

2024

## STRATEGIES FOR SUCCESSFUL NEGOTIATION OF INTERNATIONAL DISPUTES: POSITIONAL BARGAINING VS. PRINCIPLED NEGOTIATION IN THE INDUS WATER TREATY NEGOTIATIONS

Sushant Mahajan

Follow this and additional works at: <https://scholarship.law.missouri.edu/jdr>



Part of the [Dispute Resolution and Arbitration Commons](#)

---

### Recommended Citation

Sushant Mahajan, *STRATEGIES FOR SUCCESSFUL NEGOTIATION OF INTERNATIONAL DISPUTES: POSITIONAL BARGAINING VS. PRINCIPLED NEGOTIATION IN THE INDUS WATER TREATY NEGOTIATIONS*, 2024 J. Disp. Resol. ()

Available at: <https://scholarship.law.missouri.edu/jdr/vol2024/iss1/7>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Dispute Resolution by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact [bassettcw@missouri.edu](mailto:bassettcw@missouri.edu).

# STRATEGIES FOR SUCCESSFUL NEGOTIATION OF INTERNATIONAL DISPUTES: POSITIONAL BARGAINING VS. PRINCIPLED NEGOTIATION IN THE INDUS WATER TREATY NEGOTIATIONS

*Sushant Mahajan\**

## TABLE OF CONTENTS

Introduction.....	65
I. THE DISPUTE.....	66
<i>a. The Indus River Basin.....</i>	66
<i>b. Development of the Indus River Basin.....</i>	67
<i>c. Pre-Partition Disputes in the Indus.....</i>	68
II. THE NEGOTIATIONS .....	69
<i>a. The ‘Standstill Agreement’ of 1947.....</i>	69
<i>b. The Delhi Agreement, 1948.....</i>	70
<i>c. Bilateral Negotiations Post the Delhi Agreement.....</i>	71
<i>d. Intervention of the World Bank.....</i>	71
<i>e. Multilateral Negotiations.....</i>	73
<i>f. The Final Stage.....</i>	75
III. ANALYSIS OF THE NEGOTIATION THROUGH <i>GETTING TO YES</i> .....	76
<i>a. The Parties.....</i>	77
<i>i. India.....</i>	77
<i>ii. Pakistan.....</i>	77
<i>b. Positional Bargaining in Bilateral Negotiations.....</i>	78

---

\* Sushant Mahajan is a dual-qualified attorney who specializes in resolving a diverse range of business disputes and providing strategic counsel for both domestic and international conflicts. He has represented multinational corporations and governments in a wide spectrum of matters before numerous international and domestic courts as well as tribunals. He is also a Visiting Scholar at the George Washington University Law School focusing his research on the role of third-party funding in developing countries. He completed his Masters (LLM) in International Arbitration, Mediation and, other forms of Dispute Resolution at the George Washington University Law School where he was the President of the GW-International Arbitration Students Association.

No. 1]	<i>Successful Negotiation of International Disputes</i>	65
	<i>i. Position of India</i> .....	78
	<i>ii. Position of Pakistan</i> .....	78
	<i>c. BATNA (or the Lack of It)</i> .....	79
	<i>i. India's BATNA</i> .....	80
	<i>ii. Pakistan's BATNA</i> .....	80
	<i>d. Principled Negotiation</i> .....	81
	<i>e. Separating the People from the Problem</i> .....	81
	<i>f. Focusing on Interests, Not Positions</i> .....	82
	<i>i. Interests of India</i> .....	83
	<i>ii. Interests of Pakistan</i> .....	83
	<i>iii. Common Interests and Failure to Recognize Them</i> .....	83
	<i>g. Insistence on Objective Criteria</i> .....	84
	<i>h. Inventing Options for Mutual Gains</i> .....	85
IV.	CONCLUSION .....	86

## INTRODUCTION

Water is the root of all civilization. Great empires of the past arose around lakes and river systems, from the Yangtze to the Nile to the Tiber.<sup>1</sup> While water resources bolstered the power of world leaders, water mismanagement had the potential to lead to their downfall. Even in modern times, water availability is a significant constraint on development – the magnitude of this constraint is particularly felt in arid and semi-arid regions especially as climate change takes effect.<sup>2</sup> This importance has made water supply a great source of conflict. Though it has been a cause of conflict for centuries, transboundary water management techniques permeate history.<sup>3</sup> Different reports have noted that there are more than one hundred international river water basins that are shared by more than two sovereign countries,<sup>4</sup> including, notably, the Nile, Mekong, Niger, Congo-Chambeshi, Amazon, Brahmaputra, and Indus Rivers.<sup>5</sup>

“The Indus Water Treaty (IWT), which arranges the use of the waters of River Indus between India and Pakistan, is praised as one of the most sophisticated

1. LUDWIK A. TELCAFF, *THE RIVER BASIN IN HISTORY AND LAW* 15 (1967).

2. See Rajagopalan Balanii et al., *The water resource: Variability, vulnerability and uncertainty*, in 1 THE UNITED NATIONS WORLD WATER DEVELOPMENT REPORT 4: MANAGING WATER UNDER UNCERTAINTY AND RISK 77, 87 (4th ed. 2012).

3. See U.N. Dep't of Econ. & Soc. Affs., *Transboundary waters*, U.N., [https://www.un.org/waterforlifedecade/transboundary\\_waters.shtml](https://www.un.org/waterforlifedecade/transboundary_waters.shtml) (last visited Jan. 1, 2024).

4. ANTHONY TURTON, ET AL., *MANAGEMENT OF TRANSBOUNDARY RIVERS & LAKES IX* (Olli Varis et al. eds., 2008).

5. See Kazuaki Hori & Yoshito Saito, *Classification, Architecture, and Evolution of Large-River Deltas*, in *LARGE RIVERS: GEOMORPHOLOGY AND MANAGEMENT* 75, 76–77 (Avijit Gupta ed., 2007).

international water agreements.”<sup>6</sup> It has also been described as one of the few examples of successful settlement of a major international river basin and as “a successful instance of conflict-resolution between two countries that have otherwise been locked in conflict.”<sup>7</sup> Even though India and Pakistan have gone to war twice and had countless skirmishes throughout the sixty year history of the treaty, the IWT still goes strong. Though emphasis has been laid down on lauding IWT as a hallmark of dispute resolution concerning watercourses, very little attention has been paid to the negotiating process that led to the conclusion of the treaty.<sup>8</sup>

This paper explores the history of the Indus River Basin and the origin of the dispute concerning distribution of its waters and control of its flow. It then examines the twelve-year negotiations that led to the resolution of the dispute culminating in the signing of the Indus Water Treaty in September of 1960. The paper then scrutinizes the negotiation process adopted by the disputing parties in both the bilateral and the multilateral phases of the negotiations, and the crucial role of the World Bank in brokering the deal. It concludes with an analysis of the negotiation techniques used by the parties in light of *Getting to Yes*, the seminal text on negotiations by Roger Fisher & William Ury.

