

**PCA CASE No. 2023-01**

**IN THE MATTER OF AN ARBITRATION**

**- before -**

**THE COURT OF ARBITRATION CONSTITUTED  
IN ACCORDANCE WITH THE INDUS WATERS TREATY 1960**

**- between -**

**THE ISLAMIC REPUBLIC OF PAKISTAN**

**- and -**

**THE REPUBLIC OF INDIA**

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**AWARD ON THE COMPETENCE OF THE COURT**

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**COURT OF ARBITRATION:**

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

**SECRETARIAT:**

The Permanent Court of Arbitration

**6 July 2023**

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<b>21 December 2022 Explanatory Note</b>	The explanatory note enclosed as Enclosure A to the 21 December 2022 Letter (P-0001)
<b>21 December 2022 Letter</b>	Letter from India to the World Bank dated 21 December 2022 (P-0001)
<b>Baglihar Determination</b>	<i>Baglihar Hydro-electric Plant (Pakistan v. India)</i> , Neutral Expert Determination on the Baglihar Hydro-electric Plant dated 12 February 2007 (PLA-0002)
<b>Commission</b>	The Permanent Indus Commission established by Article VIII of the Treaty, comprised of Pakistan’s Commissioner and India’s Commissioner
<b>Commissioners</b>	Pakistan’s Commissioner and India’s Commissioner
<b>Court</b>	The Court of Arbitration in these proceedings, constituted pursuant to Article IX(5) and Annexure G to the Treaty
<b>Division of Competence Statement</b>	Pakistan’s Statement on “Coordination between the Court of Arbitration and the Neutral Expert—A Workable Division of Competence” dated 23 February 2023
<b>Eastern Rivers</b>	The Sutlej, the Beas, and the Ravi Rivers and their tributaries
<b>First Dispute</b>	The first dispute for resolution in the <i>Kishenganga</i> Arbitration (see Part III(F) of this Award)
<b>First Meeting</b>	Meeting convened by the Court from 27 to 28 January 2023 pursuant to Paragraph 14 of Annexure G to the Treaty
<b>Further Questions of the Court</b>	The list of questions dated 12 May 2023 that the Court invited Pakistan to address in its oral submissions scheduled for 13 May 2023 during the Hearing on Competence
<b>Hearing on Competence or Hearing</b>	The oral hearing in the Preliminary Phase on Competence, held from 11 to 13 May 2023 in the Peace Palace, The Hague, the Netherlands
<b>ICJ</b>	International Court of Justice
<b>Imperial College London</b>	Imperial College of Science, Technology and Medicine
<b>India</b>	The Republic of India
<b>India’s Commissioner or ICIW</b>	Commissioner for Indus Waters appointed by India pursuant to Article VIII(1) of the Treaty

<b>India's Objections</b>	India's objections to the competence of the Court, arising from the 21 December 2022 Letter and the 21 December 2022 Explanatory Note (see Part V of this Award)
<b>KHEP or Kishenganga Plant</b>	Kishenganga Hydro-Electric Plant
<b>Kishenganga Court</b>	The court of arbitration in the <i>Kishenganga</i> Arbitration
<b>Kishenganga Final Award</b>	Final Award in the <i>Kishenganga</i> Arbitration dated 20 December 2013 ( <b>PLA-0004</b> )
<b>Kishenganga or Kishenganga Arbitration</b>	<i>Indus Waters Kishenganga Arbitration (Pakistan v. India)</i> , PCA Case No. 2011-01
<b>Kishenganga Partial Award</b>	Partial Award in the <i>Kishenganga</i> Arbitration dated 18 February 2013 ( <b>PLA-0003</b> )
<b>Kishenganga/Neelum River</b>	The river called the "Kishenganga" by India and the "Neelum" by Pakistan
<b>Neutral Expert or NE</b>	Mr. Michel Lino, the Neutral Expert appointed on 13 October 2022 by the World Bank further to the Neutral Expert Request
<b>Neutral Expert Request</b>	India's Request to the World Bank for the Appointment of a Neutral Expert dated 4 October 2016 ( <b>P-0156</b> )
<b>Pakistan</b>	The Islamic Republic of Pakistan
<b>Pakistan's Commissioner or PCIW</b>	Commissioner for Indus Waters appointed by Pakistan pursuant to Article VIII(1) of the Treaty
<b>Pakistan's Response</b>	Pakistan's Response on the Competence of the Court and the Operation of Article IX of the Indus Waters Treaty dated 24 March 2023
<b>Parties</b>	The Parties to these proceedings, namely the Islamic Republic of Pakistan and the Republic of India
<b>Pause</b>	The suspension of the process of appointing the Chairman of the Court and the Neutral Expert, reflected in the World Bank's letter dated 12 December 2016 ( <b>P-0008</b> )
<b>PCA</b>	Permanent Court of Arbitration
<b>Procedural Order No. 1</b>	Procedural Order No. 1 (Preliminary Phase on Competence) dated 2 February 2023
<b>Procedural Order No. 2</b>	Procedural Order No. 2 (Procedural Timetable) dated 14 March 2023

<b>Procedural Order No. 3</b>	Procedural Order No. 3 (Organization of the Hearing on Competence) dated 2 May 2023
<b>Procedural Order No. 4</b>	Procedural Order No. 4 (Amended Schedule for the Hearing on Competence) dated 5 May 2023
<b>Procedural Order No. 5</b>	Procedural Order No. 5 (Further Amended Schedule for the Hearing on Competence and Submission of Supplementary Materials) dated 9 May 2023
<b>Preliminary Phase on Competence</b>	The preliminary phase of these proceedings on the competence of the Court and the operation of Article IX of the Treaty
<b>Questions of the Court</b>	The list of questions dated 26 April 2023 that the Court invited the Parties to address in their oral submissions at the Hearing on Competence
<b>Request for Arbitration</b>	Pakistan's Request for Arbitration dated 19 August 2016
<b>RHEP or Ratle Plant</b>	Ratle Hydro-Electric Plant
<b>Run-of-River Plant or HEP</b>	As defined at Paragraph 2(g) of Annexure D to the Treaty, " <i>a Hydro-Electric plant that develops without Live Storage as an integral part of the plant, except for Pondage and Surcharge Storage</i> "
<b>Second Dispute</b>	The second dispute for resolution in the <i>Kishenganga</i> Arbitration (see Part III(F) of this Award)
<b>Supplemental Rules of Procedure</b>	Supplemental Rules of Procedure dated 31 March 2023
<b>Terms of Appointment</b>	Administrative Order No. 1 (Terms of Appointment) dated 3 February 2023
<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</i> , signed at Karachi on 19 September 1960 ( <b>PLA-0001</b> )
<b>VCLT</b>	<i>Vienna Convention on the Law of Treaties</i> , opened for signature at Vienna on 23 May 1969 ( <b>PLA-0005</b> )
<b>Western Rivers</b>	The Indus, the Jhelum, and the Chenab Rivers and their tributaries
<b>World Bank</b>	International Bank for Reconstruction and Development

## I. INTRODUCTION

1. These proceedings were instituted by the Islamic Republic of Pakistan (“**Pakistan**”) against the Republic of India (“**India**”) (together, the “**Parties**”) pursuant to the Indus Waters Treaty 1960 (“**Treaty**”).<sup>1</sup> The Treaty sets forth rights and obligations of the Parties concerning the use of the Indus system of rivers. These rivers and their tributaries rise primarily in the Himalayan Mountains and flow through Afghanistan, China, India, and Pakistan, before draining into the Arabian Sea. The system is extremely important for India and Pakistan, among other things, in supplying water for domestic use, non-consumptive use, agricultural use, and the generation of hydro-electric power.<sup>2</sup>
2. The Treaty also provides for the settlement of all questions that may arise as to the interpretation or application of the Treaty. When questions cannot be resolved by the Parties themselves, the Treaty provides that certain technical questions can be placed before a highly-qualified engineer (called a neutral expert) or any question can be placed before an arbitral panel consisting of highly-qualified lawyers and engineers (called a court of arbitration).
3. By a Request for Arbitration dated 19 August 2016, Pakistan initiated the present arbitration proceedings against India pursuant to Article IX and Paragraph 2(b) of Annexure G to the Treaty (“**Request for Arbitration**”).<sup>3</sup> Through its request, Pakistan seeks 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 (“**Run-of-River Plants**” or “**HEPs**”)<sup>4</sup> on the Indus, Jhelum, and Chenab Rivers and their tributaries (“**Western Rivers**”).<sup>5</sup>
4. The Court of Arbitration (“**Court**”) was empaneled in October 2022. To date, India has elected not to communicate directly with or to appear before the Court, nor to appoint two arbitrators to the Court as it is permitted to do under the Treaty. In a letter sent on 21 December 2022 to the International Bank for Reconstruction and Development (“**World Bank**”), however, India

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<sup>1</sup> **PLA-0001**, *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, 419 U.N.T.S. 126 (“**Treaty**”).

<sup>2</sup> **PLA-0001**, Treaty, Art. III(2); see para. 54, *infra*.

<sup>3</sup> Pakistan’s Request for Arbitration dated 19 August 2016 (“**Request for Arbitration**”).

<sup>4</sup> **PLA-0001**, Treaty, Annexure D, para. 2(g).

<sup>5</sup> **PLA-0001**, Treaty, Art. I(3), (6).

asserted that, for several reasons, the Court was not competent to decide the questions placed before it, which relate in part to the appointment by the World Bank in October 2022 of Mr. Michel Lino as a neutral expert (“**Neutral Expert**”). In the light of that letter, the Court determined on 2 February 2023 to conduct a preliminary phase on the competence of the Court, consisting of written submissions and an oral hearing in The Hague from 11 to 13 May 2023. This Award, therefore, addresses the competence of the Court.

5. Part II recounts the procedural history to this Award. Part III sets forth the relevant facts that serve as the foundation for deciding the issues that have been placed before the Court in this phase. Part IV addresses two preliminary considerations relating to the applicable law and the relevance of India’s non-appearance in these proceedings to date. Part V addresses the Parties’ arguments with respect to what the Court has deemed to be India’s six objections to the competence of the Court and provides the Court’s legal analysis concerning each of those six objections. Part VI concludes with the decision of the Court, which rejects India’s objections to the Court’s competence.
6. In a separate procedural order issued on the same date as this Award, the Court sets forth the issues to be addressed in the next phase of these proceedings. It is noted that Article 7 of the Court’s Supplemental Rules of Procedure (“**Supplemental Rules of Procedure**”) provides that India may appoint two arbitrators to the Court no later than seven days following the date of this Award.<sup>6</sup>

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<sup>6</sup> Supplemental Rules of Procedure dated 31 March 2023, Art. 7 (“**Supplemental Rules of Procedure**”).

## II. PROCEDURAL HISTORY

### A. THE INITIATION OF THE ARBITRATION

7. On 19 August 2016, Pakistan initiated the present arbitration proceedings against India by way of its Request for Arbitration. The Request for Arbitration was received by India on the same date, under cover of a Note Verbale from Pakistan's Ministry of Foreign Affairs to the High Commission of India in Islamabad.
8. In the Request for Arbitration, the Parties' disagreements are said to have arisen specifically in the context of two hydro-electric projects: the Kishenganga Hydro-Electric Plant ("KHEP" or "Kishenganga Plant") on the Kishenganga/Neelum River (a tributary of the Jhelum River); and the Ratle Hydro-Electric Plant ("RHEP" or "Ratle Plant") on the Chenab River.<sup>7</sup> Pakistan stated that India is, however, developing many other Run-of-River Plants on the Western Rivers, such that the resolution of the issues of Treaty interpretation raised in the Request for Arbitration takes on a greater significance.<sup>8</sup>
9. Pakistan identified the following seven "Disputes" in its Request for Arbitration:

*First*, whether India's design for maximum Pondage of 7.55 million cubic meters of water (*MCM or Mm<sup>3</sup>*) for the Kishenganga Hydroelectric Plant is based on a method of calculations that contravenes the Treaty, particularly Paragraph 8(c) of Annexure D; and, relatedly, whether India's design for submerged power intakes at the Kishenganga Hydroelectric Plant contravenes the Treaty, particularly Paragraph 8(f) of Annexure D, because the intakes are not 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?

*Second*, whether India's proposed design for maximum Pondage of 23.86 Mm<sup>3</sup> for the Ratle Hydroelectric Plant is based on a method of calculations that contravenes the Treaty, particularly Paragraph 8(c) of Annexure D; and, relatedly, whether India's proposed design for submerged power intakes at the Ratle Hydroelectric Plant contravenes the Treaty, particularly Paragraph 8(f) of Annexure D, because the intakes are not 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?

*Third*, whether India's design for low-level sediment outlets at the Kishenganga Hydroelectric Plant, in the form of a deep orifice spillway with three large, gated openings below Dead Storage Level and close to the reservoir bottom, contravenes the Treaty, particularly Paragraph 8(d) of Annexure D?

*Fourth*, whether India's proposed design for low-level sediment outlets at the Ratle Hydroelectric Plant, in the form of a deep orifice spillway with five large, gated openings far below the Dead Storage Level and deep in the reservoir, contravenes the Treaty, particularly Paragraph 8(d) of Annexure D?

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<sup>7</sup> Request for Arbitration, para. 5.

<sup>8</sup> Request for Arbitration, para. 5.

*Fifth*, whether India’s design for gated spillways for flood control at the Kishenganga Hydroelectric Plant, with the bottom level of the gates in normal closed position located 14.5 meters below Dead Storage Level and close to the reservoir bottom, contravenes the Treaty, particularly Paragraph 8(e) of Annexure D?

*Sixth*, whether India’s proposed design for gated spillways for flood control at the Ratle [H]ydroelectric Plant, with the bottom level of the gates in normal closed position located approximately 31 meters below Dead Storage Level and deep in the reservoir, contravenes the Treaty, particularly Paragraph 8(e) [of] Annexure D?

*Seventh*, whether India’s proposed design for 2 meters of freeboard at the Ratle Hydroelectric Plant contravenes the Treaty, particularly Paragraph 8(a) of Annexure D?<sup>9</sup>

10. By its Request for Arbitration, Pakistan sought interim measures enjoining India from initiating or continuing the construction and operation of works that are the subject of one of the seven “Disputes” raised in its Request for Arbitration, as well as corresponding declaratory and injunctive relief in respect of each of the seven “Disputes”.<sup>10</sup>

## **B. THE CONSTITUTION OF THE COURT OF ARBITRATION**

11. The Court was established pursuant to Article IX(5) and Annexure G to the Treaty. Paragraph 4 of Annexure G provides:

4. Unless otherwise agreed between the Parties, a Court of Arbitration shall consist of seven arbitrators appointed as follows :
- (a) Two arbitrators to be appointed by each Party in accordance with Paragraph 6 ; and
  - (b) Three arbitrators (hereinafter sometimes called the umpires) to be appointed in accordance with Paragraph 7, one from each of the following categories :
    - (i) Persons qualified by status and reputation to be Chairman of the Court of Arbitration who may, but need not, be engineers or lawyers.
    - (ii) Highly qualified engineers,
    - (iii) Persons well versed in international law.

The Chairman of the Court shall be a person from category (b) (i) above.

12. On 19 August 2016, through its Request for Arbitration, Pakistan appointed Judge Bruno Simma and Dr. Donald Blackmore as arbitrators for these proceedings, pursuant to Paragraphs 4 and 6 of Annexure G to the Treaty.<sup>11</sup> On 20 October 2022, Pakistan observed that Judge Simma was no longer in a position to accept appointment, and appointed Judge Awn Shawkat Al-Khasawneh.<sup>12</sup>

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<sup>9</sup> Request for Arbitration, para. 9 (emphasis in original).

<sup>10</sup> Request for Arbitration, paras. 90–97.

<sup>11</sup> Request for Arbitration, para. 98.

<sup>12</sup> Letter from Pakistan to the Chairman of the Court of Arbitration dated 20 October 2022, para. 17.

On 20 October 2022, Pakistan also confirmed that Dr. Blackmore remained able to fulfill the functions of arbitrator.<sup>13</sup>

13. India did not appoint any arbitrators within 30 days of receipt of the Request for Arbitration, as required by Paragraph 6 of Annexure G.
14. As the Parties were unable to agree on the selection of any of the umpires,<sup>14</sup> and India failed to participate in the drawing of lots for the appointment of each umpire,<sup>15</sup> Pakistan requested the President of the World Bank to nominate a person to draw lots to determine the appointing authorities to select umpires pursuant to Paragraph 9 of Annexure G.<sup>16</sup>
15. On 18 October 2016, the World Bank wrote to the Parties indicating, among other things, that once it was satisfied that a Party was not participating in the procedure of the drawing of lots with respect to the selection of appointing authorities and the constitution of the Court of Arbitration, the World Bank would nominate the person to do so.<sup>17</sup>
16. On 3 November 2016, the World Bank confirmed that the President of the World Bank had nominated Ms. Anne-Marie Leroy, Senior Vice President and Group General Counsel of the World Bank, to draw the lots, and invited the Parties to be represented at the drawing of the lots on 10 November 2016.<sup>18</sup>
17. On 11 November 2016, the World Bank wrote to the Parties to notify them that it had conducted the drawing of lots pursuant to Paragraph 9 of Annexure G to the Treaty,<sup>19</sup> and the President of the World Bank, the President<sup>20</sup> of Imperial College of Science, Technology and Medicine

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<sup>13</sup> Letter from Pakistan to the Chairman of the Court of Arbitration dated 20 October 2022, para. 18.

<sup>14</sup> See **PLA-0001**, Treaty, Annexure G, para. 7(b)(i).

<sup>15</sup> See **PLA-0001**, Treaty, Annexure G, para. 7(b)(ii).

<sup>16</sup> See **PLA-0001**, Treaty, Annexure G, para. 9. As the World Bank observed, this request had been “conveyed in the *Note Verbale* received by the Bank on August 22, 2016, as well as subsequent correspondence dated September 22, 2016, October 17, 2016, and October 27, 2016” (“Annex 3: Overview of Key Milestones”, enclosed with the Letter from the World Bank to the Parties and the Chairman of the Court of Arbitration dated 9 January 2023).

<sup>17</sup> **P-0038**, Letter from the World Bank to the Parties dated 18 October 2016, paras. 6–8.

<sup>18</sup> **P-0107**, Letter from the World Bank to the Parties dated 3 November 2016, paras. 8–9.

<sup>19</sup> **P-0109**, Letter from the World Bank to the Parties dated 11 November 2016, p. 1.

<sup>20</sup> Previously, “Rector”.

(“**Imperial College London**”),<sup>21</sup> and the Chief Justice of the United States had been selected as appointing authorities.

18. On 12 December 2016, the President of the World Bank wrote to the Parties, stating that he had “decided to pause the process of appointing the Chairman of the Court of Arbitration and the Neutral Expert” (“**Pause**”).<sup>22</sup>
19. On 31 March 2022, the World Bank informed the Parties that it had determined to resume the process of appointing the Chairman of the Court of Arbitration and the Neutral Expert.<sup>23</sup>
20. On 19 September 2022, the World Bank wrote to the Parties, stating, among other things, that the World Bank had decided on the appointment of Professor Sean D. Murphy to serve as the Chair for the Court of Arbitration.<sup>24</sup> Professor Murphy was notified in writing on 13 October 2022 of his appointment by the President of the World Bank as umpire and Chairman of the Court, pursuant to Paragraphs 4(b)(i), 7, and 8 of Annexure G to the Treaty.<sup>25</sup>
21. On 28 September 2022, the President of Imperial College London appointed Professor Wouter Buytaert as an umpire, in accordance with Paragraphs 4(b)(ii) and 7 of Annexure G.<sup>26</sup>
22. On 17 October 2022, the Chief Justice of the United States appointed Mr. Jeffrey P. Minear as an umpire in accordance with Paragraphs 4(b)(iii) and 7 of Annexure G.<sup>27</sup>
23. The Members of the Court signed and delivered declarations of independence and impartiality, which the Permanent Court of Arbitration (“**PCA**”) transmitted to the Parties on behalf of the Court on 25 and 27 January 2023.<sup>28</sup>

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<sup>21</sup> Previously, “Imperial College of Science and Technology, London”.

<sup>22</sup> **P-0008**, Letter from the World Bank to Pakistan dated 12 December 2016, p. 1.

<sup>23</sup> **P-0120**, Letter from the World Bank to the Parties dated 31 March 2022, p. 1.

<sup>24</sup> **P-0009**, Letter from the World Bank to the Parties dated 19 September 2022, p. 1.

<sup>25</sup> Letter from the World Bank to the Chairman of the Court of Arbitration dated 13 October 2022.

<sup>26</sup> Letter from the President of Imperial College London to the World Bank dated 28 September 2022 (enclosed with the Letter from the World Bank to the Chairman of the Court of Arbitration dated 17 October 2022).

<sup>27</sup> Letter from the Chief Justice of the United States to the World Bank dated 17 October 2022 (enclosed with the Letter from the World Bank to the Chairman of the Court of Arbitration dated 17 October 2022).

<sup>28</sup> Letter from the PCA to the Parties dated 25 January 2023; E-mail from the PCA to the Parties dated 27 January 2023.

**C. THE FIRST MEETING OF THE COURT**

24. On 16 December 2022, the Chairman of the Court invited the Parties to meet with the Members of the Court at the headquarters of the PCA in The Hague on 27 and 28 January 2023, pursuant to Paragraph 14 of Annexure G to the Treaty.<sup>29</sup> Enclosed with that letter was a draft agenda for the first meeting, which, among other things, proposed discussion on the topic of “Relationship with the Work of the Neutral Expert”, and on which the Parties were invited to comment by 6 January 2023.
25. On 21 December 2022, India sent a letter to the World Bank (“**21 December 2022 Letter**”), enclosing an “explanatory note” as “Enclosure A” (“**21 December 2022 Explanatory Note**”), setting out its objections “to the creation and functioning of any court of arbitration” and stating that it “expressly decline[d] to accept or recognize the existence of the so-called Court of Arbitration”.<sup>30</sup> On the same date, the World Bank transmitted the 21 December 2022 Letter and 21 December 2022 Explanatory Note to the Chairman of the Court.<sup>31</sup>
26. On 12 January 2023, the Chairman of the Court sent the Parties a revised agenda for the Court’s first meeting and proposed discussion of a possible “Preliminary Phase on Jurisdiction/Admissibility/Competence”.
27. On 27 and 28 January 2023, the Court of Arbitration held its first meeting in the Peace Palace in The Hague, the Netherlands (“**First Meeting**”). India did not appear or participate at this meeting. Immediately following the First Meeting, the PCA transmitted to the Parties a verbatim transcript of the First Meeting, which was signed by the Chairman of the Court and constituted minutes for the purpose of Paragraph 19 of Annexure G.
28. On 3 February 2023, the Court issued Administrative Order No. 1 (Terms of Appointment) (“**Terms of Appointment**”), which, among other things, confirmed the appointment of the Members of the Court, set out the details and representatives of the Parties, and appointed the International Bureau of the PCA as the secretariat.<sup>32</sup>

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<sup>29</sup> **PLA-0001**, Treaty, Annexure G, para. 14 (“The Court of Arbitration shall convene, for its first meeting, on such date and such place as shall be fixed by the Chairman”).

<sup>30</sup> **P-0001**, Letter from India to the World Bank dated 21 December 2022 (“**21 December 2022 Letter**”), enclosing “Explanatory Note” marked as “Enclosure A” (“**21 December 2022 Explanatory Note**”), paras. 2, 15.

<sup>31</sup> Letter from the World Bank to the Chairman of the Court of Arbitration dated 21 December 2022.

<sup>32</sup> Administrative Order No. 1 dated 3 February 2023 (“**Terms of Appointment**”), paras. 1 (the Parties), 2.1–2.9 (the Members), 4.1–5.1 (the secretariat). The Terms of Appointment further appointed Mr. Garth

**D. THE PRELIMINARY PHASE ON COMPETENCE**

29. Paragraph 16 of Annexure G to the Treaty provides:

16. Subject to the provisions of this Treaty and except as the Parties may otherwise agree, **the Court shall decide all questions relating to its competence and shall determine its procedure, including the time within which each Party must present and conclude its arguments.** All such decisions of the Court shall be by a majority of those present and voting. Each arbitrator, including the Chairman, shall have one vote. In the event of an equality of votes, the Chairman shall have a casting vote.<sup>33</sup>

30. On 2 February 2023, having sought the views of the Parties, the Court issued Procedural Order No. 1 (Preliminary Phase on Competence) (“**Procedural Order No. 1**”). In that Order, the Court considered India’s 21 December 2022 Letter (including the enclosed 21 December 2022 Explanatory Note) as constituting a plea concerning the competence of the Court for the purposes of Paragraph 16 of Annexure G to the Treaty.<sup>34</sup> Accordingly, the Court resolved that it would conduct a preliminary phase of the proceedings to consider, on an expedited basis, the competence of the Court and the operation of Article IX of the Treaty (“**Preliminary Phase on Competence**”).<sup>35</sup>

31. By Procedural Order No. 1, the Court fixed the schedule for further written submissions and determined the dates for an oral hearing in the Preliminary Phase on Competence for 11 to 13 May 2023 (“**Hearing on Competence**”).<sup>36</sup> Paragraph 1.5 of Procedure Order No. 1 further provided:

- 1.5 The Court may, at any time, invite the Parties to address specific issues or questions relating to the competence of the Court and/or the operation of Article IX of the Treaty, in their written submissions or at the Hearing as set out in the schedule above, or in supplementary written submissions within a deadline to be prescribed by the Court.<sup>37</sup>

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Schofield, Deputy Secretary General of the PCA, as the Registrar of the Court, and Mr. Bryce Williams, Legal Counsel of the PCA, as Treasurer. Having paid regard to Paragraph 24 of Annexure G, the Terms of Appointment also set in place arrangements for a deposit to cover fees and expenses by which, in keeping with prevailing practice, all Members of the Court (whether arbitrators or umpires) would receive the same fees, and that all such fees would be paid by the Treasurer without any direct Party payments to the arbitrators: See Terms of Appointment, paras. 3.1–3.4.

<sup>33</sup> **PLA-0001**, Treaty, Annexure G, para. 16 (emphasis added).

<sup>34</sup> Procedural Order No. 1 (Preliminary Phase on Competence) dated 2 February 2023 (“**Procedural Order No. 1**”), para. 1.1.

<sup>35</sup> Procedural Order No. 1, para. 1.2.

<sup>36</sup> Procedural Order No. 1, para. 1.3.

<sup>37</sup> Procedural Order No. 1, para. 1.5.

32. On 14 March 2023, Pakistan wrote to the Court requesting the amendment of the timetable for the submission of its Response to India’s 21 December 2022 Letter. On 15 March 2023, after considering the proposed amendment, and having sought and received no comments from India, the Court issued Procedural Order No. 2 (Procedural Timetable) (“**Procedural Order No. 2**”), amending the schedule for further written submissions in the Preliminary Phase on Competence.<sup>38</sup>
33. On 24 March 2023, pursuant to Paragraph 1.1 of Procedural Order No. 2, Pakistan submitted its Response on the Competence of the Court and the Operation of Article IX of the Indus Waters Treaty, and its accompanying documents (“**Pakistan’s Response**”).
34. India did not submit a Reply to Pakistan’s Response by 14 April 2023 in accordance with Procedural Order No. 2 and, in turn, no Sur-Reply was submitted by Pakistan by 28 April 2023.

**E. POTENTIAL COORDINATION WITH THE NEUTRAL EXPERT**

35. On 3 February 2023, the Court directed each of the Parties to file, by 24 February 2023, a statement addressing the possibility of coordination between the Court of Arbitration and Mr. Michel Lino in his capacity as the Neutral Expert, with respect to matters placed before both bodies pursuant to the Treaty. In particular, the Court indicated that it would find it helpful to understand better the Parties’ positions on the following points:
  - (a) specifically what issues now before the Court and the Neutral Expert might be addressed by the Court;
  - (b) specifically what issues now before the Court and the Neutral Expert might be addressed by the Neutral Expert; and
  - (c) the optimal sequencing and suggested time frame for decisions by the Court and the Neutral Expert in addressing their respective issues.
36. On 8 February 2023, the Chairman of the Court sent a letter to the Neutral Expert, which was copied to the Parties, informing him that—without prejudice to any decisions to be reached as to the competence of either body—the Court, in principle, was open to the idea of a coordinated process between the Court and the Neutral Expert, and inviting him to indicate whether he would be open to such an approach in principle.

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<sup>38</sup> Procedural Order No. 2 (Procedural Timetable) dated 14 March 2023 (“**Procedural Order No. 2**”), para. 1.1.

37. On 11 and 21 February 2023, India sent letters to the Neutral Expert, rejecting any proposed coordination between the Neutral Expert and the Court of Arbitration.<sup>39</sup> In both letters, India reiterated its objections to the competence and constitution of the Court, as outlined in its 21 December 2022 Letter and 21 December 2022 Explanatory Note.
38. On 23 February 2023, Pakistan submitted its statement on “Coordination between the Court of Arbitration and the Neutral Expert—A Workable Division of Competence” (“**Division of Competence Statement**”).<sup>40</sup>
39. On 3 May 2023, the Neutral Expert responded to the Chairman of the Court’s letter of 8 February 2023, stating that, having considered the views of the Parties, the Neutral Expert had “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’”.<sup>41</sup>

#### **F. PRE-HEARING PROCEDURES**

40. On 31 March 2023, having sought the views of the Parties, the Court issued its Supplemental Rules of Procedure, by which it adopted rules of procedure supplementing and implementing those contained in Annexure G to the Treaty. The Supplemental Rules of Procedure apply in these proceedings subject to the Treaty, the procedural orders of the Court, and the Terms of Appointment.<sup>42</sup> Among other things, the Supplemental Rules of Procedure, in Article 15, provide:

**Determination of the Court’s Competence, Jurisdiction, the Admissibility of Claims, and the Operation of Article IX of the Treaty**

*Article 15*

1. In accordance with Paragraph 16 of Annexure G of the Treaty, the Court has the power to decide all questions relating to its competence.
2. The Court shall have the power to rule on its competence, jurisdiction, the admissibility of any claim made in the proceedings, and the operation of Article IX of the Treaty (including other associated provisions of the Treaty), in response to an objection raised by a Party, or on its own motion.

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<sup>39</sup> **P-0002**, Letter from India to the Neutral Expert dated 11 February 2023; **P-0003**, Letter from India to the Neutral Expert dated 21 February 2023. The Court notes that this correspondence was not addressed to the Court, and was entered into the record of these proceedings by Pakistan, as exhibits to Pakistan’s Response on the Competence of the Court and the Operation of Article IX of the Indus Waters Treaty dated 24 March 2023 (“**Pakistan’s Response**”).

<sup>40</sup> Pakistan’s Statement on Coordination and Division of Competence dated 23 February 2023 (“**Division of Competence Statement**”).

<sup>41</sup> Letter from the Neutral Expert to the Chairman of the Court of Arbitration dated 3 May 2023.

<sup>42</sup> Supplemental Rules of Procedure, Art. 1(1).

3. By the fact that it has appointed or participated in the appointment of an Arbitrator, a Party is not precluded from raising an objection to the Court's competence, jurisdiction, or the admissibility of any claim made in the proceedings, or from making submissions regarding the operation of Article IX of the Treaty.
  4. Further to India's letter to the World Bank dated 21 December 2022 (including its enclosed explanatory note), which the Court considers to constitute a plea concerning the competence of the Court for the purposes of Paragraph 16 of Annexure G of the Treaty, the Court shall rule on its competence and on the operation of Article IX of the Treaty in accordance with the schedule set down in Procedural Order No. 1 (as amended by Procedural Order No. 2, and as may be further amended by the Court).<sup>43</sup>
41. On 26 April 2023, the Court wrote to the Parties, enclosing a list of questions from the Court that the Parties were invited to address in their oral submissions at the Hearing on Competence ("**Questions of the Court**").
  42. On 2 May 2023, having sought the views of the Parties, the Court issued Procedural Order No. 3 (Organization of the Hearing on Competence) ("**Procedural Order No. 3**") addressing the organization of the Hearing on Competence. Relevantly, pursuant to Paragraph 1.2, the Court required each Party to confirm to the PCA and to the other Party its appearance at and participation in the Hearing and to communicate the list of all participants who would attend the Hearing, by 4 May 2023.
  43. On 3 May 2023, Pakistan confirmed its appearance at and participation in the Hearing on Competence, and communicated its list of participants attending the Hearing. No such communication was received from India.
  44. Given that India had not confirmed its appearance or participation in the Hearing by 4 May 2023, on 5 May 2023, the Court issued Procedural Order No. 4 (Amended Schedule for the Hearing on Competence) ("**Procedural Order No. 4**"), amending the schedule for the Hearing on Competence.
  45. On 7 May 2023, Pakistan applied for a further variation of the schedule for the Hearing on Competence, seeking additional time for Pakistan's oral submissions addressing the Questions of the Court. On 8 May 2023, Pakistan made a further application, pursuant to Paragraph 3.5 of Procedural Order No. 3, for leave of the Court to rely on supplementary factual exhibits and legal authorities at the Hearing on Competence, as identified in an annexure to Pakistan's application.
  46. On 9 May 2023, after considering both of Pakistan's applications, the Court issued Procedural Order No. 5 (Further Amended Schedule for the Hearing on Competence and Submission of

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<sup>43</sup> Supplemental Rules of Procedure, Art. 15.

Supplementary Materials) (“**Procedural Order No. 5**”), granting Pakistan’s requests for an extension of time for its oral submissions at the Hearing on Competence and for leave to introduce its supplementary materials into the record of the proceedings.<sup>44</sup>

**G. THE HEARING ON COMPETENCE**

47. The Hearing on Competence took place at the Peace Palace in The Hague from 11 to 13 May 2023, in accordance with Paragraph 1.3 of Procedural Order No. 1. The following persons were present:

**The Court of Arbitration**

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

**Pakistan**

Mr. Ahmad I. Aslam, Agent  
Mr. Hassan Nasir Jamy  
Secretary, Ministry of Water Resources  
Syed Muhammad Mehar Ali Shah, Commissioner for Indus Waters  
Ministry of Water Resources  
H.E. Mr. Suljuk Mustansar Tarar, Ambassador  
Ms. Fatima Hamdia Tanweer, First Secretary-II  
Embassy of Pakistan  
Ms. Leena Nishtar, Consultant  
Office of the Attorney General for Pakistan  
Mr. Zohair Waheed, Consultant  
Office of the Attorney General for Pakistan  
Sir Daniel Bethlehem KC, Counsel for Pakistan  
Professor Attila Tanzi, Counsel for Pakistan  
Professor Philippa Webb, Counsel for Pakistan  
Dr. Cameron Miles, Counsel for Pakistan  
Mr. Stephen Fietta KC, Counsel for Pakistan  
Mr. Jiries Saadeh, Counsel for Pakistan  
Ms. Laura Rees-Evans, Counsel for Pakistan

**The Secretariat**

Mr. Garth Schofield, Registrar and Deputy Secretary-General of the PCA  
Mr. Bryce Williams, Treasurer and Legal Counsel  
Mr. Sebastian King, Assistant Legal Counsel

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<sup>44</sup> Procedural Order No. 5 (Further Amended Schedule for the Hearing on Competence and Submission of Supplementary Materials) (“**Procedural Order No. 5**”), paras. 1.1–1.2, 2.3.

**Court Reporter**

Mr. Trevor McGowan

48. The following persons presented oral arguments before the Court on behalf of Pakistan:

Mr. Ahmad I. Aslam, Agent  
Sir Daniel Bethlehem KC, Counsel  
Ms. Laura Rees-Evans, Counsel  
Dr. Cameron Miles, Counsel  
Mr. Jiries Saadeh, Counsel  
Professor Philippa Webb, Counsel  
Mr. Stephen Fietta KC, Counsel

49. India did not appear at, nor participate in, the Hearing on Competence.

50. On 12 May 2023, further to Paragraph 1.2 of Procedural Order No. 5, the Court issued to the Parties its Further Questions to be Addressed at the Hearing on Competence (“**Further Questions of the Court**”), inviting Pakistan to address these further questions in its oral submissions scheduled for 13 May 2023.

51. Following the Hearing on Competence, the Court distributed the verbatim transcript for the Hearing on Competence, signed by the Chairman of the Court, which constituted minutes for the purpose of Paragraph 19 of Annexure G.

52. On 22 May 2023, the Court informed the Parties that it had admitted into the record the additional documents relied upon by Pakistan in responding to the Further Questions of the Court. At the same time, the Court invited India to provide any comments it might wish to make in respect of the additional documents. No such comments were received.

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### III. FACTS RELEVANT TO THE COURT'S DECISION ON ITS COMPETENCE

53. This Part sets forth certain facts relevant to the Court's decision on its competence. It begins with geographical and historical facts that are generally useful for understanding why the Parties adopted the Treaty—facts which the Court understands to be uncontroversial.<sup>45</sup> Thereafter, it briefly addresses the basic structure of the Treaty and past utilization by the Parties of the Treaty's mechanisms for dispute resolution, before turning to a more detailed discussion of facts relating to the current controversy between the Parties, from its origins to the present. Except insofar as is necessary for the Court to determine its competence, the Court is not making findings of fact at this stage in the proceedings.

#### A. THE GEOGRAPHY OF THE INDUS RIVER BASIN<sup>46</sup>

54. The Indus system of rivers is composed of six main rivers and their tributaries: the Indus, the Jhelum, and the Chenab (Western Rivers); and the Sutlej, the Beas, and the Ravi (“**Eastern Rivers**”).<sup>47</sup> These rivers and their tributaries rise primarily in the Himalayan Mountains and flow through Afghanistan, China, India, and Pakistan. They merge into the Indus River, which drains into the Arabian Sea (in the northwestern part of the Indian Ocean), southeast of the Pakistani port of Karachi.<sup>48</sup> The Indus river system and its catchment area are depicted in the map below:

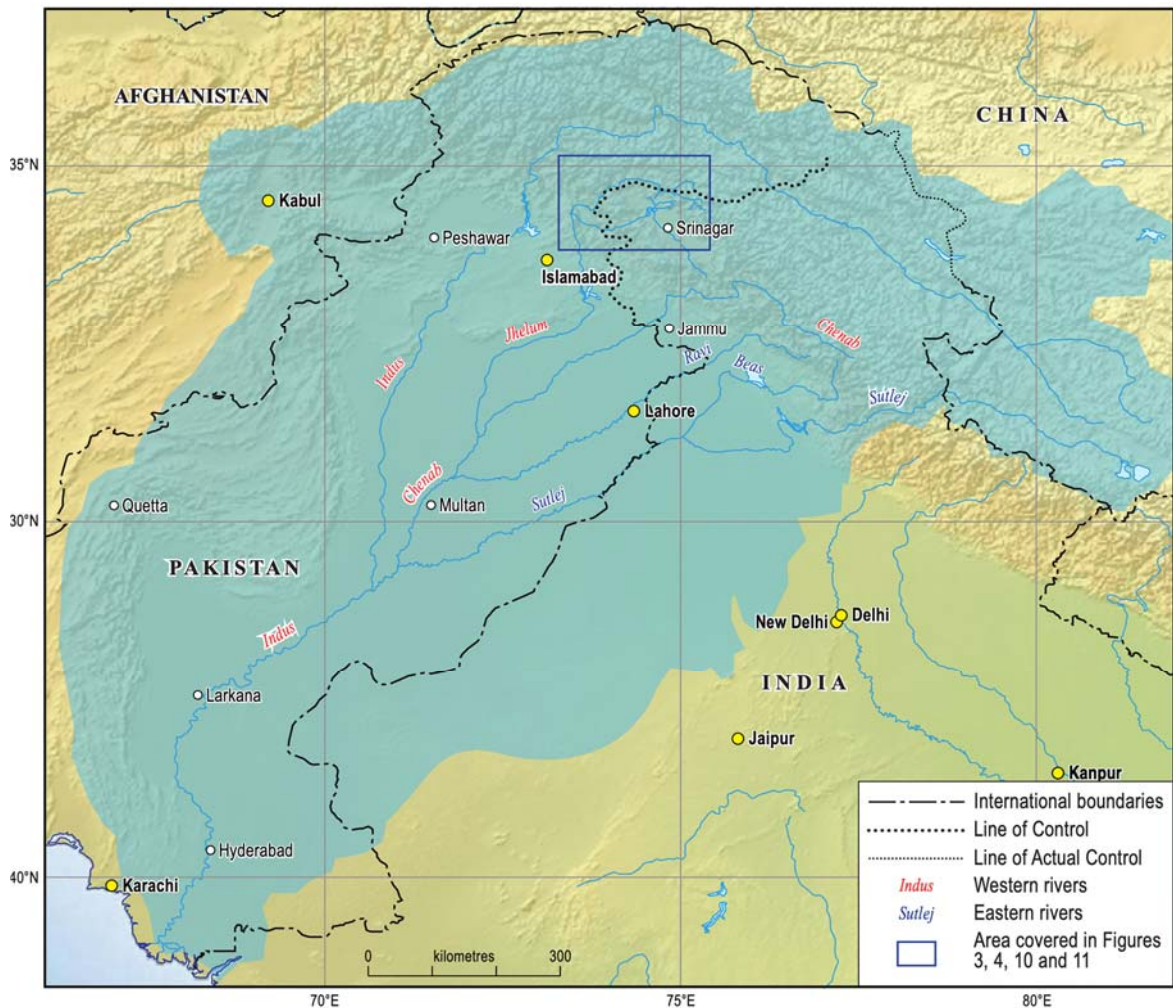
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<sup>45</sup> See **PLA-0003**, *Indus Waters Kishenganga Arbitration (Pakistan v India)*, PCA Case No. 2011-01, Partial Award, 18 February 2013, 31 Rep. of Intl. Arb. Awards 55 (“**Kishenganga Partial Award**”), paras. 126–139.

