in advance, on an annual basis, or, in the absence of such agreement, by the Bank.

Provided that every appointment made in accordance with (a) or (b)(ii) above shall be made after consultation with each of the Parties.

The Bank shall be notified of every appointment, except when the Bank is itself the appointing authority.

5. If a difference arises and has to be dealt with in accordance with the provisions of Article IX (2)(a), the following procedure will be followed:
- (a) The Commissioner who is of the opinion that the difference falls within the provisions of Part 1 of this Annexure (hereinafter in this paragraph referred to as "the first Commissioner") shall notify the other Commissioner of his intention to ask for the appointment of a Neutral Expert. Such Notification shall clearly state the paragraph or paragraphs of Part 1 of this Annexure under which the difference falls and shall also contain a statement of the point or points of difference.
  - (b) Within two weeks of the receipt by the other Commissioner of the notification specified in (a) above, the Commissioners will endeavour to prepare a joint statement of the point or points of difference.
  - (c) After expiry of the period of two weeks specified in (b) above, the first Commissioner may request the appropriate authority specified in Paragraph 4 to appoint a Neutral Expert; a copy of the request shall be sent at the same time to the other Commissioner.



- (d) The request under (c) above shall be accompanied by the joint statement specified in (b) above; failing this, either Commissioner may send a separate statement to the appointing authority and, if he does so, he shall at the same time send a copy of the separate statement to the other Commissioner.
13. On 6 September 2016, the Indian Commissioner for Indus Waters notified the Governments of India and Pakistan that “the Permanent Indus Commission (PIC) ha[d] been unable to reach agreement on the questions that had arisen relating to the designs of Ratle and Kishenganga Hydroelectric Plants (HEP), in terms of Article IX(2) of the Indus Waters Treaty 1960”. He requested that the Parties appoint a neutral expert within a month of his request pursuant to Paragraph 4(b)(i) of Annexure F to the Treaty. The Indian Commissioner for Indus Waters also noted that “a joint statement of points of difference could not be prepared” and transmitted his separate statement of the Points of Difference to the Parties.
14. On 4 October 2016, India notified the World Bank that the Parties had not appointed a neutral expert under Paragraph 4(b)(i) of Annexure F to the Treaty. It requested that the World Bank appoint a neutral expert under Paragraphs 4(b)(ii) and 5(c) of Annexure F. By the same correspondence, India transmitted to the World Bank its Statement of the Points of Difference.
15. On 19 September 2022, following the imposition of a “pause” by the World Bank (as described at paragraph 338 below), the World Bank notified the Parties that it would appoint Mr. Michel Lino to the role of neutral expert.
16. By letter dated 13 October 2022, after consultation with each of the Parties, the World Bank appointed Mr. Lino as the neutral expert in these Proceedings (the “**Neutral Expert**”) pursuant to Article IX(2) and Annexure F to the Treaty and notified the Parties accordingly.
17. As will be discussed further below, in October 2022, a court of arbitration (the “**2022 CoA**”) was also empanelled under the Treaty in proceedings initiated by Pakistan against India by way of a Request for Arbitration dated 19 August 2016. In its letter of 13 October 2022, the World Bank informed the Parties of its appointment of Professor Sean D. Murphy as Chairman of the 2022 CoA.
- B. EARLY EXCHANGES ON THE COMPETENCE OF THE NEUTRAL EXPERT AND HANDOVER MEETING**
18. On 21 October 2022, Pakistan acknowledged the appointment of Mr. Lino as the Neutral Expert and assured him of its “commitment to engage fully and in good faith to address the issues with which [he] will be charged”. Pakistan then recalled certain background information on the Neutral Expert’s appointment, including the following:

The correspondence ... appointing you as Neutral Expert followed correspondence almost six years previously, of 5 December 2016, in which the then General Counsel of the [World] Bank wrote to the Parties to canvass (amongst others) your name for appointment as Neutral Expert. Pakistan replied to this letter on 9 December 2016 referencing your qualifications and experience and stating that accordingly, Pakistan shall have no objection to the appointment of Mr Lino as the Neutral Expert.

This formulation by Pakistan is explained by what preceded it in the letter of 9 December 2016, and other correspondence, namely, that Pakistan was participating in the process of appointing a Neutral Expert “with full reservation of, and without prejudice to, its rights under the Treaty and that its participation cannot be understood as acquiescence to the jurisdiction of a Neutral Expert who may be appointed. Pakistan’s reservation of rights at the time, a reservation which it maintains today, reflected its carefully considered position that ... the disputes concerning Kishenganga and Ratle Hydroelectric Plants can be addressed only by the Court of Arbitration as requested by Pakistan on 19 August 2016.

...

The Bank subsequently contemplated both the constitution of a Court and the appointment of a Neutral Expert, an approach to which Pakistan objected. Unable to determine how to proceed, the President of the Bank imposed a “pause” in this process on 12 December 2016, the effect of which was to freeze the issues before the Bank and effectively preclude either Party from progressing a request under the dispute settlement mechanisms of the Treaty. For completeness, I note that Pakistan considers that the Bank acted in breach of its responsibilities under the Treaty in imposing the Pause, a unilateral act that had no foundation in the Treaty or in wider international law.

19. Regarding a possible meeting between the Neutral Expert and the Parties, foreshadowed in the World Bank’s letter of 13 October 2022, Pakistan proposed a joint meeting involving the Neutral Expert and the 2022 CoA “[w]ith a view to arriving at an approach to the relationship and necessary and appropriate coordination between the two processes” considering the “unavoidable overlap between the preliminary and procedural issues that will arise before the Court and the Neutral Expert”.
20. On 24 October 2022, the World Bank transmitted to the Neutral Expert India’s request for the appointment of a neutral expert and India’s Statement of Points of Difference. The World Bank notified the Neutral Expert of its plan to host a handover briefing meeting with the Neutral Expert and the Parties (the “**Handover Meeting**”) on 8 November 2022 at the World Bank offices in Washington DC. By a separate letter of the same day, the World Bank also notified the Parties about the Handover Meeting.
21. On 26 October 2022, the Neutral Expert acknowledged receipt of Pakistan’s letter of 21 October 2022 and, *inter alia*, indicated availability to attend a meeting with the Parties.
22. By letter dated 2 November 2022 to the Neutral Expert, India provided further background on the Proceedings stating, *inter alia*, as follows:

[T]he issues now under consideration are pre-eminently of the same nature as the differences earlier dealt with by the Neutral Expert in the case of the Baglihar [Hydroelectric Plant] on

the river Chenab in 2007, and therefore, the Neutral Expert process is ideally suited and will be in consonance with the Indus Waters Treaty procedures.

...

India's position is that the World Bank's decision to pause the parallel processes was a well-considered decision "in the interest of preserving the Treaty and in order to provide a window to further explore whether India and Pakistan can agree on a way forward for resolving the matter", as stated in the President of the World Bank's letter dated 12<sup>th</sup> December, 2016.

It may be recalled that the World Bank, in their letter dated 18<sup>th</sup> October, 2016, had called upon the two countries "to take into serious consideration the possibility that pursuing the two parallel tracks could seriously imperil the Treaty and the goodwill that underpins it."

During the pause, India offered, on multiple occasions, the possibility of discussing and resolving the issues bilaterally at the level of the Permanent Indus Commission. This has not been possible due to lack of cooperation from Pakistan.

23. On the same day, 2 November 2022, the World Bank, noting the Parties' availabilities for the Handover Meeting, proposed to hold it on 21 November 2022.
24. By letter to the Neutral Expert dated 4 November 2022, Pakistan reiterated its proposal that the Handover Meeting take place in the presence of both the Neutral Expert and the Chairman of the 2022 CoA. By separate correspondence of the same day addressed to the World Bank, Pakistan requested an indication of the proposed agenda of the Handover Meeting.
25. On 12 November 2022, the Neutral Expert notified the World Bank of the matters he wished to raise with the Parties at the Handover Meeting.
26. On 14 November 2022, the World Bank notified the Parties that the Handover Meeting with the Neutral Expert would take place on the morning of 21 November 2022, and with the Chairman of the 2022 CoA on the afternoon of the same day. The World Bank also transmitted a proposed agenda for the meeting.
27. On 17 November 2022, Pakistan proposed to the World Bank, *inter alia*, the addition of "Coordination between the Neutral Expert and Court of Arbitration processes" as an agenda item in the Handover Meeting. It also noted its understanding that the Handover Meeting would not involve decision-making.
28. On the same day, in a letter to the World Bank, India stated as follows:

With the confirmation of Mr. Michel Lino's appointment as Neutral Expert in accordance with the provisions of the Indus Waters Treaty (the "Treaty"), and the transmission of India's request and statement of points of difference to him by the Bank as well as by India, Mr. Lino now stands seized of the points of difference between the parties. These differences are now being dealt with by the Neutral Expert. As a consequence of this, Article IX(6) of the Treaty is triggered, which states that once a Neutral Expert is appointed and dealing with the differences referred to him, a Court of Arbitration may not be established first in point of time and may not proceed to adjudicate the same differences, which procedure will be a breach of Treaty.

29. On 18 November 2022, the World Bank, in response to Pakistan's letter of 17 November 2022, confirmed that the Handover Meeting would not involve decision-making.
30. In a separate letter of the same day, the Senior Vice President and Group General Counsel of the World Bank, writing on behalf of the World Bank, also responded to India's letter of 17 November 2022, stating as follows:

For the avoidance of doubt, I express no view on this. The Bank has made the appointments it was requested to and has thus fulfilled its limited obligations under the Treaty. It is neither for me, nor for the Bank to opine on the implications of the Neutral Expert's appointment. Any legal arguments about the implications of the appointments and the validity or otherwise of the two mechanisms should be taken up by the two parties within the context of the Treaty.

I do understand and share your concern that by invoking two separate mechanisms under the Treaty over this matter, there is a risk of contradictory outcomes. The Bank has been consistent in emphasizing this risk to both parties which is the reason the Bank sought to create space for an amicable resolution between the parties over the last six years unsuccessfully.

31. On 19 November 2022, Pakistan, in a letter addressed to the World Bank, expressed concern that it had not been copied in India's letter of 17 November 2022. Regarding the substance of that letter, Pakistan stated as follows:

- Arbitration proceedings were commenced on 19 August 2016 with the transmittal of Pakistan's Request for Arbitration to India by Note Verbale of that date. Paragraph 3 of Annexure G of the Treaty leaves this point beyond contention.
  - There are well established legal principles which give primacy to bodies seised of a dispute first in time.
  - The dispute of which the Court of Arbitration is now seised covers all of the matters addressed in India's subsequent Request for Neutral Expert Determination as well as other matters of a more systemic nature that fall manifestly outside the jurisdiction and competence of the Neutral Expert.
  - The constitution of both a Court of Arbitration and a Neutral Expert was a decision of the Bank that, in Pakistan's contention, was informed by a misapprehension, or misapplication, of the Bank's responsibilities under the Treaty.
  - In these circumstances, India cannot properly rely on Article IX(6) of the Treaty to oust the jurisdiction of the Court of Arbitration[.]
- ... Pakistan considers that the solution to the difficulties created by the constitution of both a Court of Arbitration and a Neutral Expert lies in the two mechanisms working together, constructively and in cooperation.

32. On 21 November 2022, the Handover Meeting was held at the World Bank's offices in Washington DC. The following were present:

**Neutral Expert**  
Mr. Michel Lino

**India**  
Shri Pankaj Kumar  
*Secretary*  
*Department of Water Resources, River Development & Ganja Rejuvenation*

Mr. Rajesh Khullar  
*Executive Director, World Bank*

Mr. Rajeev Topno  
*Senior Advisor to Executive Director, World Bank*

Ms. Uma Shekhar  
*Additional Secretary (L&T), Ministry of External Affairs*

Mr. J.P. Singh  
*Joint Secretary (PAI), Ministry of External Affairs*

Shri A.K. Pal  
*Indian Commissioner for Indus Waters  
Department of Water Resources, River Development & Ganja Rejuvenation*

Ms. Gitanjali Brandon  
*Deputy Secretary (Pakistan), Ministry of External Affairs*

Shri Naveen Kumar  
*Senior Joint Commissioner  
Department of Water Resources, River Development & Ganja Rejuvenation*

Mr. Ankur Talwar  
*Advocate and Legal Counsel*

Ms. Chitrangna Singh  
*Counsellor (Pol), Embassy of India*

Ms. Dilasha Anand  
*Third Secretary (Eco), Embassy of India*

**Pakistan**

Mr. Hassan Nasir Jamy  
*Secretary, Ministry of Water Resources*

Mr. Ahmad Irfan Aslam  
*Additional Attorney-General for Pakistan, Office of the Attorney General for Pakistan*

Mr. Naveed Baloch, Executive Director  
*World Bank*

Mr. Syed Muhammad Mehar Ali Shah  
*Pakistan Commissioner for Indus Waters*

Mr. Rizwan Gui  
*First Secretary, Embassy of Pakistan*

**World Bank**

Mr. Christopher Stephens  
*Senior Vice President and World Bank Group General Counsel*

Mr. Victor Mosoti  
*Chief Counsel, Environment and International Law Practice*

Mrs. Christina Leb  
*Senior Counsel, Environment and International Law Practice*

Mrs. Francesca Daverio  
*Head of Office, Legal Department*

33. At the Handover Meeting, the Neutral Expert and the representatives of the Parties discussed the key milestones characterizing the preceding six years, the next steps in the Neutral Expert process, the secretariat for the Proceedings, the technical and legal advisors to the Neutral Expert, and the 2022 CoA *vis-à-vis* these Neutral Expert Proceedings. Regarding the secretariat, India proposed the International Centre for Investment Disputes (“ICSID”) and Pakistan proposed the Permanent Court of Arbitration (the “PCA”).
34. On 28 November 2022, following discussions at the Handover Meeting, the World Bank provided the Parties with a list of potential organizations that the Parties could consider to provide secretariat support to the Neutral Expert.
35. On 1 December 2022, in a letter addressed to the Neutral Expert, Pakistan reiterated its position that “cooperation and coordination between the Neutral Expert and the Court will be essential if the delicate balance and integrity of the Indus Waters Treaty is to be maintained”. In another letter of the same date addressed to the Neutral Expert and the Chairman of the 2022 CoA, Pakistan stated as follows:

Pakistan has also expressed the view that the Court of Arbitration, having been seised first in time, and in respect of a subject-matter that subsumes the issues addressed in India’s subsequent Request for the Appointment of a Neutral Expert, has presumptive jurisdiction in respect of the matters addressed in both Pakistan’s Request for Arbitration and India’s Request for the Appointment of a Neutral Expert.

36. On 7 December 2022, the World Bank circulated to the Parties a draft summary of the Handover Meeting and invited the Parties’ comments. Following receipt of comments from the Parties, an amended version of the summary was circulated to the Parties on 9 January 2023 and a final version, on 9 February 2023.

**C. FIRST MEETING WITH THE PARTIES AND ADOPTION OF PROCEDURAL FRAMEWORK**

37. On the same day, 7 December 2022, the Neutral Expert (i) invited the Parties’ suggestions regarding the secretariat for these Proceedings, (ii) proposed Mr. Luc Deroo as the technical assistant of the Neutral Expert and circulated his *curriculum vitae*, and (iii) invited the Parties to confirm their availability in January and February 2023 for the first meeting of the Parties and the Neutral Expert (the “**First Meeting**”).
38. On 20 December 2022, the Neutral Expert proposed 30 and 31 January 2023 as the dates of the First Meeting.

39. On 21 December 2022, India, in a letter to the World Bank, reiterated its position set out in its letter of 17 November 2022 regarding the parallel proceedings in this matter and the empanelment of the 2022 CoA.
40. On the same day, the World Bank notified India that it had “handed over the Indus Waters Treaty matter to the Neutral Expert and the Chairman of the [2022 CoA] [and] [h]enceforth has no further substantive role and authority in [the] process”.
41. On 23 December 2022, Pakistan asserted that the Neutral Expert and the 2022 CoA “are not substantively distinct”. With an end to “deconflict[...]" the two processes, Pakistan proposed that the Neutral Expert and the 2022 CoA establish a workable mode of operation to address the issues of substance raised by the Parties’ referrals to the Neutral Expert and the Court. Pakistan also requested additional information regarding Mr. Deroo, confirmed its availability to attend the First Meeting on 30 and 31 January 2023, and reiterated its proposal that the PCA act as the secretariat for the Proceedings.
42. On 26 December 2022, in a letter to the World Bank, India reiterated its position at the Handover Meeting that ICSID should be the secretariat for the Proceedings.
43. On 6 January 2023, the Neutral Expert provided the additional information requested by Pakistan regarding Mr. Deroo. Regarding the date of the First Meeting, the Neutral Expert noted that this was contingent on the appointment of a secretariat by the Parties.
44. On 9 January 2023, the Neutral Expert noted the Parties’ preferences regarding the secretariat for the Proceedings, and notified the Parties that he would establish a process to select a secretariat.
45. On 10 January 2023, Pakistan confirmed its agreement to the appointment of Mr. Deroo as technical assistant to the Neutral Expert “without prejudice to ... Pakistan’s reserved issues”. By the same correspondence, Pakistan reiterated its preference for the PCA and its objections regarding ICSID as the secretariat for these proceedings.
46. On 17 January 2023, India opposed the appointment of Mr. Deroo as the technical assistant to the Neutral Expert, noting that Mr. Deroo “was associated with Pakistan on conducting a programme for the so-called ‘AJK’ (Pakistan Occupied Jammu and Kashmir) Power Development Organization”. By a separate letter of the same day, India submitted further comments regarding the choice of the secretariat for the Proceedings.
47. On the same day, the Neutral Expert confirmed that Mr. Deroo had no association with AJK Power Development Organization. He explained that Mr. Deroo had given a lecture organized by

the *Agence Française de Développement*, but had had no interactions with Pakistani officials. The Neutral Expert invited India to reconsider its position regarding Mr. Deroo. By the same correspondence, the Neutral Expert proposed the Peace Palace—the PCA headquarters in The Hague—as the venue of the First Meeting, while noting that a decision on the secretariat for the Proceedings remained to be made.

48. Later on the same day, Pakistan submitted further comments regarding the choice of the secretariat for the proceedings.
49. On 18 January 2023, the Neutral Expert proposed that the First Meeting be organized with the administrative support of the PCA, without prejudice to the decision on the choice of the secretariat for the Proceedings. The Neutral Expert also invited the Parties' proposals for the agenda of the First Meeting.
50. On 19 January 2023, India confirmed that it had no objection to the appointment of Mr. Deroo as the technical assistant to the Neutral Expert. India counter-proposed that the First Meeting be held at the World Bank offices either in Washington DC or Paris.
51. On 23 January 2023, the Neutral Expert indicated that, based on his inquiries, the International Chamber of Commerce (the "ICC"), which had also been proposed by India, could provide a venue for the First Meeting, but could not provide secretariat support in these Proceedings. The Neutral Expert also confirmed that the PCA was available to organize the First Meeting and could provide secretariat services, an arrangement which would not imply coordination with the 2022 CoA. By the same correspondence, the Neutral Expert proposed dates in February 2023 for the First Meeting.
52. In a further exchange of correspondence at the end of January 2023, both Parties confirmed that they would be available for a First Meeting to be held on 27 and 28 February 2023, and that such meeting could be held at the headquarters of the PCA in the Peace Palace, in The Hague, without prejudice to an eventual choice of a secretariat for the Proceedings.
53. On 8 February 2023, the Chairman of the 2022 CoA, Professor Sean D. Murphy, wrote to the Neutral Expert, with the Parties in copy, stating as follows:

Without prejudice to the Court's upcoming decision on its competence, and equally without prejudice to any decision with respect to your competence, the Court in principle is open to the idea of a coordinated process between the Court and the Neutral Expert. I would welcome an indication from you as to whether you also, in principle, would be open to such an approach and, if so, to an informal exchange with me on this matter.



54. On the same day, the Neutral Expert circulated to the Parties a draft agenda for the First Meeting and invited their comments.
55. On 10 February 2023, the Neutral Expert circulated draft Terms of Appointment and draft Rules of Procedure for the Parties' consideration ahead of the First Meeting.
56. On 11 February 2023, India submitted its comments regarding the draft agenda for the First Meeting, including its opposition to the inclusion in the agenda of a "Discussion of the relationship with the work of the [2022 CoA]". By the same correspondence, India expressed its objections to various matters addressed at the first meeting of the 2022 CoA, which had been held the previous month, but which India had not attended, as follows:

India has received copies of the transcript of the proceedings before the so-called Court of Arbitration as well as a procedural order passed by it, although India does not accept the jurisdiction of the Court of Arbitration and will be constrained to raise challenges to its proceedings as long as there is deviation from the Treaty mandates.

On a reading of these documents, two significant themes emerge, which create a sense of disquiet. First, the so-called Court of Arbitration appears to have accepted Pakistan's request to explore the possibility of cooperation and coordination between itself and your good self. We categorically reject and oppose any coordination, formal or informal, of the Neutral Expert with the Court of Arbitration. Any interface with the Court of Arbitration would impinge on the independence and neutrality of the Neutral Expert.

Second, the Court of Arbitration has scheduled another hearing, in May, 2023, seemingly to address the issue of its own competence and jurisdiction, which could have a bearing on your independent proceedings as the Neutral Expert. This, too, is categorically rejected by India.

57. India also stated as follows regarding the dispute resolution structure in the Treaty:

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

58. On 12 February 2023, in response to India's letter of the previous day, Pakistan asserted that the competence of the Neutral Expert, as provided in Paragraph 1 of Annexure F to the Treaty, "does not include questions or disputes concerning the interpretation or application of Article IX of the Treaty, or ... of other key provisions to which India refers". Regarding coordination with the 2022 CoA, Pakistan stated that the issue is "at the centre of a wider dispute between the Parties that inextricably engages both ... proceedings".

59. By another correspondence of the same day, Pakistan transmitted to the Neutral Expert various documents arising from the first meeting of the 2022 CoA, noting that these documents were relevant to, *inter alia*, upcoming discussions at the First Meeting.
60. On 17 February 2023, Pakistan submitted its comments on the draft agenda for the First Meeting, the draft Terms of Appointment and the draft Rules of Procedure.
61. On 20 February 2023, the Neutral Expert circulated a revised agenda for the First Meeting, having taken into account the Parties' comments. Regarding the agenda item on the relationship with the 2022 CoA, the Neutral Expert clarified that this was not a proposal for coordination between the two processes, but an opportunity for each Party to express its views on the matter before the Neutral Expert determined the procedure, in accordance with Paragraph 6(a) of Annexure F to the Treaty.
62. On 21 February 2023, India requested that the Neutral Expert reconsider the inclusion of the discussions on the relationship with the 2022 CoA on the agenda of the First Meeting, noting that it "will not be in a position to participate in any meetings of the Neutral Expert unless its legitimate concerns are taken on board and any discussion on coordination with the illegitimately constituted Court of Arbitration excluded from the agenda".
63. On the same day, Pakistan submitted its response to India's letter, stating *inter alia* that "[a] full and open discussion of the issue of coordination between the Neutral Expert and the Court of Arbitration must now take place, including for purposes of providing necessary context to you for any engagement that you may have with Professor Sean Murphy [the Chairman of the 2022 CoA] in response to his letter of 9 February 2023 [*sic*]".
64. On the same day, the Neutral Expert notified the Parties that he would conduct the First Meeting without an agenda, on the basis that the meeting would commence with an introduction of the participants and an oral presentation by each Party.
65. On 22 February 2023, India proposed a draft agenda for the First Meeting, stating that "[i]n the face of the position taken by Pakistan, it has become necessary to reinstate the discipline of an Agenda which is drawn to ensure that the issue of the [2022] CoA and any kind of coordination is not raised".
66. On 23 February 2023, the Neutral Expert circulated a final agenda for the First Meeting, which did not include a separate item for discussion on the relationship with the 2022 CoA. Referring to Paragraph 6(a) of Annexure F to the Treaty, the Neutral Expert noted that the First Meeting

was being convened to afford each Party an adequate hearing before deciding on the procedure for the Proceedings.

67. On the same day, both Parties separately confirmed their attendance at the First Meeting.
68. On 27 and 28 February 2023, the First Meeting of the Parties with the Neutral Expert was held at the headquarters of the PCA at the Peace Palace, in The Hague. The following were present:

**Neutral Expert**

Mr. Michel Lino

**Technical Assistant to the Neutral Expert**

Mr. Luc Deroo

**India**

Shri Pankaj Kumar

*Secretary*

*Department of Water Resources, River Development & Ganja Rejuvenation*

Mr. Kushvinder Vohra

*Chairman*

*Central Water Commission*

Ms. Uma Shekhar

*Additional Secretary (L&T), Ministry of External Affairs*

Mr. S.K. Sibal

*Member Design & Research*

*Central Water Commission*

Mr. J.P. Singh

*Joint Secretary (PAI), Ministry of External Affairs*

Shri A.K. Pal

*Indian Commissioner for Indus Waters*

*Department of Water Resources, River Development & Ganja Rejuvenation*

Shri Naveen Kumar

*Senior Joint Commissioner*

*Department of Water Resources, River Development & Ganja Rejuvenation*

Ms. Gitanjali Brandon

*Deputy Secretary (Pakistan)*

*Ministry of External Affairs*

Mr. Ankur Talwar

*Legal Counsel*

Professor Gerrit Basson

Professor Subhasish Dey

*Technical Experts*

Ms. K.C. Sowmya

*First Secretary, Embassy of India in the Netherlands*

**Pakistan**

Mr. Ahmad Irfan Aslam

*Additional Attorney-General for Pakistan, Office of the Attorney General for Pakistan*

Mr. Hassan Nasir Jamy

*Secretary to the Government of Pakistan, Ministry of Water Resources*

Mr. Syed Muhammad Mehar Ali Shah

*Pakistan Commissioner for Indus Waters*

H.E. Mr. Suljuk Mustansar Tarar

*Ambassador of Pakistan to the Netherlands*

Sir Daniel Bethlehem K.C

Professor Attila Tanzi

Professor Philippa Webb

Dr. Cameron Miles

Ms. Laura Rees-Evans

*Counsel*

**Permanent Court of Arbitration**

Ms. Evgeniya Goriatcheva

*Senior Legal Counsel*

Ms. Balla Galma Godana

*Assistant Legal Counsel*

Ms. Diana Pyrikova

*Case Manager*

**Court Reporter**

Mr. Trevor McGowan

69. At this meeting, the Parties made presentations on the background and subject matter of the dispute, and discussed various procedural matters including the draft Terms of Retainer of the Neutral Expert and the Technical Assistant (previously termed “the draft Terms of Appointment”), the draft Rules of Procedure, the secretariat and the work programme for the Proceedings. With respect to the work programme, Pakistan proposed a schedule for a preliminary procedure on the competence of the Neutral Expert under Paragraph 7 of Annexure F to the Treaty. It also proposed staying the Neutral Expert Proceedings pending a decision of the 2022 CoA on competence and the interpretation of Article IX of the Treaty.
70. On 3 March 2023, Pakistan submitted further comments regarding the draft Terms of Retainer.
71. On 7 March 2023, the Neutral Expert circulated a new draft of the Terms of Retainer for the Parties’ consideration, as well as directions regarding submission of further comments by the Parties on the registry and secretariat for the Proceedings, the draft Rules of Procedure and the transcript of the First Meeting. The Parties separately submitted their corrections to the transcript

on 21 March and 7 April 2023. A final version of the transcript of the First Meeting was transmitted to the Parties on 29 April 2023.

72. On 14 March 2023, India proposed ICSID, the Danish Institute of Arbitration and the Vienna International Arbitration Centre as registry and secretariat for the Proceedings.
73. On 21 March 2023, India proposed draft Terms of Retainer and a draft Protocol for the Proceeding (in place of rules of procedure) based on the Baglihar Neutral Expert Proceeding, arguing that “[t]ill date the Baglihar proceedings are the only instance of Neutral Expert proceedings under the Treaty”. Regarding the timing of the Paragraph 7 procedure proposed by Pakistan, India submitted that a decision on the competence of the Neutral Expert could only be undertaken after the submission of India’s Memorial and Pakistan’s Counter-Memorial on the merits of the Parties’ disagreement. India also objected to Pakistan’s proposal to stay the Proceedings.
74. On the same day, Pakistan objected to the Danish Institute of Arbitration and the Vienna International Arbitration Centre as registry and secretariat for the Proceedings, and proposed the PCA Vienna Office for this role.
75. By another correspondence of the same day, Pakistan confirmed that it had no further comments regarding the draft Terms of Retainer circulated by the Neutral Expert.
76. On 23 March 2023, India submitted further objections to the PCA acting as secretariat and registry for the Proceedings.
77. On 24 March 2023, the Neutral Expert circulated a further draft of the Terms of Retainer and invited the Parties’ comments in this respect.
78. On 31 March 2023, Pakistan submitted its further comments regarding the draft Terms of Retainer, noting in particular that “the Baglihar Neutral Expert Process is not an appropriate analogous procedure for that currently underway”.
79. On the same day, India confirmed its agreement with the draft Terms of Retainer.
80. On 4 April 2023, the Neutral Expert circulated draft Terms of Retainer taking into account certain of Pakistan’s comments.
81. On 10 April 2023, the Parties separately confirmed agreement with the draft Terms of Retainer circulated on 4 April 2023. The Terms of Retainer were then circulated to the Parties for their signature on 13 April 2023.

82. On 24 April 2023, the Neutral Expert circulated to the Parties drafts of supplemental rules of procedure and a work programme for the Proceedings. The draft work programme included timings for the Parties' submissions on the merits and a procedure for the Neutral Expert's decision of issues under Paragraph 7 of Annexure F to the Treaty.
83. On 3 May 2023, the Neutral Expert circulated to the Parties an electronic version of the fully signed Terms of Retainer. The Terms of Retainer, *inter alia*, noted the appointment of the Neutral Expert on 13 October 2022. Additionally, through the Terms of Retainer, the Neutral Expert appointed Mr. Luc Deroo as his technical assistant (the "**Technical Assistant**").
84. On the same day, the Neutral Expert notified the Parties that he would respond to the letter of 8 February 2023 from the Chairman of the 2022 CoA.
85. By another letter of the same day, the Neutral Expert responded to the letter of 8 February 2023 from the Chairman of the 2022 CoA as follows:
- Having now benefited from the Parties' views on the issue of coordination, as set out in correspondence and written and oral submissions, as well as from the oral statements made by the Parties regarding the background and subject matter of the neutral expert proceedings during the First Meeting that I held with the Parties on 27 and 28 February 2023, I have arrived at the conclusion that at this time it would not be desirable to establish "a coordinated process between the Court and the Neutral Expert". I believe that there is accordingly also no need for an informal exchange on this matter.
86. On 5 May 2023, the Parties separately submitted their comments regarding the draft supplemental rules of procedure and work programme.
87. On 11 May 2023, the Neutral Expert circulated revised drafts of the supplemental rules of procedure and work programme and invited the Parties' comments. The Parties submitted their comments on 18 May 2023.
88. On 22 May 2023, the Neutral Expert invited final comments from the Parties regarding revised drafts of the supplemental rules of procedure and work programme. The Parties submitted their final comments on 29 May 2023.

89. On 30 May 2023, Pakistan provided the Neutral Expert with an update on developments before the 2022 CoA. Regarding the validity of the appointment of the Neutral Expert, Pakistan stated as follows:

As you will recall from your First Meeting with the Parties, Pakistan takes the view that the Court is competent to address not only its own competence but, in the circumstances in issue, also that of the Neutral Expert. Following your First Meeting, however, Pakistan expressly refrained from challenging the validity of your appointment before the Court.

90. On 31 May 2023, India notified the Neutral Expert that at the hearing before the 2022 CoA which had taken place from 11-13 May 2023, “Pakistan engaged in extensive discussions regarding the Neutral Expert (NE) proceedings before the CoA, and also placed on record a copy of the NE proceedings of 27-28 February 2023”. India argued that this was “a grave breach of the sanctity, confidentiality and independence of the Neutral Expert proceedings” and that the act “disregard[ed]” the Neutral Expert’s letter of 3 May 2023 to the Chairman of the 2022 CoA. India requested the Neutral Expert “to ensure that any materials related to [his] proceedings [were] not disclosed to any third party, including the illegally-constituted CoA”.
91. On 1 June 2023, Pakistan opposed India’s contention that Pakistan was in breach of the confidentiality of the Neutral Expert process, stating that “[i]nternational arbitral practice affirms that there is no breach of confidentiality in submitting factual and legal information that is relevant and material to the decision of an adjudicator to that adjudicator subject to an express caveat of confidentiality”.
92. On the same day, the Neutral Expert issued the Supplemental Rules, including the Work Programme as their Annex 2. Paragraph 14 of the Supplemental Rules provided as follows in the respect of the transparency and confidentiality of the Proceedings:
- 14.1 The appointment of the Neutral Expert and the existence of these Neutral Expert proceedings are matters already in the public domain. Accordingly, the Registry shall identify on its website the names of the Parties, the Neutral Expert, and the designated (authorized) representatives, representatives and counsel for the Parties. The Parties will have an opportunity to review the content of any website relating to these proceedings prior to publication by the Registry.
- 14.2 These Rules and procedural and substantive decisions of the Neutral Expert shall be made publicly available, including on the website of the Registry.
- 14.3 Unless the Neutral Expert directs otherwise after ascertaining the views of the Parties, the Parties, the Neutral Expert, the Registry and any assistants engaged by the Neutral Expert shall maintain strict confidentiality in respect of all other aspects of the proceedings.
93. The Work Programme provided that the filing of a Memorial by India and a first site visit to the KHEP and the RHEP would be followed by a procedure on Paragraph 7 of Annexure F to the Treaty, including oral and written submissions by the Parties and a decision by the Neutral Expert, which would precede the filing of Pakistan’s Counter-Memorial on the merits. Following

consultations with the Parties, the deadlines set out in the Work Programme were subsequently revised on 21 August 2023, 11 October 2023, 2 November 2023, 29 May 2024 and 4 June 2024.

94. In his correspondence of 1 June 2023, the Neutral Expert also addressed the issue of a bilateral tour of inspection to both the KHEP and the RHEP, previously addressed in the Parties' comments on the draft Supplemental Rules. The Neutral Expert stated that he would be assisted in discharging his mandate if both Parties were to present their case on the basis of the fullest information. On this basis, he encouraged the Parties to cooperate in exchanging information, including by organizing an inspection of the KHEP and the RHEP by the Pakistan Commissioner for Indus Waters at the earliest possible time.
95. By letter dated 5 June 2023, the Neutral Expert appointed the PCA as Registry and Secretariat for the Proceedings, and notified the Parties that the proceedings would be administered by the Vienna Office of the PCA, in cooperation with its Mauritius Office. By the same correspondence, the Neutral Expert notified the Parties that Ms. Evgeniya Goriatcheva, PCA Senior Legal Counsel, had been appointed to serve as Registrar for the Proceedings.
96. On the same day, 5 June 2023, pursuant to the Work Programme, India submitted documentation it had previously provided to Pakistan pursuant to Paragraphs 9 and 12 of Annexure D to the Treaty, including documents requested by Pakistan on modifications to the RHEP. By the same correspondence, India addressed the matter of a bilateral tour of inspection, stating that "at no stage has India deliberately obstructed access to any project site" and further that:

Pakistan's allegations regarding denial of its right to access to the Kishenganga and Ratle sites, which are, in any event, totally unfounded, are not matters which the Treaty allows to be agitated in these proceedings. Any issue which Pakistan may wish to raise in this regard, can only legitimately be taken up in a manner, and before an appropriate forum, permitted by the Treaty. This being so, I do not wish to get drawn into a discussion regarding site visits over and above what is provided for in the Work Programme finalized by you. This is not the appropriate forum for those discussions.

97. On 23 June 2023, India confirmed that it would continue to participate in the Proceedings despite its reservations regarding the role of the PCA and reiterated its position that there should be no coordination between these Proceedings and the 2022 CoA.

**D. SECOND MEETING, DISCUSSION OF SITE VISITS, INDIA'S MEMORIAL AND DATA REQUESTS**

98. On 26 June 2023, the Neutral Expert invited the Parties to confer and agree on a period of no more than 14 days between 16 October and 11 November 2023 for a first site visit to the KHEP and the RHEP.



99. On 4 July 2023, India estimated that the site visits to the KHEP and the RHEP would take four days and proposed that the first site visit take place from 16 to 19 October 2023.
100. On the same day, Pakistan notified the Neutral Expert that despite its invitation *via* a bilateral letter to India dated 30 June 2023, India had failed to engage with Pakistan on the issue of a preferred 14-day window for the first site visit.
101. On 12 July 2023, Pakistan submitted that the documentation submitted by India on 5 June 2023 was insufficient and objected to the site visit dates proposed by India, noting that four days were insufficient.
102. On 12 July 2023, India noted that it was not in receipt of Pakistan's letter of 30 June 2023, and proposed 16 to 19 November 2023 as the dates for the first site visit.
103. On 13 July 2023, Pakistan reiterated its position that four days would be insufficient for a site visit, proposed a minimum duration of eight days, and further proposed 10-19 November 2023 as the dates for the first site visit.
104. On 20 July 2023, the Neutral Expert (i) proposed that the Parties reserve eight consecutive days between 16 November and 2 December 2023 for the first site visit; (ii) invited the Parties to confer regarding other modalities of the site visit, and (iii) having consulted the Parties on its location, confirmed that the second meeting of the Neutral Expert and the Parties fixed in the Work Programme for 20 and 21 September 2023 (the "**Second Meeting**") would take place in Vienna, Austria.
105. On 24 July 2023, India requested an extension of time, from 28 July to 31 August 2023, to submit its Memorial.
106. On the same day, Pakistan confirmed that it had no objections to India's requested extension for the submission of the Memorial "on the basis that appropriate time will in due course be afforded to Pakistan for its response". It requested that the Neutral Expert vacate all dates indicated in the Work Programme save for the dates for the Second Meeting and the dates to be agreed by the Parties for the first site visit. Pakistan also indicated that members of its delegation were only available between 16-24 November 2023 to participate in the site visit.
107. On 25 July 2023, the Neutral Expert granted India's request to extend the deadline for the submission of its Memorial to 31 August 2023.

108. On 31 July 2023, India, citing concerns regarding confidentiality and possible coordination with the 2022 CoA, indicated that it was not in a position to agree to any site visit until either Pakistan requested the 2022 CoA to suspend its proceedings or Pakistan signed a binding confidentiality undertaking with respect to the Neutral Expert Proceedings. The Senior Vice-President and Group General Counsel of the World Bank was indicated to be in copy of this correspondence.
109. On 2 August 2023, Pakistan reiterated its position that it was not in breach of confidentiality obligations with respect to the Proceedings. It further stated that given India's position, Pakistan "does not apprehend that it will be possible to make any useful progress on the issue of the site visit by correspondence in advance of the Second Meeting". Pakistan then requested the Neutral Expert to vacate deadlines previously set for the Parties to confer and revert regarding the modalities of the first site visit, and that deliberations regarding this matter be deferred to the Second Meeting. In transmitting this correspondence, Pakistan copied the Senior Vice-President and Group General Counsel of the World Bank on the basis that "he was a copy addressee on India's correspondence [of 31 July 2023]", as well as the Registrar of the 2022 CoA "for the attention of the Court of Arbitration, as India's correspondence directly impugns the Court and Pakistan's conduct before the Court".
110. On 3 August 2023, the Neutral Expert confirmed that, pending the Second Meeting, all deadlines set in the Work Programme, as confirmed or amended in subsequent correspondence, were maintained. He also indicated that the modalities of the first site visit would be on the agenda for the Second Meeting. By the same correspondence, the Neutral Expert invited the Parties' proposals regarding the agenda for the Second Meeting.
111. On 4 August 2023, Pakistan requested that the Neutral Expert grant Pakistan an extension of time for the filing of its Paragraph 7 submission equivalent to the extension granted to India for the submission of its Memorial, such that Pakistan's submission deadline would move from 29 September to 2 November 2023. Pakistan also proposed an extension of the deadline for India's Paragraph 7 reply to 14 December 2023, and a revision of the dates of the third meeting between the Parties and the Neutral Expert, which was to concern Paragraph 7 issues (the "**Third Meeting**").
112. On 9 August 2023, India, referring to Pakistan's letter of 2 August 2023, stated that "[b]y sending its own letter, and with it India's letter of 31 July, 2023 as well, to the illegally constituted so-called Court of Arbitration, Pakistan is in grave breach of its confidentiality obligation owed to the Neutral Expert proceedings". India also noted that by sharing the transcript of the case management conference of the 2022 CoA with the Neutral Expert, Pakistan had attempted to

“effectuate *de facto* cooperation and coordination between the Neutral Expert and the so-called Court of Arbitration”. India reiterated its position regarding the 2022 CoA, the issue of coordination between the two proceedings, and the need for either a confidentiality undertaking from Pakistan or for Pakistan to request a suspension of proceedings of the 2022 CoA.

113. On 16 August 2023, India confirmed that it had no objections to the rescheduling of Paragraph 7 submissions as proposed by Pakistan on 4 August 2023, and requested that all other rescheduling matters be discussed at the Second Meeting.
114. On 21 August 2023, the Neutral Expert issued a revised Work Programme confirming the extension of the deadline for Pakistan’s Paragraph 7 submission to 2 November 2023, and India’s reply to 14 December 2023.
115. On 31 August 2023, in accordance with the Work Programme, India submitted its memorial (“**India’s Memorial**” or “**Memorial**”), accompanied by annexures IN-1 to IN-64 and a corresponding appendix, and exhibits IN-EX-1 to IN-EX-13.
116. On 8 September 2023, the Parties submitted their proposals regarding the agenda for the Second Meeting. In its letter, Pakistan also queried whether the reports submitted as exhibits IN-EX-12 and IN-EX-13 to India’s Memorial were being put forward as expert reports. Pakistan also identified and requested the Neutral Expert to direct India to rectify what it termed “key data omissions” in India’s Memorial.
117. On 13 September 2023, the Neutral Expert circulated the agenda for the Second Meeting, prepared on the basis of the Parties’ suggestions.
118. On the same day, India opposed the inclusion of “India’s failure to facilitate a tour of inspection of the KHEP and the RHEP in disregard of the Neutral Expert’s directions of 1 June 2023” and “the implications of the [2022 CoA] Award on Competence and Procedural Order No. 6 for the Neutral Expert proceedings” on the agenda for the Second Meeting as proposed by Pakistan.
119. Later on the same day, the Neutral Expert, in response to India’s letter, confirmed that the Second Meeting would proceed on the basis of the agenda circulated earlier.
120. On 14 September 2023, Pakistan, referring to an agenda item of the Second Meeting titled “Status of a bilateral tour of inspection of the KHEP and the RHEP”, notified the Neutral Expert that the Pakistan Commissioner for Indus Waters had bilaterally written to the Indian Commissioner for Indus Waters to request a site visit of the KHEP and the RHEP. Pakistan stated that this request had not received a response from India.