## I. THE DISPUTE

### *a. The Indus River Basin*

The Indus River Basin is one of the most important water systems in Asia. The Indus River originates on the Tibetan Plateau and runs 3,200 kilometers across northern India and the length of Pakistan before emptying into the Arabian Sea near Karachi, Pakistan. While the Indus system has 27 major tributaries, the six most significant branches are (i) Chenab, (ii) Ravi, (iii) Sutlej, (iv) Jhelum, (v) Beas, and (vi) the Indus itself. These tributaries flow west through India before crossing into Pakistan. A seventh major tributary, the Kabul River, rises in Afghanistan and flows east into Pakistan. All including, the Indus River Basin encompasses 1.12 million square kilometers, with 47 percent of this are falling in Pakistan, 39 percent in India, 8 percent in China, and 6 percent in Afghanistan. In turn, 65 percent of the total area of Pakistan and 14 percent of the Indian land mass lie within the Indus River Basin. Pakistan draws 63 percent of the water used in the basin while India’s share is 36 percent. Pakistan’s dependence on the Indus is critical, especially for its agriculture which continues to be the backbone of its economy, contributing to over 21 percent of the gross domestic product, 45 percent of all jobs, and 80 percent of raw material used for agro-based industry. The Indus River system is essentially the lifeline of Pakistan.<sup>9</sup> On the other hand, when it comes to India, the basin produces around a third of the rice stocks and more than half of the wheat crop disseminated

---

6. ARIEL DINAR ET AL., BRIDGES OVER WATER: UNDERSTANDING TRANSBOUNDARY WATER CONFLICT, NEGOTIATION AND COOPERATION 270 (2007).

7. Ramaswamy R. Iyer, Lecture at Madras Institute of Development Studies (Jan. 12, 2012).

8. Asit K. Biswas, *Indus Water Treaty: The Negotiating Process*, 17 WATER INTERNATIONAL 201 (1992).

9. David Michel, *Water Conflict Pathways and Peacebuilding Strategies*, 164 PEACEWORKS 1, 10 (2020).

through the government-run Public Distribution System, helping to promote national food security.<sup>10</sup>

The Indus Basin is a system characterized by huge variations in water supply. The mean annual rainfall ranges from less than 100mm in parts of the lower Indus region, above the Arabian Sea, to more than 750 mm in the northern foothills, below the Himalaya mountains. The area is subject to seasonal monsoons, which dump rainfall in July and August. Rainfall and waterflow (from snowmelt) variability in the river is vast, with about 3/4<sup>th</sup> of the flow occurring in the four months from June to September.<sup>11</sup> The large flow of water carries silt in the alluvial that makes the riverine tracks fertile and productive. Thus, “lands across the Indus and its tributaries are always considered as productive and vital to the socio-economic development of the region,”<sup>12</sup> as is evident by the reliance of Pakistan on the waters of Indus.

### *b. Development of the Indus River Basin*

Irrigation in the Indus River Basin had been practiced since prehistoric times. It goes back thousands of years to the early civilizations of Mohenjo Daro and Harappa. Using inundation irrigation, these civilizations were dependent upon the rise and fall of the Indus rivers.<sup>13</sup> These, however, were small scale projects, and the total extent of the land irrigated, as to be expected, was limited. “Though the civilizations died out with the shift eastwards of the Indus rivers, the technique of inundation canals persisted until the advent of the British in the Punjab, in the late nineteenth century.”<sup>14</sup> This new era was heralded in 1859, when the Upper Bari Doab Canal (UBDC) was completed. The canal irrigated about one million acres of land between the Ravi and Beas Rivers with water from the Ravi. Thereafter the Sirhind Canal was completed in 1872. “In addition to the construction of new canals, many old canals were rehabilitated, extended, and improved.”<sup>15</sup> This was all done under the British ruled India (“British Raj”).

Thereafter in the late nineteenth century, the British extended the canal network throughout the Indus plains, both in the Punjab and Sind Province. “They established canal command areas or colonies which cultivated a variety of crops such as cotton, rice, wheat, and sugarcane.”<sup>16</sup> The irrigated area in the Sind doubled from about 1.5 million acres to 3 million acres within a short span of 25 years, between 1875 and 1900. The Upper Swat and Bahawalpur canals were complete in 1908 and 1914, respectively. The Triple Canals Project was completed in 1915. After World War I, the Sukkar Barrage, the world’s largest irrigation project, was completed in 1932 to use water of the main Indus. The Sutlej Valley project was also completed

---

10. See Undala Z. Alam, *Water Rationality – Mediating the Indus Water Treaty* (Sept. 1998) (unpublished thesis on file with the University of Durham); see also S.M.A SALMAN & K. UPRETY, *CONFLICT AND COOPERATION ON SOUTH ASIA’S INTERNATIONAL RIVERS: A LEGAL PERSPECTIVE* (2002).

11. Shafqat Kakakhel, *Indus Water Treaty: Negotiation, Implementation, Challenges and Future Prospects*, 67 PAK. HORIZON 43 (2014).

12. R.N. Ali et al., *Indus Water Treaty between Pakistan and India: From Conciliation to Confrontation*, 10 THE DIALOGUE 166, 167 (2015).