<sup>46</sup> The terminology and map used in this Award to denote geographic locations is intended to be neutral and should not be construed as the adoption by the Court of any position with regard to any matters of territorial sovereignty.

<sup>47</sup> **PLA-0001**, Treaty, Art. I(3), (5)–(6).

<sup>48</sup> **PLA-0003**, *Kishenganga Partial Award*, para. 128.



Source: *Indus Waters Kishenganga Arbitration (Pakistan v India)*, PCA Case No. 2011-01, Partial Award, 18 February 2013, para. 128 (map provided by Pakistan).

55. The Kishenganga/Neelum River, on which the KHEP is located, is a tributary of the Jhelum. The Kishenganga/Neelum River originates in India-administered Jammu and Kashmir and merges with the Jhelum River at the city of Muzaffarabad in Pakistan-administered Jammu and Kashmir.<sup>49</sup> The RHEP is located on the Chenab River, near the town of Drabshala in Indian-administered Jammu and Kashmir.<sup>50</sup>

<sup>49</sup> PLA-0003, *Kishenganga* Partial Award, para. 129.

<sup>50</sup> Request for Arbitration, para. 29.

**B. THE ORIGINS OF THE INDUS WATERS TREATY**

56. Following the end of British colonial rule in 1947, India was partitioned into the Dominion of Pakistan (now the Islamic Republic of Pakistan and the People’s Republic of Bangladesh) and the Union of India (now the Republic of India).<sup>51</sup>
57. Before partition, the relevant provinces and states of British India shared use of the Indus waters, and the British Secretary of State for India and, later, the Government of India, resolved any disputes. Partition resulted in placing parts or all of the upper reaches of the six main rivers of the Indus system in India, with their downstream stretches flowing into Pakistan, which in turn created the potential for transboundary conflict over water use, most acutely in the Punjab region. A temporary agreement between East Punjab (an Indian state) and West Punjab (a province of Pakistan) addressed the use of waters in that area.<sup>52</sup>
58. Following the expiration of that agreement on 31 March 1948, a dispute arose from East Punjab discontinuing the flow of waters to canals in West Punjab. Within one month, India and Pakistan reached an agreement resolving the dispute, but the incident revealed the two States’ divergent views on their respective rights and obligations regarding the waters of the Indus river system.<sup>53</sup>
59. On 6 September 1951, the World Bank offered to assist India and Pakistan in developing a cooperative approach to the use of the Indus river system. Both States accepted the offer. In 1954, after several years of unsuccessful negotiations, the World Bank put forward a proposal suggesting a division of the waters of the Indus river system between the two States.<sup>54</sup> The 1954 proposal allocated to Pakistan the “exclusive use and benefit” of the “entire flow of the Western Rivers (Indus, Jhelum and Chenab)” and to India “the exclusive use and benefit” of the “entire flow of the Eastern Rivers (Ravi, Beas and Sutlej)”.<sup>55</sup> It also provided for a transitional period during which India would continue to supply Pakistan with its “historic withdrawals” from the

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<sup>51</sup> **PLA-0003**, *Kishenganga* Partial Award, para. 130.

<sup>52</sup> **PLA-0003**, *Kishenganga* Partial Award, para. 131.

<sup>53</sup> **PLA-0003**, *Kishenganga* Partial Award, para. 132.

<sup>54</sup> **P-0130**, Proposal by the International Bank Representative for a Plan for the Development and Use of the Indus Basin Waters dated 5 February 1954.

<sup>55</sup> **P-0130**, Proposal by the International Bank Representative for a Plan for the Development and Use of the Indus Basin Waters dated 5 February 1954, para. 24(a)–(b).

Eastern Rivers, while Pakistan constructed link canals from the Western Rivers that would allow it to replace water it had previously obtained from the Eastern Rivers.<sup>56</sup>

60. Over the next four years of negotiations, the States exchanged increasingly detailed drafts that, among other matters, restricted uses that India would be permitted to make of the waters of the Western Rivers.<sup>57</sup> On 19 September 1960, the States signed the Indus Waters Treaty 1960, which provided that it would enter into force upon the exchange of documents of ratification (which occurred on 12 January 1961), with retroactive effect from 1 April 1960.<sup>58</sup> The World Bank also signed the Treaty for the purposes of specific provisions that require World Bank action.<sup>59</sup>

### C. THE STRUCTURE OF THE INDUS WATERS TREATY

61. The Treaty contains a Preamble, followed by twelve Articles and eight Annexures. The Preamble states the Parties' joint goal 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 ...<sup>60</sup>

62. Article I sets out relevant definitions, while Articles II through IV set out provisions governing the Eastern and Western Rivers, specifying the rights and obligations of the Parties with respect to those waters.<sup>61</sup> Article V contains financial provisions for funding of works, described in

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<sup>56</sup> **P-0130**, Proposal by the International Bank Representative for a Plan for the Development and Use of the Indus Basin Waters dated 5 February 1954, para. 24(b). See also **PLA-0003**, *Kishenganga* Partial Award, paras. 133–136.

<sup>57</sup> See, e.g., **P-0132**, India's Preliminary Draft of the Indus Waters Treaty dated 10 August 1959; **P-0133**, Pakistan's Preliminary Draft of the Indus Waters Treaty dated 10 August 1959; **P-0141**, Comparative Table of Provisions of the Heads of Agreement of 15 September 1959 and the Draft Indus Waters Treaty of 9 December 1959; **P-0143**, Draft of the Indus Waters Treaty 1960 (without Annexures) dated 20 April 1960.

<sup>58</sup> **PLA-0001**, Treaty, Art. XII(2).

<sup>59</sup> **PLA-0001**, Treaty, *final clause* (signature by a World Bank representative "for the purposes specified in Articles V and X and Annexures F, G and H"); see **PLA-0003**, *Kishenganga* Partial Award, para. 138.

<sup>60</sup> **PLA-0001**, Treaty, Preamble.

<sup>61</sup> See **PLA-0001**, Treaty, Art. I ("Definitions"), Art. II ("Provisions regarding Eastern Rivers"), Art. III ("Provisions regarding Western Rivers"), Art. IV ("Provisions regarding Eastern and Western Rivers").

Article IV(1), to redirect water from the Western Rivers to replace water that Pakistan had historically received from the Eastern Rivers.<sup>62</sup>

63. Article VI provides for the exchange of water resource data, while Article VII sets out principles for future cooperation, including provisions for one State to notify the other of plans to construct engineering works.<sup>63</sup>

64. Article VIII establishes a “Permanent Indus Commission” (“**Commission**”) consisting of a Commissioner for Indus Waters appointed by India (“**India’s Commissioner**” or “**ICIW**”) and a Commissioner for Indus Waters appointed by Pakistan (“**Pakistan’s Commissioner**” or “**PCIW**”).<sup>64</sup> Each Commissioner, who “should ordinarily be a high-ranking engineer competent in the fields of hydrology and water use”, is designated as the representative of the appointing Party for “all matters arising out of the Treaty” and is to serve as the regular channel of communication for all matters relating to the implementation of the Treaty.<sup>65</sup> The function and purpose of the Commission is, among other things, “to establish and maintain co-operative arrangements for the implementation of [the] Treaty, to promote co-operation between the Parties in the development of the waters of the Rivers”, and, in particular:

- (a) to study and report to the two Governments on any problem relating to the development of the waters of the Rivers which may be jointly referred to the Commission by the two Governments: in the event that a reference is made by one Government alone, the Commissioner of the other Government shall obtain the authorization of his Government before he proceeds to act on the reference;
- (b) to make every effort to settle promptly, in accordance with the provisions of Article IX (1), any question arising thereunder ;
- (c) to undertake, once in every five years, a general tour of inspection of the Rivers for ascertaining the facts connected with various developments and works on the Rivers;
- (d) to undertake promptly, at the request of either Commissioner, a tour of inspection of such works or sites on the Rivers as may be considered necessary by him for ascertaining the facts connected with those works or sites; and
- (e) to take, during the Transition Period, such steps as may be necessary for the implementation of the provisions of Annexure H.<sup>66</sup>

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<sup>62</sup> **PLA-0001**, Treaty, Art. V (“Financial Provisions”).

<sup>63</sup> **PLA-0001**, Treaty, Art. VI (“Exchange of data”), Art. VII (“Future co-operation”).

<sup>64</sup> **PLA-0001**, Treaty, Art. VIII (“Permanent Indus Commission”).

<sup>65</sup> **PLA-0001**, Treaty, Art. VIII(1).

<sup>66</sup> **PLA-0001**, Treaty, Art. VIII(4).

The Commission must meet at least once a year, and also upon the request of either Commissioner.<sup>67</sup> The Commission is required to provide, before 1 June each year, an annual report to the Governments of India and Pakistan on its work for the year ending 31 March.<sup>68</sup>

65. Article IX sets out a procedure for the settlement of “differences and disputes”.<sup>69</sup> Article IX(1) provides that any question concerning the interpretation or application of the Treaty, or the existence of any fact which, if established, might constitute a breach of the Treaty, must first be examined by the Commission, which will endeavor to resolve the question by agreement.<sup>70</sup> If the Commission fails to reach agreement, Article IX(2) sets out avenues for third-party resolution.<sup>71</sup> Depending on the circumstances, the questions may be resolved through a neutral expert, a court of arbitration, or “in any other way agreed upon by the Commission”.<sup>72</sup> Article IX(3) through (6), supplemented by Annexures F and G, set out details of those resolution processes. Article IX, which is discussed at length in Part V, is central to the matters now before the Court. Given its importance, Article IX is set out here in full:

*Article IX*

SETTLEMENT OF DIFFERENCES AND DISPUTES

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

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<sup>67</sup> **PLA-0001**, Treaty, Art. VIII(5).

<sup>68</sup> **PLA-0001**, Treaty, Art. VIII(8).

<sup>69</sup> **PLA-0001**, Treaty, Art. IX (“Settlement of differences and disputes”).

<sup>70</sup> **PLA-0001**, Treaty, Art. IX(1).

<sup>71</sup> Article IX also preserves, both expressly and by implication, the retained powers of the Parties to settle any disagreements through other means of their mutual choice: See **PLA-0001**, Treaty, Art. IX(2) (“any difference ... may be settled in any other way agreed upon by the Commission”).

<sup>72</sup> **PLA-0001**, Treaty, Art. IX(2).

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

- (3) As soon as a dispute to be settled in accordance with this and the succeeding paragraphs of this Article has arisen, the Commission shall, at the request of either Commissioner, report the fact to the two Governments, as early as practicable, stating in its report the points on which the Commission is in agreement and the issues in dispute, the views of each Commissioner on these issues and his reasons therefor.
- (4) Either Government may, following receipt of the report referred to in Paragraph (3), or if it comes to the conclusion that this report is being unduly delayed in the Commission, invite the other Government to resolve the dispute by agreement. In doing so it shall state the names of its negotiators and their readiness to meet with the negotiators to be appointed by the other Government at a time and place to be indicated by the other Government. To assist in these negotiations, the two Governments may agree to enlist the services of one or more mediators acceptable to them.
- (5) A Court of Arbitration shall be established to resolve the dispute in the manner provided by Annexure G
  - (a) upon agreement between the Parties to do so ; or
  - (b) at the request of either Party, if, after negotiations have begun pursuant to Paragraph (4), in its opinion the dispute is not likely to be resolved by negotiation or mediation ; or
  - (c) at the request of either Party, if, after the expiry of one month following receipt by the other Government of the invitation referred to in Paragraph (4), that Party comes to the conclusion that the other Government is unduly delaying the negotiations.
- (6) The provisions of Paragraphs (3), (4) and (5) shall not apply to any difference while it is being dealt with by a Neutral Expert.<sup>73</sup>

66. Article X addresses the role the World Bank was to have in the event that, prior to 31 March 1973, “large-scale international hostilities” prevented Pakistan from the timely completion of the system of works for the replacement of water supplies from the Eastern Rivers with water from the Western Rivers under Article IV(1).<sup>74</sup> Article XI contains general provisions addressing the scope of the Treaty, while Article XII sets out the title of the Treaty and the process for its ratification and entry into force.<sup>75</sup> It also provides that the Treaty may be modified by agreement of the Parties, but shall continue in force until terminated by a duly ratified treaty concluded for that purpose.<sup>76</sup>

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<sup>73</sup> **PLA-0001**, Treaty, Art. IX (citations omitted).

<sup>74</sup> **PLA-0001**, Treaty, Art. X (“Emergency Provisions”).

<sup>75</sup> **PLA-0001**, Treaty, Art. XI (“General Provisions”), Art. XII (“Final Provisions”).

<sup>76</sup> **PLA-0001**, Treaty, Art. XII(3), (4).

67. The eight Annexures supplement the Articles with detailed directions on specific matters. Of particular relevance in these proceedings: Annexure D addresses the generation of hydro-electric power by India on the Western Rivers; Annexure E addresses the storage of waters by India on the Western Rivers; Annexure F addresses the appointment and responsibilities of a neutral expert; and Annexure G addresses the appointment and responsibilities of a court of arbitration.<sup>77</sup>

**D. PAST UTILIZATION OF ARTICLE IX OF THE INDUS WATERS TREATY**

68. The provisions of Article IX for the settlement of differences and disputes set out three principal means for the Parties to resolve questions concerning the interpretation or application of the Treaty. Each has been utilized in the past:

- (a) Under Article IX(1), the Parties may employ the Commission, created under Article VIII, to examine questions and resolve them by agreement. The Commission, which meets at least once a year, and has met some 118 times since 1960, has provided a cooperative venue for discussion and resolution of many questions since the Treaty's inception.<sup>78</sup>
- (b) Under Article IX(2), if the Commission does not reach agreement on a question, then a difference will be deemed to have arisen.<sup>79</sup> If the difference, in the opinion of either Commissioner, falls within the provisions of Part 1 of Annexure F to the Treaty, either Commissioner may request the appointment of a neutral expert to resolve the difference.<sup>80</sup> On 15 January 2005, after Commission discussions and correspondence with India, Pakistan requested the World Bank to appoint a neutral expert to resolve differences concerning India's design of its Baglihar Hydro-Electric Plant on the Chenab River.<sup>81</sup> On 12 February 2007, the neutral expert in that case issued his determination on those differences ("**Baglihar Determination**").<sup>82</sup>

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<sup>77</sup> **PLA-0001**, Treaty, Annexure D ("Generation of Hydro-Electric Power By India On The Western Rivers"), Annexure E ("Storage of Waters by India on the Western Rivers"), Annexure F ("Neutral Expert"), Annexure G ("Court of Arbitration").

<sup>78</sup> The 118<sup>th</sup> meeting of the Commission was held from 30 to 31 May 2022.

<sup>79</sup> **PLA-0001**, Treaty, Art. IX(2).

<sup>80</sup> **PLA-0001**, Treaty, Art. IX(2).

<sup>81</sup> See **P-0228**, Letter from the PCIW to the ICIW dated 8 May 2003; **P-0229**, Statement of Points of Difference prepared by the PCIW dated 20 June 2003; **P-0230**, Letter from the PCIW to the ICIW dated 15 January 2005; **P-0231**, Letter from India to the World Bank dated 21 April 2005.

<sup>82</sup> **PLA-0002**, *Baglihar Hydro-electric Plant (Pakistan v. India)*, Neutral Expert Determination on the Baglihar Hydro-electric Plant dated 12 February 2007 ("**Baglihar Determination**").

(c) Under Article IX(2)(b), 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. In 2010, as discussed further below,<sup>83</sup> after initially suggesting the appointment of a neutral expert, Pakistan requested the appointment of a court of arbitration to resolve disputes concerning India’s construction of the KHEP on a tributary of the Jhelum River. The court of arbitration in that case (“***Kishenganga Court***”) issued a partial award on 18 February 2013 (“***Kishenganga Partial Award***”), and a final award on 20 December 2013 (“***Kishenganga Final Award***”).<sup>84</sup>

69. Article IX also preserves, both expressly and by implication, the retained powers of the Parties to settle any disagreements through other means of their mutual choice.<sup>85</sup>

#### **E. THE ORIGINS OF THE CURRENT CONTROVERSY**

70. The current disagreement arises out of India’s efforts to develop hydro-electric plants in the Indus River Basin. In 1994, India notified Pakistan of its plans to develop a storage hydro-electric project on the Kishenganga/Neelum tributary of the Jhelum River.<sup>86</sup> As India’s plans crystalized, Pakistan raised what it regarded as “questions” within the Commission.<sup>87</sup> In 2007, after sending correspondence raising its concerns, Pakistan asserted at the Commission’s 99th meeting that India’s run-of-the-river design plans for the KHEP did not comply with the Treaty’s requirements.<sup>88</sup> On 4 February 2008, Pakistan identified six specific matters that, in Pakistan’s

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<sup>83</sup> See paras. 71–73, *infra*.

<sup>84</sup> **PLA-0003**, *Kishenganga Partial Award*; **PLA-0004**, *Indus Waters Kishenganga Arbitration (Pakistan v India)*, PCA Case No. 2011-01, Final Award, 20 December 2013, 31 Rep. of Intl. Arb. Awards 309 (“***Kishenganga Final Award***”). In the course of issuing its awards, the Court also issued an Order on Interim Measures dated 6 June 2011, and a Decision on India’s Request for Clarification or Interpretation dated 20 December 2013.

<sup>85</sup> See **PLA-0001**, Treaty, Art. IX(2) (“any difference ... may be settled in any other way agreed upon by the Commission”).

<sup>86</sup> **P-0047**, Letter from the ICIW to the PCIW dated 2 June 1994.

<sup>87</sup> **P-0051**, Record of the 92<sup>nd</sup> Meeting of the Commission, Lahore, 27 to 29 November 2004; **P-0054**, Letter from the ICIW to the PCIW dated 20 April 2006; **P-0055**, Letter from the ICIW to the PCIW dated 19 June 2006.

<sup>88</sup> **P-0056**, Letter from the PCIW to the ICIW dated 24 August 2006; **P-0058**, Record of the 99<sup>th</sup> Meeting of the Commission, New Delhi, 30 May to 4 June 2007, pp. 9–13.

view, required resolution.<sup>89</sup> However, India and Pakistan failed to resolve those matters over the course of the Commission's 100th and 101st meetings.<sup>90</sup> The minutes of the 101st meeting record:

Since Pakistan believes these discussions to be under Article IX(l) 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>91</sup>

71. On 11 March 2009, Pakistan's Commissioner wrote to India's Commissioner regarding the six "questions" identified by Pakistan as arising out of the discussions of the Parties with respect to the KHEP.<sup>92</sup> After outlining the history of their past exchanges, Pakistan's Commissioner stated that question 2 was no longer pressed, subject to India confirming the revised design of the KHEP in the manner indicated at the 101st meeting of the Commission.<sup>93</sup> Pakistan's Commissioner stated that questions 3 to 5 were of a "technical nature" that "fall within the jurisdiction of a Neutral Expert", and provided notice under Paragraph 5(a) of Annexure F to the Treaty that Pakistan intended to seek the appointment of a neutral expert in respect of those "differences".<sup>94</sup> Pakistan's Commissioner further stated that questions 1 and 6 qualified as "disputes" under Article IX(2)(b), and he attached a draft joint report as "the next step mandated for the resolution of disputes between the two countries".<sup>95</sup> A copy of this letter and its annexures was sent to the Governments of India and Pakistan by Pakistan's Commissioner, informing them that

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<sup>89</sup> **P-0058**, Record of the 99<sup>th</sup> Meeting of the Commission, New Delhi, 30 May to 4 June 2007; **P-0059**, Letter from the PCIW to the ICIW dated 4 February 2008. Pakistan has described those questions as addressing: (1) India's latitude to divert the Jhelum as part of the design of the KHEP; (2) the excessive design of the KHEP freeboard; (3) the excessive pondage calculation used by India in the KHEP design and the associated placement of the power intakes; (4) the placement and design of outlets in the KHEP, taking into consideration the Treaty's prohibition on depleting Plant reservoirs below Dead Storage Level; (5) the placement of spillways and the use of spillway gating in the KHEP design; and (6) whether a Plant's reservoir could be fully depleted. See Pakistan's Response, para. 40; **P-0063**, Letter from the PCIW to the ICIW dated 11 March 2009, para. 4. See also **PLA-0001**, Treaty, Annexure D, para. 2(c) ("Pondage" means Live Storage of only sufficient magnitude to meet fluctuations in the discharge of the turbines arising from variations in the daily and the weekly loads of the plant").

<sup>90</sup> **P-0060**, Record of the 100<sup>th</sup> Meeting of the Commission, Lahore, 31 May to 4 June 2008; **P-0061**, Record of the 101<sup>st</sup> Meeting of the Commission, New Delhi, 25 to 28 July 2008.

<sup>91</sup> **P-0061**, Record of the 101<sup>st</sup> Meeting of the Commission, New Delhi, 25 to 28 July 2008, p. 14.

<sup>92</sup> **P-0063**, Letter from the PCIW to the ICIW dated 11 March 2009, para. 4.

<sup>93</sup> **P-0063**, Letter from the PCIW to the ICIW dated 11 March 2009, paras. 6, 8.

<sup>94</sup> **P-0063**, Letter from the PCIW to the ICIW dated 11 March 2009, para. 8.

<sup>95</sup> **P-0063**, Letter from the PCIW to the ICIW dated 11 March 2009, paras. 9–10.

“differences have arisen with respect to [the KHEP], which are to be resolved within the ambit of Article IX(2)(a) and (b) of the Indus Waters Treaty 1960”.<sup>96</sup>

72. On 11 May 2009, Pakistan’s Commissioner requested the two Governments to join in the appointment of a neutral expert to address the three “differences” he had identified in his 11 March 2009 letter.<sup>97</sup> That matter, as well as the resolution of the two “disputes” that Pakistan had identified, received further discussion without resolution at the 103rd Commission meeting, held from 31 May to 5 June 2009.<sup>98</sup> On 10 July 2009, Pakistan, through its Ministry of Foreign Affairs, invited India to meet to discuss the joint appointment of a neutral expert to address the three “differences” and to appoint negotiators under Article IX(4) to negotiate the two “disputes”.<sup>99</sup> On 20 August 2009, India, through its Ministry of External Affairs, rejected those proposals, stating that “the proposal for a meeting of the representatives of the two governments to jointly appoint a Neutral Expert to resolve the purported differences and for appointing esteemed negotiators for resolution of the purported disputes is not warranted at present”.<sup>100</sup>

#### F. THE *KISHENGANGA* ARBITRATION

73. On 17 May 2010, Pakistan filed a request for arbitration, setting forth (in simplified terms below) two disputes for resolution:
- (a) whether India’s proposed diversion of the Kishenganga/Neelum River breached the Treaty (“**First Dispute**”); and
  - (b) whether India was allowed to deplete the KHEP’s reservoir below Dead Storage Level in any circumstances except in the case of an unforeseen emergency (“**Second Dispute**”).<sup>101</sup>
74. Thereafter, a court of arbitration of seven members was empaneled. India initially gave notice to the *Kishenganga* Court that it would “urge preliminary objections which go to the maintainability

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<sup>96</sup> P-0062, Letter from the PCIW to the Secretary, Ministry of Water and Power, Government of Pakistan and Secretary, Ministry of Water Resources, Government of India dated 11 March 2009, para. 2.

<sup>97</sup> P-0064, Letter from the PCIW to the Secretary, Ministry of Water and Power, Government of Pakistan and Secretary, Ministry of Water Resources, Government of India dated 11 May 2009, para. 2, referring to P-0062, Letter from the PCIW to the Secretary, Ministry of Water and Power, Government of Pakistan and Secretary, Ministry of Water Resources, Government of India dated 11 March 2009.

<sup>98</sup> P-0066, Record of the 103<sup>rd</sup> Meeting of the Commission, New Delhi, 31 May to 5 June 2009.

<sup>99</sup> P-0067, Note Verbale from Pakistan to India dated 10 July 2009.

<sup>100</sup> P-0068, Note Verbale from India to Pakistan dated 20 August 2009, para. 5.

<sup>101</sup> PLA-0003, *Kishenganga* Partial Award, paras. 4–6.

of Pakistan’s Request for Arbitration, including the competence of the Court of Arbitration to deal with the differences mentioned in the Request for Arbitration”.<sup>102</sup> However, India, the following year, informed the *Kishenganga* Court that it no longer intended to “lodge preliminary objections to jurisdiction” and that “[o]bjections to admissibility ... would be addressed at the appropriate stage of the proceedings”.<sup>103</sup>

75. At a later stage of those proceedings, India requested that the *Kishenganga* Court declare the case inadmissible under Article IX of the Treaty, arguing that: (i) except when the Commissioners agree to pursue an alternative course, the Treaty requires a neutral expert to make the initial determination of whether a matter arising between the Parties is a technical difference that the expert can resolve or a “dispute” to be referred to a court of arbitration, and that Pakistan had failed to request the appointment of such a neutral expert; and (ii) the subject matter of the second “dispute” presented was among the questions consigned to a neutral expert under Annexure F, and Pakistan itself had expressed the intention to submit that matter to a neutral expert.<sup>104</sup>

76. In the *Kishenganga* Partial Award issued on 18 February 2013, the *Kishenganga* Court unanimously rejected both of those arguments. With respect to the first argument, the *Kishenganga* Court stated:

As confirmed by the Preamble of the Treaty, the purpose of Article IX is to provide for the settlement, ‘in a cooperative spirit,’ of differences and disputes through the various specified procedures. In keeping with that goal, Article IX(2)(a) ensures the appointment of a neutral expert where a Party actually requests the appointment of the same. It does not serve to impose—for its own sake—an additional procedural hurdle to access to a court of arbitration. Nor can the Court accept that India’s current position in the proceedings, to the effect that the Second Dispute is a matter for a neutral expert, would be relevant under Article IX(2)(a)—even if India were now to request the appointment of such an expert. The Court considers that, having consistently maintained in the Commission that no difference between the Parties existed, India cannot now assert that the Second Dispute is, in fact, a difference after all.<sup>105</sup>

77. The *Kishenganga* Court added:

In the absence of any indication by India during the key period prior to the commencement of these proceedings that the subject-matter of the Second Dispute was a matter for a neutral expert, and of any request—by either Party—for the appointment of such an Expert, the Court dismisses India’s first objection to the admissibility of the Second Dispute.<sup>106</sup>

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<sup>102</sup> **PLA-0003**, *Kishenganga* Partial Award, para. 23.

<sup>103</sup> **PLA-0003**, *Kishenganga* Partial Award, para. 26.

<sup>104</sup> **PLA-0003**, *Kishenganga* Partial Award, para. 475.

<sup>105</sup> **PLA-0003**, *Kishenganga* Partial Award, para. 481.

<sup>106</sup> **PLA-0003**, *Kishenganga* Partial Award, para. 482.

78. With respect to India’s second argument, the *Kishenganga* Court concluded:

[A]lthough a neutral expert is competent only with respect to the technical questions identified in Annexure F, a duly constituted court of arbitration can consider any question “concerning the interpretation or application of [the] Treaty or the existence of any fact which, if established, might constitute a breach of this Treaty.” [footnote citation to Article IX(1)]. Accordingly, the Court considers that no dispute brought before a court of arbitration could be rendered inadmissible merely on the grounds that it involved a technical question.<sup>107</sup>

79. The *Kishenganga* Court additionally observed that “only an actual request for the appointment of an expert would activate the neutral expert process and preclude such a difference from submission to a court of arbitration”.<sup>108</sup>

80. Although the *Kishenganga* Court recognized that a legal issue, such as permissible modes of operation generally under the Treaty, and a technical issue, such as sound design of a particular project, may be “related”,<sup>109</sup> it observed:

It does not follow, however, that the two questions are a “single composite issue” that must be decided in a single forum, much less that the antecedent legal question of permissible operation becomes subsumed within questions relating to the design of a particular project.... [W]here 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>110</sup>

81. The *Kishenganga* Partial Award also addressed the merits of the two disputes. On the First Dispute, the Court ruled in substance:

- (a) The KHEP constituted a Run-of-River Plant for the purpose of Paragraph 15 of Annexure D.
- (b) India may accordingly divert water from the Kishenganga/Neelum River for power generation and deliver the water released below the power station into the Bonar Nallah.
- (c) India is however obligated to construct and operate the KHEP to maintain a minimum flow into the Kishenganga/Neelum River, at a rate to be determined in a Final Award.<sup>111</sup>

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<sup>107</sup> PLA-0003, *Kishenganga* Partial Award, para. 487

<sup>108</sup> PLA-0003, *Kishenganga* Partial Award, para. 488.

<sup>109</sup> PLA-0003, *Kishenganga* Partial Award, para. 489.

<sup>110</sup> PLA-0003, *Kishenganga* Partial Award, para. 490.

<sup>111</sup> PLA-0003, *Kishenganga* Partial Award, Part V (“Decision”).

As to the Second Dispute, the *Kishenganga* Court ruled in substance:

- (a) Except in the case of an unforeseen emergency, the Treaty does not permit reduction below Dead Storage Level in the reservoirs of Run-of-River Plants on the Western Rivers.
- (b) The accumulation of sediment in a Run-of-River Plant on the Western Rivers does not constitute an unforeseen emergency.
- (c) Accordingly, India may not employ drawdown flushing at the KHEP to the extent it would deplete the reservoir below Dead Storage Level.
- (d) The limitation on drawdown flushing does not apply to Run-of-River Plants that are (i) in operation at the time of the decision; or (ii) already under construction at the time of the decision, provided that India had communicated the design and Pakistan did not object.<sup>112</sup>

82. On 20 December 2013, the *Kishenganga* Court delivered its unanimous Final Award requiring, in substance, that when operating the KHEP:

- (a) India must release a minimum of 9 cumecs into the Kishenganga/Neelum River below the KHEP at all times at which the daily average flow immediately upstream meets or exceeds 9 cumecs.
- (b) At any time when the daily average flow of the Kishenganga/Neelum River immediately upstream of the KHEP is less than 9 cumecs, India must release 100 percent of that flow into the Kishenganga/Neelum River below the KHEP.<sup>113</sup>

The *Kishenganga* Court also provided that, beginning seven years after the diversion of water to the KHEP, either Party may seek reconsideration of the minimum flow requirement set forth in (a) above through the Commission or the Treaty mechanisms.<sup>114</sup>

83. During the *Kishenganga* Arbitration, the other four issues that Pakistan had previously raised with India (relating to freeboard; pondage calculation and placement of power intakes; outlet design and placement; and the type and placement of the spillways) remained unresolved. Following the Partial Award, Pakistan's Commissioner proposed resuming discussions to resolve those issues,

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<sup>112</sup> **PLA-0003**, *Kishenganga* Partial Award, Part V ("Decision").

<sup>113</sup> **PLA-0004**, *Kishenganga* Final Award, Part V ("Decision").

<sup>114</sup> **PLA-0004**, *Kishenganga* Final Award, Part V ("Decision").

discontinuing further construction while those matters were pending, and seeking the immediate appointment of a neutral expert if the matters remained unresolved.<sup>115</sup> The Parties discussed those matters through further correspondence and at the 108th meeting of the Commission, held from 24 to 25 March 2013, yet were unable to resolve them.<sup>116</sup>

84. In addition, during the *Kishenganga* Arbitration, questions arose concerning India's proposed RHEP. These questions resembled, to a considerable degree, those regarding the KHEP. On 16 August 2012, India's Commissioner provided Pakistan's Commissioner with technical information about the RHEP's design and related hydrological data pursuant to Paragraph 9 of Annexure D.<sup>117</sup> On 26 November 2012, Pakistan's Commissioner responded that, "on the basis of information received, 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 and accordingly Pakistan objects to the design of the Plant".<sup>118</sup> On 11 January 2013, India's Commissioner replied that, in his view, the RHEP's design was consistent with the Treaty and invited further technical discussion.<sup>119</sup> Further exchanges ensued, including discussions at the 108th and 109th meetings of the Commission, but at the time the *Kishenganga* Court issued its Final Award on 20 December 2013, questions concerning the RHEP remained unresolved.<sup>120</sup>

#### **G. COMMUNICATIONS BETWEEN INDIA AND PAKISTAN FROM 2014 TO 2015**

85. On 10 January 2014, Pakistan's Commissioner reiterated to his Indian counterpart his interest in continuing efforts to resolve the outstanding issues concerning the KHEP and RHEP projects.<sup>121</sup> On 31 March 2014, Pakistan's Commissioner provided India's Commissioner with a document setting out the "technical bases behind Pakistan's objections" to the KHEP project.<sup>122</sup>

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<sup>115</sup> **P-0069**, Letter from the PCIW to the ICIW dated 6 March 2013.

<sup>116</sup> **P-0070**, Record of the 108<sup>th</sup> Meeting of the Commission, Lahore, 24 to 25 March 2013; **P-0071**, Letter from the ICIW to the PCIW dated 15 April 2013; **P-0072**, Letter from the PCIW to the ICIW dated 20 March 2013.

<sup>117</sup> **P-0077**, Letter from the ICIW to the PCIW dated 16 August 2012.

<sup>118</sup> **P-0078**, Letter from the PCIW to the ICIW dated 26 November 2012, para. 2.

<sup>119</sup> **P-0079**, Letter from the ICIW to the PCIW dated 11 January 2013, para. 10.

<sup>120</sup> See **P-0080**, Letter from the ICIW to the PCIW dated 22 March 2013; **P-0081**, Letter from the PCIW to the ICIW dated 25 March 2013; **P-0082**, Letter from the ICIW to the PCIW dated 11 September 2013; **P-0083**, Record of the 109<sup>th</sup> Meeting of the Commission, New Delhi, 22 to 25 September 2013; **P-0084**, Letter from the PCIW to the ICIW dated 5 December 2013.

<sup>121</sup> **P-0073**, Letter from the PCIW to the ICIW dated 10 January 2014.

<sup>122</sup> **P-0074**, Letter from the PCIW to the ICIW dated 31 March 2014, Annexure A.

86. The Commission held its 110th meeting from 23 to 27 August 2014, and discussed both the KHEP and RHEP projects.<sup>123</sup> Pakistan’s Commissioner repeated his request for an immediate “resolution on design aspects of the Kishenganga HEP”.<sup>124</sup> He also announced that Pakistan was withdrawing its objection to the freeboard contemplated in the KHEP after considering India’s technical arguments.<sup>125</sup> The Parties’ discussions included a topic first raised in the 108th and 109th meetings—the relevance and precedential effect of the *Baglihar* Determination and of the *Kishenganga* Partial Award.<sup>126</sup> Those discussions, however, did not lead to a further resolution of the outstanding issues for either project.
87. Pakistan’s Commissioner noted, in a 30 January 2015 letter to his Indian counterpart, that their informal discussions following the 110th Commission meeting raised the possibility of an “amicable settlement” of the design differences for the KHEP project, but those discussions did not answer Pakistan’s objections to the RHEP “to any significant extent”.<sup>127</sup> After reviewing the current status of the disagreements, he observed that “[i]n 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>128</sup>
88. The Commission held its 111th meeting from 31 January to 4 February 2015.<sup>129</sup> At this meeting, the Parties first outlined their perceptions of the progress and obstacles to resolving their disagreements.<sup>130</sup> In the case of the KHEP, Pakistan’s Commissioner observed that construction was progressing and “to avoid fait accompli situation, early resolution on the differences on the design need to be achieved”.<sup>131</sup> He added, “[i]f the issues are not resolved then Pakistan would

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<sup>123</sup> P-0024, Record of the 110<sup>th</sup> Meeting of the Commission, Lahore, 23 to 27 August 2014.

<sup>124</sup> P-0024, Record of the 110<sup>th</sup> Meeting of the Commission, Lahore, 23 to 27 August 2014, para. 4.

<sup>125</sup> P-0024, Record of the 110<sup>th</sup> Meeting of the Commission, Lahore, 23 to 27 August 2014, para. 43.

<sup>126</sup> P-0024, Record of the 110<sup>th</sup> Meeting of the Commission, Lahore, 23 to 27 August 2014, paras. 4, 5, 9–12, 31–32, 40, 46, 50.

<sup>127</sup> P-0026, Letter from the PCIW to the ICIW dated 30 January 2015, para. 1.

<sup>128</sup> P-0026, Letter from the PCIW to the ICIW dated 30 January 2015, para. 14.

<sup>129</sup> P-0025, Record of the 111<sup>th</sup> Meeting of the Commission, New Delhi, 31 January to 4 February 2015.

<sup>130</sup> P-0025, Record of the 111<sup>th</sup> Meeting of the Commission, New Delhi, 31 January to 4 February 2015, paras. 2–38.

<sup>131</sup> P-0025, Record of the 111<sup>th</sup> Meeting of the Commission, New Delhi, 31 January to 4 February 2015, para. 49.

opt for third party for resolution in accordance with the provisions of Article IX of the Treaty”.<sup>132</sup> India’s Commissioner responded that “all the design related issues should be discussed with an endeavor to resolve them amicably without resorting to Article IX of the Treaty”; he later added, with respect to pondage, “the difference has not arisen as the Pakistan objections can be further discussed and resolved amicably within the ambit of [the Commission]”.<sup>133</sup> The Parties expressed similar positions with respect to the RHEP. On the issue of pondage at the RHEP, Pakistan’s Commissioner stated that a “difference has arisen between the Parties and the matter needs to be dealt with under Article IX of the Treaty”, while India’s Commissioner stated that “in his view the difference has not arisen”.<sup>134</sup>

89. On 3 July 2015, Pakistan’s Commissioner formally notified India’s Commissioner of his intention to seek the appointment of a neutral expert to resolve the issues concerning the KHEP and RHEP.<sup>135</sup> His letter stated in relevant part:

2. Pakistan had indicated as far back as 2009 its intention to take the questions relating to the Kishenganga Hydroelectric Plant (HEP) 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 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 Kishenganga HEP was amicably resolved).<sup>136</sup>

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<sup>132</sup> **P-0025**, Record of the 111<sup>th</sup> Meeting of the Commission, New Delhi, 31 January to 4 February 2015, para. 49.

<sup>133</sup> **P-0025**, Record of the 111<sup>th</sup> Meeting of the Commission, New Delhi, 31 January to 4 February 2015, paras. 50, 70.

<sup>134</sup> **P-0025**, Record of the 111<sup>th</sup> Meeting of the Commission, New Delhi, 31 January to 4 February 2015, paras. 85–86.

<sup>135</sup> **P-0010**, Letter from the PCIW to the ICIW dated 3 July 2015.

<sup>136</sup> **P-0010**, Letter from the PCIW to the ICIW dated 3 July 2015, paras. 2–3.

The letter asked India's Commissioner to 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.<sup>137</sup>

90. In a letter dated 13 July 2015, Pakistan's Commissioner repeated his call for the preparation of a joint statement of points of difference, inviting India's Commissioner to meet in Lahore, Pakistan.<sup>138</sup> On 16 July 2015, India's Commissioner replied to the 3 July 2015 letter, expressing disappointment over Pakistan's statement that points of difference had arisen.<sup>139</sup> He suggested that the 110th and 111th Commission meetings had produced progress and that India was awaiting further technical information from Pakistan.<sup>140</sup> India's Commissioner also observed that the neutral expert in the *Baglihar* Determination had rejected Pakistan's approach to pondage, stating:

India has followed the same procedure as used by Neutral Expert for arriving at the permissible pondage values for the Baglihar HEP. It is the duty of the Commission to consider all relevant provisions of the Treaty and guidelines/views in earlier award of Neutral Expert appointed under the provision of the Treaty wherever applicable. Therefore, the Commission may deliberate pondage provided for above projects as per the guidelines/views of Neutral Expert in the case of Baglihar HEP.<sup>141</sup>

India's Commissioner reiterated his view that the potential for these issues' resolution at the Commission level had not been exhausted and called for further discussion at a Commission meeting.<sup>142</sup>

91. On 24 July 2015, Pakistan's Commissioner wrote to the Governments of India and Pakistan, observing that the "Permanent Indus Commission (PIC) has 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 Indus Waters Treaty 1960".<sup>143</sup> The letter recounted the recent exchanges between the Commissioners and concluded:

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<sup>137</sup> **P-0010**, Letter from the PCIW to the ICIW dated 3 July 2015, para. 4.