121. On 16 September 2023, India opposed the inclusion of the “Status of a bilateral tour of inspection of the KHEP and the RHEP” as an agenda item for the Second Meeting, reiterating that “[t]he Treaty does not bring within the ambit of a Neutral Expert proceeding any issue regarding tours of inspection which are governed by Article VIII(4) [and that] [t]hese matters are wholly extraneous to a Neutral Expert proceeding”.
122. On 17 September 2023, the Neutral Expert, having considered the Parties’ positions, confirmed that the “Status of a bilateral tour of inspection of the KHEP and the RHEP” would remain on the agenda for the Second Meeting.
123. On 20 and 21 September 2023, the Second Meeting of the Parties and the Neutral Expert was held at the premises of the PCA at the Imperial Hofburg Palace in Vienna. The following persons were present:

**Neutral Expert**

Mr. Michel Lino

**Technical Assistant to the Neutral Expert**

Mr. Luc Deroo

**Permanent Court of Arbitration**

Ms. Evgeniya Goriatcheva  
*Registrar, PCA Senior Legal Counsel*

Ms. Balla Galma Godana  
Ms. Iris Koberg  
*PCA Legal Counsel*

**India**

Shri Pankaj Kumar  
*Designated Representative and Leader of the Delegation; Secretary, Department of Water Resources, River Development & Ganga Rejuvenation (DoWR, RD&GR)*

Mr. Kushvinder Vohra  
*Chairman and Ex-Officio Secretary, Central Water Commission (CWC), DoWR, RD&GR*

Ms. Uma Shekhar  
*Additional Secretary, Legal & Treaties Division (L&T), Ministry of External Affairs (MEA)*

Mr. S. K. Sibal  
*Member Design & Research, CWC, DoWR, RD&GR*

Mr. J.P. Singh  
*Joint Secretary, MEA*

Mr. A. K. Pal  
*Commissioner (Indus), DoWR, RD&GR*

Mr. Naveen Kumar  
*Senior Joint Commissioner (Indus), DoWR, RD&GR*

Mr. Narendra Singh Shekhawat  
*Director, CWC, DoWR, RD&GR*

Ms. Gitanjali Brandon  
*Deputy Secretary (Pakistan), MEA*

Ms. M. S. Harshitha (Harshita Harris)  
*Deputy Director, CWC*

Dr. Kumar Abhijeet  
*Legal Officer, L&T Division, MEA*

Mr. Vishal Kumar Saini  
*Executive Director (Design & Engineering) NHPC India Ltd. (National Hydroelectric Power Corporation) (NHPC), MoP*

Mr. Arunesh Bihari Dwivedi  
*Deputy General Manager (Civil), D&E Division, NHPC*

Mr. Harish Salve  
*Senior Advocate and KC (Lead Counsel)*

Mr. Ankur Talwar  
Mr. Anandh Venkataramani  
*Advocates (Counsel)*

Prof. G.R. Basson  
Prof. Dr. Anton J Schleiss  
*Technical experts*

**Pakistan**

H.E. Mr. Ahmad Irfan Aslam  
*Designated Representative, Minister of Law & Justice*

H.E. Mr. Mansoor Awan  
*Attorney General for Pakistan*

Mr. Syed Ali Murtaza  
*Federal Secretary, Ministry of Water Resources*

Mr. Syed Muhammad Mehar Ali Shah  
*Pakistan Commissioner for Indus Waters*

Mr. Ilyas Nizami  
*Director-General South Asia, Ministry of Foreign Affairs*

H.E. Mr. Aftab Ahmad Khokher  
*Ambassador of Pakistan to Austria*

Mr. Khalid Mahmood  
*General Manager, Water and Agriculture Division, National Engineering Services, Pakistan (NESPAK)*

Ms. Leena Nishtar  
*Office of the Attorney General for Pakistan*

Sir Daniel Bethlehem KC  
Mr. Sean Brannigan KC  
Dr. Cameron Miles

Ms. Laura Rees-Evans  
*Counsel*

Dr. Gregory L. Morris  
Mr. Peter J Rae  
*Technical advisors*

**Court Reporters**

Ms. Diana Burden  
Ms. Alice Stewart (attending remotely)

124. During the Second Meeting, both Parties made submissions to the Neutral Expert regarding the scheduling, scope and modalities of site visits, and provided initial comments on a draft itinerary for the first site visit prepared by the Neutral Expert. The Neutral Expert and the Parties also discussed the confidentiality of the Proceedings, questions arising from India's Memorial and potential amendments to the Work Programme.
125. On 13 October 2023, the Parties separately submitted proposed corrections to the transcript of the Second Meeting. Further amendments to the transcript were submitted on 20 and 30 October 2023 by Pakistan and India respectively. A final version of the transcript was circulated to the Parties on 15 November 2023.
126. On 22 September 2023, the Neutral Expert communicated to the Parties preliminary written questions arising from India's Memorial, expert reports, exhibits and annexures.
127. On 25 September 2023, Pakistan gave an assurance that it would abide by the Neutral Expert's directions on confidentiality of the Proceedings issued at the Second Meeting, together with the requirements of confidentiality provided in the Supplemental Rules. By the same correspondence, Pakistan reiterated an alternative five-pronged proposal on confidentiality in connection with the first site visit, previously presented at the Second Meeting.
128. On 27 September 2023, India recalled its position regarding the 2022 CoA and coordination between the present Proceedings and the 2022 CoA, and opposed Pakistan's assurance of confidentiality on the ground that Pakistan's "assurance and affirmation ... do not ... add to its existing confidentiality under [Paragraph] 14.3 [of the Supplemental Rules]". India also opposed Pakistan's confidentiality proposal. It proposed that the two Governments conclude a "binding agreement to put in place the necessary protocols" regarding confidentiality.
129. On 28 September 2023, Pakistan submitted its comments in response to India's letter, and, following from the Second Meeting, its proposals regarding the scheduling of site visits. It proposed a site visit to the RHEP and to the Dul-Hasti Hydroelectric Plant ("HEP") to take place

between 16 and 22 November 2023, and a 9-day visit to the KHEP, Baglihar HEP, Salal HEP, and Pakul Dul HEP to take place in June 2024.

130. On 9 October 2023, India reiterated its proposal for a binding bilateral agreement on confidentiality and government-to-government dialogue. Regarding the matter of site visits, India stated as follows:

as regards a site visit involving Pakistan, unless the prerequisite binding agreement on confidentiality is put in place jointly by both countries, no further progress is possible. It would therefore be more fruitful, in my view, to address these matters regarding the timing and modalities of the site visit(s) involving Pakistan after the parties have mutually resolved the confidentiality issue.

131. By letter dated 11 October 2023, the Neutral Expert made the following comments regarding the confidentiality of the proceedings and the prospect of holding a first site visit:

The Neutral Expert takes note of the Parties' correspondence on the issue of confidentiality following the Second Meeting, from which it emerges that no mutually agreeable solution was available at the time of writing. The Neutral Expert further notes from this correspondence that the unavailability of a solution may, for the time being, stand in the way of the organization of a site visit and possibly of the implementation of other procedural steps in these proceedings.

In this connection and to follow up on his comments at the Second Meeting, the Neutral Expert wishes to reiterate that, in his view, Paragraph 14(3) of the Supplemental Rules, which was adopted following extensive consultation with the Parties, establishes a rule on confidentiality that ought to be sufficient as a basis for these proceedings and for the implementation of all procedural steps required by the Neutral Expert, including the conduct of site visits and the production of data and information by the Parties.

The Neutral Expert acknowledges in this connection the express assurance in respect of compliance with Paragraph 14(3) given by Mr. Aslam, in his capacity as Designated Representative for Pakistan in these proceedings, in paragraph 3 of his letter of 25 September 2023.

Paragraph 14(3) of the Supplemental Rules establishes that, apart from information that may be published pursuant to Paragraphs 14(1) and (2), all aspects of these proceedings are to be treated as strictly confidential. In establishing this rule, Paragraph 14(3) protects any legitimate interest that the Parties may have in the maintenance of confidentiality in respect of materials and information submitted to the Neutral Expert in these proceedings. At the same time, the first clause of Paragraph 14(3) recognises that there may be circumstances in which it would be appropriate for the Neutral Expert to allow, by way of exception, the disclosure of certain aspects of the proceedings that are otherwise to be treated as strictly confidential. Whether or not an exception is warranted is a matter to be decided in the light of the specific circumstances in which a potential exception is considered, having regard to the nature of the materials or information for which the exception is sought and to the rights and interests of both Parties.

In addition, the Neutral Expert appreciates that the Parties are well aware of their commitment under the Treaty and the Supplemental Rules to extend to the Neutral Expert such facilities as he may require for the discharge of his function, including by giving him full and unrestricted access to any place or site and any technical data related to the differences between the Parties.

Having regard to the foregoing (and subject to changes to the timetable addressed under Item 4 of this letter), all previously-agreed steps in the Work Programme remain unchanged. For the avoidance of doubt, the Neutral Expert confirms that, in accordance with

Paragraph 5.1 of his Terms of Retainer, Paragraph 11.1 of the Supplemental Rules and general principles of due process and procedural fairness, any site visit by the Neutral Expert shall be carried out in the presence of representatives of both Parties.

The Neutral Expert thus urges the Parties to take the necessary actions toward the implementation of the steps in the Work Programme and other procedural directions of the Neutral Expert. Should a site visit prove impracticable in November 2023, the Neutral Expert will continue to work with the Parties to organize such a visit at the earliest appropriate time. That said, to the extent that any steps in the Work Programme or other procedural directions are not implemented, this may have consequences for these proceedings, including with respect to the Neutral Expert's evaluation of the evidence.

132. In the same letter, the Neutral Expert invited the Parties to consider a possible amendment to Paragraph 14(3) of the Supplemental Rules with a view to providing greater certainty regarding the confidentiality regime. The Neutral Expert also requested India to produce various information and data relevant to the Proceedings, some of which were identified in Pakistan's letter of 8 September 2023 and discussed in a preliminary manner at the Second Meeting. Further, the Neutral Expert invited India to confirm whether the authors of the reports submitted as exhibits IN-EX-12 and IN-EX-13 to its Memorial were being put forward by it as expert witnesses in the meaning of Paragraph 9.5 of the Supplemental Rules.
133. On 18 October 2023, India submitted its comments regarding the proposed amendment to Paragraph 14(3) of the Supplemental Rules, stating that it would not sufficiently address its concerns regarding confidentiality. It reiterated its position on the need for a binding bilateral agreement between the Parties following which it would be in a position to discuss other pending matters, including site visits. Moreover, India asserted that "absent a bilateral agreement India is not amenable to Pakistan's representatives being a part of any proposed site visit". Regarding the additional data and information requested by the Neutral Expert, India maintained its position that it "is not prepared to share any additional data/information or documents with Pakistan until it executes a binding bilateral agreement addressing India's confidentiality concerns". It requested an assurance from the Neutral Expert that any data and information provided by India would be disclosed to Pakistan only after the Parties had executed a bilateral confidentiality agreement.
134. On the same day, Pakistan also submitted its comments regarding the proposed amendment to Paragraph 14(3) of the Supplemental Rules, noting that an addition to the existing provision is neither needed nor warranted.
135. On 20 October 2023, Pakistan, in a further response to the Neutral Expert's letter of 11 October 2023, and to India's letter of 18 October 2023, asserted that "India's demands on confidentiality are without foundation in either fact or law". It objected to India's request for an assurance from the Neutral Expert, citing fundamental dictates of due process that proscribe *ex parte* communications and that are reflected in the Terms of Retainer. Pakistan further noted that India's



position negated the prospect of a site visit, and confirmed that its representatives and counsel had vacated the proposed November dates. Moreover, it requested that all dates in the Work programme be vacated pending further developments. In the same correspondence, Pakistan stated as follows:

Pakistan will now have to give careful consideration to whether there is any reason for the Neutral Expert process to continue in circumstances in which the Court of Arbitration has affirmed that it is competent in respect of the entirety of the dispute submitted to the Court pursuant to Pakistan's Request for Arbitration. As the dispute with which the Court is seised covers all of the issues engaged by India's Points of Difference that form the basis of the Neutral Expert's Terms of Retainer, it is unclear whether a Neutral Expert process that has effectively stalled due to India's obstructionism can have any continuing utility under Article IX of the Treaty.

136. On 30 October 2023, India opposed that it was holding hostage the Neutral Expert Proceedings and argued that Pakistan's approach on the confidentiality issue was an attempt to mix the Neutral Expert Proceedings and the proceedings before the 2022 CoA. It reiterated its position regarding a bilateral confidentiality agreement, which to India was a condition precedent to sharing any data and information with Pakistan. India agreed with Pakistan that a site visit in November 2023 was not viable, but asserted that the process pertaining to Paragraph 7 of Annexure F to the Treaty should in any event be allowed to proceed. Regarding Pakistan's assertion on the feasibility of the Proceedings, India stated that it "has full faith in the Neutral Expert process and remains ready to continue this Treaty-compliant process even in Pakistan's absence, should Pakistan elect to opt out".
137. In the same letter, India confirmed that IN-EX-13 submitted together with its Memorial, is in the nature of expert evidence and that it puts forward one of its authors, Dr. Kim Wium Olesen, as an expert witness. Regarding IN-EX-12, India clarified that this report had been prepared based on empirical evidence and was in the nature of documentary evidence.
138. On 2 November 2023, having considered the Parties' comments on the proposed amendment to Paragraph 14(3) of the Supplemental Rules, the Neutral Expert decided not to proceed with the proposed amendment. Regarding sharing of data with Pakistan, the Neutral Expert directed that:
- in accordance with Paragraph 5.1 of his Terms of Retainer, Paragraph 7.1 of the Supplemental Rules and general principles of due process and procedural fairness, any documents and information transmitted by India to the Registry will be conveyed to the Neutral Expert, the Technical Assistant and the representatives of Pakistan.
139. By the same correspondence, the Neutral Expert issued a revised Work Programme, amending the time limits for the process pertaining to Paragraph 7 of Annexure F to the Treaty and the submission of Pakistan's Counter-Memorial, and indicating that a first site visit would take place in an "[a]ppropriate period of at least 14 days in June 2024".

**E. DATA REQUESTS, ORGANIZATION OF FIRST SITE VISIT AND PARAGRAPH 7 WRITTEN SUBMISSIONS**

140. On 30 November 2023, India submitted various data and information requested by the Neutral Expert on 11 October 2023. It also requested the Neutral Expert “to seek from Pakistan an assurance in writing that it shall not disclose any of this data or material to the so called [2022] CoA”.
141. On 1 December 2023, the Neutral Expert indicated that India’s confidentiality concerns addressed in its letter of 30 November 2023 were adequately addressed by the confidentiality provisions in the Supplemental Rules.
142. On 1 February 2024, Pakistan submitted its statement on the competence of the Neutral Expert under Article IX(2)(a) and Paragraph 7 of Annexure F to the Treaty (“**Pakistan’s Statement**”), together with factual exhibits and legal authorities.
143. On 8 February 2024, the Neutral Expert proposed to communicate copies of his Terms of Retainer and his letter to the Parties dated 5 June 2023, setting out the terms of the PCA’s appointment as Registry and Secretariat, to the World Bank for purposes of facilitating the remuneration of the Neutral Expert, the Technical Assistant and the PCA under the Treaty. Each Party confirmed its agreement to this proposal on 15 February 2024.
144. On 27 February 2024, India submitted certain further data and information requested by the Neutral Expert on 11 October 2023.
145. On the same day, Pakistan applied for a revision of the schedule for the submission of its Counter-Memorial, stating that pending the Neutral Expert’s decision on Paragraph 7 issues, Pakistan was unable to determine the scope and content of its Counter-Memorial. To this end, it proposed either a suspension of the proceedings on merits, pending a determination of the Neutral Expert’s competence, or that the Counter-Memorial be scheduled for 13.5 months after the Neutral Expert’s decision on competence.
146. On 4 March 2024, India objected to Pakistan’s Statement, citing the submission’s “references to, and reliance on” the 2022 CoA, and requested that the Neutral Expert direct that his submission be returned and redrafted without any reference to the 2022 CoA, or that Pakistan give an undertaking that it would not make any reference to the 2022 CoA, or that the Neutral Expert give an assurance to the Parties that he would not take cognizance of any reference to the 2022 CoA.

147. On 6 March 2024, the Neutral Expert transmitted to the Parties for their comments a draft site visit protocol and invited the Parties to engage with each other regarding the organization of a site visit in June 2024 (the “**First Site Visit**”). The draft site visit protocol envisaged both a preparatory visit by the Parties’ engineering teams and the Technical Assistant and a visit by the full delegations of the Parties and the Neutral Expert. In his letter, the Neutral Expert explained the need to visit the KHEP, the RHEP, the Dul-Hasti dam, the Premnagar gauging station, the Baglihar reservoir and dam, and the Salal HEP.
148. On 8 March 2024, India proposed 20-28 June 2024 for the conduct of the First Site Visit, and suggested an itinerary for this visit.
149. On 11 March 2024, Pakistan opposed India’s proposals of 4 March 2024 regarding Pakistan’s Statement.
150. On 13 March 2024, the Neutral Expert dismissed India’s requests of 4 March 2024 reasoning that:
- granting India’s requests of 4 March 2024 would not be consonant with [Paragraph 6 of Annexure F to the Treaty] or general principles of due process and procedural fairness. Within the confines of the Treaty and, subsidiarily, the Supplemental Rules of Procedure dated 1 June 2023 (including the Work Programme as amended from time to time), the requirement to afford each Party an adequate hearing includes the requirement that each Party be permitted to make the submissions it wishes to make and be assured that those submissions will be given due consideration.
151. By the same correspondence, the Neutral Expert confirmed the availability of his delegation to conduct the First Site Visit from 20-28 June 2024.
152. On the same day, India, citing Pakistan’s letter of 11 March 2024 and that Pakistan had had over 5 months to prepare its Statement, requested that the Neutral Expert vacate the deadline for the submission of India’s reply to the Statement. It proposed that, “[o]nce the matter regarding the acceptability of Pakistan’s Paragraph 7 statement is resolved, the deadline for India’s reply can be appropriately reworked”.
153. Pakistan confirmed, on the same day, that it had no objection in principle to India’s request for an extension of the deadline for its Paragraph 7 reply.
154. Later on the same day, the Neutral Expert invited India’s further comments following from its letter and Pakistan’s response to these comments. The Neutral Expert also reminded the Parties to take into account his letter of earlier that day.

155. On 14 March 2024, India indicated that it did not in principle object to Pakistan's request for an extension of time to submit its Counter-Memorial, but opposed Pakistan's proposal regarding suspension of proceedings.
156. Pakistan submitted its comments regarding India's letter of 14 March 2024 on the same day. It clarified that it did not propose the suspension of proceedings and agreed that the Paragraph 7 proceedings should continue.
157. On 15 March 2024, India requested an extension until 31 May 2024 to submit its reply to Pakistan's Statement. Pakistan confirmed that it had no objection to this request on 21 March 2024.
158. On 24 March 2024, the Neutral Expert extended the deadline for the submission of India's Paragraph 7 reply to 31 May 2024, and decided that Pakistan's Counter-Memorial shall be filed within seven months of his Paragraph 7 decision, should such decision call for the continuation of the Proceedings.
159. By letters dated 26 March 2024, the Parties submitted their respective comments on the draft site visit protocol circulated by the Neutral Expert on 6 March 2024. Pakistan *inter alia* gave a formal undertaking that it would not make any application under Paragraph 14.3 of the Supplemental Rules in relation to the First Site Visit and any information or materials connected to it until at least after the issuance of the Neutral Expert's decision under Paragraph 7 of Annexure F to the Treaty.
160. On 10 April 2024, the Neutral Expert, having sought both Parties' availabilities, scheduled the Third Meeting to take place in Vienna, Austria on 10 and 11 September 2024.
161. By letters dated 9 and 15 April 2024, India and Pakistan, respectively, submitted further comments on the draft protocol and itinerary of the First Site Visit.
162. On 24 April 2024, the Neutral Expert communicated a further draft itinerary for the First Site Visit to the Parties for their comments, and circulated a revised site visit protocol, noting that the protocol was to be considered final, subject to the incorporation of the itinerary.
163. On 2, 3, 4, 8 and 10 May 2024, the Parties provided their comments on the draft itinerary for the First Site Visit circulated by the Neutral Expert on 24 April 2024.
164. On 14 May 2024, the Neutral Expert circulated a final version of the site visit protocol, including the itinerary, which was duly signed by each Party on 17 May 2024 (the "**Site Visit Protocol**").

The Site Visit Protocol provided that the First Site Visit would take place over a period of 12 days during the wet (high flow) season, from 17 to 28 June 2024 and would comprise a preparatory visit by the Parties' 2-member engineering teams and the Technical Assistant, as well as a further visit by the full delegations of the Neutral Expert and the Parties. For logistical reasons, each Party's full delegation for the First Site Visit was limited to 10 individuals. The Registry was also to hire a professional team to produce a photographic and videographic record of the site visit.

165. In his cover letter dated 14 May 2024, the Neutral Expert clarified certain aspects of the Site Visit Protocol as follows:

The Neutral Expert further notes that (i) members of the engineering teams for the preparatory visit should be considered as being included among the "technical experts" under Paragraph 3.1 of the Protocol; (ii) all "technical experts" under Paragraph 3.1 of the Protocol, including the members of the engineering teams for the preparatory visit, may have speaking roles during the site visit in accordance with Paragraph 6.1 of the Protocol; and (iii) all "technical experts" under Paragraph 3.1 of the Protocol, including the members of the engineering teams for the preparatory visit, may in due course participate in these proceedings as expert witnesses within the meaning of Paragraph 9.5 of the Supplemental Rules of Procedure (it being noted that pursuant to Paragraph 3.3 of the Protocol, only experts *in situ* are excluded from giving evidence on behalf of a Party in these proceedings).

Further, the Neutral Expert takes note of the Parties' differing positions on the definition of experts *in situ* under the Protocol. Paragraph 3.3 of the Protocol provides that such experts, while not members of the official delegations of the Parties, will be permitted to brief and assist the delegations *in situ*. For the Neutral Expert, the purpose of this provision is to recognize that there may be personnel working at the sites or closely associated with the sites who may be best placed to provide information regarding those sites to the delegations. As the purpose of the site visit is to inspect India's hydroelectric power projects, it is natural that in the present context it is India's experts *in situ* who will (if expedient) brief and assist the delegations. In the Neutral Expert's view, no procedural imbalance arises in this regard.

For completeness, the Neutral Expert notes that the size limit for delegations under Paragraph 3.3 of the Protocol was carefully set to keep the logistical burden of the site visit within reasonable bounds. Experts *in situ* do not count toward that size limit precisely because no particular travel or other arrangements would be required to enable them to assist the delegations.

166. In the same letter, the Neutral Expert also requested that India make best efforts to provide the remaining data originally requested on 11 October 2023 by 10 June 2024.
167. On 20 May 2024, India and Pakistan submitted details of certain administrative arrangements for the First Site Visit.
168. On 21 May 2024, the Neutral Expert, noting that a number of aspects of the logistical arrangements for the First Site Visit remained outstanding, issued a schedule of exchange of information regarding these arrangements. The schedule was subsequently revised by the Neutral Expert on a number of occasions in advance of the First Site Visit.

169. On 29 May 2024, the Neutral Expert issued a revised Work Programme to reflect previous directions. On 4 June 2024, following a request from India to which Pakistan did not object, the Neutral Expert extended the deadline for the submission of India's Paragraph 7 reply to Pakistan's Statement to 14 June 2024, and issued a revised Work Programme reflecting this direction.
170. From 27 May 2024 until the First Site Visit, the Neutral Expert, the Registry and the Parties also exchanged extensive correspondence regarding procedural and logistical matters relating to the First Site Visit, key aspects of which are recalled below.
171. On 4 June 2024, upon a request from India to which Pakistan did not object, the Neutral Expert extended the deadlines set in paragraph 6.5 of the Site Visit Protocol for the filing of, and comments on, electronic or hard copy materials meant to be distributed during presentations at the First Site Visit.
172. On 5 June 2024, India confirmed that all the members of its delegation to the First Site Visit would address the Neutral Expert and provided a list of the topics that its *in situ* experts would address.
173. On 6 June 2024, Pakistan submitted details of its expert who would make a presentation at the First Site Visit. In this correspondence, Pakistan objected to India's proposal that all members of its delegation would address the Neutral Expert at the First Site Visit, noting that the Site Visit Protocol limits the speaking role to members of each Party's engineering teams and India's *in situ* experts. It requested that the Neutral Expert direct India to (i) clarify whether any member of India's engineering team would be making any presentation, and (ii) confirm that each of its proposed *in situ* experts met the requirements laid down by the Site Visit Protocol and the Neutral Expert's letter of 14 May 2024.
174. On 8 June 2024, India (i) identified its technical experts for purposes of the First Site Visit, (ii) confirmed the members of its delegation who would be making presentations, and (iii) submitted a detailed by-the-hour itinerary and the presentational materials of its experts.
175. On the same day, Pakistan identified its technical experts for purposes of the First Site Visit and requested clarification on whether the Pakistan Commissioner for Indus Waters should also be regarded as a technical expert. Pakistan also submitted the presentational materials of its experts.
176. On 10 June 2024, India submitted certain data requested by the Neutral Expert on 11 October 2023 and 14 May 2024. In the same letter, India objected to the classification of the Pakistan Commissioner for Indus Waters as a technical expert for purposes of the First Site Visit.

177. On the same day, Pakistan submitted its comments in response to India's letter of earlier that day. Additionally, it noted that India had not distributed presentational materials which would be used by its *in situ* experts.
178. On 11 June 2024, the Neutral Expert (i) confirmed that the Pakistan Commissioner for Indus Waters would be regarded as a technical expert for purposes of the First Site Visit, and (ii) directed India to provide sufficient information to show that its experts *in situ* were personnel working at the sites or closely associated with the sites, and to indicate whether these experts would be relying on any materials in connection with their presentations.
179. On 12 June 2024, India indicated that its *in situ* experts (i) are persons who work or are closely associated with the respective sites, and (ii) would only be speaking about basic factual details of each site and that no presentational materials would be distributed in this regard.
180. By separate correspondence of the same day, India proposed a procedure for the photography and videography of the First Site Visit, noting that "the sites/ areas being visited are of significance for India, from defence and national security standpoint". Specifically, India asserted that (i) "[p]anoramic photographs or videos of the dam/powerhouse, and related structures and nearby areas will not be permitted", (ii) "[p]hotography and videography shall be strictly prohibited" when travelling "through (restricted areas/ defence installations/cantonments etc", (iii) "[p]hotography /videography from the helicopter is also strictly prohibited", and (iv) the raw video and photographic footage taken by the professional photographer/ videographer will need to be screened by the Government of India, before being handed over to the Registry for further processing and safe custody".
181. On 13 June 2024, Pakistan, *inter alia*, objected to India's proposed review of the video and photo record of the First Site Visit and proposed that any editorial review that the Neutral Expert considered to be warranted be undertaken in the presence and with the participation of the Registrar and a member of Pakistan's external counsel team. Pakistan also submitted its comments and counter-proposals to India's by-the-hour itinerary.
182. On 14 June 2024, the Neutral Expert, *inter alia*, directed the adoption of certain adjustments to the by-the-hour itinerary as proposed by Pakistan. Regarding the issue of screening of the site visit footage, the Neutral Expert directed as follows:

the Neutral Expert proposes that India's security screening of the photographs and video footage be carried out along the following broad lines, which may be refined further in the course of the site visit:

- At the end of the site visit (possibly, on 29 June 2024), the videographer will hand over the unedited photographic and video record on a permanent storage drive to (i) India's designated

officer for screening, and (ii) the Registry for temporary safekeeping. This will not include the audio record of the site visit, which will be handed over to the Registry only for permanent safe-keeping.

- Any modifications to the photographic and video record received from the videographer will be made by India's designated officer in consultation with the Registry (acting on the authority of the Neutral Expert) and a designated member of Pakistan's external counsel team. During the period of consultations, the designated member of Pakistan's external counsel team may view the unedited photographic and video record entrusted to the Registry for temporary safe-keeping.
- Once any redactions to the photographic and video record have been agreed, the Registry will destroy its copy of the unedited photographic and video record. It will keep the redacted version for safe-keeping and further processing (if any).

183. On the same day, 14 June 2024, India submitted its statement on the competence of the Neutral Expert under Article IX(2)(a) and Paragraph 7 of Annexure F to the Treaty ("**India's Reply**"), together with annexures and exhibits.
184. Later on the same day, Pakistan submitted that India had not provided a complete response to the data requests of 11 October 2023, and requested that the Neutral Expert direct India to provide the outstanding data and information as a matter of urgency considering that the data and information were intended to be provided to Pakistan and the Neutral Expert in advance of the First Site Visit.
185. On 15 June 2024, India, *inter alia*, (i) notified the Neutral Expert that given that the First Site Visit was imminent, it was constrained for time to accommodate the changes to the by-the-hour itinerary proposed in Pakistan's letter of 13 June 2024, and (ii) agreed generally to the procedure set out by the Neutral Expert for the security screening of the footage of the First Site Visit save for the involvement of Pakistan's representative in the process.
186. By the same correspondence, India provided two additional documents in response to the data requests of 11 October 2023.
187. On 16 June 2024, Pakistan asserted that India had failed to comply, or timely comply, with various directions of the Neutral Expert to India regarding the procedural and logistical arrangements, particularly in respect of visas and travel arrangements, for the First Site Visit and was thus in breach of, *inter alia*, Paragraph 8 of Annexure F to the Treaty. Pakistan also objected to India's proposal to exclude the participation of one of Pakistan's external counsel team from the review of the unedited photographic and video record of the First Site Visit, and submitted that the documents provided by India on 15 June 2024 did not fully address the relevant data requests.
188. By letter of the same day, 16 June 2024, the Neutral Expert, *inter alia*, (i) urged India to implement certain changes to the detailed itinerary of the First Site Visit and noted that other changes



proposed by Pakistan would be discussed during the site visit, and (ii) directed that the matter of restrictions on photography and videography would be discussed further in the course of the site visit. Further, the Neutral Expert noted that certain data requests had not been answered in full and that certain outstanding information and data in particular would enhance the utility of the upcoming First Site Visit. Accordingly, the Neutral Expert invited India to provide certain information and data by 17 June 2024, while indicating that other questions regarding the completeness of information and data provided by India would be revisited after the First Site Visit.

189. On 18 and 19 June 2024, India, *inter alia*, (i) opposed Pakistan's submission that India was in breach of Paragraph 8 of Annexure F to the Treaty, (ii) confirmed that it was in the process of implementing the changes to the by-the-hour itinerary of the First Site Visit as directed by the Neutral Expert, and (iii) indicated that given its work on the organization of the First Site Visit, it would only be able to address the data requests in due course.

**F. FIRST SITE VISIT AND FURTHER DATA REQUESTS**

190. In accordance with the Site Visit Protocol, the purpose of the First Site Visit was to engage in an exercise of fact-finding to facilitate the Neutral Expert's determination in due course of the differences of which he is seized (without prejudice to his eventual decision under Paragraph 7 of Annexure F to the Treaty as to whether any particular difference falls within his competence).
191. As planned in the Site Visit Protocol, the preparatory visit by the Technical Assistant and two-person engineering teams from each Party took place from 17 to 19 June 2024. India was represented by Mr. S.K. Sibal, Member (Design & Research), CWC, and Dr. Kim Wium Olesen. Pakistan was represented by Dr. Gregory L. Morris and Mr. Peter J. Rae.
192. The purpose of the preparatory visit was to ensure that the Technical Assistant and the engineering teams of both Parties would thereafter be adequately prepared to assist the Neutral Expert in his examination of the sites.
193. On 20 June 2024, the members of the delegations for the preparatory visit were joined in Srinagar by the Neutral Expert, the other members of his delegation and the Parties' full delegations. The Parties' and the Neutral Expert's delegations were composed of the following persons:

**Neutral Expert's Delegation**

Mr. Michel Lino  
*Neutral Expert*

Mr. Luc Deroo  
*Technical Assistant*

Ms. Evgeniya Goriatcheva  
*Registrar, PCA Senior Legal Counsel*

Ms. Balla Galma Godana  
*PCA Legal Counsel*

Ms. Polina Fedorova  
Mr. Alexei Antonov  
*Photography/Videography Team*

**India**

Ms. Debashree Mukherjee (on 20 and 28 June 2024 only)  
*Designated Representative; Secretary, Department of Water Resources, River Development & Ganga Rejuvenation (DoWR, RD&GR)*

Mr. Kushvinder Vohra  
*Chairman, Central Water Commission (CWC), DoWR, RD&GR*

Mr. S.K. Sibal  
*Member (Design & Research), CWC*

Mr. M.A.K.P. Singh  
*Member (Hydro), Central Electricity Agency (CEA)*

Mr. J.P. Singh  
*Joint Secretary, Ministry of External Affairs*

Mr. Darpan Talwar  
*Commissioner (Indus), DoWR, RD&GR*

Mr. V.K. Saini  
*Executive Director, NHPC Ltd*

Dr. Kim Wium Olesen  
Prof. (Dr.) Anton J. Schleiss  
Prof. Gerrit Roux Basson  
*Technical Experts*

Mr. Anandh Venkataramani  
*Counsel*

**Pakistan**

Mr. Syed Ali Murtaza  
*Federal Secretary, Ministry of Water Resources*

Mr. Syed Muhammad Mehar Ali Shah  
*Pakistan Commissioner for Indus Waters*

Mr. Muhammad Umar Farooq  
Mr. Tariq Javed Bhatti  
*Engineers*

Mr. Someir Siraj Khan  
*Attorney General's Office*

Sir Daniel Bethlehem KC

Professor Philippa Webb  
Dr. Cameron Miles  
*Counsel*

Dr. Gregory L. Morris  
Mr. Peter J. Rae  
*Technical Experts*

194. In Srinagar, technical presentations were made by both Parties. The itinerary for the following days was also discussed in the light of the Technical Assistant's and the engineering teams' experience during the preparatory visit. The PCA circulated a copy of slides prepared by the Technical Assistant, as well as a revised itinerary, to the Parties. On the following day, 21 June 2024, India submitted an electronic copy of the slide presentation made by one of its technical experts on 20 June 2024.
195. From 21 to 28 June 2024, the full delegations visited (i) the KHEP dam and reservoir, as well as the nearby gauging station at Achura bridge, (ii) the RHEP construction site, as well as the nearby Premnagar gauging station, and (iii) the dam of the Dul-Hasti HEP, located on the Chenab River in the Chenab Valley. At these sites, experts *in situ* explained the technical details of the design and operation of these projects and responded to queries and comments by the delegations. Although, contrary to the itinerary set out in the Site Visit Protocol, the delegations were not ultimately able to visit the Baglihar HEP, they met online with experts from that project in Jammu.
196. On 28 June 2024, the delegations travelled to Delhi, where a closing session to the First Site Visit was held. During that session, the Neutral Expert and the Parties *inter alia* discussed that certain data and information requested from India remained outstanding and a procedure for the security screening of the video and photo record of the First Site Visit by India.
197. On 2 and 3 July 2024, Pakistan and India respectively submitted written comments on the procedure for India's security screening of the video and photo record of the First Site Visit. In this correspondence, Pakistan also asked that India be requested to submit outstanding data and information as a matter of urgency, whereas India asked that Pakistan be directed to maintain full confidentiality in respect of all aspects of the First Site Visit, particularly in the context of a hearing of the 2022 CoA scheduled for July 2024.
198. On 4 July 2024, Pakistan provided further comments on the procedure for India's security screening of the video and photo record of the First Site Visit and indicated that it would not provide any further confidentiality undertakings in the light of Paragraph 14.3 of the Supplemental Rules and its previously-provided undertaking of 26 March 2024.

199. On 10 July 2024, the Neutral Expert (i) issued directions in relation to the security screening of the video and photo record of the First Site Visit, pursuant to which India could review the record and request modifications before the record was communicated to Pakistan and its external counsel; (ii) indicated that he considered neither a further confidentiality undertaking by Pakistan nor any further directions on the matter of confidentiality to be necessary or appropriate; and (iii) requested that India submit certain information and data (modifying and supplementing earlier data requests) by various dates in July, August and September 2024.
200. On 24 July 2024, India submitted a list of proposed modifications to the video and photo record of the First Site Visit.
201. On 26 July 2024, Pakistan requested that the Neutral Expert direct India to provide further information concerning its proposed modifications to the video and photo record of the First Site Visit on the basis that India had not fully complied with the directions of the Neutral Expert of 10 July 2024.
202. On 31 July 2024, India submitted various data requested by the Neutral Expert on 10 July 2024.
203. On 7 August 2024, India objected to Pakistan's position relating to the security screening of the video and photo record.
204. On 13 August 2024, the Neutral Expert issued further directions regarding the screening process, *inter alia* requesting additional information from India regarding the proposed modifications.
205. On 19 August 2024, India provided additional information regarding its proposed modifications.
206. By letter dated 26 August 2024, Pakistan indicated that it raised no objection to the proposed modifications being implemented by the videographer, but reserved "the right to revisit the issue of the proposed modifications if, once it has had sight of the modified footage and images, it considers that the modified material is inconsistent with the imperative of a faithful and effective record of the Site Visit".
207. On 30 August 2024, India submitted various data requested by the Neutral Expert on 10 July 2024.

**G. THIRD MEETING AND DEVELOPMENTS ON DATA REQUESTS AND THE RECORD OF THE FIRST SITE VISIT**

208. On 11 July 2024, the Neutral Expert confirmed that the Third Meeting, scheduled to take place on 10 and 11 September 2024, would be dedicated to submissions from the Parties and questions

from the Neutral Expert regarding his competence under Paragraph 7 of Annexure F to the Treaty. The Neutral Expert circulated a draft agenda for the Third Meeting for the Parties' comments and requested that Pakistan introduce into the record the primary sources and documents supporting its account of the origins and development of the disagreement between the Parties over the KHEP and the RHEP as set out in its Statement.

209. On 29 July 2024, the Parties provided their respective comments on the draft agenda for the Third Meeting, following which the Neutral Expert circulated a final agenda on 1 August 2024.
210. On 2 August 2024, Pakistan introduced documents into the record in response to the Neutral Expert's request of 11 July 2024.
211. On 21 August 2024, the Neutral Expert circulated a list of questions for the Parties to address in their opening submissions at the Third Meeting:

*The below questions are intended to assist the Parties in their preparations for the Third Meeting. They should not be understood as in any way limiting; each Party may address any and all questions that it deems relevant to the matters of competence presently before the Neutral Expert at the Third Meeting. To the extent certain questions are addressed to one Party only, this reflects the fact that the other Party may already have addressed those questions in its written submissions, but does not prevent that Party from addressing those questions further at the Third Meeting. The below questions are put to the Parties without prejudice to the Neutral Expert's eventual decision on any matters before him.*

#### **Questions to Pakistan**

1. At paragraph 5 of its Paragraph 7 Statement dated 14 June 2014 ("**India's Paragraph 7 Statement**"), India states that "Pakistan has directly or indirectly, on multiple occasions, admitted that the Points of Difference indeed fall within Part 1 of Annexure F." This statement is elaborated upon at, inter alia, paragraph 41 of India's Paragraph 7 Statement. Pakistan is invited to address this statement.
2. Pakistan is invited to address India's argument that "Pakistan invites the Neutral Expert to limit the scope of the plain language of the Treaty by inserting words of limitation in Article IX, which are conspicuous by their absence" (India's Paragraph 7 Statement, para. 13).
3. Pakistan is invited to address India's argument that "[t]he Neutral Expert is capable of and empowered to interpret and apply any part of the Treaty which may be related to or relevant for the resolution of the differences falling within Part 1 of Annexure F" (India's Paragraph 7 Statement, para. 24(b)).
4. Pakistan is invited to address the statements made in paragraphs 33, 34, 36 and 48 of India's Paragraph 7 Statement.

#### **Questions to India**

5. India is invited to address the "alternative submission" made at paragraphs 1.39 and 6.16-6.17 of Pakistan's Paragraph 7 Statement dated 1 February 2024 ("**Pakistan's Paragraph 7 Statement**"), as well as the request set out at paragraph 6.22(b) of Pakistan's Paragraph 7 Statement.
6. India is invited to indicate whether and/or to what extent it agrees with Pakistan's characterization of the Parties' disagreement regarding the awards and decisions of the Court of Arbitration in the Indus Waters Kishenganga Arbitration (PCA Case No. 2011-

01) (the “**Kishenganga Court**”) as described at paragraphs 4.53, 5.18-5.19, 5.22-5.24 and 5.27-5.29 of Pakistan’s Paragraph 7 Statement.

7. Are any of the disagreements referred to in the preceding question engaged by the “Points of Difference” set out in the enclosure to India’s letter to the World Bank dated 4 October 2016 and reproduced in Annex 1 to the Supplemental Rules of Procedure (the “**Points of Difference**”)?
8. India is invited to indicate whether and/or to what extent it agrees with Pakistan’s characterization of the Parties’ disagreement regarding the Baglihar Expert Determination dated 12 February 2007 (the “**Baglihar Determination**”) as described at paragraphs 4.70 and 5.38-5.39 of Pakistan’s Paragraph 7 Statement.
9. Are any of the disagreements referred to in the preceding question engaged by the Points of Difference?
10. At paragraph 5.46 of Pakistan’s Paragraph 7 Statement, it states that “[d]etermining which of India or Pakistan is correct will require a comprehensive consideration of the Treaty as a whole, in the light of the rules of treaty interpretation in international law, the Treaty’s drafting history, international caselaw (including Baglihar and Kishenganga), and scholarly commentaries. These aspects are comprehensively beyond the competence of the Neutral Expert, on any reading of that competence.” India is invited to address these statements.
11. Can the Neutral Expert decide the Points of Difference without addressing each of the following matters:
  - (i) the proper method of pondage calculation under the Treaty;
  - (ii) the relevance and applicability of the Baglihar Determination;
  - (iii) the relevance and applicability of the awards and decisions of the Kishenganga Court, including, in particular, the relevance and applicability of its ruling on drawdown flushing?

#### **Questions to both Parties**

12. Should the Neutral Expert answer the preceding question in the negative, finding, for example, that he is required to address some or all of the three matters listed therein in order to decide the Points of Difference, would that take some or all of the Points of Difference outside of his competence under the Treaty? Or, conversely, would that take the three matters in question within his competence as necessary to address Points of Difference that otherwise fall within Part 1 of Annexure F to the Treaty?
  13. The Parties are invited to address the relevance, if any, of Paragraph IX(6) of the Treaty, referred to in paragraph 23 of India’s Paragraph 7 Statement, to the question of competence of the Neutral Expert to decide the Points of Difference.
  14. The Parties are invited to address the relevance, if any, of Paragraph 13 of Annexure F to the Treaty to the question of competence of the Neutral Expert to decide the Points of Difference.
212. On 5 September 2024, Pakistan requested leave to introduce seven new documents relating to the 2022 CoA and one news report into the record of the proceedings for reference during the Third Meeting. India opposed this request on 6 September 2024, and Pakistan responded to India’s opposition on the same day. On 7 September 2024, the Neutral Expert granted Pakistan’s request to introduce the documents.
213. On 10 September 2024, both Parties submitted documents to which they intended to refer during the Third Meeting.