13. See Biswas, *supra* note 8, at 202.

14. Alam, *supra* note 10, at 33.

15. Biswas, *supra* note 8, at 202.

16. Alam, *supra* note 10, at 35.

in 1932 comprising four headworks at Punjnad, Islam, Sullemanki and Ferozpur. “In 1939, to use surplus waters of the Chenab, Haveli Canal Project including Trimmu Barrage was completed and the Kapabagh Barrage was opened in 1947.”<sup>17</sup> Modern irrigation, at that time, provided the framework around which both Pakistani and Indian Punjab grew to their present economic importance.<sup>18</sup> By 1947, the irrigation system in the basin consisted of 26 million acres of irrigated agriculture, 34,000 miles of major canals, and 50 million people relying on a system consisting of 13 additional canals that were already in place. The Indus Basin was thought to contain the world’s largest irrigated area and the irrigation works along the river were the most extensive in the world.<sup>19</sup>

### *c. Pre-Partition Disputes in the Indus*

Disputes over water-sharing in British India were common, but they were not the only issues among the various parties inhabiting British India. The British administered two-thirds of pre-partition India’s territory,<sup>20</sup> while the rest was ruled by more than 500 Indian Princes. “Each of these principalities was large enough to be a nation-state, had they been independent.”<sup>21</sup> This extensive division of the land gave rise to difference in interests over control and management of natural resources, leading to local disputes that were resolved locally under the aegis of the British. Treaties negotiating resolution of disputes in the Indus River Basin date back to 1874 when the British and Indian Princes agreed on the percentage of water each would receive from the Hathmatee Basin for irrigation purposes.<sup>22</sup> In 1892, the State of Jind and the British government agreed to allocate water for irrigation in exchange for payment. The only problem with the above agreements was that the Indian parties had little to no bargaining power.<sup>23</sup> This was a notable characteristic of all arrangements in pre-partition India. “After the First World War, disputes over apportionment of waters emerged due to the increase in the withdrawals of rivers, since various projects were planned at several places of the Basin.”<sup>24</sup> The major stakeholders in this dispute were the provinces of Punjab and Bombay and the Indian states of Bhawalpur and Bikaner. At that time the Government of India and the Secretary of State for India in London “had the authority to settle interstate water conflicts by an executive order, and they did so by sanctioning” the projects “after consultations and discussions with the” concerned parties.<sup>25</sup>

However, this was destined to change. The Government of India Act of 1935 “placed water under provincial jurisdiction,” and the disputes between Punjab and Sind grew as a result.<sup>26</sup> In October 1939, Sind formally complained to the Governor-General of India about the Bhakra Project. As the provinces were now separate, and

17. B.A. MALIK, *INDUS WATER TREATY IN RETROSPECT* 71 (2006).

18. DENNIS KUX, *INDIA PAKISTAN NEGOTIATIONS: IS PAST STILL PROLOGUE?* 61 (2006).

19. See AARON T. WOLF & JOSHUA T. NEWTON, *CASE STUDY OF TRANSBOUNDARY DISPUTE RESOLUTION: THE INDUS WATER TREATY I* (2007).

20. Pre-partition India comprised of the modern-day India, Pakistan, and Bangladesh.

21. Kux, *supra* note 18, at 3.

22. See Articles of Agreement, *Edur Durbar-Gr. Brit.*, July 20, 1874.

23. DINAR ET AL., *supra* note 6, at 274.

24. Muhammad Nawaz Bhatti, *Negotiating the Indus Water Treaty: An Historical Assessment*, 57 J. RSCH. SOC’Y PAK. 482, 483 (2020).

25. Biswas, *supra* note 8, at 202.

26. DINAR ET AL., *supra* note 6, at 274.

irrigation was a provincial matter, a special commission was convened with quasi-judicial powers. “Appointed by the Government of India in September 1941, the Indus Commission comprised of two Chief Engineers, P. F. B. Hickey and E. H. Chave, and was chaired by Justice B. N. Rau.”<sup>27</sup> The Commission submitted its report in July, 1942 concluding that the withdrawals by Punjab were likely to cause material injury to the inundation canals in Sind, especially in the month of September. It also recommended sharing the waters of Indus during the winter season. “The findings of the Commission” were not acceptable to either of the provinces.<sup>28</sup> It was imperative for the British to intervene to ensure peace in the basin. As a last resort at peaceful resolution of the dispute, the Chief Engineers of the two provinces met informally between 1943 and 1945 and produced a draft agreement. This Agreement did not find favor with the two provinces either.<sup>29</sup> This resulted in the matter being referred to the British Government in London. However, as fate would have it, before any decision could be taken on the dispute, the Indian Independence Act of 1947 came into being creating India and Pakistan, and thus internationalizing a hitherto local dispute. This problem was further complicated by the fact that the eastern parts of Punjab were now in India while the western parts of Punjab and the region of Sind came into the lap of Pakistan. It was also of no help that while deciding on the boundary between India and Pakistan, the Punjab Boundary Commission made no provision for dividing the waters flowing through these two nations.<sup>30</sup> According to the Commission, the irrigation and infrastructure systems of Punjab, as well as Bengal, “had been built to function under a single administration. They were never intended to be divided. No partition line [ . . . ] would have allowed Pakistan and India to operate their infrastructure separately, without cross-border interference.”<sup>31</sup> This marked the escalation of the dispute between two conflicting nations which had already seen tremendous amounts of violence and bloodshed at their very inception.

## II. THE NEGOTIATIONS

### *a. The ‘Standstill Agreement’ of 1947*

The partition decapitated the irrigation infrastructure created by the provinces since the headworks (structures controlling the flow of water) were “in upstream India, and the dependent canals in downstream Pakistan.”<sup>32</sup> It thus became imperative for Pakistan to ensure that the dispute did not escalate any further and that it entered into an agreement with India to protect its canals. Engineers from the two halves of Punjab (West Punjab in Pakistan and East Punjab in India), having failed

---

27. Alam, *supra* note 10, at 41; *see also* A.A. MICHEL, *THE INDUS RIVERS: A STUDY OF THE EFFECTS OF PARTITION* 129 (1967); *see also* N.D. GULHATI, *INDUS WATERS TREATY: AN EXERCISE IN INTERNATIONAL MEDIATION* 38 (1973).

28. Biswas, *supra* note 8, at 202.

29. *Id.*

30. *See id.* at 203. Punjab Boundary Commission was one of the two high powered panels set up by the British to divide the Punjab between India and Pakistan, the two new states that were being carved out from the pre-partition India. *Id.*

31. LUCY P. CHESTER, *BORDERS AND CONFLICT IN SOUTH ASIA: THE RADCLIFFE BOUNDARY COMMISSION AND THE PARTITION OF PUNJAB* 73 (John M. MacKenzie ed., 2009).