<sup>138</sup> **P-0011**, Letter from the PCIW to the ICIW dated 13 July 2015.

<sup>139</sup> **P-0012**, Letter from the ICIW to the PCIW dated 16 July 2015, p. 1.

<sup>140</sup> **P-0012**, Letter from the ICIW to the PCIW dated 16 July 2015, p. 1.

<sup>141</sup> **P-0012**, Letter from the ICIW to the PCIW dated 16 July 2015, p. 2.

<sup>142</sup> **P-0012**, Letter from the ICIW to the PCIW dated 16 July 2015, p. 3.

<sup>143</sup> **P-0013**, Letter from the PCIW to the Secretary, Ministry of Water and Power, Government of Pakistan and Secretary, Ministry of Water Resources, Government of India dated 24 July 2015, para. 1.

Under the circumstances, I request the Government of Pakistan and the Government of India, in terms of provisions of Paragraph 5(c) of Annexure F to the Treaty, **to appoint a Neutral Expert in the exercise of powers vested in them under Paragraph 4(b)(i) of Annexure F of the Treaty, within a month after the date of this request.** Since a joint statement of points of difference could not be prepared, a separate statement of points of difference is enclosed (Annexure), as required under the provisions of Paragraph 5(d) of Annexure F to the Treaty.<sup>144</sup>

92. On the same date, Pakistan’s Commissioner wrote to India’s Commissioner, contesting his claims that Pakistan had failed to provide sufficient technical information, stating that “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 [*Kishenganga*] Court of Arbitration”.<sup>145</sup> Pakistan’s Commissioner also stated the neutral expert’s opinion in the *Baglihar* Determination did not provide appropriate guidance, noting that the *Kishenganga* Partial Award had established that the neutral expert’s determination had “no precedential value”.<sup>146</sup> He concluded:

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>147</sup>

93. On 21 August 2015, India’s Commissioner responded to his Pakistani counterpart’s 24 July 2015 letter, stating “your unilateral intention to take the matter to Neutral Expert (NE) is premature”.<sup>148</sup> He expressed his disagreement with Pakistan’s interpretation of the *Kishenganga* Court ruling concerning the effect of a neutral expert’s determination.<sup>149</sup> He also “reiterate[d] that India will scrupulously honour the Court’s award”.<sup>150</sup> Once again, he stated that “taking the matter to [a Neutral Expert] is premature” and called for a Commission meeting to discuss exclusively the KHEP and RHEP projects.<sup>151</sup>

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<sup>144</sup> **P-0013**, Letter from the PCIW to the Secretary, Ministry of Water and Power, Government of Pakistan and Secretary, Ministry of Water Resources, Government of India dated 24 July 2015, para. 6 (emphasis added).

<sup>145</sup> **P-0014**, Letter from the PCIW to the ICIW dated 24 July 2015, para. 2.

<sup>146</sup> **P-0014**, Letter from the PCIW to the ICIW dated 24 July 2015, para. 8.

<sup>147</sup> **P-0014**, Letter from the PCIW to the ICIW dated 24 July 2015, para. 12.

<sup>148</sup> **P-0016**, Letter from the ICIW to the PCIW dated 21 August 2015, para. 2.

<sup>149</sup> **P-0016**, Letter from the ICIW to the PCIW dated 21 August 2015, paras. 6, 9, 12–13, 15.

<sup>150</sup> **P-0016**, Letter from the ICIW to the PCIW dated 21 August 2015, para. 13.

<sup>151</sup> **P-0016**, Letter from the ICIW to the PCIW dated 21 August 2015, paras. 14–15.

94. The exchange of letters continued through the remainder of 2015. On 11 September 2015, Pakistan’s Commissioner responded to India’s Commissioner’s 21 August 2015 letter, stating that India had shown no inclination to accommodation on the most significant issues and taking issue with India’s interpretation of the Treaty’s pondage requirements and the *Kishenganga* Court’s rulings.<sup>152</sup> Pakistan’s Commissioner stated: “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”.<sup>153</sup> On 13 October 2015, India’s Commissioner expressed his regret at Pakistan’s “unilateral resolve to take up the matters to third party ignoring the facts highlighted by me in my previous correspondence and ample scope of resolution at Commission level”.<sup>154</sup> He renewed his request for a Commission meeting.<sup>155</sup> On 4 November 2015, Pakistan’s Commissioner replied, challenging again India’s interpretation of the Treaty provisions on pondage and other design features, but adding:

[I]f 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>156</sup>

95. On 12 November 2015, Pakistan’s Ministry of Foreign Affairs transmitted a Note Verbale to the High Commission of India in Islamabad, with reference to Pakistan’s Commissioner’s request for the appointment of a neutral expert dated 24 July 2015.<sup>157</sup> In the Note, Pakistan’s Ministry of Foreign Affairs stated that, “[a]ccording to Annexure F Part 2 Para 4(b)(ii) of Indus Waters 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 India to “urgently propose modalities for making appointment of a Neutral Expert within ten days”.<sup>158</sup>

96. On 23 November 2015, the High Commission of India responded to the 12 November 2015 Note Verbale, with reference to Pakistan’s Commissioner’s request on 24 July 2015 for the appointment of a neutral expert under Annexure F to the Treaty.<sup>159</sup> Noting that, “as is evident

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<sup>152</sup> **P-0018**, Letter from the PCIW to the ICIW dated 11 September 2015.

<sup>153</sup> **P-0018**, Letter from the PCIW to the ICIW dated 11 September 2015, para. 26.

<sup>154</sup> **P-0019**, Letter from the ICIW to the PCIW dated 13 October 2015.

<sup>155</sup> **P-0019**, Letter from the ICIW to the PCIW dated 13 October 2015, p. 2.

<sup>156</sup> **P-0020**, Letter from the PCIW to the ICIW dated 4 November 2015, para. 14.

<sup>157</sup> **P-0093**, Note Verbale from Pakistan to India dated 12 November 2015.

<sup>158</sup> **P-0093**, Note Verbale from Pakistan to India dated 12 November 2015.

<sup>159</sup> **P-0015**, Note Verbale from India to Pakistan dated 23 November 2015.

from the letter of the PCIW to the [ICIW] dated 4 November 2015, there remains ample scope for resolution of the matter in the Permanent Indus Commission”, the High Commission of India stated:

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>160</sup>

97. On 27 November 2015, India’s Commissioner responded to the Commissioner of Pakistan’s 24 July 2015 letter, proposing once again a meeting of the Commission to discuss and resolve the outstanding issues within the Commission itself.<sup>161</sup>

#### H. COMMUNICATIONS BETWEEN INDIA AND PAKISTAN IN 2016

98. At the beginning of 2016, the Parties remained at odds over the appointment of a neutral expert. Pakistan’s Commissioner renewed their exchanges through a letter on 25 February 2016, responding to the 27 November 2015 letter of India’s Commissioner.<sup>162</sup> Paragraphs 2 and 3 of that letter recounted the past correspondence. Paragraph 4 then 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 of the Indus Waters Treaty, **and that invitation has lapsed and is hereby formally revoked.**<sup>163</sup>

The letter 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.

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<sup>160</sup> P-0015, Note Verbale from India to Pakistan dated 23 November 2015.

<sup>161</sup> P-0021, Letter from the ICIW to the PCIW dated 27 November 2015.

<sup>162</sup> P-0023, Letter from the PCIW to the ICIW dated 25 February 2016.

<sup>163</sup> P-0023, Letter from the PCIW to the ICIW dated 25 February 2016, para. 4 (emphasis added).

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” (Partial Award, ¶470).<sup>164</sup>

Citing Article IX(3) of the Treaty, Pakistan's Commissioner asked India's Commissioner to insert India's position on the points of dispute set forth in a “Statement of Points of Dispute” annexed to the letter, noting that “[i]f you fail to do so within two week's time, the Statement of Points of Dispute will be transmitted to the Governments of Pakistan and India for their consideration in accordance with Article IX(4) of the Indus Waters Treaty”.<sup>165</sup>

99. On 14 March 2016, India's Commissioner responded to the letter of 25 February 2016 of Pakistan's Commissioner.<sup>166</sup> He stated at the outset:

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>167</sup>

In the following paragraphs, India's Commissioner first set out the text of Paragraph 2(b) of Article IX of the Treaty.<sup>168</sup> He then stated:

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 of the Treaty.<sup>169</sup>

In the next paragraph, India's Commissioner stated that “it is beyond my comprehension on how the design features of a project mentioned by you such as Freeboard, design of spillway, pondage

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<sup>164</sup> **P-0023**, Letter from the PCIW to the ICIW dated 25 February 2016, paras. 5–7.

<sup>165</sup> **P-0023**, Letter from the PCIW to the ICIW dated 25 February 2016, para. 8.

<sup>166</sup> **P-0027**, Letter from the ICIW to the PCIW dated 14 March 2016.

<sup>167</sup> **P-0027**, Letter from the ICIW to the PCIW dated 14 March 2016, para. 2.

<sup>168</sup> **P-0027**, Letter from the ICIW to the PCIW dated 14 March 2016, para. 3.

<sup>169</sup> **P-0027**, Letter from the ICIW to the PCIW dated 14 March 2016, para. 4.

etc. can be generalised, thereby rendering the role of the Commission and the Neutral Expert, virtually redundant”.<sup>170</sup> He further stated that “it is clear that these issues are purely technical and not legal in nature”.<sup>171</sup> India’s Commissioner reiterated India’s position, expressed in the Note Verbale of 23 November 2015, that the matter should be resolved through the Commission.<sup>172</sup> While preserving his position that those issues should be resolved through the Commission, India’s Commissioner asserted that if a difference existed, it should be resolved by a neutral expert:

7. Without prejudice to India’s stand that the matter can be resolved within the Commission itself, I must say that such matters, if a need arises, could only be proceeded in accordance with Article IX(2a) of Annexure-F. Such a need, for the reasons mentioned in subsequent paras, does not arise at present.<sup>173</sup>

India’s Commissioner also took issue with Pakistan on the relevance of the neutral expert’s determinations in the *Baglihar* Determination<sup>174</sup> and on particular design issues.<sup>175</sup> He stated that “there is no provision in the Treaty to stop construction, till the issues raised by Pakistan are resolved”<sup>176</sup> and rejected Pakistan’s assertions that India was engaging in “dilatory tactics”.<sup>177</sup> India’s Commissioner did acknowledge Pakistan’s withdrawal of its previous request for the appointment of a neutral expert:

15. I have also noted that you have revoked your letter dated 24-7-2015 regarding appointment of Neutral Expert. Further, the request as mentioned in your above cited letter is not supported by the Treaty provisions, as elaborated above.<sup>178</sup>

In closing, India’s Commissioner repeated his “earnest desire to have a bilateral settlement of issues within the Commission”.<sup>179</sup>

100. During the same period that Pakistan’s Commissioner and India’s Commissioner were exchanging letters, their respective foreign ministries made diplomatic exchanges. On

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<sup>170</sup> P-0027, Letter from the ICIW to the PCIW dated 14 March 2016, para. 5.

<sup>171</sup> P-0027, Letter from the ICIW to the PCIW dated 14 March 2016, para. 6.

<sup>172</sup> P-0027, Letter from the ICIW to the PCIW dated 14 March 2016, para. 8.

<sup>173</sup> P-0027, Letter from the ICIW to the PCIW dated 14 March 2016, para. 7.

<sup>174</sup> P-0027, Letter from the ICIW to the PCIW dated 14 March 2016, paras. 9–10.

<sup>175</sup> P-0027, Letter from the ICIW to the PCIW dated 14 March 2016, paras. 11–12.

<sup>176</sup> P-0027, Letter from the ICIW to the PCIW dated 14 March 2016, para. 13.

<sup>177</sup> P-0027, Letter from the ICIW to the PCIW dated 14 March 2016, para. 14.

<sup>178</sup> P-0027, Letter from the ICIW to the PCIW dated 14 March 2016, para. 15, referring to P-0023, Letter from the PCIW to the ICIW dated 25 February 2016, para. 4.

<sup>179</sup> P-0027, Letter from the ICIW to the PCIW dated 14 March 2016, para. 16.

4 March 2016, Pakistan’s Ministry of Foreign Affairs transmitted a Note Verbale to the High Commission of India, stating in relevant part:

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>180</sup>

The High Commission of India responded on 21 March 2016.<sup>181</sup> It stated 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 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 issue 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>182</sup>

The High Commission of India once again suggested recourse to a meeting of the Permanent Indus Commission “at an early date”.<sup>183</sup>

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<sup>180</sup> **P-0098**, Note Verbale from Pakistan to India dated 4 March 2016.

<sup>181</sup> **P-0099**, Note Verbale from India to Pakistan dated 21 March 2016.

<sup>182</sup> **P-0099**, Note Verbale from India to Pakistan dated 21 March 2016, paras. 3–5.

<sup>183</sup> **P-0099**, Note Verbale from India to Pakistan dated 21 March 2016, para. 6.

101. On 29 March 2016, Pakistan transmitted a further Note Verbale to India noting the Commissioner of Pakistan's 25 February 2016 request for India's Commissioner to respond to the "Statement of Points in Dispute" appended to that letter.<sup>184</sup> The Note Verbale stated:

As three weeks have elapsed and the ICIW has failed to provide India's position in the Statement of Points of Dispute, the Report of the Commission, as provided in Article IX (3), is being unduly delayed. The Government of Pakistan, therefore, invites the Government of India to expeditiously appoint negotiators to resolve the points of dispute by agreement in terms of Article IX (4) of the Treaty.<sup>185</sup>

Pakistan named its four negotiators and expressed its willingness to meet at a time and place convenient to India, but added, "If India does not set a time for a meeting to take place within 30 days of the date of this letter, the Government of Pakistan reserves the right to establish a Court of Arbitration pursuant to Article IX(5)(c) of the Treaty".<sup>186</sup>

102. On 28 April 2016, India responded by "agree[ing] with the offer of negotiation of Government of Pakistan without prejudice to India's stand on inadmissibility of taking the matters to Court of Arbitration [CoA] that are under the purview of Neutral Expert and not CoA".<sup>187</sup> It appointed four negotiators and agreed to meet on a mutually convenient date.<sup>188</sup>

103. After further diplomatic exchanges, India and Pakistan agreed to hold inter-governmental negotiations in India from 14 to 15 July 2016.<sup>189</sup> In accepting those dates, Pakistan stated that:

[a]s a lot of time has been consumed in arranging the meeting of negotiators, the Government of Pakistan wants to convey that this would be the final meeting for seeking resolution at the government level.<sup>190</sup>

104. The inter-governmental negotiations took place as scheduled in New Delhi.<sup>191</sup> The jointly prepared minutes of the negotiations reflect that they did not produce a significant change in the two Governments' respective positions. Pakistan's delegation expressed its goal to seek

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<sup>184</sup> **P-0028**, Note Verbale from Pakistan to India dated 29 March 2016.

<sup>185</sup> **P-0028**, Note Verbale from Pakistan to India dated 29 March 2016.

<sup>186</sup> **P-0028**, Note Verbale from Pakistan to India dated 29 March 2016.

<sup>187</sup> **P-0029**, Note Verbale from India to Pakistan dated 28 April 2016, para. 2.

<sup>188</sup> **P-0029**, Note Verbale from India to Pakistan dated 28 April 2016, paras. 3, 5.

<sup>189</sup> **P-0100**, Note Verbale from Pakistan to India dated 19 May 2016; **P-0101**, Note Verbale from India to Pakistan dated 8 June 2016; **P-0030**, Note Verbale from India to Pakistan dated 28 June 2016; **P-0102**, Note Verbale from Pakistan to India dated 1 July 2016.

<sup>190</sup> **P-0102**, Note Verbale from Pakistan to India dated 1 July 2016.

<sup>191</sup> **P-0031**, Minutes of Secretary Level Meeting on Kishenganga and Ratle Hydroelectric Plants, New Delhi, 14 to 15 July 2016.

discussion of the “Statement of Points of Dispute”.<sup>192</sup> The Indian delegation reiterated that the discussions were being held “without prejudice to India’s stand on admissibility”.<sup>193</sup> Pakistan conveyed, after “noting that a number of rounds of discussions had taken place”, that this meeting “would be the final meeting for seeking resolution of all outstanding issues concerning Kishenganga and Ratle HE Projects”.<sup>194</sup> The negotiations included “broad based discussions” by the technical experts, including an Indian concession on pondage that Pakistan rejected.<sup>195</sup> India proposed a tour of the KHEP and further inter-governmental discussions, emphasizing the utility of “the continuation of the process of inter-governmental negotiations to give adequate opportunity to resolve these technical issues”.<sup>196</sup> Pakistan stated that “extensive discussions on all aspects of the Points of Dispute have been held on multiple occasions over a long period of time and another round is unlikely to lead to any convergence”.<sup>197</sup> The concluding paragraphs of the minutes record:

7. The Secretaries noted the flexibility shown by both sides but regretted lack of adequate convergence. This being the first Governmental level meeting, Indian Secretary proposed to have another meeting shortly after examining design offered by Pakistan to reach an amicable solution. Pakistan reiterated its stance that the broad divergence even after various rounds of discussion is unlikely to be bridged in another meeting.
8. The head of Pakistan delegation noted the urgent importance of resolving all outstanding disputes related to Kishenganga and Ratle Hydroelectric plants through referral to an impartial forum as provided for in the Indus Waters Treaty 1960.<sup>198</sup>

105. On 11 August 2016, in apparent response to the impasse in inter-governmental negotiations, India’s Commissioner wrote to his Pakistani counterpart.<sup>199</sup> He reviewed the various disagreements over the design issues and stated that “you changed your own position from appointment of Neutral Expert vide, letter dated 25 February 2016, to unilaterally taking the

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<sup>192</sup> **P-0031**, Minutes of Secretary Level Meeting on Kishenganga and Ratle Hydroelectric Plants, New Delhi, 14 to 15 July 2016, para. 2.

<sup>193</sup> **P-0031**, Minutes of Secretary Level Meeting on Kishenganga and Ratle Hydroelectric Plants, New Delhi, 14 to 15 July 2016, para. 2.

<sup>194</sup> **P-0031**, Minutes of Secretary Level Meeting on Kishenganga and Ratle Hydroelectric Plants, New Delhi, 14 to 15 July 2016, para. 3.

<sup>195</sup> **P-0031**, Minutes of Secretary Level Meeting on Kishenganga and Ratle Hydroelectric Plants, New Delhi, 14 to 15 July 2016, para. 4.

<sup>196</sup> **P-0031**, Minutes of Secretary Level Meeting on Kishenganga and Ratle Hydroelectric Plants, New Delhi, 14 to 15 July 2016, paras. 5–6.

<sup>197</sup> **P-0031**, Minutes of Secretary Level Meeting on Kishenganga and Ratle Hydroelectric Plants, New Delhi, 14 to 15 July 2016, para. 6.

<sup>198</sup> **P-0031**, Minutes of Secretary Level Meeting on Kishenganga and Ratle Hydroelectric Plants, New Delhi, 14 to 15 July 2016, paras. 7–8.

<sup>199</sup> **P-0032**, Letter from the ICIW to the PCIW dated 11 August 2016.

differences regarding the design of the two projects to the Court of Arbitration”.<sup>200</sup> He observed that “[m]y 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>201</sup> India’s Commissioner noted the impasse in the inter-governmental negotiations and India’s willingness to continue discussions.<sup>202</sup> Maintaining that the issues are “purely technical in nature” and noting that “bilateral solution within the Commission appears unlikely”, he continued:

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 1 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>203</sup>

India’s Commissioner appended to his letter a draft statement of points of difference concerning the KHEP and RHEP and requested Pakistan’s Commissioner to respond within two weeks in accordance with Paragraph 5(b) of Part 2 of Annexure F.<sup>204</sup> The appended points of difference were essentially identical to those that Pakistan had enclosed with its 3 July 2015 letter expressing its intention to seek the appointment of a neutral expert.<sup>205</sup>

106. On 19 August 2016, by means of a Note Verbale, Pakistan served India with the Request for Arbitration.<sup>206</sup> That Note recounted the attempts at negotiation and 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>207</sup>

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<sup>200</sup> **P-0032**, Letter from the ICIW to the PCIW dated 11 August 2016, paras. 2–3.

<sup>201</sup> **P-0032**, Letter from the ICIW to the PCIW dated 11 August 2016, para. 3.

<sup>202</sup> **P-0032**, Letter from the ICIW to the PCIW dated 11 August 2016, para. 4.

<sup>203</sup> **P-0032**, Letter from the ICIW to the PCIW dated 11 August 2016, para. 5.

<sup>204</sup> **P-0032**, Letter from the ICIW to the PCIW dated 11 August 2016, para. 6.

<sup>205</sup> **P-0010**, Letter from the PCIW to the ICIW dated 3 July 2015; c.f. **P-0032**, Letter from the ICIW to the PCIW dated 11 August 2016.

<sup>206</sup> **P-0034**, Note Verbale from Pakistan to India dated 19 August 2016.

<sup>207</sup> **P-0034**, Note Verbale from Pakistan to India dated 19 August 2016, p. 1.

The Note also invited India to undertake steps for appointing additional arbitrators in accordance with Annexure G.<sup>208</sup>

107. On 30 August 2016, India responded to Pakistan's Request for Arbitration, by means of a Note Verbale.<sup>209</sup> That Note first stated:

- i. That 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>210</sup>

The Note recounted that India, without prejudice to its position on inadmissibility, participated in negotiations, made a concession on pondage, and invited further negotiations, but "Pakistan had made up its mind to approach the CoA without taking recourse to other remedial measures which must be exhausted as per the provisions of the Indus Waters Treaty, before approaching CoA".<sup>211</sup> The Note asserted that, "[i]n the above circumstances, the only option left is to let the technical differences be resolved by the Neutral Expert".<sup>212</sup> The Note concluded:

- v. The Government of India, therefore, wishes to convey to the Government of Pakistan that the matters raised by Pakistan are purely technical 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 Indus Waters Treaty, other forms of dispute resolution envisaged in the Indus Waters Treaty are *non est* (that is not permissible/admissible/possible).<sup>213</sup>

108. During the period of the foregoing diplomatic exchanges, the Commissioners also exchanged correspondence. On 22 August 2016, Pakistan's Commissioner informed his Indian counterpart

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<sup>208</sup> **P-0034**, Note Verbale from Pakistan to India dated 19 August 2016, p. 2.

<sup>209</sup> **P-0036**, Note Verbale from India to Pakistan dated 30 August 2016.

<sup>210</sup> **P-0036**, Note Verbale from India to Pakistan dated 30 August 2016, para. i.

<sup>211</sup> **P-0036**, Note Verbale from India to Pakistan dated 30 August 2016, paras. iii–iv.

<sup>212</sup> **P-0036**, Note Verbale from India to Pakistan dated 30 August 2016, para. iv.

<sup>213</sup> **P-0036**, Note Verbale from India to Pakistan dated 30 August 2016, paras. v–vi.

of Pakistan's service of the Request for Arbitration.<sup>214</sup> He described the history leading up to that action and stated:

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 (vide Note Verbale No. KA(II)-2/11/2016 of 19 August 2016).<sup>215</sup>

109. India's Commissioner responded on 6 September 2016.<sup>216</sup> He expressed surprise at Pakistan's Request for Arbitration, noting that Pakistan had previously stated that the issues under discussion "fall within the purview of a Neutral Expert".<sup>217</sup> He continued:

Since 2013, you continued to hold the above position. In July 2015, you gave the notice for appointment of Neutral expert in spite of sufficient scope for resolution in the Commission as highlighted by my predecessors from time to time. 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>218</sup>

He asserted that, in the light of India's stance on inadmissibility, the inter-governmental discussions did not meet the requirements for seeking the appointment of a court of arbitration under Article IX(4) of the Treaty, and that, under the circumstances, India itself was seeking the appointment of a neutral expert.<sup>219</sup> He surmised that the Parties were unable to prepare a joint statement of points of difference, and he was therefore "proceeding to request both the Governments in terms of provisions of Paragraph 5(c) of Annexure F to the Treaty, to appoint a neutral expert in the exercise of powers vested in them under Paragraph 4(b)(i) of Annexure F of the Treaty, within a month after the date of the request".<sup>220</sup>

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<sup>214</sup> **P-0035**, Letter from the PCIW to the ICIW dated 22 August 2016.

<sup>215</sup> **P-0035**, Letter from the PCIW to the ICIW dated 22 August 2016, p. 1.

<sup>216</sup> **P-0037**, Letter from the ICIW to the PCIW dated 6 September 2016, p. 1.

<sup>217</sup> **P-0037**, Letter from the ICIW to the PCIW dated 6 September 2016, p. 1, citing **P-0069**, Letter from the PCIW to the ICIW dated 6 March 2013, p. 1.

<sup>218</sup> **P-0037**, Letter from the ICIW to the PCIW dated 6 September 2016, p. 1.

<sup>219</sup> **P-0037**, Letter from the ICIW to the PCIW dated 6 September 2016, p. 2.

<sup>220</sup> **P-0037**, Letter from the ICIW to the PCIW dated 6 September 2016, p. 2.

110. On the same date, 6 September 2016, India's Commissioner wrote to the Governments of India and Pakistan, seeking the appointment of a neutral expert.<sup>221</sup> He described the history of the dispute set out in the past correspondence of the Parties.<sup>222</sup> He concluded:

11. I still firmly believe that these technical issues can be resolved in the PIC itself provided PCIW comes out with the technical basis for his objections or considers justifications provided by Indian side. Since the same has not been done despite fervent requests, bilateral solution within the Commission appears unlikely. Left with no option I, vide my letter dated August 11 2016, had to invoke paragraph 2(a) of Article IX of the Treaty and notify PCIW 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 enclosed with the letter. I also requested PCIW for preparation of a joint statement of points of difference.
12. However, PCIW in his reply dated 22 August 2016 has held that my proposal for appointment of Neutral Expert to resolve the points of difference with respect to Ratle and Kishenganga HE projects is belated, contradictory and untenable. As such both the Commissioners were unable to prepare a joint statement of points of difference.
13. Under the circumstances, I request the Government of India and the Government of Pakistan, in terms of provisions of Paragraph 5(c) of Annexure F to the Treaty, to appoint a Neutral Expert in the exercise of powers vested in them under Paragraph 4(b)(i) of part 2 of Annexure F of the Treaty, within a month after the date of this request. Since a joint statement of points of difference could not be prepared, a separate statement of points of difference is enclosed (Annexure), as required under the provisions of Paragraph 5(d) of Annexure F to the Treaty.<sup>223</sup>

#### **I. COMMUNICATIONS BETWEEN INDIA, PAKISTAN, AND THE WORLD BANK FROM 2016 TO 2022**

111. On 31 August 2016, the President of the World Bank confirmed receipt of Pakistan's Request for Arbitration dated 19 August 2016.<sup>224</sup> On 4 October 2016, India transmitted its request to the World Bank for the appointment of a neutral expert ("**Neutral Expert Request**").<sup>225</sup> On 5 October 2016, the World Bank confirmed receipt of India's request.<sup>226</sup>

112. On 18 October 2016, the World Bank wrote to both India and Pakistan, observing that it was in the "unprecedented" situation under the Indus Waters Treaty of being seized of two requests: (1) a request from Pakistan to facilitate the appointment of umpires for the Court of Arbitration

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<sup>221</sup> **P-0105**, Letter from the ICIW to the Secretary, Ministry of Water Resources, Government of India and Secretary, Ministry of Water and Power, Government of Pakistan dated 6 September 2016.

<sup>222</sup> **P-0105**, Letter from the ICIW to the Secretary, Ministry of Water Resources, Government of India and Secretary, Ministry of Water and Power, Government of Pakistan dated 6 September 2016, paras. 2–10.

<sup>223</sup> **P-0105**, Letter from the ICIW to the Secretary, Ministry of Water Resources, Government of India and Secretary, Ministry of Water and Power, Government of Pakistan dated 6 September 2016, paras. 11–13.

<sup>224</sup> **P-0106**, Letter from the World Bank to the Parties dated 31 August 2016.

<sup>225</sup> **P-0156**, India's Request for the Appointment of a Neutral Expert dated 4 October 2016.

<sup>226</sup> See **P-0038**, Letter from the World Bank to the Parties dated 18 October 2016, para. 3, referencing a letter from the World Bank to the ICIW and the PCIW dated 5 October 2016.

in accordance with Annexure G; and (2) a request from India to appoint a neutral expert in accordance with Annexure F.<sup>227</sup> In the ensuing paragraphs of that letter, the World Bank laid out its understanding of its “limited” role and suggested a cooperative modality for moving forward.<sup>228</sup>

- (a) The World Bank first noted that Annexure G addresses the manner of appointment of a seven-member court of arbitration, providing that each Party shall select two arbitrators, and the Parties shall jointly select three additional “umpires” from a standing panel.<sup>229</sup> If the Parties have not established a standing panel and are unable to agree bilaterally on the selection of umpires, then they may agree to draw lots to select appointing authorities.<sup>230</sup> Failing that, a Party may request the World Bank to select a person a draw lots to determine appointing authorities from an appended list.<sup>231</sup>
- (b) The World Bank next noted that Annexure F requires the World Bank to appoint a neutral expert “following ‘receipt of a request made in accordance with Paragraph 5’ of Annexure F”.<sup>232</sup> As the World Bank further noted, Paragraph 5 sets out procedural steps that a Party must follow before a request may be made including “conveying the *intention* to ask for the appointment of a Neutral Expert—which ought to happen two weeks before submitting the formal request as specified in paragraph 5(a)”.<sup>233</sup>

The World Bank acknowledged its obligation to go forward with both charges, but expressed its “profound concern about the implications of the two parallel processes that the Bank is constrained to act upon”.<sup>234</sup> Citing “the spirit of cooperation and goodwill that is at the heart of

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<sup>227</sup> **P-0038**, Letter from the World Bank to the Parties dated 18 October 2016, paras. 4–5.

<sup>228</sup> **P-0038**, Letter from the World Bank to the Parties dated 18 October 2016, paras. 6–17.

<sup>229</sup> **P-0038**, Letter from the World Bank to the Parties dated 18 October 2016, para. 6. See **PLA-0001**, Treaty, Annexure G, paras. 4–7.

<sup>230</sup> **P-0038**, Letter from the World Bank to the Parties dated 18 October 2016, para. 6. See **PLA-0001**, Treaty, Annexure G, para. 7(b).

<sup>231</sup> **P-0038**, Letter from the World Bank to the Parties dated 18 October 2016, para. 6. See **PLA-0001**, Treaty, Annexure G, para. 9, Appendix.

<sup>232</sup> **P-0038**, Letter from the World Bank to the Parties dated 18 October 2016, para. 9. See **PLA-0001**, Treaty, Annexure F, paras. 4–5.

<sup>233</sup> **P-0038**, Letter from the World Bank to the Parties dated 18 October 2016, para. 9 (emphasis in original). See **PLA-0001**, Treaty, Annexure F, paras. 4–5.

<sup>234</sup> **P-0038**, Letter from the World Bank to the Parties dated 18 October 2016, para. 14.

the Treaty”, the World Bank offered to provide “an independent third-party mediator to facilitate the possibility of agreement on the modality for resolving the matter regarding the two dams”.<sup>235</sup>

113. On 3 November 2016, the World Bank wrote to India and Pakistan to reiterate its suggestion of mediation, but nevertheless confirmed that “the Bank will now proceed both with the process of drawing lots pertaining to the Court of Arbitration and the selection of a Neutral Expert”.<sup>236</sup> On 10 November 2016, the World Bank wrote to India and Pakistan to propose three candidates for appointment as the neutral expert.<sup>237</sup> On 11 November 2016, the World Bank additionally notified the Parties that the drawing of lots had led to the World Bank’s appointment of the World Bank’s President, the President of Imperial College London, and the Chief Justice of the United States as appointing authorities.<sup>238</sup>
114. On 5 December 2016, following additional correspondence between the World Bank and the Parties, the World Bank informed India and Pakistan that, because they had failed to agree on any of the three proposed neutral experts, it would put forward three further candidates, stating that if the Parties failed to agree on a candidate from that list, the World Bank would make a selection “from among candidates not mentioned above or in the list shared in [previous correspondence]”.<sup>239</sup>
115. On 12 December 2016, the President of the World Bank notified the Parties that the World Bank had decided “to pause the process of appointing the Chairman of the Court of Arbitration and the Neutral Expert”.<sup>240</sup> He explained, “I take this step in the interest of preserving the Treaty and in order to provide a window to further explore whether Pakistan and India can agree on a way forward for resolving the matter relating to the two hydroelectric power plants, in a manner that is satisfactory to both countries”.<sup>241</sup> He expressed “hope that the two countries will come to an agreement by the end of January”.<sup>242</sup>

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<sup>235</sup> **P-0038**, Letter from the World Bank to the Parties dated 18 October 2016, para. 16.

<sup>236</sup> **P-0107**, Letter from the World Bank to the Parties dated 3 November 2016, paras. 1, 8.

<sup>237</sup> **P-0108**, Letter from the World Bank to the Parties dated 10 November 2016.

<sup>238</sup> **P-0109**, Letter from the World Bank to the Parties (with Annexes) dated 11 November 2016.

<sup>239</sup> **P-0114**, Letter from the World Bank to the Parties dated 5 December 2016, p. 2.

<sup>240</sup> **P-0008**, Letter from the World Bank to Pakistan dated 12 December 2016.

<sup>241</sup> **P-0008**, Letter from the World Bank to Pakistan dated 12 December 2016.

<sup>242</sup> **P-0008**, Letter from the World Bank to Pakistan dated 12 December 2016.

116. On 23 December 2016, Pakistan expressed to the World Bank its objections to the Pause.<sup>243</sup> When the Pause remained in place beyond January 2017, Pakistan reiterated those objections.<sup>244</sup>
117. On 31 March 2022, the World Bank notified India and Pakistan that it was lifting the Pause and would proceed with “the concurrent appointment of the Neutral Expert and the Chair of the Court of Arbitration”.<sup>245</sup>
118. On 19 September 2022, in response to India’s request, the World Bank stated that it “will appoint Mr. Michel Lino to the role of Neutral Expert”.<sup>246</sup> In the same letter, the World Bank stated that it “has decided on the appointment of ... the Chair for the Court of Arbitration”.<sup>247</sup>
119. On the morning of 21 November 2022, representatives of India and Pakistan attended a “hand-over” meeting at the World Bank in Washington, D.C., relating to the Neutral Expert. That afternoon, representatives of Pakistan attended a “hand-over” meeting with the Chair of the Court of Arbitration relating to the Court of Arbitration. Such meetings marked the completion of the World Bank’s involvement in the proceedings.

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<sup>243</sup> **P-0116**, Letter from Pakistan to the World Bank dated 23 December 2016; see **P-0117**, Letter from Pakistan to the World Bank dated 27 December 2016.

<sup>244</sup> See **P-0118**, Letter from Pakistan to the World Bank dated 17 April 2017; **P-0119**, Letter from Pakistan to the World Bank dated 13 July 2017.

<sup>245</sup> **P-0120**, Letter from the World Bank to the Parties dated 31 March 2022, p. 1.

<sup>246</sup> **P-0009**, Letter from the World Bank to the Parties dated 19 September 2022.

<sup>247</sup> **P-0009**, Letter from the World Bank to the Parties dated 19 September 2022.

#### IV. PRELIMINARY CONSIDERATIONS

##### A. THE APPLICABLE LAW

120. Paragraph 29 of Annexure G to the Treaty provides for the law to be applied by a court of arbitration. It reads:

Except as the Parties may otherwise agree, the law to be applied by the Court shall be this Treaty and, whenever necessary for its interpretation or application, but only to the extent necessary for that purpose, the following in the order in which they are listed:

- (a) International conventions establishing rules which are expressly recognized by the Parties.
- (b) Customary international law.

121. Thus, the primary source of law for this Court to interpret and apply is the Treaty. Whenever necessary for the Treaty's interpretation or application, however, the Court may apply international conventions and customary international law as indicated by Paragraph 29.

122. For example, the Treaty itself does not provide rules on the method for treaty interpretation. The 1969 Vienna Convention on the Law of Treaties ("VCLT"),<sup>248</sup> at Articles 31 to 33, provides such rules. While neither India nor Pakistan is a party to the VCLT, Article 31 ("General rule of interpretation") and Article 32 ("Supplementary means of interpretation") are generally considered as reflecting rules of customary international law.<sup>249</sup> In the *Kishenganga* Arbitration, India acknowledged that the principles of the VCLT are part of customary international law,<sup>250</sup> while in these proceedings Pakistan has stated that the customary international law rules of treaty interpretation are as set out in the VCLT.<sup>251</sup> Consequently, the Court will rely on such customary rules in the course of interpreting the Treaty.

123. The Court notes that some of India's objections raise issues of interpretation or application of the Treaty that were also raised before and decided in the *Kishenganga* Partial Award. Annexure G, Paragraph 23 provides that "[a]ny such Award rendered in accordance with the provisions of this Annexure in regard to a particular dispute shall be final and binding upon the Parties with respect

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<sup>248</sup> **PLA-0005**, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 ("VCLT").

<sup>249</sup> See, e.g., 'Report of the Commission to the General Assembly on the work of its seventieth session' (2018) II(2) *Yearbook of the International Law Commission* 1, p. 27, para. 4 (and citations therein).

<sup>250</sup> **PLA-0003**, *Kishenganga* Partial Award, para. 174, n. 101.

<sup>251</sup> Hearing on Competence Tr., (Day 1), 11 May 2023, pp. 193.21–194.2; see also Pakistan's Response, para. 129, n. 97.

to that dispute”. As such, an interpretation or application of the Treaty by the *Kishenganga* Court is final and binding upon both India and Pakistan.

**B. THE RELEVANCE OF THE NON-APPEARANCE OF A PARTY**

124. India has not expressly argued that its non-appearance before the Court, by itself, defeats the Court’s competence, and therefore the Court has not regarded India’s non-appearance as a formal objection to the Court’s competence. Even so, India’s non-appearance may indicate a belief that its non-participation in the Court’s proceedings has an effect in preventing such proceedings from moving forward or otherwise in diminishing the legal effect of the Court’s decisions. As such, the Court regards it as pertinent to address the relevance of the non-appearance of a Party for the Court’s proceedings.
125. According to Pakistan, the failure of one Party to appoint its arbitrators or to appear before an international court or tribunal does not prevent proceedings from advancing, nor does it undermine the authority of the court or tribunal to issue orders and to reach decisions, culminating in one or more binding judgments or awards.<sup>252</sup> Consequently, India’s failure to participate does not and cannot prevent the proceedings before the Court from advancing, nor prevent the Court from issuing orders, directions or decisions, culminating in awards with final and binding effect on both Parties.<sup>253</sup>
126. The Court notes that, as a general observation, fewer propositions in international law can be more confidently advanced than that the non-appearance of a party does not deprive a properly constituted court or tribunal of its competence.<sup>254</sup> Whether a court has been properly constituted in a specific instance is not a matter that can be subjectively determined by a party to a dispute and then resolved simply through non-appearance by that party. Rather, whether a court has been properly constituted must be measured against an objective yardstick of whether the formal requirements in the governing instrument have been met.

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<sup>252</sup> Pakistan’s Response, para. 272, citing **PLA-0018**, *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits Judgment, [1986] ICJ Rep 14, paras. 27–28.

<sup>253</sup> Pakistan’s Response, paras. 262, 272, 275; Hearing Tr., (Day 2), 12 May 2023, pp. 26.9–27.5.

<sup>254</sup> See **PLA-0018**, *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits Judgment, [1986] ICJ Rep 14; *South China Sea (Republic of the Philippines v. the People’s Republic of China)*, PCA Case No. 2013-19, Award on Jurisdiction and Admissibility, 29 October 2015; *Arctic Sunrise (Kingdom of the Netherlands v. Russian Federation)*, PCA Case No. 2014-02, Award on Jurisdiction, 26 November 2014.