214. On 11 September 2024, Pakistan submitted electronic copies of the slides and three legal authorities that its counsel planned to rely on that morning at the Third Meeting. In response, on the same day, India submitted a “General Report” produced by its Central Electricity Authority entitled “Preliminary Ranking Study of Hydro Electric Schemes”.
215. On 10 and 11 September 2024, the Third Meeting of the Neutral Expert with the Parties was held at the premises of the PCA at the Imperial Hofburg Palace in Vienna, Austria. The following persons were present:

**Neutral Expert**  
Mr. Michel Lino

**Technical Assistant**  
Mr. Luc Deroo

**Permanent Court of Arbitration**  
Ms. Evgeniya Goriatcheva  
*Registrar, Senior Legal Counsel*

Ms. Balla Galma Godana  
Ms. Iris Koberg  
*Legal Counsel*

**India**  
Ms. Debashree Mukherjee  
*Designated Representative and Leader of the Delegation; Secretary, Department of Water Resources, River Development & Ganga Rejuvenation (DoWR, RD&GR)*

Mr. Kushvinder Vohra  
*Chairman and Ex-Officio Secretary, Central Water Commission (CWC), DoWR, RD&GR*

Ms. Uma Shekhar  
*Additional Secretary, Legal & Treaties Division (L&T), Ministry of External Affairs (MEA)*

Mr. J.P. Singh  
*Joint Secretary, MEA*

Mr. Darpan Talwar  
*Commissioner (Indus), DoWR, RD&GR*

Mr. Vivek Tripathi  
*Chief Engineer, CWC, DoWR, RD&GR*

Mr. Sharvan Kumar  
*Chief Engineer (Hydro Power Planning & Investigation (HPP&I)), Central Electricity Agency (CEA), Ministry of Power (MoP)*

Ms. Chitranga Singh  
*Director, MEA*

Mr. Naveen Kumar  
*Senior Joint Commissioner (Indus), DoWR, RD&GR*

Mr. Narendra Singh Shekhawat  
*Director, CWC, DoWR, RD&GR*

Mr. Samarth Agarwal  
*Director, CWC, DoWR, RD&GR*

Dr. Kumar Abhijeet  
*Legal Officer, L&T Division, MEA*

Mr. Vishal Kumar Saini  
*Executive Director (Design & Engineering) NHPC India Ltd. (National Hydroelectric Power Corporation) (NHPC), MoP*

Mr. Shrish Dubey  
*General Manager (Civil), NHPC, MoP*

Ms. Nidhi Dhiman  
*First Secretary, Embassy of India, Vienna*

Mr. Harish Salve  
*Senior Advocate and KC (Lead Counsel)*

Ms. Chetna Rai  
Mr. Anandh Venkataramani  
*Advocate (Counsel)*

Prof. G.R. Basson  
Dr. Kim Wium Olesen  
*Technical Experts*

**Pakistan**

Mr. Ahmad Irfan Aslam  
*Designated Representative*

Mr. Syed Ali Murtaza  
*Federal Secretary, Ministry of Water Resources*

Mr. Syed Muhammad Mehar Ali Shah  
*Pakistan Commissioner for Indus Waters*

Mr. Ilyas Nizami  
*Director-General South Asia, Ministry of Foreign Affairs*

Mr. Assad Khan Burki  
*Legal Adviser, Ministry of Foreign Affairs*

H.E. Mr. Kamran Ali Akhtar  
*Ambassador of Pakistan to Austria*

Mr. Adeel Ahmed Khan  
*Deputy Head of Mission, Embassy of Pakistan, Vienna*

Mr. Hassan Abbas  
*Head of Chancery, Embassy of Pakistan, Vienna*

Sir Daniel Bethlehem KC  
Professor Philippa Webb  
Dr. Cameron Miles  
Ms. Laura Rees-Evans  
Mr. Abdullah Tariq  
*Counsel*



**Court Reporters**

Ms. Diana Burden

Ms. Ann Lloyd (attending remotely)

216. On 27 September and 3 October 2024, Pakistan and India respectively submitted proposed corrections to the transcript of the Third Meeting. A final version of the transcript was circulated to the Parties on 14 October 2024.
217. On 30 September 2024, India submitted various data and information requested by the Neutral Expert on 10 July 2024.
218. On 4 October 2024, Pakistan submitted a list of data and information that it considered outstanding and asked “that India provides the requested information no later than the date of the Neutral Expert’s Paragraph 7 Decision”.
219. On 28 November 2024, the Neutral Expert observed that, while India had submitted some of the requested data and information, other data and information remained pending either in whole or in part. The Neutral Expert accordingly compiled an updated list of requested data and information and indicated that, should his decision on Paragraph 7 issues require the proceedings to continue, India would be requested to provide all relevant pending information and data within two weeks of the issuance of the decision.
220. In his letter of 28 November 2024, the Neutral Expert also invited the Parties to consider the possibility of publishing certain materials pertaining to the Paragraph 7 process, such as the Parties’ oral and written submissions, simultaneously with the publication of the decision on Paragraph 7 issues, which was provided for in the Supplemental Rules. Additionally, the Neutral Expert notified the Parties of his understanding that Paragraph 13.2 of the Supplemental Rules regarding the communication of draft decisions to the Parties does not apply to the decision on Paragraph 7 issues.
221. On the same day, 28 November 2024, the PCA informed the Parties that India’s proposed modifications to the photo and video record of the First Site Visit had been completed, and that the amended version of the record would be provided to India (only) for its review. The amended footage of the First Site Visit was provided to India on the same day.
222. On 5 December 2024, India requested additional modifications to the photo and video record of the First Site Visit.

223. By letter dated 11 December 2024, Pakistan, *inter alia*, agreed to the publication of additional materials together with the Neutral Expert's decision on Paragraph 7 issues and confirmed its acceptance of the Neutral Expert's understanding regarding the non-applicability of the last two sentences of Paragraph 13.2 of the Supplemental Rules to the Neutral Expert's Paragraph 7 decision.
224. In the same correspondence of 11 December 2024, Pakistan, citing delays in the Neutral Expert Proceedings "which have given cover for India to race ahead with RHEP construction", made an application to the Neutral Expert to give directions "to secure a meaningful Neutral Expert process but also safeguard Pakistan's right to a fair and effective procedure".
225. On 12 December 2024, India opposed the publication of additional materials together with the Neutral Expert's decision on Paragraph 7 issues. India also confirmed its agreement with the Neutral Expert's understanding that the last two sentences of Paragraph 13.2 of the Supplemental Rules were inapplicable to the decision on Paragraph 7 issues.
226. By letter dated 12 December 2024, the Neutral Expert noted that India's proposed additional modifications to the photographs of the First Site Visit may reduce the amount of information on the photographs and diminish the utility of the record. On this basis, he invited India to reconsider the extent of its proposed additional modifications and invited Pakistan's comments in response to India's proposals. Regarding the video footage, the Neutral Expert noted that this would be modified in accordance with India's proposals, following which the Parties would be provided with access to the video footage and transcript of the First Site Visit.
227. On 16 December 2024, India agreed to limit certain additional modifications to the photographs of the First Site Visit.
228. On 18 December 2024, India opposed Pakistan's application for directions of 11 December 2024.
229. On 20 December 2024, Pakistan reiterated its position regarding the modifications to the photo and video record of the First Site Visit indicated in its letter of 26 August 2024. Noting that it was unable to comment on the effect of India's proposed modifications having had no sight of the record, and recalling its concerns that India's proposals had "become detached from the narrow national security concern first expressed by India", Pakistan reserved its right to revisit the issue once it had access to the modified footage and images. Pakistan then requested the Neutral Expert to "direct that the only modifications that are acceptable are those that preserve an authentic and effective photographic record of the Site Visit".

230. On 24 December 2024, the Neutral Expert directed that in view of the Parties' respective position and Paragraph 14 of the Supplemental Rules only his decision on Paragraph 7 issues would be made publicly available. Regarding the issue of the modifications to the photographs of the First Site Visit, the Neutral Expert confirmed that the modifications would be carried out as proposed by India on 16 December 2024 and took note of Pakistan's reservations. The Neutral Expert also notified the Parties that he would revert to Pakistan's request for directions of 11 December 2024 if and as needed, following the issuance of the decision on Paragraph 7 issues.
231. On the same day, the Registry transmitted the video record and the transcript of the First Site Visit to the Parties. The photo record was transmitted to the Parties on 31 December 2024.

#### **IV. FACTUAL BACKGROUND**

##### **A. THE INDUS SYSTEM OF RIVERS**

232. As noted above, the Treaty governs the Indus system of rivers and sets forth the mutual rights and obligations of the Parties concerning the use of the waters of these rivers.<sup>1</sup>
233. The Indus system of rivers consists of six main rivers and their tributaries: the Sutlej, the Beas and the Ravi, which comprise the "Eastern Rivers"; and the Indus, the Jhelum and the Chenab, which comprise the "Western Rivers".<sup>2</sup> These rivers and their tributaries originate primarily in the Himalayas and flow through Afghanistan, China, India and Pakistan. They join the Indus River, which flows into the Arabian Sea south-east of the Pakistani port of Karachi. The main source of water for these rivers is precipitation (rain and snow) in the lower and middle Himalayas at altitudes of 3,000 to 16,000 feet above sea level.<sup>3</sup>

##### **B. THE HYDROELECTRIC PROJECTS**

234. The KHEP is a run-of-river hydroelectric plant located in the Gurez Valley on the Kishenganga/Neelum River, a major tributary of the Jhelum. It was commissioned in March 2018.<sup>4</sup> The KHEP has an installed generating capacity of 330 megawatt ("MW"). It comprises a concrete faced rockfill dam across the Kishenganga/Neelum River with a maximum

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<sup>1</sup> *Indus Waters Kishenganga Arbitration (Pakistan v. India)*, PCA Case No. 2011-01, Partial Award, 18 February 2013, 31 Rep. of Intl. Arb Awards 1, para. 126 (IN-EX-10) (hereinafter "*Kishenganga Partial Award*").

<sup>2</sup> Treaty, Article I(3), (5)-(6); *Kishenganga Partial Award*, para. 128 (IN-EX-10).

<sup>3</sup> India's Memorial, para. 2; *Kishenganga Partial Award*, paras. 128, 129 (IN-EX-10).

<sup>4</sup> India's Memorial, para. 46; *Kishenganga Partial Award*, para. 129 (IN-EX-10).

height of 37 meters above the lowest level of the river bed and a reservoir with a gross storage capacity of 18.35 million cubic meters (“MCM”) of water.<sup>5</sup> The approximate location of the dam is [34°38’57”N; 74°45’05”E].

235. The RHEP is a run-of-river hydroelectric plant, presently under construction on the Chenab River in the Chenab Valley. The RHEP is designed to have an installed generating capacity of 850 MW. It will consist of a 133-meter-high concrete dam with a gross storage capacity of 78.71 MCM.<sup>6</sup> The approximate location of the dam is [33°10’47”N; 75°48’16”E].

## C. THE INDUS WATERS TREATY 1960

### 1. Historical Background

236. Negotiations for a treaty to regulate the use of the waters of the Indus system of rivers became necessary after the partition of India in 1947, which left either part or all of the upper reaches of the six main rivers of the Indus river system in India, while their lower reaches flowed through Pakistan. A temporary treaty to share the use of those waters expired on 31 March 1948.<sup>7</sup>
237. The negotiations on the Treaty were initiated in response to the cessation of water flow in the canals from East Punjab to West Punjab in April 1948. Despite the two states subsequently reaching an agreement and restoring the water supply within a month, the incident brought to light the differing views held by the two states on their respective rights and obligations regarding the waters of the Indus river system.<sup>8</sup>
238. After several years of negotiations under the auspices of the World Bank, the Treaty was signed by the Parties and the World Bank<sup>9</sup> on 19 September 1960 and entered into force on 12 January 1961, with retroactive effect from 1 April 1960.<sup>10</sup>

### 2. The Structure of the Treaty

239. The Treaty contains a Preamble followed by twelve Articles and eight Annexures.

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<sup>5</sup> India’s Memorial, para. 47.

<sup>6</sup> India’s Memorial, para. 56.

<sup>7</sup> *Kishenganga* Partial Award, para. 131 (IN-EX-10).

<sup>8</sup> *Kishenganga* Partial Award, para. 132 (IN-EX-10).

<sup>9</sup> The Treaty was signed by the World Bank for the purposes specified in Articles V (“Financial Provisions”) and X (“Emergency Provision”) and Annexures F, G and H.

<sup>10</sup> *Kishenganga* Partial Award, para. 138 (IN-EX-10).

240. According to the Preamble:

The Government of India and the Government of Pakistan, being equally desirous of attaining the most complete and satisfactory utilisation of the waters of the Indus system of rivers and recognising the need, therefore, of fixing and delimiting, in a spirit of goodwill and friendship, the rights and obligations of each in relation to the other concerning the use of these waters and of making provision for the settlement, in a cooperative spirit, of all such questions as may hereafter arise in regard to the interpretation or application of the provisions agreed upon herein, have resolved to conclude a Treaty in furtherance of these objectives,  
[...]

241. Article I sets out Treaty definitions, including the distinction between “Eastern Rivers” and “Western Rivers”, as described at paragraph 233 above.

242. Articles II to IV contain provisions relating to the reciprocal rights and obligations of the Parties in respect of the Eastern and the Western Rivers. Article III provides for the “unrestricted use” by Pakistan of all the waters of the Western Rivers, including the Indus, the Jhelum, the Chenab and their tributaries, which India is under an obligation to “let flow”<sup>11</sup> and imposes an obligation on India to “let flow” and “not permit any interference with” the waters of the Western Rivers, subject to certain exceptions.<sup>12</sup> Under Article III(2)(d), these exceptions include the generation of hydroelectric power, as set out in Annexure D to the Treaty.

243. Articles V to VII contain provisions on financial contributions by India, the exchange of data “with respect to the flow in, and utilisation of the waters of the rivers” and future cooperation between the Parties.<sup>13</sup>

244. Article VIII of the Treaty establishes the Permanent Indus Commission (the “**Commission**”), comprised of two Commissioners for Indus Waters, one to be appointed by each of the Parties (the “**Indian Commissioner for Indus Waters**” or “**ICIW**” and “**Pakistan Commissioner for Indus Waters**” or “**PCIW**”; together, the “**Commissioners**”). Pursuant to Article VIII, the Commission serves as the regular channel of communication for all matters relating to the implementation of the Treaty. Its purpose and functions are to “establish and maintain co-operative arrangements for the implementation” of the Treaty and “to promote co-operation between the Parties in the development of the waters of the Rivers”. The Commission meets regularly, at least once a year and at the request of either Commissioner, alternately in India or Pakistan. It submits annual reports on its work to the Governments of India and Pakistan.<sup>14</sup>

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<sup>11</sup> Treaty, Article III(1).

<sup>12</sup> Treaty, Article III(2).

<sup>13</sup> Treaty, Articles V (“Financial Provisions”), VI (“Exchange of Data”), VII (“Future Co-operation”).

<sup>14</sup> Treaty, Article VIII (“Permanent Indus Commission”).

245. As noted above, Article IX of the Treaty sets forth a system for the settlement of questions, differences and disputes that may arise under the Treaty. It is reproduced in full at paragraph 7 above.
246. Article X contains provisions on the role that the World Bank would have had if the outbreak of hostilities before 31 March 1973 had prevented Pakistan from fulfilling its obligations under Article IV(1) of the Treaty.<sup>15</sup>
247. Articles XI and XII contain final provisions in relation to, *inter alia*, the scope of the Treaty and its ratification.<sup>16</sup>
248. These provisions are followed by eight Annexures.
249. Of relevance to these Proceedings, Annexure D to the Treaty regulates the generation of hydroelectric power by India on the Western Rivers.<sup>17</sup> Paragraph 1 of Annexure D provides that it shall apply with respect to the use by India of the waters of the Western Rivers for the generation of hydroelectric power under the provisions of Article III(2)(d) of the Treaty and that, subject to the provisions of Annexure D, such use shall be unrestricted, provided that the design, construction and operation of new hydroelectric plants incorporated in a storage work (as defined in Annexure E) shall be subject to the relevant provisions of Annexure E.
250. Paragraph 2 of Annexure D contains definitions for the purposes of Annexure D, including the definitions of “Dead Storage”, “Live Storage”, “Pondage”, “Full Pondage Level”, “Operating Pool”, “Run-of-River Plant” and “Firm Power”.
251. Part 3 of Annexure D, which comprises its Paragraphs 8 to 23, sets out rules that apply to the design and operation of new run-of-river plants.
252. Annexure E to the Treaty governs the storage of water on the Western Rivers and the construction and operation of Storage Works thereon by India.<sup>18</sup>
253. As noted above, Annexures F and G to the Treaty respectively concern the referral of differences and disputes arising under the Treaty for determination by a neutral expert or a court of arbitration.

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<sup>15</sup> Treaty, Article X (“Emergency Provision”).

<sup>16</sup> Treaty, Articles XI (“General Provisions”), XII (“Final Provisions”).

<sup>17</sup> Treaty, Annexure D, Paragraph 1.

<sup>18</sup> Treaty, Annexure E (“Storage of Waters by India on the Western Rivers”).

**D. PROCEEDINGS UNDER ARTICLE IX OF THE TREATY**

254. In addition to these Proceedings, the Parties have invoked Article IX and Annexures F and G to the Treaty to commence proceedings under the Treaty on three other occasions.

**1. Neutral Expert Determination in Respect of the Baglihar Hydroelectric Plant (“*Baglihar*”)**

255. On 15 January 2005, Pakistan requested that the World Bank appoint a neutral expert in accordance with Article IX and Annexure F to the Treaty to decide differences that had arisen between the Parties in respect of the design of the Baglihar hydroelectric plant, a run-of-river plant located on the Chenab River.<sup>19</sup>

256. The following points of difference were submitted to the neutral expert:

- a. **Pakistan is of the considered view that the design of the Baglihar Plant on the Chenab Main does not conform to criteria (e) and (a) specified in Paragraph 8 of Annexure D to the Indus Waters Treaty 1960 and that the Plant design is not based on correct, rational and realistic estimates of maximum flood discharge at the site.**

The Indian side does not agree with Pakistan’s position.

- b. **Pakistan is of the considered view that the Pondage of 37.722 MCM exceeds twice the Pondage required for Firm Power in contravention of Paragraph 8(c) of Annexure D to the Treaty.**

The Indian side does not agree with Pakistan’s position.

- c. **Pakistan is of the considered view that the intake for the turbines for the Plant is not located at the highest level consistent with satisfactory and economical construction and operation of the Plan as a Run-of River Plant and is in contravention of Paragraph 8 (f) of Annexure D to the Treaty.**

The Indian side does not agree with Pakistan’s position.<sup>20</sup>

257. The neutral expert appointed by the World Bank, Professor Raymond Lafitte, issued his determination on these differences on 12 February 2007 (the “*Baglihar Determination*”).

**2. Indus Waters Kishenganga Arbitration (“*Kishenganga*”)**

258. Article IX of the Treaty was again invoked when Pakistan initiated arbitration proceedings against India through a Request for Arbitration dated 17 May 2010.<sup>21</sup>

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<sup>19</sup> *Baglihar Hydroelectric Plant (Pakistan v. India)*, Neutral Expert Determination on Points of Difference Regarding the Baglihar Hydroelectric Plant Referred by the Government of Pakistan under the Provisions of the Indus Waters Treaty, 12 February 2007 (hereinafter “*Baglihar Determination*”) (IN-EX-9).

<sup>20</sup> *Baglihar Determination*, Section 2, p. 6 (IN-EX-9).

<sup>21</sup> *Kishenganga Partial Award*, para. 4 (IN-EX-10).

259. The Request for Arbitration referred two disputes to a court of arbitration for determination:

- a. Whether India's proposed diversion of the river Kishenganga (Neelum) into another Tributary, i.e. the Bonar-Madmati Nallah, being one central element of the Kishenganga Project, breaches India's legal obligations owed to Pakistan under the Treaty, as interpreted and applied in accordance with international law, including India's obligations under Article III(2) (let flow all the waters of the Western rivers and not permit any interference with those waters) and Article IV(6) (maintenance of natural channels)?
- b. Whether under the Treaty, India may deplete or bring the reservoir level of a run-of-river Plant below Dead Storage Level (DSL) in any circumstances except in the case of an unforeseen emergency?<sup>22</sup>

260. The court of arbitration in that matter (the "**Kishenganga Court**") issued a partial award on these disputes on 18 February 2013 (the "**Kishenganga Partial Award**") and a final award on 20 December 2013.

261. On 20 December 2013, the *Kishenganga Court* also issued a decision addressing a request submitted by India for the clarification and interpretation of the *Kishenganga Partial Award*.<sup>23</sup>

### 3. Indus Waters Treaty Arbitration

262. As noted at paragraph 17 above, Article IX of the Treaty was also invoked when Pakistan initiated arbitration proceedings against India through a Request for Arbitration dated 19 August 2016.<sup>24</sup> The context in which those proceedings were initiated is touched upon in the following section of this Decision.

263. Through its Request, Pakistan sought to resolve "certain issues that have arisen between the parties concerning the interpretation or application of various parts of the Treaty governing the design or operation of run-of-river hydro-electric plants ... on the Indus, Jhelum and Chenab Rivers and their tributaries ...".<sup>25</sup>

264. The 2022 CoA was empanelled in October 2022, following which it issued an award on its competence on 6 July 2023 (the "**Competence Award**").<sup>26</sup> A phase on the merits is currently underway in those proceedings.

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<sup>22</sup> *Kishenganga Arbitration*, Pakistan's Request for Arbitration, 17 May 2010, para. 4 (**PK-36**).

<sup>23</sup> *Kishenganga Arbitration*, Decision on India's Request for Clarification or Interpretation dated 20 May 2013, 20 December 2013 (**PKA-4**).

<sup>24</sup> *Indus Waters Treaty Arbitration (Pakistan v. India)*, PCA Case No. 2023-01 (hereinafter "**Indus Waters Arbitration**"), Award on the Competence of the Court, 6 July 2023 (hereinafter "**Competence Award**"), para. 3 (**PKA-1**).

<sup>25</sup> *Indus Waters Arbitration*, Competence Award, para. 3 (**PKA-1**).

<sup>26</sup> *Indus Waters Arbitration*, Competence Award (**PKA-1**).



265. India does not participate in the arbitration before the 2022 CoA, for the reasons explained at paragraphs 28, 56 and 57 above and paragraphs 494 and 496 below.

**E. HISTORY OF THE DISAGREEMENT BETWEEN THE PARTIES**

266. The disagreement between the Parties originated in 1994, when India first notified Pakistan of its intention to construct a hydroelectric power plant on the Kishenganga/Neelum River.

267. The KHEP was initially conceived by India as a storage work under Annexure E to the Treaty, rather than a run-of-river plant under Annexure D.<sup>27</sup> Consequently, on 2 June 1994, India provided Pakistan with information on the KHEP in accordance with Paragraph 12 of Annexure E to the Treaty.

268. On 8 September 1994, Pakistan raised objections to the design of the KHEP. Pakistan's objections were based on the grounds that the KHEP: (i) "contravenes the provisions of paragraph 10 of Annexure E to the Treaty", (ii) "incorporates the diversion of flow of one Tributary (Kishenganga) to another Tributary (Bonar-Madmati Nallah) of the river Jhelum, which is not provided under the provisions of Annexure E to the Treaty", and (iii) "does not conform to the criteria mentioned in paragraph 11 of Annexure E to the Treaty".<sup>28</sup>

269. Following several years of discussions, India informed Pakistan on 21 May 1999 that the design of the Kishenganga storage work was "likely to undergo some minor modifications".<sup>29</sup>

270. The objections raised by Pakistan were also discussed at certain meetings of the Commission.<sup>30</sup> In the absence of progress on Pakistan's objections during these meetings, Pakistan notified India on 7 February 2006 "that a dispute ... to be settled in accordance with Articles IX(3), (4) and (5) of the Treaty has arisen".<sup>31</sup>

271. On 20 April 2006, India informed Pakistan that the KHEP had been "reconfigured ... as a Run-of-River Hydroelectric Plant".<sup>32</sup>

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<sup>27</sup> Letter from the ICIW to the PCIW, No. 3(7)/82-IT/708, 2 June 1994 (**PK-14**).

<sup>28</sup> Letter from the PCIW to the ICIW, No. WT(132)/(5446-A)/PCIW, 8 September 1994, paras. 2, 3, 5(c) (**PK-15**).

<sup>29</sup> Letter from the ICIW to the PCIW, No. 9(3)/98-IT/909, 21 May 1999 (**PK-17**).

<sup>30</sup> *See e.g.* Record of the 92<sup>nd</sup> Meeting of the Permanent Indus Commission, 29 November 2004 (**PK-18**).

<sup>31</sup> Letter from the PCIW to the ICIW, No. WT(132)/(6662-A)/PCIW, 7 February 2006 (**PK-19**).

<sup>32</sup> Letter from the ICIW to the PCIW, No. 3/7/82-IT/1216, 20 April 2006 (**PK-21**).

272. On 19 June 2006, India provided Pakistan with revised information on the KHEP.<sup>33</sup> Following receipt of the new information, Pakistan noted on 24 August 2006 that the KHEP was a “new Run-of-River Plant” that had to be assessed *de novo* under Annexure D and that the information provided by India was incomplete. It also raised objections regarding the new design of the KHEP under Annexure D, as well as the proposed diversion of the Kishenganga/Neelum River by India. The letter concluded:

[I]t is Pakistan’s position that the proposed design of the Kishenganga Plant is violative of the Treaty. India is therefore requested to amend the design of the Kishenganga Plant to ensure its compliance with the Treaty.<sup>34</sup>

273. India rejected Pakistan’s objections on 25 May 2007. In India’s view, no changes were required in the ongoing construction work due to design changes.

274. In a letter dated 4 February 2008, the PCIW identified certain questions for examination by the Commission under Article IX(1) of the Treaty.<sup>35</sup> These questions, which were discussed in detail by the Commission at its 100<sup>th</sup> meeting from 31 May to 4 June 2008 and its 101<sup>st</sup> meeting from 25 to 28 July 2008, were:

Question/Issue No. 1

Whether India’s proposed diversion of the river Kishenganga (Neelum) into another Tributary, i.e. the Bonar-Madmati Nallah, being one central element of the Kishenganga Plant, breaches India’s legal obligations owed to Pakistan under the Treaty, as interpreted and applied in accordance with international law, including India’s obligations under Article III(2) (let flow all the waters of the Western rivers and not permit any interference with those waters) and Article IV(6) (maintenance of natural channels)?

[...]

Question/Issue No. 2

Whether the design of the Kishenganga Plant is in conformity with Paragraph 8(a) of Annexure D to the Treaty?

[...]

Question/Issue No. 3

Whether the design of the Kishenganga Plant is in conformity with Paragraph 8(c) and Paragraph 8(f) of Annexure D to the Treaty?

[...]

Question/Issue No. 4

Whether the design of the Kishenganga Plant is in conformity with Paragraph 8(d) of Annexure D to the Treaty?

[...]

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<sup>33</sup> Letter from the ICIW to the PCIW, No. 3/7/82-IT/1228, 19 June 2006 (**PK-22**).

<sup>34</sup> Letter from the PCIW to the ICIW, No. WT(132)/(6713-A)/PCIW, 24 August 2006 (**PK-23**).

<sup>35</sup> Letter from the PCIW to the ICIW, No. WT(132)/(6839-A)/PCIW, 4 February 2008 (**PK-26**).

Question/Issue No. 5

Whether the design of the Kishenganga Plant is in conformity with Paragraph 8(e) of Annexure D to the Treaty?

[...]

Question/Issue No. 6

Whether under the Treaty, India may deplete or bring the reservoir level of a run-of-river Plant below dead storage level in any circumstances except in the case of an unforeseen emergency?<sup>36</sup>

275. Despite extensive discussions, no progress was made on the above issues, with the exception of “question/issue No. 2”. The following was recorded in the minutes of the 101<sup>st</sup> meeting:

[W]ith the exception of issue/question No. 2, there had been no development with respect to the other questions/issues. [The PCIW] stated further that in his view the Parties had already made sufficient efforts to resolve these questions/issues. Since Pakistan believes these discussions to be under Article IX(1) of the Treaty, it was therefore clear that certain differences had arisen which are now required to be dealt with further under the Treaty. PCIW therefore stated that Pakistan would now intimate India of its future course of action under Article IX of the Treaty to resolve these differences.<sup>37</sup>

276. Pakistan informed India on 11 March 2009 that differences had arisen and that it had come to the conclusion “that further bilateral discussions of these questions [would] serve no constructive purpose”.<sup>38</sup>

277. The letter also discussed the different “nature” of the questions:

8. As noted earlier, the 100<sup>th</sup> Meeting of the Commission identified six questions arising with respect to the Kishenganga Project. Out of those six questions, Question No. 2 may no longer be relevant for the reasons given above. So far as the remaining Questions are concerned, it is self-evident that not all of the Questions examined by the Commission are of the same nature.

- a. Instead, it is evident that Questions 3-5 are of a technical nature which relate specifically to the broad issue of whether or not the design of the Kishenganga Project conforms to the criteria stipulated in Paragraph 8 of Annexure D.
- b. By virtue of Paragraph 1(11) of Annexure F, it follows that Questions 3-5 fall within the jurisdiction of a Neutral Expert.
- c. Accordingly, it is Pakistan's position that “differences” have arisen between the parties with respect to Questions 3-5 within the meaning of that phrase as used in Article IX(2) of the Treaty.
- d. You are therefore informed, as required by Paragraph 5(a) of Annexure F, that Pakistan intends to seek the appointment of a Neutral Expert for the resolution of the differences between India and Pakistan with respect to Questions 3-5 ...

9. So far as the remaining two questions are concerned, namely Question 1 and Question 6, it is equally self-evident that these two questions are not questions of a purely technical nature

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<sup>36</sup> Record of the 101<sup>st</sup> Meeting of the Permanent Indus Commission, 25-28 July 2008, pp. 4, 6-8, 10-12 (**PK-28**).

<sup>37</sup> Record of the 101<sup>st</sup> Meeting of the Permanent Indus Commission, 25-28 July 2008 (**PK-28**).

<sup>38</sup> Letter from the PCIW to the ICIW, No. WT(132)/(6981-A)/PCIW, 11 March 2009, para. 7 (**PK-30**).

and that they do not therefore fall within the jurisdiction of a Neutral Expert as defined under Paragraph I of Annexure F [to] the Treaty. Given the inability of the Commission to resolve these two Questions, it is evident that “disputes” have arisen between the two parties within the meaning of that term as used in Article IX(2)(b) of the Treaty.<sup>39</sup>

278. On the same date, the PCIW informed the Governments of Pakistan and India that certain “differences [had] arisen with respect to [the KHEP], which are to be resolved within the ambit of Article IX(2)(a) and (b) of the [Treaty]”.<sup>40</sup>
279. On 11 May 2009, the PCIW informed both Governments that the Commission had failed to prepare a joint statement of points of difference and requested that they jointly appoint a neutral expert under Paragraph 4(b)(i) of Annexure F to the Treaty.<sup>41</sup>
280. On 10 July 2009, Pakistan invited India to a meeting to discuss the joint appointment of a neutral expert and the nomination of negotiators. India declined Pakistan’s invitation on 20 August 2009, stating that “the proposal for a meeting of the representatives of the two governments to jointly appoint a Neutral Expert ... and for appointing esteemed negotiators ... is not warranted at present” as “[t]hese matters are capable of resolution given a positive approach on the part of both sides”.<sup>42</sup>
281. As noted at paragraph 258 above, on 17 May 2010, having failed “to settle the disputes by agreement”, Pakistan initiated arbitration proceedings against India by way of a Request for Arbitration, stating:

In light of the response received from the Government of India, the Government of Pakistan has come to the conclusion that the negotiations regarding resolution of the disputes referred by Pakistan are being unduly delayed by the Government of India. Accordingly, the Government of Pakistan hereby institutes arbitration proceedings in terms of Paragraph 2(b) and Paragraph 6 of Annexure G to the Treaty.<sup>43</sup>

282. The Request for Arbitration set forth two of the issues, namely “Question/Issue No. 1” and “Question/Issue No. 6”, for resolution by a court of arbitration. The remaining issues, *i.e.* “Question/Issue No. 3”, “Question/Issue No. 4” and “Question/Issue No. 5”, were considered to be of a technical nature and to fall within the jurisdiction of a neutral expert.

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<sup>39</sup> Letter from the PCIW to the ICIW, No. WT(132)/(6981-A)/PCIW, 11 March 2009 (**PK-30**).

<sup>40</sup> Letter from the PCIW to the ICIW, No. WT(132)/(412-413)/PCIW, 11 March 2009 (**PK-29**).

<sup>41</sup> Letter from the PCIW to the ICIW, No. WT(132)/(7002-7003-A), 11 May 2009 (**PK-31**).

<sup>42</sup> *Note Verbale* from India to Pakistan, No. J/112/03/2009, 20 August 2009, para. 5 (**PK-35**).

<sup>43</sup> *Note Verbale* from Pakistan to India, No. KA(II) 2/2/2010, 17 May 2009 (**PK-36**).

283. On 16 August 2012, while the arbitration was still pending, India notified Pakistan of the planned construction of the RHEP on the Chenab River and provided Pakistan with information “as specified in Appendix II to Annexure D”.<sup>44</sup>
284. On 26 November 2012, Pakistan raised objections to the RHEP on the grounds that “the design of the Plant does not conform to criteria 8 (a), (c), (d), (e) and (f) laid down in Paragraph 8 of Annexure D to the Treaty”.<sup>45</sup>
285. On 18 February 2013, the *Kishenganga* Court issued its Partial Award on the two disputes. Based on the Court’s decision in the Partial Award, the PCIW wrote to the ICIW on 6 March 2013, noting that the Partial Award required modification of the proposed KHEP deep spillway and requesting that India “not proceed with the construction of those works that are contentious” until “a determination on the differences is rendered by a Neutral Expert”.<sup>46</sup>
286. On 15 April 2013, India responded, noting that Pakistan’s request for a change in design of the KHEP was “premature until India considers the full implications of the Partial Award and indeed until the Final Award on minimum flows is issued”.<sup>47</sup>
287. In view of the similarities between Pakistan’s objections to the KHEP and the RHEP, the Commission addressed issues related to both plants at its 110<sup>th</sup> meeting, held from 23 to 27 August 2014. At the meeting, the PCIW reiterated his request for an immediate resolution and emphasised the need to address the design issues due to the ongoing construction of the KHEP.<sup>48</sup>
288. By letter dated 30 January 2015, the PCIW indicated that Pakistan remained open to an amicable settlement, while noting that Pakistan’s objections to different hydroelectric plants had been discussed for years without significant progress. He concluded:

In case we are unable to progress further in reaching settlement of the outstanding questions/issues in the coming meeting of the Commission, no other option will be left but to approach one of the two forms of third-party settlement referred to by the Court and the Treaty.<sup>49</sup>

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<sup>44</sup> Letter from the ICIW to the PCIW, No. 3/5/2007-IT/1947, 16 August 2012 (**PK-37**).

<sup>45</sup> Letter from the PCIW to the ICIW, No. WT(150)/(7314-A)/PCIW, 26 November 2012, para. 2 (**PK-38**).

<sup>46</sup> Letter from the PCIW to the ICIW, No. WT(132)/(7330-A), 6 March 2013 (**PK-40**).

<sup>47</sup> Letter from the ICIW to the PCIW, No. 3/7/82-IT/1999, 15 April 2013, para. 2 (**PK-44**).

<sup>48</sup> Record of the 110<sup>th</sup> Meeting of the Permanent Indus Commission, 23-27 August 2014, para. 4 (**PK-55**).

<sup>49</sup> Letter from the PCIW to the ICIW, No. WT(47)/(7464-A)/PCIW, 30 January 2015, para. 14 (**PK-54**).

289. At the 111<sup>th</sup> meeting of the Commission held from 31 January to 4 February 2015, the PCIW considered the progress of the discussions to be unsatisfactory and concluded that it was necessary “to move towards common formulation of the questions, as the Commission had spent years discussing [them]”. Noting that the construction of the KHEP “[was] progressing”, he emphasised the need for an “early resolution on the differences” to avoid a “fait accompli situation”. In the view of the PCIW, failure to do so would result in Pakistan seeking a “third party for resolution in accordance with the provisions of Article IX of the Treaty”.<sup>50</sup>
290. Following extensive discussions which reaffirmed the initial positions of the Parties, Pakistan declared that differences had arisen with regard to the KHEP and the RHEP, which needed to be addressed under Article IX of the Treaty. In response, India suggested that all design-related issues should be discussed in “an endeavor to resolve them amicably”, without recourse to Article IX of the Treaty.<sup>51</sup>
291. The Parties continued to hold different views after the 111<sup>th</sup> meeting. On 13 May 2015, the ICIW stated that the Parties had agreed to continue discussions on all projects, including the RHEP and the KHEP, in order to reach an “amicable settlement on [the] remaining issues”.<sup>52</sup> In a letter of the same date, the PCIW noted that the Commission had failed to resolve the differences over the RHEP and the KHEP and stated that it was “imperative” that the Commission “[opt] for the next available option for resolution of the ... issues under the provisions of [the Treaty], i.e. that of a Neutral Expert and/or a Court of Arbitration.”<sup>53</sup>
292. The Commission convened for a further meeting on 30 and 31 May 2015, but was unable to reach an agreement.<sup>54</sup>
293. On 3 July 2015, Pakistan notified India of its intention to request the appointment of a neutral expert to resolve the differences that had arisen in relation to the KHEP and the RHEP. The letter stated, in relevant part:
2. Pakistan had indicated as far back as 2009 its intention to take the questions relating to the [KHEP] to the Neutral Expert, while taking two of the six questions relating to the Plant to the Court of Arbitration. At the conclusion of the 110<sup>th</sup> meeting of the Commission, I stated

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<sup>50</sup> Record of the 111<sup>th</sup> Meeting of the Permanent Indus Commission, 31 January-4 February 2015, paras. 19, 49 (PK-61).

<sup>51</sup> Record of the 111<sup>th</sup> Meeting of the Permanent Indus Commission, 31 January-4 February 2015, para. 50 (PK-61).

<sup>52</sup> Letter from the ICIW to the PCIW, No. Y-20014/1/2015-IT/2140, 13 May 2015 (PK-57).

<sup>53</sup> Letter from the PCIW to the ICIW, No. WT(51)/(7480-A)/PCIW, 13 May 2015 (PK-58).

<sup>54</sup> Record of the 112<sup>th</sup> Meeting of the Permanent Indus Commission, 30-31 May 2015 (PK-62).

that points of difference on the design parameters of the Ratle Hydroelectric Plant had arisen and Pakistan would, therefore, refer the matter to the Neutral Expert or Court of Arbitration, though you did not agree. In spite of our best efforts, the questions relating to both could not, however, be resolved during the 111<sup>th</sup> meeting of the Commission held in New Delhi and I stated that the difference had arisen in respect of design of both the Plants.

3. The conditions of paragraph 1 of Article IX of the Indus Waters Treaty 1960 (the Treaty) have been met. As a difference has arisen, I now invoke paragraph 2(a) of Article IX of the Treaty. The difference falls within the provisions of part 1 of Annexure F to the Treaty, paragraph 1(11) to be exact (a statement of points of difference is enclosed as Annex-A). I, therefore, notify you under paragraph 5(a) of Part 2 *ibid* that I intend to ask for the appointment of a Neutral Expert to decide upon the points of difference (Annex-A refers) that have arisen in respect of the designs of the Plants (the issue of Freeboard relating to the [KHEP] was amicably resolved).<sup>55</sup>

294. The letter also requested that the ICIW join in preparing a joint statement of points of difference in accordance with Paragraph 5(b) of Part 2 of Annexure F to the Treaty. A draft joint statement with Pakistan's position on the differences relating to the KHEP and the RHEP was attached for the ICIW's consideration.<sup>56</sup> After India failed to respond to the PCIW's letter, the PCIW reiterated his request on 13 July 2015 to prepare a joint statement of points of difference and invited the ICIW to a meeting in Lahore, Pakistan, for this purpose.<sup>57</sup>
295. By letter dated 16 July 2015, the ICIW declined the invitation and expressed his disappointment at Pakistan's statement that differences had arisen "despite being fully aware of the progress made in this regard during [the] 110<sup>th</sup> and 111<sup>th</sup> meeting[s] of [the Commission]". He noted that the issues raised in Pakistan's letter did not "take into account the facts, particularly those discussed in the various meetings" and that "the potential for their resolution at the Commission level" had not been exhausted. The letter concluded: "As such, your invocation of Article IX(2)(a) of the [Treaty] at this stage is premature and not in line with cooperative spirit enshrined in the Treaty".<sup>58</sup>
296. On 24 July 2015, the PCIW informed the Governments of Pakistan and India that the "[Commission] ha[d] failed to reach agreement on the questions that had arisen relating to the designs of Ratle and Kishenganga Hydroelectric Plants (HEP), in terms of Article IX(2) of the [Treaty]" and was "unable to prepare a joint statement of points of difference". The PCIW therefore invited both Governments to appoint a neutral expert and attached a statement of points of difference.<sup>59</sup>

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<sup>55</sup> Letter from the PCIW to the ICIW, No. WT(132)/(7493-A)/PCIW, 3 July 2015, paras. 2, 3 (**PK-63**).

<sup>56</sup> Letter from the PCIW to the ICIW, No. WT(132)/(7493-A)/PCIW, 3 July 2015 (**PK-63**).

<sup>57</sup> Letter from the PCIW to the ICIW, No. WT(132)/(7495-A)/PCIW, 13 July 2015 (**PK-64**).

<sup>58</sup> Letter from the ICIW to the PCIW, No. Y-20014/1/2015-16/2152, 16 July 2015 (**PK-65**).

<sup>59</sup> Letter from the PCIW to the Governments of Pakistan and India, No. WT(132)/(7497-98-A)/PCIW, 24 July 2015, paras. 1, 5 (**PK-66**).