32. Undala Z. Alam, *Questioning the Water Wars Rationale: A Case Study of the Indus Water Treaty*, 168 *GEO. J.* 341, 342 (2002).

to work out a durable water sharing deal, signed a ‘Standstill Agreement’ to maintain the status quo. This agreement also referred outstanding differences to the Arbitral Commission which was mandated to address the disputes over resources.<sup>33</sup> Curiously under the ‘Standstill Agreement,’ Pakistan agreed to make payments to India for the water, which it later clarified were for the cost of operation and maintenance of the irrigation system and not for water itself.

The ‘Standstill Agreement’ was to operate only until March 31, 1948, and worked well until that time. However, Pakistan, being the lower riparian, had the onus to initiate negotiations before the expiration of the ‘Standstill Agreement.’ Because Pakistan failed to take any steps to negotiate a fresh agreement, including referring disputes to the Arbitral Commission, India discontinued the delivery of water to two major canals of Pakistan. “[T]he sense of insecurity and vulnerability that this interruption caused in Pakistan [...] became a permanent part of the Pakistani psyche, and continues to influence thinking even today.”<sup>34</sup> This lackadaisical approach of Pakistan has often been categorized as a major failure in its Indus Diplomacy.<sup>35</sup> Chaudhuri Muhammad Ali, who was the Secretary-General of Pakistan at that time and who later became the Prime Minister, while referring to the interruption of water by India, said that “there was neglect of duty, complacency and lack of common prudence” by West Punjab, “which had disastrous consequences on Pakistan.”<sup>36</sup>

#### *b. The Delhi Agreement, 1948*

“Canal water to West Punjab was restored on April 30, 1948, and an ‘Agreement on the Canal Water Dispute’ was signed at an Inter-Dominion Conference on May 4, 1948, which recognized” India’s “right to progressively reduce water supplies to” Pakistan, “in order enable India to develop its water-scarce areas.”<sup>37</sup> This agreement later came to be known as the ‘Delhi Agreement’. To summarize, “India agreed to the resumption of flow, but maintained that Pakistan could not claim any share of those waters as a matter of right.”<sup>38</sup>

This position was reinforced by the Indian claim that, since Pakistan had agreed to pay for water under the Standstill Agreement of 1947, Pakistan had recognized India’s water rights. Pakistan countered that they had rights of prior appropriation, and that payments to India were only to cover operation and maintenance costs.<sup>39</sup>

These conflicting positions form the bedrock of all future negotiations concerning the Indus River Basin between India and Pakistan.

Three essential features of the ‘Delhi Agreement’ which allowed India to dictate future negotiations were:

---

33. Kakakhel, *supra* note 11, at 44.

34. Iyer, *supra* note 7. Pakistan’s anxiety is exemplified by its objection to the Baglihar and the Kishenganga Projects which necessitated the exercise of dispute resolution mechanisms under the Indus Water Treaty. *Id.*

35. Muhammad Imran Mehsud, *Pakistan’s Indus Diplomacy: From Troubled Waters to a Troubled Treaty*, 27 INT’L NEGOT. 247 (2022).

36. CHAUDHRI MUHAMMAD ALI, *THE EMERGENCE OF PAKISTAN* 270–72 (1967).

37. Kakakhel, *supra* note 11, at 45.

38. D. Caponera, *International Water Resources Law in the Indus Basin*, in WATER RESOURCE POLICY FOR ASIA 509, 511 (M. Ali et al. eds., 1987).

39. WOLF & NEWTON, *supra* note 19, at 4.



No. 1] *Successful Negotiation of International Disputes* 71

- i. Pakistan agreed to India progressively diminishing waters from canals in Pakistan. This enabled India to claim acquiescence of Pakistan to the exclusive rights of India over the waters of the Indus.
- ii. Pakistan agreed that East Punjab (India) was water-scarce and ‘under-developed in relation to the parts of West Punjab (Pakistan).’
- iii. Pakistan agreed to pay charges to the India even under the ‘Delhi Agreement’ fortifying India’s claims over the waters.<sup>40</sup>

Notably, an essential aspect of the ‘Delhi Agreement’ was the provision urging the parties to find a permanent friendly solution to the dispute.<sup>41</sup>

### *c. Bilateral Negotiations Post the Delhi Agreement*

While the ‘Delhi Agreement’ temporarily solved the pressing issues, Pakistan was not happy with it. Consequently, on June 16, 1949, Pakistan sent a note to India with the view that the “present *modus vivendi* (Delhi Agreement) is onerous and unsatisfactory to Pakistan.” Pakistan insisted that another conference should be held at the earliest convenience to ensure an equitable apportionment of the flow of all waters common to Pakistan and India thereby resolving by agreement all disputes incidental to the use of Indus waters. Pakistan further stated that “if negotiations cannot accomplish such a practical solution, the International Court of Justice shall, upon application of either party, have jurisdiction to resolve the dispute.”<sup>42</sup> India preferred a commission of judges from each side to attempt to resolve their differences before turning the problem over to a third party. This stalemate continued through 1950.<sup>43</sup>

The ‘Delhi Agreement’ set in stone the positions of the two disputing nations. India relying on the principle of ‘equitable utilization of waters’ claimed greater share in the waters of Indus. Whereas, Pakistan relied upon the principle of ‘no significant harm’ in order to argue minimum allocation to India.<sup>44</sup> Pakistan could however no longer deny rights of India over the waters as the same had been acceded to twice, first in the ‘Standstill Agreement’ of 1947 and second in the ‘Delhi Agreement’ of 1948.

### *d. Intervention of the World Bank*

David Lilienthal, former chairperson of the Tennessee Valley Authority (TVA),<sup>45</sup> was the catalyst that knowingly or unknowingly reignited the efforts of

40. Mehsud, *supra* note 35, at 251.

41. Inter-Dominion Agreement, India-Pak., art. 6-7, May 4, 1948, [1948] INT Ser 3.

42. Biswas, *supra* note 8, at 204.

43. N.D. GULHATI, *INDUS WATERS TREATY: AN EXERCISE IN INTERNATIONAL MEDIATION* (1973).

44. Kari Lipschutz, *Global Insider: The India Pakistan Water Dispute*, *WORLD POL. REV.* (Jun. 10, 2010), <https://www.worldpoliticsreview.com/global-insider-the-india-pakistan-water-dispute/>.