127. Indeed, the relationship between a non-appearing party and an international court or tribunal was cogently described by the International Court of Justice in *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*:

[T]he non-participation of a party in the proceedings at any stage of the case cannot, in any circumstances, affect the validity of [the Court's] judgment. ... A State which decides not to appear must accept the consequences of its decision, the first of which is that the case will continue without its participation; the State which has chosen not to appear remains a party to the case, and is bound by the eventual judgment[.]<sup>255</sup>

128. In the present case, the governing instrument (the Treaty) does not envisage non-appearance as depriving a court of arbitration of its competence. To the contrary, the Treaty clearly anticipated non-participation by one Party as having no effect on the establishment and functioning of such a court. Article IX(5) and Paragraph 2(b) of Annexure G to the Treaty provide that, in the absence of an agreement between the Parties as to the establishment of a court of arbitration, a Party can proceed on its own to request the establishment of a court of arbitration. If the other Party then fails to participate in the selection of the three umpires, that does not end the matter; Annexure G, Paragraph 9 provides in relevant part: “Should either Party fail to participate in the drawing of lots [for selecting the umpires], the other Party may request the President of the World Bank nominate a person to draw the lots”.<sup>256</sup>

129. Once the three umpires have been appointed, and the requesting Party has appointed two arbitrators, the court of arbitration is properly constituted and may function even if the other Party fails to appoint two arbitrators. While the court of arbitration can and ideally would consist of seven arbitrators, Paragraph 11 of Annexure G is clear and specific:

As soon as the three umpires have accepted appointment, they together with such arbitrators as have been appointed by the two Parties under Paragraph 6 shall form the Court of Arbitration. Unless the Parties otherwise agree, **the Court shall be competent to transact business only when all three umpires and at least two arbitrators are present.**<sup>257</sup>

130. This same ability of the court of arbitration to function without the appointment of two arbitrators by one of the Parties carries through to its final decision. Paragraph 23 of Annexure G provides, among other things, that “[a]n Award signed by four or more members of the Court shall constitute the Award of the Court”.<sup>258</sup>

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<sup>255</sup> **PLA-0018**, *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits Judgment, [1986] ICJ Rep 14, paras. 27–28.

<sup>256</sup> **PLA-0001**, Treaty, Annexure G, para. 9.

<sup>257</sup> **PLA-0001**, Treaty, Annexure G, para. 11 (emphasis added).

<sup>258</sup> **PLA-0001**, Treaty, Annexure G, para. 23.

131. On this basis, the Supplemental Rules of Procedure similarly anticipate the possibility of non-appearance by a Party, providing for a default mechanism for the proceedings to move forward in the event one Party fails to appear before the Court.<sup>259</sup>
132. India has six objections for why it views the Court as lacking competence,<sup>260</sup> which are addressed seriatim in Part V. It suffices for the present purpose to ascertain whether the existence of such objections by India constitutes a justification for India's non-appearance before the Court. The Court recalls India's standing consent to be bound by the Treaty, including its dispute resolution provisions (to which India entered no reservation). As discussed in Part V(A),<sup>261</sup> India's consent includes the recognition that a court of arbitration possesses general interpretative competence over the Treaty, regulated only by the terms of the Treaty regarding recourse to the court, including what might be referred to as the conditions precedent to such recourse. In these circumstances, while India may not be obligated to appear before the Court with written and oral submissions, when India ratified the Treaty it accepted an obligation to appoint two arbitrators to the Court,<sup>262</sup> accepted the Court's ability to decide all questions relating to its competence,<sup>263</sup> and accepted that awards of the Court shall be final and binding upon the Parties,<sup>264</sup> without any exception for situations where India fails to appear before the Court.
133. Further, in approaching this issue, the Court does not start from a *tabula rasa*. It takes cognizance of the approach accepted by India before the *Kishenganga* Court, as is evident from the *Kishenganga* Partial Award.<sup>265</sup> In that instance, Pakistan requested the establishment of a court of arbitration. India did not regard that Court as competent to deal with the differences mentioned in Pakistan's request for arbitration.<sup>266</sup> Even so, India named two arbitrators to the Court, attended the Court's first meeting with the Parties in January 2010, and gave notice at that meeting that India would "urge preliminary objections which go to the maintainability of Pakistan's Request for Arbitration, including the competence of the Court of Arbitration".<sup>267</sup> In other words, while

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<sup>259</sup> Supplemental Rules of Procedure, Art. 25.

<sup>260</sup> See **P-0001**, 21 December 2022 Letter and 21 December 2022 Explanatory Note.

<sup>261</sup> See paras. 146–154, *infra*.

<sup>262</sup> See **PLA-0001**, Treaty, Annexure G, para. 6.

<sup>263</sup> See **PLA-0001**, Treaty, Annexure G, para. 16.

<sup>264</sup> See **PLA-0001**, Treaty, Annexure G, para. 23.

<sup>265</sup> **PLA-0003**, *Kishenganga* Partial Award; see paras. 74-75, *supra*.

<sup>266</sup> **PLA-0003**, *Kishenganga* Partial Award, para. 25.

<sup>267</sup> **PLA-0003**, *Kishenganga* Partial Award, paras. 9, 18–20, 25.

India objected to the *Kishenganga* Court's competence, India nevertheless appointed two arbitrators to that Court and appeared before the Court so as to present those objections. India did not take the position that its view that the Court lacked competence allowed India unilaterally to decide that its objections were meritorious; rather, India accepted that, under the Treaty, such objections were to be decided by the *Kishenganga* Court. Ultimately, in July 2011, India informed the Court that it no longer intended to lodge any preliminary objections to the Court's jurisdiction and that objections to admissibility would be addressed at the appropriate stage of the proceedings.<sup>268</sup>

134. The character of the questions placed before this Court does not appear to explain India's decision not to appear; as noted above,<sup>269</sup> several of the issues before the *Kishenganga* Court are not significantly different from the issues underlying India's objections in relation to these proceedings. Indeed, the *Kishenganga* Court dealt extensively with whether Pakistan had properly followed the procedures of Article IX for the submission of disputes to the Court<sup>270</sup> and whether one of the disputes before the Court was of a type that must be decided by a neutral expert.<sup>271</sup> India participated fully in the written and oral proceedings before the *Kishenganga* Court on these and other issues, making many of the same arguments to that Court that it now urges in relation to these proceedings, such as arguing that (absent agreement of the Parties) all differences must first go before a neutral expert before being brought before a court of arbitration.<sup>272</sup>
135. Even so, the Court is acutely aware that it is under a standing duty to verify that it is competent and has jurisdiction over the dispute before it. The non-appearance of one Party does not lessen the importance of this duty, and the wealth of judicial and arbitral decisions on the matter confirms that this duty is undoubtedly part of *jurisprudence constante*.<sup>273</sup> Consequently, the Court has endeavored to take into account India's views to the extent they are known or can be gleaned. The

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<sup>268</sup> **PLA-0003**, *Kishenganga* Partial Award, para. 26. For disposition of India's objections to admissibility, see paras. 472–491 of the *Kishenganga* Partial Award.

<sup>269</sup> See para. 123, *supra*.

<sup>270</sup> **PLA-0003**, *Kishenganga* Partial Award, paras. 476–482.

<sup>271</sup> **PLA-0003**, *Kishenganga* Partial Award, paras. 483–491.

<sup>272</sup> **PLA-0003**, *Kishenganga* Partial Award, paras. 273–278, 284–288.

<sup>273</sup> **PLA-0018**, *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits Judgment, [1986] ICJ Rep 1986 14; *South China Sea (Republic of the Philippines v. the People's Republic of China)* (PCA Case No. 2013-19), Award on Jurisdiction and Admissibility, 29 October 2015; *Arctic Sunrise (Kingdom of the Netherlands v. Russian Federation)*, PCA Case No. 2014-02, Award on Jurisdiction, 26 November 2014; *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, Judgment, [1978] ICJ Rep 3, para. 15.

Court has also proceeded on the assumption that the possibility, in due course, of India's participation in these proceedings should be preserved. While bearing in mind the need to ensure due process in these proceedings, India is welcome to assume participation, including through the appointment of two arbitrators in accordance with the Court's Supplemental Rules of Procedure.<sup>274</sup>

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<sup>274</sup> Supplemental Rules of Procedure, Art. 7.

## V. INDIA'S OBJECTIONS

136. Although India has not addressed its submissions to the Court directly, India's objections to the competence of the Court have been formally expressed in India's correspondence to the World Bank, consisting of the 21 December 2022 Letter and the 21 December 2022 Explanatory Note (together, "**India's Objections**"). As outlined above,<sup>275</sup> following the First Meeting, the Court determined to treat the objections in the 21 December 2022 Letter and the 21 December 2022 Explanatory Note as a plea concerning the competence of the Court for the purposes of Paragraph 16 of Annexure G to the Treaty.<sup>276</sup>
137. Although not expressly advanced in this way, India's Objections to the competence of the Court can be distilled into six distinct, albeit interrelated, objections:
- (a) *First*, the Court is not competent to address its competence ("**India's First Objection**").<sup>277</sup>
  - (b) *Second*, the Court is not competent because a "dispute" has not arisen within the meaning Article IX(2) of the Treaty ("**India's Second Objection**").<sup>278</sup>
  - (c) *Third*, the Court is not competent because the requirements of Article IX(3), (4), and (5) were not met ("**India's Third Objection**").<sup>279</sup>
  - (d) *Fourth*, the Court is not competent because it was not properly constituted under Annexure G, Paragraphs 4 to 11 ("**India's Fourth Objection**").<sup>280</sup>
  - (e) *Fifth*, the Court is not competent because a neutral expert is dealing with the situation (Article IX(6)) ("**India's Fifth Objection**").<sup>281</sup>

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<sup>275</sup> See para. 30, *supra*.

<sup>276</sup> Procedural Order No. 1, para. 1.1.

<sup>277</sup> **P-0001**, 21 December 2022 Letter, paras. 12–15.

<sup>278</sup> **P-0001**, 21 December 2022 Letter, paras. 3, 4; **P-0001**, 21 December 2022 Explanatory Note, paras. 5–12, 15–16, 18–20.

<sup>279</sup> **P-0001**, 21 December 2022 Explanatory Note, paras. 5(iii), 6, 8–12, 18–19.

<sup>280</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 12.

<sup>281</sup> **P-0001**, 21 December 2022 Letter, paras. 9–10; **P-0001**, 21 December 2022 Explanatory Note, paras. 1, 12, 18.

(f) *Sixth*, the Court is not competent because there is no “necessity” for the Court of Arbitration under Annexure G, Paragraph 1 (“**India’s Sixth Objection**”).<sup>282</sup>

138. Pakistan rejects India’s Objections to the competence of the Court. Pakistan’s affirmative case is that Pakistan complied meticulously and in good faith with every procedural requirement for the commencement of arbitration and that the Court has been validly constituted in accordance with the Treaty.<sup>283</sup> As such, Pakistan submits that the Court can properly determine the matters set out in its Request for Arbitration, including matters involving the systemic interpretation or application of the Treaty, which are within the exclusive competence of the Court.<sup>284</sup>

## A. INDIA’S FIRST OBJECTION: THE COURT IS NOT COMPETENT TO ADDRESS ITS COMPETENCE

### 1. The Parties’ Positions

#### (a) *India’s arguments*

139. India’s First Objection is that the Court has been illegally constituted and is not competent to rule on its own competence.<sup>285</sup> In India’s view, a court of arbitration is only able to consider its own competence if it has been properly constituted in accordance with the Treaty, which has not occurred in the present case. Further, India’s non-acceptance of the validity of the Court is an “assertion of the right of a sovereign nation to fairly interpret a Treaty to which it is a party” and, as such, cannot be considered by this Court.<sup>286</sup>

140. *First*, India argues that the “principle of *kompetenz-kompetenz*”<sup>287</sup> and any “objection to arbitral proceedings” will only arise when the “arbitral institution is duly constituted in accordance with the governing legal document”.<sup>288</sup> India repeatedly claims that the Court was “illegally

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<sup>282</sup> P-0001, 21 December 2022 Explanatory Note, paras. 13–15.

<sup>283</sup> Hearing on Competence Tr., (Day 1), 11 May 2023, p. 159.9–16.

<sup>284</sup> Hearing on Competence Tr., (Day 1), 11 May 2023, p. 158.9–15.

<sup>285</sup> P-0001, 21 December 2022 Letter, para. 12.

<sup>286</sup> P-0003, Letter from India to the Neutral Expert dated 21 February 2023, para. 7.

<sup>287</sup> The principle that a judicial body such as the Court has the power to rule on its own jurisdiction (“*kompetenz-kompetenz*”).

<sup>288</sup> P-0001, 21 December 2022 Letter, para. 14.

constituted<sup>289</sup> and describes the Court as therefore “*non est* in law”.<sup>290</sup> The Court understands India’s contention as being predicated on the foundational question of whether the Court has been legally constituted in accordance with the Treaty. For the reasons outlined in respect of India’s other objections below,<sup>291</sup> India considers that the Court has not been properly constituted because it emerged through “clear deviations from the Treaty mandates”.<sup>292</sup> By this, India appears to contend that the procedure for the constitution of a court of arbitration, as is provided for in Article IX and Annexure G, has not been complied with in the present case, such that there is “no effectively constituted Court of Arbitration”.<sup>293</sup> Accordingly, in India’s view, any consideration of the Court’s competence by the Court further to the principle of *kompetenz-kompetenz* is premature until such time as the Court is properly constituted.<sup>294</sup>

141. *Second*, India asserts that its non-acceptance of the validity of the Court is an “assertion of the right of a sovereign nation to fairly interpret a Treaty to which it is a party”.<sup>295</sup> Therefore, India considers that it is “for India alone to decide upon its position in the matter”.<sup>296</sup> In other words, according to India, the Court “cannot exercise any jurisdiction over India unless the legality of the Court’s constitution is accepted by India”.<sup>297</sup> This course, India says, is open to it as the Treaty operates in the “realm of public international law and not under any municipal law and the general principles applicable to Tribunals’ resolving contractual disputes are inapplicable”.<sup>298</sup> What

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<sup>289</sup> **P-0001**, 21 December 2022 Letter, para. 10; **P-0002**, Letter from India to the Neutral Expert dated 11 February 2023, paras. 1, 5, 8, 10–12; **P-0003**, Letter from India to the Neutral Expert dated 21 February 2023, paras. 8, 9, 11.

<sup>290</sup> **P-0002**, Letter from India to the Neutral Expert dated 11 February 2023, para. 10.

<sup>291</sup> See paras. 155–160 (India’s Second Objection), paras. 214–216 (India’s Third Objection), para. 247 (India’s Fourth Objection), paras. 267–271 (India’s Fifth Objection), paras. 294–297 (India’s Sixth Objection), *infra*.

<sup>292</sup> **P-0002**, Letter from India to the Neutral Expert dated 11 February 2023, para. 9; **P-0001**, 21 December 2022 Letter, para. 14.

<sup>293</sup> **P-0001**, 21 December 2022 Letter, para. 12.

<sup>294</sup> **P-0001**, 21 December 2022 Letter, para. 14. India observes in **P-0003**, Letter from India to the Neutral Expert dated 21 February 2023, para. 9:

The Treaty operates in the realm of public international law and not under any municipal law and the general principles applicable to Tribunals’ resolving contractual disputes are inapplicable. It is open to the sovereign Republic of India to decline to recognize the existence of any Court of Arbitration, emerging through clear deviation from the Treaty mandates.

<sup>295</sup> **P-0003**, Letter from India to the Neutral Expert dated 21 February 2023, para. 7.

<sup>296</sup> **P-0003**, Letter from India to the Neutral Expert dated 21 February 2023, para. 7.

<sup>297</sup> **P-0003**, Letter from India to the Neutral Expert dated 21 February 2023, para. 3.

<sup>298</sup> **P-0002**, Letter from India to the Neutral Expert dated 11 February 2023, para. 9.

follows, India argues, is that India’s Objection to the competence of the Court is “not a matter to be deliberated directly or indirectly in any forum”; specifically, neither the Court nor the Neutral Expert is competent to consider India’s position.<sup>299</sup> Therefore, given that it does not recognize that the Court has been properly constituted, in India’s view, any orders or directions sought from or issued by the Court, including any preliminary rulings or interim awards, will “have no relevance”.<sup>300</sup>

**(b) Pakistan’s arguments**

142. Pakistan submits that the Court is competent to decide on its own competence, and that India cannot invoke sovereignty as a basis for escaping from compulsory dispute settlement that it accepted when it ratified the Treaty.<sup>301</sup>
143. *First*, Pakistan contends that “it follows from the valid establishment of the Court that it has *compétence de la compétence*”.<sup>302</sup> Such a power is expressly provided in Paragraph 16 of Annexure G, which states: “the Court shall decide *all questions* relating to its competence”.<sup>303</sup> Pakistan submits that Paragraph 16 of Annexure G is simply a codification in the Treaty of a “wider and very robust principle of international dispute settlement: that a tribunal is competent to determine its own competence”.<sup>304</sup>
144. Paragraph 11 of Annexure G, in turn, provides that: “Unless the Parties otherwise agree, the Court shall be competent to transact business only when all the three umpires and at least two arbitrators are present”. In the present case, Pakistan considers that upon the appointment of the three umpires and at least two arbitrators in October 2022, the Court became competent to proceed to transact business, and to determine its own competence.<sup>305</sup> Rather than a unilateral decision by either Party as to the Court’s competence, Pakistan observes that there are a number of “backstops” that may otherwise act as the “guardian of legitimacy”, including a transparent

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<sup>299</sup> **P-0003**, Letter from India to the Neutral Expert dated 21 February 2023, para. 3.

<sup>300</sup> **P-0001**, 21 December 2022 Letter, para. 15.

<sup>301</sup> Pakistan’s Response, paras. 270–272, 275.

<sup>302</sup> Pakistan’s Response, para. 270.

<sup>303</sup> Pakistan’s Response, para. 270, citing **PLA-0001**, Treaty, Annexure G, para. 16 (emphasis added).

<sup>304</sup> Hearing on Competence Tr., (Day 2), 12 May 2023, pp. 20.7–10, 179.4–15, citing **PLA-0024** *Nottebohm (Liechtenstein v. Guatemala)*, Preliminary Objections, [1953] ICJ Rep 111, p. 119.

<sup>305</sup> Pakistan’s Response, para. 270; Hearing on Competence Tr., (Day 1), 11 May 2023, p. 178.19–25; Hearing on Competence Tr., (Day 2), 12 May 2023, pp. 19.4–12, 178.18–24.

process and “full and complete reasoning from the Court” in its decision on its competence.<sup>306</sup> Pakistan also notes that the World Bank, a party to the Treaty, is competent to request advisory opinions of the International Court of Justice pursuant to Article VIII of the World Bank’s specialized agency agreement with the United Nations, acting as a further backstop.<sup>307</sup>

145. *Second*, India and Pakistan are both equally sovereign nations, Pakistan notes, and both entered into the Treaty in the exercise of their sovereignty.<sup>308</sup> Thus, Pakistan asserts, the Treaty is binding on both of the Parties and is to be performed by each of them in good faith.<sup>309</sup> Specifically, Pakistan recalls that the Treaty establishes standing consent between the Parties to binding dispute resolution, to which India’s consent is expressed through its signature and ratification of the Treaty.<sup>310</sup> That consent included accepting the Court as a “mechanism of general interpretive competence” consisting of highly qualified experts with the “competence to engage in Treaty interpretation writ large”,<sup>311</sup> as well to grant interim measures of protection<sup>312</sup> and remedies.<sup>313</sup> In Pakistan’s view, India’s unilateral refusal to accept the Court’s *compétence de la compétence* cannot be a means to “paralyse” the dispute settlement mechanisms upon which the Parties previously agreed when ratifying the Treaty.<sup>314</sup>

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<sup>306</sup> Hearing on Competence Tr., (Day 2), 12 May 2023, pp. 20.17–21.10.

<sup>307</sup> Hearing on Competence Tr., (Day 2), 12 May 2023, p. 21.11–25, citing International Bank for Reconstruction and Development Agreement Between The United Nations and The International Bank for Reconstruction and Development (1947), Art. XIII:

The General Assembly of the United Nations hereby authorizes the Bank to request advisory opinions of the International Court of Justice on any legal questions arising within the scope of the Bank’s activities other than questions relating to the relationship between the Bank and the United Nations or any specialized agency. Whenever the Bank shall request the Court for an advisory opinion, the Bank will inform the Economic and Social Council of the request.

Pakistan notes that it does not suggest that the Court should “prevail upon the Bank to request an advisory opinion” in this instance: Hearing on Competence Tr., (Day 2), 12 May 2023, p. 22.1–6.

<sup>308</sup> Pakistan’s Response, para. 272.

<sup>309</sup> Pakistan’s Response, para. 272, citing **PLA-0005**, VCLT, Art. 26.

<sup>310</sup> Hearing on Competence Tr., (Day 2), 12 May 2023, p. 14.9–13.

<sup>311</sup> Pakistan’s Response, para. 271, citing **PLA-0001**, Treaty, Annexure G, paras. 4, 29.

<sup>312</sup> Pakistan’s Response, para. 271, citing **PLA-0001**, Treaty, Annexure G, para. 28.

<sup>313</sup> Pakistan’s Response, para. 271, citing **PLA-0001**, Treaty, Annexure F, para. 13; Annexure G, para. 23.

<sup>314</sup> Pakistan’s Response, para. 270.

## 2. The Court's Analysis

146. India's First Objection is that not only has the Court been illegally constituted, but that the Court is not competent to rule on its own competence.<sup>315</sup>
147. The Court begins by noting that a core principle of international law is that no State can be made subject to the jurisdiction of a court or tribunal without its consent. Yet, when such consent is given, the State both exercises and relinquishes, in part, its sovereignty by accepting the court or tribunal's power to resolve disputes.<sup>316</sup>
148. India contends that it is "a sovereign nation" and, as such, "the Court of Arbitration cannot exercise any jurisdiction over it unless the legality of its constitution is accepted by India".<sup>317</sup> Yet, by ratifying the Treaty, India exercised its sovereignty by accepting not just a set of rules concerning the waters of the Indus system of rivers, but also accepting compulsory dispute settlement for the interpretation or application of those rules, including the possibility of awards rendered by a court of arbitration that are final and binding upon both India and Pakistan. This exercise of India's sovereignty secured important benefits for India, by imposing binding rules and dispute settlement procedures upon Pakistan, once it too exercised its sovereignty by ratifying the Treaty.
149. India further contends that a court of arbitration is only able to consider its own competence if first it has been properly constituted in accordance with the Treaty, which has not occurred in the present case. Yet the general rule of international law that an international tribunal or court has the power, in the absence of an agreement to the contrary, to interpret the instruments that govern its jurisdiction, is of old standing.<sup>318</sup> Since the *Alabama Claims Arbitration* that ended in 1872, this rule—often referred to as the *compétence de la compétence* rule (or *kompetenz-kompetenz* rule)—has been described as "a rule consistently accepted by general international law in the

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<sup>315</sup> **P-0001**, 21 December 2022 Letter, para. 12.

<sup>316</sup> See *The Case of the S.S. "Lotus" (France v. Turkey)*, Judgment, 7 September 1927, PCIJ Reports Series A No. 10, p. 18 ("The rules of law binding upon States ... emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims").

<sup>317</sup> **P-0003**, Letter from India to the Neutral Expert dated 21 February 2023, para. 3.

<sup>318</sup> **PLA-0024 Nottebohm (Liechtenstein v. Guatemala)**, Preliminary Objections, [1953] ICJ Rep 111, p. 119 ("an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction").

matter of international arbitration”.<sup>319</sup> In this regard, no distinction is drawn between objections concerning the constitution of the tribunal and objections, once constituted, as to its jurisdiction; both types of objections fall within the tribunal’s inherent power to interpret its constituent instrument.

150. Far from being set aside in the Treaty, the rule is instead affirmed in Paragraph 16 of Annexure G to the Treaty, which provides, in relevant part: “Subject to the provisions of this Treaty and except as the Parties may otherwise agree, the Court shall decide *all questions* relating to its competence”.<sup>320</sup>
151. India’s stance is predicated on the assumption that its *own* interpretation of Article IX has not been accepted and that this is a deviation from the scheme of the Treaty, and therefore the constitution of the Court is flawed. Consequently, India, keen on preserving the integrity and dignity of the Treaty, cannot appear before the Court or appoint arbitrators.<sup>321</sup> Moreover, India asserts that the Court, in view of all these antecedent issues, cannot even begin to exercise *kompetenz-kompetenz*.
152. The problem with India’s argument lies in the first premise—that India can pre-emptively appropriate for itself the power of interpreting the governing instrument. Any such logic not only militates against the inherent power of the Court to decide its own competence; it goes against the process that India itself accepted before the *Kishenganga* Court<sup>322</sup> and, more fundamentally, undermines the value and efficacy of the Treaty’s compulsory third-party dispute settlement process.
153. Indeed, if either Party were to hold the sole authority to determine or “accept[.]”<sup>323</sup> whether a court of arbitration has been properly constituted, the dispute settlement provisions of the Treaty would be rendered meaningless, as either Party to a dispute would be capable of precluding a court of arbitration from functioning at any time. A good faith interpretation of the terms of Article IX and

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<sup>319</sup> **PLA-0024**, *Nottebohm (Liechtenstein v. Guatemala)*, Preliminary Objections, [1953] ICJ Rep 111, p. 119, where the rule was described as “of the very essence of the arbitral function and one of the inherent requirements for the exercise of this function”, quoting the Rapporteur of the *1899 Convention for the Pacific Settlement of International Disputes*.

<sup>320</sup> **PLA-0001**, Treaty, Annexure G, para. 16 (emphasis added).

<sup>321</sup> **P-0001**, 21 December 2022 Letter, para. 11.

<sup>322</sup> See paras. 133–134, *supra*.

<sup>323</sup> **P-0003**, Letter from India to the Neutral Expert dated 21 February 2023, para. 3.

Annexure G to the Treaty cannot lead to this conclusion, nor to a deviation from the general rule that it is within the Court’s power to interpret the instruments that govern it.

154. In sum, the validity of the Court’s competence to decide upon its competence is based on the standing consent given by India at the time of its signature and ratification of the Treaty. The interpretation of the limit and conditions of that consent, by force of Paragraph 16 of Annexure G and of necessary logic, falls to be decided by the Court itself and not by either Party alone.<sup>324</sup> For these reasons, the Court rejects India’s First Objection.

**B. INDIA’S SECOND OBJECTION: THE COURT IS NOT COMPETENT BECAUSE A “DISPUTE” HAS NOT ARISEN WITHIN THE MEANING OF ARTICLE IX(2)**

**1. The Parties’ Positions**

**(a) India’s arguments**

155. India’s Second Objection concerns the procedure by which a “dispute” may arise under Article IX.<sup>325</sup> India argues that, absent the agreement of both Commissioners, a “dispute” can only arise where a neutral expert determines that a “difference” is, in whole or in part, a “dispute” that ought to be referred to a court of arbitration.<sup>326</sup> In India’s view, this has not occurred in the present case and, as such, the Court has not been validly seized because a “dispute” has not arisen.<sup>327</sup>

156. India submits that Article IX of the Treaty, read in conjunction with Annexures F and G, provides for a “graded dispute resolution mechanism” that precludes unilateral recourse to a court of arbitration except where the Parties have exhausted the “first stages of resolution”.<sup>328</sup> In other words, according to India, the Parties must traverse the “sequence of technical, negotiatory and mediatory steps for resolution of any dispute” before they can bring a dispute to a court of arbitration.<sup>329</sup> For India, this corresponds with the “wholesome process of understanding and cooperation” contemplated by the Treaty, whereby adherence to the procedure facilitates a

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<sup>324</sup> See, e.g., *Arctic Sunrise (Kingdom of the Netherlands v. Russian Federation)* (PCA Case No. 2014-02), Award on Jurisdiction, 26 November 2014, para. 65 *et seq.*

<sup>325</sup> **P-0001**, 21 December 2022 Letter, paras. 3–4; **P-0001**, 21 December 2022 Explanatory Note, paras. 5–12, 15–16, 18–20.

<sup>326</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 5.

<sup>327</sup> **P-0001**, 21 December 2022 Explanatory Note, paras. 7–8, 18.

<sup>328</sup> **P-0001**, 21 December 2022 Letter, para. 9; **P-0001**, 21 December 2022 Explanatory Note, para. 13.

<sup>329</sup> **P-0001**, 21 December 2022 Letter, paras. 2, 9.

“sequential”<sup>330</sup> and “seamless transition from one stage to the other in the dispute resolution process”.<sup>331</sup> Specifically, India notes, “questions” are first to be examined by the Commission, which is to endeavor to resolve them by agreement.<sup>332</sup> In the event the Commission fails to resolve a “question” by agreement, a “difference” arises.<sup>333</sup>

157. In turn, according to India, a difference may only be deemed to be a “dispute” in three circumstances:

- (a) where both Commissioners agree, pursuant to Article IX(2)(a), that the difference does not fall within Part 1 of Annexure F;<sup>334</sup>
- (b) where both Commissioners agree, pursuant to the *chaussette* of Article IX(2), that the difference may be deemed to be a dispute, “irrespective of whether the difference falls within Part 1 of Annexure F”;<sup>335</sup> or
- (c) where the two Commissioners are not *ad idem* as to whether a difference is within the ambit of Part 1 of Annexure F, and either Commissioner, pursuant to Article IX(2)(a), read in conjunction with Paragraph 7 of Annexure F, refers the issue to a neutral expert, who determines that the “difference”, or part thereof, should be treated as a “dispute”.<sup>336</sup>

158. Relevant for the present proceedings, India submits that recourse to arbitration under the Treaty may not be treated as a matter of course or unilateral discretion.<sup>337</sup> For India, this arises principally from its view that Article IX(2)(a) expressly provides that “either Commissioner” may request a neutral expert, whereas Article IX(2)(b) does not allow a single Commissioner to deem a dispute to have arisen.<sup>338</sup> Accordingly, in India’s view, the only avenue available to a single Commissioner is to refer a “difference” to a neutral expert to determine whether the “difference”, or part thereof, should be treated as a “dispute”. In this regard, India considers that the Treaty

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<sup>330</sup> **P-0002**, Letter from India to the Neutral Expert dated 11 February 2023, para. 8.

<sup>331</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 13. See also **PLA-0001**, Treaty, Preamble.

<sup>332</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 4.

<sup>333</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 5.

<sup>334</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 7(i).

<sup>335</sup> **P-0001**, 21 December 2022 Explanatory Note, paras. 5(iii), 7(ii).

<sup>336</sup> **P-0001**, 21 December 2022 Explanatory Note, paras. 5(i), 7(iii).

<sup>337</sup> **P-0001**, 21 December 2022 Explanatory Note, paras. 5(i), 13.

<sup>338</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 5(i).

incorporates the engagement of a neutral expert as a “seminal component” within the sequential dispute resolution mechanism from which the Parties cannot deviate without further agreement.<sup>339</sup> This is reinforced, India submits, by the fact that the determination of whether a “difference” falls within the jurisdiction of a neutral expert pursuant to Paragraph 7 of Annexure F will be binding upon the Parties and any court of arbitration pursuant to Paragraph 11 of Annexure F.<sup>340</sup>

159. In the present case, India considers that none of the conditions necessary for a dispute to be deemed to have arisen have been satisfied.<sup>341</sup> India notes that the Commissioners never agreed that the difference was not a technical matter or may be deemed a dispute, nor has a recommendation by a duly appointed neutral expert been made to treat the “difference” as a “dispute”.<sup>342</sup> Rather, India contends, both Commissioners have sought the appointment of a neutral expert in relation to the differences regarding the KHEP and the RHEP.<sup>343</sup> Specifically:

- (a) on 3 July 2015, Pakistan’s Commissioner notified India’s Commissioner of his intention to request the appointment of a neutral expert;<sup>344</sup>
- (b) on 24 July 2015, Pakistan’s Commissioner requested the Governments of India and Pakistan to appoint jointly a neutral expert, enclosing a draft statement of points of difference;<sup>345</sup>
- (c) on 12 November 2015, Pakistan invited India to propose modalities for the appointment of a neutral expert within ten days;<sup>346</sup> and
- (d) on 11 August 2016, India’s Commissioner notified Pakistan’s Commissioner of his intention to request the appointment of a neutral expert.<sup>347</sup>

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<sup>339</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 5(i).

<sup>340</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 5(i).

<sup>341</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 7(iii).

<sup>342</sup> **P-0001**, 21 December 2022 Letter, para. 4; **P-0001**, 21 December 2022 Explanatory Note, paras. 7–8, 18.

<sup>343</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 7(iii).

<sup>344</sup> **P-0010**, Letter from the PCIW to the ICIW dated 3 July 2015.

<sup>345</sup> **P-0013**, Letter from the PCIW to the Secretary, Ministry of Water and Power, Government of Pakistan and Secretary, Ministry of Water Resources, Government of India dated 24 July 2015.

<sup>346</sup> **P-0093**, Note Verbale from Pakistan to India dated 12 November 2015.

<sup>347</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 7(iii); **P-0032**, Letter from the ICIW to the PCIW dated 11 August 2016.

160. India contends that, contrary to Pakistan’s letter dated 25 February 2016,<sup>348</sup> the request of Pakistan’s Commissioner for a neutral expert never “lapsed”.<sup>349</sup> In India’s view, the Treaty does not envisage the “lapsing” of a request to appoint a neutral expert; rather, Paragraph 4(b)(ii) of Annexure F to the Treaty provides that, where no appointment is made jointly by India and Pakistan within one month after the date of the request, a neutral expert may be appointed by an agreed upon person or body or, in the absence of such agreement, by the World Bank.<sup>350</sup> Indeed, India observes that this is how the appointment of Mr. Michel Lino as the Neutral Expert occurred.<sup>351</sup> However, instead of approaching the World Bank to take action under Paragraph 4(b)(ii) of Annexure F, India submits that, on 25 February 2016,<sup>352</sup> Pakistan’s Commissioner unilaterally proceeded to deem the difference to be a “dispute”, which is impermissible under the Treaty.<sup>353</sup> In any event, India notes that it made a similar request for the appointment of a neutral expert to Pakistan’s Commissioner on 11 August 2016.<sup>354</sup> Accordingly, India says that both of the Commissioners’ requests for the appointment of a neutral expert remained “live” and took “primacy and precedence over any request for [the] establishment of a [court of arbitration]”.<sup>355</sup> Because of this, India submits, the arbitration provisions under Article IX(3), (4), and (5) and Annexure G to the Treaty have “not been triggered at all”.<sup>356</sup>

**(b) Pakistan’s arguments**

161. Pakistan contends that a dispute has validly arisen in accordance with Article IX.<sup>357</sup> Article IX(2) provides that a dispute may be deemed to have arisen, in the absence of a request for the appointment of a neutral expert in respect of the difference. Pakistan accepts that a court of arbitration cannot be seized without a dispute arising between the Parties.<sup>358</sup> Yet it contends that, when a “difference” emerges from the Commission (after the application of Article IX(1)), the

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<sup>348</sup> **P-0023**, Letter from the PCIW to the ICIW dated 25 February 2016.

<sup>349</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 16.

<sup>350</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 16.

<sup>351</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 7.

<sup>352</sup> **P-0023**, Letter from the PCIW to the ICIW dated 25 February 2016.

<sup>353</sup> **P-0093**, Note Verbale from Pakistan to India dated 12 November 2015.

<sup>354</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 7(iii); **P-0032**, Letter from the ICIW to the PCIW dated 11 August 2016.

<sup>355</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 16.

<sup>356</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 18.

<sup>357</sup> Pakistan’s Response, paras. 192–206.

<sup>358</sup> Pakistan’s Response, para. 195.

*chapeau* and *chaussette* of Article IX(2), read together, provide that the Commissioners can agree on the method of its resolution: by a neutral expert, by a court of arbitration, or by such other methods as the Commission sees fit.<sup>359</sup> Where the Commissioners do not agree on how the “difference” is to be resolved, however, Pakistan submits that the provisions of both Article IX(2)(a) and (b) may be applicable.<sup>360</sup>

162. In Pakistan’s view, pursuant to Article IX(2)(b), a “dispute” will arise, in the first instance, “[i]f the difference does not come within the provisions of [Article IX(2)(a)]”.<sup>361</sup> Article IX(2)(a), in turn, will only be engaged where both of the following criteria is satisfied:

(a) One of the Commissioners has identified a “difference” as falling within Part 1 of Annexure F that is capable of being dealt with under Part 2 of Annexure F;<sup>362</sup> and

(b) One of the Commissioners has requested the appointment of a neutral expert.<sup>363</sup> In this regard, Pakistan submits, relying on the reasoning of the *Kishenganga* Court in its Partial Award, that an “actual request” for the appointment of a neutral expert in accordance with Paragraph 5(c) of Annexure F to the Treaty is necessary to engage Article IX(2)(a); it is not sufficient merely to express an intention to request a neutral expert pursuant to Paragraph 5(a) of Annexure F.<sup>364</sup>

163. Accordingly, unless and until both of these criteria are met, Pakistan submits, pursuant to Article IX(2)(b), “a dispute will be deemed to have arisen which shall be settled in accordance

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<sup>359</sup> Pakistan’s Response, paras. 139, 201–202; Hearing on Competence Tr., (Day 1), 11 May 2023, pp. 199.24–200.7; Hearing on Competence Tr., (Day 2), 12 May 2023, pp. 37.20–38.3.

<sup>360</sup> Pakistan’s Response, para. 139.

<sup>361</sup> Pakistan’s Response, para. 197.1.

<sup>362</sup> Pakistan’s Response, para. 197.3.1.

<sup>363</sup> Pakistan’s Response, para. 197.3.2.

<sup>364</sup> Hearing on Competence Tr., (Day 1), 11 May 2023, pp. 211.17–212.25; Hearing on Competence Tr., (Day 3), 13 May 2023, pp. 26.20–28.5; Pakistan’s Response, para. 186, citing **PLA-0003**, *Kishenganga* Partial Award, para. 479, where the *Kishenganga* Court stated:

[T]he requirement of an actual request is necessary, in the Court’s view, to avoid the procedural impasse that could arise, for example, under the formulation recalled in the December 1959 draft: a Commissioner could express the view that a difference fell within Annexure F, thereby unequivocally foreclosing access to a court of arbitration, and yet decline to request a neutral expert to resolve the difference. Such a “pathological clause” (to use the parlance of international arbitration) was commendably avoided in the final version of Article IX.

See also **PLA-0003**, *Kishenganga* Partial Award, para. 475; Hearing on Competence Tr., (Day 1), 11 May 2023, pp. 212.14–24, 217.2–13, 218.1–23.

with Paragraphs (3), (4) and (5)”<sup>365</sup> Pakistan notes that this construction finds support in the reasoning of the *Kishenganga* Court, which rejected an identical objection by India in its Partial Award.<sup>366</sup>

164. The practical implications of the alternative construction advanced by India, Pakistan submits, would lead to the unreasonable outcome whereby a Party could obstruct expeditious recourse to a court of arbitration by “instruct[ing] its Commissioner to refuse to recognise a dispute as having arisen”, and requiring the determination of a neutral expert, no matter how obvious the existence of a “dispute” falling outside the competence of a neutral expert may be.<sup>367</sup> Significantly, Pakistan submits this could undermine, or even render moot, recourse with respect to matters falling within the exclusive jurisdiction of a court of arbitration, such as interim relief under Paragraph 28 of Annexure G.<sup>368</sup> In Pakistan’s view, this interpretation would be contrary to both the text of the Treaty and its underlying object and purpose.<sup>369</sup>
165. Applying this construction of Article IX to the present facts, Pakistan contends that a dispute has validly arisen in accordance with Article IX(2)(b).<sup>370</sup> Specifically, Pakistan recalls that Pakistan’s Commissioner notified India’s Commissioner on 25 February 2016 that, in his view, a dispute had arisen between them, and proceeded to follow the procedural steps in Article IX(3), (4), and (5), culminating in Pakistan’s Request for Arbitration on 19 August 2016.<sup>371</sup> Accordingly,

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<sup>365</sup> Pakistan’s Response, para. 197.4.

<sup>366</sup> Pakistan’s Response, paras. 145, 199–200, citing **PLA-0003**, *Kishenganga* Partial Award, para. 475, in which the *Kishenganga* Court stated:

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

See also **PLA-0003**, *Kishenganga* Partial Award, paras. 479–480.

<sup>367</sup> Pakistan’s Response, para. 203; Hearing on Competence Tr., (Day 1), 11 May 2023, pp. 218.24–219.6.

<sup>368</sup> Pakistan’s Response, para. 204.

<sup>369</sup> Pakistan’s Response, para. 204.

<sup>370</sup> Hearing on Competence Tr., (Day 1), 11 May 2023, p. 224.8–17.