297. On the same date, the PCIW sent a letter to the ICIW, providing further explanations for Pakistan's decision to request the appointment of a neutral expert:

2. ... Pakistan had indicated, as far back as 2009, its intention to take up the questions relating to Kishenganga Hydroelectric Plant (KHEP) before a Neutral Expert, except for the two questions that were submitted to the Court of Arbitration. I had hoped that you would modify your design features objected to by Pakistan in the light of Award of the Court of Arbitration issued in December 2013. In spite of our lengthy discussions in a number of meetings, however, you did not show any flexibility and made no effort to bring the designs of the two hydroelectric plants in conformity with the design criteria laid down in paragraph 8 of Annexure D [to] the [Treaty]. ...<sup>60</sup>

298. The PCIW also rejected India's assertion that it was still awaiting information on the technical basis and grounds for Pakistan's objections to the designs of the KHEP and the RHEP, stating that "Pakistan had again and again furnished technical basis of its objections and elaborated its point of view in various meetings of the [Commission]". He also cited India's reference to the *Baglihar* Determination as a further reason for the differences that had arisen:

8. ... You keep on relying on Neutral Expert's (NE) determination in Baglihar case wherein to support his interpretation the NE had to disregard the definition of the term "Firm Power" given in the Treaty and adopt the definition of the term given by American Society of Civil Engineers ... That despite the Award of the Court of Arbitration in Kishenganga case, wherein it was held that the determination of Neutral Expert had no precedential value, your insistence on disregarding clear provisions of the Treaty on the basis of the determination of Neutral Expert in Baglihar case is not understandable and I don't see any prospect of our amicably resolving the questions/issues, under the circumstances. ...<sup>61</sup>

299. The PCIW concluded:

11. Amicable resolution of questions/issues is thus not designed to take years when the construction on the hydroelectric plants and discussions keep on moving in circles[.] I am therefore, unable to agree to your suggestion that we should come back to square one and provide you with technical basis of our objections to be examined in future meetings of the [Commission] for amicable resolution and am requesting the Government of India and the Government of Pakistan to appoint a Neutral Expert to deal with the points of difference in respect of the designs of the two plants.

12. In case you suggest any modifications in the designs of the two hydroelectric plants to meet Pakistan's objections, pending appointment of the Neutral Expert, I assure you that the same would be considered in a positive manner to still reach an amicable resolution but I cannot agree to any delay in the appointment of a Neutral Expert while the constructions on the plants continue leading to a fait-accompli situation.<sup>62</sup>

300. On 21 August 2015, India reiterated its position that Pakistan had not provided any specific technical basis to substantiate its objections and that Pakistan's "unilateral intention" to refer the matter to a neutral expert was therefore premature. Confirming that "India will scrupulously honor the Court's award", India addressed Pakistan's interpretation of the *Kishenganga* Court's decision

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<sup>60</sup> Letter from the ICIW to the PCIW, No. WT(132)/(7496-A)/PCIW, 24 July 2015, para. 2 (PK-10).

<sup>61</sup> Letter from the PCIW to the ICIW, No. WT(132)/(7496-A)/PCIW, 24 July 2015 (PK-10).

<sup>62</sup> Letter from the PCIW to the ICIW, No. WT(132)/(7496-A)/PCIW, 24 July 2015 (PK-10).



on the effect of neutral expert determinations, and emphasised that the decision imposed operational restrictions but did not require design changes. It proposed that the Commission meet to discuss “exclusively” Pakistan’s objections to the KHEP and the RHEP.<sup>63</sup>

301. Pakistan responded on 11 September 2015, noting that India had not demonstrated flexibility in addressing the “two most important parameters” of pondage and spillway configuration. It concluded:

25. ... [Y]ou would note from this letter that we have strong disagreements between us and there seems very little chance that we can converge on resolution, which is the reason I declared in 111<sup>th</sup> meeting of [the Commission] that the Commission had failed in resolving the questions that had arisen in respect of designs of Ratle and Kishenganga Hydroelectric Plants and subsequently started the process of appointment of NE for resolution of our differences.

26. You are also aware of our concerns of heading towards a fait accompli situation due to continuing construction on these plants while we were involved in protracted discussions that proved unsuccessful in converging to resolution. Thus, without suspension of construction till resolution we cannot agree to put on hold the process of resolution that has been initiated for appointment of a Neutral Expert. I, therefore, cannot accept the suggestion you made in your letter for a meeting towards the end of his month for making another attempt towards resolution of the differences at Commission level, as it will bring us back to square one in the resolution process of Article IX, which we cannot afford.<sup>64</sup>

302. On 13 October 2015, the ICIW expressed regret at Pakistan’s “unilateral resolve to take up the matters to third party [resolution] ignoring the facts highlighted by me in my previous correspondence and ample scope of resolution at Commission level”.<sup>65</sup>

303. The PCIW replied on 4 November 2015, stating that Pakistan had made repeated requests to resolve the issues at the Commission level, but had found no accommodation on India’s part. He continued:

14. Even now I find from your letter that you are not prepared to change your position on the procedure of computation of “maximum Pondage” and the resulting values for the parameter for the two plants, and placement of spillway, but if you think that I have got you wrong you may send us the best configurations you can offer in response to our objections on the design parameters of Ratle [and] Kishenganga Hydroelectric Plants. If your configurations come close to our estimates of the parameters, there will be no need of going to the Neutral Expert, otherwise it would be better to go to a Neutral Expert for resolution and avoid any further wastage of time.<sup>66</sup>

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<sup>63</sup> Letter from the ICIW to the PCIW, No. Y-11017/2/2015-IT/2155, 21 August 2015, paras. 2, 13, 16 (PK-67).

<sup>64</sup> Letter from the PCIW to the ICIW, No. WT(132)/(7505-A)/PCIW, 11 September 2015, paras. 25, 26 (PK-68).

<sup>65</sup> Letter from the ICIW to the PCIW, No. Y-11017/2/2015-IT/2162, 13 October 2015 (PK-69).

<sup>66</sup> Letter from the PCIW to the ICIW, No. WT(132)/(7513-A)/PCIW, 4 November 2015, para. 14 (PK-71).

304. On 12 November 2015, the Ministry of Foreign Affairs of Pakistan sent a *Note Verbale* to the High Commission of India in response to the PCIW's request dated 24 July 2015 for the appointment of a neutral expert. It noted that, "[a]ccording to Annexure F, Part 2, Para 4(b)(ii) of [the Treaty], if no appointment is made by the two Governments jointly within a month after the date of the request, the appointment is required to be made ... by the World Bank" and invited the Government of India to "urgently propose modalities for making the appointment of a Neutral Expert within ten days".<sup>67</sup>

305. On 23 November 2015, the High Commission of India replied by *Note Verbale* to the Pakistan Ministry of Foreign Affairs, stating that the PCIW and the ICIW were seized of the matter and that there remained "ample scope for the resolution of the matter in the [Commission]". The Note concluded:

The request of the Government of the Islamic Republic of Pakistan to appoint a Neutral Expert on Ratle and Kishenganga Hydroelectric Plants therefore appears premature and the Government of India is of the view that the Permanent Indus Commission may continue to address the matter for an amicable resolution.<sup>68</sup>

306. On 27 November 2015, the ICIW proposed another meeting to resolve the dispute amicably within the Commission.<sup>69</sup>

307. On 5 February 2016, the PCIW replied to the ICIW's proposal for a meeting to resolve the issues within the Commission. He noted:

[I]t is abundantly clear that all the points raised by you have been responded to in an exhaustive manner and nothing remains to which we have not responded ...

I had asked you a number of times that if you can suggest modifications in your designs to meet the requirements of the Treaty these could be considered any time before commencement of any dispute settlement proceedings under Article IX. This, however, does not mean that the matter would be re-opened within the Permanent Indus Commission.

Since I find from perusal of your letter that you are sticking to your old position on both the maximum pondage and placement of spillways, I do not see any point in going back to discuss these issues/differences in the Permanent Indus Commission. Even otherwise, you would appreciate that this is not the stage when we can re-open discussions in the Permanent Indus Commission as the construction on the plants continues apace towards a fait accompli situation. It is, therefore, not possible for me to agree to delay invocation of Article IX of the Indus Waters Treaty to definitively resolve the issues identified in my correspondence of 24 July 2015.<sup>70</sup>

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<sup>67</sup> *Note Verbale* from Pakistan to India, No. KA(II)-2/11/2015, 12 November 2015 (PK-72).

<sup>68</sup> *Note Verbale* from India to Pakistan, No. ISL/112/1/2015, 23 November 2015 (PK-73).

<sup>69</sup> Letter from the ICIW to the PCIW, No. Y-11017/2/2015-IT/2169, 27 November 2015 (PK-74).

<sup>70</sup> Letter from the PCIW to the ICIW, No. WT(132)/(7523-A)/PCIW, 5 February 2016 (PK-76).

308. On 25 February 2016, the PCIW wrote to the ICIW (the “**PCIW’s Letter of 25 February 2016**”), recalling that on 24 July 2015 he had requested the Governments of Pakistan and India to appoint a neutral expert within one month. Referring to prior correspondence, the PCIW stated:

4. As reflected in the above correspondence, the Government of India has rejected the invitation of 24 July 2015 to jointly appoint a Neutral Expert pursuant to Paragraph 4(b)(i) of Annexure F [to] the Indus Waters Treaty, and that invitation has lapsed and is hereby formally revoked.<sup>71</sup>

309. The PCIW continued:

5. It has become apparent from the correspondence since 24 July 2015 that the issues over the Kishenganga and Ratle HEPs are substantially, if not predominantly, legal in nature. You continue to insist, for instance, that the pondage calculation for the Kishenganga and Ratle HEPs should be resolved by reference to the Neutral Expert’s pondage determination in the Baglihar case, notwithstanding the fact that the Partial Award issued by the Court of Arbitration in the Kishenganga case (i) rejected the “best practices” interpretation of the Treaty that led to the Neutral Expert’s final determination on pondage and other issues in the Baglihar case and (ii) declared that a Neutral Expert’s determinations do not have general precedential value beyond the specific hydro-electric plant before him.

6. Similarly, although the Court of Arbitration in the Kishenganga case ruled that drawdown flushing is not permitted under the Treaty, India insists on maintaining a design with deep orifice spillways for sediment control in both the Kishenganga and Ratle HEPs’ configurations that would not be effective unless water can be drawn down to or near the streambed.

7. Your positions on these and related issues, which Pakistan rejects, present legal questions of Treaty interpretation that will inevitably recur as India proceeds with other HEP projects on the Western Rivers. In accordance with Article IX (5) of the Treaty, and in the interests of efficiency, economy, and finality, the legal and technical aspects of the disputes over the Kishenganga and Ratle HEPs should therefore be resolved by a full Court of Arbitration, comprised of experts trained in both law and engineering, which can render an award of general applicability for the parties’ future guidance, and—as the Court of Arbitration clarified—“binding on the general question presented” ...<sup>72</sup>

310. In his letter, the PCIW requested that the ICIW provide India’s position on the points of dispute set out in an attached Statement of Points of Dispute (the “**Points of Dispute**”). He indicated that if India did not comply with the request within the specified timeframe, the Points of Dispute would be transmitted to the Governments of Pakistan and India for their consideration in accordance with Article IX(4) of the Treaty.

311. On 1 March 2016, the ICIW declined the PCIW’s request, expressing disappointment “with PCIW’s repeated assertions of invoking Article IX of [the Treaty]” and calling for a bilateral settlement meeting within the Commission.<sup>73</sup>

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<sup>71</sup> Letter from the PCIW to the ICIW, No. WT(132)/(7531-A)/PCIW, 25 February 2016, para. 4 (**PK-5**).

<sup>72</sup> Letter from the PCIW to the ICIW, No. WT(132)/(7531-A)/PCIW, 25 February 2016, paras. 5, 6, 7 (**PK-5**).

<sup>73</sup> Letter from the ICIW to the PCIW, No. Y-11017/2/2015-IT/2177, 1 March 2016 (**PK-78**).

312. On 4 March 2016, the Ministry of Foreign Affairs of Pakistan sent a *Note Verbale* to the Indian High Commission, which stated:

The Government of Pakistan considers that it is not possible to delay or put on hold the dispute resolution mechanisms of Article IX of the Treaty. In the interest of efficiency, economy, and finality, the Government of Pakistan will take the necessary steps to have the pending questions arising from the Kishenganga and Ratle HEPs resolved as disputes under Article IX of the Treaty by a full Court of Arbitration, without further waste of time. It is reiterated that discussions on the matter remain closed in the Permanent Indus Commission.<sup>74</sup>

313. On 8 March 2016, the ICIW informed the PCIW that the issues raised in the PCIW's Letter of 25 February 2016 were under consideration. He indicated that the two-week deadline set by Pakistan could not be met, but that a response would be forthcoming.<sup>75</sup>

314. On 11 March 2016, Pakistan agreed to extend the deadline for India's response by one week.<sup>76</sup>

315. On 14 March 2016, the ICIW responded to the PCIW's Letter of 25 February 2016. The ICIW took note of the PCIW's revocation of his letter of 24 July 2015 regarding the appointment of a neutral expert. He stated:

2. I have noted the sudden change in your position and dismayed at your unilateral resolve to take your perceived differences regarding the design of the two projects to the Court of Arbitration under the Treaty. I consider taking the technical design related issues to the Court in camouflage of legal ones, by your side as improper and invalid for the reasons elucidated in the succeeding paragraphs.<sup>77</sup>

316. The ICIW then referred to Article IX(2)(b):

4. It is clear that the necessity for invoking Paragraph 2(b) of Article IX arises only when either the difference does not come within the provisions of Paragraph (2) (a) or if the Neutral Expert informs the Commission that the difference, or a part thereof, should be treated as a dispute. None of the above conditions are met in the present case. Your objections on design of Ratle and Kishenganga HE Project are primarily based on para 8(a) to 8(f) of Annexure D, which fall well within the provisions of paragraph 11 of Annexure F and thereby within the provisions of Paragraph (2) (a) of Article IX [to] the Treaty.<sup>78</sup>

317. With regard to the PCIW's request for adjudication by a court of arbitration, he stated as follows:

5. Regarding your contention of an award by a full Court of Arbitration on issues of general applicability and future guidance to Parties as mentioned at para 7 of your above referred letter, it is beyond my comprehension on how the design features of a project mentioned by you such as freeboard, design of spillway, pondage etc. can be generalised thereby rendering the role of the Commission and the Neutral Expert virtually redundant? Each one of the above design features is project specific and needs to be decided as per related provisions of

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<sup>74</sup> *Note Verbale* from Pakistan to India, No. KA (II)-2/11/2015, 4 March 2016 (**PK-79**).

<sup>75</sup> Letter from the ICIW to the PCIW, No. Y-11017/2/2015-IT/2178, 8 March 2016 (**PK-80**).

<sup>76</sup> Letter from the PCIW to the ICIW, No. WT(132)/(7535-A)/PCIW, 11 March 2016 (**PK-81**).

<sup>77</sup> Letter from the ICIW to the PCIW, No. Y-11017/2/2015-IT/2181, 14 March 2016, para. 2 (**PK-82**).

<sup>78</sup> Letter from the ICIW to the PCIW, No. Y-11017/2/2015-IT/2181, 14 March 2016, para. 4 (**PK-82**).

paragraph 8 of Annexure D [to] the Treaty. The Treaty provides a two-pronged mechanism for settlement of dispute by the third party, if need be and such matters therefore have to be decided only under the related provisions of Treaty and not as per wishes of a party.<sup>79</sup>

318. Noting that “these issues are purely technical and not legal in nature”, the ICIW reiterated his desire for a bilateral resolution of these issues within the Commission. He further stated that, “[w]ithout prejudice” to India’s position to seek a solution within the Commission, the issues would fall within the competence of a neutral expert.<sup>80</sup>

319. On 21 March 2016, the High Commissioner of India replied to Pakistan’s *Note Verbale* of 4 March 2016, conveying the Government of India’s position on the invocation of a court of arbitration by Pakistan. The *Note Verbale* read, in relevant part:

2. The Government of India is of the view that the objections raised by Pakistan Commissioner for Indus Waters (PCIW) on design of Kishenganga and Ratle HEPs are primarily based on paragraphs 8 (a) to 8 (f) of Annexure D, which fall well within the provisions of paragraph 11 of Annexure F and thereby within the provisions of Article IX (2) (a) of the Treaty.

3. The High Commission of India has the honour to state further that the necessity for invoking Article IX(2) (b) for settlement of dispute, if any, arises only when either the difference does not come within the provisions of Article IX (2) (a) or if the Neutral Expert informs the Commission that the difference, or a part thereof, should be treated as a dispute. None of the above conditions are met in the matters raised by PCIW pertaining to the Kishenganga and Ratle HEPs.

4. The High Commission has further honour to state that the necessity of invoking Article IX (5) for settlement of dispute, if any, through full Court of Arbitration arises only when both the Governments could not resolve the dispute by agreement as provided in Article IX (4). Hence, the course of action suggested vide the NV of the Ministry referred to above also overlooks the inter-governmental route to resolving a dispute by agreement as provided in Article IX (4).

5. Therefore, the Government of India is of the view that the unilateral resolve of the Government of Pakistan to have the technical design related issues of the Kishenganga and Ratle HEPs resolved as disputes under Article IX (5) of the Treaty by a full Court of Arbitration is inadmissible as elaborated by Indian Commissioner for Indus Waters vide his communication Y11017/2/2015-IT/2181 dated 14 March 2016 addressed to PCIW.<sup>81</sup>

320. The High Commissioner concluded:

[T]he Government of India is of the view that the issues related to Kishenganga and Ratle HEPs can and should be addressed within the Permanent Indus Commission.<sup>82</sup>

321. Pakistan replied on 29 March 2016, noting that India had failed to provide its position on the Points of Dispute within the three-week deadline. It therefore proposed to conduct negotiations

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<sup>79</sup> Letter from the ICIW to the PCIW, No. Y-11017/2/2015-IT/2181, 14 March 2016, para. 5 (**PK-82**).

<sup>80</sup> Letter from the ICIW to the PCIW, No. Y-11017/2/2015-IT/2181, 14 March 2016, para. 7 (**PK-82**).

<sup>81</sup> *Note Verbale* from India to Pakistan, No. ISL/112/1/2016, 21 March 2016, paras. 2, 3, 4, 5 (**PK-83**).

<sup>82</sup> *Note Verbale* from India to Pakistan, No. ISL/112/1/2016, 21 March 2016, para. 6 (**PK-83**).

under Article IX(4) of the Treaty and appointed its four negotiators. Pakistan urged India to “expeditiously appoint negotiators to resolve the points of dispute by agreement in terms of Article IX (4) of the Treaty” and reserved its right to request the establishment of a court of arbitration in accordance with Article IX(5)(c) of the Treaty, should India not “set a time for a meeting to take place within 30 days of the date of this letter”.<sup>83</sup>

322. On 28 April 2016, the Government of India accepted the proposal of the Government of Pakistan to enter into negotiations, noting that this was “without prejudice to India’s stand on the inadmissibility of taking the matters to Court of Arbitration (CoA) that are under the purview of Neutral Expert and not CoA”. It named four negotiators and agreed to hold a meeting.<sup>84</sup>

323. On 19 May 2016, Pakistan proposed that a meeting of the negotiators from both sides be held in Islamabad during the last week of May or the first week of June 2016. Pakistan further noted that India’s admissibility arguments “[conflict] with the interpretation of Article IX and Annexure F & G [to] the Treaty found in the Partial Award in the Kishenganga Arbitration”. It continued:

[T]he existence of technical elements in the points of dispute, along with legal questions, is not an impediment to resolution by the Court of Arbitration in accordance with the provisions of Article IX of the Treaty. As the Court of Arbitration in that case held, it is nowhere provided in the Indus Waters Treaty 1960 that questions falling totally or partially in Part 1 of Annexure F [to] the Treaty can be dealt with only by a Neutral Expert to the exclusion of the Court ...<sup>85</sup>

324. The *Note Verbale* further confirmed the commitment of the Government of Pakistan “to fully avail of the opportunity provided by Article IX (4) of the Treaty of resolving the issues at the Government level in a sincere manner”. According to Pakistan, “[t]his will not be possible, however, if India does not accept the precedential nature of the decision of the Court of Arbitration in the Kishenganga case or is unwilling to implement the resulting design changes implicated by such decision in good faith”.<sup>86</sup>

325. Following further diplomatic exchanges, inter-governmental negotiations took place from 14 to 15 July 2016. Despite “detailed broad based discussions” between technical experts from both sides, the negotiations did not result in any significant convergence of positions.<sup>87</sup>

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<sup>83</sup> *Note Verbale* from Pakistan to India, No. KA(II)-2/11/16, 29 March 2016 (PK-84).

<sup>84</sup> *Note Verbale* from India to Pakistan, No. ISL/112/1/2016, 28 April 2016, para. 2 (PK-85).

<sup>85</sup> *Note Verbale* from Pakistan to India, No. KA (II)-2/11/2016, 19 May 2016 (PK-86).

<sup>86</sup> *Note Verbale* from Pakistan to India, No. KA (II)-2/11/2016, 19 May 2016 (PK-86).

<sup>87</sup> Minutes of Secretary Level Meeting on Kishenganga and Ratle Hydroelectric Plants held in New Delhi, 15 July 2016 (PK-90).

326. As the inter-governmental negotiations did not “yield to a solution”, the ICIW wrote to the PCIW on 11 August 2016. He observed that Pakistan had “changed [its] own position from appointment of Neutral Expert vide letter dated 25 February 2016, to unilaterally taking the differences regarding the design of the two projects to the Court of Arbitration”. The letter continued:

Each one of the ... design features is project specific and needs to be decided as per related provisions of paragraph 8 of Annexure D of the Treaty. My predecessor, vide letter dated 14 March 2016, had already brought out in detail that taking the technical design related issues to the Court ignoring the Commission and the Neutral Expert is inadmissible and against the letter and spirit of the Treaty.<sup>88</sup>

327. According to the ICIW, it was “clear that these issues are purely technical in nature and cannot be in any way legal in the sense which may require resolution through the Court of Arbitration”. Noting that “a bilateral resolution within the Commission appears unlikely”, he concluded:

In such a situation, though still being open for resolution in the Commission, I have no option but to state that the conditions of paragraph 1 of Article IX of the Indus Waters Treaty 1960 have been met and a difference has arisen in respect of design of these projects. I therefore invoke paragraph 2(a) of Article IX of the Treaty. The difference falls within the provisions of paragraph 11 of part I of Annexure F to the Treaty. I, therefore, notify you under paragraph 5(a) of Part 2 of Annexure F that I intend to seek the appointment of a Neutral Expert to decide upon the points of difference as enclosed in Annex A to this letter that have arisen in respect of the designs of these Plants.<sup>89</sup>

328. On 19 August 2016, Pakistan served India with a Request of Arbitration by *Note Verbale*.<sup>90</sup> Recalling previous attempts at negotiation and noting that the recent inter-governmental negotiations in Delhi had failed to reach a compromise on any of the disputes, Pakistan stated:

Following the negotiations pursuant to Article IX(4) in New Delhi on 14-15 July 2016, the Government of Pakistan has come to the conclusion that the Disputes are not likely to be resolved by further negotiation per Article IX(5)(b). Accordingly, the Government of Pakistan hereby institutes arbitration proceedings pursuant to Paragraph 2(b) and Paragraph 6 of Annexure G to the Treaty. As required by Paragraph 2(b) of Annexure G to the Treaty, enclosed herewith is a Request for Arbitration containing a statement setting forth the nature of the Disputes to be submitted to arbitration, the nature of the relief sought, and the names of the two arbitrators appointed by the Government of Pakistan. Also enclosed herein is a copy of Appendix A (Procedural History of the Case).<sup>91</sup>

329. Pakistan also invited the Government of India to select three umpires in accordance with Paragraph 7(b)(i) of Annexure G to the Treaty.<sup>92</sup>

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<sup>88</sup> Letter from the ICIW to the PCIW, No. Y-11017/2/2015-IT/2202, 11 August 2016, para. 3 (PK-92).

<sup>89</sup> Letter from the ICIW to the PCIW, No. Y-11017/2/2015-IT/2202, 11 August 2016, para. 5 (PK-92).

<sup>90</sup> *Indus Waters Arbitration*, Pakistan’s Request for Arbitration, 19 August 2016 (PK-1A).

<sup>91</sup> *Note Verbale* from Pakistan to India, No. KA (II)-2/11/2016, 19 August 2016 (PK-1A).

<sup>92</sup> *Note Verbale* from Pakistan to India, No. KA (II)-2/11/2016, 19 August 2016 (PK-1A).

330. On 22 August 2016, the PCIW informed the ICIW that the Request for Arbitration had been served on India. In his letter, the PCIW stated that due to “[t]he predominantly legal nature of the arguments advanced by India in support of its designs” and the need to reach “a final award of general applicability for the parties’ future guidance”, Pakistan’s application for adjudication of the disputes by a court of arbitration “was the only proper way to resolve the disputes”. Noting that the inter-governmental negotiations had failed to “resolve the Disputes”, he stated:

The failure of those talks led Pakistan to initiate establishment of a Court of Arbitration under Article IX(5)(b) by serving a Request for Arbitration seeking the empanelment of a Court of Arbitration and institute arbitration proceedings under Paragraph 2(b) of Annexure G [to] the Treaty on 19 August 2016 ... .

Now that all procedural steps under the Treaty have been met, and arbitral proceedings have been instituted through Pakistan’s Request, your belated and contradictory proposal for joint appointment of a Neutral Expert is untenable. We, therefore, invite the Government of India to abide by the arbitral process set forth in the Treaty, which Pakistan has formally initiated, in particular with respect to the formation of the Court of Arbitration ... .<sup>93</sup>

331. On 30 August 2016, India responded to Pakistan’s Request for Arbitration as follows:

i. ... Pakistan had in July 2015 proposed taking the matter relating to designs of the KHEP and RHEP to the Neutral Expert. Later, it revoked its own notice in February 2016 and instead conveyed unilaterally that it was taking the differences regarding the design of the two projects to the Court of Arbitration (CoA). India had already brought out in detail that taking the technical design related issues to the CoA, ignoring the Commission and the Neutral Expert, is inadmissible and against the letter and spirit of the Treaty.<sup>94</sup>

332. India concluded:

iv. ... In the above circumstances, the only option left is to let the technical differences be resolved by the Neutral Expert.

v. The Government of India, therefore, wishes to convey to the Government of Pakistan that the matters raised by Pakistan are purely technical [in] nature and cannot be taken to the Court of Arbitration. Such matter is appropriate to be resolved by the Neutral Expert as indicated by Commissioner (Indus) vide No. Y-11017/2/2015-IT/2002 dated 11 August 2016 to Pakistan Commissioner for Indus Waters (PCIW), while inviting PCIW to frame joint Points of Difference to be referred to the Neutral Expert.

vi. Pending suitable disposal of the points of difference conveyed by the Indian Commissioner for Indus Waters to the Pakistan Commissioner for Indus Waters by a Neutral Expert in accordance with the [Treaty], other forms of dispute resolution envisaged in the [Treaty] are *non est* (that is not permissible/admissible/possible).<sup>95</sup>

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<sup>93</sup> Letter from the PCIW to the ICIW, No. WT(132)/(7563-A)/PCIW, 22 August 2016 (PK-94).

<sup>94</sup> *Note Verbale* from India to Pakistan, No. ISL/112/1/2016, 30 August 2016, para. i (PK-95).

<sup>95</sup> *Note Verbale* from India to Pakistan, No. ISL/112/1/2016, 30 August 2016, paras. iv, v, vi (PK-95).



333. On 31 August 2016, the President of the World Bank confirmed that he had received the Request for Arbitration and that he was willing to nominate a person to draw lots to select the appointing authorities who were to appoint the three umpires of the court of arbitration.<sup>96</sup>
334. On 6 September 2016, the ICIW wrote to the PCIW expressing his surprise at Pakistan's Request for Arbitration. He noted Pakistan's earlier position that the remaining four issues not brought before the *Kishenganga* Court fell "within the purview of a Neutral Expert". He also observed that Pakistan had consistently maintained its position since 2013 and, in 2015, had given notice of the appointment of a neutral expert "in spite of sufficient scope for resolution in the Commission". He stated:
- While the matter was under correspondence between us, you again chose to revoke the above notice vide letter dated February 25, 2016 and decided instead to take the matter to the Court of Arbitration. You may appreciate that the Treaty provides for resolution of differences through a specific dispute settlement mechanism which needs to be adhered by both the parties. My predecessor has already explained in length that your action of taking the technical design related issues to the Court is inadmissible. After you have revoked your own notice for appointment of NE and your subsequent notice for setting up the CoA is inadmissible, the matter remains under the scope of the Commission for further discussion.<sup>97</sup>
335. The ICIW concluded that the Commissioners were "unable to prepare a joint statement of points of difference" and informed the PCIW of his intention to proceed with a request to both Governments to appoint a neutral expert under the Treaty.<sup>98</sup>
336. On the same date, the ICIW wrote to the Governments of Pakistan and India requesting the joint appointment of a neutral expert under Paragraph 4(b)(i) of Annexure F to the Treaty.<sup>99</sup>
337. As noted at paragraph 14 above, on 4 October 2016, India served its Request for the Appointment of a Neutral Expert on the World Bank, requesting the World Bank to appoint a neutral expert under Paragraphs 4(b)(ii) and 5(c) of Annexure F to the Treaty. India also enclosed a statement of the Points of Difference in accordance with Paragraph 5(d) of the Annexure F to the Treaty.<sup>100</sup>
338. On 18 October 2016, the President of the Bank confirmed that the Bank would initiate the procedures for the appointment of both a neutral expert and a court of arbitration.<sup>101</sup> However, on

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<sup>96</sup> Letter from the World Bank to the Parties, 31 August 2016 (**PK-96**).

<sup>97</sup> Letter from the ICIW to the PCIW, No. Y-11017/2/2015-IT/2206, 6 September 2016 (**PK-97**).

<sup>98</sup> Letter from the ICIW to the PCIW, No. Y-11017/2/2015-IT/2206, 6 September 2016 (**PK-97**).

<sup>99</sup> Letter from the ICIW to the Governments of Pakistan and India, No. Y-11017/2/2015-IT/2209, 6 September 2016 (**PK-98**).

<sup>100</sup> *Note Verbale* from India to Pakistan, No. Y-11017/2/2015-IT/2212, 4 October 2016 (**IN-2**).

<sup>101</sup> Letter from the World Bank to the Parties, 18 October 2016 (**PK-99**).

12 December 2016, both Governments were informed of the imposition of a “pause”. According to the President of the World Bank, this step was taken “in the interest of preserving the Treaty and in order to provide a window to further explore whether Pakistan and India can agree on a way forward for resolving the matter relating to the two hydroelectric power plants, in a manner that is satisfactory to both countries”.<sup>102</sup>

339. As the Parties were unable to agree on a way forward to resolve the issues between them regarding the KHEP and the RHEP in the following years, on 31 March 2022, the World Bank’s General Counsel informed the Parties of the Bank’s decision to appoint both a neutral expert and a court of arbitration,<sup>103</sup> following which, as noted at paragraphs 15-17 above, the Neutral Expert was appointed and the 2022 CoA was empanelled by October 2022.

## **V. THE PARTIES’ REQUESTS FOR RELIEF**

340. In its “final submissions” at paragraph 6.22 of its Statement, Pakistan requested the following relief:

Having regard to the preceding, and to the submissions advanced in this Statement, Pakistan respectfully requests the Neutral Expert to adjudge and declare that:

(a) The Points of Difference set out in India’s Statement of Points of Difference at Annex 1 of the Neutral Expert’s Supplemental Rules of Procedure and developed in India’s Memorial submitted in the Neutral Expert proceedings dated 31 August 2023 do not fall, or do not fall in material part, within Part 1 of Annexure F.

(b) The question of whether any part of any of the Points of Difference falls within Paragraph 1(11) of Annexure F, read together with Paragraph 11 of Annexure D, such that they might be addressed by the Neutral Expert without trespassing into questions beyond the competence of the Neutral Expert is deferred for further decision by the Neutral Expert following consultations with the Parties.

(c) In the alternative to point (b) above, each of India’s Points of Difference should be treated as a dispute.

341. At the Third Meeting, Pakistan modified its request for relief as follows:

Having regard to the submissions advanced in this Paragraph 7 proceeding and to the submissions advanced during this third meeting, Pakistan respectfully requests the Neutral Expert to adjudge and declare that:

(a) The point[s] of difference set out in India’s statement of points of difference in annex 1 of the Neutral Expert’s Supplemental Rules of Procedure and developed in India’s Memorial dated 31 August 2023 submitted in these Neutral Expert proceedings, do not fall, or do not fall in material part, within Part I of Annexure F, and they must accordingly be treated as disputes.

(b) In the alternative, the question of whether any part of the points of difference falls within Paragraph 1(11) of Annexure F, read together with Paragraph 11 of Annexure D, such that

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<sup>102</sup> Letter from the World Bank to the Parties, 12 December 2016 (**PK-109**).

<sup>103</sup> Letter from the World Bank to the Parties, 31 March 2022 (**PK-115**).

they might be addressed by the Neutral Expert without trespassing into questions beyond the competence of the Neutral Expert is deferred, pending the issuance of the award or awards by the [2022 CoA] in its parallel proceedings on the first phase on the merits and following consultations with the parties.

(c) In the further alternative, that the points of difference set out in India's statement of points of difference at Annexure 1 of the Neutral Expert's Supplemental Rules of Procedure and developed in India's Memorial dated 31 August 2023 submitted in these Neutral Expert proceedings, fall within Part I of Annexure F to the extent indicated in the detailed guidance and directions to the parties included as part of Neutral Expert's Paragraph 7 decision.<sup>104</sup>

342. At paragraph 58 of its Reply, India stated as follows:

In sum, India submits its simple case that the Points of Difference appended to the [Supplementary Rules of Procedure] referred by India fall squarely and entirely within Part 1 of Annexure F, and consequently, in terms of Paragraph 7, the Neutral Expert is duty-bound to render a decision on merits.

## **VI. THE PARTIES' POSITIONS ON THE NEUTRAL EXPERT'S COMPETENCE UNDER ARTICLE IX AND PARAGRAPH 7 OF ANNEXURE F TO THE TREATY**

### **A. PAKISTAN'S POSITION**

343. Pakistan maintains that "[t]hree closely linked issues come together in this Paragraph 7 procedure".<sup>105</sup> The first, according to Pakistan, is "whether each of the differences advanced by India, as set out in India's Points of Difference and developed in India's Memorial, fall within the scope of Part 1 of Annexure F of the Treaty".<sup>106</sup> The second is "whether the Neutral Expert is competent to address any of the differences that may in principle fall within the scope of Part 1 of Annexure F of the Treaty having regard to the parallel proceedings between Pakistan and India before the [2022 CoA] pursuant to Pakistan's Request for Arbitration of 19 August 2016, as amended ..., the Award on the Competence of the Court ..., and the Court's Procedural Order No. 6 ... of 6 July 2023".<sup>107</sup> The third issue is "how, having regard to the highly unusual circumstances of the parallel proceedings before the Court and the Neutral Expert, the Neutral Expert should proceed to address the issues engaged by this Paragraph 7 enquiry".<sup>108</sup>

344. In respect of the above issues, Pakistan's "headline case" is that the Neutral Expert has "no competence to address the case" submitted to him by India.<sup>109</sup> It submits that the Points of

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<sup>104</sup> Third Meeting Transcript, 316:22-318:12 (Mr. Aslam).

<sup>105</sup> Pakistan's Statement, para. 1.15.

<sup>106</sup> Pakistan's Statement, para. 1.15.

<sup>107</sup> See *Indus Waters Arbitration*, Pakistan's Request for Arbitration, 19 August 2016 (**PK-1A**); Pakistan's Amended Request for Arbitration, 28 July 2023 (**PK-1B**); Competence Award (**PKA-1**); Procedural Order No. 6 (Decision on Further Proceedings), 6 July 2023 (**PKA-2**).

<sup>108</sup> Pakistan's Statement, para. 1.15.

<sup>109</sup> Third Meeting Transcript, Day 1, 27:4-5 (Sir Daniel); 130:23-131:16 (Professor Webb).

Difference “as developed in India’s Memorial, fall outside Paragraph 1(11) of Annexure F and Paragraph 11 of Annexure D”.<sup>110</sup> It states:

[...] as a formal matter, Pakistan considers that the Neutral Expert is not competent in respect of any of these points of difference advanced by India, with the sole possible exception of Difference 4 dealing with the RHEP freeboard. This is Pakistan’s headline submission – that the Neutral Expert is not competent in respect of these matters; that they fall outside the scope of Part 1 of Annexure F; and, as the Court of Arbitration is already seised of these issues, that the Neutral Expert must simply relinquish them.<sup>111</sup>

345. In addition to its main submission, Pakistan puts forth two alternative submissions, stating that it wishes “the [Neutral Expert] process to succeed”.<sup>112</sup>

346. As a first alternative, Pakistan makes the following submission:

Pakistan’s alternative submission is that, following the Court’s determination of the systemic questions of Treaty interpretation that are identified in [the 2022 CoA’s Procedural Order No. 6], questions going to the application of the design requirements of Paragraph 8 of Annexure D in respect of the KHEP and the RHEP could properly come within the scope of Paragraph 1(11) of Annexure F. In this case, ... “the Neutral Expert [could become] competent in respect of the issues presented to him on the basis, and to the extent, of the Parties’ joint consent”.<sup>113</sup>

347. As a second alternative, Pakistan proposes that the Neutral Expert “take a filleting knife to India’s [M]emorial” and inform the Parties “in precise and granular detail” what he deems to be within the limits of his competence.<sup>114</sup>

348. Pakistan elaborates on the above submissions and the proposed way forward, as set out below.

# **1. The Competence of the Neutral Expert under Article IX and Annexure F to the Treaty**

349. Pakistan submits that the procedure for determining the Neutral Expert’s competence under Paragraph 7 of Annexure F to the Treaty (reproduced at paragraph 10 above) “is premised on the limited scope of the Neutral Expert’s competence” under the Treaty.<sup>115</sup> According to Pakistan, this competence is (i) “Plant-specific”, (ii) “design-specific”, (iii) “provision-specific”, and (iv) “confined to technical issues”.<sup>116</sup> In contrast, the Neutral Expert’s competence does not

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<sup>110</sup> Pakistan’s Statement, para. 1.37.

<sup>111</sup> Pakistan’s Statement, para. 1.37.

<sup>112</sup> Third Meeting Transcript, Day 1, 27:6-7 (Sir Daniel).

<sup>113</sup> Pakistan’s Statement, para. 1.39 (emphasis by Pakistan) *citing Indus Waters Arbitration*, Procedural Order No. 6 (Decision on Further Proceedings), 6 July 2023, para. 27 (**PKA-2**).

<sup>114</sup> Third Meeting Transcript, Day 1, 138:10-13 (Sir Daniel).

<sup>115</sup> Pakistan’s Statement, para. 3.1.

<sup>116</sup> Pakistan’s Statement, paras. 3.2-3.3; Third Meeting Transcript, Day 1, 39:4-40:25 (Sir Daniel).

extend to issues “that are not Plant-specific and/or concern treaty interpretation of a systemic nature.”<sup>117</sup>

350. Pakistan explains:

The Neutral Expert’s competence is circumscribed in multiple ways by the Treaty, reflecting his status as a highly qualified engineer and not a legal expert. His competence is limited to 23 technical issues. His competence is plant-specific. The Neutral Expert may conclude that a matter addressed to him constitutes a dispute rather than a difference and should be addressed through another Article IX settlement mechanism and matters not within the Neutral Expert’s competence shall be settled through some other Article IX mechanism, of which the Court of Arbitration is at the apex.<sup>118</sup>

351. In support of its argument that the competence of the Neutral Expert is Plant-specific, Pakistan cites the reference to “the design of a Plant” in Paragraph 11 of Annexure D (the provision on which India relies to base the competence of the Neutral Expert).<sup>119</sup>

352. In support of its argument that the competence of the Neutral Expert under the Treaty is confined to technical issues, Pakistan refers to a number of Treaty provisions, as follows:

- (a) Paragraph 4 of Annexure F requires that the Neutral Expert “be a highly qualified engineer”, rather than a lawyer.
- (b) Paragraph 7 of Annexure F and Article IX(2)(b) expressly contemplate the possibility that a Neutral Expert may conclude that a matter addressed to him constitutes a dispute, rather than a difference, to be addressed through some other Article IX settlement mechanism.
- (c) Paragraph 13 of Annexure F states that matters “not within the competence of a Neutral Expert” shall be settled through some other Article IX mechanism, of which a Court of Arbitration under Article IX(5) and Annexure G is at the apex.<sup>120</sup>

353. Pakistan notes that Article IX of the Treaty establishes the neutral expert “as one of the mechanisms for the settlement of differences and disputes, alongside the [Commission] and alongside the Court of Arbitration”.<sup>121</sup> It argues that the competence of a neutral expert is “expressly limited by the terms of Article IX, paragraph 2 (a)” to any difference falling within Part 1 of Annexure F.<sup>122</sup> It contends that the issues listed in Part 1 of Annexure F are of such a nature that they are “amenable to a reasonably quick, engineering resolution” with a view to getting the Parties to resume cooperation under the Treaty. Thus, in Pakistan’s view, the role of a neutral expert under the Treaty was conceived as that of “an expert engineer” to be called in to

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<sup>117</sup> Pakistan’s Statement, para. 3.4.

<sup>118</sup> Third Meeting Transcript, Day 1, 129:22-130:9 (Professor Webb).

<sup>119</sup> Pakistan’s Statement, para. 3.2(b).

<sup>120</sup> Pakistan’s Statement, para. 3.3.

<sup>121</sup> Third Meeting Transcript, Day 1, 30:13-17 (Sir Daniel).

<sup>122</sup> Third Meeting Transcript, Day 1, 31:22-32:1 (Sir Daniel).

address and quickly resolve technical differences between the Parties regarding a specific plant that posed practical impediments to their cooperation.<sup>123</sup>

354. Pakistan contends that, in contrast to the limited competence of a neutral expert, the competence of a court of arbitration established under Annexure G to the Treaty “is unconstrained”, which enables “it to address both Plant-specific disagreements and wider questions of legal and systemic treaty interpretation and application”.<sup>124</sup>

355. Pakistan cites several provisions of the Treaty which, in its view, underline the “unconstrained” competence of a court of arbitration:

- (a) Article IX(2)(b), which provides that if a difference does not come within the provisions of Article IX(2)(a), or if the Neutral Expert appointed to resolve a difference determines that it should be treated as a “dispute”, then a dispute will be deemed to have arisen, and the dispute may be settled (among other means) through a Court of Arbitration.
- (b) Paragraph 11 of Annexure D, which enables either the Neutral Expert or the Court of Arbitration to resolve a Plant-specific question about conformity with Paragraph 8 of Annexure D.
- (c) Paragraph 2(b) of Annexure G, which provides that arbitration proceedings may be instituted at the request of either Party. This request shall be accompanied by a statement “setting forth the nature of the dispute or claim”.
- (d) Paragraphs 4 and 5 of Annexure G, which set out that the Court of Arbitration shall consist of seven or five arbitrators from three categories: “[h]ighly qualified engineers”, “[p]ersons well versed in international law” and “[p]ersons qualified by status and reputation to be Chairman [...] who may, but need not, be engineers or lawyers.” This composition, carefully balanced with three of the members being appointed by leading figures of the law and academia, ensures a panel with the range of skills and knowledge consistent with the general competence of the Court of Arbitration.
- (e) Paragraph 16 of Annexure G, which states that “the Court shall decide all questions relating to its competence and shall determine its procedure”.
- (f) Paragraph 28 of Annexure G empowering the Court to issue interim measures to “safeguard [...] interests under the Treaty with respect to the matter in dispute, or to avoid prejudice to the final solution or aggravation or extension of the dispute”.<sup>125</sup>

356. Pakistan points out that, under the Treaty, the Neutral Expert is competent to address questions regarding the conformity of the design of a Plant to the criteria set out in Paragraph 8 of Annexure D, but “does not have a remedial competence”, such as the power to “specify interim measures”, to “award financial compensation”, or to “prescribe wider remedies”.<sup>126</sup>

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<sup>123</sup> Third Meeting Transcript, Day 1, 37:20-38:11 (Sir Daniel).