45. *Tennessee Valley Authority Act*, NAT’L ARCHIVES (1993), <https://www.archives.gov/milestone-documents/tennessee-valley-authority-act>. Tennessee Valley Authority (TVA) is a U.S. government agency established in 1933 to control floods, improve navigation, improve the living standards of farmers, and produce electrical power along the Tennessee River and its tributaries. In 1933 the U.S. Congress passed a bill establishing the TVA, thus consolidating all the activities of the various government agencies in the area and placing them under the control of a single one. A massive program of building dams,

resolution of the Indus River Basin dispute. In 1951, David Lilienthal visited India on the invitation of the Indian Prime Minister to discuss the possibility of adapting the TVA regime to India's water problems. "Lilienthal also visited Pakistan and, on his return to the U.S., wrote an article" titled *Another 'Korea' in the Making* "outlining his impressions and recommendations" qua the Indus River Basin.<sup>46</sup> He also warned that "Pakistan could be devastated by the simple [act] of India permanently shutting off the source of waters"<sup>47</sup> Lilienthal suggested joint management of the international river basin through building of greater storage facilities. He further alluded to the possibility of the World Bank funding the work of an Indus Engineering Corporation, consisting of representatives from Pakistan, India, and the World Bank. Such a corporation would be tasked with the job of undertaking "necessary engineering works for the optimum utilization of the water resources of the Indus Basin."<sup>48</sup>

Eugene Black, the then World Bank President, impressed by Lilienthal's views wrote to the Prime Ministers of India and Pakistan in September of 1951 offering them the 'Bank's good offices for discussions of the Indus water dispute and negotiation of a settlement'. The offer was predicated on acceptance by the two countries of three essential principles, namely:

- (i) The Indus Basin's water resources are sufficient to continue all existing uses and to meet future needs;
- (ii) The water resources should be cooperatively developed and used in such a manner as to most effectively promote the economic development of the Indus Basin viewed as a unit; and
- (iii) The problem of development and use of the Indus Basin water resources should be solved on a functional and not a political plan, without relations to past negotiations and past claims, and independently of political issues.<sup>49</sup>

The Bank also outlined the process to achieve resolution. The World Bank proposed setting up a working party of engineers to deal with the Canal Waters problem. Pakistan and India would each send qualified engineers to meet with the Bank's own engineers. "These Designee Engineers would be accompanied by their technical staff they thought necessary."<sup>50</sup> The Working Party would decide on the procedures to be followed and the timetable to develop a plan to manage the Basin. An engineer selected by the Bank would be continuously available during the planning stage to participate as an impartial adviser, free to express his views, but

---

hydroelectric generating stations, and flood-control projects ensued. The fusion of a broad range of specific powers with a sense of social responsibility to the region made the TVA significant as a prototype of natural-resource planning. *Id.*

46. DINAR ET AL., *supra* note 6, at 275.

47. ABDUL SATTAR, PAKISTAN'S FOREIGN POLICY, 1947-2005: A CONCISE HISTORY 73 (1st ed. 2007).

48. Kakakhel, *supra* note 11, at 46.

49. G.T. Keith Pitman, *The Role of the World Bank in Enhancing Cooperation and Resolving Conflict on International Watercourses*, in INTERNATIONAL WATERCOURSES: ENHANCING COOPERATION AND MANAGING CONFLICT: PROCEEDINGS OF A WORLD BANK SEMINAR 160 (Salman M.A. Salman & Laurence Boisson de Chazournes eds., 1998).

50. Alam, *supra* note 10, at 102.

without being in the position of an arbitrator. The Bank would act as the “post office” for both parties.<sup>51</sup>

It may be noteworthy that in the early days of statehood, India and Pakistan had approached the World Bank with separate applications for loans to develop their portion of Indus waters. The World Bank, at its nascent stage in the late 1940s, had great interest in getting involved with such significant development investments. However, the requested loans were evidently based on conflicting positions taken by both Pakistan and India as regards to their rights over the waters. “Nonetheless, if the [World] Bank could successfully resolve the dispute between the two [parties], its reputation would be boosted in the international arena.”<sup>52</sup> Therefore, the World Bank was essentially an additional party to the negotiations rather than being a mediator in the dispute in as much as it had an equal stake in resolving the dispute between India and Pakistan. This argument is also fructified by the fact that the agreement which was the result of these extended negotiations i.e., the Indus Water Treaty, 1960 was co-signed by the World Bank.

#### *e. Multilateral Negotiations*

The intervention of the World Bank implied that any negotiations concerning the Indus River Basin would now be multilateral rather than only bilateral. This also marked a significant change in the negotiation strategy. While earlier both India and Pakistan approached the negotiations with ‘positional bargaining,’<sup>53</sup> the entry of the World Bank and its efforts changed the approach to one of a ‘principled negotiation.’<sup>54</sup> Having accepted the offer of the World Bank, a Working Party was set-up with efforts of India and Pakistan. The Working Party consisted of engineers from India, Pakistan, and the World Bank. The first meeting of the Working Party was held in May 1952 in Washington DC, US, and it subsequently met in November 1952 in Karachi, Pakistan, and in January 1953 in Delhi, India. As one would anticipate, India and Pakistan failed to reach any agreement on the approach to adopt to develop the waters of Indus. However, they were able to agree on certain important points, the most critical being that the “Working Party would validate data collected by one of the parties at the request of either side, but its acceptance or addition of any subject of study would not” commit either side as to its relevance or materiality.<sup>55</sup>

To overcome the impasse, the World Bank then suggested that the parties submit their own plans of development of the waters of Indus. India and Pakistan submitted their plans to the World Bank on October 6, 1953. The plans were as follows<sup>56</sup>:

---

51. *Id.*

52. DINAR ET AL., *supra* note 6, at 275.

53. See ROGER FISHER ET AL., *GETTING TO YES – NEGOTIATING AGREEMENT WITHOUT GIVING IN* xxviii (3d ed. 2011). Positional Bargaining depends upon successively taking (and then giving up) a sequence of positions until an agreement is reached. *Id.*

54. See *id.* Principled Negotiation as coined at the Harvard Negotiation Project which entails four basic principles: (1) “[s]eparate the people from the problem;” (2) “[f]ocus on interests, not positions;” (3) invent multiple options looking for mutual gains before deciding what to do; and (4) insist that the result be based on some objective standard. *Id.*