<sup>371</sup> Pakistan’s Response, para. 259, citing **P-0034**, Note Verbale from Pakistan to India dated 19 August 2016; **P-0013**, Letter from the PCIW to the Secretary, Ministry of Water and Power, Government of Pakistan and Secretary, Ministry of Water Resources, Government of India dated 24 July 2015.

Pakistan observes that India's Commissioner had approximately six months within which to consider whether the issues identified in the Request for Arbitration fell within the provisions of Part 1 of 11 Annexure F, and to request that any difference be dealt with by a neutral expert.<sup>372</sup> Importantly for the purposes of the operation of Article IX(2)(b), Pakistan considers that at no point during this time was there an active request by either Commissioner for the appointment of a neutral expert under Article IX(2)(a).<sup>373</sup> In this regard, Pakistan observes:

- (a) *First*, the request of Pakistan's Commissioner for the appointment of a neutral expert on 24 July 2015<sup>374</sup> was subsequently revoked on 25 February 2016.<sup>375</sup> In Pakistan's view, this is confirmed by the documentary record and India's own understanding at the time.<sup>376</sup> Specifically, although Pakistan's Commissioner expressed an intention to request the appointment of a neutral expert on 24 July 2015,<sup>377</sup> India's Commissioner responded by describing this request as "premature".<sup>378</sup> Following further unsuccessful exchanges between the Parties, Pakistan expressly revoked its request in its letter dated 25 February 2016.<sup>379</sup> This revocation was expressly acknowledged in subsequent correspondence from India,<sup>380</sup> and India's Commissioner.<sup>381</sup> Indeed, Pakistan argues, India shared this understanding at the time, given that India separately indicated its intention to

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<sup>372</sup> Hearing on Competence Tr., (Day 1), 11 May 2023, pp. 221.8–224.7.

<sup>373</sup> Pakistan's Response, para. 205.

<sup>374</sup> Pakistan's Response, para. 187.1; **P-0013**, Letter from the PCIW to the Secretary, Ministry of Water and Power, Government of Pakistan and Secretary, Ministry of Water Resources, Government of India dated 24 July 2015; **P-0014**, Letter from the PCIW to the ICIW dated 24 July 2015, para. 11. Pakistan submits that this request for the appointment of a neutral expert on 24 July 2015 "subsumed" its request for the appointment of a neutral expert on 11 March 2009: See Hearing on Competence Tr., (Day 1), 11 May 2023, pp. 37.16–24, 75.3–24, 76.2–24.

<sup>375</sup> Pakistan's Response, para. 205, citing **P-0023**, Letter from the PCIW to the ICIW dated 25 February 2016, para. 4; **P-0032**, Letter from the ICIW to the PCIW dated 11 August 2016; **P-0037**, Letter from the ICIW to the PCIW dated 6 September 2016. See also Hearing on Competence Tr., (Day 1), 11 May 2023, pp. 127.23–128.17.

<sup>376</sup> Pakistan's Response, para. 188.

<sup>377</sup> Pakistan's Response, para. 187.1; **P-0013**, Letter from the PCIW to the Secretary, Ministry of Water and Power, Government of Pakistan and Secretary, Ministry of Water Resources, Government of India dated 24 July 2015; **P-0014**, Letter from the PCIW to the ICIW dated 24 July 2015, para. 11.

<sup>378</sup> **P-0016**, Letter from the ICIW to the PCIW dated 21 August 2015, paras. 2, 3, 14.

<sup>379</sup> Pakistan's Response, para. 205.

<sup>380</sup> Pakistan's Response, para. 187.4, citing **P-0036**, Note Verbale from India to Pakistan dated 30 August 2016, para. i.

<sup>381</sup> Pakistan's Response, para. 187.4, citing **P-0027**, Letter from the ICIW to the PCIW dated 14 March 2016, para. 15; **P-0032**, Letter from the ICIW to the PCIW dated 11 August 2016, para. 3; **P-0037**, Letter from the ICIW to the PCIW dated 6 September 2016.

request the appointment of a neutral expert on 11 August 2016,<sup>382</sup> and requested the appointment of a neutral expert (by the Governments) on 6 September 2016,<sup>383</sup> and (by the World Bank) on 4 October 2016,<sup>384</sup> which would have been unnecessary if Pakistan's earlier request remained "live".<sup>385</sup>

- (b) *Second*, according to Pakistan, India did not request the appointment of a neutral expert on 11 August 2016.<sup>386</sup> On that date, in Pakistan's view, India's Commissioner had merely indicated to Pakistan's Commissioner an intention to request the appointment of a neutral expert, in accordance with Paragraph 5(a) of Annexure F to the Treaty.<sup>387</sup> Accordingly, Pakistan submits, India's letter dated 11 August 2016 does not constitute an "actual request" for the appointment of a neutral expert.<sup>388</sup> In Pakistan's view, India's request to the World Bank for the appointment of a neutral expert was only made on 4 October 2016—over six weeks after the arbitral proceedings had commenced.<sup>389</sup>

## 2. The Court's Analysis

166. The Government of India's Second Objection to the competence of the Court rests on its understanding of Article IX of the Treaty, governing the "settlement of differences and disputes".<sup>390</sup> As the *Kishenganga* Court explained:

The purpose of Article IX is to provide a comprehensive framework for the resolution of disagreements between the Parties arising from the Treaty, either by negotiation (both within the Commission and at the inter-governmental level) or by submitting disagreements to one of two forms of third-party settlement.<sup>391</sup>

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<sup>382</sup> **P-0032**, Letter from the ICIW to the PCIW dated 11 August 2016, para. 3.

<sup>383</sup> **P-0105**, Letter from ICIW to the Governments of India and Pakistan dated 6 September 2016; see **P-0037**, Letter from the ICIW to the PCIW dated 6 September 2016.

<sup>384</sup> **P-0156**, India's Request to the World Bank for the Appointment of a Neutral Expert dated 4 October 2016.

<sup>385</sup> Pakistan's Response, para. 188, citing **P-0040(C)**, Transcript, Neutral Expert First Meeting (Indus Waters), Day 1, p. 8.4–8. See also **P-0001**, 21 December 2022 Explanatory Note, para. 7.

<sup>386</sup> Pakistan's Response, para. 186. See also **P-0001**, 21 December 2022 Explanatory Note, para. 7.

<sup>387</sup> Pakistan's Response, para. 186, citing **P-0032**, Letter from the ICIW to the PCIW dated 11 August 2016.

<sup>388</sup> Pakistan's Response, para. 186, citing **PLA-0003**, *Kishenganga* Partial Award, para. 475. Hearing on Competence Tr., (Day 1), 11 May 2023, p. 212.11–13.

<sup>389</sup> Pakistan's Response, para. 205, referring to **P-0156**, India's Request for the Appointment of a Neutral Expert dated 4 October 2016.

<sup>390</sup> **PLA-0001**, Treaty, Art. IX ("Settlement of differences and disputes").

<sup>391</sup> **PLA-0003**, *Kishenganga* Partial Award, para. 473.

167. India's Second Objection focuses specifically on the first two numbered Paragraphs of Article IX, which state:

- (1) Any question which arises between the Parties concerning the interpretation or application of this Treaty or the existence of any fact which, if established, might constitute a breach of this Treaty shall first be examined by the Commission, which will endeavour to resolve the question by agreement.
- (2) If the Commission does not reach agreement on any of the questions mentioned in Paragraph (1), then a difference will be deemed to have arisen, which shall be dealt with as follows :
  - (a) Any difference which, in the opinion of either Commissioner, falls within the provisions of Part 1 of Annexure F shall, at the request of either Commissioner, be dealt with by a Neutral Expert in accordance with the provisions of Part 2 of Annexure F ;
  - (b) If the difference does not come within the provisions of Paragraph (2) (a), or if a Neutral Expert, in accordance with the provisions of Paragraph 7 of Annexure F, has informed the Commission that, in his opinion, the difference, or a part thereof, should be treated as a dispute, then a dispute will be deemed to have arisen which shall be settled in accordance with the provisions of Paragraph (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.<sup>392</sup>

168. As explained in Part V(B)(1)(a), India contends that the disagreements that Pakistan has raised are not eligible for third-party resolution by a court of arbitration because they have not progressed to the point of being "disputes" within the meaning of Article IX(2). At the core of its contention, India submits that a dispute can arise under Article IX(2) under only three circumstances: (1) both Commissioners agree that the difference does not fall within Part 1 of Annexure F; (2) both Commissioners agree that the difference be deemed a dispute irrespective of Part 1 of Annexure F; or (3) the Commissioners disagree whether the difference falls within Part 1 of Annexure F and a neutral expert has determined that the difference, in whole or in part, should be treated as a dispute.<sup>393</sup>

169. The starting point for evaluating India's contention is the text of Article IX of the Treaty. Article IX(1) recognizes that questions may arise between the Parties concerning the

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<sup>392</sup> **PLA-0001**, Treaty, Art. IX(1), (2) (citations omitted).

<sup>393</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 7.

interpretation or application of the Treaty. A “question” should “first be examined by the Commission, which will endeavour to resolve the question by agreement”.<sup>394</sup>

170. The Commission is well suited to serve as the first recourse for resolving such “questions”. The Commissioners, who are ordinarily high-ranking engineers competent in the field of hydrology and water-use, serve as the primary representatives of their respective Governments “for all matters arising out of the Treaty”.<sup>395</sup> They meet at least once a year to discuss issues of common concern,<sup>396</sup> and they must jointly prepare and submit annual reports on the Commission to their respective Governments.<sup>397</sup> But most importantly, they are charged with “establish[ing] and maintain[ing] co-operative arrangements for the implementation of the Treaty” and, specifically, “to make every effort to settle promptly, in accordance with the provisions of Article IX(1), any questions arising thereunder”.<sup>398</sup>
171. The Treaty’s direction to settle questions “promptly” does not contemplate interminable Commission discussions; indeed, Article IX(1) simply requires that the Parties “endeavour” to seek agreement within the Commission. The Treaty in essence recognizes that, after good-faith attempts to resolve questions through agreement in accordance with Article IX(1), the two-member Commission may reach an impasse. Article IX(2) addresses the consequence of such an impasse: “If the Commission does not reach agreement on any of the questions mentioned in Paragraph (1), then a difference will arise”.<sup>399</sup> Under the terminology of Article IX, an impasse transforms a “question concerning the interpretation or application of the Treaty” into a “difference”.<sup>400</sup>
172. The Court concludes that Pakistan has satisfied the threshold of establishing that “differences” have arisen in this case. As recounted in Part III, Pakistan raised questions before the Commission about the current design of the KHEP as early as its 99th meeting held from 30 May to 4 June 2007.<sup>401</sup> Pakistan raised questions before the Commission about the design of the RHEP

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<sup>394</sup> **PLA-0001**, Treaty, Art. IX(1).

<sup>395</sup> **PLA-0001**, Treaty, Art. VIII(1).

<sup>396</sup> **PLA-0001**, Treaty, Art. VIII(5).

<sup>397</sup> **PLA-0001**, Treaty, Art. VIII (8).

<sup>398</sup> **PLA-0001**, Treaty, Art. VIII(4)(b).

<sup>399</sup> **PLA-0001**, Treaty, Art. IX(2).

<sup>400</sup> **PLA-0001**, Treaty, Art. IX(1), (2).

<sup>401</sup> See para. 70, *supra*; **P-0058**, Record of the 99<sup>th</sup> Meeting of the Commission, New Delhi, 30 May to 4 June 2007, pp. 9–13.

as early as its 108th meeting held on 24 to 25 March 2013.<sup>402</sup> As explained more fully below,<sup>403</sup> despite determined efforts over a period of *years*, the Commission was unable to resolve those questions by agreement.

173. In the case of the KHEP, the record establishes that after Pakistan raised its questions about the design of the plant at the 99th meeting of the Commission, it doggedly continued to pursue resolution.<sup>404</sup> In February 2008, Pakistan identified six specific questions that, in Pakistan’s view, required resolution.<sup>405</sup> It raised those questions for discussion at the Commission’s 100th meeting, held from 31 May to 4 June 2008.<sup>406</sup> Those questions each received extensive discussion, with Pakistan asserting that the design features were inconsistent with Annexure D of the Treaty, and India asserting they were not.<sup>407</sup> They ultimately agreed to the following statement:

The Commission discussed and endeavoured to resolve Pakistan’s questions relating to the Kishenganga Hydroelectric Plant under Article IX(1) of the Treaty/issues relating to the project, as supplied to India vide PCIW’s letter dated 4 February 2008 and as handed over during this meeting on 1<sup>st</sup> June 2008. It was agreed to have a meeting of the Commission in 3<sup>rd</sup> week of July 2008 wherein all the best efforts shall be made to conclusively resolve all the questions/issues.<sup>408</sup>

174. The Commission returned to the KHEP issues at its 101st meeting, held 25 to 28 July 2008.<sup>409</sup> The six questions again received extensive discussion, but again without resolution.<sup>410</sup> At the end of the meeting, Pakistan’s Commissioner stated that the Parties had previously agreed that “this meeting would be a conclusive meeting with respect to the questions/issues which had been identified” and that “it is therefore clear that certain differences had arisen which are now required to be dealt with further under the Treaty”.<sup>411</sup> India’s Commissioner stated that “in his view the discussions have taken place without reference to Article IX(1)”.<sup>412</sup> He added: “The design of the

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<sup>402</sup> See para. 84, *supra*; **P-0070**, Record of the 108<sup>th</sup> Meeting of the Commission, Lahore, 24 to 25 March 2013, paras. 36–44.

<sup>403</sup> See paras. 173–178, 184–188 (with respect to KHEP), paras. 179–183, 184–188 (with respect to RHEP), *infra*.

<sup>404</sup> See paras. 70–98, *supra*.

<sup>405</sup> See para. 70, n. 89, *supra*.

<sup>406</sup> **P-0060**, Record of the 100<sup>th</sup> Meeting of the Commission, Lahore, 31 May to 4 June 2008.

<sup>407</sup> **P-0060**, Record of the 100<sup>th</sup> Meeting of the Commission, Lahore, 31 May to 4 June 2008, pp. 7–29.

<sup>408</sup> **P-0060**, Record of the 100<sup>th</sup> Meeting of the Commission, Lahore, 31 May to 4 June 2008, p. 29.

<sup>409</sup> **P-0061**, Record of the 101<sup>st</sup> Meeting of the Commission, New Delhi, 25 to 28 July 2008.

<sup>410</sup> **P-0061**, Record of the 101<sup>st</sup> Meeting of the Commission, New Delhi, 25 to 28 July 2008, pp. 4–14.

<sup>411</sup> **P-0061**, Record of the 101<sup>st</sup> Meeting of the Commission, New Delhi, 25 to 28 July 2008, p. 14.

<sup>412</sup> **P-0061**, Record of the 101<sup>st</sup> Meeting of the Commission, New Delhi, 25 to 28 July 2008, p. 14. Describing the matters in contention as “issues” rather “questions”, India suggested that those matters had not yet

Kishenganga HE Plant is in compliance with the Treaty and therefore in India's view, no difference has arisen and Pakistan is further welcome to discuss the issues/questions in the continuing spirit of goodwill and friendship".<sup>413</sup>

175. Nearly eight months later, on 11 March 2009, Pakistan's Commissioner sent a letter to India's Commissioner stating that certain differences had arisen between the Parties with respect to the KHEP, formally notifying him of an intention to seek the appointment of a neutral expert, and inviting him to prepare a joint statement on the "points of difference".<sup>414</sup> On the same date, Pakistan's Commissioner informed the Governments of India and Pakistan that "differences have arisen with respect to [the KHEP], which are to be resolved within the ambit of Article IX(2)(a) and (b) of the Indus Waters Treaty 1960", attaching the letter he had sent to India's Commissioner.<sup>415</sup>
176. Based on this record of inconclusive Commission discussions concerning the KHEP, spanning three Commission meetings over two years, the Commission failed to "reach agreement" within the meaning of Article IX(2), and Pakistan was justified in concluding that those questions had ripened into "differences". The determination of whether the Parties within the Commission have endeavored to resolve by agreement any questions that have arisen is necessarily contextual. In this case, Pakistan had engaged in concrete discussion of specific issues over a period of years without substantial progress while India's plans for construction of the KHEP moved forward.<sup>416</sup> On this record, Pakistan was justified in concluding on 11 March 2009 that the questions concerning the KHEP then at issue had become "differences" subject to third-party resolution.
177. That conclusion is confirmed by the subsequent actions of the Parties. As described in Part III, the Parties proceeded to adjudicate two of the differences that Pakistan raised about the KHEP through a court of arbitration (the *Kishenganga* Court), which issued a Partial Award and Final

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ripened into "questions" under Art. IX(1). The Treaty makes no such distinction. Rather, the Treaty denominates "any" matter in contention before the Commission as a "question". See **PLA-0001**, Treaty, Art. VIII(4)(b) (directing the Commission "to make every effort to settle promptly ... *any* question arising thereunder") (emphasis added), Art. IX(1) ("*Any* question ... shall first be examined by the Commission") (emphasis added), Art. IX(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") (emphasis added).

<sup>413</sup> **P-0061**, Record of the 101<sup>st</sup> Meeting of the Commission, New Delhi, 25 to 28 July 2008, p. 14.

<sup>414</sup> **P-0063**, Letter from the PCIW to the ICIW dated 11 March 2009, para. 8.

<sup>415</sup> **P-0062**, Letter from the PCIW to the Secretary, Ministry of Water and Power, Government of Pakistan and Secretary, Ministry of Water Resources, Government of India dated 11 March 2009, para. 2.

<sup>416</sup> See paras. 70–71, *supra*.

Award.<sup>417</sup> The *Kishenganga* Court’s competence was necessarily premised on the fact that the questions Pakistan had placed before it had ripened into “differences” under Article IX(2) and further qualified as “disputes” under Article IX(2)(b).<sup>418</sup>

178. Pakistan’s remaining four differences concerning the KHEP remained dormant during the *Kishenganga* Court’s proceedings.<sup>419</sup> Following the *Kishenganga* Partial Award, Pakistan’s Commissioner proposed resuming discussions to resolve those issues in the light of the *Kishenganga* Partial Award, suggesting that India discontinue further construction while those matters were pending, and seeking the immediate appointment of a neutral expert if the matters remained unresolved.<sup>420</sup> The Commissioners discussed those matters through correspondence and at the 108th meeting of the Commission, held from 24 to 25 March 2013, but without resolution.<sup>421</sup> Those discussions continued at the 109th, 110th, and 111th Commission meetings, in each case without resolution.<sup>422</sup> Those four differences concerning the KHEP accordingly remained outstanding and capable of being addressed as “differences” under Article IX(2) of the Treaty.
179. In the case of the RHEP, the record shows that Pakistan’s Commissioner raised questions about the design of the plant in correspondence with his Indian counterpart on 26 November 2012.<sup>423</sup> On 11 January 2013, India’s Commissioner responded that the RHEP conformed to the Treaty and proposed technical discussions.<sup>424</sup> The Commission conferred on Pakistan’s questions at its 108th meeting on 24 to 25 March 2013, but did not reach a resolution.<sup>425</sup> Further correspondence between the Commissioners ensued, in which Pakistan, at India’s request, provided further technical information.<sup>426</sup> The RHEP questions (together with the four remaining KHEP

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<sup>417</sup> See paras. 73–84, *supra*.

<sup>418</sup> **PLA-0003**, *Kishenganga* Partial Award, paras. 472–491.

<sup>419</sup> See para. 83, *supra*.

<sup>420</sup> **P-0069**, Letter from the PCIW to the ICIW dated 6 March 2013.

<sup>421</sup> **P-0070**, Record of the 108<sup>th</sup> Meeting of the Commission, Lahore, 24 to 25 March 2013; **P-0071**, Letter from the ICIW to the PCIW dated 15 April 2013; **P-0072**, Letter from the PCIW to the ICIW dated 20 March 2013.

<sup>422</sup> See paras. 84–88, *supra*.

<sup>423</sup> **P-0078**, Letter from the PCIW to the ICIW dated 26 November 2012, para. 2.

<sup>424</sup> **P-0079**, Letter from the ICIW to the PCIW dated 11 January 2013, para. 10.

<sup>425</sup> **P-0070**, Record of the 108<sup>th</sup> Meeting of the Commission, Lahore, 24 to 25 March 2013, paras. 36–44.

<sup>426</sup> **P-0081**, Letter from the PCIW to the ICIW dated 25 March 2013; **P-0082**, Letter from the ICIW to the PCIW dated 11 September 2013.

- differences) received further discussion at the Commission's 109th meeting, held from 22 to 25 September 2013, again without resolution.<sup>427</sup>
180. The Commissioners continued to exchange correspondence concerning both the KHEP and RHEP projects.<sup>428</sup> The RHEP questions (together with the four remaining KHEP differences) received further attention at the Commission's 110th meeting, held from 23 to 27 August 2014, again without resolution.<sup>429</sup>
181. This pattern continued in the next year.<sup>430</sup> Pakistan's Commissioner described the status of the discussions on the questions it had raised through a 30 January 2015 letter, warning that "[i]n 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>431</sup> At the Commission's 111th meeting, held from 31 January to 4 February 2015, the Commissioners adhered to their previously stated positions, with Pakistan asserting that its questions, including those involving the RHEP, had ripened into "differences" and India urging instead that further discussion was warranted.<sup>432</sup>
182. On 3 July 2015, Pakistan's Commissioner notified India's Commissioner that "[t]he conditions of paragraph 1 of Article IX ... have been met" for both the KHEP and the RHEP. In that letter, Pakistan's Commissioner asserted that "a difference has arisen", formally notified India's Commissioner of his intention to seek the appointment of a neutral expert, and invited India's Commissioner to prepare a joint statement on the points of difference.<sup>433</sup> Having been unable to prepare such a statement with India's Commissioner, on 24 July 2015, Pakistan's Commissioner

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<sup>427</sup> **P-0083**, Record of the 109<sup>th</sup> Meeting of the Commission, New Delhi, 22 to 25 September 2013, paras. 19–47.

<sup>428</sup> See **P-0084**, Letter from the PCIW to the ICIW dated 5 December 2013; **P-0075**, Letter from the ICIW to the PCIW dated 6 February 2014; **P-0074**, Letter from the PCIW to the ICIW dated 31 March 2014.

<sup>429</sup> **P-0024**, Record of the 110<sup>th</sup> Meeting of the Commission, Lahore, 23 to 27 August 2014, paras. 3–50.

<sup>430</sup> See paras. 87–97, *supra*.

<sup>431</sup> **P-0026**, Letter from the PCIW to the ICIW dated 30 January 2015, para. 14.

<sup>432</sup> **P-0025**, Record of the 111<sup>th</sup> Meeting of the Commission, New Delhi, 31 January to 4 February 2015, paras. 13–14, 17–19, 49–86.

<sup>433</sup> **P-0010**, Letter from the PCIW to the ICIW dated 3 July 2015, paras. 3–4.

wrote to the Governments of India and Pakistan, noting that differences had arisen under Article IX(2) of the Treaty and inviting the Governments to appoint a neutral expert.<sup>434</sup>

183. Based on this record of inconclusive Commission discussions on the questions Pakistan raised concerning the RHEP, spanning four Commission meetings over two years, Pakistan was justified in concluding that the Commission had failed to “reach agreement” within the meaning of Article IX(2), and that those questions concerning RHEP had ripened into “differences”. Pakistan had engaged in concrete discussions on specific issues over a period of years without substantial progress while India’s plans for construction of the RHEP moved forward.<sup>435</sup>
184. Although the Commission discussions of the KHEP and RHEP did not lead to a resolution of the Parties’ disagreements, they did focus the Parties on the *nature* of those disagreements. At the 108th meeting of the Commission, Pakistan characterized the disagreements in technical terms as design choices, stating that “Pakistan was objecting on the design of the Plants on the basis by which India’s designs were not following the criteria given in the Treaty”.<sup>436</sup> But it was also becoming apparent that India and Pakistan disagreed on what the Treaty required.<sup>437</sup>
185. These disagreements were evident in the case of pondage. At the 109th meeting of the Commission, the Parties squarely differed on the correct measure for calculating pondage and on the relevance of the *Baglihar* Determination. Pakistan’s Commissioner stated that “[t]he differences in interpretation of the clauses of the two Parties are quite large and lead to results that are widely divergent”, contending that “the method used by [the neutral expert] in the Baglihar case was not in conformity with the Treaty provisions”.<sup>438</sup> India’s Commissioner stated

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<sup>434</sup> **P-0013**, Letter from the PCIW to the Secretary, Ministry of Water and Power, Government of Pakistan and Secretary, Ministry of Water Resources, Government of India dated 24 July 2015, paras. 5, 6.

<sup>435</sup> See paras. 84–88, *supra*.

<sup>436</sup> **P-0070**, Record of the 108<sup>th</sup> Meeting of the Commission, Lahore, 24 to 25 March 2013, para. 22.

<sup>437</sup> Those disagreements emerged most clearly in discussions on whether the neutral expert in the *Baglihar* case correctly applied the Treaty. Compare **P-0070**, Record of the 108<sup>th</sup> Meeting of the Commission, Lahore, 24 to 25 March 2013, para. 20 (statement of India’s Commissioner citing **PLA-0002**, *Baglihar* Determination, on pondage as reflecting the Treaty’s requirements) with para. 31 (statement of Pakistan’s Commissioner that “he did not consider the interpretation provided by the [neutral expert] in Baglihar case as a valid interpretation of the Treaty”).

<sup>438</sup> **P-0083**, Record of the 109<sup>th</sup> Meeting of the Commission, New Delhi, 22 to 25 September 2013, paras. 26, 28.

that Pakistan’s approach “will amount to rewriting the Treaty”, asserting that “[t]he Neutral Expert’s approach in case of Baglihar HE Project also coincides with India’s approach”.<sup>439</sup>

186. Those disagreements became more pronounced in the 110th and 111th Commission meetings. At the 110th meeting, Pakistan’s Commissioner maintained its position that “India’s Pondage does not conform to the Treaty’s express provision provided at Paragraph (8)(c) of Annexure D for calculation of Pondage”, while India’s Commissioner “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”.<sup>440</sup> Pakistan’s Commissioner stated:

[I]f no agreement is reached at the Commission level, a third forum must be approached to have a general decision on the matter concerning calculation of Pondage to be applicable on all future projects as this issue had been under discussion since last 10 years and also discussed during the 108<sup>th</sup> and 109<sup>th</sup> meetings of the Commission.<sup>441</sup>

187. At the 111th Commission meeting, the Parties returned to their divergent views on the correct interpretation of the Treaty. Pakistan’s Commissioner again took issue with India’s reliance on the neutral expert’s methodology in the *Baglihar* Determination for estimating maximum pondage, saying:

Pakistan has many times explained the methodology proposed by the Neutral Expert had two major flaws, firstly, that he abandoned the definition of Firm Power given in the Treaty and adopted a definition from outside of the Treaty ([the American Society of Civil Engineers or] ASCE definition) with altogether different meanings, and secondly he did not differentiate between the purpose of pondage and method of computation of pondage which are distinctly different from each other as defined in the Treaty.<sup>442</sup>

India’s Commissioner replied that its “view had been supported by an eminent neutral expert” and it was Pakistan “that misinterprets the provisions” of the Treaty.<sup>443</sup>

188. Thus, while this record establishes that Pakistan was justified in concluding on 3 July 2015 that its questions concerning both the KHEP and RHEP had become a “difference” subject to third-party resolution, the contours of that difference had evolved over time and became more focused in the months that followed. After Pakistan expressed its intention on 3 July 2015 to request the

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<sup>439</sup> See **P-0083**, Record of the 109<sup>th</sup> Meeting of the Commission, New Delhi, 22 to 25 September 2013, paras. 46–47.

<sup>440</sup> **P-0024**, Record of the 110<sup>th</sup> Meeting of the Commission, Lahore, 23 to 27 August 2014, paras. 28, 29.

<sup>441</sup> **P-0024**, Record of the 110<sup>th</sup> Meeting of the Commission, Lahore, 23 to 27 August 2014, para. 12.

<sup>442</sup> **P-0025**, Record of the 111<sup>th</sup> Meeting of the Commission, New Delhi, 31 January to 4 February 2015, para. 31.

<sup>443</sup> **P-0025**, Record of the 111<sup>th</sup> Meeting of the Commission, New Delhi, 31 January to 4 February 2015, para. 32.

appointment of a neutral expert,<sup>444</sup> and after it made such a request on 24 July 2015,<sup>445</sup> India's resistance to that appointment convinced Pakistan that this difference was not limited to technical disagreements that could be resolved by a neutral expert. After an exchange of correspondence between the Commissioners, in which India reiterated its adherence to the *Baglihar* Determination and rejected Pakistan's interpretation of the *Kishenganga* Partial Award, Pakistan concluded, by 25 February 2016, that the "differences" had legal as well as technical dimensions that "present legal questions of Treaty interpretation that will inevitably recur as India proceeds with other HEP projects on the Western Rivers".<sup>446</sup>

189. Given that "differences" had arisen between the Parties, India's Second Objection posits that, unless the Parties agree that the differences qualify as a dispute, the differences must be directed to a neutral expert for initial determination. India advanced this same argument before the *Kishenganga* Court,<sup>447</sup> which rejected India's argument.<sup>448</sup> That interpretation of Article IX is final and binding upon India. Before quoting from the *Kishenganga* Court's Partial Award on this point, the Court finds it useful to analyze Article IX so as to explain why the *Kishenganga* Court reached the conclusion that it did.

190. Once a "difference" has arisen, Article IX(2)(a) and (b) of the Treaty address how that difference shall "be dealt with". Article IX(2)(a) states:

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.<sup>449</sup>

A neutral expert is a "highly qualified engineer" who is selected by the Parties or, if they cannot agree, by the World Bank.<sup>450</sup> His competence is limited to a prescribed list of technical questions, set out in Part 1 of Annexure F, that are appropriate for determination by a person with expertise in hydrology, dam operation, and dam design.

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<sup>444</sup> **P-0010**, Letter from the PCIW to the ICIW dated 3 July 2015.

<sup>445</sup> **P-0013**, Letter from the PCIW to the Secretary, Ministry of Water and Power, Government of Pakistan and Secretary, Ministry of Water Resources, Government of India dated 24 July 2015.

<sup>446</sup> **P-0023**, Letter from the PCIW to the ICIW dated 25 February 2016, para. 7.

<sup>447</sup> **PLA-0003**, *Kishenganga* Partial Award, paras. 273–278.

<sup>448</sup> **PLA-0003**, *Kishenganga* Partial Award, paras. 476–479.

<sup>449</sup> **PLA-0001**, Treaty, Art. IX(2)(a).

<sup>450</sup> **PLA-0001**, Treaty, Annexure F, Part 2, para. 4.

191. Under the plain terms of Article IX(2)(a), a difference “shall be dealt with by a Neutral Expert” if two conditions are met.

- (a) *First condition:* The difference “in the opinion of either Commissioner, falls within the provisions of Part 1 of Annexure F”.

This provision ensures that at least one of the Commissioners believes the difference falls within a neutral expert’s technical expertise. If neither Commissioner believes that the difference falls within a neutral expert’s competence, then there is no basis for enlisting a neutral expert’s assistance.

- (b) *Second condition:* The difference is subject to a “request of either Commissioner” that it “be dealt with by a Neural Expert”.

This provision ensures that at least one of the Commissioners has actually requested that the two Governments (or failing that the World Bank) appoint a neutral expert to address the difference at issue. If neither Commissioner requests the appointment of a neutral expert—because, for example, they wish to pursue a different avenue for resolving the difference—then there is no basis for enlisting a neutral expert’s assistance, even if the neutral expert would be competent to address the difference.

192. If the two conditions are met, then a neutral expert is appointed and proceeds to address the difference “in accordance with the provisions of Part 2 of Annexure F”. Part 2 of Annexure F sets out the process for appointing the neutral expert and the procedures the neutral expert is to follow in resolving the difference. Significantly, Part 2 states that, if the Commissioners disagree on whether a difference falls within Part 1 of Annexure F, the neutral expert must determine whether he is competent to proceed.<sup>451</sup> Paragraph 7 of Annexure F provides that, if the neutral expert determines that the difference involves a matter—such as a legal question concerning the interpretation of the Treaty—that is beyond his competence, then the neutral expert must inform the Commission that the difference “should be treated as a dispute”.<sup>452</sup>

193. Article IX(2)(b) addresses the consequences if either the difference does not “come within” Article IX(2)(a), or if a neutral expert, following appointment, concludes that he or she is not competent to resolve the difference before him or her. Article IX(2)(b) states:

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<sup>451</sup> **PLA-0001**, Treaty, Annexure F, para. 7.

<sup>452</sup> **PLA-0001**, Treaty, Annexure F, para. 7.

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).<sup>453</sup>

The “provisions of Paragraphs (3), (4) and (5)” are the provisions of Article IX that set out the process for instituting a court of arbitration<sup>454</sup>—an adjudicative body that is not limited to technical issues, but can resolve any question concerning the interpretation or application of the Treaty.

194. Under the plain terms of Article IX(2)(b), “a dispute will be deemed to have arisen” under either of two circumstances:

(a) *First circumstance:* The difference—which arose because the Commission failed to reach agreement on a question—“does not come within the provisions of Paragraph (2)(a)”.

This provision ensures that, if a difference arises and it is not referred to a neutral expert, it can be resolved through a court of arbitration. As previously explained, under the plain terms of Article IX(2)(a), a difference comes within the provisions of Paragraph (2)(a) only if it meets *both* requirements set out in its text: (1) The difference “in the opinion of either Commissioner, falls within the provisions of Part 1 of Annexure F”; *and* (2) The difference is subject to a “request of either Commissioner” that it “be dealt with by a Neutral Expert”. Under the express language of Article IX(2)(a), if the difference does not meet both requirements, it “does not come within the provisions of Paragraph (2)(a)”. A key point, critical to this case, follows logically from the text of Article IX(2)(a) and (b): if a difference arises, then a dispute can arise if neither Commissioner believes the difference falls within the competence of a neutral expert *or* neither Commissioner requests the appointment of a neutral expert.

(b) *Second circumstance:* The difference has met both of the requirements of Paragraph (2)(a), and it has been referred to a neutral expert, but the neutral expert has determined under Paragraph 7 of Annexure F that the difference falls outside his competence, which is limited to technical matters.

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<sup>453</sup> **PLA-0001**, Treaty, Art. IX(2)(b).

<sup>454</sup> See **PLA-0001**, Treaty, Art. IX(3), (4), (5). These provisions are discussed in detail in Part V(C) of this Award. See paras. 224–246, *infra*.

This provision ensures that if a difference is referred to a neutral expert—which can be initiated at the request of one Commissioner—and the neutral expert determines that the difference, in whole or part, falls outside of his prescribed competence, the difference can be redirected to a court of arbitration for its consideration.

195. Article IX(2) also includes a concluding proviso, or *chaussette*, stating:

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.<sup>455</sup>

This proviso preserves the Commission’s discretion to agree to follow a resolution process other than that prescribed by Article IX(2)(a) and (b). By the plain terms of the text, the Commission may (1) direct any difference to a neutral expert; (2) direct any difference to a court of arbitration; or (3) settle the difference in any other way agreed upon by the Commission.

196. India’s Second Objection—which posits that, unless the Parties agree that a difference qualifies as a dispute, the difference must be directed to a neutral expert for initial determination—is demonstrably contrary to the express language of Article IX(2).

197. Article IX(2)’s proviso leaves no doubt that the Parties may agree to deem any difference a dispute and then direct that dispute to a court of arbitration. But Article IX(2) contains no provision requiring that, absent such agreement, the Parties must first seek recourse to a neutral expert.

198. Article IX(2)(a), by its plain terms, requires resort to a neutral expert only if “either Commissioner” concludes that the difference falls within the competence of a neutral expert *and* “either Commissioner” requests the appointment of a neutral expert. India’s position would make sense only if one excised critical language from Article IX(2)(a) so that it read:

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.

If that critical language were removed, then any difference identified by one of the Commissioners as falling within the provisions of Part 1 of Annexure F would have to be directed to a neutral expert—unless the Parties agreed otherwise under Article IX(2)’s proviso. But neither the Parties nor this Court is free to selectively erase key Treaty language. That critical language ensures that, if neither Commissioner requests a neutral expert, then the difference “does not come within the

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<sup>455</sup> PLA-0001, Treaty, Art. IX(2).

provisions of Paragraph (2) (a)”, and a “dispute will be deemed to have arisen” under Article IX(2)(b) upon recourse to Article IX(3), (4), and (5).<sup>456</sup>

199. India asserts that Article IX, read in conjunction with Annexures F and G, provides for a “graded dispute resolution mechanism”.<sup>457</sup> That is true, but not in the rigid sense that India urges. Article IX(1) requires the Parties—within the Commission—to attempt resolution through agreement. If agreement cannot be reached, Article IX(2)(a) provides either Commissioner with the option of invoking the services of a neutral expert, but that option must be exercised through an actual request for the appointment of a neutral expert by the two Governments (or failing that, by the World Bank). If the option provided in Article IX(2)(a) is not exercised, then Article IX(2)(b) provides the alternative option of invoking the services of a court of arbitration. This stepwise procedure ensures that the Parties will attempt to reach prompt consensual resolution, but if they do not, they can seek the form of third-party resolution best suited to their needs.
200. For these reasons, the *Kishenganga* Court rejected India’s interpretation of the Treaty on this issue.<sup>458</sup> The heart of its analysis was as follows:

478. In the Court’s view, the conjunction within Article IX(2)(a) of both references manifests the Parties’ intention for the Commissioners to exercise a dual role under that Article, both as the initiators of the neutral expert process and a part of a mechanism that requires recourse to a neutral expert in certain circumstances. Article IX(2)(a) thus requires that a difference be referred to a neutral expert if either Commissioner believes that it relates to one of the identified technical matters and prefers that it be resolved by a neutral expert. This requirement only becomes effective, however, if a request for the appointment of a neutral expert is actually made. It is insufficient for a Commissioner merely to express the view that a difference would, at some point, be an appropriate matter for a neutral expert.

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<sup>456</sup> The travaux préparatoires of the Treaty provides further evidence that the drafters of the Treaty specifically intended for the “request” for a neutral expert to be necessary to “come within the provisions of Paragraph (2)(a)”. The 9 December 1959 Draft of Art. IX included language requiring “a request of either Commissioner” in a separate subparagraph. The final version merged that language into Art. IX(2)(a) so that the request would “come within” that paragraph. See **PLA-0003**, *Kishenganga* Partial Award, para. 477, n. 687.

<sup>457</sup> **P-0001**, 21 December 2022 Letter, para. 9; **P-0001**, 21 December 2022 Explanatory Note, para. 13.

<sup>458</sup> **PLA-0003**, *Kishenganga* Partial Award, paras. 476–479.

479. For the Court, this is the natural consequence of the combination, within a single sentence, of the two elements of Article IX(2)(a), and is the only interpretation to give full effect to the words of the Article. The phrase “in the opinion of either Commissioner” serves to guarantee either Party’s ability to empower a neutral expert in respect of the many critical technical questions identified in Annexure F. Under Article IX(2)(a), a disagreement regarding the competence of a neutral expert is not a hurdle to appointment; any objection will simply be resolved by the Expert himself. At the same time, the requirement of an actual request is necessary, in the Court’s view, to avoid the procedural impasse that could arise, for example, under the formulation recalled in the December 1959 draft: a Commissioner could express the view that a difference fell within Annexure F, thereby unequivocally foreclosing access to a court of arbitration, and yet decline to request a neutral expert to resolve the difference. Such a “pathological clause” (to use the parlance of international arbitration) was commendably avoided in the final version of Article IX.<sup>459</sup>
201. The *Kishenganga* Court’s concern about a “procedural impasse” is particularly pertinent. As that Court pointed out, if one Commissioner could insist that a difference be resolved by a neutral expert, but then decline to request an appointment, it would frustrate the resolution of the difference. The construction that the *Kishenganga* Court adopted, which this Court follows, prevents this potential for stalemate by enabling the other Commissioner to request a neutral expert. And if that Commissioner concludes that the difference should be dealt with by a court of arbitration, rather than a neutral expert, the Commissioner could proceed under Article IX(2)(b) to have the difference resolved as a dispute “in accordance with the provisions of Paragraphs (3), (4) and (5)”.<sup>460</sup>
202. As noted in Part V(B)(1)(a), India argues, under its interpretation, that none of the conditions necessary for a dispute to arise have been satisfied.<sup>461</sup> Its arguments that the Commissioners have not agreed to bypass a neutral expert and that a neutral expert has not determined that any of the “differences” should be treated as disputes<sup>462</sup> are inapposite under the settled interpretation of the Treaty’s text.
203. India’s remaining argument—that both Commissioners have sought the appointment of a neutral expert in relation to the differences regarding the KHEP and RHEP, thereby precluding the emergence of a dispute<sup>463</sup>—fails on the face of the factual record. In this regard, India recounts at various points that: (1) on 3 July 2015, Pakistan’s Commissioner notified India’s Commissioner

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<sup>459</sup> **PLA-0003**, *Kishenganga* Partial Award, paras. 478–479.