<sup>124</sup> Pakistan’s Statement, para. 3.5; Third Meeting Transcript, Day 1, 31:13-22 (Sir Daniel).

<sup>125</sup> Pakistan’s Statement, para. 3.5.

<sup>126</sup> Pakistan’s Statement, para. 3.9.

357. Moreover, according to Pakistan, India’s assertion that each difference listed in Part 1 of Annexure F is *required* to be resolved by a neutral expert and that the two mechanisms established under Annexures F and G to the Treaty are “mutually exclusive” is incorrect for two reasons.<sup>127</sup>
358. First, Pakistan asserts that “India’s claim that only a Neutral Expert can address technical issues under Part 1 of Annexure F” has been rejected by the *Kishenganga* Court.<sup>128</sup>
359. Second, Pakistan submits that, where a technical issue involves legal or Treaty-systemic issues that are outside the competence of a neutral expert, India’s position that a neutral expert would have to decide the technical issues and then refer the other matters back to the Commission is “unsatisfactory, and risks putting the Neutral Expert in an invidious situation”.<sup>129</sup> Pakistan asserts that there will be many differences that “may be superficially characterised as technical questions under Part 1 of Annexure F, but the resolution of which will be entirely dependent on the answer to be given to a wider legal or Treaty-systemic enquiry”, such that it would be impossible or undesirable for a neutral expert to answer the technical question while the legal or Treaty-systemic issue remains unresolved.<sup>130</sup>
360. In Pakistan’s view, this is precisely why Paragraph 7 of Annexure F permits different courses of action and “gives the Neutral Expert considerable discretion” to determine how to resolve “a ‘mixed’ difference” in a manner that will “provide the best and most enduring solution for the Parties”.<sup>131</sup> Specifically, Pakistan submits that, in determining whether a particular difference falls within the scope of Part 1 of Annexure F, Paragraph 7 allows the Neutral Expert to “make three determinations, leading to four possible courses of action”:
- (a) First, the Neutral Expert can decide that a difference in its entirety falls within Part 1 of Annexure F, in which case he must render a decision on the merits.
  - (b) Second, the Neutral Expert can decide that a difference in its entirety falls outside Part 1 of Annexure F, in which case he must inform the Commission that the difference should be treated as a dispute—subject, of course, to the appreciation and the caveat in this case that the Court of Arbitration is already seised of the matters in question.
  - (c) Third, the Neutral Expert can decide that a difference partially falls outside Part 1 of Annexure F, in which case he may, at his discretion:
    - (i) decide that portion of the difference that falls within Part 1 of Annexure F, and inform the Commission that the remainder should be treated as a dispute, or

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<sup>127</sup> Pakistan’s Statement, para. 3.10 *referring to* India’s Memorial, para. 35.

<sup>128</sup> Pakistan’s Statement, paras. 3.11-3.12 *citing Kishenganga* Partial Award, paras. 483-487 (IN-EX-10).

<sup>129</sup> Pakistan’s Statement, para. 3.13 *referring to* India’s Memorial, para. 36.

<sup>130</sup> Pakistan’s Statement, para. 3.13 (emphasis by Pakistan).

<sup>131</sup> Pakistan’s Statement, para. 3.16.

- (ii) inform the Commission that the entire difference should be treated as a Dispute [...] <sup>132</sup>

361. Pakistan also rejects India's argument that the procedure under Article IX operates as a "waterfall mechanism" (see paragraphs 447-457 below). It submits that both the *Kishenganga* Court and the 2022 CoA comprehensively rejected this argument. <sup>133</sup>
362. In relation to Question 14 of the Neutral Expert (see paragraph 211 above) concerning the possible relevance of Paragraph 13 of Annexure F, Pakistan submits that any decision of the Neutral Expert, "including under Paragraph 7 of Annexure F", that goes beyond the competence of the Neutral Expert under Part I of Annexure F, "would be amenable to challenge by Pakistan before the [2022 CoA] in the parallel proceedings". <sup>134</sup>

## **2. The Competence of the Neutral Expert in Relation to the Points of Difference**

### *(a) The Scope of the Neutral Expert's Competence in Relation to the Points of Difference*

363. Pakistan asserts that, based on India's Memorial, "India's case on the competence of the Neutral Expert rests, and rests only, on Paragraph 1(11) in Part 1 of Annexure F read together with Paragraph 11 of Annexure D of the Treaty". <sup>135</sup> Pakistan therefore submits that the Neutral Expert's competence in these Proceedings is to be assessed solely on the basis of these provisions. <sup>136</sup>
364. Paragraph 1(11) in Part I of Annexure F refers to Paragraph 11 of Annexure D, which provides as follows:

If a question arises as to whether or not the design of a Plant conforms to the criteria set out in Paragraph 8, then either Party may proceed to have the question resolved in accordance with the provisions of Article IX(1) and (2).

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<sup>132</sup> Pakistan's Statement para. 5.2 (emphasis omitted); Third Meeting Transcript, Day 1, 105:23-106:22 (Professor Webb).

<sup>133</sup> Third Meeting Transcript, Day 1, 30:21-31:12 (Sir Daniel) *referring to Kishenganga* Partial Award, paras. 269-283, 472-482 (**IN-EX-10**); *Indus Waters Arbitration*, Competence Award, paras. 155-213 (**PKA-1**).

<sup>134</sup> Third Meeting Transcript, Day 1, 29:12-17 (Sir Daniel).

<sup>135</sup> Pakistan's Statement, para. 1.12.

<sup>136</sup> Pakistan's Statement, para. 1.12; Third Meeting Transcript, Day 1, 40:5-25 (Sir Daniel).



365. According to Pakistan, a literal interpretation of this Paragraph suggests that the scope and limits of an issue that can be raised under this provision are that it can only be an issue of whether “the design of a Plant conforms to the criteria set out in Paragraph 8”.<sup>137</sup>
366. Pakistan thus argues that it follows from Paragraph 1(11) of Annexure F and Paragraph 11 of Annexure D that the competence of a neutral expert under these provisions extends only to questions that are (i) Plant-specific, (ii) focused on the design of a Plant, and (iii) engage issues of interpretation and application of Paragraph 8 of Annexure D.<sup>138</sup> According to Pakistan, the neutral expert’s competence therefore does not extend to (i) “questions of systemic Treaty interpretation and application”, (ii) “questions that go beyond a Plant-specific enquiry”, (iii) “non-design-specific questions”, and (iv) “questions of interpretation and application of Treaty provisions apart from Paragraph 8 of Annexure D”.<sup>139</sup> It states:

The Neutral Expert cannot take legal and Treaty-systemic matters supposedly within his competence in order to address points of difference. This transforms the nature of the enquiry and the determination and is not in compliance with the Neutral Expert’s role under the Treaty.<sup>140</sup>

367. Pakistan submits that India’s case would “[a]t the very least” require the Neutral Expert to consider, address and resolve the following three questions that fall outside the scope of his competence under Part 1 of Annexure F to the Treaty:

- (a) heavily contested issues of law and Treaty interpretation going far beyond Paragraph 8 of Annexure D,
- (b) the Parties’ disputes about the interpretation and application of the awards and decisions of the [*Kishenganga* Court] ... , and
- (c) questions concerning the interpretation and the binding and systemic effect of the [*Baglihar* Determination].<sup>141</sup>

368. Pakistan elaborates on each of these three questions as set out below.

(b) *India’s Points of Difference Relate to a Wider Disagreement*

369. Pakistan contends that the proceedings before the Neutral Expert “arise in the context of a wider disagreement” between the Parties over India’s programme for the construction of HEPs on the

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<sup>137</sup> Pakistan’s Statement, para. 1.13 (emphasis omitted); Third Meeting Transcript, Day 1, 40:18-23 (Sir Daniel); 105:16-22 (Professor Webb).

<sup>138</sup> Pakistan’s Statement, para. 1.13; Third Meeting Transcript, Day 1, 40:1-4; 40:18-23 (Sir Daniel); 130:1-2 (Professor Webb).

<sup>139</sup> Pakistan’s Statement, para. 1.14.

<sup>140</sup> Third Meeting Transcript, Day 1, 130:15-20 (Professor Webb).

<sup>141</sup> Pakistan’s Statement, para. 1.14.

Western Rivers, as expressed in the PCIW's Letter of 25 February 2016, quoted at paragraphs 308-309 above.<sup>142</sup>

370. Pakistan asserts that the KHEP and the RHEP are “part of an extensive Indian programme of HEP construction on the Western Rivers and cascading HEP operations on individual rivers”.<sup>143</sup> According to it, India's programme of HEPs on the Western Rivers comprises 52 HEPs that are in operation, 44 HEPs that have been formally notified to Pakistan under Paragraph 9 of Annexure D to the Treaty and are already under construction, as well as 105 HEPs that have not been formally notified, but that are “nevertheless contemplated in publicly available documents”.<sup>144</sup> Pakistan claims that these existing and planned HEPs together add up to a network of 201 power plants that would “turn the narrow valleys of the Western Rivers ... into a major power generation hub for north India” and asserts that all of these power plants are designed “with common elements in mind”, namely “large live storage, low power intakes, and orifice spillways designed to allow reservoir flushing as the principal means of sediment management”.<sup>145</sup> Accordingly, in Pakistan's view, “the KHEP and RHEP are therefore simply examples of a common Indian HEP design that is being broadly replicated across dozens of Plants throughout the Indus Basin”.<sup>146</sup>
371. Against this background, Pakistan submits that, while a number of technical issues were initially raised regarding the compliance of the KHEP and the RHEP with Paragraph 8 of Annexure D to the Treaty, the discussions between the Parties in the Commission subsequently “revealed a deeper, legal and Treaty-systemic disagreement between them on a variety of matters”, as reflected in the characterisation of the disagreements in the Points of Dispute attached to the PCIW's Letter of 25 February 2016.<sup>147</sup>
372. Pakistan cites its realization that there was a “deeper, legal and Treaty-systemic” disagreement between the Parties as the main reason for initiating arbitration proceedings before the 2022 CoA. Whereas Pakistan in July 2015 considered that “(a) the issues between the Parties regarding the RHEP and the KHEP were differences best resolved by a neutral expert, and that (b) by the same

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<sup>142</sup> Pakistan's Statement, paras. 4.1-4.11 *referring to* Letter from the PCIW to the ICIW, No. WT (132)/(7531-A)/PCIW, 25 February 2016 (**PK-5**); Third Meeting Transcript, Day 1, 98:23-99:5; 99:13-25 (Professor Webb). *See also* Third Meeting Transcript, Day 1, 79:19-82:18 (Dr. Miles).

<sup>143</sup> Pakistan's Statement, para. 2.2.

<sup>144</sup> Third Meeting Transcript, Day 1, 53:20-54:22 (Dr. Miles).

<sup>145</sup> Third Meeting Transcript, Day 1, 54:23-55:15 (Dr. Miles).

<sup>146</sup> Pakistan's Statement, para. 2.2.

<sup>147</sup> Pakistan's Statement, paras. 4.1-4.11.

reasoning, they included matters within the competence of a neutral expert under Paragraph 1 of Annex F”, it submits that, through the continued correspondence between the Commissioners, “Pakistan’s Commissioner realised, for the first time, that the technical differences concerning the KHEP and RHEP inextricably contained legal and Treaty-systemic disputes that could only be resolved by a Court of Arbitration”.<sup>148</sup> Pakistan rejects India’s characterization of the PCIW’s Letter of 26 February 2016 as a “*volte face*”.<sup>149</sup> According to Pakistan:

[W]hile prior to 3 July 2015, Pakistan did indeed consider the points of difference could be resolved by a Neutral Expert, the interaction between the Commissioners after that time persuaded Pakistan that the discrete technical issues concerning the design of the KHEP and the RHEP were the tip of a much larger iceberg, and that lurking beneath the water were a number of legal and Treaty-systemic issues that could only be resolved by a Court of arbitration. Pakistan’s change of position was not unthinking, but carefully thought through and explained in full in its Commissioner’s letter of 25 February 2016 . . . And since that point in time, Pakistan has been clear as to what the correct position is and it has acted upon it accordingly. There is therefore no inconsistency in its position.<sup>150</sup>

373. Pakistan further asserts that India’s Points of Difference are merely a copy of Pakistan’s characterisation of the Parties’ differences in its Points of Dispute, while “carefully removing those elements requiring a legal or Treaty-based determination”.<sup>151</sup>
374. What India portrays as a “straightforward disagreement about the technical characteristics of the KHEP and the RHEP”<sup>152</sup> is, in Pakistan’s view, “anything but a narrow Plant-specific difference”.<sup>153</sup> It explains that, even if “cast in terms of KHEP and RHEP compliance with the technical design requirements of Annexure D”, India’s Points of Difference necessarily involve issues of interpretation and application of the relevant provisions, not the comparison of technical requirements with Treaty provisions whose meaning is well-established and undisputed.<sup>154</sup>
375. In this respect, Pakistan argues that a dispute cannot be rendered “purely technical or HEP-specific” by simply “delet[ing] references to Treaty-systemic, legal and multi-Plant issues” and then “assert[ing] that it is a narrow Plant-specific technical difference”.<sup>155</sup> In the context of the wider disagreements between the Parties over India’s run-of-river HEP programme on the

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<sup>148</sup> Third Meeting Transcript, Day 1, 75:22-76:13 (Dr. Miles).

<sup>149</sup> Third Meeting Transcript, Day 1, 92:4-11 (Dr. Miles) *referring* to India’s Reply, para. 41(e).

<sup>150</sup> Third Meeting Transcript, Day 1, 90:19-91:13 (Dr. Miles).

<sup>151</sup> Pakistan’s Statement, para. 4.22. *See also* Third Meeting Transcript, Day 1, 126:11-14 (Professor Webb).

<sup>152</sup> Pakistan’s Statement, para. 4.34.

<sup>153</sup> Pakistan’s Statement, para. 4.28.

<sup>154</sup> Pakistan’s Statement, para. 1.9. *See also* Third Meeting Transcript, Day 1, 131:2-9 (Professor Webb).

<sup>155</sup> Pakistan’s Statement, 4.23.

Western Rivers, the issues raised by India are rather indicative of a dispute between the Parties that is both technical and HEP-specific, as well as legal and/or Treaty-systemic.<sup>156</sup>

376. According to Pakistan, India's Memorial indicates that India itself views the current disagreement over the KHEP and the RHEP as part of a wider disagreement. Pakistan cites India's statement that Pakistan's objections to India's HEPs "have often [been] repetitive and in common form".<sup>157</sup> Pakistan contends that India's statement is evidence that its case is only a "subset of the wider disagreement", with which the specific issues relating to the KHEP and the RHEP are inextricably linked and which constitutes the "real dispute between the Parties".<sup>158</sup>
377. Pakistan thus maintains that a resolution of the issues raised by the Points of Difference solely in the context of the KHEP and the RHEP would not address the underlying wider dispute, as identical issues would inevitably arise with any subsequent notification by India of its intention to construct a similar HEP under Annexure D.<sup>159</sup> Pakistan therefore emphasises the need to address these issues "holistically".<sup>160</sup> According to Pakistan, "[t]echnical detail can be addressed on a plant by plant basis but the rules of the game must be established for all HEPs on the Western Rivers, and well in advance of any *fait accompli*".<sup>161</sup>
378. Citing the *Kishenganga* Partial Award, which states that a court of arbitration's determinations on all matters before it are "binding in respect of the general question[s] presented",<sup>162</sup> even if they involve technical issues that could theoretically be decided by a neutral expert on a Plant-specific basis, Pakistan argues that only a court of arbitration is in a position to resolve the Parties' disagreements in a permanent and sustainable manner, even if they originate from a technical disagreement concerning the KHEP and the RHEP.<sup>163</sup>
379. In this connection, Pakistan argues that India's Points of Difference "would take the Neutral Expert far beyond the limits of the competence that he is accorded by Paragraph 1(11) of Annexure F and Paragraph 11 of Annexure D" as the Neutral Expert would have "to consider,

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<sup>156</sup> Pakistan's Statement, para. 4.10.

<sup>157</sup> Pakistan's Statement, para. 4.32 *citing* India's Memorial, para. 27; Third Meeting Transcript, Day 1, 101:13-102:7 (Professor Webb).

<sup>158</sup> Pakistan's Statement, para. 4.34 (emphasis by Pakistan).

<sup>159</sup> Pakistan's Statement, paras. 4.10, 4.24.

<sup>160</sup> Third Meeting Transcript, Day 1, 96:19-23 (Dr. Miles).

<sup>161</sup> Third Meeting Transcript, Day 1, 99:9-12 (Professor Webb).

<sup>162</sup> Pakistan's Statement, para. 4.11 *citing* *Kishenganga* Partial Award, para. 470 (IN-EX-10).

<sup>163</sup> Pakistan's Statement, para. 4.11 *citing* *Kishenganga* Partial Award, para. 470 (IN-EX-10). *See also* Third Meeting Transcript, Day 1, 102:9-19 (Professor Webb).

address and resolve ... heavily contested issues of law and Treaty interpretation going far beyond Paragraph 8 of Annexure D ... ”.<sup>164</sup>

380. In Pakistan’s view, India’s Points of Difference, which are “cast in terms of KHEP and RHEP compliance with the technical design requirements of Annexure D” necessarily involve contentious questions of interpretation and application of Treaty provisions rather than a simple exercise of mapping “technical requirements against provisions of the Treaty whose meaning is settled and uncontroversial”.<sup>165</sup>
381. In particular, Pakistan asserts that in order to resolve India’s Points of Difference, the Neutral Expert “would have to reach a view on the correct interpretation and application” not only of Paragraph 8, but also Paragraphs 2(c) and 15 of Annexure D.<sup>166</sup> In this respect, Pakistan contends that “[t]he relevance, interpretation and application of Paragraph 15 of Annexure D to India’s compliance with the design requirements of Paragraph 8 is not straightforward”.<sup>167</sup> Further, in accordance with the principles of Treaty interpretation, it calls for a “holistic interpretation of all the elements of Part 3 of Annexure D”<sup>168</sup>, asserting that such a holistic interpretation “would be a legal undertaking of some complexity”<sup>169</sup>. Neither, according to Pakistan, is within the competence of a neutral expert.<sup>170</sup>
382. Pakistan cites further provisions that, in its view, fall outside the scope of an inquiry by a neutral expert under Paragraph 11 of Annexure D and which would be engaged in the consideration of India’s case, such as “the Preamble, the data sharing provisions in Article VI and Appendix II of Annexure D and the cooperation provisions in, amongst other provisions, Article VII of the Treaty”.<sup>171</sup> Since the competence of the Neutral Expert in these proceedings “does not extend to questions of interpretation and application of Treaty provisions apart from Paragraph 8 of Annexure D”, Pakistan concludes that a determination of these issues falls outside the scope of an enquiry by the Neutral Expert under Paragraph 11 of Annexure D.<sup>172</sup>

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<sup>164</sup> Pakistan’s Statement, para. 1.14.

<sup>165</sup> Pakistan’s Statement, para. 1.9.

<sup>166</sup> Pakistan’s Statement, para. 1.7.

<sup>167</sup> Third Meeting Transcript, Day 1, 104:15-18 (Professor Webb).

<sup>168</sup> Third Meeting Transcript, Day 1, 104:21-23 (Professor Webb).

<sup>169</sup> Pakistan’s Statement, para. 5.13(c).

<sup>170</sup> See Pakistan’s Statement, para. 5.13(c); Third Meeting Transcript, Day 1, 104:11-105:7 (Professor Webb).

<sup>171</sup> See Pakistan’s Statement, para. 5.13(d).

<sup>172</sup> Pakistan’s Statement, para. 5.12; Third Meeting Transcript, Day 1, 102:20-103:5 (Professor Webb).

383. At the same time, Pakistan clarifies that the disagreement between the Parties over the interpretation and application of the terms of Paragraph 8 of Annexure D is not the basis of its Paragraph 7 competence objection and that it “does not contest the Neutral Expert’s competence to interpret the provisions of Paragraph 8 of Annexure D in circumstances in which he is properly seised of a difference that falls within Part 1 of Annexure F”.<sup>173</sup>

(c) *The Parties Disagree on the Interpretation, Application and Binding Effect of the Kishenganga Court’s Awards and Decisions*

384. A further aspect that, according to Pakistan, points to a broader disagreement between the Parties that does not fall within the Neutral Expert’s competence to resolve is that India “does not accept the findings of the *Kishenganga Court*”.<sup>174</sup>

385. Pakistan asserts that “despite the unambiguous statements in the *Kishenganga* Partial Award, confirmed in the Court’s subsequent decision under Paragraph 27 of Annexure G”,<sup>175</sup> India does not accept the *Kishenganga Court*’s finding that drawdown flushing is prohibited under the Treaty both as a general matter and with respect to the KHEP specifically.<sup>176</sup> In Pakistan’s view, there is no doubt that such a finding was made.<sup>177</sup>

386. Pakistan maintains that India’s non-acceptance of the *Kishenganga Court*’s findings is evident from its Memorial, half of which is devoted to the question of sediment management, including a 105-page chapter entitled “Importance of Sediment Management for Sustainability of the Projects”, and which is further supported by two expert reports and several case studies that allegedly “demonstrate that drawdown flushing is essential to the viability of both the KHEP and the RHEP”.<sup>178</sup>

387. Pakistan notes that, while India challenges the findings of the *Kishenganga Court* in its Memorial, it “touches on the *Kishenganga* Partial Award only briefly” and “frames its discussion in terms of the provisions of the Treaty dealing with sediment management”, thereby failing “to mention

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<sup>173</sup> Pakistan’s Statement, para. 1.10.

<sup>174</sup> Pakistan’s Statement, para. 4.36.

<sup>175</sup> Pakistan’s Statement, para. 4.41.

<sup>176</sup> Pakistan’s Statement, para. 4.36.

<sup>177</sup> Pakistan’s Statement, para. 4.37.

<sup>178</sup> Pakistan’s Statement, para. 4.41. *See also* Third Meeting Transcript, Day 1, 110:14-21 (Professor Webb).

Paragraph 19 of Annexure E”, which, in Pakistan’s view, is the “crux of the *Kishenganga* Partial Award”.<sup>179</sup>

388. Pakistan further notes that, whereas India refers to the final decision of the *Kishenganga* Partial Award, including the injunction that “India may not employ drawdown flushing at the [KHEP reservoir] to an extent that would entail depletion of the reservoir below the Dead Storage Level”, it attempts “to unpick” it by citing the *Kishenganga* Court’s statement that “[i]f a prohibition on drawdown flushing would render any sustainable hydroelectric development impossible” it would consider this relevant in approaching any Treaty provision suggesting such a prohibition.<sup>180</sup>
389. According to Pakistan, this statement appears early in the *Kishenganga* Partial Award, before the Court considered sluicing to be an appropriate method of sediment management and concluded that Paragraph 19 of Annexure E, as incorporated into Annexure D by Paragraph 14, absolutely prohibited drawdown flushing.<sup>181</sup> For Pakistan, the fact that India does not cite this aspect of the Partial Award, nor the Court’s subsequent elaboration, and suggests that sediment management is a “site specific issue”<sup>182</sup> and that it is entitled to carry out drawdown flushing when “sluicing is not sufficient to maintain Live Storage at the KHEP and the RHEP”, demonstrates India’s attempt to avoid “the inconvenient truth of this decision by quoting it out of context and turning it on its head”.<sup>183</sup>
390. Pakistan points to two other so-called “techniques” used by India to evade the “inconvenient truth” of the *Kishenganga* Partial Award. Pakistan asserts that the first technique appeared when the PCIW called on India to remove deep orifice spillways from its HEP designs after the conclusion of the *Kishenganga* arbitration. Rather than engage with the PCIW’s arguments as to why India’s position that the *Kishenganga* Partial Award only imposes operational restrictions and does not require a change in design is incorrect, the ICIW claimed that the *Kishenganga* Court “had not objected to placement or existence” of orifice spillways and refused to comment further.<sup>184</sup> The second technique, according to Pakistan, was introduced more recently in India’s

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<sup>179</sup> Pakistan’s Statement, para. 4.46.

<sup>180</sup> Pakistan’s Statement, para. 4.46 *citing* *Kishenganga* Partial Award, para. 509 (IN-EX-10).

<sup>181</sup> Pakistan’s Statement, para. 4.47.

<sup>182</sup> Pakistan’s Statement, para. 4.47 *citing* India’s Memorial, paras. 403-404.

<sup>183</sup> Pakistan’s Statement, paras. 4.47-4.48.

<sup>184</sup> Pakistan’s Statement, para. 4.49 *referring to* Letter from the ICIW to the PCIW, No. Y-11017/2/2015-IT/2155, 21 August 2015, para. 13 (PK-6); Letter from the PCIW to the ICIW, No. WT(132)/(7505-A)/PCIW, 11 September 2015, paras. 22-25 (PK-7); Letter from the ICIW to the PCIW, No. Y-11017/2/2015-IT/2162, 13 October 2015, p. 2 (PK-8).

letter to the Neutral Expert dated 11 February 2023, when India argued that there is no provision in the Treaty declaring that an award by a court of arbitration is binding on a neutral expert.<sup>185</sup>

391. Pakistan views these statements as an indication that India intends to argue that the Neutral Expert is not bound by the general prohibition in the *Kishenganga* Partial Award on drawdown flushing under Annexure D and the specific prohibition on drawdown flushing at the KHEP.<sup>186</sup> Pakistan disagrees with this position on the grounds that the *Kishenganga* Court is an international tribunal whose awards “carry full *res judicata* effect not only under Paragraph 23 of Annexure G, but also under the general law of international dispute settlement”.<sup>187</sup>
392. Pakistan notes India’s arguments during the Third Meeting in relation to deep orifice spillways and, *inter alia*, their necessity to “create a coning effect so that sediments don’t go into the water inlets of the turbines and pass through” (see paragraph 477 below).<sup>188</sup> It states that it does not know “what to make of this, and of the other revisionist comments going to India’s case on the scope and effect of the *Kishenganga* awards and the Baglihar [D]etermination”.<sup>189</sup>
393. In the light of the above and as will be elaborated upon further below in relation to specific Points of Difference, Pakistan states that the following three disagreements about the *Kishenganga* Partial Award and the Court’s subsequent decision under Paragraph 27 of Annexure G have arisen between the Parties:
- (a) First, the Parties disagree about the meaning of the *Kishenganga* Partial Award, and whether the decision imposed a blanket ban on drawdown flushing with respect to Indian HEPs on the Western Rivers.
  - (b) Second, the Parties disagree about the implications of the *Kishenganga* Partial Award with respect to the question of drawdown flushing and deep orifice spillways at the KHEP, and whether the *Kishenganga* Court imposed a design restriction in that case.
  - (c) Third, the Parties disagree about the capacity of the *Kishenganga* Partial Award to bind the Neutral Expert in the context of the present proceedings.<sup>190</sup>

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<sup>185</sup> Pakistan’s Statement, para. 4.50 *referring to* Letter from India to the Neutral Expert, No. Y-18012/1/2020-Indus, 11 February 2023, paras. 7-8.

<sup>186</sup> Pakistan’s Statement, para. 4.51.

<sup>187</sup> Pakistan’s Statement, para. 4.52.

<sup>188</sup> Third Meeting Transcript, Day 2, 257:6-258:8 (Sir Daniel) *referring to* Third Meeting Transcript, Day 1, 187:12-188:17 (Mr. Salve).

<sup>189</sup> Third Meeting Transcript, Day 2, 258:9-12 (Sir Daniel).

<sup>190</sup> Pakistan’s Statement, para. 4.53. *See also* Third Meeting Transcript, Day 1, 111:20-112:8 (Professor Webb).



(d) *The Parties Disagree on the Interpretation and Binding Effect of the Baglihar Determination*

394. According to Pakistan, a further systemic disagreement between the Parties that does not fall within the Neutral Expert's competence to resolve relates to the status of the *Baglihar* Determination.
395. Pakistan argues that India relies on the *Baglihar* Determination to "urge the Neutral Expert in these proceedings to adopt similar conclusions with respect to the KHEP and the RHEP", in particular with respect to pondage calculation, drawdown flushing and depletion of Dead Storage, and on the meaning to be given to "sound and economical design" and cognate concepts in Paragraph 8 of Annexure D to the Treaty.<sup>191</sup> Pakistan also argues that India urges the Neutral Expert "to adopt the *Baglihar* Determination's theory of treaty interpretation, which prioritises 'best' or 'state of the art' practices in HEP construction over the terms and intent of the Treaty".<sup>192</sup>
396. Pakistan disagrees that the *Baglihar* Determination should be followed on these aspects, pointing out, *inter alia*, that the *Kishenganga* Court took a different view on all of them and has made clear that neutral expert determinations are only binding with respect to the HEP at issue and have no wider precedential effect.<sup>193</sup>
397. Based on the foregoing and as will be elaborated upon further below in relation to specific Points of Difference, Pakistan submits that the following "two underlying disagreements" on the "force and effect of the Neutral Expert's determination in *Baglihar*" have arisen between the Parties:
- (a) First, the Parties disagree as to whether *Baglihar* constitutes a precedent that is binding on the Parties (and presumably, by extension, the Neutral Expert) with respect to calculation of Pondage at the KHEP and the RHEP.
  - (b) Second, the Parties disagree as to whether the theory of interpretation adopted by the Neutral Expert in *Baglihar*, pursuant to which India is entitled automatically to use "best" or "state of the art" practices in HEP design, is the correct way of approaching Annexure D and the Treaty in general.<sup>194</sup>

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<sup>191</sup> Pakistan's Statement, paras. 4.54-4.55.

<sup>192</sup> Pakistan's Statement, para. 4.54.

<sup>193</sup> Pakistan's Statement, paras. 4.57, 4.59-4.65.

<sup>194</sup> Pakistan's Statement, para. 4.70.

### 3. Analysis of the Points of Difference in Relation to the Neutral Expert's Competence

#### (a) Differences that Fall Outside the Scope of Part 1 of Annexure F

398. Pakistan disagrees with India's position that each of the Points of Difference falls exclusively within the competence of the Neutral Expert. In its view, the following Points of Difference, considered "individually", fall outside the scope of Part 1 of Annexure F:

(a) Differences 2, 3, 6, and 7 (numbered in accordance with their order in India's Statement of Points of Difference reproduced at paragraph 4 above) concerning the use of deep orifice spillways at the KHEP and the RHEP for sediment management by way of drawdown flushing;<sup>195</sup> and

(b) Differences 1 and 5, concerning the proper formula for the calculation of maximum Pondage at the KHEP and the RHEP.<sup>196</sup>

#### i. Differences 2, 3, 6 and 7 of the Points of Difference

399. Pakistan submits that the first set of differences that fall outside the scope of Part 1 of Annexure F are Differences 2, 3, 6 and 7, which concern whether the use of deep orifice spillways at the KHEP and the RHEP is compliant with Paragraphs 8(d) and (e) of Annexure D.<sup>197</sup>

400. Pakistan maintains that, "while these differences, on their own, could perhaps be considered technical in character", they cannot be "divorced from what has come before".<sup>198</sup> Referring to the *Kishenganga* Partial Award, Pakistan notes that "the use of drawdown flushing is prohibited generally for Indian HEPs on the Western Rivers to the extent this results in an HEP's reservoir being depleted to below Dead Storage Level".<sup>199</sup>

401. With regard to the *Kishenganga* Partial Award, Pakistan elaborates as follows:

This position has been confirmed, in terms that are binding on the Parties pursuant to Paragraph 23 of Annexure G, by the Court of Arbitration in the *Kishenganga* Partial Award. In the light of that award, the question of India's use of deep orifice spillways at the KHEP and the RHEP is not, in reality, about Paragraph 8(d) of Annexure D at all but rather about

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<sup>195</sup> Pakistan's Statement, para. 5.14; Third Meeting Transcript, Day 1, 109:9-15 (Professor Webb).

<sup>196</sup> Pakistan's Statement, para. 5.14; Third Meeting Transcript, Day 1, 117:23-118:1 (Professor Webb).

<sup>197</sup> See Third Meeting Transcript, Day 1, 109:9-15 (Professor Webb). See also 116:10-15, 117:5-11 (Professor Webb).

<sup>198</sup> Pakistan's Statement, para. 5.16.

<sup>199</sup> Pakistan's Statement, para. 5.16. See also Third Meeting Transcript, Day 1, 113:1-9 (Professor Webb).

the force and effect of the *Kishenganga* Partial Award on these Neutral Expert proceedings and the meaning of the *Kishenganga* Partial Award.<sup>200</sup>

402. Thus, according to Pakistan, India's position on the use of deep orifice spillways at the KHEP and the RHEP for the purpose of sediment management through drawdown flushing calls into question the *Kishenganga* Partial Award. In particular, Pakistan argues that the Parties disagree on three aspects of the *Kishenganga* Partial Award.<sup>201</sup>
403. First, the Parties disagree as to what the *Kishenganga* Court found in its Partial Award.<sup>202</sup> Whereas, according to Pakistan, India's Memorial seems to suggest that India considers that the *Kishenganga* Partial Award did not find that the Treaty generally prohibits drawdown flushing with respect to Indian HEPs on the Western Rivers,<sup>203</sup> Pakistan maintains that the *Kishenganga* Court did find that the Treaty generally prohibits drawdown flushing by India with respect to any HEP.<sup>204</sup>
404. Second, the Parties disagree as to whether the *Kishenganga* Partial Award imposes a design restriction at the KHEP, thereby requiring a change in the design of the KHEP as a result of its conclusion that drawdown flushing is prohibited under the Treaty.<sup>205</sup> In Pakistan's view, the *Kishenganga* Court "imposed a design limitation on the KHEP in the Partial Award". In contrast, India contends that the Partial Award in *Kishenganga* "imposes an operational restriction only" in relation to the KHEP.<sup>206</sup>
405. Third, the Parties disagree as to whether the *Kishenganga* Partial Award is binding on the Neutral Expert.<sup>207</sup> According to Pakistan, such a disagreement may arise between the Parties as a result of India's view, expressed in correspondence, that "a decision of the Court can only bind the Parties, not the Neutral Expert".<sup>208</sup> This contention, in Pakistan's view, would allow the Neutral

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<sup>200</sup> Pakistan's Statement, para. 5.16.

<sup>201</sup> Third Meeting Transcript, Day 1, 111:16-112:8 (Professor Webb).

<sup>202</sup> Third Meeting Transcript, Day 1, 111:20-24 (Professor Webb).

<sup>203</sup> Pakistan's Statement, para. 5.18 *citing* India's Memorial, paras. 400-405.

<sup>204</sup> Pakistan's Statement, para. 5.19 *citing Kishenganga Arbitration*, Decision on India's Request for Clarification or Interpretation dated 20 May 2013, 20 December 2013, para. 34 (**PKA-4**); Third Meeting Transcript, Day 1, 112:16-113:9 (Professor Webb).

<sup>205</sup> Pakistan's Statement, para. 5.22; Third Meeting Transcript, Day 1, 111:25-112:5 (Professor Webb).

<sup>206</sup> Pakistan's Statement, paras. 5.23-5.24 *referring, inter alia, to* Letter from the ICIW to the PCIW, No. Y-11017/2/2015-IT/2155/ICIW, 21 August 2015, para. 13 (**PK-6**); Third Meeting Transcript, Day 1, 113:25-115:5 (Professor Webb).

<sup>207</sup> Pakistan's Statement, para. 5.27; Third Meeting Transcript, Day 1, 112:6-8 (Professor Webb).

<sup>208</sup> Pakistan's Statement, para. 5.27 *referring to* India's Letter to the Neutral Expert, No. Y-18012/1/2020-Indus, 11 February 2023.

Expert “to dismiss the *Kishenganga* Partial Award, hold that drawdown flushing is permitted under the Treaty, and find that India’s deep orifice spillway is compliant with Paragraph 8(d) of Annexure D”.<sup>209</sup> Pakistan considers this contention to be “flatly wrong”. Pakistan refers to the *res judicata* effect of an award or judgment of an international court or tribunal, which cannot be deviated from even if the parties “are before a forum that is different to that which issued the initial award or judgment”.<sup>210</sup>

406. Pakistan submits that a decision on the first of the above issues, namely the question of what the *Kishenganga* Court found in its Partial Award, would require the Neutral Expert to determine which interpretation of the *Kishenganga* Partial Award is correct. Such a determination would require the “examination of multiple legal texts”, including the Treaty and other legal documents.<sup>211</sup> Considering that the Neutral Expert is not empowered by Part 1 of Annexure F to conduct such an analysis, Pakistan maintains that it falls outside his competence.<sup>212</sup>
407. Likewise, a decision on the second issue, namely whether the *Kishenganga* Partial Award imposes a design restriction on the KHEP, would require the Neutral Expert “to undertake a careful and considered interpretation of the *Kishenganga* Partial Award” and would include the “examination of multiple legal texts identified by Pakistan”.<sup>213</sup> Pakistan again submits that this falls outside the competence of the Neutral Expert on the basis that he is not empowered by Part 1 of Annexure F to conduct such an analysis.<sup>214</sup>
408. Similar to the first two issues, a decision on the question of whether the Neutral Expert is bound by the *Kishenganga* Partial Award would require “an investigation into and a conclusion on the interpretation and application of Paragraph 23 of Annexure G as well as into the wider concept of *res judicata* in international law”. Pakistan submits that, although it “takes the view that the answer to such enquiry is clear and straightforward—namely, that the Neutral Expert is so bound by decisions and determinations of the Court”, in circumstances in which this is not “(apparently)

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<sup>209</sup> Pakistan’s Statement, para. 5.27; Third Meeting Transcript, Day 1, 116:10-15 (Professor Webb).

<sup>210</sup> Pakistan’s Statement, para. 5.28. *See also* Third Meeting Transcript, Day 1, 115:18-116:24; 117:15-18 (Professor Webb).

<sup>211</sup> Pakistan’s Statement, para. 5.20; Third Meeting Transcript, Day 1, 113:10-18 (Professor Webb).

<sup>212</sup> Pakistan’s Statement, para. 5.21; Third Meeting Transcript, Day 1, 113:19-24 (Professor Webb).

<sup>213</sup> Pakistan’s Statement, para. 5.25; Third Meeting Transcript, Day 1, 115:6-13 (Professor Webb).

<sup>214</sup> Pakistan’s Statement, para. 5.26; Third Meeting Transcript, Day 1, 115:14-17 (Professor Webb).

agreed” by the Parties, however, “a determination of this matter is plainly far outside the scope of the Neutral Expert’s competence under Part 1 of Annexure F”.<sup>215</sup>

409. In view of the above, Pakistan concludes that Differences 2, 3, 6 and 7 are beyond the scope of the Neutral Expert’s competence and must therefore be treated as disputes rather than differences.<sup>216</sup>

*ii. Differences 1 and 5 of the Points of Difference*

410. According to Pakistan, Differences 1 and 5 of India’s Points of Difference, which concern the calculation of maximum Pondage at the KHEP and the RHEP, also fall outside the scope of Part I of Annexure F and hence the Neutral Expert’s competence.<sup>217</sup>

411. Pakistan contends that India, in those Points of Difference and its Memorial, “almost casually” attempts to bring the interpretation of Paragraphs 2(c) and 15 of Annexure D within the purview of the Neutral Expert’s competence.<sup>218</sup> However, it contends that Paragraph 11 of Annexure D and Paragraph 1(11) of Annexure F, which are the only jurisdictional basis invoked by India in these proceedings, “do not afford the Neutral Expert competence to address questions of the operation of new run-of-river hydroelectric plants under Paragraph 15 of Annexure D”.<sup>219</sup> Pakistan notes that “there is a provision in Part I of Annexure F that would have afforded a Neutral Expert the competence to address questions concerning the operation of a plant by reference to the criteria in Paragraph 15 of Annexure D”. However, it points out that India “repeatedly failed to invoke that provision as a basis for its assertion of the competence of the Neutral Expert”.<sup>220</sup>

412. Pakistan further submits that the Parties disagree as to whether the *Baglihar* Determination has resolved the question of maximum Pondage calculation and is binding on the Parties with respect to the KHEP and the RHEP.<sup>221</sup> It argues that India contends that “maximum Pondage ‘should be calculated to satisfy daily [and/or] weekly load variations of the Plant and consequently the

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<sup>215</sup> Pakistan’s Statement, para. 5.30 (emphasis by Pakistan); Third Meeting Transcript, Day 1, 117:12-22 (Professor Webb).

<sup>216</sup> Third Meeting Transcript, Day 1, 113:23-24, 115:14-17, 117:20-22 (Professor Webb).

<sup>217</sup> Third Meeting Transcript, Day 1, 117:23-118:1, 121:8-11 (Professor Webb).

<sup>218</sup> Pakistan’s Statement, para. 5.13.

<sup>219</sup> Third Meeting Transcript, Day 1, 44:20-24 (Sir Daniel); 119:14-17 (Professor Webb).

<sup>220</sup> Third Meeting Transcript, Day 1, 45:12-19 (Sir Daniel).

<sup>221</sup> Pakistan’s Statement, para. 5.39. *See also* Third Meeting Transcript, Day 1, 119:25-120:10 (Professor Webb).

variations in the turbine discharge necessary to produce this variable demand of power’.”<sup>222</sup> According to Pakistan, in support of its methodology, India relies on the methodology used by the neutral expert in the *Baglihar* Determination.<sup>223</sup> Pakistan does not accept this calculation method and argues that key points of its own position were “affirmed in passing” in the *Kishenganga* Partial Award, in which the *Kishenganga* Court noted that the Treaty’s approach to storage of water by India on the Western Rivers was “not generous” and that for new run-of-river plants Annexure D restricted the permitted pondage volume, tying this limit to the minimum mean discharge calculated at the site.<sup>224</sup>

413. While Pakistan accepts that the methodology used in the *Baglihar* Determination, which it believes to be wrong, is binding on Pakistan in respect of the Baglihar plant, it does not accept “that the Baglihar methodology for the calculation of maximum pondage can properly be applied to every run-of-river HEP that India constructs on the Western Rivers”.<sup>225</sup> Pakistan argues that India, in contrast, considers that the *Baglihar* Determination was not only correct on this matter, but should apply to all plants built under Annexure D and thus be binding on the Parties with regard to the calculation of maximum Pondage for the KHEP and the RHEP.<sup>226</sup>
414. According to Pakistan, the determination of whether the findings of one neutral expert are binding on another neutral expert “... would require an examination of the legal effect of Paragraph 11 of Annexure F, as well as the character of the Neutral Expert as an international adjudicative body, together with international law principles such as *res judicata*”.<sup>227</sup>
415. Considering that such analysis is “plainly beyond the scope of Part 1 of Annexure F”, Pakistan submits that the Neutral Expert is not empowered under Part 1 of Annexure F to undertake such an analysis and that it is therefore outside his competence.<sup>228</sup> Pakistan submits that, as a result, Differences 1 and 5 “must—for the time being at least—be treated ... as disputes, rather than as

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<sup>222</sup> Pakistan’s Statement, para. 5.34 *referring* to India’s Memorial, paras. 80, 211.