55. Bhatti, *supra* note 24, at 492.

56. Biswas, *supra* note 8, at 206.

	Allocation to India	Allocation to Pakistan	Total Usable Supplies
<b>India's Plan</b>	29 MAF	90 MAF	119 MAF
<b>Pakistan's Plan</b>	15.5 MAF	102.5 MAF	118 MAF

(MAF = Million Acre Feet)

After some discussion on the above plans, the parties submitted modified plans, which were as follows<sup>57</sup>:

	Allocation to India	Allocation to Pakistan
<b>India's Plan</b>	100% flow of Eastern Rivers 7% flow of Western Rivers	93% flow of Western Rivers 0% flow of Eastern Rivers
<b>Pakistan's Plan</b>	30% flow of Eastern Rivers 0% flow of Western Rivers	100% flow of Western Rivers 70% flow of Eastern Rivers

(Eastern Rivers = Ravi, Beas, and Sutlej)

(Western Rivers = Indus, Jhelum, and Chenab)

From the plans submitted by India and Pakistan, “the [World] Bank concluded that not only was the stalemate likely to continue, but that the ideal goal of integrated watershed development for the benefit of both [parties] was probably too elusive of a goal” considering the positions of the parties.<sup>58</sup> The World Bank in order to take the negotiations forward made its own proposal. The Bank’s plan consisted of three essential parts:

- (i) historical withdrawals must be continued, but not necessarily from the same sources;
- (ii) the three eastern rivers were assigned to India and the three western rivers to Pakistan; and
- (iii) Pakistan would have a transition period of 5 years to construct link canals to allow replacement of water supplies from India. Left out was the issue of storage reservoirs in Pakistan.<sup>59</sup>

The World Bank also realized “that it was virtually impossible to resolve the dispute without” arranging for sources of finance for “replacement and construction of new storage works.”<sup>60</sup> The proposal was shared simultaneously with both India and Pakistan.

On March 25, 1954, India formally accepted the proposal of the World Bank. On the contrary Pakistan in May 1954 stated that the plan does not meet the test of fairness laid down by the World Bank. It made vigorous representations to the Bank’s allocation of the eastern rivers to India and argued that the supplies from the western rivers were inadequate to replace Pakistan’s existing uses of the water from the eastern rivers.<sup>61</sup> Politically, Pakistan was not in a position to give away water and economically it was not possible for Pakistan to build huge infrastructure unilaterally for shifting the surplus flow of Western to Eastern Rivers.<sup>62</sup>

57. *Id.*

58. DINAR ET AL., *supra* note 6, at 276.

59. Pitman, *supra* note 49, at 161.

60. DINAR ET AL., *supra* note 6 at 276.

61. ALI, *supra* note 36, at 247.

62. MALIK, *supra* note 17, at 160–61.

“India issued an ultimatum to Pakistan that unless it accepted the Bank’s plan, the cooperative arrangements agreed in 1952 (referring to the water supplies arrangements) would lapse in June, 1954.”<sup>63</sup> Following pressure from the Bank, Pakistan gave a qualified acceptance to on July 28, 1954, reiterating its position that it considered flow of the western rivers insufficient to replace its existing supplies from the eastern river. India welcomed this progress and worked with the Bank to clarify certain aspects of the plan proposed by the Bank. The Bank, as a first step, “brokered several new agreements for the day-to-day regulation of the canal water. These [agreements] replaced” the ‘Delhi Agreement,’ which was ‘chronic irritant’ for Pakistan.<sup>64</sup> In 1955, the Bank asked India and Pakistan to develop plans allowing for storage reservoirs. The Bank further “issued an *aide memoire*” in May 1956 recognizing Pakistan’s limited storage and suggesting India’s financial liability for the “increased storage facilities and enlarged link canals in Pakistan.”<sup>65</sup> This proposal led to the final stage of the negotiations.

#### *f. The Final Stage*

Foreseeing that its *aide-memoire* was likely to accelerate the dispute because of financial concerns. The Bank approached the USA and the Commonwealth nations and asked if they would be willing to provide financial assistance. Informal discussions were held at the Bank with Australia, Canada, New Zealand, the UK, and the USA. “However, none of the potential donors would provide” any financing in the absence of a comprehensive plan agreed to by both India and Pakistan.<sup>66</sup> Little progress was made until the representatives of India and Pakistan met in May 1958. Pakistan proposed a plan including two major storage facilities which skyrocketed the cost to 1.12 billion dollars. India on the other hand vehemently argued that it would pay only for ‘replacement’ and not for ‘development.’ To overcome this roadblock, the World Bank suggested that instead of diving into the problem of which works would be considered ‘replacement’ and which ‘development,’ one could consider India paying a specific amount.<sup>67</sup> The Bank further assured financial help to India for its watershed development plans.

In August 1959 President Black convinced Australia, Canada, New Zealand, West Germany, the UK, and the USA to underwrite a water settlement that would cost almost 1 billion dollars. “This included, \$541 million from the donor consortium as grants; \$150 million as loans from the Bank and USA, and a single payment from India of \$174 million. A supplementary agreement provided an additional \$315 million to Pakistan.”<sup>68</sup> This funding was critical to both parties agreeing to a settlement of their disputes as both parties required the finances to develop their own water resources, something for which they had already knocked on the doors of the Bank.

With the funding now in place and parties eager to put an end to their decade long dispute, the Indus Water Treaty was signed in Karachi, Pakistan on September 19, 1960. The key features of IWT were:

63. Kakakhel, *supra* note 11, at 47.

64. Pitman, *supra* note 49, at 162.

65. DINAR ET AL., *supra* note 6, at 277.

66. Pitman, *supra* note 49, at 162.

67. WOLF & NEWTON, *supra* note 19, at 6.

68. Pitman, *supra* note 49, at 163.

- (i) Pakistan would receive unrestricted waters of the western rivers, which India would allow to flow unimpeded;
- (ii) India would continue to have right over the western rivers for hydro-electric power generation and for agricultural uses;
- (iii) There would be a 10-year transition period from April 1, 1960, to March 31, 1970, during which water would continue to be supplied to Pakistan from the eastern rivers as per the schedule to the treaty;
- (iv) India would provide 174 million dollars (62 million pounds) to Pakistan in 10 annual installments during the transition period;
- (v) Establishment of the Permanent Indus Commission consisting of Indus Water Commissioners from both sides. This commission would promote cooperation between the parties in the development of Indus waters.
- (vi) Numerous dispute resolution mechanisms in case any differences or disputes arises between the parties.<sup>69</sup>

While there have been some disputes between India and Pakistan primarily relating to the building of hydro-electric plants by India on the western rivers, the dispute resolution mechanism under the IWT has come to the rescue to ensure substantial compliance with the treaty. These features of IWT make it a leading example of international cooperation. The World Bank undoubtedly played a crucial role in the culmination of the negotiations and signing of the IWT. The role of the Bank and the strategies adopted by the parties have been analyzed in detail in the next part.