<sup>460</sup> **PLA-0001**, Treaty, Art. IX(2)(b).

<sup>461</sup> See paras. 155–160, *supra*.

<sup>462</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 7(iii).

<sup>463</sup> **P-0001**, 21 December 2022 Explanatory Note, paras. 7(iii), 23.

of his intention to request the appointment of a neutral expert,<sup>464</sup> (2) on 24 July 2015, Pakistan Commissioner requested the Governments of India and Pakistan to jointly appoint a neutral expert, enclosing a draft statement of points of difference;<sup>465</sup> (3) on 12 November 2015, Pakistan invited India to propose modalities for the appointment of a neutral expert within ten days;<sup>466</sup> and (4) on 11 August 2016, India's Commissioner notified Pakistan's Commissioner of his intention to request the appointment of a neutral expert.<sup>467</sup>

204. As to points (1) through (3), India has no answer to Pakistan's letter dated 25 February 2016, wherein Pakistan expressly revoked its request for the appointment of a neutral expert in the face of India's repeated rejection of the request.<sup>468</sup> That letter stated in unequivocal terms:

As reflected in the above correspondence, the Government of India has rejected the invitation of 24 July 2015 to jointly appoint a Neutral Expert pursuant to Paragraph 4(b)(i) of Annexure F of the Indus Waters Treaty, and that invitation has lapsed and is hereby formally revoked.<sup>469</sup>

205. India and its Commissioner expressly acknowledged that revocation in subsequent correspondence.<sup>470</sup> Accordingly, there was no "live request" from Pakistan for a neutral expert as of 25 February 2016—and the differences therefore did not "come within the provisions of Paragraph (2)(a)"—when Pakistan then began the process of having those differences settled as disputes "in accordance with Paragraphs (3), (4) and (5)".
206. India's suggestion that "the Treaty does not envisage the 'lapsing' of a request to appoint a [neutral expert]"<sup>471</sup> finds no support in the text of the Treaty. The Treaty nowhere prohibits a Party

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<sup>464</sup> **P-0010**, Letter from the PCIW to the ICIW dated 3 July 2015.

<sup>465</sup> **P-0013**, Letter from the PCIW to the Secretary, Ministry of Water and Power, Government of Pakistan and Secretary, Ministry of Water Resources, Government of India dated 24 July 2015.

<sup>466</sup> **P-0093**, Note Verbale from Pakistan to India dated 12 November 2015.

<sup>467</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 7(iii); **P-0032**, Letter from the ICIW to the PCIW dated 11 August 2016, para. 3.

<sup>468</sup> **P-0023**, Letter from the PCIW to the ICIW dated 25 February 2016.

<sup>469</sup> **P-0023**, Letter from the PCIW to the ICIW dated 25 February 2016, para. 4.

<sup>470</sup> **P-0036**, Note Verbale from India to Pakistan dated 30 August 2016, para. i; **P-0027**, Letter from the ICIW to the PCIW dated 14 March 2016, para. 15; **P-0032**, Letter from the ICIW to the PCIW dated 11 August 2016, para. 3; **P-0037**, Letter from the ICIW to the PCIW dated 6 September 2016. Additionally, India treated Pakistan's request as revoked through its actions. India separately indicated its intention to request the appointment of a neutral expert on 11 August 2016, and 6 September 2016, and it requested the appointment of a neutral expert on 4 October 2016. **P-0032**, Letter from the ICIW to the PCIW dated 11 August 2016, para. 5; **P-0057**, Letter from the ICIW to the PCIW dated 6 September 2016; **P-0156**, India's Request for the Appointment of a Neutral Expert dated 4 October 2016. Those actions would have been unnecessary if Pakistan's earlier request remained "live".

<sup>471</sup> **P-0001**, 21 December 2022 Letter, para. 16.

from withdrawing a request. Contrary to India's suggestion, the provisions enabling the World Bank to appoint a neutral expert in the absence of a joint request do not implicitly preclude a Party from unilaterally withdrawing its request.<sup>472</sup> Rather, those provisions enable a Party to go forward with the appointment of a neutral expert in the absence of cooperation from the other Party,<sup>473</sup> which implicitly allows for that Party to elect unilaterally to revoke its request in the face of changed circumstances or resistance to the appointment from the other Party. Moreover, India's express acceptance of Pakistan's revocation undermines India's assertion that revocation is not permissible; indeed, India's express acceptance is suggestive of an interpretation of the Treaty by both Parties, through their practice, that the Treaty allows such revocation.<sup>474</sup>

207. As to point (4), India's Commissioner's notification of his intention to request the appointment of a neutral expert on 11 August 2016, did not qualify as a "request" for the appointment of a neutral expert. Mere notification of an *intention* to request the appointment of a neutral expert does not initiate a neutral expert proceeding in the sense of precluding the emergence of a "dispute" under Article IX(2). As the *Kishenganga* Court concluded in its Partial Award, which is final and binding upon the Parties:

Article IX(2)(a) thus requires that a difference be referred to a neutral expert if either Commissioner believes that it relates to one of the identified technical matters and prefers that it be resolved by a neutral expert. This requirement only becomes effective, however, if a request for the appointment of a neutral expert is actually made. It is insufficient for a Commissioner merely to express the view that a difference would, at some point, be an appropriate matter for a neutral expert.<sup>475</sup>

208. The *Kishenganga* Court recognized that a notification of the intent to request a neutral expert is only the first step in a multi-step process set out in Annexure F: *Step 1* entails the Commissioner of one Party notifying the Commissioner of the other Party of his or her intention to request the appointment of a neutral expert;<sup>476</sup> *Step 2* entails a two week period during which the two Commissioners shall endeavor to prepare a joint statement on the points of difference;<sup>477</sup> *Step 3* entails the first Commissioner requesting the Governments of India and Pakistan to jointly appoint

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<sup>472</sup> See **PLA-0001**, Treaty, Annexure F, para. 16.

<sup>473</sup> **PLA-0001**, Treaty, Annexure F, para. 4(b)(ii).

<sup>474</sup> See **PLA-0005**, VCLT, Art. 31(3)(b) (identifying as an element of treaty interpretation "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation").

<sup>475</sup> **PLA-0003**, *Kishenganga* Partial Award, para. 478.

<sup>476</sup> **PLA-0001**, Treaty, Annexure F, para. 5(a).

<sup>477</sup> **PLA-0001**, Treaty, Annexure F, para. 5(b).

a neutral expert,<sup>478</sup> and *Step 4* entails, in the absence of a joint appointment by the two Governments after one month, a request to the World Bank for the appointment of a neutral expert.<sup>479</sup> Completion of the first step alone does not constitute a “request” within the meaning of Article IX(2)(a).

209. When Pakistan notified India, on 25 February 2016, that its invitation to appoint a neutral expert had lapsed, it also informed India that it was commencing the process referenced in Article IX(2) for seeking the institution of a court of arbitration.<sup>480</sup> Pakistan expressed its view that the discussions and correspondence over the past years had revealed that “the issues over the Kishenganga and Ratle HEPs are substantially, if not predominantly, legal in nature”.<sup>481</sup> It noted, for example, the Parties’ disagreements over the proper method of making pondage calculations, the relevance of the neutral expert’s determinations in the *Baglihar* Determination, and the applicability of the *Kishenganga* Court’s ruling on drawdown flushing.<sup>482</sup> Pakistan stated that the Parties’ disagreements “present legal questions that will inevitably recur as India proceeds with other HEP projects on the Western Rivers.”<sup>483</sup> As Pakistan correctly observed, these are matters outside of a neutral expert’s competence under Part 1 of Annexure F and qualify as “disputes” within the meaning of Article IX(2)(b).
210. Furthermore, Pakistan has raised issues of interim relief, declaratory relief, and other remedies, which are also beyond the competence of a neutral expert.<sup>484</sup> As Pakistan has pointed out, if a Party has attempted to reach agreement with the other Party on questions concerning works subject to the Treaty’s provisions, and has identified differences that need to be resolved before construction begins, the Party is entitled to request interim relief before irreparable harm may occur.<sup>485</sup> India’s interpretation of Article IX(2), which would postpone court of arbitration

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<sup>478</sup> **PLA-0001**, Treaty, Annexure F, para. 5(c).

<sup>479</sup> **PLA-0001**, Treaty, Annexure F, para. 4(b)(ii).

<sup>480</sup> **P-0023**, Letter from the PCIW to the ICIW dated 25 February 2016, para. 8.

<sup>481</sup> **P-0023**, Letter from the PCIW to the ICIW dated 25 February 2016, para. 5.

<sup>482</sup> **P-0023**, Letter from the PCIW to the ICIW dated 25 February 2016, paras. 5–6.

<sup>483</sup> **P-0023**, Letter from the PCIW to the ICIW dated 25 February 2016, para. 7.

<sup>484</sup> Request for Arbitration, paras. 90–97.

<sup>485</sup> See **PLA-0001**, Treaty, Annexure G, para. 28. (“Either Party may request the Court [of Arbitration] at its first meeting to lay down, pending the Award, such interim measures as, in the opinion of that Party, are necessary to safeguard its interests under the Treaty with respect to the matter in dispute, or to avoid prejudice to the final solution or aggravation of extension of the dispute”). See *Indus Waters Kishenganga Arbitration (Pakistan v India)*, PCA Case No. 2011-01, Order on the Interim Measures Application of Pakistan dated 6 June 2011, 18 February 2013, 31 Rep. of Intl. Arb. Awards 6.

proceedings until the neutral expert has confirmed what is clear—that providing such relief is beyond his or her competence—would delay and potentially thwart the ability of a court of arbitration to provide timely interim relief.

211. More fundamentally, the erection of unnecessary obstacles is inconsistent with the Treaty’s overarching goal 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”.<sup>486</sup>
212. In summary, Article IX(1) required the Commissioners to endeavor to resolve Pakistan’s questions concerning the KHEP and RHEP. After years of discussions, spanning numerous Commission meetings, they failed to reach agreement on those questions. Consequently, those questions, as refined over the course of those discussions, became differences within the meaning of Article IX(2) no later than 25 February 2016. While Pakistan initially invited India to join it in appointing a neutral expert to address those differences, India declined, and Pakistan then validly revoked that invitation. The differences therefore did not come within the provisions of Article IX(2)(a), which govern recourse to a neutral expert. Under Article IX(2)(b), the differences existing between the Parties as of 25 February 2016 qualified as disputes that could be settled through the provisions of Article IX(3), (4), and (5).
213. Because a dispute did arise within the meaning of Article IX(2)(b), the Court is not barred by Article IX(2)(a) from proceeding. The Court rejects India’s Second Objection to the competence of the Court.

**C. INDIA’S THIRD OBJECTION: THE COURT IS NOT COMPETENT BECAUSE THE REQUIREMENTS OF ARTICLE IX(3), (4), AND (5) WERE NOT MET**

**1. The Parties’ Positions**

**(a) India’s arguments**

214. India’s Third Objection concerns the procedural requirements stipulated by Article IX(3), (4), and (5) of the Treaty for the establishment of a court of arbitration.<sup>487</sup> For the reasons outlined above,<sup>488</sup> India maintains that a “dispute” has not arisen, which thereby precludes the application

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<sup>486</sup> PLA-0001, Treaty, Preamble.

<sup>487</sup> P-0001, 21 December 2022 Explanatory Note, paras. 5(iii), 6, 8–12, 18–19.

<sup>488</sup> See paras. 155–160, *supra*.

of Article IX(3), (4), and (5).<sup>489</sup> Even if a dispute has arisen, India considers that, pursuant to Article IX(5), a court of arbitration can only be established in circumstances where either: (i) the Parties have agreed to refer the matter to a court of arbitration pursuant to Article IX(5)(a),<sup>490</sup> or (ii) the Parties have satisfied the requirements of Article IX(3) and (4) and, despite any attempts at negotiation and/or mediation, the “dispute” could not be settled.<sup>491</sup> India submits that the “Parties never arrived at any agreement to refer the outstanding differences to arbitration” and have not satisfied the procedural requirements of Article IX(3), (4), and (5).<sup>492</sup>

215. Article IX(3) requires that, as soon as a “dispute” arises, at the request of either Commissioner, the Commission shall, as early as practicable, provide a report to the two Governments, stating that a dispute has arisen, the points on which the Commission is in agreement and the issues in dispute, the views of each Commissioner on these issues, and his or her reasons therefor. India argues that, to date, no such report has been prepared by the Commissioners pursuant to Article IX(3).<sup>493</sup> The Court understands that, by this submission, India considers that Article IX(3) is a prerequisite to recourse to Article IX(4), such that a report must be prepared *jointly* by the Commissioners to elucidate the issues in dispute and each Commissioner’s position, before negotiations can be initiated pursuant to Article IX(4).

216. Further, India considers that the requirements of Article IX(4) have not been satisfied:

(a) *First*, India observes that its willingness to discuss this matter at the Government level was “purely in the interest of good neighborly relations” and can never be construed to mean that a “dispute” had arisen as defined in Article IX(2)(b) of the Treaty.<sup>494</sup> In this regard, India emphasizes that it accepted and participated in the negotiations with Pakistan from 14 to 15 July 2016 in good faith, and in an effort to resolve the issue bilaterally. However, India’s participation was without “prejudice to India’s stand on inadmissibility of taking the matters to the Court of Arbitration which are under the purview of the Commission or at most of Neutral Expert”.<sup>495</sup> The Court understands India’s position to be that, given that

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<sup>489</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 8.

<sup>490</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 11(i), citing **PLA-0001**, Treaty, Art. IX(5)(a), Annexure G, para. 2(a).

<sup>491</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 11(ii).

<sup>492</sup> **P-0001**, 21 December 2022 Explanatory Note, paras. 11(ii), 18.

<sup>493</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 19.

<sup>494</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 19.

<sup>495</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 10.

it attended the negotiations on a “without prejudice” basis, India’s participation in the negotiations cannot be taken to satisfy the requirement for there to be negotiations to resolve the “dispute” under Article IX(4).

- (b) *Second*, and in any event, India considers that Article IX(4) envisages a genuine attempt by the Governments of both India and Pakistan to settle the “dispute” that has arisen in a cooperative spirit, including by utilizing the services of mediators acceptable to them.<sup>496</sup> This expectation of a genuine attempt, India argues, “runs through all such international treaties”.<sup>497</sup> However, India considers that the negotiations “could not have [had] a positive outcome” because of Pakistan’s non-cooperation.<sup>498</sup> Specifically, India states that it “extended an invitation to Pakistan Indus Water Commission to undertake a tour of inspection of the [KHEP] and offered reduction of pondage in Kishenganga”.<sup>499</sup> Yet, despite India’s suggestion of “another early meeting to resolve the issues bilaterally”, Pakistan “continued to insist that the meeting would be the final meeting for seeking [a] solution at the government level”.<sup>500</sup> Accordingly, due to Pakistan’s failure to undertake a genuine attempt to settle the “dispute”, India appears to contend that Pakistan has not satisfied the requirements of Article IX(4), such that it could not then seek the establishment of a court of arbitration pursuant to Article IX(5).<sup>501</sup>

**(b) *Pakistan’s arguments***

217. Pakistan contends that the factual record clearly demonstrates that the relevant and applicable procedural requirements of the Treaty have been “meticulously fulfilled”.<sup>502</sup>
218. *First*, Pakistan submits that Article IX(4) makes clear that the Treaty does not require a joint report in order for a court of arbitration to be seized of the dispute.<sup>503</sup> Pakistan observes that Article IX(3) provides that the process of establishing a court of arbitration may be started at the initiative of one of the Commissioners, who may request that the Commissioners jointly report

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<sup>496</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 9.

<sup>497</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 9.

<sup>498</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 10.

<sup>499</sup> **P-0036**, Note Verbale from India to Pakistan dated 30 August 2016, para. iii.

<sup>500</sup> **P-0036**, Note Verbale from India to Pakistan dated 30 August 2016, para. iv.

<sup>501</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 10.

<sup>502</sup> Pakistan’s Response, para. 75.

<sup>503</sup> Pakistan’s Response, para. 155.

the fact of the dispute and the details of the same to the Parties for further action.<sup>504</sup> However, Pakistan notes, Article IX(4) expressly provides that if “this report is being unduly delayed in the Commission”, either Government may invite the other to resolve the dispute by agreement.<sup>505</sup> When these provisions are read in conjunction, Pakistan contends, it is clear that an invitation to negotiate may be made either: (i) upon the Parties’ receipt of the Commission’s report prepared pursuant to Article IX(3); or (ii) upon either Party’s request, where that Party has come to the subjective conclusion that the report is being unduly delayed in the Commission.<sup>506</sup>

219. In accordance with Article IX(3), Pakistan notes that its Commissioner presented his statement of points of dispute in his letter of 25 February 2016, which set out in detail the disputes as he then saw them, and expressly sought India’s position as to the enclosed “Statement of Points of Dispute” pursuant to Article IX(3) of the Indus Waters Treaty.<sup>507</sup> In that letter, Pakistan’s Commissioner also indicated that, if India’s position on the points of dispute was not received within two weeks, Pakistan’s Commissioner would transmit the “Statement of Points of Dispute” to the Parties for their consideration in accordance with Article IX(4).<sup>508</sup> However, in his letter dated 14 March 2016, India’s Commissioner made it clear that he considered the 25 February 2016 letter to be “improper and invalid”.<sup>509</sup> From this, Pakistan’s Commissioner understood that a joint report would not be produced.<sup>510</sup> Accordingly, Pakistan concluded, in a Note Verbale to India on 29 March 2016, that “the Report of the Commission, as provided in Article IX (3), is being unduly delayed” and invited India to engage in negotiations under Article IX(4).<sup>511</sup> Pakistan submits that this period of almost five weeks was sufficient, in the light of India’s failure to cooperate, for Pakistan to come to the subjective conclusion that the report

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<sup>504</sup> Pakistan’s Response, para. 152.

<sup>505</sup> Pakistan’s Response, para. 247.

<sup>506</sup> Pakistan’s Response, para. 154.

<sup>507</sup> Pakistan’s Response, para. 248, citing **P-0023**, Letter from the PCIW to the ICIW dated 25 February 2016, para. 8. Hearing on Competence Tr., (Day 1), 11 May 2023, p. 129.2–8.

<sup>508</sup> **P-0023**, Letter from the PCIW to the ICIW dated 25 February 2016, para. 8.

<sup>509</sup> Hearing on Competence Tr., (Day 1), 11 May 2023, pp. 129.9–130.1; **P-0027**, Letter from the ICIW to the PCIW dated 14 March 2016, para. 2.

<sup>510</sup> Pakistan’s Response, paras. 248–249. See also **P-0023**, Letter from the PCIW to the ICIW dated 25 February 2016, para. 9; Hearing on Competence Tr., (Day 1), 11 May 2023, p. 130.13–17.

<sup>511</sup> **P-0028**, Note Verbale from Pakistan to India dated 29 March 2016.

was being unreasonably delayed and, therefore, Pakistan was entitled to commence inter-governmental negotiations pursuant to Article IX(4).<sup>512</sup>

220. *Second*, regarding Article IX(4), Pakistan submits that the use of the word “may” makes clear that recourse to negotiations is permissive and discretionary; it is not mandatory.<sup>513</sup> Accordingly, for Pakistan, inter-State negotiations (including with the good offices of mediators) may be pursued, but there is no requirement to do so.<sup>514</sup> As the International Court of Justice held in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, provisions of this kind grant States “a very considerable discretion” in their implementation.<sup>515</sup> For Pakistan, the essential requirement is that the exercise of that discretion must not be arbitrary or abusive.<sup>516</sup>
221. In any event, pursuant to Article IX(4), Pakistan recalls that it notified India on 29 March 2016 that it had come “to the conclusion that [the Article IX(3) report] is being unduly delayed in the Commission”, invited India to engage in negotiations under Article IX(4), nominated its own representatives, and noted that, if India did not set a time and place for the meeting within 30 days, “the Government of Pakistan reserves the right to establish a Court of Arbitration pursuant to Article IX(5)(c) of the Treaty”.<sup>517</sup> Pakistan notes that India agreed to negotiations and named its negotiators on 28 April 2016.<sup>518</sup> The details of the negotiations were then finalized on 28 June 2016.<sup>519</sup> According to Pakistan, those negotiations were subsequently held from 14 to 15 July 2016.<sup>520</sup>

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<sup>512</sup> Hearing on Competence Tr., (Day 1), 11 May 2023, pp. 130.23–133.11; Pakistan’s Response, paras. 247–249.

<sup>513</sup> Pakistan’s Response, para. 154.

<sup>514</sup> Pakistan’s Response, para. 154.

<sup>515</sup> Pakistan’s Response, para. 156, citing **PLA-0007**, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, Judgment [2008] ICJ Rep 177, para. 145. See also Hearing on Competence Tr., (Day 1), 11 May 2023, pp. 229.21–130.6.

<sup>516</sup> Pakistan’s Response, para. 156, citing **PLA-0008**, *Immunities and Criminal Proceedings (Equatorial Guinea v France)*, Judgment [2020] ICJ Rep 300, para. 7.

<sup>517</sup> Pakistan’s Response, paras. 224, 255, citing **P-0028**, Note Verbale from Pakistan to India dated 29 March 2016. Hearing on Competence Tr., (Day 1), 11 May 2023, pp. 130.23–131.2, 134.2–16, 134.20–135.22, 175.24–176.5.

<sup>518</sup> Pakistan’s Response, para. 256, citing **P-0029**, Note Verbale from India to Pakistan dated 28 April 2016, para. 2.

<sup>519</sup> Pakistan’s Response, para. 256, citing **P-0030**, Note Verbale from India to Pakistan dated 28 June 2016.

<sup>520</sup> **P-0031**, Minutes of Secretary Level Meeting on Kishenganga and Ratle Hydroelectric Plants, New Delhi, 14 to 15 July 2016.

222. *Third*, Pakistan observes that the final step in the Article IX dispute settlement framework is Article IX(5), which sets out the conditions under which a Party is permitted to request arbitration of a dispute before a court of arbitration.<sup>521</sup> As is clear from the terms of Article IX(5)(b) and (c), Pakistan argues, it is not necessary that Article IX(4) negotiations be objectively exhausted or futile.<sup>522</sup> Rather, Article IX(5)(b) and (c) set out a subjective standard that is focused on the view of the requesting Party: Article IX(5)(b) refers to the “opinion” of the requesting Party that the dispute is not likely to be resolved by negotiation or mediation; while Article IX(5)(c) refers to the “conclusion” of the requesting Party that the other Party is unduly delaying the negotiations.<sup>523</sup>
223. In the present case, Pakistan recalls that it transmitted its Request for Arbitration to India on 19 August 2016, along with a Note Verbale expressly noting the failure of the 14 to 15 July 2016 negotiations and stating that Pakistan had “come to the conclusion that the Disputes are not likely to be resolved by further negotiation per Article IX(5)(b)”.<sup>524</sup> Pakistan argues that the negotiations held from 14 to 15 July 2016 show a good faith effort by both sides that were ultimately, however, to no avail.<sup>525</sup> Specifically, Pakistan notes that the minutes of the negotiations record that the various issues were “discussed in exhaustive detail”<sup>526</sup> and that the Secretaries took express note of “the flexibility shown by both sides but regretted lack of adequate convergence”.<sup>527</sup> Accordingly, despite India’s offers of a further meeting, Pakistan observes that it “reiterated its stance that the broad divergence ... is unlikely to be bridged in another meeting” and noted “the urgent importance of resolving all outstanding disputes ... through referral to an impartial forum as provided for in the [Treaty]”.<sup>528</sup> In the light of this, and the fact that the construction phase of the KHEP was nearing completion,<sup>529</sup> Pakistan recalls that it informed India that it had “come to

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<sup>521</sup> Pakistan’s Response, para. 157.

<sup>522</sup> Hearing on Competence Tr., (Day 1), 11 May 2023, p. 231.12–13.

<sup>523</sup> Pakistan’s Response, para. 159. Hearing on Competence Tr., (Day 1), 11 May 2023, pp. 225.20–230.6.

<sup>524</sup> Pakistan’s Response, para. 259, citing **P-0034**, Note Verbale from Pakistan to India dated 19 August 2016, p. 1. Hearing on Competence Tr., (Day 1), 11 May 2023, pp. 131.18–132.1.

<sup>525</sup> Pakistan’s Response, para. 256.

<sup>526</sup> Pakistan’s Response, para. 256.1, citing **P-0031**, Minutes of Secretary Level Meeting on Kishenganga and Ratle Hydroelectric Plants, New Delhi, 14 to 15 July 2016, para. 4.

<sup>527</sup> Pakistan’s Response, para. 256.3, citing **P-0031**, Minutes of Secretary Level Meeting on Kishenganga and Ratle Hydroelectric Plants, New Delhi, 14 to 15 July 2016, para. 7.

<sup>528</sup> Pakistan’s Response, para. 256.4, citing **P-0031**, Minutes of Secretary Level Meeting on Kishenganga and Ratle Hydroelectric Plants, New Delhi, 14 to 15 July 2016, paras. 7–8.

<sup>529</sup> Pakistan’s Response, para. 258, citing **P-0033**, Letter from the ICIW to the PCIW dated 12 August 2016.

the conclusion that the Disputes are not likely to be resolved by further negotiation per Article IX(5)(b)” and transmitted its Request for Arbitration.<sup>530</sup>

## 2. The Court’s Analysis

224. The Government of India argues that the provisions of Article IX(3), (4), and (5) of the Treaty were not properly invoked, as there was no “dispute” that had arisen within the meaning of Article IX(2).<sup>531</sup> The argument that a dispute has not arisen was addressed and rejected in the prior section.<sup>532</sup> The Government of India further contends that the Court is not competent because the requirements of Article IX(3), (4), and (5) were not met. Those arguments are addressed in this section.

225. India maintains that the requirements of Article IX(3) were not met. Article IX(3) provides:

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

226. India argues that no report under Article IX(3) was ever prepared by the Commissioners.<sup>533</sup> While that is true, it was not for a lack of effort on the part of Pakistan’s Commissioner. As Article IX(3) makes clear, either Commissioner may request that the other Commissioner participate in concluding a joint report on the issues in dispute. The 25 February 2016 letter from Pakistan’s Commissioner to India’s Commissioner—by which, as previously discussed,<sup>534</sup> Pakistan announced its intention to pursue resolution of the dispute through a court of arbitration—presented a statement by Pakistan’s Commissioner of the points in dispute<sup>535</sup> and sought his counterpart’s views “pursuant to Article IX(3) of the Indus Waters Treaty”. Specifically, Pakistan’s Commissioner stated:

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<sup>530</sup> Pakistan’s Response, para. 259, citing **P-0034**, Note Verbale from Pakistan to India dated 19 August 2016. Hearing on Competence Tr., (Day 1), 11 May 2023, p. 176.6–11.

<sup>531</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 18.

<sup>532</sup> See paras. 166–213, *supra*.

<sup>533</sup> **P-0001**, 21 December 2022 Explanatory Note, paras. 8, 19.

<sup>534</sup> See paras. 98, 188, 209, 212, *supra*.

<sup>535</sup> **P-0023**, Letter from the PCIW to the ICIW dated 25 February 2016, annexure.

Accordingly, pursuant to Article IX(3) of the Indus Waters Treaty, I ask you to insert India's position on the points of dispute set forth in the "Statement of Points of Dispute" annexed to this letter. If you fail to do so within two week's time, the Statement of Points of Dispute will be transmitted to the Governments of Pakistan and India for their consideration in accordance with Article IX(4) of the Indus Waters Treaty.<sup>536</sup>

227. By that statement, Pakistan's Commissioner was expressly seeking to conclude a joint report as envisaged under Article IX(3). India's Commissioner responded on 14 March 2016 not by inserting India's position with respect to the points of dispute, but by stating that he considered the 25 February 2016 letter to be "improper and invalid".<sup>537</sup>
228. Contrary to India's position, the Treaty does not require that a report be completed for the process of initiating a court of arbitration proceeding to move forward. Anticipating that a Party might not cooperate in preparing a report, Article IX(4) of the Treaty provides:

Either Government may, following receipt of the report referred to in Paragraph (3), **or if it comes to the conclusion that the report is being unduly delayed in the Commission**, invite the other Government to resolve the dispute by agreement. In doing so, it shall state the names of its negotiators and their readiness to meet with the negotiators to be appointed by the other Government at a time and place to be indicated by the other Government. To assist in these negotiations, the two Governments may agree to enlist the services of one or more mediators acceptable to them.<sup>538</sup>

229. Thus, Article IX(4) envisages a situation arising where a Commissioner declines to complete a joint report or otherwise "unduly delays" such a report, in which case the process may continue through an invitation at the diplomatic level for negotiations to resolve the dispute by agreement. On 29 March 2016, Pakistan sent a Note Verbale to India stating: "As three weeks have elapsed and the ICIW has failed to provide India's position in the Statement of Points of Dispute, the Report of the Commission, as provided in Article IX (3), is being unduly delayed".<sup>539</sup>
230. In concluding that this requirement of "undue delay" in Article IX(4) was met, the Court regards five elements as bearing emphasis. *First*, while there is no set time period for completion of the joint report envisaged in Article IX(3), other provisions of the Treaty concerning the pursuit of dispute settlement envisage time periods of two weeks for one Commissioner to respond to the other.<sup>540</sup> Indeed, the Treaty is generally interested in procedures for dispute resolution that move along with all due speed, to be measured in weeks not months. *Second*, the letter of

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<sup>536</sup> **P-0023**, Letter from the PCIW to the ICIW dated 25 February 2016, para. 8.

<sup>537</sup> **P-0027**, Letter from the ICIW to the PCIW dated 14 March 2016, para. 2.

<sup>538</sup> **PLA-0001**, Treaty, Art. IX(4) (emphasis added).

<sup>539</sup> **P-0028**, Note Verbale from Pakistan to India dated 29 March 2016, para. 2.

<sup>540</sup> See **PLA-0001**, Treaty, Annexure F, para. 5(b), (c).

25 February 2016 of Pakistan's Commissioner requested the completion of the joint report within two weeks. As such, a specific timetable was proposed for completing the joint report. The record indicates that Pakistan's Commissioner, by letter dated 11 March 2016, agreed to a further one-week extension for the response of India's Commissioner.<sup>541</sup>

231. *Third*, India's Commissioner's letter in response dated 14 March 2016 did not indicate any need for additional time for completing the joint report. Rather, India's Commissioner's letter essentially communicated an unwillingness to complete the joint report.<sup>542</sup> *Fourth*, Pakistan ultimately expressed its conclusion that the report was being "unduly delayed" in its Note Verbale of 29 March 2016, a full month after the Pakistan Commissioner's initial request for completion of the report, thus allowing some five weeks for India's Commissioner to participate in completing the joint report. *Finally*, the language of Article IX(4), which provides that "[e]ither government may ... if it comes to the conclusion that this report is being unduly delayed", is oriented toward the view of "undue delay" as a subjective one by the Party seeking the joint report. As noted, Pakistan expressly came to its conclusion of "undue delay" a month after its request. Its determination did not evince any element of arbitrariness or bad faith.
232. As for the remaining requirements of Article IX(4), Pakistan's Note Verbale of 29 March 2016—after concluding that there was undue delay in concluding the joint report within the Commission—continued by: (a) inviting India "in terms of Article IX(4) of the Treaty" to resolve the dispute by agreement; (b) identifying its negotiators; and (c) stating their readiness to meet with India's negotiators at a time and place to be indicated by India.<sup>543</sup> Further, in its Note Verbale, Pakistan proposed a specific individual who could serve as a mediator "if the two Governments agree to enlist the services of a mediator".<sup>544</sup> Pakistan concluded by indicating that if India did not set a time and place for the meeting within 30 days "the Government of Pakistan reserves the right to establish a court of arbitration pursuant to Article IX(5)(c) of the Treaty".<sup>545</sup>
233. India argues that the negotiations envisaged by Article IX(4) never in fact occurred, so as to then allow resort to a court of arbitration pursuant to Article IX(5). The Court, however, views the Parties as having held, in July 2016, an inter-governmental negotiation as contemplated in

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<sup>541</sup> **P-0097**, Letter from the PCIW to the ICIW dated 11 March 2016. See also **P-0028**, Note Verbale from Pakistan to India dated 29 March 2016.

<sup>542</sup> **P-0027**, Letter from the ICIW to the PCIW dated 14 March 2016, para. 2.

<sup>543</sup> **P-0028**, Note Verbale from Pakistan to India dated 29 March 2016.

<sup>544</sup> **P-0028**, Note Verbale from Pakistan to India dated 29 March 2016.

<sup>545</sup> **P-0028**, Note Verbale from Pakistan to India dated 29 March 2016.

Article IX(4) to resolve the dispute that had been identified by Pakistan. By letter of 28 April 2016, India responded to Pakistan’s invitation (made “in terms of Article IX(4) of the Treaty”) by stating that it “agree[s] with the offer of negotiation of the Government of Pakistan”.<sup>546</sup> Further, India identified its negotiators and said that it did not regard there to be any need for a mediator.<sup>547</sup> India then determined the time and place of the meeting in a subsequent Note Verbale dated 28 June 2016.<sup>548</sup> Thereafter, the two Parties met in New Delhi from 14 to 15 July 2016. The minutes adopted at the end of the meeting clearly indicate that it was held for the purpose of resolving, in accordance with Article IX of the Treaty, the dispute that had been identified by Pakistan. Notably, the minutes state that:

- (a) The meeting was “[p]ursuant to the Note Verbale of Government of Pakistan dated 29 March 2016 through which it invited [the] Government of India to resolve disputes under Article IX of Indus Waters Treaty, 1960”.<sup>549</sup>
- (b) “The head of Pakistan delegation stated that the negotiations were being held to discuss the Statement of Points of Dispute communicated by Pakistan to India on 25 February 2016”.<sup>550</sup>
- (c) “After the opening plenary session, detailed broad-based discussions took place between the technical experts of the two sides. Among others, issues of freeboard, pondage, intake, spillway, including un-gated, surface-gated and orifice spillways were discussed in exhaustive details”.<sup>551</sup>
- (d) While India extended an offer for a visit by Pakistan’s Commissioner to the KHEP, Pakistan maintained that the “design aspects of the Kishenganga project are well known since 2006 and the visit could not be linked with the outcome of the meeting”.<sup>552</sup>

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<sup>546</sup> **P-0029**, Note Verbale from India to Pakistan dated 28 April 2016, para. 2.

<sup>547</sup> **P-0029**, Note Verbale from India to Pakistan dated 28 April 2016, paras. 3–5.

<sup>548</sup> **P-0030**, Note Verbale from India to Pakistan dated 28 June 2016.

<sup>549</sup> **P-0031**, Minutes of Secretary Level Meeting on Kishenganga and Ratle Hydroelectric Plants, New Delhi, 14 to 15 July 2016, para. 1.

<sup>550</sup> **P-0031**, Minutes of Secretary Level Meeting on Kishenganga and Ratle Hydroelectric Plants, New Delhi, 14 to 15 July 2016, para. 2.

<sup>551</sup> **P-0031**, Minutes of Secretary Level Meeting on Kishenganga and Ratle Hydroelectric Plants, New Delhi, 14 to 15 July 2016, para. 4.

<sup>552</sup> **P-0031**, Minutes of Secretary Level Meeting on Kishenganga and Ratle Hydroelectric Plants, New Delhi, 14 to 15 July 2016, para. 5.

- (e) While India also offered to hold another inter-governmental meeting, Pakistan responded, against the background of past discussions within the Commission, that “extensive discussions on all aspects of the Points of Dispute have been held on multiple occasions over a long period of time and another round is unlikely to lead to any convergence”.<sup>553</sup>
- (f) Instead, the “head of Pakistan delegation noted the urgent importance of resolving all outstanding disputes related to Kishenganga and Ratle Hydroelectric plants through referral to an impartial forum as provided for in the Indus Waters Treaty 1960”.<sup>554</sup>

234. Based on this interaction, the Court has no difficulty in concluding that, on its face, the meeting in July 2016 was an inter-governmental negotiation of the kind contemplated in Article IX(4) to resolve the dispute that had been identified by Pakistan. India’s position to the contrary appears to turn on three propositions: (1) India’s willingness to enter into these discussions cannot be construed as India’s accepting that a “dispute” had arisen; (2) India only participated in the negotiations without prejudice to India’s position on the inadmissibility of taking the dispute to a court of arbitration; and (3) Pakistan did not genuinely engage in the negotiations.

235. *First*, India asserts that:

The Parties never arrived at any agreement to refer the outstanding differences to arbitration. India’s willingness to discuss this matter at the Government level, purely in the interest of good neighborly relations, can never be construed to mean that a ‘dispute’, as defined in Article IX of the Treaty, is deemed to have arisen.<sup>555</sup>

236. India is correct that no agreement was reached on submitting the matter to a court of arbitration. The Court observes, however, that Article IX(4) does not require the Parties to reach any such agreement. Article IX(4) provides for negotiations, but does not require that the Parties reach agreement in the course of those negotiations. Further, the fact that India maintained its position that no “dispute” existed is not a basis for finding that an inter-governmental negotiation did not take place; rather, it is a basis for finding that the negotiation did not succeed. Whether a “dispute” existed does not turn on the position taken by India at this meeting, but on other factors, as

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<sup>553</sup> **P-0031**, Minutes of Secretary Level Meeting on Kishenganga and Ratle Hydroelectric Plants, New Delhi, 14 to 15 July 2016, paras. 6, 7.

<sup>554</sup> **P-0031**, Minutes of Secretary Level Meeting on Kishenganga and Ratle Hydroelectric Plants, New Delhi, 14 to 15 July 2016, para. 8.

<sup>555</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 19.

previously discussed.<sup>556</sup> Consequently, this proposition by India is not a basis for saying that inter-governmental negotiations within the meaning of Article IX(4) were not held.

237. *Second*, India maintains that it only participated in the negotiations without prejudice to its position on the inadmissibility of taking the dispute to a court of arbitration. It says:

In good faith and to resolve the issue bilaterally, India accepted and participated in the negotiations without “prejudice to India’s stand on inadmissibility of taking the matters to the Court of Arbitration which are under the purview of the Commission or at most of Neutral Expert.”<sup>557</sup>

238. That India expressed this “without prejudice” position is clear from the record. When India on 28 April 2016 agreed by Note Verbale to participate in the negotiations, it said this was “without prejudice to India’s stand on inadmissibility of taking the matters to Court of Arbitration (CoA) that are under the purview of Neutral Expert”.<sup>558</sup> Further, the minutes of the July meeting record India as again asserting that the “head of Indian delegation stated that the present discussions were being held without prejudice to India’s stand on inadmissibility of taking the matters to the Court of Arbitration which are under the purview of the Commission or at most of Neutral Expert”.<sup>559</sup>

239. Both of these statements, however, are not reservations with respect to whether the July 2016 meeting constituted a negotiation within the meaning of Article IX(4). Rather, such statements are best understood as indicating that, if the matter ultimately were placed before a court of arbitration, India’s participation in the negotiation could not be regarded as waiving its position as to the inadmissibility of the matter before that court. Had India instead intended to express a view that the July 2016 meeting was not a negotiation within the meaning of Article IX(4), India should have phrased it as such. Yet rather than doing so, India said in the same sentence of the Note Verbale that it agreed “with the offer of negotiation of Government of Pakistan”,<sup>560</sup> and that offer by Pakistan expressly invited India “to expeditiously appoint negotiators to resolve the points of dispute by agreement *in terms of Article IX (4) of the Treaty*”.<sup>561</sup> Consequently, this

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<sup>556</sup> See paras. 166–213, *supra*.

<sup>557</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 10.

<sup>558</sup> **P-0029**, Note Verbale from India to Pakistan dated 28 April 2016, para. 2.

<sup>559</sup> **P-0031**, Minutes of Secretary Level Meeting on Kishenganga and Ratle Hydroelectric Plants, New Delhi, 14 to 15 July 2016, para. 2.

<sup>560</sup> **P-0029**, Note Verbale from India to Pakistan dated 28 April 2016, para. 2.

<sup>561</sup> **P-0028**, Note Verbale from Pakistan to India dated 29 March 2016, para. 22 (emphasis added).

proposition by India also is not a basis for saying that inter-governmental negotiations within the meaning of Article IX(4) were not held.