<sup>223</sup> Pakistan’s Statement, para. 5.36 *referring* to India’s Memorial, paras. 90, 221. *See also* Third Meeting Transcript, Day 1, 119:25-120:4 (Professor Webb).

<sup>224</sup> Pakistan’s Statement, para. 5.35 *citing* *Kishenganga* Partial Award, para. 504 (IN-EX-10); Third Meeting Transcript, Day 1, 120:5-19 (Professor Webb).

<sup>225</sup> Pakistan’s Statement, paras. 5.37, 5.38 (emphasis by Pakistan); Third Meeting Transcript, Day 1, 120:2-10 (Professor Webb).

<sup>226</sup> Pakistan’s Statement, paras. 4.58, 5.37, 5.38 *referring to* Letter from the ICIW to the PCIW, No. Y-11017/2/2015-IT/2155, 21 August 2015, para. 9 (PK-6); Third Meeting Transcript, Day 1, 119:3-6 (Professor Webb).

<sup>227</sup> Pakistan’s Statement, para. 5.39; Third Meeting Transcript, Day 1, 120:20-121:7 (Professor Webb).

<sup>228</sup> Pakistan’s Statement, para. 5.39; Third Meeting Transcript, Day 1, 121:8-10 (Professor Webb).

differences”.<sup>229</sup> In the alternative, Pakistan argues that “the relevant issues are, at the very least, inextricable from or necessarily antecedent to Differences 1 and 5, such that the Neutral Expert must treat them as only partially falling within Part 1 of Annexure F”.<sup>230</sup>

(b) *Differences that Fall Within the Scope of Part 1 of Annexure F but Should be Treated as Disputes*

416. In a second line of argument put forward in the alternative, Pakistan submits that, should the Neutral Expert not agree that the Points of Difference discussed above (all of the Points of Difference save Difference 4 relating to freeboard) are to be treated as disputes, they nevertheless “fall in material part outside of Part 1 of Annexure F”<sup>231</sup> if “properly contextualised”.<sup>232</sup>

417. Pakistan argues that these Points of Difference are all “partially dependent on legal or Treaty-systemic issues that are beyond the competence of the Neutral Expert to decide”<sup>233</sup> and that, in particular:

(i) India’s case [in respect of Differences 2-3 and 5-7] is dependent on the *Baglihar* theory of Treaty interpretation, which Pakistan rejects;

(ii) India’s case [in respect of Differences 1-3 and 5-7] forms part of the wider disagreement between the Parties concerning its programme of HEP construction on the Western Rivers.<sup>234</sup>

418. With regard to the argument concerning India’s dependence on the “*Baglihar* theory of Treaty interpretation” in its Memorial, Pakistan asserts that there is “a significant disagreement” between the Parties with respect to the “proper interpretive approach to be taken to Paragraph 8 of Annexure D”, resulting from the fact that Paragraph 8 contains a number of terms that can be considered ambiguous.<sup>235</sup> While India is of the view that it has to ensure that “any HEP it constructs under Annexure D will work in the ‘most economical, efficient and sustainable manner’”, Pakistan is of the view that Paragraph 8 of Annexure D should be interpreted

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<sup>229</sup> Pakistan’s Statement, para. 5.40; Third Meeting Transcript, Day 1, 121:10-11 (Professor Webb).

<sup>230</sup> Pakistan’s Statement, para. 5.40. *See also* Third Meeting Transcript, Day 1, 121:12-23 (Professor Webb).

<sup>231</sup> Pakistan’s Statement, para. 5.41 (emphasis added); Third Meeting Transcript, Day 1, 121:16-17 (Professor Webb).

<sup>232</sup> Pakistan’s Statement, para. 5.41.

<sup>233</sup> Pakistan’s Statement, para. 5.41; Third Meeting Transcript, Day 1, 121:20-23 (Professor Webb).

<sup>234</sup> Pakistan’s Statement, para. 5.41. *See also* Third Meeting Transcript, Day 1, 121:25-122:7 (Professor Webb).

<sup>235</sup> Pakistan’s Statement, paras. 5.46, 5.47.

restrictively “in light of the ‘let flow’, ‘unrestricted use’ and ‘no interference with the waters’ obligations” arising under Article III of the Treaty.<sup>236</sup>

419. Further, Pakistan submits that India relies on the theory of Treaty interpretation developed in the *Baglihar* Determination, arguing that it is permitted to incorporate “best practices” into its HEP designs.<sup>237</sup> While Pakistan concurs with India that it is obliged to use best practices, these, according to Pakistan, “must be best practices that apply within the framework of the Treaty”.<sup>238</sup>
420. Pakistan submits that determining which of the Parties’ positions is correct would require a comprehensive consideration of the “Treaty as a whole, in the light of the rules of treaty interpretation in international law, the Treaty’s drafting history, international caselaw (including *Baglihar* and *Kishenganga*), and scholarly commentaries”.<sup>239</sup> According to Pakistan, these aspects are comprehensively beyond the scope of the Neutral Expert’s competence.<sup>240</sup>
421. Pakistan further argues that before the Neutral Expert can engage with the question of whether the designs of the KHEP and the RHEP comply with Paragraph 8 of Annexure D, he would need guidance on the meaning of the terms in this provision. Since an “interpretive exercise” by the Neutral Expert is outside his competence, Pakistan maintains that he must conclude that “Differences 2–3 and 5–7 are only partially within his competence and that he cannot proceed with any element that is within his competence until he is authoritatively advised on the proper meaning of the provisions in question”.<sup>241</sup>
422. With regard to the second argument that India’s case forms part of a wider disagreement, Pakistan notes that this disagreement is closely tied to Pakistan’s concerns regarding “India’s ambitious programme of HEP construction on the Western Rivers”, of which the KHEP and the RHEP are only a part.<sup>242</sup> In view of this wider disagreement, Pakistan submits that even if the Neutral Expert were to conclude that he could address the Points of Difference presented to him, he should conclude that Differences 1-3 and 5-7 should be treated as disputes.<sup>243</sup>

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<sup>236</sup> Pakistan’s Statement, paras. 5.43, 5.44; Third Meeting Transcript, Day 1, 122:8-17; 123:7-12 (Professor Webb).

<sup>237</sup> Pakistan’s Statement, para. 5.46; Third Meeting Transcript, Day 1, 123:2-4 (Professor Webb).

<sup>238</sup> Pakistan’s Statement, para. 5.45; Third Meeting Transcript, Day 1, 124:3-125:2 (Professor Webb).

<sup>239</sup> Pakistan’s Statement, para. 5.46.

<sup>240</sup> Pakistan’s Statement, para. 5.46; Third Meeting Transcript, Day 1, 125:16-23 (Professor Webb).

<sup>241</sup> Pakistan’s Statement, para. 5.47; Third Meeting Transcript, Day 1, 125:24-126:4 (Professor Webb).

<sup>242</sup> Pakistan’s Statement, para. 5.48; Third Meeting Transcript, Day 1, 126:5-10 (Professor Webb).

<sup>243</sup> Pakistan’s Statement, para. 5.49. *See also* Third Meeting Transcript, Day 1, 126:5-23 (Professor Webb).



(c) *Difference 4*

423. Pakistan accepts that Difference 4 “could, on a narrow construction of the issue, come within the scope of the Neutral Expert’s competence as it is ostensibly focused on RHEP design compliance with Paragraph 8(a) of Annexure D alone”.<sup>244</sup>
424. Nevertheless, Pakistan argues that the Neutral Expert “should not proceed to address Difference 4 alone” and in isolation from the other Points of Differences raised by India for the following three reasons.<sup>245</sup>
425. First, the design parameters for Indian run-of-river HEPs on the Western Rivers contained in Paragraph 8 of Annexure D are intended to “operate holistically and should ... also be construed holistically”.<sup>246</sup>
426. Second, the Neutral Expert should defer to the 2022 CoA’s pending interpretation in relation to freeboard design and then address all of the KHEP and RHEP Paragraph 8 design issues together.<sup>247</sup>
427. Third, India’s arguments on Difference 4 may extend beyond Paragraph 8(a), necessitating the Neutral Expert to consider issues beyond his competence under the Treaty.<sup>248</sup>
428. For these reasons, Pakistan contends that the Neutral Expert, while potentially competent on this issue, should “defer engagement on Difference 4” to enable this issue to be addressed holistically alongside other RHEP design issues identified in India’s Points of Difference.<sup>249</sup>

**4. The Competence of the Neutral Expert in View of the 2022 CoA’s Competence Award and Procedural Order No. 6**

429. In addition to the question of whether the differences raised by India “fall within the scope of Part 1 of Annexure F of the Treaty”, Pakistan also addresses the issue of “whether the Neutral Expert is competent to address any of the differences that may otherwise fall within the scope of

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<sup>244</sup> Pakistan’s Statement, para. 6.19.

<sup>245</sup> Pakistan’s Statement, para. 6.20; Third Meeting Transcript, Day 1, 126:24-127:3 (Professor Webb).

<sup>246</sup> Pakistan’s Statement, para. 6.20; Third Meeting Transcript, Day 1, 127:4-8 (Professor Webb).

<sup>247</sup> Pakistan’s Statement, para. 6.20; Third Meeting Transcript, Day 1, 127:9-13 (Professor Webb).

<sup>248</sup> Pakistan’s Statement, para. 6.20; Third Meeting Transcript, Day 1, 127:14-18 (Professor Webb).

<sup>249</sup> Pakistan’s Statement, para. 6.21.

Part 1 of Annexure F, having regard to the parallel proceedings between the Parties before the [2022 CoA]”.<sup>250</sup> According to Pakistan:

proper assessment by the Neutral Expert of this issue is also ... capable of producing a constructive way forward as it indicates a pathway towards active engagement by the Neutral Expert on questions that could properly fall within the scope of his competence under Paragraph 1(11) of Annexure F once systemic questions of interpretation and application have been cleared away by the Court.<sup>251</sup>

430. Pakistan recalls that the 2022 CoA has recently issued a Competence Award, which Pakistan considers to be dispositive, binding and relevant, “both generally and with respect to the present Paragraph 7 procedure”.<sup>252</sup> According to Pakistan, the binding character of the Competence Award follows from Paragraph 23 of Annexure G to the Treaty and the 2002 CoA’s “general competence to address any question concerning the interpretation and application of the Treaty”, as well as the “*res judicata* effect of final decisions by a competent court on a given matter between the same Parties”.<sup>253</sup> Pakistan submits that, for the Neutral Expert, the 2022 CoA’s findings and determinations “are dispositive findings and determinations of fact” and that he is not “required, called upon or competent to question them”.<sup>254</sup>
431. Pakistan notes that, in its Competence Award, the Court concluded, “*inter alia*, that it ‘is competent to consider and determine the disputes set forth in Pakistan’s Request for Arbitration’”<sup>255</sup> and therefore “affirmed its competence without limitation”.<sup>256</sup> It asserts that the Points of Dispute as set out in Pakistan’s Request for Arbitration “fully encompass each and every point of difference set out in India’s Point of Difference”.<sup>257</sup>
432. Pakistan further contends that the following “five highly material points relevant for the present Paragraph 7 proceedings” emerge from the Competence Award:

- (a) First, the Treaty restricts the competence of the Neutral Expert to the technical questions identified in Part 1 of Annexure F.

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<sup>250</sup> Pakistan’s Statement, para. 1.17.

<sup>251</sup> Pakistan’s Statement, para. 1.17.

<sup>252</sup> Pakistan’s Statement, para. 1.22.

<sup>253</sup> Pakistan’s Statement, para. 1.22; Third Meeting Transcript, Day 1, 52:9-15 (Sir Daniel).

<sup>254</sup> Pakistan’s Statement, para. 1.35 (emphasis by Pakistan). *See also* Third Meeting Transcript, Day 1, 52:15-16 (Sir Daniel).

<sup>255</sup> Pakistan’s Statement, para. 1.25 *referring to Indus Waters Arbitration*, Competence Award, para. 318 (PKA-1).

<sup>256</sup> Pakistan’s Statement, para. 1.25; Third Meeting Transcript, Day 1, 23:17-23 (Sir Daniel).

<sup>257</sup> Pakistan’s Statement, para. 1.25 (emphasis by Pakistan). *See also* Third Meeting Transcript, Day 1, 131:14-16 (Professor Webb).

- (b) Second, questions that are predominately legal in nature, including (a) the proper method of making pondage calculations, (b) the relevance of the Neutral Expert's determinations in the *Baglihar* Determination, and (c) the applicability of the *Kishenganga* Court's ruling on drawdown flushing, fall outside of a Neutral Expert's competence under Part 1 of Annexure F.
- (c) Third, parallel proceedings are entirely possible under the Treaty.
- (d) Fourth, in the case of parallel proceedings, it is incumbent upon a Court of Arbitration and a Neutral Expert to resolve questions concerning the permissibility or impermissibility of parallel proceedings through their respective competence procedures.
- (e) Fifth, parallel proceedings concerning related questions should preferably only occur on the basis of a coordination of responsibilities between a Court of Arbitration and a Neutral Expert.<sup>258</sup>

433. Referring to Question 13 of the Neutral Expert (reproduced at paragraph 211 above) regarding the possible relevance of Article IX(6) of the Treaty to the competence of the Neutral Expert, Pakistan submits that Article IX(6) is irrelevant. It asserts that India's challenge before the 2022 CoA under that provision was "decisively rejected" on the grounds that the 2022 CoA was properly seised of Pakistan's request before India requested the appointment of the Neutral Expert.<sup>259</sup>
434. Pakistan also submits that the 2022 CoA's Procedural Order No. 6 addresses the circumstances of the current parallel proceedings before the 2022 CoA and the Neutral Expert in terms that "are highly material" to the current procedure under Paragraph 7 of Annexure F.<sup>260</sup>
435. Pakistan recalls that Procedural Order No. 6 recorded that Pakistan refrained from objecting to the Neutral Expert's competence in the proceedings before the 2022 CoA.<sup>261</sup> Pakistan further

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<sup>258</sup> Pakistan's Statement, para. 1.26.

<sup>259</sup> Third Meeting Transcript, Day 1, 27:17-28:9 (Sir Daniel).

<sup>260</sup> Pakistan's Statement, para. 1.27 *referring to Indus Waters Arbitration*, Procedural Order No. 6 (Decision on Further Proceedings), 6 July 2023 (**PKA-2**).

<sup>261</sup> Pakistan's Statement, para. 1.26 *referring to Indus Waters Arbitration*, Procedural Order No. 6 (Decision on Further Proceedings), 6 July 2023, para. 26 (**PKA-2**); Third Meeting Transcript, Day 1, 24:6-25:3 (Sir Daniel). Pakistan's full statement as recorded in Procedural Order No. 6 was as follows:

"Pakistan considers that India's Neutral Expert Request was improper and invalid, thereby fundamentally tainting the competence of the Neutral Expert. Pakistan has, though, now resolved to participate in the Neutral Expert process, the consequence of which is to cure the invalidity of the Neutral Expert's appointment. Without prejudice to this, Pakistan maintains a residual reservation of position as regards the possibility of challenges to the competence of the Neutral Expert on the basis that paragraph 13 of Annexure F provides that if any question which is not within the competence of the Neutral Expert should arise out of his decision, that question would fall to be resolved through the procedures of Article IX(3), (4) and (5), of which the Court is the backstop."

notes that the 2022 CoA stated that both it and the Neutral Expert may be “competent to address the KHEP/RHEP Design and Operation issues that have been presented in both processes”.<sup>262</sup>

436. Pakistan further asserts that the following four relevant points emerge from Procedural Order No. 6:

- (a) First, while the Court has reserved its position on the status of the Neutral Expert proceedings—notably because Pakistan did not pursue a challenge before the Court to the Neutral Expert proceedings—it accepted that the Neutral Expert may be competent in respect of issues presented to him on the basis, and to the extent, of the Parties’ joint consent.
- (b) Second, in the circumstances of the present parallel proceedings, both the Court and the Neutral Expert are subject to a general duty of mutual respect and comity with regard to the exercise of their respective competences.
- (c) Third, in exercise of this duty, the Court determined that it would so arrange its own proceedings to accommodate the fact of parallel proceedings before the Neutral Expert.
- (d) Fourth, the same duty is applicable to the Neutral Expert.<sup>263</sup>

437. In particular, Pakistan asserts that the 2022 CoA established “a phased proceeding that is intended to be attentive to the parallel proceedings before the Neutral Expert”.<sup>264</sup> In a first phase on the merits, the 2022 CoA will thus “address a series of Treaty-systemic legal interpretative questions which the Court ha[s] clearly concluded fall outside the scope of the Neutral Expert’s competence under Paragraph 1 of Annexure F.”<sup>265</sup>

438. In the light of the limitations on his competence, Pakistan does not ask the Neutral Expert to address his mind to whether the above affirmations of the 2022 CoA are correct, but suggests that the developments in the parallel proceedings suggest a potential way forward for these Proceedings, as elaborated below.<sup>266</sup>

439. In relation to Question 14 of the Neutral Expert (see paragraph 211 above) concerning the possible relevance of Paragraph 13 of Annexure F, Pakistan submits that any decision of the Neutral Expert, “including under Paragraph 7 of Annexure F”, that goes beyond the competence of the

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<sup>262</sup> Pakistan’s Statement, para. 1.28 *citing Indus Waters Arbitration*, Procedural Order No. 6 (Decision on Further Proceedings), 6 July 2023, para. 28 (**PKA-2**); Third Meeting Transcript, Day 1, 25:24-26:3 (Sir Daniel). .

<sup>263</sup> Pakistan’s Statement, para. 1.31.

<sup>264</sup> Pakistan’s Statement, para. 1.30.

<sup>265</sup> Pakistan’s Statement, para. 1.30.

<sup>266</sup> Pakistan’s Statement, paras. 1.33, 1.36ff.

Neutral Expert under Part I of Annexure F, “would be amenable to challenge by Pakistan before the [2022 CoA] in the parallel proceedings”.<sup>267</sup>

## 5. Pakistan’s Alternative Submissions and the Proposed Way Forward

440. In addition to Pakistan’s main submission that “India’s Points of Difference, as developed in India’s Memorial, fall outside Paragraph 1(11) of Annexure F and Paragraph 11 of Annexure D” and that therefore, “the Neutral Expert is not competent in respect of all of the points of difference advanced by India, with the sole possible exception of Difference 4 dealing with the RHEP freeboard”,<sup>268</sup> Pakistan proposes two alternatives as to how the Neutral Expert could proceed.
441. Pakistan puts forward a first alternative submission “rooted in the [2022 CoA’s] determination in [its Procedural Order No. 6] with regard to parallel proceedings”.<sup>269</sup> This submission is as follows:

A determination by the [2022 CoA] of the systemic questions of Treaty interpretation identified in PO6 would clear the way for the Neutral Expert to address the outstanding questions of the application of the design requirements of Paragraph 8 of Annexure D in respect of the KHEP and the RHEP in a manner that could come properly within the scope of Paragraph 1(11) of Annexure F.<sup>270</sup>

442. Pakistan notes that, in this case, “the Neutral Expert could become competent in respect of the issues presented to him on the basis, and to the extent, of the Parties’ joint consent” expressed by Pakistan “through its participation in the Neutral Expert process”.<sup>271</sup>
443. Pakistan further submits that, as an expression of Pakistan’s commitment to constructively engage with these Proceedings, Pakistan is “content to advance its alternative submission as its principal submission” to allow the Neutral Expert to address it first given that should the alternative submission be adopted, “the Neutral Expert may consider that he need not engage with Pakistan’s headline submission on grounds of judicial economy”.<sup>272</sup>

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<sup>267</sup> Third Meeting Transcript, Day 1, 29:12-17 (Sir Daniel).

<sup>268</sup> Pakistan’s Statement, para. 6.14. *See also* Third Meeting Transcript, Day 1, 130:23-131:1 (Professor Webb).

<sup>269</sup> Pakistan’s Statement, paras. 1.38-1.39, 6.16-6.18; Third Meeting Transcript, Day 1, 135:17-136:22 (Sir Daniel).

<sup>270</sup> Pakistan’s Statement, para. 6.17 (emphasis by Pakistan). *See also* Third Meeting Transcript, Day 1, 136:5-15 (Sir Daniel).

<sup>271</sup> Pakistan’s Statement, para. 6.17 (emphasis by Pakistan); Third Meeting Transcript, Day 1, 136:16-21 (Sir Daniel).

<sup>272</sup> Pakistan’s Statement, para. 6.18. *See also* Third Meeting Transcript, Day 1, 135:23-136:3 (Sir Daniel).

444. Pakistan emphasises that its alternative submission “is not a submission that the Neutral Expert should co-operate” or “co-ordinate with the [2022 CoA]”.<sup>273</sup> It notes that, in the case of Pakistan’s alternative submission, the 2022 CoA and the Neutral Expert would each remain sovereign and act within the framework of their respective proceedings. However, it also notes that this alternative submission would require the Neutral Expert to recognise that “a Court of Arbitration proceeding is indeed under way” and that the 2022 CoA will provide a “definitive and binding interpretation of the terms of Paragraph 8 of Annexure D of the Treaty” in due course.<sup>274</sup> According to Pakistan, “following an Award on these issues, the Neutral Expert would become competent to address and determine the differences between the parties regarding the design criteria relevant to the KHEP and the RHEP in a manner consistent with the [2022 CoA’s] interpretation”.<sup>275</sup>
445. As a second alternative, proposed in the course of the Third Meeting, Pakistan suggests that the Neutral Expert “take a filleting knife to India’s [M]emorial” and inform the Parties “in precise and granular detail” what he deems to be within the limits of his competence.<sup>276</sup>

## **B. INDIA’S POSITION**

446. India submits that the Points of Difference “fall within Part 1 of Annexure F [to the Treaty] and, therefore, in terms of [Paragraph] 7 of Annexure F, the Neutral Expert is bound to render a decision on merits on the Points of Difference”.<sup>277</sup> Regarding Pakistan’s first alternative submission, India submits that the 2022 CoA “has no role whatsoever to play in these proceedings”. It contends that the Neutral Expert’s role is to determine whether the Points of Difference fall within his competence and that “there can be no abeyance or suspended animation of [the] proceedings [as] [t]his is not envisaged in the Treaty”.<sup>278</sup> India also rejects Pakistan’s second alternative submission.

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<sup>273</sup> Third Meeting Transcript, Day 1, 136:23-137:3 (Sir Daniel).

<sup>274</sup> Third Meeting Transcript, Day 1, 137:10-16 (Sir Daniel).

<sup>275</sup> Third Meeting Transcript, Day 1, 137:17-22 (Sir Daniel).

<sup>276</sup> Third Meeting Transcript, Day 1, 138:7-13 (Sir Daniel).

<sup>277</sup> India’s Reply, paras. 2, 58.

<sup>278</sup> Third Meeting Transcript, Day 1, 17:1-11 (Ms. Mukherjee).

## 1. The Structure of Dispute Resolution under Article IX

447. India submits that Article IX of the Treaty, which provides for the settlement of differences and disputes, “sets up a waterfall mechanism for dispute resolution”.<sup>279</sup>
448. It argues that, in the first instance, the Commissioners of the Permanent Indus Commission examine any question concerning “the interpretation or application of the Treaty”<sup>280</sup> and in this way “resolve all disagreements including those relating to construction of hydro-electric projects”.<sup>281</sup>
449. Relying on Articles IX(1) and (2) of the Treaty, India submits that the second step of the mechanism is when the Commission cannot reach agreement on any question that arises between the Parties concerning the interpretation or application of the Treaty, in which case a difference is deemed to have arisen.<sup>282</sup> It argues that such a difference “has to be dealt with” by a neutral expert pursuant to Article IX(2)(a) and in accordance with Part 2 of Annexure F to the Treaty.<sup>283</sup> It highlights what it considers to be mandatory language in Article IX(2)(a): that the difference “shall” be dealt with by a neutral expert.<sup>284</sup>
450. Additionally, India emphasises that neither consent nor consensus of both Commissioners is necessary to trigger the submission of a difference to a neutral expert; rather, the opinion of one of them is sufficient.<sup>285</sup> Relying on the language of Article IX(2)(a) of the Treaty, India asserts that differences may be referred to a neutral expert “if either of the Commissioners is of the opinion that it should be dealt with in this manner”.<sup>286</sup> Further, relying on the *Kishenganga* Partial Award, India submits as follows:

the requirement under Article IX (2) (a) [of the Treaty] becomes effective if a request for the appointment of a Neutral Expert is actually made, and ... the phrase “in the opinion of either Commissioner” serves to guarantee either party’s ability to empower a neutral expert in respect of many critical technical questions identified in Annexure F. At the same time the requirement of an actual request is necessary. The need of an actual request was to avoid an impasse where a commissioner could express the view that a difference fell within

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<sup>279</sup> India’s Reply, para. 12.

<sup>280</sup> India’s Reply, para. 14; Third Meeting Transcript, Day 1, 145:12-22 (Mr. Salve).

<sup>281</sup> India’s Reply, para. 12.

<sup>282</sup> India’s Reply, para. 15; Third Meeting Transcript, Day 1, 146:5-148:3 (Mr. Salve).

<sup>283</sup> India’s Reply, paras. 12, 17.

<sup>284</sup> Third Meeting Transcript, Day 1, 148:8-24 (Mr. Salve).

<sup>285</sup> Third Meeting Transcript, Day 1, 147:11-15 (Mr. Salve).

<sup>286</sup> India’s Reply, para. 17.

Annexure F, thereby unequivocally foreclosing access to a court of arbitration and yet decline to request a neutral expert to resolve the difference.<sup>287</sup>

451. India asserts that the *Kishenganga* Court reasoned that India's delay in referring the question of drawdown flushing to a neutral expert in that case had created a situation where the Court could not allow the dispute resolution clause in the Treaty to be pathological. According to India, what follows from the *Kishenganga* Court's reasoning is that the matter of drawdown flushing referred to the Court in that instance would have been determined by a neutral expert had India taken the positive step to refer the matter to a neutral expert.<sup>288</sup> India adds that the impasse that arose in that arbitration, of a failure to appoint a neutral expert, has not arisen in the present instance.<sup>289</sup>
452. Moreover, India contends that Article IX(2)(a) of the Treaty, which should be "sensibly read, and not unduly restrictively", broadly prescribes the material competence of a neutral expert as "any difference" and does not limit it to technical or plant-based differences.<sup>290</sup>
453. India acknowledges that "there may be a disagreement on whether the differences are indeed those which fall within Part 1 of Annexure F".<sup>291</sup> It submits that, where there is such a disagreement, a neutral expert may take one of three paths. First, where he determines that a difference falls within Part 1 of Annexure F, "he has to decide the difference on merits",<sup>292</sup> and cannot determine that that difference is a dispute.<sup>293</sup> Second, pursuant to Article IX(2)(b) of the Treaty, where he determines that a difference does not fall within Part 1 of Annexure F, "he shall inform the Commission that in his opinion the difference should be treated as a dispute".<sup>294</sup> As a third possibility, the neutral expert may determine that only part of a difference falls within Part 1 of Annexure F, "in which event alone" he may decide the part of the difference that so falls, or inform the Commission that the entire difference should be treated as a dispute.<sup>295</sup> India argues

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<sup>287</sup> India's Reply, para. 47 *citing Kishenganga* Partial Award, paras. 478-479 (**IN-EX-10**) (emphasis by India).

<sup>288</sup> Third Meeting Transcript, Day 1, 169:25-178:1 (Mr. Salve) *citing Kishenganga* Partial Award, paras. 476-481 (**IN-EX-10**).

<sup>289</sup> Third Meeting Transcript, Day 1, 215:23-216:17 (Mr. Salve).

<sup>290</sup> Third Meeting Transcript, Day 1, 148:3-16 (Mr. Salve).

<sup>291</sup> India's Reply, para. 18.

<sup>292</sup> India's Reply, para. 18.

<sup>293</sup> Third Meeting Transcript, Day 1, 150:2-151:21 (Mr. Salve).

<sup>294</sup> India's Reply, para. 18.

<sup>295</sup> India's Reply, para. 18.



that a neutral expert is limited to these three possible determinations and that Article IX(2) of the Treaty “does not give [him] a discretion to decline” exercising his jurisdiction.<sup>296</sup>

454. In support of its position that any question relating to Part 1 of Annexure F must be, where the Commissioners disagree, first submitted to a neutral expert,<sup>297</sup> India relies on the principles of treaty interpretation, arguing that one cannot add to nor rewrite treaties, but must instead “go primarily by the language of treaties” and “read [them] literally”.<sup>298</sup> It cites the advisory opinion of the Permanent Court of International Justice (the “**PCIJ**”) in the *Polish Postal Service in Danzig* case as follows:

In the opinion of the Court, the rules as to a strict or liberal construction of treaty stipulations can be applied only in cases where ordinary methods of interpretation have failed. It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd.<sup>299</sup>

455. India also cites the following excerpt from the advisory opinion of the International Court of Justice in the *Competence of the General Assembly for the Admission of a State to the United Nations* case:

In one of the written statements placed before the Court, an attempt was made to attribute to paragraph 2 of Article 4 a different meaning. The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words.<sup>300</sup>

456. According to India, Pakistan’s position that the Points of Difference are legal questions that the Neutral Expert, who is an engineer, is not equipped to determine, does not point to an ambiguity of the Treaty. The Treaty, for its part, empowers the Neutral Expert to interpret the Treaty.<sup>301</sup>

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<sup>296</sup> Third Meeting Transcript, Day 1, 151:8-21 (Mr. Salve).

<sup>297</sup> Third Meeting Transcript, Day 1, 181:4-10 (Mr. Salve).

<sup>298</sup> Third Meeting Transcript, Day 1, 179:22-180:9 (Mr. Salve).

<sup>299</sup> Third Meeting Transcript, Day 1, 180:11-181:3 (Mr. Salve) *citing Polish Postal Service in Danzig (Poland v. High Commissioner of the League of Nations and Free City of Danzig)*, Advisory Opinion, 16 May 1925, PCIJ Rep. Series B - No. 11, p. 39.

<sup>300</sup> Third Meeting Transcript, Day 1, 181:11-182:5 (Mr. Salve) *citing Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, 3 March 1950, ICJ Reports 1950, p. 8.

<sup>301</sup> Third Meeting Transcript, Day 1, 182:6-13 (Mr. Salve).

457. The third step of the Article IX dispute resolution mechanism is then where a dispute arises. India considers disputes to be a “subset” of differences.<sup>302</sup> Relying on Article IX(2)(b), it submits that a dispute may arise where a difference between the Commissioners does not fall within Article IX(2)(a) of the Treaty or where a neutral expert determines that, pursuant to Paragraph 7 of Annexure F, the whole or part of the difference referred to him should be treated as a dispute.<sup>303</sup>
458. Following from this interpretation, India asserts that “disagreement between the two Commissioners ... does not by itself lead to a dispute under the Treaty”.<sup>304</sup> Additionally, Article IX(2) does not envision the inception of a dispute where “the differences raise complex issues of treaty interpretation or issues of systemic nature”.<sup>305</sup> Further, India argues that its delay in requesting the appointment of a neutral expert in connection with the present disagreement, as alleged by Pakistan, does not convert the Points of Difference into disputes.<sup>306</sup>
459. India refers to the proviso of Article IX(2) of the Treaty and submits that “differences can be treated as disputes” and resolved through arbitration by consent of both Parties.<sup>307</sup> In its view, Pakistan’s position that the Points of Difference are disputes to be referred to an arbitral process disregards the imperative of both Parties’ consent prescribed by this provision.<sup>308</sup> Absent such consent and agreement of the Parties, it is only in an instance “where a dispute has arisen”, that the subsequent dispute resolution processes, which include the constitution of a court of arbitration, are triggered.<sup>309</sup>
460. India submits that, in the event that the Neutral Expert determines that either the whole or part of the Points of Difference should be treated as disputes, contrary to Pakistan’s position, those disputes will not be referred to the 2022 CoA, but the decision will trigger the application of Articles IX(3), (4) and (5) of the Treaty.<sup>310</sup>

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<sup>302</sup> India’s Reply, para. 16.

<sup>303</sup> India’s Reply, para. 19.

<sup>304</sup> India’s Reply, para. 21.

<sup>305</sup> Third Meeting Transcript, Day 1, 160:19-161:3 (Mr. Salve).

<sup>306</sup> Third Meeting Transcript, Day 1, 147:16-23 (Mr. Salve).

<sup>307</sup> India’s Reply, para. 20.

<sup>308</sup> India’s Reply, para. 20.

<sup>309</sup> India’s Reply, para. 22.

<sup>310</sup> Third Meeting Transcript, Day 1, 161:14-163:17 (Mr. Salve).

461. With respect to Article IX(6) of the Treaty, which stipulates that the provisions of Article IX(3), (4) and (5) shall not apply to any difference while it is being dealt with by a neutral expert, India submits that this provision was inserted out of an abundance of caution.<sup>311</sup>
462. On the basis of these provisions, India concludes that a court of arbitration can only resolve disputes and cannot resolve differences.<sup>312</sup>

## 2. The Competence of the Neutral Expert

### (a) *The Points of Difference Fall within Part 1 of Annexure F*

463. India submits that its Points of Difference relate to whether the KHEP and the RHEP are compliant with the requirements of Paragraphs 8(a), (c), (d), (e) and (f) of Annexure D<sup>313</sup> and therefore fall within Part 1 of Annexure F.<sup>314</sup>
464. It notes that Paragraph 1 of Annexure F lists 23 categories of questions which may be referred to a neutral expert by either Party's Commissioner. One of these categories, identified under Paragraph 1(11) of Annexure F, is "questions arising under Paragraph 11 of Annexure D".<sup>315</sup> Paragraph 11 of Annexure D provides that, "if a question arises as to whether or not the design of a Plant conforms to the criteria set out in Paragraph 8 [of Annexure D], then either Party may proceed to have the question resolved in accordance with the provisions of Article IX (1) and (2)".<sup>316</sup>
465. India paraphrases its Points of Difference as follows, concluding that they all relate to different aspects of Paragraph 8 of Annexure D:
- a. In relation to the KHEP, the issues that arise are:
    - i. Whether the pondage of 7.55 million cubic metre provided in the design is within the limits permitted in Paragraph 8 (c)?
    - ii. Whether the intakes for the turbines are located in a manner consistent with Paragraph 8 (f)?
    - iii. Whether the outlets below the dead storage level as provided in the design of the Plant are in accordance with Paragraph 8 (d) and are of the minimum size and located at the highest level?

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<sup>311</sup> India's Reply, para. 23.

<sup>312</sup> India's Reply, paras. 22, 23.

<sup>313</sup> India's Reply, paras. 2, 30.

<sup>314</sup> India's Reply, paras. 2, 24 (a).

<sup>315</sup> India's Reply, para. 26.

<sup>316</sup> India's Reply, para. 25.

iv. Whether the design of the spillway configuration adheres to the design criteria specified in Paragraph 8 (e)?

b. In relation to the RHEP, the issues that arise are:

i. Whether the freeboard provided in the design of the Plant is in accordance with Paragraph 8 (a) and does not make the works themselves capable of raising artificially the water level in the operating pool above the full pondage level?

ii. Whether the pondage of 23.86 million cubic metre provided in the design is in accordance with Paragraph 8 (c) and does not exceed twice the pondage required for firm power?

iii. Whether the intakes for the turbines are located at the highest level consistent with satisfactory and economical construction and operation of the Plant in accordance with Paragraph 8 (f)?

iv. Whether the outlets below the dead storage level are in accordance with Paragraph 8 (d)?

v. Whether the design of the Plant in relation to the gated spillway conforms to the design criterion specified in Paragraph 8(e)?<sup>317</sup>

466. India explains that where a Commissioner refers a question that in his opinion falls within Part 1 of Annexure F, such question “has to be dealt with [by] a Neutral Expert in accordance with the provisions of Part 2 of Annexure F”.<sup>318</sup> If the Commission is then unable to agree whether the question falls within Part 1 of Annexure F, pursuant to Paragraph 7 of Annexure F, the neutral expert makes the determination. Based on this analysis, India asserts that, “[u]ntil such time as the Neutral Expert determines that the difference(s) or any part thereof are to be treated as disputes, the differences on the questions that are listed in Part 1 of Annexure F continue to be dealt with by the Neutral Expert”.<sup>319</sup>

*(b) Plant-Specific Differences and Systemic Differences*

467. India acknowledges that the Neutral Expert’s competence is plant-specific such that he must consider each plant individually.<sup>320</sup> It disagrees, however, with Pakistan’s objection that the Points of Difference comprise wider legal issues involving systemic treaty interpretation, terming this categorization an “unnecessary semantic”,<sup>321</sup> and Pakistan’s contentions common across multiple HEPs “systemic obduracy”.<sup>322</sup>

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<sup>317</sup> India’s Reply, para. 30.

<sup>318</sup> India’s Reply, para. 27.

<sup>319</sup> India’s Reply, para. 28.

<sup>320</sup> Third Meeting Transcript, Day 1, 157:19-158:3 (Mr. Salve).

<sup>321</sup> India’s Reply, para. 31.

<sup>322</sup> Third Meeting Transcript, Day 1, 158:4-9 (Mr. Salve).

468. As a factual starting point, India asserts that there are in fact 35 HEPs of which Pakistan has been notified and that only three of these are “big projects, which have serious implications”.<sup>323</sup>
469. Regarding the plant-specific nature of the Neutral Expert’s mandate, India submits that, where differences regarding matters under Paragraph 11 of Annexure D arise, the Neutral Expert is “required to examine each of the projects” from which the differences arise.<sup>324</sup> India draws this conclusion from the language of Paragraph 8 of Annexure D, which prescribes the design of “any” new run-of-river plant.<sup>325</sup>
470. According to India, the questions identified in Paragraph 1 of Annexure F and their determination by a neutral expert are plant-specific because these questions are such that the manner of their resolution could change with time, experience and the advancement of technology.<sup>326</sup> Considering that “the decision of a neutral expert [is] binding on the parties and also on a court of arbitration in relation to that plant but not cast in stone”, a neutral expert may revisit any earlier conclusions of a neutral expert “for good reason”.<sup>327</sup>
471. More broadly, according to India, the Treaty does not distinguish between a single plant-specific difference and systemic or wider legal differences.<sup>328</sup> It explains that a careful look at the Treaty reveals that all matters therein “have an intricate technical component”.<sup>329</sup> It notes that pondage, spillways and intakes are common to all HEPs, and thus give rise to systemic engineering issues.<sup>330</sup> However, each of these technical elements varies between HEPs depending on site conditions such as topography, geology, hydrology, location of dam and sediment. Thus, whether an HEP is Treaty compliant can only be assessed on a plant-to-plant basis.<sup>331</sup> Furthermore, that a difference could arise with respect to more than one plant is not recognized under the Treaty as an exception to the agreement of the Parties to refer questions under Paragraph 1 of Annexure F to a neutral expert.<sup>332</sup>

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<sup>323</sup> Third Meeting Transcript, Day 1, 153:24-154:8 (Mr. Salve).

<sup>324</sup> India’s Reply, para. 32.

<sup>325</sup> India’s Reply, para. 32.

<sup>326</sup> India’s Reply, para. 56.

<sup>327</sup> India’s Reply, para. 56.

<sup>328</sup> India’s Reply, para. 24(c).

<sup>329</sup> India’s Reply, para. 49.

<sup>330</sup> Third Meeting Transcript, Day 2, 320:19-322:8 (Mr. Salve).

<sup>331</sup> India’s Reply, paras. 49-53.

<sup>332</sup> India’s Reply, para. 55.

472. India further submits that neutral experts are “capable of and empowered to interpret and apply any part of the Treaty which may be related to or relevant for the resolution of the differences falling within Part 1 of Annexure F”.<sup>333</sup> It contends that whether or not the design of a plant conforms with Paragraph 8 of Annexure D is a plant-specific and design question and that, in his determination, the Neutral Expert may interpret various provisions of Paragraph 8 and “other related relevant parts of the Treaty”.<sup>334</sup>
473. Furthermore, India highlights that the Treaty considers both the Commissioners and neutral experts, who are senior technical experts, to be competent to understand its plain language and to apply it in the resolution of disagreements between the Parties.<sup>335</sup> The Treaty uses technical expressions the implications of which an engineer is skilled to understand<sup>336</sup> and, in any event, the Commissioners and neutral experts may seek legal advice where necessary.<sup>337</sup> According to India, it is for this reason that the mechanism for resolving differences under the Treaty does not distinguish legal issues from factual and technical issues with respect to the questions under Paragraph 1 of Annexure F.<sup>338</sup>
474. India asserts that whether the Neutral Expert is a lawyer or not is inapposite to his competence. In its view, the competence of the Neutral Expert, the question at issue at this stage of the proceedings, is not an issue of the Neutral Expert’s skill set, but an issue of jurisdiction.<sup>339</sup>
475. India challenges Pakistan’s submission that the lack of an applicable law clause in Annexure F to the Treaty, unlike Paragraph 29 of Annexure G, is evidence of the limit of a neutral expert’s competence to technical matters, excluding questions of treaty interpretation or systemic application of the Treaty. According to India, the Neutral Expert’s competence is limited to the consideration of whether the design parameters of the HEPs in question are in conformity with the Treaty, such that an applicable law clause would be unnecessary. It submits that those matters under the Treaty for which an applicable law clause could be relevant do not arise before the Neutral Expert.<sup>340</sup>

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<sup>333</sup> India’s Reply, para. 24(b).

<sup>334</sup> India’s Reply, para. 36.

<sup>335</sup> India’s Reply, para. 33.

<sup>336</sup> India’s Reply, para. 34; Third Meeting Transcript, Day 1, 185:21-190:24 (Mr. Salve).

<sup>337</sup> India’s Reply, paras. 14, 33.

<sup>338</sup> India’s Reply, para. 34.

<sup>339</sup> Third Meeting Transcript, Day 1, 183:2-184:16 (Mr. Salve).

<sup>340</sup> Third Meeting Transcript, Day 1, 168:1-169:6 (Mr. Salve).