### III. ANALYSIS OF THE NEGOTIATION THROUGH *GETTING TO YES*

“[N]egotiation is an interactive communication process by which two or more parties who lack identical interests attempt to find a way to coordinate their behavior or allocate scarce resources in a way that will make them both better off than they could be if they were to act alone.”<sup>70</sup> “Although negotiations take place every day, it is not easy to do well. Standard strategies for negotiations often leave parties dissatisfied, worn out, or alienated – and frequently all three.”<sup>71</sup>

The thought-provoking book ‘*Getting to Yes – Negotiating Agreement Without Giving In*,’ provides a framework within which one could maximize the benefits of any negotiation. According to the *Getting to Yes*, people “see two ways to negotiate: soft or hard. The soft negotiator wants to avoid personal conflict and so makes concessions readily to reach agreement. [...] The hard negotiator sees any situation as a contest of wills in which the side that takes the more extreme positions and holds out for longer fares better.”<sup>72</sup> However, neither of these methods yield efficient results and as such leave the parties disappointed with the negotiation process.

69. Indus Water Treaty, India-Pak., Sep. 19, 1960, 419 U.N.T.S. 125.

70. RUSSELL KOROBKIN, *NEGOTIATION THEORY AND STRATEGY* 1 (2002).

71. FISHER ET AL., *supra* note 53, at xviii.

72. *Id.*

Unskilled negotiators often approach the negotiation with a methodology which relies upon putting forth various positions and giving in marginally, only when necessary, to continue a negotiation. This process of routinely taking positions is known as positional bargaining.<sup>73</sup> Positional bargaining to a long extent was the approach of the bilateral negotiations between India and Pakistan concerning the distribution of the waters of the river Indus.

A third way to negotiate which often escapes parties to a negotiation is the method of ‘principled negotiation.’

The method of ‘principled negotiation’ developed at the Harvard Negotiation Project is to decide issues on their merits rather than through a haggling process focused on what each side says it will and won’t do. It suggests parties look for mutual gains wherever possible, and that where your interests conflict, [the parties] should insist that the result be based on some fair standards independent of the will of either side.<sup>74</sup>

This part analyses the parties involved, the different negotiation techniques adopted by them and how the techniques helped or hindered the negotiation process.

#### *a. The Parties*

##### *i. India*

India (as we now know it) shook of the mantle of the British rule on August 15, 1947, as power transferred peacefully from the colonizer to the colonized. It was ready for this independence and its leaders were prepared to take charge of its development. As the official successor to the colonized India, independent India inherited automatic membership to a number of international organizations, including the World Bank. “Embassies that had been established to represent India before independence, were handed over to the new government.”<sup>75</sup>

India also saw continuity in political leadership, leaders which were an important part of politics pre-1947 saw themselves claiming important positions in the political structures. India announced itself as a republic on January 26, 1950, after successfully adopting a constitution, which embodied secular values and established all structures required for an effective and efficient government. Stable political leadership and a will to ensure expeditious development were hallmarks of India post 1947.

##### *ii. Pakistan*

In pre-1947 India, Muslims formed the largest religious minority and were spread over various parts of India. The fear of being persecuted in a Hindu majority nation, led the Muslims to rally behind a demand for an independent nation for Muslims. This gave birth to the idea of Pakistan, which was accepted by the British

---

73. *Id.* at 3.

74. *Id.* at xviii. The agreement must reflect some fair standard independent of the naked will of either side. This does not mean insisting that the terms be based on the standard you select, but only that some fair standard such as market value, expert opinion, custom, or law determine the outcome. *See id.*

75. Alam, *supra* note 10, at 86.

who by then were impatient to leave India. At its inception, even the territory of Pakistan was not contiguous. Pakistan comprised of West Pakistan (now Pakistan) and East Pakistan (now Bangladesh). East and West Pakistan were separated by India, an enemy that Muslims feared enough to demand for a separate nation.

However, unlike India, Pakistan was not blessed with a stable political structure. By the time that the Indus Water Treaty was signed, Pakistan had seen seven Prime Ministers and one Chief of Staff, who in 1958 became the head of the State. This lack of political stability hit Pakistan hard when it came to the negotiation process. There was no central figure which took charge of the negotiations and consequently not enough attention was paid to the problem of allocating waters. Pakistan was also cursed with internal strife. While East Pakistan constantly felt that it was treated as a stepchild, Sind and Punjab provinces within West Pakistan were unable to agree on water sharing arrangements each demanding more than the other.

### *b. Positional Bargaining in Bilateral Negotiations*

Throughout the negotiations concerning the Indus Basin, India and Pakistan established their positions, and guarded them against attack from the other. Clothed in a range of legal terms, each country claimed the waters from eastern rivers, in particular the river Sutlej. India, adamant that it was justified in developing its own irrigation needs, refused to subjugate its needs to Pakistan's prior, and absolute claim to the waters. Pakistan, fearful of any further action by India to unilaterally alter its water supply, in turn, refused to recognize that India too had a legitimate claim to use some of the water.<sup>76</sup> The positions of the parties may be summarized as follows:

#### *i. Position of India*

The essence of India's position was recorded in the 'Delhi Agreement.' Firstly, India argued that the Indian region of Punjab was under-developed in relation to the Pakistani region of Punjab and thus needed more water. Secondly, it insisted that India had proprietary rights over the waters of the Indus Rivers, especially since Pakistan had agreed to pay for water in both the Standstill Agreement as well as the Delhi Agreement. Thirdly, it maintained that it would progressively diminish water from the canals in Pakistan and Pakistan would need to look for alternative sources.

During the entire duration of the bilateral negotiations starting from 1947 and continuing till 1951, India held these positions and made no effort to reconcile them with the interests of Pakistan. Furthermore, the conduct of Pakistan in first failing to initiate talks before the expiry of the 'Standstill Agreement' in March 1948 and agreeing to pay for water without clarifying in the documents what the payment signified, allowed India to be steadfast in its positions.