240. *Third*, India maintains that Pakistan did not genuinely engage in the negotiations. India says that the Treaty “envisages a genuine attempt by the ... governments of Pakistan and India to settle the ‘dispute’ which has arisen in a cooperative spirit, including by utilizing the services of mediators acceptable to them”.<sup>562</sup> However, “because of Pakistan’s non-cooperation the negotiations could not have a positive outcome”.<sup>563</sup> The Court notes that Article IX(4) contains no requirement that the negotiations meet a particular standard of “genuineness” in the efforts by one or both Parties to resolve the dispute, nor that the negotiations be exhausted or be proven futile; it simply envisages that there might be an inter-governmental negotiation, which then becomes relevant when applying Article IX(5). Moreover, the minutes of the July 2016 meeting record that, as previously noted, “detailed broad-based discussions took place between the technical experts of the two sides. Among others, issues of freeboard, pondage, intake, spillway, including un-gated, surface-gated and orifice spillways were discussed in exhaustive details”.<sup>564</sup> As such, the negotiation was substantive and not just *pro forma*. And the fact that Pakistan (or India) did not change its position over the course of the meeting does not demonstrate that there was no attempt to resolve the dispute through negotiation. Consequently, this proposition by India also is not a basis for saying that inter-governmental negotiations within the meaning of Article IX(4) were not held.
241. India’s assertion that the requirements of Article IX(5) have not been met is not explained in detail, but appears to turn on some aspects already discussed, notably that there was no “dispute” arising under Article IX(2),<sup>565</sup> no joint report under Article IX(3), and no negotiation under Article IX(4), such that the process could not reach Article IX(5). Part V(B) explained why the requirements of Article IX(2) were met<sup>566</sup> and this section has explained why the requirements in Article IX(3) and (4) were met. India’s principal contention with respect to Article IX(5), therefore, appears to be that the Parties never agreed to refer the matter to a court of arbitration.<sup>567</sup>

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<sup>562</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 9.

<sup>563</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 10.

<sup>564</sup> **P-0031**, Minutes of Secretary Level Meeting on Kishenganga and Ratle Hydroelectric Plants, New Delhi, 14 to 15 July 2016, para. 4.

<sup>565</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 18.

<sup>566</sup> See paras. 166–213, *supra*.

<sup>567</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 18.

242. Article IX(5), however, provides that there are three alternative methods by which a court of arbitration may be established. It reads:

- (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.<sup>568</sup>

243. India is correct that the method set out in Article IX(5)(a) was not fulfilled; as just discussed, the Parties never reached an agreement to take the matter to a court of arbitration. Such an agreement, pursuant to Annexure G, would have entailed entering into a special agreement specifying the issues in dispute, the composition of the Court, instructions to the Court, and other matters.<sup>569</sup>

244. The Court finds, however, that the method set out in Article IX(5)(b) was fulfilled. As early as the end of the July 2016 negotiations, Pakistan may have formed an opinion that the dispute was not likely to be resolved by negotiation or mediation.<sup>570</sup> The minutes of the July 2016 meeting record, as its final item, that the “head of Pakistan delegation noted the urgent importance of resolving all outstanding disputes related to Kishenganga and Ratle Hydroelectric plants through referral to an impartial forum as provided for in the Indus Waters Treaty 1960”.<sup>571</sup> In any event, such an opinion was formed no later than Pakistan’s Request for Arbitration, which was served upon India by Note Verbale dated 19 August 2016. In it, 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)”.<sup>572</sup> That Note Verbale took the form of a request by Pakistan for arbitration as provided for in Annexure G.<sup>573</sup> As such, the requirements of Article IX(5)(b) were met; after the negotiations had begun, Pakistan formed an opinion that the dispute was not likely

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<sup>568</sup> **PLA-0001**, Treaty, Art. IX(5) (citations omitted).

<sup>569</sup> **PLA-0001**, Treaty, Annexure G, para. 2(a).

<sup>570</sup> Hearing on Competence Tr., (Day 1), 11 May 2023, pp. 139.23–140.9.

<sup>571</sup> **P-0031**, Minutes of Secretary Level Meeting on Kishenganga and Ratle Hydroelectric Plants, New Delhi, 14 to 15 July 2016, para. 8.

<sup>572</sup> **P-0034**, Note Verbale from Pakistan to India dated 19 August 2016.

<sup>573</sup> **PLA-0001**, Treaty, Annexure G, para. 2(b) (referring to a request based on Art. IX(5)(b)).

to be resolved by negotiation or mediation, and therefore proceeded with its Request for Arbitration in the manner provided for in Annexure G.

245. Although not necessary in the light of the Court’s conclusions above, the following observation is warranted. Even if India were correct that the July 2016 meeting was not a “negotiation” within the meaning of Article IX(4), then that alone would not preclude the establishment of a court of arbitration, given the third method set out in Article IX(5)(c). If, after inviting India on 29 March 2016 to resolve the dispute by agreement through inter-governmental negotiations, India’s response was not to accept any such negotiation then, after one month, Pakistan would have been fully able to reach the conclusion that India was unduly delaying the negotiations. Given that more than four months elapsed from the invitation for negotiation to Pakistan’s Request for Arbitration, the requirements for Article IX(5)(c) would have been met if Pakistan concluded during that period that India was unduly delaying the negotiations, entitling Pakistan to submit its Request for Arbitration to Pakistan on this basis, as also provided for in Annexure G.<sup>574</sup>
246. Hence, the requirements of Article IX(3), (4), and (5) have been met in this case, such that a failure to do so has not defeated the competence of the Court to address Pakistan’s request. The Court rejects India’s Third Objection.

**D. INDIA’S FOURTH OBJECTION: THE COURT IS NOT COMPETENT BECAUSE IT WAS NOT PROPERLY CONSTITUTED UNDER ANNEXURE G, PARAGRAPHS 4 TO 11**

**1. The Parties’ Positions**

**(a) India’s arguments**

247. India’s Fourth Objection is tangentially related to, and follows on from, its Third Objection.<sup>575</sup> India contends that, even if a dispute had arisen, the constitution of the Court is not “in consonance with the provisions and the procedures set out in Annexure G” to the Treaty.<sup>576</sup> Perhaps by way of illustration, India specifically states that “[t]he question of India notifying the names of Arbitrators to be appointed by it, does not arise, in view of the fundamental flaws and discrepancies in the process so far adopted”.<sup>577</sup> In any event, India appears to contend that the procedure for the constitution of a court of arbitration, as is provided for in Paragraphs 4 to 11 of

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<sup>574</sup> PLA-0001, Treaty, Annexure G, para. 2(b) (referring as well to a request based on Art. IX(5)(c)).

<sup>575</sup> See paras. 214–216, *supra*.

<sup>576</sup> P-0001, 21 December 2022 Letter, para. 12.

<sup>577</sup> P-0001, 21 December 2022 Letter, para. 12.

Annexure G, has not been complied with in the present case, such that there is “no effectively constituted Court of Arbitration”.<sup>578</sup>

**(b) Pakistan’s arguments**

248. Pakistan submits that the Court has been properly constituted in accordance with Paragraphs 4 to 11 of Annexure G to the Treaty, notwithstanding India’s failure to participate in the constitution of the Court.<sup>579</sup> Indeed, in Pakistan’s view, those provisions implicitly anticipate and facilitate the constitution of a court of arbitration in circumstances where a Party refuses to participate.<sup>580</sup> Specifically, Pakistan notes that Paragraph 11 of Annexure G provides that, upon the umpires having accepted their appointments, and “unless the Parties otherwise agree, *the Court shall be competent to transact business only when all the three umpires and at least two arbitrators are present*”.<sup>581</sup> Given that each Party is to appoint two arbitrators pursuant to Paragraph 4(a) of Annexure G, on a plain reading of Paragraph 11, Pakistan submits, the failure of one Party to appoint arbitrators does not prevent a court of arbitration from being “formed” and “competent to transact business”.<sup>582</sup> Equally, Pakistan observes that Paragraph 23 of Annexure G provides that “[a]n Award signed by four or more members of the Court shall constitute the Award of the Court”.<sup>583</sup> Any alternative conclusion, Pakistan submits, would allow a Party to frustrate the settlement of a dispute merely by refusing to appoint arbitrators, contrary to the text of the Treaty and its underlying object and purpose.<sup>584</sup>
249. In the present case, Pakistan submits that the preconditions of Paragraph 11 of Annexure G have been satisfied.<sup>585</sup> Pakistan recalls that it appointed its two designated arbitrators on 19 August 2016 pursuant to Paragraphs 4 and 6 of Annexure G.<sup>586</sup> Pakistan further notes that, on

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<sup>578</sup> P-0001, 21 December 2022 Letter, para. 12.

<sup>579</sup> Pakistan’s Response, paras. 263–269.

<sup>580</sup> Pakistan’s Response, para. 268.

<sup>581</sup> Pakistan’s Response, para. 266, citing PLA-0001, Treaty, Annexure G, para. 11 (emphasis added).

<sup>582</sup> Pakistan’s Response, para. 268; Hearing on Competence Tr., (Day 2), 12 May 2023, pp. 19.4–25, 28.20–29.12.

<sup>583</sup> Hearing on Competence Tr., (Day 2), 12 May 2023, p. 29.8–12.

<sup>584</sup> Pakistan’s Response, para. 268.

<sup>585</sup> Pakistan’s Response, para. 267.

<sup>586</sup> Pakistan’s Response, para. 265, citing Request for Arbitration, para. 98; Terms of Appointment, paras. 2.2–2.3.

20 October 2022, it appointed a substitute arbitrator when one of its original designees was no longer able to accept appointment.<sup>587</sup>

250. Furthermore, Pakistan observes, given India’s failure to cooperate in the selection of the umpires under Paragraph 7(b)(i) of Annexure G, the “default mechanism” under Paragraphs 7(b)(ii) and 9 of Annexure G was triggered, which led to the World Bank nominating a person to draw lots to select the appointing authorities.<sup>588</sup> In accordance with these provisions, the President of the World Bank had decided on the appointment of an umpire (and Chairman of the Court) on 19 September 2022;<sup>589</sup> the President of Imperial College London appointed a second umpire, in accordance with Paragraphs 4(b)(ii) and 7 of Annexure G, on 28 September 2022; and the Chief Justice of the United States appointed a third umpire, in accordance with Paragraphs 4(b)(iii) and 7 of Annexure G, on 17 October 2022.<sup>590</sup>
251. Once these two arbitrators and three umpires were appointed, Pakistan submits that the Court was “formed” and “competent to transact business”.<sup>591</sup> While India failed to make its appointment of arbitrators within the mandated 30 days after receipt of the Request for Arbitration, as required by Paragraph 6 of Annexure G,<sup>592</sup> Pakistan emphasizes that that failure did not prevent the Court from being formed and competent to transact business.

## 2. The Court’s Analysis

252. India argues that the Court is not competent because “the constitution of the proposed Court of Arbitration is not even in consonance with the provisions and procedures set out in Annexure G”.<sup>593</sup> Referring to “the fundamental flaws and discrepancies in the process so far adopted”, India asserts that “there is no effectively constituted Court of Arbitration”.<sup>594</sup>

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<sup>587</sup> Pakistan’s Response, para. 265, citing Terms of Appointment, paras. 2.2–2.3.

<sup>588</sup> Pakistan’s Response, para. 266.

<sup>589</sup> Pakistan’s Response, para. 266, citing **P-0009**, Letter from the World Bank to the Parties dated 19 September 2022, para. 2.4.

<sup>590</sup> Pakistan’s Response, para. 266, citing Terms of Appointment, para. 2.6.

<sup>591</sup> Hearing on Competence Tr., (Day 2), 12 May 2023, pp. 28.20–29.7.

<sup>592</sup> Pakistan’s Response, para. 265, citing Terms of Appointment, paras. 2.2–2.3.

<sup>593</sup> **P-0001**, 21 December 2022 Letter, para. 12.

<sup>594</sup> **P-0001**, 21 December 2022 Letter, para. 12.

253. Leaving aside Paragraph 1 of Annexure G to the Treaty,<sup>595</sup> India does not specify exactly which provisions or procedures of Annexure G were not followed.<sup>596</sup> To a large extent, India's references to Annexure G appear to relate to its arguments that the provisions of Article IX were not properly followed, such that any resort to the procedures of Annexure G to set up the Court of Arbitration was not warranted. As those arguments with respect to the initiation of the Court of Arbitration's proceedings have been addressed above,<sup>597</sup> they will not be repeated here.
254. For the sake of completeness, however, the Court will assess in this section whether the provisions of Annexure G relating to the empanelment of the Court, found at Paragraphs 4 to 11 of that Annexure, were properly followed. In the following sections,<sup>598</sup> the Court will consider India's arguments against the competence of the Court with respect to the existence of a separate, parallel procedure before a neutral expert.
255. Paragraph 4 of Annexure G provides that, unless otherwise agreed by the Parties, the Court shall consist of seven arbitrators: two arbitrators to be appointed by each Party in accordance with Paragraph 6; and three arbitrators (referred to as umpires), to be appointed in accordance with Paragraph 7. Paragraph 5 says that the Parties shall endeavor to nominate and maintain a standing panel of umpires, a step that was not taken and therefore not of relevance to the Court's analysis. Paragraph 6 calls upon the Party instituting the proceedings to appoint two arbitrators at the time it submits its request for arbitration to the other Party. Pakistan appointed two arbitrators with its Request for Arbitration on 19 August 2016.<sup>599</sup> Paragraph 6 then provides that the other Party shall notify the names of its arbitrators within 30 days. India failed to comply with this provision within the 30-day period.<sup>600</sup>
256. Paragraph 7 addresses the appointment of the umpires. In the absence of a panel of umpires (as contemplated in Paragraph 5), in the absence of agreement by the Parties as to appointment of the umpires, and in the absence of agreement by the Parties as to the selection of one or more persons to help them in selecting umpires by agreement, Paragraph 7 provides that the Parties shall, after 60 days from the date of the request for arbitration, determine the persons to select the umpires by lot (i.e., by chance) from a list of persons set out in the Appendix. In this instance, the Parties

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<sup>595</sup> See Part V(E), *infra*.

<sup>596</sup> See, e.g., **P-0001**, 21 December 2022 Letter, para. 12.

<sup>597</sup> See paras. 166–213, 224–246, *supra*.

<sup>598</sup> See Parts V(E), V(F), *infra*.

<sup>599</sup> See para. 12, *supra*.

<sup>600</sup> See para. 13, *supra*.

were unable to agree on any of these steps for selecting the umpires. Paragraph 8 provides that when selecting umpires pursuant to Paragraph 7, the Chairman shall be selected first, unless the Parties otherwise agree. Paragraph 9 provides that if either Party fails to participate in the drawing of lots, the other Party may request the President of the World Bank to nominate a person to draw the lots; the person so nominated shall then draw the lots after giving the Parties due notice and inviting them to be present at the drawing of the lots. After receiving Pakistan's Request for Arbitration, the World Bank nominated a person to draw the lots, which occurred on 10 November 2016.<sup>601</sup> Pakistan attended the drawing of the lots, but India declined to do so. The drawing of the lots resulted in the selection of the President of the World Bank to appoint the Chairman of the Court; the President of Imperial College London to appoint the engineer umpire; and the Chief Justice of the United States to appoint the person well versed in international law. In September and October of 2022, the three umpires were appointed by these authorities.<sup>602</sup>

257. Paragraph 10 of Annexure G provides that in the case of death, retirement or disability, a Party-appointed arbitrator may be replaced by the Party that appointed him or her. On 20 October 2022, Pakistan informed the World Bank (and India) that one of its original Party-appointed arbitrators had withdrawn, and Pakistan therefore had appointed a replacement arbitrator, while confirming its other appointment.<sup>603</sup>
258. While the imposition of the Pause delayed the appointment of the umpires, and apparently led to the withdrawal and replacement of one of Pakistan's originally appointed arbitrators, these appointments also do not reveal any flaw or discrepancy in the appointment of arbitrators to the Court of Arbitration. In particular, it is noted that the Treaty contains no provision that indicates that the appointment of the umpires becomes untenable if it does not occur within a specific time frame.
259. Paragraph 11 provides that as soon as the three umpires have accepted their appointments, they and any Party-appointed arbitrators shall form the court of arbitration. Thus, as of October 2022, the Court of Arbitration was empaneled. Paragraph 11 also provides that, unless the Parties otherwise agree, "the Court shall be competent to transact business only when all three umpires and at least two arbitrators are present". This condition was also fulfilled as of October 2022.

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<sup>601</sup> **P-0109**, Letter from the World Bank to the Parties dated 11 November 2016.

<sup>602</sup> See paras. 14–17, 20–22, *supra*.

<sup>603</sup> See para. 11, *supra*.

260. If a discrepancy arose in the course of the establishment of the Court of Arbitration, it concerns the appointment of India’s arbitrators. As noted above,<sup>604</sup> India failed to appoint its arbitrators within 30 days after Pakistan’s Request for Arbitration; as such, India failed to observe its obligation to appoint such arbitrators, and this failure in September 2016 might have resulted in a Court of Arbitration consisting solely of five arbitrators. At the same time, as explained above,<sup>605</sup> the Treaty provides that “the Court of Arbitration shall consist of seven arbitrators”, with two arbitrators appointed by each Party. In the light of this situation, after being empaneled, the Court decided in its Supplemental Rules of Procedure to recognize a right of India to appoint two arbitrators up to seven days after an (affirmative) decision on its competence, so as to ensure both the integrity of the proceedings and the due process rights of Pakistan. If it is this aspect of the establishment of the Court of which India complains, the Court’s approach supports the text, purpose, and spirit of the Treaty’s dispute resolution procedures, and does so to India’s advantage.
261. It follows that the Court has been properly constituted to address Pakistan’s Request for Arbitration. The Court rejects India’s Fourth Objection in this regard.
262. Before concluding this section, the Court views it as appropriate to comment on the role of the World Bank in the dispute resolution architecture of the Treaty. In the course of its pleadings before the Court, counsel for Pakistan urged that the Court “provide appropriate guidance for future conduct”<sup>606</sup> as regards the “pause” and the World Bank’s “obligation to empanel the Court once proceedings have been instituted”.<sup>607</sup>
263. Article IX contemplates a specific and special role for the World Bank under the Treaty, one that—critically—enables the dispute resolution process to be completed when the Parties are not themselves able to agree on particular steps in the process. It is extraordinarily important for the World Bank to fulfill this role whenever called upon to do so, as it allows for the expeditious resolution of differences (including disputes) that arise between India and Pakistan on extremely important issues of natural resource management under the Treaty. The convening of a court of arbitration without delay is important in all circumstances, but it is especially important in

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<sup>604</sup> See para. 13, *supra*.

<sup>605</sup> See paras. 255, *supra*.

<sup>606</sup> Hearing on Competence Tr., (Day 1), 11 May 2023, p. 61.4–8 (“we hope and request that the Court will address these issues in the form of appropriate guidance for future conduct. There is a risk of repetition in the future, and this is what most exercises Pakistan”).

<sup>607</sup> Hearing on Competence Tr., (Day 1), 11 May 2023, p. 34.6–11 (“The guidance we are looking for ... as regards the pause and the Bank’s conduct, is the obligation to empanel the Court once proceedings have been instituted; the pause itself did immeasurable harm; it put a thumb on the scale in India’s cause”).

circumstances where India or Pakistan's request for arbitration includes a request for interim measures of protection.

264. The World Bank's role in this regard is ministerial in nature. When it receives a request from India or Pakistan for the appointment of a neutral expert, it should immediately proceed to do so in accordance with the Treaty.<sup>608</sup> When it receives a request from India or Pakistan for the nomination of a person to draw the lots for identifying the persons who will select the umpires, it should immediately proceed to do so in accordance with the Treaty,<sup>609</sup> and after the lots have been drawn to facilitate administratively such selections.<sup>610</sup> This ministerial role of the World Bank follows from the Treaty's allocation of questions of competence to other bodies: (1) a neutral expert is competent to decide, in the first instance, whether a question before him or her falls within the scope of Annexure F, Part 1;<sup>611</sup> (2) a court of arbitration is competent to decide whether a question falls outside the competence of a neutral expert;<sup>612</sup> and (3) a court of arbitration is competent to decide upon its own competence.<sup>613</sup> While it is unusual for the World Bank to be seized with two requests in the same general time frame, the Treaty does not foreclose that possibility,<sup>614</sup> and therefore it is not a basis for the World Bank's failure to act.
265. To the extent it is uncertain whether a particular request properly rests with one or the other of those bodies, it is for those bodies to address, not the World Bank.<sup>615</sup> The World Bank may be expected in its ministerial role to ensure, through a prima facie review, that it has received a request from a duly authorized representative of India or Pakistan, and that the request invokes the relevant Articles and Annexures of the Treaty necessary to identify the World Bank's role for the type of request at issue. Beyond that, however, the World Bank should act with dispatch to

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<sup>608</sup> **PLA-0001**, Treaty, Annexure F, para. 4(b)(ii) (such appointment "shall be made after consultation with each of the Parties").

<sup>609</sup> **PLA-0001**, Treaty, Annexure G, para. 9 (the nominated person shall draw the lots "after giving due notice to the Parties and inviting them to be represented at the drawing of the lots").

<sup>610</sup> It may be added that the offices indicated in the appendix to Annexure G, by agreeing to serve the function assigned to it under the Treaty, are also expected to act with dispatch to identify the relevant umpire.

<sup>611</sup> **PLA-0001**, Treaty, Art. IX, para. 2(b), Annexure F, para. 7.

<sup>612</sup> **PLA-0001**, Treaty, Annexure F, para. 13.

<sup>613</sup> **PLA-0001**, Treaty, Annexure G, para. 16; see paras. 146–154, *supra*.

<sup>614</sup> See paras. 313–316, *infra*.

<sup>615</sup> Thus, India is not correct in asserting that the Treaty envisages the World Bank's "going into the merits of procedural requirements of the requests as per the Treaty provisions"; see **P-0001**, 21 December 2022 Letter, para. 5. The Treaty assigns to the World Bank no such role.

fulfill its responsibilities for facilitating the dispute resolution process, thereby empowering the work of the body with the treaty-assigned competence.

266. There may, of course, be situations where, after a request has been made to the World Bank, both Parties request the World Bank to delay the appointment of a neutral expert or the drawing of lots, perhaps to allow a process of mediation or for further negotiation to unfold. Indeed, the dispute resolution provisions of the Treaty are replete with references to “unless the Parties otherwise agree” such that the ability of the Parties jointly to depart from the Treaty’s procedures cannot be doubted. Critically, however, any such departure should be done only when *both* India and Pakistan *expressly* agree to such a departure from the normal processes; one Party cannot be in a position of frustrating the other Party’s desire to pursue the Treaty’s dispute resolution procedures, especially for a matter of months, let alone years.

**E. INDIA’S FIFTH OBJECTION: THE COURT IS NOT COMPETENT BECAUSE A NEUTRAL EXPERT IS DEALING WITH THE SITUATION (ARTICLE IX(6))**

**1. The Parties’ Positions**

**(a) *India’s arguments***

267. The basis of India’s Fifth Objection concerns Article IX(6), which provides:

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

268. According to India, Article IX(6) explicitly prohibits a court of arbitration from considering a question that is “being dealt with” by a neutral expert.<sup>616</sup> India considers that Article IX(6) is triggered whenever a neutral expert is seized of a difference; that is, “as soon as either party *requests* [a neutral expert] to be appointed”.<sup>617</sup> India appears to regard this as including the statement by one Commissioner of his intention to seek the appointment of a neutral expert and his request to the other Commissioner that they endeavor to prepare a joint statement of the point or points of difference. Once Article IX(6) is triggered, Article IX(3), (4), and (5) are on “moratorium”, and the neutral expert resolution process takes “primacy and precedence”.<sup>618</sup> Accordingly, India argues that Article IX(6) explicitly rules out the possibility of a court of

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<sup>616</sup> **P-0001**, 21 December 2022 Letter, paras. 9–10; **P-0001**, 21 December 2022 Explanatory Note, paras. 1, 12, 18.

<sup>617</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 12 (emphasis added).

<sup>618</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 12.

arbitration being brought into existence, or indeed any existing court of arbitration continuing its proceedings, in respect of any difference “while it is being dealt with by a [n]eutral [e]xpert”.<sup>619</sup> India maintains that this conclusion accords with Pakistan’s position in the *Kishenganga* Arbitration, and the reasoning of the *Kishenganga* Court in its Partial Award.<sup>620</sup>

269. In this regard, India insists that the Treaty does not permit parallel proceedings. Instead, the relationship between the two resolution mechanisms is necessarily sequential: absent agreement to the contrary, “differences” are to be raised and resolved before a neutral expert; and only those unresolved “differences” that the neutral expert considers to be a “dispute”, in whole or in part, are then to be decided upon by a court of arbitration.<sup>621</sup> Absent a sequential process, India says, parallel proceedings before a neutral expert and a court of arbitration could result in inconsistent or contradictory outcomes that “could seriously jeopardize the legitimacy, if not the very existence, of the Treaty itself”.<sup>622</sup>
270. In India’s view, this conclusion is fortified by Paragraph 11 of Annexure F, which provides that a decision of a neutral expert on matters within his or her competence shall be final and binding upon the Parties and, importantly, upon any court of arbitration.<sup>623</sup> India argues that there is no provision in the Treaty that declares that a court of arbitration’s determination shall bind a neutral expert.<sup>624</sup> India also argues that the determination of whether a “difference” falls within the

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<sup>619</sup> **P-0002**, Letter from India to the Neutral Expert dated 11 February 2023, para. 7 (“Article IX(6) explicitly rules out the possibility of any Court of Arbitration being brought into existence, *or continuing its proceedings*, in respect of any difference ‘while it is being dealt with by a Neutral Expert’) (emphasis added).

<sup>620</sup> **P-0001**, 21 December 2022 Explanatory Note, paras. 22–23, citing **PLA-0003**, *Kishenganga* Partial Award, paras. 280, 484, in which the *Kishenganga* Court stated (emphasis in original, citations omitted):

280. In Pakistan’s view, Article IX(2)(a) permits either Party to insist on the appointment of a neutral expert. ... In other words, “if the Commissioner doesn’t trigger the Neutral Expert procedure under Article IX(2)(a) prior to the establishment of the Court of Arbitration, that priority is never triggered and the Court of Arbitration has jurisdiction under Article IX(5) of the Treaty.

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484. In the Court’s view, nothing in the Treaty requires that a technical question listed in Part 1 of Annexure F be decided by a neutral expert rather than a court of arbitration—*except* where a Party so requests (and then only if the neutral expert considers himself competent).

<sup>621</sup> **P-0002**, Letter from India to the Neutral Expert dated 11 February 2023, para. 7.

<sup>622</sup> **P-0001**, 21 December 2022 Explanatory Note, paras. 2–3, 17–18, citing **P-0008**, Letter from the World Bank to Pakistan dated 12 December 2016.

<sup>623</sup> **P-0002**, Letter from India to the Neutral Expert dated 11 February 2023, para. 7.

<sup>624</sup> **P-0002**, Letter from India to the Neutral Expert dated 11 February 2023, para. 8.

jurisdiction of a neutral expert pursuant to Paragraph 7 of Annexure F to the Treaty is “squarely within the competence of the Neutral Expert”.<sup>625</sup>

271. Applying this construction to the facts, India contends that the Court has not been validly seized because the Neutral Expert has been dealing with the “difference” in advance of the initiation of these proceedings before the Court.<sup>626</sup> India notes that Pakistan’s Commissioner notified India’s Commissioner of the intention to seek appointment of a neutral expert on 3 July 2015,<sup>627</sup> and India’s Commissioner made a similar request to Pakistan’s Commissioner on 11 August 2016.<sup>628</sup> According to India, both of those notifications remained “live”, and took “primacy and precedence” over any subsequent request for the establishment of a court of arbitration.<sup>629</sup> The Court understands India’s position to be that, from 3 July 2015 or, in any event, from 11 August 2016, the Neutral Expert was “dealing with the differences that have arisen” such that Article IX(6) was triggered, precluding any recourse to the Court.<sup>630</sup> As such, India considers that it is now for the Neutral Expert, who is currently seized of the matter, to decide finally whether the unresolved questions constitute, in whole or in part, a “difference” that he must deal with, or a “dispute” to be dealt with by a court of arbitration.<sup>631</sup>

**(b) *Pakistan’s arguments***

272. Pakistan argues that Article IX(6) precludes the operation of Article IX(3), (4), and (5) only from the point in time after a neutral expert has been appointed and his or her terms of retainer fixed.<sup>632</sup> Given that the Neutral Expert in the present case had been neither appointed nor even identified when the present arbitral proceedings were commenced in August 2016, Pakistan argues that it could not be said that the Neutral Expert was “dealing with” any points of difference between the Parties for the purposes of Article IX(6).<sup>633</sup>

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<sup>625</sup> **P-0002**, Letter from India to the Neutral Expert dated 11 February 2023, para. 7.

<sup>626</sup> **P-0002**, Letter from India to the Neutral Expert dated 11 February 2023, para. 11(a).

<sup>627</sup> **P-0010**, Letter from the PCIW to the ICIW dated 3 July 2015, para. 3.

<sup>628</sup> **P-0032**, Letter from the ICIW to the PCIW dated 11 August 2016, para. 5.

<sup>629</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 16.

<sup>630</sup> **P-0001**, 21 December 2022 Explanatory Note, paras. 7, 16.

<sup>631</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 20.

<sup>632</sup> Pakistan’s Response, para. 190.

<sup>633</sup> Pakistan’s Response, para. 190; Hearing on Competence Tr., (Day 1), 11 May 2023, pp. 177.24–178.5.

273. On Pakistan’s construction, the words “being dealt with” must be given meaning, and the ordinary meaning of these words suggests that Article IX(6) operates only at the point at which a neutral expert’s terms of retainer have been fixed.<sup>634</sup> Until the terms of retainer have been fixed, Pakistan argues, a neutral expert will not be formally authorized by the Parties to deal with any “differences” under the Treaty and, indeed, there will be no certainty or any obligation for that particular neutral expert to deal with the substance of the “difference”.<sup>635</sup> Certainly, the mere signaling of an intention to request the appointment of a neutral expert at some point in the future would not suffice.<sup>636</sup>
274. Furthermore, Pakistan argues, and contrary to India’s interpretation,<sup>637</sup> Article IX(6) will not prohibit a court of arbitration, once established, from continuing its proceedings even if a neutral expert is thereafter appointed.<sup>638</sup> Pakistan submits that Article IX(6) can only apply to preclude the operation of Article IX(3), (4), and (5) up until the moment that the arbitral proceedings have been initiated, which will be the date on which the Parties agree to arbitration in accordance with Article IX(5)(a), or a Party receives a request for arbitration in accordance with Article IX(5)(b) or (c).<sup>639</sup> At that point, so long as the underlying difference is not already “being dealt with” by a neutral expert so as to engage Article IX(6), the procedure set out in Article IX is at an end and the provisions of Annexure G take over to require the empanelment of a court of arbitration and the orderly settlement of the dispute.<sup>640</sup> In other words, having regard to Paragraphs 2 and 3 of Annexure G, once the request for arbitration is received by the other Party, Pakistan is of the view that arbitral proceedings have begun and a court of arbitration is required to be empaneled to resolve the dispute.<sup>641</sup> Accordingly, Pakistan argues, Article IX(6) will no longer be applicable.<sup>642</sup> A contrary approach, Pakistan submits, would openly invite abuse because it would allow a

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<sup>634</sup> Pakistan’s Response, para. 190; Hearing on Competence Tr., (Day 1), 11 May 2023, pp. 239.20–240.5; Hearing on Competence Tr., (Day 2), 12 May 2023, p. 31.6–36.14.

<sup>635</sup> Pakistan’s Response, para. 190; Hearing on Competence Tr., (Day 1), 11 May 2023, pp. 239.6–240.19.

<sup>636</sup> Pakistan’s Response, para. 190.

<sup>637</sup> **P-0002**, Letter from India to the Neutral Expert dated 11 February 2023, para. 7.

<sup>638</sup> Pakistan’s Response, para. 169.

<sup>639</sup> Pakistan’s Response, paras. 161, 169, citing **PLA-0001**, Treaty, Annexure G, para. 3(b). Hearing on Competence Tr., (Day 1), 11 May 2023, pp. 23.7–14, 178.11–181.18, 234.12–22.

<sup>640</sup> Pakistan’s Response, para. 161.

<sup>641</sup> Pakistan’s Response, para. 161.

<sup>642</sup> Pakistan’s Response, para. 169; Hearing on Competence Tr., (Day 1), 11 May 2023, pp. 233.17–235.22.

recalcitrant Party to derail duly instituted proceedings *ex post facto* simply by referring differences to a neutral expert.<sup>643</sup>

275. Pakistan further submits that the operation of Article IX(6) must necessarily be confined to questions that are at the heart of the difference with which a neutral expert is dealing.<sup>644</sup> That is, Article IX(6) could not preclude the operation of Article IX(3), (4), and (5) in respect of differences distinct from those being “dealt with” by a neutral expert or otherwise in respect of which a neutral expert could never be competent.<sup>645</sup> Moreover, Pakistan asserts that Article IX(6) can operate only “where the question or questions purportedly being dealt with by the Neutral [Expert] fall, at least on the basis of a *prima facie* appreciation, within the scope of a Neutral Expert’s competence under Part 1 of Annexure F”.<sup>646</sup> Thus, in Pakistan’s view, Article IX(6) cannot preclude the operation of Article IX(3), (4), and (5) in respect of questions requiring Treaty-systemic interpretation or application, which could never come within the competence of a neutral expert under Part 1 of Annexure F.<sup>647</sup>
276. In the present case, Pakistan considers that a neutral expert had not been appointed, let alone his or her retainer fixed, when the proceedings before the Court were commenced on 19 August 2016, the date on which India received Pakistan’s Request for Arbitration.<sup>648</sup> Indeed, for the reasons outlined above in relation to India’s Second Objection, Pakistan contends there was no “actual request” by either Commissioner for the appointment of a neutral expert prior to that date.<sup>649</sup> Rather, Pakistan notes, the Neutral Expert was only appointed on 13 October 2022, and his terms of appointment were only fixed on 2 May 2023.<sup>650</sup> It follows for Pakistan that at no stage prior to the initiation of the Court of Arbitration’s proceedings was the Neutral Expert “dealing with” the matter, such that the Court’s proceeding was precluded by Article IX(6).<sup>651</sup>

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<sup>643</sup> Hearing on Competence Tr., (Day 1), 11 May 2023, p. 235.12–22.

<sup>644</sup> Pakistan’s Response, para. 172.

<sup>645</sup> Pakistan’s Response, para. 172.

<sup>646</sup> Pakistan’s Response, para. 164.

<sup>647</sup> Pakistan’s Response, para. 172.

<sup>648</sup> Pakistan’s Response, paras. 65, 190, citing **P-0034**, Note Verbale from Pakistan to India dated 19 August 2016. See also Hearing on Competence Tr., (Day 1), 11 May 2023, p 23.7–14.

<sup>649</sup> See para. 165, *supra*.

<sup>650</sup> Hearing on Competence Tr., (Day 1), 11 May 2023, p. 18.3–5.

<sup>651</sup> See para. 165, *supra*.

## 2. The Court's Analysis

277. India contends that the Treaty establishes a “graded mechanism” whereby, when the Parties cannot agree on the resolution of a question that has arisen, the question is first dealt with by the Commission, then dealt with by a neutral expert, and only if it falls outside the competence of the neutral expert, is then dealt with by a court of arbitration.<sup>652</sup> As discussed in Part V(B) of this Award,<sup>653</sup> the *Kishenganga* Court rejected any such interpretation of the Treaty, and this Court follows that conclusion. It is possible under the Treaty for a difference to be placed before a court of arbitration and treated as a dispute without first being dealt with by a neutral expert. In this instance, Pakistan did just that when it instituted the present proceedings before the Court by its Request for Arbitration on 19 August 2016.
278. India further maintains, however, that a proceeding has been instituted before the Neutral Expert on the questions before this Court of Arbitration and that, pursuant to Article IX(6) of the Treaty, the Neutral Expert’s proceeding deprives this Court of competence. India also refers repeatedly to the impermissibility of “parallel proceedings” under the Treaty (proceedings before both a court of arbitration and a neutral expert).<sup>654</sup> The Court addresses here India’s objection relating specifically to Article IX(6) and addresses in the next section the permissibility or impermissibility of parallel proceedings.<sup>655</sup>
279. Article IX(6) of the Treaty provides:
- The provisions of Paragraphs (3), (4) and (5) shall not apply to any difference while it is being dealt with by a Neutral Expert.
280. The interpretation or application of this provision requires a focus on two points in time: (1) the time when any difference is being “dealt with” by a neutral expert; and (2) the time when “the provisions of” Article IX(3), (4), and (5) are being “applied”.
281. India’s position as to these two different points in time is not entirely clear. India may regard the point in time when the differences at issue were being “dealt with” by a neutral expert as occurring as early as Pakistan’s request to India for the appointment of a neutral expert on 3 July 2015. India maintains that “when the NE is seized of a difference, i.e., as soon as *either party* requests an NE

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<sup>652</sup> **P-0001**, 21 December 2022 Letter, paras. 3, 5–8.

<sup>653</sup> See paras. 166–213, *supra*.

<sup>654</sup> **P-0001**, 21 December 2022 Letter, paras. 9–10; **P-0001**, 21 December 2022 Explanatory Note, para. 1.

<sup>655</sup> See paras. 310–316, *infra*.

to be appointed, the provisions of Paragraphs (3), (4), and (5) are on a moratorium, and the NE resolution process takes primacy and precedence”.<sup>656</sup> Given that India has argued that Pakistan’s request could not and did not lapse,<sup>657</sup> it may be arguing that a neutral expert was “dealing with” the questions now before the Court starting from 3 July 2015, triggering the prohibition under Article IX(6) prior to Pakistan’s Request for Arbitration in August 2016.<sup>658</sup>

282. As the Court explained in Part V(B) of this Award, however, Pakistan’s request of 3 July 2015 was revoked on 25 February 2016 and that revocation was thereafter accepted by India.<sup>659</sup> As such, there was no outstanding request by Pakistan for the appointment of a neutral expert after 25 February 2016, and no possibility of such a neutral expert “dealing with” the questions now before the Court.

283. Alternatively, India may be arguing that the point in time when the differences at issue were being “dealt with” by a neutral expert commenced when India notified Pakistan of its intention to appoint a neutral expert on 11 August 2016. Indeed, India maintains that “the appointment of the Neutral Expert had been triggered ... even before institution of the proceedings as defined under paragraph 3 of Annexure G”.<sup>660</sup> Under that view, a neutral expert proceeding had been instituted prior to the institution of the court of arbitration proceedings, and thus a neutral expert was “dealing with” the questions now before the Court.

284. Part V(B) of this Award explained, however, that notification of an *intention* to request a neutral expert proceeding does not initiate a neutral expert proceeding in the sense of precluding the emergence of a “dispute” under Article IX(2).<sup>661</sup> As the *Kishenganga* Court concluded, and this Court has reaffirmed, it “is insufficient for a Commissioner merely to express the view that a difference would, at some point, be an appropriate matter for a neutral expert”.<sup>662</sup>

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<sup>656</sup> P-0001, 21 December 2022 Explanatory Note, para. 12 (emphasis added).

<sup>657</sup> P-0001, 21 December 2022 Explanatory Note, para. 16.

<sup>658</sup> P-0001, 21 December 2022 Explanatory Note, para. 16. If India’s position encompasses Pakistan’s 2010 request for the appointment of a neutral expert as well, the result is the same, as the Court views that request as having been subsumed into Pakistan’s 3 July 2015 request for a neutral expert, which then was revoked on 25 February 2016. See paras. 204–206, *supra*. P-0023, Letter from the PCIW to the ICIW dated 25 February 2016, para. 4.

<sup>659</sup> See paras. 204–206, *supra*.

<sup>660</sup> P-0001, 21 December 2022 Explanatory Note, para. 23.

<sup>661</sup> See paras. 207–208, *supra*.

<sup>662</sup> PLA-0003, *Kishenganga* Partial Award, para. 478.