476. India further asserts that a neutral expert’s competence “is fixed always at the commencement of the enquiry”,<sup>341</sup> in this case as at 4 October 2016,<sup>342</sup> and “not on the basis of the material which may be placed before [him]”.<sup>343</sup> Likening the neutral expert to a judicial tribunal, India submits that:

The question whether a tribunal has jurisdiction depends not on the truth or falsehood of the facts into which it has to inquire, or upon the correctness of its findings on these facts, but upon their nature, and it is determinable “at the commencement, not at the conclusion, of the inquiry”.<sup>344</sup>

477. In this case, India urges the Neutral Expert to look only at the Points of Difference. It contends that its Memorial should not be read as part of its case on the Neutral Expert’s competence.<sup>345</sup> It further contends that the question of what materials the Neutral Expert may need to refer to in determining whether the Points of Difference fall under Part 1 of Annexure F, in particular, whether he will need to consider the *Kishenganga* Partial Award or the *Baglihar* Determination, is inapposite to the consideration of his competence at this point in the proceedings.<sup>346</sup> More specifically in relation to those materials, India submits that it does not contend that the *Baglihar* Determination has *res judicata* effect, although it considers it to be persuasive, and that any need for the Neutral Expert to decide whether or not the *Baglihar* Determination is persuasive does not take the Points of Difference relating to pondage outside the scope of Part 1 of Annexure F.<sup>347</sup> Regarding the *Kishenganga* Partial Award, India submits that it proscribes dropping the reservoir level below the Dead Storage Level (“**DSL**”) “except in unforeseen emergencies”,<sup>348</sup> but does not prohibit outlets below DSL *per se*.<sup>349</sup> According to India, outlets below DSL are necessary at the KHEP and the RHEP for “technical reasons” of pressure flushing, which is in turn necessary for emergency draining of plants, and for “preventing sediments flowing into the inlets by creating a

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<sup>341</sup> Third Meeting Transcript, Day 1, 184:6-16 (Mr. Salve).

<sup>342</sup> Third Meeting Transcript, Day 1, 185:17-23 (Mr. Salve).

<sup>343</sup> Third Meeting Transcript, Day 1, 184:13-16 (Mr. Salve).

<sup>344</sup> Third Meeting Transcript, Day 1, 184:17-185:16 (Mr. Salve) *citing* Ivan Hare *et al.*, *De Smith’s Judicial Review* (2023), paras. 4-12.

<sup>345</sup> Third Meeting Transcript, Day 1, 148:25:149:3 (Mr. Salve); India’s Reply, para. 7.

<sup>346</sup> Third Meeting Transcript, Day 1, 149:3-23 (Mr. Salve).

<sup>347</sup> Third Meeting Transcript, Day 1, 155:6-20; 186:10-187:21 (Mr. Salve).

<sup>348</sup> Third Meeting Transcript, Day 1, 227:10-12, 228:23-25 (Mr. Salve).

<sup>349</sup> Third Meeting Transcript, Day 1, 156:5-8, 227:12-13 (Mr. Salve).

coning effect.”<sup>350</sup> India submits in this respect that the design and location of the outlets is a question within the competence of the Neutral Expert.<sup>351</sup>

478. Likewise, India opposes Pakistan’s position that the Neutral Expert will need to refer to the *travaux préparatoires* of the Treaty.<sup>352</sup> To this end, India cites the following reasoning of the PCIJ in the *S.S. Lotus (France v Turkey)* case:

The Court must recall in this connection what it has said in some of its preceding judgments and opinions, namely, that there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself.<sup>353</sup>

479. India concludes that if the Neutral Expert declines jurisdiction or defers to the 2022 CoA, as pleaded by Pakistan, such decision would “rewrite the Treaty by adding words of limitation that do not exist ... [and] create an impasse”.<sup>354</sup>

*(c) Pakistan’s Alleged Contemporaneous Conduct*

480. India submits that “Pakistan’s own contemporaneous conduct demonstrates its strongly held opinion that the Points of Difference referred by India are indeed differences”.<sup>355</sup> It submits that, if these questions were differences at the point of their inception, they cannot have turned into disputes since.<sup>356</sup> In support of its assertion regarding Pakistan’s contemporaneous conduct, India points to various instances.<sup>357</sup>
481. First, India recalls that on 11 March 2009, Pakistan, citing Paragraph 5(a) of Annexure F, communicated to India a statement of points of difference.<sup>358</sup> In this correspondence, Pakistan put forward three questions of a technical nature on whether the design of the KHEP was in conformity with Paragraphs 8(c), (d), (e) and (f) of Annexure D. India argues that Pakistan stated that by virtue of Paragraph 1(11) of Annexure F, the three questions fell within the jurisdiction of

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<sup>350</sup> Third Meeting Transcript, Day 1, 156:9-16, 189:2-19, 190:2-10, 209:10-15 (Mr. Salve).

<sup>351</sup> Third Meeting Transcript, Day 1, 156:24-157:4, 189:21 – 190:1, 209:2-17, 227:13-229:17 (Mr. Salve).

<sup>352</sup> Third Meeting Transcript, Day 1, 182:14-183:1 (Mr. Salve).

<sup>353</sup> Third Meeting Transcript, Day 1, 182:14-21 (Mr. Salve) *citing S.S. Lotus (France v. Turkey)*, Judgment, 7 September 1927, PCIJ Rep. Series A - No. 10, p. 16.

<sup>354</sup> India’s Reply, para. 57(b).

<sup>355</sup> India’s Reply, paras. 24(d), 41.

<sup>356</sup> Third Meeting Transcript, Day 1, 196:18-21 (Mr. Salve).

<sup>357</sup> *See* India’s Reply, para. 5, *referring to* Pakistan’s Statement, paras. 1.12, 1.13, 1.17, 1.33, 1.39, 3.13, 5.14, 5.16, 5.21, Section VC.

<sup>358</sup> Third Meeting Transcript, Day 1, 195:14-17 (Mr. Salve) *referring to* Letter from PCIW to Pakistan and India, No. WT(132)/(412-413)/PCIW, 11 March 2009 (**PK-29**).



a neutral expert.<sup>359</sup> India notes that when it opposed Pakistan's proposal to refer the questions to a neutral expert or arbitration, Pakistan, on 29 April 2009, stated as follows:

With respect to your statement that "no difference has arisen", kindly note that the existence of a "difference" or a "dispute" is not a normative question but a factual one. India is therefore entitled to disagree with the merits of Pakistan's position but it is not entitled to insist that no difference or no dispute exists. It is Pakistan's position that the current design of the Kishenganga project is violative of the Treaty. Unless India chooses to agree with that position, it does not have the option of denying the consequential fact that a difference or dispute does indeed exist.<sup>360</sup>

482. India adds that in this latter correspondence, Pakistan acknowledged the wide scope of Article IX(1) of the Treaty as follows:

Without prejudice to the foregoing, it may kindly be noted that the ambit of the [C]ommission is not restricted to "purely technical" questions. Instead, Article IX(1) of the Treaty specifically provides that "any question, which arises between the Parties concerning the interpretation or application of this Treaty... shall first be examined by the Commission." The term "any question", is clearly of extremely wide import and includes all questions "concerning the interpretation or application" of the Treaty, and not just purely technical questions.<sup>361</sup>

483. Additionally, Pakistan also indicated that it intended to seek the appointment of a neutral expert for the resolution of the three questions.<sup>362</sup> This was again repeated in Pakistan's correspondence of 11 May 2009<sup>363</sup> and 9 April 2010.<sup>364</sup>

484. Second, on 6 March 2013, after the *Kishenganga* Partial Award was rendered,<sup>365</sup> Pakistan recalled the discussions of the Commission prior to that arbitration, and identified four issues on whether the KHEP was in compliance with Paragraphs 8(a), (c), (d), (e) and (f) of Annexure D that it said "ought to be referred to a Neutral Expert".<sup>366</sup> According to India, these issues are reflected in the

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<sup>359</sup> Third Meeting Transcript, Day 1, 195:17- 196:17 (Mr. Salve) *referring to* Letter from the PCIW to the ICIW, No. WT(132)/( 6981-A)/PCIW, 11 March 2009, para. 7 (**PK-30**).

<sup>360</sup> Third Meeting Transcript, Day 1, 197:3-198:1 (Mr. Salve) *citing* Letter from the PCIW to the ICIW, No. WT(132)/(6997-A)/PCIW, 29 April 2009, para. 4(e) (**IN-2.12**).

<sup>361</sup> Third Meeting Transcript, Day 1, 198:4-14 (Mr. Salve) *citing* Letter from the PCIW to the ICIW, No. WT(132)/(6997-A)/PCIW, 29 April 2009, para. 6(f) (**IN-2.12**).

<sup>362</sup> Third Meeting Transcript, Day 1, 199:9-18 (Mr. Salve) *citing* Letter from the PCIW to the ICIW, No. WT(132)/(6997-A)/PCIW, 29 April 2009, para. 9 (**IN-2.12**).

<sup>363</sup> Third Meeting Transcript, Day 1, 200:19-24 (Mr. Salve) *referring to* Letter from the PCIW to Pakistan and India, No. WT(132)/(7002-7003-A)/PCIW, 11 May 2009, para. 4 (**PK-31**).

<sup>364</sup> Third Meeting Transcript, Day 1, 201:11-202:8 (Mr. Salve) *referring to* Note Verbale from Pakistan to India, No. KA(II)-2/2/2010, 9 April 2010 (**IN-2.21**).

<sup>365</sup> *Kishenganga* Partial Award (**IN-EX-10**).

<sup>366</sup> India's Reply, para. 41(a) *referring to* Letter from the PCIW to the ICIW, No. WT (132)/(7411 -A)/PCIW, 31 March 2014 (**IN-6**); India's Reply, para. 5 *referring to* Letter from the PCIW to the ICIW, No. WT(132)/(7330-A)/PCIW, 6 March 2013 (**IN-3**).

Points of Difference in this instance.<sup>367</sup> Furthermore, India asserts that in the 6 March 2013 correspondence, Pakistan appreciated that a neutral expert would refer to the *Kishenganga* Partial Award to determine the KHEP's compliance with Paragraph 8(e) of Annexure D. According to India, Pakistan acknowledged that the *Kishenganga* Partial Award had addressed the issue of depletion of the reservoir level below the DSL, and argued that as a result India was required to reconsider the deep orifice design of the KHEP, failing which Pakistan would refer the matter to a neutral expert.<sup>368</sup>

485. Third, at the 110<sup>th</sup> and the 111<sup>th</sup> meetings of the Commission, Pakistan stated that the design issues relating to the KHEP are differences because there was no agreement between the Commissioners and the differences thus required reference to a neutral expert.<sup>369</sup>
486. Fourth, on 3 and 24 July 2015, Pakistan called for the appointment of a neutral expert in respect of differences between the Parties regarding the design of the KHEP and the RHEP.<sup>370</sup>
487. Fifth, in subsequent exchanges between the ICIW and the PCIW, the PCIW was of the opinion that differences had arisen with respect to the design of the KHEP and the RHEP and that these differences had remained unsolved by the Commission.<sup>371</sup>
488. Sixth, India adds that, although in these exchanges the Commission discussed pondage issues of other Indian HEPs, Pakistan did not refer to the issues with these other HEPs as "differences", while consistently using the term "differences" for pondage issues pertaining to the KHEP and the RHEP.<sup>372</sup>

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<sup>367</sup> India's Reply, paras. 41(a), 41(f).

<sup>368</sup> Third Meeting Transcript, Day 1, 205:15-22 (Mr. Salve) *referring to* Letter from the PCIW to the ICIW, No. WT(132)/(7330-A)/PCIW, 6 March 2013 (IN-3).

<sup>369</sup> India's Reply, para. 41(b) *referring to* Minutes of the 110<sup>th</sup> Meeting of the Permanent Indus Commission, 23-27 August 2014, para. 12 (IN-7); Minutes of the 111<sup>th</sup> Meeting of the Permanent Indus Commission, 31 January-4 February 2015, paras. 49-69, 85 (IN-8).

<sup>370</sup> India's Reply, para. 41(c) *referring to* Letter from PCIW to Pakistan and India, No. WT (132)/(7497-98-A)/PCIW, 24 July 2015 (IN-9). *See also* India's Reply, para. 5 *referring to* Letter from the PCIW to the ICIW, No. WT(132)/(7493-A)/PCIW, 3 July 2015 (IN-4).

<sup>371</sup> India's Reply, para. 41(d) *referring to* Letter from PCIW to Pakistan and India, No. WT (132)/(7497-98-A)/PCIW, 24 July 2015 (IN-9).

<sup>372</sup> India's Reply, para. 41(h).

489. Seventh, on 11 September 2015, Pakistan acknowledged that it had initiated the process for the appointment of a neutral expert in respect of the KHEP and the RHEP.<sup>373</sup>
490. Eighth, and finally, Pakistan referred a similar set of points of differences as in the present instance to a neutral expert in respect of the Baglihar HEP.<sup>374</sup>
491. India notes that although Pakistan later revoked its request for the appointment of a neutral expert in respect of the KHEP and the RHEP and sought the appointment of a court of arbitration, “India has never agreed to this, and absent mutual consent, these remained differences—since they could not be resolved by the Commission, they would have to be resolved by a Neutral Expert”.<sup>375</sup> India challenges Pakistan’s assertion that its invitation to neutral expert proceedings “lapsed”, and contends that Pakistan’s “demand” to commence neutral expert proceedings was not an invitation, and could not lapse.<sup>376</sup>
492. India also notes that during the *Kishenganga* arbitration,<sup>377</sup> while Pakistan litigated the question of reduction of water below the DSL, it did not argue that this issue was systemic in nature, despite having knowledge of the capacity for further development of HEP projects on the Kishenganga River. Furthermore, the *Kishenganga* Court in that instance acknowledged that this was a matter which could have been submitted to a neutral expert.<sup>378</sup>
493. Where Pakistan argues that India recast Pakistan’s Points of Dispute, India objects that that is an attempt by Pakistan to “justify the unlawful creation of the court of arbitration”.<sup>379</sup> Moreover, according to India, Pakistan’s interpretation of the Treaty regarding the limited competence of the Neutral Expert in this instance is based on the order of the 2022 CoA,<sup>380</sup> in circumstances where India “has refused to accept its jural existence and strongly objects to its purported orders being

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<sup>373</sup> Third Meeting Transcript, Day 1, 209:23-210:16 (Mr. Salve) *referring to* Letter from the PCIW to the ICIW, No. WT(132)/(7505-A)/PCIW, 11 September 2015 (IN-11).

<sup>374</sup> India’s Reply, para. 41(i) *referring to* Baglihar Determination, Section 2, p. 6 (IN-EX-9).

<sup>375</sup> India’s Reply, para. 41(e) *referring to* Letter from the PCIW to the ICIW, No. WT (132)/(7531-A)/PCIW, 25 February 2016 (IN-16).

<sup>376</sup> Third Meeting Transcript, Day 2, 338:22-339:9 (Mr. Salve).

<sup>377</sup> *Indus Waters Kishenganga Arbitration (Pakistan v. India)*, PCA Case No. 2011-01.

<sup>378</sup> Third Meeting Transcript, Day 1, 224:11-225:21 (Mr. Salve).

<sup>379</sup> India’s Reply, para. 41(g).

<sup>380</sup> India’s Reply, para. 43.

placed before the Neutral Expert”.<sup>381</sup> Consequently, according to India, Procedural Order No. 6 of the 2022 CoA is not binding on the Neutral Expert.<sup>382</sup>

### 3. Pakistan’s Alternative Submissions

494. In response to Pakistan’s first alternative submission, which according to India requires an acceptance of the “outreach” of the 2022 CoA,<sup>383</sup> India submits that it takes no cognizance of the 2022 CoA and that, in line with Article IX(6) of the Treaty, no court of arbitration can be constituted while the Neutral Expert is dealing with the Points of Difference.<sup>384</sup>
495. According to India, Pakistan’s alternative submission is not an option available under the Treaty. It argues that the only alternatives envisaged by the Treaty are: either the seven questions in the Points of Difference fall within the competence of the Neutral Expert, in which case he will proceed to determine them, or the questions fall outside his competence, in which case the Neutral Expert will inform the Commissioners who will in turn inform the Governments of India and Pakistan and the Governments will decide whether to proceed with negotiation, mediation and arbitration as prescribed by the Treaty.<sup>385</sup>
496. Further, India submits that the decisions of the 2022 CoA are not binding on India and the Neutral Expert.<sup>386</sup> First, they are not binding because they are “void” and “a nullity”, as the Court “has no authority” to make those decisions. Thus, the 2022 CoA’s Procedural Order No. 6, its Competence Award and the effect of these decisions, which Pakistan classifies as “juridical facts”, are, in India’s view, “anecdotal facts”.<sup>387</sup> India adds that these decisions cannot be *res judicata* because *res judicata* applies to a “final judgment of a competent Tribunal” and a court’s lack of jurisdiction is a defence against *res judicata*.<sup>388</sup> Second, India asserts that the 2022 CoA cannot injunct the Neutral Expert just as much as the Neutral Expert cannot injunct the Court.<sup>389</sup>

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<sup>381</sup> India’s Reply, para. 40.

<sup>382</sup> Third Meeting Transcript, Day 1, 224:23-225:12 (Mr. Salve).

<sup>383</sup> Third Meeting Transcript, Day 1, 221:3-5 (Mr. Salve).

<sup>384</sup> Third Meeting Transcript, Day 1, 226:15-24 (Mr. Salve).

<sup>385</sup> Third Meeting Transcript, Day 1, 219:17-220:14 (Mr. Salve).

<sup>386</sup> Third Meeting Transcript, Day 1, 221:14-20 (Mr. Salve).

<sup>387</sup> Third Meeting Transcript, Day 1, 222:1-21 (Mr. Salve).

<sup>388</sup> Third Meeting Transcript, Day 1, 222:17-225:21 (Mr. Salve) *citing* B. Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (reissue: Cambridge University Press, 2006), p. 337 (PKA-5).

<sup>389</sup> Third Meeting Transcript, Day 1, 226:10-12 (Mr. Salve).

497. Finally, India views Pakistan’s first alternative submission as another attempt at creating coordination between these Proceedings and the 2022 CoA, a matter which has already been decided by the Neutral Expert.<sup>390</sup>

498. Finally, India also objects to Pakistan’s second alternative submission, requesting that the Neutral Expert determine in detail which parts of India’s claims and Memorial fall within his competence and should be answered in Pakistan’s Counter-Memorial. According to India, such a procedure is “unheard of” and, if the Neutral Expert finds that the Points of Difference are “differences” within the meaning of the Treaty, Pakistan should be directed to answer India’s entire case.<sup>391</sup>

## VII. THE NEUTRAL EXPERT’S ANALYSIS

### A. PRELIMINARY MATTERS

#### 1. Governing Instrument

499. Paragraph 6 of Annexure F to the Treaty provides that “[t]he procedure with respect to each reference to a Neutral Expert shall be determined by him, provided that . . . (b) in making his decision, he shall be governed by the provisions of this Treaty and by the *compromis*, if any, presented to him by the Commission”. In the present case, no *compromis* has been presented to the Neutral Expert by the Commission. Accordingly, the Neutral Expert’s decisions in this reference, including as to competence, shall be governed by the provisions of the Treaty.

#### 2. Scope of this Decision

500. This Decision is concerned solely with issues related to the competence of the Neutral Expert, as circumscribed in the following paragraphs. It is not intended to address the merits of any aspect of the Points of Difference.

501. The Neutral Expert’s competence arises out of Article IX of the Treaty, which is reproduced in full at paragraph 7 above. Article IX concerns “Settlement of Differences and Disputes” and provides, in relevant part:

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

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<sup>390</sup> Third Meeting Transcript, Day 1, 225:19–226:6 (Mr. Salve).

<sup>391</sup> Third Meeting Transcript, Day 1, 243:6–244:14 (Mr. Salve).

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

- (a) Any difference which, in the opinion of either Commissioner, falls within the provisions of Part 1 of Annexure F shall, at the request of either Commissioner, be dealt with by a Neutral Expert in accordance with the provisions of Part 2 of Annexure F;
- (b) If the difference does not come within the provisions of Paragraph (2) (a), or if a Neutral Expert, in accordance with the provisions of Paragraph 7 of Annexure F, has informed the Commission that, in his opinion, the difference, or a part thereof should be treated as a dispute, then a dispute will be deemed to have arisen which shall be settled in accordance with the provisions of Paragraphs (3), (4) and (5):

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

Paragraphs (3), (4) and (5) of Article IX then provide for the making of a report by the Commission to the Governments of India and Pakistan as to the issues in dispute, the attempt by the two Governments to resolve the dispute through negotiations and, ultimately, if certain conditions are met, the resolution of the dispute by a court of arbitration constituted under Annexure G of the Treaty.

502. Article IX(2)(b), quoted above, together with Paragraph 7 of Annexure F to the Treaty, to which it refers, define the Neutral Expert's powers regarding his competence. Paragraph 7 of Annexure F to the Treaty provides:

Should the Commission be unable to agree that any particular difference falls within Part 1 of this Annexure, the Neutral Expert shall, after hearing both Parties, decide whether or not it so falls. Should he decide that the difference so falls, he shall proceed to render a decision on the merits: should he decide otherwise, he shall inform the Commission that, in his opinion, the difference should be treated as a dispute. Should the Neutral Expert decide that only a part of the difference so falls, he shall, at his discretion, either:

- (a) proceed to render a decision on the part which so falls, and inform the Commission that, in his opinion, the part which does not so fall should be treated as a dispute, or
- (b) inform the Commission that, in his opinion, the entire difference should be treated as a dispute.

503. Pursuant to these provisions, the Neutral Expert is given the power to decide whether a particular difference referred to him by a Party falls within Part 1 of Annexure F. In making this determination, he has three options: (i) to find that the entire difference falls within Part 1 of Annexure F and proceed to render a decision on the merits in respect of that difference; (ii) to find that only a part of the difference falls within Part 1 of Annexure F, proceed to render a decision on the merits in respect of that part of the difference, and inform the Commission that the part of the difference that does not fall within Part 1 should be treated as a dispute (and hence

settled in accordance with the provisions of Paragraphs (3), (4) and (5) of Article IX); or (iii) to find that the entire difference does not fall within Part 1 of Annexure F, or that only a part of the difference falls within Part 1 of Annexure F, and to inform the Commission that, in his opinion, the entire difference should be treated as a dispute (and hence settled in accordance with the provisions of Paragraphs (3), (4) and (5) of Article IX). If the Neutral Expert informs the Commission that a difference, or part of a difference, should be treated as a dispute, that difference, or part of a difference, may ultimately be submitted for determination to a court of arbitration constituted pursuant to Annexure G of the Treaty, subject to certain conditions.

504. This is the extent of the powers given to the Neutral Expert in respect of his competence. The Treaty does not give the Neutral Expert a broad power to decide all issues pertaining to his competence or jurisdiction, but only the power (and, indeed, the duty) to decide whether a difference referred to him should be treated as a difference (and hence decided by him on the merits) or as a dispute (setting it on a track that may lead to its resolution by a court of arbitration). The formulation in Paragraph 7 of Annexure F may be contrasted with the broader formulation used in respect of the powers of a court of arbitration constituted under Annexure G to decide on its competence: Paragraph 16 of Annexure G provides that “the Court shall decide all questions relating to its competence”.<sup>392</sup>
505. In the light of the foregoing, in the present Decision pertaining to the Neutral Expert’s competence, the Neutral Expert will consider whether the Points of Difference referred to him by India are indeed differences or should be treated as disputes. While generally noting that his competence arises from Article IX of the Treaty, he will not consider any other questions relating to his competence.
506. The Neutral Expert notes that there appears to be common ground between the Parties as to the scope of his powers in respect of the determination of his competence. In particular, the Neutral Expert recalls that, in consultations on the draft Supplemental Rules, both Parties agreed on the following description of his mission in Paragraph 2 of those Rules, which largely reprises the text of Paragraph 7 of Annexure F:

2.1 The mission of the Neutral Expert is defined by the Treaty and the “Points of Difference” notified by the Republic of India.

2.2 The Republic of India has stated the “Points of Difference” between the Parties in the enclosure to its letter to the Bank dated 4 October 2016. The Points of Difference are appended to these Rules as Annex 1.

2.3 In accordance with Paragraph 7 of Annexure F to the Treaty and Article IX(2)(b) of the Treaty, the Neutral Expert shall, after hearing both Parties, decide whether any particular

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<sup>392</sup> Emphasis added.

difference falls within Part 1 of Annexure F. Should he decide that the difference so falls, he shall proceed to render a decision on the merits; should he decide otherwise, he shall inform the Permanent Indus Commission (the “Commission”) that, in his opinion, the difference should be treated as a dispute. Should the Neutral Expert decide that only a part of the difference so falls, he shall, at his discretion, either: (a) proceed to render a decision on the part which so falls, and inform the Commission that, in his opinion, the part which does not so fall should be treated as a dispute, or (b) inform the Commission that, in his opinion, the entire difference should be treated as a dispute.

[...]

507. Notwithstanding the above, the Neutral Expert notes that, as he understands it, there is no live challenge to the validity of his appointment or any other aspect of his competence other than the matters discussed in this Decision. Before the 2022 CoA, Pakistan made the following statement, to which it referred both in its written Statement and at the Third Meeting:

Pakistan considers that India’s Neutral Expert Request was improper and invalid, thereby fundamentally tainting the competence of the Neutral Expert. Pakistan has, though, now resolved to participate in the Neutral Expert process, the consequence of which is to cure the invalidity of the Neutral Expert’s appointment. Without prejudice to this, Pakistan maintains a residual reservation of position as regards the possibility of challenges to the competence of the Neutral Expert on the basis that paragraph 13 of Annexure F provides that if any question which is not within the competence of the Neutral Expert should arise out of his decision, that question would fall to be resolved through the procedures of Article IX(3), (4) and (5), of which the Court is the backstop.<sup>393</sup>

508. The Neutral Expert will also not address any issues pertaining to the competence of the 2022 CoA, notwithstanding that the Paragraph 7 issues before him have been occasionally framed by Pakistan as questions as to whether certain matters should be decided by the Neutral Expert *or* the 2022 CoA.<sup>394</sup> It is uncontroversial between the Parties that any pronouncement on the competence of another dispute resolution body constituted under the Treaty would fall outside the scope of the Neutral Expert’s competence under the Treaty.<sup>395</sup>
509. Finally, the Neutral Expert notes that Pakistan, in its Paragraph 7 submissions, raises two main questions. First, it asks whether India’s claims in these proceedings fall within the scope of Part 1 of Annexure F.<sup>396</sup> It answers this question in the negative in respect of the overwhelming majority of the claims (possibly excluding the issue of freeboard) and argues that the Neutral Expert must therefore find that he is not competent to decide them.<sup>397</sup> Second, it asks how the Neutral Expert

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<sup>393</sup> Pakistan’s Statement, para. 1.28; Third Meeting Transcript, Day 1, 24:3-25:3 (Sir Daniel) (emphasis added). *See also* Pakistan’s Letter to the Neutral Expert, 30 May 2023, paras. 7-8.

<sup>394</sup> *See e.g.* Pakistan’s Statement, para. 1.15.

<sup>395</sup> *See* Third Meeting Transcript, Day 1, 22:22-23 (Mr. Salve); First Meeting Transcript, Day 2, 25:17-26:2 (Sir Daniel).

<sup>396</sup> *See* Pakistan’s Statement, para. 1.15.

<sup>397</sup> Pakistan’s Statement, paras. 1.37, 5.11, 5.41; Third Meeting Transcript, Day 1, 98:12-22 (Sir Daniel).



should proceed in circumstances where parallel proceedings are pending before the 2022 CoA.<sup>398</sup> Here, it makes the alternative submission that, following the 2022 CoA's determination of the systemic questions of Treaty interpretation and application identified by it, questions going to compliance with the design requirements of Paragraph 8 of Annexure D to the Treaty in respect of the KHEP and the RHEP could properly come within the scope of Part 1 of Annexure F.<sup>399</sup> On this basis, it asks the Neutral Expert to defer his decision on competence pending the issuance of the award or awards of the 2022 CoA.<sup>400</sup> Pakistan also submits that it is content "to advance its alternative submission as its principal submission, allowing the Neutral Expert to come to it first on the basis that, if the alternative submission is adopted, the Neutral Expert may consider that he need not engage with Pakistan's headline submission [that he is not competent] on grounds of judicial economy".<sup>401</sup>

510. The Neutral Expert does not consider that it would be appropriate to take up this proposal to address the consequences of the existence of parallel proceedings before considering his own competence. The first part of the Neutral Expert's mission under the Treaty, as confirmed in the Supplemental Rules, is to address the issues of competence arising under Paragraph 7 of Annexure F. The Neutral Expert must do so with reasonable expedition in accordance with the Work Programme adopted following consultation with the Parties. This is what the Neutral Expert will do first and foremost in this Decision, having given the Parties a full opportunity to express their views on the Paragraph 7 issues both in writing and orally. That said, having addressed the Paragraph 7 issues and what they mean for his competence, the Neutral Expert will also address Pakistan's alternative submission and the consequences of the parallel proceedings before the 2022 CoA.

## **B. ISSUES UNDER PARAGRAPH 7 OF ANNEXURE F**

### **1. Analysis**

511. As noted above, pursuant to Paragraph 7 of Annexure F, the Neutral Expert must determine in this Decision whether each difference referred to him is a difference (to be decided by him on the merits) or should be treated as a dispute (setting it on a track that may lead to its resolution by a court of arbitration).

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<sup>398</sup> See Pakistan's Statement, para. 1.15.

<sup>399</sup> Pakistan's Statement, paras. 1.15, 1.37-1.39, 6.1-6.3, 6.14-6.17; Third Meeting Transcript, Day 1, 136:4-22 (Sir Daniel).

<sup>400</sup> Third Meeting Transcript, Day 2, 317:10-20 (Mr. Aslam).

<sup>401</sup> Pakistan's Statement, para. 6.18. *See also* Third Meeting Transcript, Day 1, 135:23-136:22 (Sir Daniel).

512. In the present case, differences were referred to the Neutral Expert by India. They were set out, under the title “Points of Difference”, in an enclosure to India’s letter to the World Bank dated 4 October 2016, were appended to the Supplemental Rules as Annex 1 and are again reproduced in paragraph 4 of this Decision. These Points of Difference were developed in India’s Memorial, and discussed in both Parties’ written and oral submissions on Paragraph 7 issues.
513. In summary, the Points of Difference, as formulated by India, call upon the Neutral Expert to determine, with respect to each of the KHEP and the RHEP:
- (a) whether the pondage provided in the design is within the maximum pondage permitted in accordance with Paragraph 8(c) of Annexure D to the Treaty and Paragraph 2(c) of Annexure D, whether the pondage provided by India meets the operational restriction imposed by Paragraph 15 of Annexure D, and whether the intakes for the turbines provided in the design are in accordance with Paragraph 8(f) of Annexure D;
  - (b) whether the outlets below Dead Storage Level provided in the design are in accordance with Paragraph 8(d) of Annexure D to the Treaty; and
  - (c) whether the design of each plant in respect of its gated spillways is in accordance with Paragraph 8(e) of Annexure D to the Treaty.

The Points of Difference also call upon the Neutral Expert to determine whether the freeboard provided in the design of the RHEP is in accordance with Paragraph 8(a) of Annexure D.

514. The Neutral Expert must accordingly determine whether these Points of Difference, as initially stated and then developed in the Parties’ submissions, should be treated as differences or disputes under Paragraph 7 of Annexure F.
515. It also follows from Paragraph 7 that the principal consideration for this determination is whether the Points of Difference fall within Part 1 of Annexure F to the Treaty. Thus, Paragraph 7 states: “Should the Commission be unable to agree that any particular difference falls within Part 1 of this Annexure, the Neutral Expert shall, after hearing both Parties, decide whether or not it so falls”.
516. Part 1 of Annexure F to the Treaty, under the heading “Questions to be Referred to a Neutral Expert”, sets out the scope of the questions that may be referred to (and, therefore, decided by) a neutral expert appointed under Annexure F. It contains three paragraphs. Paragraph 2 (read together with Paragraph 6(c) of Annexure F) excludes from the competence of neutral experts questions of financial compensation, unless the two Commissioners agree otherwise. Paragraph 3

provides that questions arising with regard to the determination of the costs of certain works may be referred to a neutral expert. In the present case, no questions of financial compensation or costs determination arise, such that neither Paragraph 2 nor Paragraph 3 are directly engaged. The relevant section of Part 1 of Annexure F for present purposes is therefore its Paragraph 1.

517. Paragraph 1 (which is reproduced in full at paragraph 8 above), in 23 subparagraphs, enumerates questions and sub-questions that may be referred to a neutral expert. In relevant part, Paragraph 1 provides:

Subject to the provisions of Paragraph 2, either Commissioner may, under the provisions of Article IX(2)(a), refer to a Neutral Expert any of the following questions:

[ . . . ]

(11) Questions arising under the provisions of Paragraph 7, Paragraph 11 or Paragraph 21 of Annexure D.<sup>402</sup>

518. In turn, Paragraph 11 of Annexure D provides:

If a question arises as to whether or not the design of a Plant conforms to the criteria set out in Paragraph 8 [of Annexure D], then either Party may proceed to have the question resolved in accordance with the provisions of Article IX(1) and (2).

519. It is on these two provisions—Paragraph 1(11) of Annexure F and Paragraph 11 of Annexure D—that India relies to refer its Points of Difference to the Neutral Expert. In so doing, India states that its Points of Difference “relate to whether the KHEP and RHEP are compliant with the requirements of Paragraph 8(a), (c), (d), (e) and (f) of the Annexure D of the Treaty”.<sup>403</sup>

520. The capitalized word “Plant” in Paragraph 11 of Annexure D refers to a “Run-of River Plant”,<sup>404</sup> which is defined in Paragraph 2(g) of Annexure D as “a hydro-electric plant that develops power without Live Storage as an integral part of the plant, except for Pondage and Surcharge Storage”. There appears to be no dispute between the Parties that the KHEP and the RHEP are Run-of-River Plants in this sense.

521. Articles IX(1) and (2) of the Treaty, referred to in Paragraph 11 of Annexure D, provide for the examination of questions by the Commission and, failing their resolution by agreement, by a neutral expert (provided that either Commissioner and, ultimately, the neutral expert, consider that such questions fall within Part 1 of Annexure F).

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<sup>402</sup> Emphasis added.

<sup>403</sup> India’s Reply, para. 3.

<sup>404</sup> See the chapeau to Paragraph 8, specifying that in Part 3 of Annexure D—where both Paragraphs 8 and 11 are found—a Run-of-River Plant may also be referred to as a “Plant”.

522. Notwithstanding a certain circularity in these provisions, it is clear on the basis of Articles IX(1) and (2) of the Treaty, Paragraph 1(11) of Annexure F and Paragraph 11 of Annexure D that questions as to whether or not the design of a Plant conforms to the criteria set out in Paragraph 8 of Annexure D fall within Part 1 of Annexure F and therefore within the Neutral Expert's competence.
523. The Neutral Expert notes that, in addition to raising questions of conformity with the design criteria in Paragraph 8 of Annexure D, the Points of Difference as formulated by India also affirm that "[t]he pondage provided by India is also in accordance with Paragraph 2(c) of Annexure D of the Treaty" and that "[t]he pondage provided by India meets the operational restriction imposed by Paragraph 15 of Annexure D". One of the 23 questions that may be referred to a neutral expert under Paragraph 1 of Annexure F is "[w]hether or not operation by India of any plant constructed in accordance with the provisions of Part 3 of Annexure D conforms to the criteria set out in Paragraphs 15, 16 and 17 of that Annexure" (at subparagraph 12). However, India has not invoked this provision as a basis for the Neutral Expert's competence. It has also not invoked any other basis for the Neutral Expert's competence in respect of the portions of the Points of Difference that refer to compliance with Paragraphs 2(c) and 15 of Annexure D. In fact, in the course of these Proceedings, India has consistently described its Points of Difference as being solely about conformity with the design criteria set out in Paragraph 8 of Annexure D.<sup>405</sup> Given India's approach in these Proceedings, the Neutral Expert understands that no separate differences are being referred to him in respect of compliance with Paragraphs 2(c) and 15 of Annexure D, and that these two provisions are being invoked in the Points of Difference and India's subsequent submissions only as potentially relevant to a determination regarding whether the pondage provided in India's design for the KHEP and the RHEP is within the maximum pondage permitted in accordance with Paragraph 8(c) of Annexure D to the Treaty.
524. On the basis of the foregoing, the Neutral Expert concludes that, on their face, the Points of Difference fall within Part 1 of Annexure F and therefore within the Neutral Expert's competence, with the caveat that no separate differences are being referred to him with respect to compliance with Paragraphs 2(c) and 15 of Annexure D.

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<sup>405</sup> India's Reply, paras. 3, 30. *See also* India's Memorial, paras. 43, 45 ("All the differences in relation to the [KHEP] are of this nature (arising under Paragraph 11 of Annexure D) since they relate to conformity of the design of the project with the criteria set out in Paragraph 8 of Annexure D... Again, [for the RHEP, it] is quite apparent that, each of these differences relates to conformity of the design of the project with the criteria set out in Paragraph 8 of Annexure D to the Treaty.").

525. India's position is essentially that the inquiry under Paragraph 7 of Annexure F may and should end here.<sup>406</sup> Notably, Pakistan does not contest the Neutral Expert's competence to interpret Paragraph 8 of Annexure D in circumstances in which he is properly seised of a difference that falls within Part 1 of Annexure F.<sup>407</sup>
526. However, Pakistan argues that, properly analysed, the Points of Difference, which are in reality broader than India makes them out to be, raise other questions that take them comprehensively, or at least in material part, outside the scope of Part 1 of Annexure F. The elements that, according to Pakistan, take the Points of Difference outside the scope of Part 1 of Annexure F may be summarized as follows:
- (a) All the Points of Difference—save possibly that relating to freeboard—engage the interpretation of parts of the Treaty other than Paragraph 8 of Annexure D (such as definitions and other provisions not listed in Part 1 of Annexure F).<sup>408</sup> In particular, the Point of Difference related to pondage requires a determination of the appropriate method of calculation of pondage—a wider question of treaty interpretation.<sup>409</sup>
  - (b) Additionally, all the Points of Difference—save possibly that relating to freeboard—engage the proper *approach* to interpretation of Annexure D, where India emphasises “state of the art” internationally-accepted best practices, while Pakistan highlights that the permissibility of run-of-river HEPs under Annexure D is by way of exception to India's overarching obligations set out in Article III of the Treaty and calls for “a holistic interpretation of all elements of Part 3 of Annexure D”.<sup>410</sup>
  - (c) All the Points of Difference—save possibly that relating to freeboard—raise recurring (systemic) issues that are relevant not only to the KHEP and the RHEP, but also to numerous other Indian run-of-river HEPs on the Western Rivers.<sup>411</sup>

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<sup>406</sup> India's Reply, paras. 2-5; Third Meeting Transcript, Day 1, 148:25-149:3; 149:24-150:1; 151:8-11; 240:22-241:4 (Mr. Salve).

<sup>407</sup> See Pakistan's Statement, para. 1.10.

<sup>408</sup> Pakistan's Statement, paras. 1.10, 1.14, 5.13; Third Meeting Transcript, Day 1, 98:16-22, 99:20-25, 102:20-105:7 (Professor Webb).

<sup>409</sup> Pakistan's Statement, paras. 5.14, 5.40; Third Meeting Transcript, Day 2, 263:16-264:14 (Sir Daniel).

<sup>410</sup> Pakistan's Statement, paras. 5.13, 4.60-4.70, 5.41-5.47; Third Meeting Transcript, Day 1, 104:20-24, 121:20-122:4, 122:8-126:4 (Professor Webb).

<sup>411</sup> Pakistan's Statement, paras. 2.2, 2.23, 5.10, 5.48-5.50; Third Meeting Transcript, Day 1, 98:6-7, 98:23-99:12 (Professor Webb).

- (d) The Points of Difference related to outlets below Dead Storage Level and spillway configuration require a determination of the legal effect, relevance and applicability of the *Baglihar* Determination and the decisions of the *Kishenganga* Court.<sup>412</sup> The Points of Difference related to pondage and intakes, as well as gated spillways, require a determination of the legal effect, relevance and applicability of at least the *Baglihar* Determination.<sup>413</sup>

527. Pakistan also submits that, while the Point of Difference about freeboard might come within the scope of the Neutral Expert's competence, it should not be detached from the other issues.<sup>414</sup>
528. Each of the elements that, according to Pakistan, take the Points of Difference outside the scope of Part 1 of Annexure F is addressed in turn below.
529. In respect of items (a) and (b) listed in paragraph 526 above, which the Neutral Expert understands to be two versions of the same argument, the Neutral Expert accepts that, in order to answer the questions of conformity of design with Paragraph 8 of Annexure D raised by the Points of Difference, he would necessarily need to understand that paragraph in its context, rather than as a few isolated sentences existing in a vacuum. In other words, he would have to look beyond Paragraph 8 at other provisions of the Treaty, as well as at the Treaty as a whole.
530. A straightforward example of why this is the case is provided by the use of defined terms in Paragraph 8. Paragraph 8 reads as follows, in relevant part:

8. Except as provided in Paragraph 18, the design of any new Run-of-River Plant (hereinafter in this Part referred to as a Plant) shall conform to the following criteria:

- (a) The works themselves shall not be capable of raising artificially the water level in the Operating Pool above the Full Pondage Level specified in the design.

[...]

- (c) The maximum Pondage in the Operating Pool shall not exceed twice the Pondage required for Firm Power.
- (d) There shall be no outlets below the Dead Storage Level, unless necessary for sediment control or any other technical purpose; any such outlet shall be of the minimum size, and located at the highest level, consistent with sound and economical design and with satisfactory operation of the works.
- (e) If the conditions at the site of a Plant make a gated spillway necessary, the bottom level of the gates in normal closed position shall be located at the highest level

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<sup>412</sup> Pakistan's Statement, paras. 5.14-5.32, 5.42-5.47; Third Meeting Transcript, Day 1, 98:8-11 (Professor Webb); 262:10-263:4 (Sir Daniel).

<sup>413</sup> Pakistan's Statement, paras. 5.33-5.40; Third Meeting Transcript, Day 1, 98:12-15 (Professor Webb); Day 2, 263:5-15 (Sir Daniel).

<sup>414</sup> Pakistan's Statement, paras. 1.37, 5.41, 5.50, 6.14, 6.19-6.20; Third Meeting Transcript, Day 1, 126:24-127:21 (Professor Webb).

consistent with sound and economical design and satisfactory construction and operation of the works.

- (f) The intakes for the turbines shall be located at the highest level consistent with satisfactory and economical construction and operation of the Plant as a Run-of-River Plant and with customary and accepted practice of design for the designated range of the Plant's operation.

531. Certain terms in this provision, such as “Operating Pool”, “Full Pondage Level”, “Pondage”, “Firm Power”, “Dead Storage Level” and “Run-of River Plant” are capitalized, indicating that they have a fixed meaning for purposes of Paragraph 8. The definitions of these terms are set out in Paragraph 2 to Annexure D of the Treaty. Paragraph 8 therefore cannot be understood without also reading Paragraph 2, and analysing the interaction between these two provisions. On the basis of the Parties’ submissions to date, it appears, for example, that the interaction between Paragraphs 2(c) and 8(c) of Annexure D would be important for any consideration of the Point of Difference concerning pondage. Possibly, other Treaty provisions, such as Article III and Paragraph 15 of Annexure D, would also be relevant.<sup>415</sup>

532. Another example of why Paragraph 8 cannot be read alone is its use of phrases such as “minimum size and highest level, consistent with sound and economical design and with satisfactory operation” (Paragraph 8(d) on outlets below Dead Storage Level), “highest level, consistent with sound and economical design and with satisfactory construction and operation” (Paragraphs 8(e) on gated spillways and 8(f) on intakes), and “customary and accepted practice of design” (Paragraph 8(f) on intakes). Giving meaning to such words as “sound”, “economical”, “satisfactory”, “customary” and “accepted” requires the exercise of judgment. These words cannot be understood in a vacuum, but must acquire (at least part) of their meaning from the context in which they are used, *i.e.*, the Treaty. This is consistent with the requirement of Paragraph 6(b) of Annexure F, recalled at paragraph 499 above, that the Neutral Expert be “governed by the provisions of the Treaty” in making his decisions. Additionally, such terms as “sound”, “economical” and expressions such as “customary and accepted practice” may also, within the constraints of the Treaty, derive part of their meaning from engineering practice in respect of the design, construction and operation of dams and HEPs.

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<sup>415</sup> With regard to Paragraph 15 of Annexure D, see India’s Memorial, para. 81 (“... pondage is computed considering paragraphs 2(c), 8(c), and 15 of Annexure D to the Treaty which are interrelated.”); Pakistan’s Statement, paras. 1.7, 5.13, 5.44; Third Meeting Transcript, Day 1, 44:24-45:1, 45:22-46:4 (Sir Daniel) (“[Paragraph 15 of Annexure D is ... fundamental to India’s approach to the calculation of Pondage ... there is a live and difficult issue between the parties which goes back to Baglihar, and goes back to Kishenganga, about whether the operational requirements of Paragraph 15 of Annexure D are at all relevant in any way to the calculation of Pondage.”).

533. In the Neutral Expert's view, Pakistan is therefore correct that in assessing conformity with Paragraph 8, he would necessarily have to *interpret* provisions of the Treaty other than Paragraph 8 of Annexure, and *adopt an approach to the interpretation* of the Treaty—in other words, balance the various considerations arising from his interpretation of Treaty provisions.
534. In the light of the foregoing, the question is whether this necessary reference to provisions of the Treaty other than Paragraph 8 and the necessary adoption of an approach to interpretation takes the Points of Difference comprehensively, or at least in material part, outside the scope of Part 1 of Annexure F. The Neutral Expert considers this not to be the case.
535. First, no such limitation on the competence of the Neutral Expert is expressed either in Part 1 of Annexure F or in any other part of the Treaty. The Neutral Expert notes that, where a subject-matter was to be excluded from his competence, notwithstanding that it had been “raised with respect to a question specified in Paragraph 1 of Annexure F,” this was spelled out in the Treaty.<sup>416</sup>
536. Second, the necessity of this reference to other aspects of the Treaty itself militates in favour of its acceptance as part of the Neutral Expert's competence. As just noted, Paragraph 8 uses many definitions and broad expressions, which invite the Neutral Expert to look beyond Paragraph 8 alone. If the use of defined terms and broad expressions were to take questions of compliance with Paragraph 8 outside the scope of Part 1 of Annexure F and the Neutral Expert's competence, this would carve out most, if not all, questions pertaining to Paragraph 8 from the Neutral Expert's competence, rendering the reference to Paragraph 8 in Paragraph 1(11) of Annexure F (via Paragraph 11 of Annexure D) devoid of effective meaning or content.
537. Third, the necessity of referring to context does not set the interpretation of Paragraph 8 apart from the interpretation of any other text. It is common sense that to decide questions of compliance under provisions of the Treaty, the Neutral Expert would need to interpret those provisions. It is also common sense that the interpretation of text requires consideration of context. Therefore, in bestowing upon a neutral expert appointed under Annexure F the competence to decide whether there has been compliance with certain provisions of the Treaty (such as Paragraph 8 of Annexure D or any other provision of the Treaty referred to, directly or indirectly, in Paragraph 1 of Annexure F), the Treaty gives the neutral expert the competence to interpret, as an incidental matter, other provisions of the Treaty relevant to the proper interpretation and application of the main provision at hand. It also implicitly gives the neutral

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<sup>416</sup> Treaty, Annexure F, Paragraph 2 (“If a claim for financial compensation has been raised with respect to any question specified in Paragraph 1, that question shall not be referred to a Neutral Expert unless the two Commissioners are agreed that it should be so referred.”).



expert the competence to adopt an *approach* to the interpretation of the main provision at hand, in other words, to decide, as he inevitably will need to do, which considerations or elements of context are determinative or more or less important to the interpretation of that provision.

538. The foregoing does not mean that the Neutral Expert has free reign to interpret *any* part of the Treaty, or make a general determination as to the approach to be taken to the interpretation of the Treaty, or indeed to settle any disagreement—technical, legal or otherwise—between the Parties as to the interpretation and application of the Treaty other than those questions that are enumerated in Part 1 of Annexure F. The Neutral Expert will remain within his competence solely to the extent that he considers and decides questions that fall within Part 1 of Annexure F, including, to the extent necessary to answer those questions, any incidental questions.
539. At this stage, pending a full briefing of the merits of the Points of Difference, the Neutral Expert does not consider it necessary or helpful to exhaustively identify such incidental questions. He does, however, find it expedient to comment on one such question raised by Pakistan. Pakistan highlights that there is a disagreement of principle between the Parties with regard to the Point of Difference pertaining to pondage, such that the precondition to deciding whether the design of the KHEP and the RHEP complies with the requirements of Paragraph 8(c) of Annexure D is a determination of the correct method for the calculation of pondage under the Treaty. Pakistan submits that such a determination would require the consideration of the definition of “Pondage” at Paragraph 2(c) of Annexure D, as well as other relevant Treaty provisions. Pakistan contends that this precondition takes the Point of Difference related to pondage outside the competence of the Neutral Expert.<sup>417</sup> The Neutral Expert does not consider this to be correct. It is true that the Parties’ disagreement has crystallized, at least to date, around the question of the correct method for the calculation of pondage. The determination of the correct method will likely require a consideration of the Treaty definition of “Pondage” at Paragraph 2(c) of Annexure D and may require the consideration of other provisions of the Treaty, such as Article III and Paragraph 15 of Annexure D. However, these matters arise in these Proceedings incidentally to a Point of Difference that falls expressly within Part 1 of Annexure F. Accordingly, for all the reasons set out above, the Neutral Expert finds that the consideration of these matters also falls within his competence, to the extent that it is necessary to resolve a Point of Difference.
540. Pakistan argues that only technical (and hence not legal) questions fall within the competence of the Neutral Expert, relying *inter alia* on the *Kishenganga* Court’s characterization of the questions enumerated in Paragraph 1 of Annexure F as “technical” and on the Neutral Expert’s

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<sup>417</sup> Pakistan’s Statement, paras. 5.33-5.40; Third Meeting Transcript, Day 1, 117:23-121:11 (Professor Webb).

qualifications as an engineer.<sup>418</sup> While the Neutral Expert agrees with the use of the term “technical” in a general sense to describe the questions enumerated in Paragraph 1 of Annexure F, and certainly agrees that in his capacity as an engineer and a dam specialist, he is best placed to answer technical questions, he notes that the term “technical” does not actually appear in Part 1 of Annexure F and therefore does not constitute a limitation placed on his competence by the Treaty. Rather, the Treaty plainly envisages that engineers, as well as lawyers, will engage in the exercise of interpretation of the Treaty. The Indus Waters Commissioners are ordinarily high-ranking engineers<sup>419</sup> and, in all instances, the first persons to engage on all issues of interpretation and application of the Treaty.<sup>420</sup> Similarly, by providing that 23 questions (plus some subquestions), all pertaining to aspects of the Treaty, may be referred to neutral experts, the Treaty plainly envisages that neutral experts will have to read and understand—in other words interpret—the Treaty.<sup>421</sup>

541. The Neutral Expert notes that, in commenting on the competence of neutral experts in its Partial Award, the *Kishenganga* Court stated as follows: “The Court accepts, of course, that such an expert may have to interpret the Treaty in the process of rendering a determination on the matters before him”. The Court then continued: “But where a legal issue (such as the permissibility of reservoir depletion) is contested and does not fall within a question identified for the neutral expert, the Court considers that it would be incumbent on such an expert to refer the matter back to the Commission to be handled as a dispute”.<sup>422</sup> While the Court addressed in this instance a case where a legal issue should be referred to be handled as a dispute, the Court did not rely on the fact that it was a legal issue, but highlighted that the criterion is whether the legal issue in question *falls within* a question identified for the neutral expert.
542. Turning now to item (c) listed in paragraph 526 above, Pakistan argued in its written submissions that recurring issues that are relevant not only to the KHEP and the RHEP, but also to numerous other Indian run-of-river HEPs on the Western Rivers fall outside the competence of the Neutral

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<sup>418</sup> Pakistan’s Statement, paras. 3.3, 4.61-4.62; Third Meeting Transcript, Day 1, 35:10-36:03 (Sir Daniel); *Kishenganga* Partial Award, paras. 474, 483-487 (IN-EX-10).

<sup>419</sup> See Treaty, Article VIII(1) (“India and Pakistan shall each create a permanent post of Commissioner for Indus Waters, and shall appoint to this post, as often as a vacancy occurs, a person who should ordinarily be a high-ranking engineer competent in the field of hydrology and water-use.”).

<sup>420</sup> See Treaty, Article IX(1) (“Any question which arises between the Parties concerning the interpretation or application of this Treaty or the existence of any fact which, if established, might constitute a breach of this Treaty shall first be examined by the Commission, which will endeavour to resolve the question by agreement.”).

<sup>421</sup> Treaty, Annexure F, Paragraph 1.

<sup>422</sup> *Kishenganga* Partial Award, para. 490 (IN-EX-10).

Expert, as his competence under Paragraph 1(11) of Annexure F and Paragraph 11 of Annexure D is plant-specific and thus does not extend to “questions of systemic treaty interpretation and application” that are “beyond Plant-specific”.<sup>423</sup> At the Third Meeting, Pakistan further explained that “[a]n appreciation that these questions have a systemic effect beyond the individual plant is simply a recognition of the character of the questions rather than itself a reason precluding [the Neutral Expert] from addressing their plant-specific application”.<sup>424</sup>

543. The Neutral Expert agrees that his competence is plant-specific. This is clear from the formulation of Paragraph 11 of Annexure D, which refers to “a question that arises as to whether or not the design of a Plant conforms to the criteria set out in Paragraph 8”.<sup>425</sup> In the Neutral Expert’s view, however, this limitation does not serve to take any of the Points of Difference outside the scope of his competence. Each Point of Difference referred to him by India pertains to compliance with design criteria of a specific plant—the KHEP or the RHEP. None of the Points of Differences call upon the Neutral Expert to make a general determination as to an element of interpretation or application of the Treaty that would apply to any plants beyond the KHEP and the RHEP. As noted above, to the extent incidental questions of interpretation need to be answered *in order to* decide the Points of Difference, this falls within the scope of the Neutral Expert’s competence under the Treaty.
544. While certain issues may recur in the design, construction and operation of Indian run-of-river HEPs on the Western Rivers, the impact of the Neutral Expert’s decision on the Points of Difference will be limited to the KHEP and the RHEP. His decision will not address such differences (or any incidental questions) as they concern other plants and projects. This is necessarily so in the light of Paragraph 11 of Annexure F, which provides that “[t]he decision of the Neutral Expert on all matters within his competence shall be final and binding, in respect of the particular matter on which the decision is made, upon the Parties and upon any Court of Arbitration established under the provisions of Article IX(5)”,<sup>426</sup> and the interpretation of this provision by the *Kishenganga* Court.<sup>427</sup>

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<sup>423</sup> Pakistan’s Statement, paras. 1.13, 2.6, 5.12; Third Meeting Transcript, Day 1, 40:18-40:25 (Sir Daniel).

<sup>424</sup> Third Meeting Transcript, Day 2, 265:5-9 (Sir Daniel).

<sup>425</sup> Emphasis added.

<sup>426</sup> Emphasis added.

<sup>427</sup> *Kishenganga* Partial Award, paras. 469-470 (“Annexure F expressly provides that the decision of a neutral expert shall be final and binding ‘in respect of the particular matter on which the decision is made.’ .... The effect of a neutral expert’s determination is restricted to the elements of the design and operation of the specific hydro-electric plant considered by that Expert. ... the Court does not see in Annexure F any

545. As to item (d) listed in paragraph 526 above, the Neutral Expert accepts that some of the issues raised by the Points of Difference, such as that of pondage and outlets below Dead Storage Level, have previously been considered by the *Kishenganga* Court and the neutral expert in *Baglihar*. Pakistan has clearly explained the potential scope of the Parties' disagreements regarding the interpretation and application of the past decisions of those dispute resolution bodies under the Treaty.<sup>428</sup> Those past decisions were also touched upon in India's Memorial.<sup>429</sup>
546. The Neutral Expert does not accept, however, that the fact that past decisions of dispute resolution bodies under the Treaty have addressed issues connected to those that are now referred to him would in and of itself deprive him of competence.
547. Whenever a dispute resolution body renders a decision in a contentious case, that decision may give rise to differing understandings and interpretations by parties with opposing interests. This is what happened when India requested a clarification of the Partial Award of the *Kishenganga* Court.<sup>430</sup> It is what has further emerged in the discussions of the Commission following the conclusion of that case.<sup>431</sup> As with time an increasing number of questions is likely to be submitted to dispute resolution bodies under the Treaty, excluding all decided and related issues from the future competence of neutral experts would have the effect of slowly but surely shrinking the competence of neutral experts under the Treaty, even where the differences referred to them fall expressly within the scope of Part 1 of Annexure F. This would have the effect of reducing the utility of one dispute resolution process provided for by the Treaty in favour of another (courts of arbitration), where the Parties in drafting the Treaty plainly contemplated that each process would

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indication that the Parties intended a neutral expert's determination to have a general precedential value beyond the scope of the particular matter before him.") (IN-EX-10).

<sup>428</sup> Pakistan's Statement, paras. 5:15-5:47; Third Meeting Transcript, Day 1, 109:05-121:11 (Professor Webb).

<sup>429</sup> India's Memorial, paras. 52, 90, 221, 362, 398, 401-405.

<sup>430</sup> *Indus Waters Kishenganga Arbitration (Pakistan v. India)*, PCA Case No. 2011-01, Decision on India's Request for Clarification or Interpretation dated 20 May 2013, 20 December 2013 (PKA-4).

<sup>431</sup> See e.g. Letter from the PCIW to the ICIW, No. WT(51)/(7394-A)/PCIW, 10 January 2014 (PK-48); Letter from the ICIW to the PCIW, No. 9/7/2013-IT/2061, 6 February 2014 (PK-49); Letter from the PCIW to the ICIW, No. WT(132)/(7411-A)/PCIW (with enclosure), 31 March 2014 (PK-50); Record of the 109<sup>th</sup> Meeting of the Permanent Indus Commission, 22-25 September 2013 (PK-51); Letter from the PCIW to the ICIW, No. WT(47)/(7464-A)/PCIW, 30 January 2015 (PK-54); Record of the 110<sup>th</sup> Meeting of the Permanent Indus Commission, 23-27 August 2014 (PK-55); Letter from the ICIW to the PCIW, No. Y-20016/1/2014-IT/2129, 20 March 2015 (PK-56); Record of the 111<sup>th</sup> Meeting of the Permanent Indus Commission, 31 January-4 February 2015 (PK-61); Letter from the PCIW to the ICIW, No. WT(132)/(7493-A)/PCIW, 3 July 2015 (PK-63); Letter from the ICIW to the PCIW, No. Y-11017/2/2015-IT/2155, 21 August 2015 (PK-67); Letter from the PCIW to the ICIW, No. WT(132)/(7505-A)/PCIW, 11 September 2015 (PK-68); Letter from the ICIW to the PCIW, No. Y-11017/2/2015-IT/2162, 13 October 2015 (PK-69); Letter from the PCIW to the ICIW, No. WT(132)/(7513-A)/PCIW, 4 November 2015 (PK-71).

have its own utilities and advantages. In the absence of any indication in this direction in the Treaty, the Neutral Expert finds that that was not the intention.

548. Consistent with his reasoning above, the Neutral Expert considers that, to the extent that it would be necessary to take a view on questions of interpretation and application of the decisions of the *Kishenganga* Court and the neutral expert in *Baglihar* in order to decide the Points of Difference, such questions would fall within his competence as incidental questions to the questions concerning the conformity of India's design with Paragraph 8 of Annexure D, which are the core of the Neutral Expert's mandate in these proceedings.
549. The Neutral Expert also notes that, while the implications of the decisions of the *Kishenganga* Court and the neutral expert in *Baglihar* may need to be worked out as incidental questions necessary to the resolution of the Points of Difference referred to him, there may not be as much of a disagreement between the Parties regarding the legal effect of those past decisions as contended by Pakistan.
550. Pakistan submits that there may be a disagreement between the Parties as to whether or not decisions of the *Kishenganga* Court can bind the Neutral Expert, referring to a letter from India to the Neutral Expert dated 11 February 2023, in which India stated that "there is no provision in the Treaty which declares that an Award by a Court of Arbitration shall bind a Neutral Expert".<sup>432</sup> However, the Neutral Expert understands India to have clarified, in the course of the Third Meeting, that the statement in its 11 February 2023 letter was made exclusively in the context of a discussion of the binding nature of the decisions of the 2022 CoA and was not intended to dispute the binding nature of the decisions of the *Kishenganga* Court.<sup>433</sup> The Neutral Expert therefore understands the Parties to be *ad idem* on the binding nature of the decisions of the *Kishenganga* Court and does not expect India to contest that binding nature going forward in these proceedings. The Neutral Expert notes that this agreement appears to be consistent with Paragraph 23 of Annexure G to the Treaty, which provides that any award of a court of arbitration rendered in accordance with the provisions of Annexure G in regard to a particular dispute "shall be final and binding upon the Parties with respect to that dispute".

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<sup>432</sup> Pakistan's Statement, paras. 4.50, 5.27 referring to Letter from India to the Neutral Expert, 11 February 2023, paras. 7-8; Third Meeting Transcript, Day 1, 115:18-116:15 (Professor Webb).

<sup>433</sup> Third Meeting Transcript, Day 1, 143:14-25 (Mr. Salve) ("What is the status of the *Kishenganga* Award? You will read and read and reread our Memorial in vain to try and find a sentence in our Memorial which says that it doesn't bind India. One letter of 11 February 2023, which says that the present [2022 CoA] doesn't bind India is being mischaracterized as India's assertion that no Award will bind India. At least India is known for its commitment to the rule of law ... you would never hear an extreme submission of this kind."). See also Third Meeting Transcript, Day 1, 179:1-21 (Mr. Salve).

551. Similarly, Pakistan submits that there is a disagreement between the Parties regarding the legal effect of the *Baglihar* Determination, which Pakistan considers to have no precedential effect, while in its view “India’s case elevates [the *Baglihar* Determination] to the status of a binding precedent”, particularly with respect to the methodology adopted by the neutral expert in that matter for the calculation of maximum pondage.<sup>434</sup> However, as with the *Kishenganga* decisions, India’s position with regard to the legal effect of the *Baglihar* Determination was clarified at the Third Meeting, where counsel explained that India does not contend that the *Baglihar* Determination has *res judicata* effect and that, while that Determination is persuasive, it is open to the Neutral Expert in these Proceedings to find that the Determination was wrong.<sup>435</sup>
552. Finally, the Neutral Expert notes that Pakistan’s arguments on the Paragraph 7 issues with regard to the Points of Difference in these proceedings represent a departure from a previously-held position with regard to virtually identical points of difference.
553. As described at paragraphs 274-282 above, in 2009, when it referred two disputes to the *Kishenganga* Court, Pakistan separated out three other questions on which there was disagreement within the Commission, as it considered them to be differences (*i.e.*, amenable to resolution by a neutral expert) rather than disputes (to be submitted to a court of arbitration). These differences comprised questions regarding the conformity of the KHEP design with Paragraphs 8(c), (d) and (e) and (f) of Annexure D, all of which are now referred to the Neutral Expert as Points of Difference.<sup>436</sup> At the time, Pakistan made the following comments regarding these questions:
- e. . . . it is evident that Questions 3-5 are of a technical nature which relate specifically to the broad issue of whether or not the design of the Kishenganga Project conforms to the criteria stipulated in Paragraph 8 of Annexure D.
  - f. By virtue of Paragraph 1(11) of Annexure F, it follows that Questions 3-5 fall within the jurisdiction of a Neutral Expert.
  - g. Accordingly, it is Pakistan’s position that “differences” have arisen between the parties with respect to Questions 3-5 within the meaning of that phrase as used in Article IX(2) of the Treaty.

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<sup>434</sup> Pakistan’s Statement, paras. 4.26, 5.33-5.39.

<sup>435</sup> Third Meeting Transcript, 155:11-20 (Mr. Salve) (“An eminent engineer before you has done the math and he has arrived at a formula. Read it. It is persuasive. . . . If Pakistan says that it is demonstrably wrong, you’ll say sorry, I don’t agree with this engineer.”); 186:19-21, 187:6-10 (Mr. Salve) (“We have never said it is *res judicata*. We say it is relevant, don’t re-invent the wheel, an eminent engineer has done this... He decided. He got it wrong, according to Pakistan. He got it right, according to India. You will decide.”).

<sup>436</sup> See Record of the 101<sup>st</sup> Meeting of the Permanent Indus Commission, 28 July 2008, pp. 4, 6-8, 10-12 (**PK-28**).

- h. You are therefore informed, as required by Paragraph 5(a) of Annexure F, that Pakistan intends to seek the appointment of a Neutral Expert for the resolution of the differences between India and Pakistan with respect to Questions 3-5 [...].<sup>437</sup>

554. Similarly, on 24 July 2015, before requesting the World Bank to constitute a court of arbitration for the resolution of “disputes”, Pakistan initially sought to refer similar points of difference regarding compliance with the design requirements of Paragraph 8 of Annexure D to a neutral expert.<sup>438</sup> Pakistan then withdrew its request on 25 February 2016.<sup>439</sup> Pakistan justified this change of position by stating that “it ha[d] become apparent from the correspondence since 24 July 2015 that the issues over Kishenganga and Ratle HEPs are substantially, if not predominantly, legal in nature”.<sup>440</sup>
555. However, it has to be noted that the “predominantly” legal issues referred to by Pakistan had been discussed in the Commission already well before 24 July 2015. Thus, during the 110<sup>th</sup> and 111<sup>th</sup> meetings of the Commission held in August 2014 and January-February 2015, the Parties discussed in detail the same issues set out in Pakistan’s letter of 25 February 2016 and their respective positions on them, including the impact of the *Kishenganga* Partial Award and the *Baglihar* Determination, and the relevance of other Treaty provisions such as Paragraphs 2(c) and 15 of Annexure D.<sup>441</sup> Similarly, in his letter to the ICIW dated 24 July 2015, the PCIW explained

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<sup>437</sup> Letter from the PCIW to the ICIW, No. WT(132)/(6981-A)/PCIW, 11 March 2009 (**PK-30**)(emphasis added).

<sup>438</sup> Letter from the PCIW to the Governments of Pakistan and India, No. WT(132)/(7497-98-A)/PCIW, 24 July 2015 (**PK-66**).

<sup>439</sup> Letter from the PCIW to the ICIW, No. WT (132)/(7531-A)/PCIW, 25 February 2016 (**PK-5**).

<sup>440</sup> Letter from the PCIW to the ICIW, No. WT (132)/(7531-A)/PCIW, 25 February 2016 (**PK-5**).

<sup>441</sup> Record of the 110<sup>th</sup> Meeting of the Permanent Indus Commission, 23-27 August 2014 (**PK-55**):

“5. [...] [The PCIW] also highlighted that as per the Final Award of Court of Arbitration issued in December 2013 it is a settled matter that India cannot drawdown the reservoir below the DSL except in an unforeseen emergency – not only for Kishenganga HEP but in general for all the future run-of-river HEPs on the Western Rivers.

[...]

8. ICIW stated that on pondage, an unambiguous neutral view is available in Baglihar determination which can always serve as a guideline to determine the value of pondage. If the same is followed, the issue can be resolved in all run of the river hydroelectric projects of India on Western Rivers wherever applicable.

[...]

10. PCIW stated that the interpretation of Firm Power given by the Neutral Expert in Baglihar case was incorrect ... He explained that in Baglihar Case the Neutral Expert adopted a definition of the Firm Power from outside of the Treaty, the definition of ASCE, with altogether different meaning than the definition provided in the Treaty. PCIW concluded without prejudice to the fact that the decisions of the Neutral Expert were final and binding in respect of the particular matter on which the decision is made, and that the Neutral Expert’s determination on maximum Pondage in Baglihar case had a major flaw as it did not employ Treaty’s definition of the Firm Power; the same, therefore, cannot be accepted as a guideline either. He also added that the Maximum Pondage calculated as per the Treaty’s criterion suffices for peaking operations;

that differences had to be referred to a neutral expert *inter alia* because: (i) India had made no effort to bring the designs of the KHEP and the RHEP in line with the requirements of Paragraph 8 of Annexure D despite Pakistan's requests for modifications in the light of the *Kishenganga* Partial Award, and (ii) India insisted on relying on the *Baglihar* Determination to support its approach to pondage.<sup>442</sup>

556. Pakistan was entitled to ultimately change its position as to what constitutes a difference or dispute under the Treaty, but the Neutral Expert nevertheless finds it worth noting that over a period of many years, Pakistan's position did not differ materially from the decision made by the Neutral Expert here. Pakistan's submissions in these Proceedings suggest that at least part of what happened is that, as Pakistan became more aware of the ramifications of the points of difference it had initially sought to put before a neutral expert, it determined that a more effective and economical strategy would be to pursue its points in a manner that could ultimately impact not only the KHEP and the RHEP, but would also "set the rules of the game" for India's whole project of development of HEPs on the Western Rivers.<sup>443</sup> While this may indeed be more practical, as noted above, it does not serve to deprive the Neutral Expert of competence over differences that fall within the scope of Part I of Annexure F.

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yet, the repeated referral by ICIW to the Neutral Expert's method of computation of Pondage may be understood as being considered favourable for India.

11. ICIW said that it was not appropriate to view that India was referring to the decision of Neutral Expert because it favoured India. Pondage in Baglihar case had been fixed by the Neutral Expert who is an eminent engineer and appointed under the provisions of the Treaty. Though the determination of pondage by the Neutral Expert was for Baglihar, the same can be considered as a guideline for the other projects of India on Western Rivers. ...

[...]

29. ICIW emphasized that India has been taking into account all the relevant provisions in the Treaty like paragraph 2(c), 8(c) and 15 of Annexure D while estimating pondage requirements. ...

[...]

32. ICIW stated that it would not be appropriate to interpret that only the design provided by Pakistan conforms to the Treaty provision and would enable the implementation of [the *Kishenganga*] Court of Arbitration's ruling. India will abide by the ruling of the Court and the design provided by India is compliant with the same ...

*See also* Record of the 111<sup>th</sup> Meeting of the Permanent Indus Commission, 31 January-4 February 2015, paras. 29, 31-34, 69, 70 (**PK-61**).

<sup>442</sup> Letter from the PCIW to the ICIW, No. WT(132)/(7496-A)/PCIW, 24 July 2015 (**PK-10**); see excerpts reproduced at paragraphs 297-298 above.

<sup>443</sup> *See* Third Meeting Transcript, Day 1, 55:6-22 (Dr. Miles); 96:19-97:6 (Dr. Miles); 98:23-99:12 (Professor Webb); Day 2, 276:22-278:11 (Dr. Miles).



## 2. Conclusion

557. For the reasons stated above, the Neutral Expert finds that (i) the Points of Difference pertain to “whether or not the design of a Plant conforms to the criteria set out in Paragraph 8” of Annexure D to the Treaty and fall within Part 1 of Annexure F to the Treaty; and that (ii) no separate differences are being referred to the Neutral Expert with respect to India’s compliance with Paragraphs 2(c) and 15 of Annexure D to the Treaty.
558. The Neutral Expert also finds that, while the Points of Difference raise certain incidental questions, including as to the interpretation of the Treaty, and the implications of past decisions of dispute resolution bodies under the Treaty, those incidental questions do not take the Points of Difference comprehensively, or in material part, outside the scope of Part 1 of Annexure F.
559. The Neutral Expert accordingly finds that, pursuant to Paragraph 7 of Annexure F, he should proceed to render a decision on the merits of the Points of Difference.
560. In the light of the foregoing, the Neutral Expert finds no need to address Pakistan’s second alternative submission<sup>444</sup> requesting the Neutral Expert to determine, in detail, which parts of India’s Memorial fall within his competence and therefore call for a response from Pakistan.

### C. PAKISTAN’S ALTERNATIVE SUBMISSION—THE CONSEQUENCES OF THE PARALLEL PROCEEDINGS BEFORE THE 2022 CoA

561. Pakistan makes the alternative submission that, following the 2022 CoA’s determination of the systemic questions of Treaty interpretation and application identified by it, questions going to compliance with the design requirements of Paragraph 8 of Annexure D in respect of the KHEP and the RHEP could properly come within the scope of Part 1 of Annexure F.<sup>445</sup> In its “final submissions” at the Third Meeting, Pakistan requested that the Neutral Expert adjudge and declare, in the alternative, that “[t]he question of whether any part of [the Points of Difference] falls within Paragraph 1(11) of Annexure F, read together with Paragraph 11 of Annexure D, such that they might be addressed by the Neutral Expert without trespassing into questions beyond the competence of the Neutral Expert is deferred, pending the issuance of the award or awards by the [2022 CoA] in its parallel proceedings on the first phase on the merits and following consultations with the Parties”.<sup>446</sup>

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<sup>444</sup> Third Meeting Transcript, Day 1, 138:7-13 (Sir Daniel).

<sup>445</sup> Pakistan’s Statement, paras. 1.15, 1.37-1.39, 6.1-6.3, 6.14-6.17; Third Meeting Transcript, Day 1, 136:4-22 (Sir Daniel).

<sup>446</sup> Third Meeting Transcript, Day 2, 317:2-20 (Mr. Aslam).

562. While the Neutral Expert has found above that the Points of Difference, including incidental questions necessary for their determination, fall within Part 1 of Annexure F and therefore within the Neutral Expert's competence, this does not exclude that some or all of these incidental questions may be better suited to determination by a court of arbitration. There is a difference in expertise between a neutral expert and a court of arbitration. There is also a difference between the legal effect of decisions of a neutral expert and a court of arbitration, such that their decisions will have different consequences with respect to the future interpretation and application of the Treaty. The Neutral Expert has therefore given Pakistan's alternative submission careful consideration.
563. In so doing, the Neutral Expert has adverted to the following circumstances:

- (a) A court of arbitration under the Treaty (referred to in this Decision as the 2022 CoA) was empanelled in October 2022. Pakistan appointed two arbitrators to that Court on 19 August 2016 and 20 October 2022. Two umpires were appointed to the Court by the President of Imperial College London and the Chief Justice of the United States, on 28 September and 17 October 2022 respectively. On 13 October 2022, on the same day on which it appointed the Neutral Expert, the World Bank notified Professor Sean D. Murphy of his appointment by the President of the World Bank as umpire and Chairman of the 2022 CoA. India did not appoint any arbitrators to the 2022 CoA as it was permitted to do under the Treaty.<sup>447</sup>
- (b) In its Competence Award dated 6 July 2023, the 2022 CoA, *inter alia*, upheld its competence to decide all questions related to its competence and declared that it is competent to consider and determine the disputes set forth in Pakistan's Request for Arbitration dated 19 August 2016.<sup>448</sup>
- (c) In its Procedural Order No. 6 dated 6 July 2023, the 2022 CoA made the following remarks regarding the present circumstances that, in its words, "have seen both the constitution of a Court of Arbitration and the appointment of a Neutral Expert"<sup>449</sup>:

29. As a general matter, situations in which multiple dispute resolution bodies have competence in respect of the same matter are, in fact, commonplace in public international law. Relations between States are based on a multiplicity of bilateral and multilateral agreements with different arrangements for the resolution of disputes, all framed against a background of customary international law. Successive treaties may provide for dispute resolution in respect of the same issues. A general treaty for the resolution of disputes may

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<sup>447</sup> *Indus Waters Arbitration*, Competence Award, paras. 4, 12, 20-22 (**PKA-1**).

<sup>448</sup> *Indus Waters Arbitration*, Competence Award, para. 318 (**PKA-1**).

<sup>449</sup> *Indus Waters Arbitration*, Procedural Order No. 6 (Decision on Further Proceedings), 6 July 2023, paras. 29-31 (**PKA-2**).

exist alongside a treaty addressing a particular subject matter that also provides for dispute resolution. A multilateral treaty may operate in parallel with a bilateral treaty, both providing for dispute resolution. And an ad hoc dispute resolution process may be given competence alongside a standing procedure for dispute resolution. Except to the extent that the instruments on which such proceedings are based so provide, or the international law on the interpretation of treaties indicates, there is no a priori basis to conclude that the competence of one dispute resolution body has priority over another.

30. In such circumstances, there is a general duty of any international dispute resolution body to exercise its competence in such a manner as to facilitate the actual resolution of the Parties' dispute and to avoid the risks of duplicative proceedings or conflicting decisions. Such mutual respect and comity may call for one dispute resolution body to structure its proceedings in a manner mindful of the other, to stay or defer its proceedings pending developments before the other body, or to give way and refrain from exercising its competence if it appears that the agreement of the Parties or the dictates of the applicable instruments so indicate.

31. In the context of the Treaty, dispute settlement processes are envisaged in Article IX involving a neutral expert and a court of arbitration. While there are certain provisions in the Treaty that speak to the final and binding nature of decisions reached by both bodies, there is no express prohibition on the simultaneous operation of two bodies, nor might one be implied when two bodies are not simultaneously addressing the same issues. The Court will organize its future proceedings mindful of the general duty of mutual respect and comity referred to above, given the possible parallel competence of the Neutral Expert in respect of the KHEP/RHEP Design and Operation Issues. The Court considers it axiomatic that the same duty of mutual respect and comity is applicable to the Neutral Expert in the organization and conduct of his proceedings.<sup>450</sup>

(d) In its Procedural Order No. 6, the 2022 CoA also gave the following directions:

34. The Court of Arbitration will conduct these proceedings in a phased manner, bearing in mind the status of, and developments concerning, the proceedings taking place before the Neutral Expert.

35. The next phase of its proceedings will address the following questions (b) through (g) that arise from Pakistan's Request for Arbitration concerning the overall interpretation or application of Article III of the Treaty and paragraph 8 of Annexure D thereto, as well as a related general question (a) concerning the legal effect of past decisions issued by dispute resolution bodies established pursuant to Article IX of the Treaty upon the Parties and upon subsequent dispute resolution bodies:

(a) To what extent and on what basis are the decisions of past dispute resolution bodies established pursuant to Article IX of the Treaty concerning (i) competence, (ii) matters of fact, (iii) the interpretation of the Treaty, or (iv) the application of the Treaty in particular factual circumstances, binding or otherwise controlling with respect to (a) the Parties, (b) the present proceedings before the Court, (c) the present proceedings before the Neutral Expert, and (d) future proceedings before a court of arbitration or a neutral expert? Insofar as such decisions are binding or otherwise controlling, what—if any—exceptions or limitations may limit their binding/controlling effect?

(b) To what extent can non-Treaty-based design and operational practices be taken into account for purposes of interpreting the technical requirements set out in Annexure D, paragraph 8?

(c) With respect to Annexure D, paragraph 8(a), what is to be taken into account for the purposes of designing the freeboard for a plant and what is to be excluded?

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<sup>450</sup> *Indus Waters Arbitration*, Procedural Order No. 6 (Decision on Further Proceedings), 6 July 2023, paras. 29-31 (PKA-2).

- (d) With respect to Annexure D, paragraph 8(c), what is to be taken into account for the purposes of calculating maximum pondage for a plant and what is to be excluded?
- (e) With respect to Annexure D, paragraph 8(d) of Annexure D, what is to be taken into account for the purposes of designing low-level sediment outlets for a plant and what is to be excluded?
- (f) With respect to Annexure D, paragraph 8(e) of Annexure D, what is to be taken into account for the purposes of designing gated spillways for flood control for a plant and what is to be excluded?
- (g) With respect to Annexure D, paragraph 8(f), what is to be taken into account for the purposes of designing submerged power intakes for a plant and what is to be excluded?<sup>451</sup>
- (e) There is overlap between the Points of Difference and the incidental questions they raise, and the questions listed in paragraph 35 of the 2022 CoA's Procedural Order No. 6. That said, the Court's questions (at least in the currently pending phase on the merits before the Court) are put at a higher level than the Points of Difference and would not go all the way to answering the Points of Difference in respect of the KHEP and the RHEP.
- (f) India is of the view that the 2022 CoA was illegally constituted and, consequently, considers "any order at any stage in respect of any matter or any award ostensibly passed by [the 2022 CoA] to be a nullity, liable to be ignored".<sup>452</sup>
- (g) India has not participated in the proceedings before the 2022 CoA to date (although it has addressed objections regarding the Court's jurisdiction to the World Bank, which were considered by the Court in its Competence Award).<sup>453</sup> Notably, on the information available to the Neutral Expert, India has made no submissions, whether written or oral, on issues of merits in the proceedings before the 2022 CoA, and has not facilitated a site visit by the Court of any pertinent Indian HEP on the Western Rivers, leading the Court to visiting only a Pakistani HEP.
- (h) In the pending phase on the merits before the 2022 CoA, it has received written submissions from Pakistan and has held an oral hearing in July 2024. It has invited Pakistan to make limited post-hearing submissions by 1 November 2024 and has provided India with the opportunity to indicate whether it wishes to provide any comments in relation to Pakistan's

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<sup>451</sup> *Indus Waters Arbitration*, Procedural Order No. 6 (Decision on Further Proceedings), 6 July 2023, paras. 34-35 (**PKA-2**).

<sup>452</sup> India's Letter to the Neutral Expert, 4 March 2024. *See also* Third Meeting Transcript, Day 1, 16:18-21 (Ms. Mukherjee) ("India will not look at, nor acknowledge, any decision or Award of the so-called Court of Arbitration, whether it is in our favour or against us"), 222:1-227:3 (Mr. Salve).

<sup>453</sup> *Indus Waters Arbitration*, Competence Award, paras. 4, 13-14, 25, 49, 136-317 (**PKA-1**).

post-hearing submissions by 15 November 2024.<sup>454</sup> Provided India maintains its non-participation in the proceedings of the 2022 CoA, it appears that the 2022 CoA will render a decision on the issues outlined in its Procedural Order No. 6 sometime in the near future, possibly in the first half of 2025. Given the Work Programme adopted in these Proceedings (which provides for the submission of Pakistan's Counter-Memorial on the merits seven months after the issuance of this Decision, to be followed by further written and oral submissions, as well as a second site visit), it is therefore likely that the 2022 CoA will issue its next award before the completion of any phase on the merits in these Proceedings.

564. As follows from the above, the 2022 CoA is presently considering questions that overlap partly, but not fully, with the Points of Difference and is doing so with the benefit of input only from one of the Parties. Its decision on those questions may be rendered shortly.
565. In respect of the above circumstances, it must first be noted that the Neutral Expert does not see any provision in the Treaty (and notes that Pakistan has not argued that there is any such provision) that would preclude parallel proceedings from taking place under the Treaty, even if they address certain overlapping matters. The constitution of the 2022 CoA and the fact that it is presently considering certain matters that partially overlap with the Points of Difference accordingly does not affect the Neutral Expert's competence over differences that fall within the scope of Part 1 of Annexure F.
566. This is not a clear-cut situation where, in the exercise of procedural discretion, one dispute resolution body ought to defer its consideration and decision on certain matters that will be addressed by another dispute resolution body in the interests of efficiency and economy. Until the 2022 CoA's next award is rendered, it will not be clear whether it will resolve or materially inform the Points of Difference that are before the Neutral Expert. As noted in the preliminary section to this analysis, the Neutral Expert has a mission to resolve the differences that are before him, and he must do so with reasonable expedition. Moreover, should India maintain its current position, the 2022 CoA's eventual award will not be recognized by it.
567. In these circumstances, the Neutral Expert does not see what would be gained from deferring his decision on any part of the Paragraph 7 issues before him to a later time and accordingly proceeds to render this Decision for all of the reasons set out above.

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<sup>454</sup> *Indus Waters Arbitration*, Procedural Order No. 13, 13 August 2024, paras. 3.1-3.4, <<https://pcacases.com/web/sendAttach/61455>>, last accessed 3 December 2024.

568. The Neutral Expert also notes that pursuant to Paragraph 13 of Annexure F, “[w]ithout prejudice to the finality of the Neutral Expert’s decision, if any question ... which is not within the competence of a Neutral Expert should arise out of his decision, that question shall, if it cannot be resolved by agreement, be settled in accordance with the provisions of Article IX(3), (4) and (5).” The Neutral Expert considers that, pursuant to this provision, should he discover, in the investigation of the merits of the Points of Difference, that any Point of Difference or part thereof, is not within his competence, he could refer that Point of Difference or part thereof to be settled by the other dispute resolution procedures of the Treaty in accordance with the provisions of Articles IX(3), (4) and (5) of the Treaty.

#### **VIII. DECISION**

569. For all of the reasons set out above, the Neutral Expert finds that (i) the Points of Difference notified by India to the World Bank in a letter dated 4 October 2016 pertain to “whether or not the design of a Plant conforms to the criteria set out in Paragraph 8” of Annexure D to the Treaty and fall within Part 1 of Annexure F to the Treaty; and that (ii) no separate differences are being referred to the Neutral Expert with respect to India’s compliance with Paragraphs 2(c) and 15 of Annexure D to the Treaty.

570. The Neutral Expert will accordingly proceed to render a decision on the merits of the Points of Difference, after hearing the Parties further on those merits in accordance with the Work Programme (as it may be amended from time to time in consultation with the Parties).


\* \* \*

Done this 7<sup>th</sup> day of January 2025

A handwritten signature in black ink, consisting of a stylized 'M' followed by a horizontal line and a vertical line extending downwards.

Mr. Michel Lino  
Neutral Expert

For the Registry and Secretariat:

A handwritten signature in blue ink, consisting of a stylized 'E' followed by 'Goriatcheva' and a vertical line extending downwards.

Ms. Evgeniya Goriatcheva  
Registrar