285. Given that India’s notification on 11 August 2016 of its intention to request the appointment of a neutral expert did not constitute the initiation of a neutral expert proceeding under Article IX(2)(a), it likewise cannot serve as the basis for concluding that a neutral expert was “dealing with” the questions now before the Court, thereby preventing the operation of Article IX(3), (4), and (5).
286. More clearly, India appears to argue that its request to the two Governments for the appointment of a neutral expert on 6 September 2016 or its Neutral Expert Request to the World Bank on 4 October 2016 had the effect of placing a “moratorium” on the operation Article IX(3), (4), and (5).<sup>663</sup> Further, India appears to argue that, at the latest, the World Bank’s confirmation of the Neutral Expert’s appointment on 13 October 2022 also had the effect of imposing such a moratorium. Specifically, India refers to “the explicit prohibition embodied under Article IX(6), which stands triggered by the appointment of the Neutral Expert, who is now dealing with the differences between the parties at the current juncture. ... The only way to address this error for the so-called Court of Arbitration is to hold its hands until the Neutral Expert decides on the issues dealt by him”.<sup>664</sup>
287. While these events (India’s request for the appointment of a neutral expert and the actual appointment of the Neutral Expert) occurred after Pakistan’s Request for Arbitration of 19 August 2016, India apparently regards the point in time when “the provisions of” Article IX(3), (4), and (5) are being “applied” as occurring up until the date when the Court of Arbitration is “established”, presumably meaning (pursuant to Annexure G) the date on which all three umpires have accepted their appointments and thus, together with such arbitrators as have been appointed by the Parties, they “form” the Court of Arbitration.<sup>665</sup> Indeed, India maintains that “the appointment of the Neutral Expert had been triggered prior to the establishment of the Court of Arbitration”.<sup>666</sup> In support of India’s position, it is noted that there are textual connections between Article IX(5) and Annexure G; the *chapeau* of Article IX(5) says that a “Court of Arbitration shall be established to resolve the dispute *in the manner provided by Annexure G*”,<sup>667</sup> while

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<sup>663</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 12.

<sup>664</sup> **P-0001**, 21 December 2022 Letter, para. 9.

<sup>665</sup> **PLA-0001**, Treaty, Annexure G, para. 11.

<sup>666</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 23.

<sup>667</sup> **PLA-0001**, Treaty, Art. IX(5) (emphasis added).

Annexure G commences with a subheading reference to “(Article IX(5))”, and refers to Article IX(5) in Paragraph 2(b) of Annexure G.

288. By contrast, Pakistan regards the point in time when “the provisions of” Article IX(3), (4), and (5) are being “applied” as completed with Pakistan’s Request for Arbitration on 19 August 2016, as that is the date on which these proceedings were instituted and the Court was first seized of the dispute.<sup>668</sup> Given that such date was well before India’s request for the appointment of a neutral expert in September 2016 (to the two Governments) and in October 2016 (to the World Bank) and well before the appointment itself in October 2022, Article IX(6) is not implicated.<sup>669</sup> If, however, the point in time when Article IX(3), (4), and (5) are being “applied” extends beyond the date of Pakistan’s Request for Arbitration, such as up to the point when the Court of Arbitration is empaneled, Pakistan maintains that the point in time when the Neutral Expert is “dealing with” questions placed before him is the date at which the retainer agreement between the Parties and the Neutral Expert is signed or fixed.<sup>670</sup> Pakistan has represented that the retainer agreement with the Neutral Expert was signed on 2 May 2023.<sup>671</sup> Consequently, on Pakistan’s case, the Court of Arbitration was empaneled in 2022, while the Neutral Expert only began “dealing with” the questions before him in 2023, such that Article IX(6) did not operate to foreclose the establishment of the Court of Arbitration.
289. The Court finds that the ordinary meaning of the Article IX(6) clause “the provisions of Paragraphs (3), (4) and (5) shall not apply” refers to the steps that are indicated in those particular provisions that lead up to and end with one of three possible acts that institute<sup>672</sup> a court of arbitration proceeding: the agreement indicated in Article IX(5)(a); the request indicated in Article IX(5)(b); or the request indicated in Article IX(5)(c). The clause is not referring to the steps set forth in “the provisions of” Annexure G by which the court of arbitration is thereafter empaneled; had it been intended to refer to the procedures set forth in “the provisions of” Annexure G, the clause in Article IX(6) would have expressly done so. Nor is the clause referring to any later point in time during the course of the court of arbitration’s proceedings. Once under Article IX(5) an agreement to establish a court of arbitration is reached, or either of the contemplated requests for a court of arbitration is made, the “provisions of Paragraphs (3), (4)

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<sup>668</sup> Pakistan’s Response, para. 185.

<sup>669</sup> Pakistan’s Response, para. 190.

<sup>670</sup> Pakistan’s Response, paras. 184.2, 190.

<sup>671</sup> Hearing on Competence Tr., (Day 1), 11 May 2023, p. 18.3–5.

<sup>672</sup> See **PLA-0001**, Treaty, Annexure G, para. 3.

and (5)” are no longer being “applied”, even though the steps thereafter for implementing the agreement or the request remain to be completed as set out in Annexure G. In other words, the clause in Article IX(6) of “the provisions of Paragraphs (3), (4) and (5) shall not apply” is referring to the steps leading up to the initiation of a court of arbitration proceeding, and is not referring to the steps to be taken thereafter under Annexure G so that the court of arbitration may be empaneled and transact business.

290. The context of Article IX(6) supports this interpretation. Article IX(2)(a) refers expressly to “the provisions of Part 1 of Annexure F” and also to “the provisions of Part 2 of Annexure F”, thus demonstrating that when the drafters intended in Article IX to refer to “the provisions of” an annexure as pertinent in a particular context, they knew how to do so.<sup>673</sup> Indeed, when the drafters wished to refer to “the provisions of” both an article and an annexure, they did so, such as in Article V(5) (“the provisions of Article II(6) and of Part 8 of Annexure H”). By contrast, in Article IX(6), no such reference to “the provisions of Annexure G” is found; instead, reference is only made to provisions by which a proceeding before a court of arbitration is initiated.
291. The object and purpose of the Treaty provide guidance as well. The Treaty’s preamble refers to “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” of the Treaty. As the *Kishenganga* Court noted, the “purpose of Article IX is to provide a comprehensive framework for the resolution of disagreements between the Parties arising from the Treaty, either by negotiation (both within the Commission and at the inter-governmental level) or by submitting disagreements to one of the two forms of third-party settlement”.<sup>674</sup> Once a Party has instituted a proceeding before a court of arbitration to address a disagreement, then—given that the procedures set forth in Annexure G may take weeks, if not months, to complete (including the appointment of the other Party’s arbitrators; the effort to agree upon umpires or upon a person to draw lots; the drawing of lots; and the vetting, identification and appointment of the umpires)—it would undermine the cooperative spirit and effective implementation of that form of dispute settlement if, at any moment in the process of empaneling the court of arbitration, it could be derailed by a request of the other Party for the appointment of a neutral expert. By contrast, a request for the appointment of a neutral expert made prior to the initiation of a proceeding before

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<sup>673</sup> Other parts of Art. IX do the same: Art. IX(2)(b) (“the provisions of Paragraph 7 of Annexure F”); Art. IX(2)(a), *chaussette* (“the provisions of Part 2 of Annexure F”); see also Art. II(6) (“the provisions of Part 8 of Annexure H”); Art. II(9) (“the provisions of Annexure H”); Art. VIII(4)(e) (“the provisions of Annexure H”).

<sup>674</sup> **PLA-0003**, *Kishenganga* Partial Award, para. 473.

a court of arbitration, even in the period when steps are being taken under Article IX up through Paragraph 4, would not undermine the cooperative spirit and effective implementation of the dispute settlement process; it would merely redirect the questions to a neutral expert before a court of arbitration proceeding has been instituted.

292. The Court’s interpretation is also consistent with rules of international law that operate in relation to judicial economy and jurisdiction. Such rules generally provide that the jurisdiction of the international court or tribunal is to be determined as of the date that the proceeding commences, typically when the claimant has filed its application before the court or its request for arbitration. Thus, any acts that occur subsequent to that date, such as a State’s termination or withdrawal from a treaty or other instrument that was used to establish the court or tribunal’s jurisdiction, have no effect on that jurisdiction.<sup>675</sup> To similar effect, once a proceeding before a court of arbitration proceeding is properly initiated (as in the present case), there must be a strong presumption against the incidental loss of jurisdiction over the matters placed before it by subsequent acts, such as the appointment of a neutral expert.
293. The fact that India requested the two Governments to appoint a neutral expert on 6 September 2016 and requested the World Bank to appoint a neutral expert on 4 October 2016, and that the World Bank thereafter appointed the Neutral Expert in 2022, does not deprive the Court of competence, given that—as concluded above<sup>676</sup>—the provisions of Article IX(3), (4), and (5) were applied no later than 19 August 2016, the date on which the present proceedings were instituted. Thus, Article IX(6), which gives priority to a neutral expert when he is “dealing with” differences, could not have any effect in preventing the earlier-in-time application of the provisions of Article IX(3), (4), or (5) in relation to those differences. Therefore, the Court rejects India’s Fifth Objection.

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<sup>675</sup> See, e.g., **PLA-0024**, *Nottebohm (Liechtenstein v. Guatemala)*, Preliminary Objections [1953] ICJ Rep 111, p. 124 (lapsing of Guatemala’s declaration accepting the International Court of Justice’s jurisdiction under Art. 36(2) of the Statute of the Court one month after the filing of Liechtenstein’s application did not have an effect on the Court’s jurisdiction, which is to be assessed on the date the application was filed); **PLA-0012**, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)*, Preliminary Objections, Judgment [1998] ICJ Rep 9 (enactment of Security Council resolutions after the date Libya filed its application before the Court has no effect on the Court’s jurisdiction, which is to be assessed on the date the application was filed); **PLA-0028**, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment [2002] ICJ Rep 3 (loss of person’s position as the DRC Foreign Minister after the date the DRC filed its application before the Court has not effect on the Court’s jurisdiction, which is to be assessed on the date the application was filed).

<sup>676</sup> See para. 289, *supra*.

**F. INDIA’S SIXTH OBJECTION: THE COURT IS NOT COMPETENT BECAUSE THERE IS NO “NECESSITY” FOR A COURT OF ARBITRATION UNDER ANNEXURE G, PARAGRAPH 1**

**1. The Parties’ Positions**

**(a) India’s arguments**

294. India’s Sixth Objection concerns Paragraph 1 of Annexure G to the Treaty, which provides that:

If the necessity arises to establish a Court of Arbitration under the provisions of Article IX, the provisions of this Annexure shall apply.

295. India considers that the establishment of a court of arbitration under Article IX is contingent on “the necessity aris[ing]” pursuant to Paragraph 1 of Annexure G.<sup>677</sup> The Court understands India’s position to be that Paragraph 1 of Annexure G sets a threshold requirement that must be satisfied before the provisions of Annexure G can apply. Specifically, India submits that the word “necessity” is to be understood as meaning “the state of being required or indispensable” or “a situation enforcing a particular course”.<sup>678</sup> In India’s view, “necessity” has been used advisedly, having regard to “the scheme of movement of resolution of differences set out in Article IX”.<sup>679</sup> What follows for India is that a “dispute” necessitating the establishment of a court of appeal can only arise in circumstances where:

- (a) the first stages of resolution have been exhausted,<sup>680</sup> or
- (b) both Parties agree that recourse to arbitration will be ideally suitable or necessary for the determination of issues between them.<sup>681</sup>

296. In the present case, India submits that this threshold of “necessity” has not been met.<sup>682</sup> India observes that, in the letters of Pakistan’s Commissioner indicating an intention to seek the appointment of a neutral expert dated 3 July 2015<sup>683</sup> and 12 November 2015,<sup>684</sup> the “narration of the questions” identified are “identical” to those raised in the letter of Pakistan’s Commissioner

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<sup>677</sup> P-0001, 21 December 2022 Explanatory Note, para. 13.

<sup>678</sup> P-0001, 21 December 2022 Explanatory Note, para. 14.

<sup>679</sup> P-0001, 21 December 2022 Explanatory Note, para. 14.

<sup>680</sup> P-0001, 21 December 2022 Explanatory Note, para. 13.

<sup>681</sup> P-0001, 21 December 2022 Explanatory Note, para. 13.

<sup>682</sup> P-0001, 21 December 2022 Explanatory Note, para. 15.

<sup>683</sup> P-0010, Letter from the PCIW to the ICIW dated 3 July 2015, para. 3.

<sup>684</sup> P-0020, Letter from the PCIW to the ICIW dated 4 November 2015.

dated 25 February 2016 requesting that India’s Commissioner collaborate in the preparation of a joint report under Article IX(3).<sup>685</sup> India argues that the “mere passage of seven months” between these letters cannot render the technical questions raised by Pakistan’s Commissioner into legal issues.<sup>686</sup> Therefore, according to India, the “inception of Pakistan’s position that a ‘dispute’ has arisen” that necessitates the establishment of a court of arbitration “is in the teeth of the express provisions of the Treaty, and the intention of the Treaty that a [court of arbitration] ought to be established only if the necessity so arises”.<sup>687</sup> In this regard, and in the light of India’s interpretation of Article IX, India appears to contend that the matter involves questions of a technical nature that fall within the exclusive competence of the Neutral Expert and, as such, the threshold of a “necessity” arising to establish a court of arbitration has not been satisfied.<sup>688</sup>

297. In the context here and elsewhere of addressing the existence of the Neutral Expert, India refers repeatedly to the impermissibility of “parallel proceedings” under the Treaty, meaning the impermissibility of simultaneous proceedings before both a court of arbitration and a neutral expert.<sup>689</sup>

**(b) Pakistan’s arguments**

298. Pakistan submits that India’s interpretation of the term “necessity” used in Paragraph 1 of Annexure G is predicated on its construction of Article IX as requiring the “exhaustion of the first stages of resolution” such that “recourse to arbitration may not be treated as a matter of course, and, thus, not even a matter of unilateral discretion”.<sup>690</sup> However, for the reasons outlined above in response to India’s Second and Third Objections,<sup>691</sup> Pakistan states that Article IX does contemplate unilateral reference of a dispute to a court of arbitration provided that certain prerequisites have been met.<sup>692</sup> Given that Pakistan considers it has met those prerequisites in the

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<sup>685</sup> P-0001, 21 December 2022 Explanatory Note, para. 15.

<sup>686</sup> P-0001, 21 December 2022 Explanatory Note, para. 15.

<sup>687</sup> P-0001, 21 December 2022 Explanatory Note, para. 15.

<sup>688</sup> P-0001, 21 December 2022 Explanatory Note, para. 15.

<sup>689</sup> P-0001, 21 December 2022 Letter, paras. 9–11, 14; P-0001, 21 December 2022 Explanatory Note, paras. 1–3, 24.

<sup>690</sup> Pakistan’s Response, para. 208–209, citing P-0001, 21 December 2022 Explanatory Note, para. 13.

<sup>691</sup> See paras. 161–165, 217–223, *supra*.

<sup>692</sup> Pakistan’s Response, para. 209; Hearing on Competence Tr., (Day 1), 11 May 2023, pp. 174.11–175.4, 220.2–14.

present case, the “necessity” to establish a court of arbitration has arisen.<sup>693</sup> This, Pakistan submits, is sufficient to dispose of India’s Sixth Objection.<sup>694</sup>

299. In any event, Pakistan submits that the “necessity” to establish a court of arbitration under Paragraph 1 of Annexure G to the Treaty does not pose an obstacle to the Court’s competence in any event for three further reasons.<sup>695</sup>

300. *First*, Pakistan submits that the “necessity” to establish a court of arbitration under Paragraph 1 of Annexure G arises at the point at which a request for arbitration is filed in accordance with the Treaty.<sup>696</sup> Properly interpreted, Pakistan argues, Paragraph 1 of Annexure G simply links Article IX(5) (which addresses the circumstances in which both Parties may agree on arbitration or a Party may file a request for arbitration) to the provisions of Annexure G (which sets out with granularity the process for empaneling a court of arbitration and its functions and procedures thereafter).<sup>697</sup> Read in this context, and in the light of the mandatory language of Article IX(5),<sup>698</sup> Pakistan considers that the “necessity” to establish a court of arbitration arises when an agreement is reached or a request is made pursuant to one of the three conditions under Article IX(5).<sup>699</sup> Equally, Pakistan observes that Paragraph 16 of Annexure G requires that a court of arbitration “*shall* decide all questions relating to its competence”.<sup>700</sup> Therefore, once a request for arbitration has been filed, Pakistan submits that the “necessity” to establish a court of arbitration will arise if for no other reason than to determine the question of its competence.<sup>701</sup>

301. *Second*, Pakistan considers that the “necessity” to establish a court of arbitration arose, given that the Request for Arbitration specifies questions of a Treaty-systemic character (and related

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<sup>693</sup> Pakistan’s Response, para. 209.

<sup>694</sup> Pakistan’s Response, paras. 208–209.

<sup>695</sup> Pakistan’s Response, para. 241.

<sup>696</sup> Pakistan’s Response, para. 210; Hearing on Competence Tr., (Day 1), 11 May 2023, pp. 219.18–220.1.

<sup>697</sup> Pakistan’s Response, para. 210.

<sup>698</sup> Pakistan’s Response, para. 210, citing **PLA-0001**, Treaty, Art. IX(5) (“A Court of Arbitration *shall be established* to resolve the dispute in the manner provided by Annexure G”) (emphasis added).

<sup>699</sup> Pakistan’s Response, para. 210; Hearing on Competence Tr., (Day 1), 11 May 2023, pp. 174.17–175.4, 219.19–220.14.

<sup>700</sup> Pakistan’s Response, para. 211, citing **PLA-0001**, Treaty, Annexure G, para. 16 (emphasis added).

<sup>701</sup> Pakistan’s Response, para. 211.

requests for relief) that cannot be answered by a neutral expert.<sup>702</sup> In Pakistan’s view, the competence allocated to a neutral expert by the Treaty is tightly confined to the questions itemized in Part 1 of Annexure F, notably the 23-plant specific questions set out in paragraph 1, in addition to determinations, upon request, of whether a matter characterized as a difference falls within Part 1 of Annexure F.<sup>703</sup> According to Pakistan, the Treaty limits the observations made by a neutral expert to “the particular matter on which the decision is made”, which are not capable of wider application.<sup>704</sup> This interpretation, Pakistan submits, echoes the reasoning of the *Kishenganga* Court in its Partial Award.<sup>705</sup>

302. In contrast, Pakistan submits, a court of arbitration’s writ runs “the length and breadth of the Treaty” and includes issues of treaty interpretation or application as well as plant-specific technical questions of a kind that could also be referred to a neutral expert as a “difference”.<sup>706</sup> Specifically, Pakistan notes that, by Article IX(5), a court of arbitration is capable of resolving a dispute, and by Article IX(1) and (2)(b), a dispute may emerge out of “[a]ny question that arises between the Parties concerning the interpretation or application of the Treaty”.<sup>707</sup> In considering this very issue in its Partial Award, the *Kishenganga* Court held that it could “identify no Treaty provision that would bar [a court of arbitration] from considering a technical question, unless a Party had in fact requested the appointment of a neutral expert”.<sup>708</sup> The *Kishenganga* Court also

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<sup>702</sup> Pakistan’s Response, para. 231; Hearing on Competence Tr., (Day 1), 11 May 2023, pp. 43.16–20, 158.8–14; Division of Competence Statement, para. 10(c). Hearing on Competence Tr., (Day 1), 11 May 2023, pp. 160.24–165.1.

<sup>703</sup> Division of Competence Statement, para. 10(b), referring to **PLA-0001**, Treaty, Annexure F, para. 7. Hearing on Competence Tr., (Day 1), 11 May 2023, pp. 166.17–167.5, 170.17–171.6; Hearing on Competence Tr., (Day 2), 12 May 2023, pp. 23.6–13, 178.16–23.

<sup>704</sup> Pakistan’s Response, paras. 232–233, citing **PLA-0001**, Treaty, Annexure D, para. 11, Annexure F, paras. 4, 11, 13.

<sup>705</sup> Pakistan’s Response, para. 234, citing **PLA-0003**, *Kishenganga* Partial Award, para. 470, where the *Kishenganga* Court stated:

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

<sup>706</sup> Pakistan’s Response, paras. 232, 235–236; Division of Competence Statement, para. 10(b); Hearing on Competence Tr., (Day 1), 11 May 2023, pp. 168.6–169.2, 178.18–24.

<sup>707</sup> Pakistan’s Response, para. 235.

<sup>708</sup> Pakistan’s Response, para. 237, citing **PLA-0003**, *Kishenganga* Partial Award, paras. 485–486.

stated, Pakistan recalls, that “the very composition of a court of arbitration also points to its competence in technical matters” given its mixed legal and technical composition.<sup>709</sup> In Pakistan’s view, a court of arbitration may therefore be even better suited to determine such technical, plant-specific matters, in contrast to a neutral expert, which will always be a “highly qualified engineer”.<sup>710</sup> Furthermore, Pakistan submits that a court of arbitration is the only body with remedial competence under the Treaty to grant interim relief, award financial compensation, and grant general declaratory and injunctive relief.<sup>711</sup> By contrast, Pakistan considers that, pursuant to Paragraph 12 of Annexure F, a neutral expert may only (and at the request of the Commission) “suggest” for the consideration of the Parties, plant-specific measures that are, in his opinion, appropriate “to compose a difference or to implement his decision”.<sup>712</sup>

303. Pakistan submits that the correspondence exchanged by the Commissioners from 3 July 2015 to 25 February 2016 demonstrates that what had previously been seen by Pakistan’s Commissioner as a set of technical issues concerning the KHEP and the RHEP, amenable to determination by a neutral expert, crystallized into a series of wider disputes between the Parties of legal and Treaty-systemic importance.<sup>713</sup> Specifically, Pakistan submits that each of the technical questions that have been raised concerning the KHEP and the RHEP in its Request for Arbitration is therefore dependent on corresponding antecedent questions of systemic Treaty interpretation and application, which can only be answered by, and therefore necessitates the establishment of, a court of arbitration.<sup>714</sup>

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<sup>709</sup> **PLA-0003**, *Kishenganga* Partial Award, para. 486.

<sup>710</sup> Pakistan’s Response, para. 146, citing **PLA-0003**, *Kishenganga* Partial Award, para. 486. Hearing on Competence Tr., (Day 1), 11 May 2023, pp. 202.9–203.3; Hearing on Competence Tr., (Day 3), 13 May 2023, p. 34.14–20.

<sup>711</sup> Pakistan’s Response, para. 88; **PLA-0001**, Treaty, Annexure G, paras. 23, 28; Hearing on Competence Tr., (Day 1), 11 May 2023, p. 169.2–180.15.

<sup>712</sup> Hearing on Competence Tr., (Day 1), 11 May 2023, p. 169.13–20.

<sup>713</sup> Pakistan’s Response, paras. 221, 228, citing **P-0010**, Letter from the PCIW to the ICIW dated 3 July 2015; **P-0011**, Letter from the PCIW to the ICIW dated 13 July 2015; **P-0012**, Letter from the ICIW to the PCIW dated 16 July 2015; **P-0013**, Letter from the PCIW to the Secretary, Ministry of Water and Power, Government of Pakistan and Secretary, Ministry of Water Resources, Government of India dated 24 July 2015; **P-0014**, Letter from the PCIW to the ICIW dated 24 July 2015; **P-0016**, Letter from the ICIW to the PCIW dated 21 August 2015; **P-0017**, Letter from the ICIW to the PCIW dated 1 September 2015; **P-0018**, Letter from the PCIW to the ICIW dated 11 September 2015; **P-0019**, Letter from the ICIW to the PCIW dated 13 October 2015; **P-0020**, Letter from the PCIW to the ICIW dated 4 November 2015; **P-0021**, Letter from the ICIW to the PCIW dated 27 November 2015; **P-0022**, Letter from PCIW to ICIW dated 5 February 2016; **P-0023**, Letter from the PCIW to the ICIW dated 25 February 2016.

<sup>714</sup> Pakistan’s Response, para. 232. Division of Competence Statement, para. 10(c); Hearing on Competence Tr., (Day 1), 11 May 2023, p. 43.15–20; Division of Competence Statement, para. 29. Beyond these specific

304. *Third*, Pakistan submits that in the context of the Treaty, the term “necessity” in Paragraph 1 of Annexure G does not mean “indispensable”, but merely “needed” or “required”.<sup>715</sup> Pakistan considers that this accords with the reasoning of the *Kishenganga* Court in regards to the use of the word “necessity” as it appears in Paragraph 15(iii) of Annexure D to the Treaty.<sup>716</sup> Upon the emergence of the issues between the Parties in this case, even if they were wholly technical in character, there arose a need for their resolution.<sup>717</sup> As the Court is one of the bodies capable of resolving such matters, and Pakistan has made a request for arbitration, it follows for Pakistan that there was the “necessity” that a court of arbitration be constituted.<sup>718</sup>

## 2. The Court’s Analysis

305. India argues that the Court lacks competence due to the absence of any “necessity” for the Court. In this respect, India points to Annexure G, Paragraph 1, which reads:

If the necessity arises to establish a Court of Arbitration under the provisions of Article IX, the provisions of this Annexure shall apply.

306. According to India, the “recourse to appointment of a CoA under Annexure G is contingent upon” either an agreement of the Parties or “exhaustion of the first stage of resolution” of the question

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questions, Pakistan accepts that other questions of legal interpretation of the Treaty may arise in the consideration of Pakistan’s Request: See Division of Competence Statement, para. 30.

<sup>715</sup> Pakistan’s Response, para. 240.

<sup>716</sup> Pakistan’s Response, paras. 239, citing **PLA-0003**, *Kishenganga* Partial Award, para. 397, where the *Kishenganga* Court stated:

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

This, Pakistan submits, corresponds with the usual presumption that the same word appearing more than once in the same agreement should bear the same meaning unless otherwise indicated: Pakistan’s Response, para. 239, citing **PLA-0016**, *Auditing of Accounts between the Netherlands and France pursuant to the Additional Protocol of 25 September 1991 to the Convention on the Protection of the Rhine against Pollution by Chlorides of 3 December 1976 (Netherlands/France)*, Award (2014) 144 ILR 259, para. 91; See also **PLA-0017**, R Gardiner, *Treaty Interpretation* (OUP, 2nd ed. (2017)), p. 209.

<sup>717</sup> Pakistan’s Response, para. 240.

<sup>718</sup> Pakistan’s Response, para. 240; Hearing on Competence Tr., (Day 1), 11 May 2023, pp. 209.14–23, 221.2–7.

that has arisen.<sup>719</sup> With respect to the latter, India maintains that the proper sequence under Article IX has not been followed, such that the necessity to establish the Court of Arbitration has not arisen.<sup>720</sup> Moreover, India argues that Annexure G, Paragraph 1, imposes its own substantive standard, as indicated when India states:

The mere passage of seven months between July, 2015 and February, 2016 cannot render the technical questions raised by the Pakistan Commissioner into legal issues. Therefore, the very inception of Pakistan’s position that a ‘dispute’ has arisen necessitating the establishment of a CoA is in the teeth of the express provisions of the Treaty, and the intention of the Treaty that a COA sought to be established only if the **necessity** so arises.<sup>721</sup>

307. The Court concurs with India that there was no agreement between the Parties to submit the questions that have arisen to a court of arbitration. At the same time, and as explained above in Parts V(B) and (C),<sup>722</sup> the Court finds that the requirements of Article IX have been met in the present case, thereby necessitating the empanelment of the Court.
308. Beyond that, the Court finds that the language of Annexure G, Paragraph 1, does not establish a new or separate requirement other than those present in Article IX; it is not calling for a substantive review of whether a court of arbitration is truly “needed” to address a dispute that has arisen. Rather, Paragraph 1 simply captures the preliminary point that, if the procedures of Article IX have resulted in an agreement or request for a court of arbitration, then the Paragraphs of Annexure G that follow will apply, setting forth the process for the empanelment and operation of a court of arbitration.
309. Given the Court’s conclusion in the preceding Part V(E),<sup>723</sup> there is no need to determine the point in time after 19 August 2016 that the Neutral Expert was “dealing with” any differences that are now before the Court. However, for the sake of completeness, the Court notes that even if the Neutral Expert were “dealing with” certain differences prior to the completion of the provisions set forth in Article IX(3), (4), and (5), that would not necessarily deprive the Court of competence either on the basis of Article IX(6) or on the basis of Annexure G, Paragraph 1. If that had been the chronological sequence (which it was not), it would then be necessary to compare: (1) the differences being “dealt with” by the Neutral Expert; and (2) the differences submitted as disputes before the Court of Arbitration, to see if they are the same. To the extent that they were exactly

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<sup>719</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 13.

<sup>720</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 14.

<sup>721</sup> **P-0001**, 21 December 2022 Explanatory Note, para. 15 (emphasis added).

<sup>722</sup> See paras. 166–213, 224–246, *supra*.

<sup>723</sup> See paras. 277–293, *supra*.

the same, then the Court would have a duty to determine that it was not competent. But to the extent that they were not the same, the Court would have a duty to determine that it was competent over those (and only those) differences that were not being dealt with by the Neutral Expert. For those differences, the temporal relationship between the two bodies would be irrelevant. In this instance, important aspects of Pakistan’s Request for Arbitration are clearly not differences presently before the Neutral Expert, most obviously Pakistan’s request for interim measures of protection,<sup>724</sup> and its various requests for injunctive relief.<sup>725</sup> The Neutral Expert has no competence over those requests.

310. Before concluding this section, the Court views it as appropriate again to comment on an aspect of the dispute resolution architecture of the Treaty. India’s Objections—both with respect to “necessity” and more broadly—focus to a large degree on the impermissibility of “parallel proceedings” before both a court of arbitration and a neutral expert, which India views as “anathema to the Treaty since they create the possibility of inconsistent and mutually repugnant decisions”.<sup>726</sup> Yet, in this instance, the emergence of parallel proceedings is a consequence of India’s own action. Had India accepted Pakistan’s invitation in July 2015 for the joint appointment of a neutral expert, then the questions at issue at that time would have proceeded before a neutral expert. Had India accepted Pakistan’s request in February 2016 for joint empanelment of a court of arbitration, the questions at issue at that time would have proceeded before a court of arbitration. Instead, faced with India’s resistance to either path, Pakistan exhausted the procedures set forth in Article IX and served its Request for Arbitration on India on 19 August 2016 under Article IX(5).
311. Only the following month (on 6 September 2016) and in reaction to Pakistan’s Request for Arbitration—thus, after the point where the Treaty expressly provides that a proceeding before a court of arbitration has been instituted<sup>727</sup>—did India’s Commissioner request that the Governments appoint a neutral expert, so as to address questions already included in the Court of Arbitration’s proceeding.<sup>728</sup> And only six weeks after Pakistan’s Request for Arbitration did India

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<sup>724</sup> Request for Arbitration, para. 90.

<sup>725</sup> See, e.g., Request for Arbitration, para. 91(c).

<sup>726</sup> **P-0001**, 21 December 2022 Letter, para. 2.

<sup>727</sup> **PLA-0001**, Treaty, Annexure G, para. 3.

<sup>728</sup> See para. 110, *supra*.

serve its request on the World Bank (on 4 October 2016) for the appointment of a neutral expert.<sup>729</sup> In doing so, it is India and India alone that created the parallel proceedings.

312. Such conduct is at odds with the underlying cooperation of the Parties that the Treaty fosters and upon which it depends. Indeed, a striking aspect of India's Note Verbale of 30 August 2016 is that, after *expressly recognizing* "the institution of arbitration proceedings pursuant to paragraph 2(b) and paragraph 6 of Annexure G of the Indus Waters Treaty" by Pakistan on 19 August 2016, India then asserted that "the only option left is to let the technical differences be resolved by the Neutral Expert",<sup>730</sup> leading to its requests for the appointment of a neutral expert on 6 September (to the two Governments) and 4 October 2016 (to the World Bank). Leaving aside that India had the alternative option of appearing before the Court of Arbitration to advance arguments as to competence, India knowingly pursued a path that created the parallel proceedings.
313. Notwithstanding the foregoing, it is noted that "parallel proceedings" are entirely possible under the Treaty, depending on the meaning of the term. In principle, and by way of an example, there is no difficulty with a neutral expert dealing with questions concerning technical aspects of a particular hydro-electric plant, while at the same time a court of arbitration addresses unrelated questions concerning the interpretation or application of the Treaty. While the existence of such parallel proceedings might complicate the dispute resolution process and might be a burden upon the Parties, there is nothing in the Treaty that precludes them.
314. The Treaty does not even preclude parallel proceedings concerning related questions, though preferably they could only occur with coordination of responsibilities. It is recalled that in 2008, Pakistan's concerns with the design of the KHEP crystallized in the form of six questions that were discussed within the Commission.<sup>731</sup> Pakistan's Commissioner viewed some of those questions as outside the scope of a neutral expert's competence, while other questions were within such competence.<sup>732</sup> Pakistan then commenced processes that might have led to parallel

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<sup>729</sup> See para. 111, *supra*.

<sup>730</sup> **P-0036**, Note Verbale from India to Pakistan dated 30 August 2016, chapeau, para. iv; **P-0156**, India's Request for the Appointment of a Neutral Expert dated 4 October 2016.

<sup>731</sup> See paras. 70–71, *supra*; see also **P-0060**, Record of the 100<sup>th</sup> Meeting of the Commission, Lahore, 31 May to 4 June 2008, Annexure 1; Hearing on Competence Tr., (Day 1), 11 May 2023, p. 70.14–20.

<sup>732</sup> **P-0063**, Letter from the PCIW to the ICIW dated 11 March 2009, paras. 6–11. At this point in the process, the evidence indicates that India's Commissioner responded by letter of 28 March 2009 saying that he viewed one of the questions designated by Pakistan for a court of arbitration as falling within the competence of a neutral expert: see **P-0225**, Letter from the PCIW to the ICIW dated 29 April 2009, para. 3(e). See also Hearing on Competence Tr., (Day 1), 11 May 2023, p. 71.14–19. Pakistan's Commissioner responded that, if that was the case, India was free to pursue the appointment of a neutral expert to determine if question 1 was within Part 1 of Annexure F. See **P-0225**, Letter from the PCIW to

proceedings; Pakistan's Commissioner invited both Governments to agree to the appointment of a neutral expert to resolve three of the questions,<sup>733</sup> and Pakistan Ministry of Foreign Affairs simultaneously requested India to engage in negotiations under Article IX(4) with respect to two of the questions.<sup>734</sup> As it happened, Pakistan only fully pursued the latter process that ultimately led to the formation of the *Kishenganga* Court, which dealt with the two questions, but there is nothing in the Treaty that would have prohibited launching both processes in that way.

315. In this context, it is again stressed that the World Bank's role is ministerial in nature; it is not assigned responsibility for determining whether parallel proceedings are consistent with the Treaty, and therefore should not be looked to by India or Pakistan for such a determination. Indeed, the Court concurs with the statement of the President of the World Bank that:

[T]he Bank's role is limited in character, and relates only to the exercise of procedural functions which do not touch upon the factual or legal merits of the contested issues. The Bank does not therefore perform—and the Treaty does not contemplate—any role in the determination of the contested issues arising between the two countries.

...

Having regard to the terms of the Treaty, it would be, in my view, fundamentally inconsistent with the Bank's neutral role in facilitating the establishment of an independent arbitral body to resolve disputes if the Bank were required or permitted to reach its own opinion about the validity of particular arbitration proceedings, including on the issue of jurisdiction.<sup>735</sup>

316. If parallel proceedings arise and a Party regards one of the bodies invoked as incompetent, it is incumbent upon that Party to present its objections to the relevant body for resolution of the matter. Because parallel proceedings may be entirely permissible under the Treaty, neither Party can—solely on the basis of the existence of parallel proceedings—unilaterally declare that one or the other body is incompetent. Rather, the issue must be resolved by the relevant bodies. To that end, the Treaty empowers a neutral expert to determine whether any difference placed before him

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the ICIW dated 29 April 2009, para. 6(h). India points to this response as evidence that, for any question not agreed within the Commission to be a dispute, the matter first must be placed before a neutral expert to address whether it is a difference within the scope of the neutral expert's competence. **P-0001**, 21 December 2022 Explanatory Note, para. 22. But Pakistan's response does not lead to such an interpretation. Pakistan's response is best understood as indicating that, in the period before either a neutral expert is dealing with a question or a proceeding has been instituted before a court of arbitration to address the question, India remained free to pursue the appointment of a neutral expert to address the question, if it viewed the question as within the competence of a neutral expert. Pakistan's response was not a concession that, in the absence of agreement within the Commission, all questions necessarily had to be placed before a neutral expert.

<sup>733</sup> **P-0064**, Letter from the PCIW to the Secretary, Ministry of Water and Power, Government of Pakistan and Secretary, Ministry of Water Resources, Government of India dated 11 May 2009.

<sup>734</sup> **P-0067**, Note Verbale from Pakistan to India dated 10 July 2009.

<sup>735</sup> **P-0038**, Letter from the World Bank to the Parties dated 18 October 2016, paras. 5, 7.

or her falls within the provisions of Part 1 of Annexure F.<sup>736</sup> Additionally, the Treaty enables a neutral expert to decide that the difference (or a part thereof) should be treated as a dispute and settled in accordance with the procedures that may lead to the establishment of a court of arbitration.<sup>737</sup> While all matters within the neutral expert's competence are final and binding in respect of the particular matter on which the decision is made,<sup>738</sup> any difference that is not within his or her competence can give rise to a dispute subject to the procedures that may lead to the establishment of a court of arbitration.<sup>739</sup> A court of arbitration, which also has authority to "decide all questions relating to its competence",<sup>740</sup> can resolve such disputes, as well as other disputes falling within its competence. In sum, the Treaty provides comprehensive processes to ensure that any questions concerning the permissibility or impermissibility of parallel proceedings can be decided.

317. For these reasons, the Court rejects India's Sixth Objection.

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<sup>736</sup> **PLA-0001**, Treaty, Art. IX(2)(a).

<sup>737</sup> **PLA-0001**, Treaty, Art. IX(2)(b), Annexure F, para. 7.

<sup>738</sup> **PLA-0001**, Treaty, Annexure F, para. 11.

<sup>739</sup> **PLA-0001**, Treaty, Annexure F, para. 13.

<sup>740</sup> **PLA-0001**, Treaty, Annexure G, para. 16.

## VI. DECISION

318. For the above reasons, the Court of Arbitration unanimously:

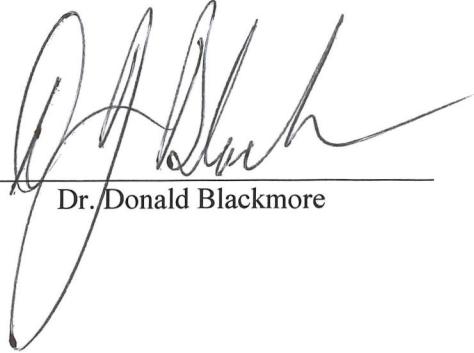
- A. FINDS that India's non-appearance in these proceedings does not deprive the Court of Arbitration of competence.
- B. FINDS that the Court of Arbitration has competence, in accordance with Paragraph 16 of Annexure G to the Indus Waters Treaty 1960, to decide all questions relating to its competence.
- C. FINDS that the matters referred to arbitration in Pakistan's Request for Arbitration concern a dispute or disputes within the meaning of Article IX(2) of the Indus Waters Treaty 1960.
- D. FINDS that the initiation of the present proceedings was in accordance with Article IX(3), (4), and (5) of the Indus Waters Treaty 1960.
- E. FINDS that the Court of Arbitration was properly constituted in accordance with Paragraphs 4 to 11 of Annexure G to the Indus Waters Treaty 1960.
- F. FINDS that India's request for, and the World Bank's appointment of, a Neutral Expert does not, pursuant to Article IX(6) of the Indus Waters Treaty 1960, deprive the Court of Arbitration of competence or limit its competence.
- G. FINDS that Paragraph 1 of Annexure G to the Indus Waters Treaty 1960 does not create an independent test for the necessity of the constitution of a Court of Arbitration beyond the requirements of Article IX of the Treaty.
- H. DECLARES that the Court of Arbitration is competent to consider and determine the disputes set forth in Pakistan's Request for Arbitration.
- I. RESERVES for further consideration and directions all issues not decided in this Award.

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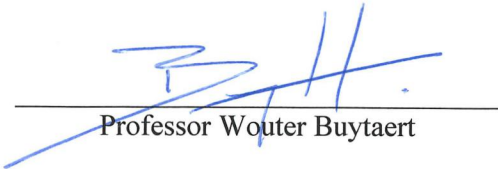
Done this 6<sup>TH</sup> day of JULY 2023:



Judge Awn Shawkat Al-Khasawneh



Dr. Donald Blackmore



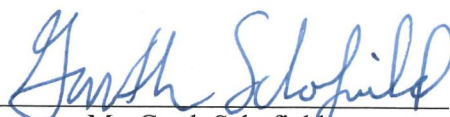
Professor Wouter Buytaert



Mr. Jeffrey P. Minear



Professor Sean D. Murphy  
Chairman



Mr. Garth Schofield  
Registrar