#### *ii. Position of Pakistan*

Pakistan had inherited one of the world's largest irrigation networks and argued that it should be allowed to utilize all waters that form part of the said network.

---

76. *Id.* at 151.



Pakistan in effect called for maintenance of the status quo. This attempt resulted in India stopping flow of water to Pakistan in April 1948 which in-turn pushed Pakistan to agree to the severely lopsided ‘Delhi Agreement.’

Another facet of Pakistan’s position was its insistence on involvement of third parties in the dispute, including referring the dispute to the International Court of Justice. Pakistan believed that it was on a strong legal-footing and would be able to seek a resolution of the dispute in its favor by involving third parties. However, this position only alienated India which had constantly maintained that it intended to resolve the dispute through bilateral talks without alleviating it to an international crisis.

The situation at the end of the bilateral negotiations can be perfectly summarized by reference to what Fisher, Ury, and Patton point out with respect to positional bargaining:

When negotiators bargain over positions, they tend to lock themselves into those positions. The more you clarify your position and defend it against attack, the more committed you become to it. The more you try to convince the other side of the impossibility of changing your opening position, the more difficult it becomes to do so. Your ego becomes identified with your position. You now have a new interest in “saving face” – in reconciling future action with past positions – making it less and less likely that any agreement will wisely reconcile the parties’ original interest.<sup>77</sup>

Positional bargaining resulted in severe deterioration of the relationship between India and Pakistan. Additionally, both India and Pakistan were nowhere close to resolving the disputes that they had hoped to when they began their negotiations. Neither party saw any result coming out of the negotiations and appeared to have given up hope of ever resolving the disputes between them.

### *c. BATNA (or the Lack of It)*

*Getting to Yes*, emphasizes the need to have a BATNA i.e., Best Alternative to Negotiated Agreement. BATNA is a standard that can protect a party from accepting terms that are too unfavorable and from rejecting terms that would be in its interest to accept. “BATNA not only is a better measure but also has the advantage of being flexible enough to permit the exploration of imaginative solutions.”<sup>78</sup> “People think of negotiating power as being determined by resources like wealth, political connections, physical strength, friends, and military might. In fact, the relative negotiating power of two parties depends primarily upon how attractive to each is the option of not reaching agreement.”<sup>79</sup>

“Vigorous exploration of what [a party] will do if [it does] not reach agreement can greatly strengthen [its] hand. Attractive alternatives are not just sitting there waiting for [a party]; [the party] usually [must] develop them.”<sup>80</sup>

---

77. FISHER ET AL., *supra* note 53, at 4–5.

78. *Id.* at 102.

79. *Id.* at 104.

80. *Id.* at 105.

Having a good BATNA can help [a party] negotiate on the merits. [A party] can convert such resources as [it has] into effective negotiating power by developing and improving [its] BATNA. [A party should a]pply knowledge, time, money, people, connections, and wits into devising the best solution for [it], independent of the other side's assent. The more easily and happily [a party] can walk away from a negotiation, the greater [the party's] capacity is to affect its outcome.<sup>81</sup>

#### *i. India's BATNA*

Fortune blessed India with upper riparian rights, which meant that India could maintain its waterflow in any manner it deemed fit. Though negotiation of the dispute concerning the Indus River was imperative for ensuring certainty in the future, India could very well have walked away without an agreement. India's BATNA was most evident from its actions in April 1948 when it stopped the flow of water to the canals in Pakistan. Thus, India made sure that Pakistan was aware that India could walk away from any unfavorable negotiations without any substantial harm to its interests.

To further fructify their alternatives, India in the 'Delhi Agreement' ensured that Pakistan agreed to (i) right of India to gradually diminish flow of water to Pakistan, and (ii) payment by Pakistan for resumption of flow of water. These two conditions allowed India to have a fallback position. If it ever found itself in an unfavorable position in the negotiation, it could (and did) resort to the 'Delhi Agreement' and exit the negotiation with an ace up its sleeve. India also vigorously worked on developing its water storage capacities during the entire period of the negotiations. The Bhakra Dam and the Nangal Dam on river Sutlej neared completion and had the capacity to divert the entire flow of Sutlej.

These efforts showed a consistent commitment by India to (knowingly or unknowingly) develop its BATNA. This gave India an upper hand in the negotiation as there was little to lose for India if the negotiations failed. Having a BATNA allowed India to claim greater rights in the water and retain control over its waters. This is also evident from the fact that even in the final treaty India was able to seek additional rights over the western rivers.

#### *ii. Pakistan's BATNA*

Pakistan on the other hand was unable to take charge of the negotiations in light of the gamut of issues that burdened it post-independence. Pakistan failed to work on its BATNA, knowing very well that India was in a superior position in the negotiations. Pakistan's inferior position required it to work harder on its BATNA, but alas that was not to be. On the contrary Pakistan proceeded with an extremely laissez-faire approach. Pakistan failed to initiate negotiations with India before the expiry of the 'Standstill Agreement.' This was a failure on part of Pakistan to not realize the implications of ending of the 'Standstill Agreement' as a downstream nation.<sup>82</sup>

---

81. *Id.* at 108.

82. Mehsud, *supra* note 35, at 249.

If Pakistan had initiated the negotiations on time, it could have escaped the consequences of the termination of water flow. The short-term hydrological and economic consequences of stopping the flow of water were negligible but its long term hydrological and strategic implications were colossal.<sup>83</sup> Pakistan thereafter insisted on negotiations which led to the ‘Delhi Agreement.’ The inability of Pakistan to recognize its interest and initiate negotiations early, necessitated it to agree to a skewed agreement which haunted it through the negotiations. Pakistan thus, not only failed to have a BATNA of its own but also paved the way for India to strengthen its BATNA.

#### *d. Principled Negotiation*

Principled Negotiation is termed as the answer to the question whether to use soft positional bargaining or hard positional bargaining. It can be boiled down to four basic points:

- a. People: Separate the people from the problem.
- b. Interests: Focus on interest, not positions.
- c. Options: Invent multiple options looking for mutual gains before deciding what to do.
- d. Criteria: Insist that the result be based on some objective standard.<sup>84</sup>

Principled negotiation permits parties “to reach a gradual consensus on a joint decision efficiently without all the transactional costs of digging into positions only to have to dig [...] out of them.”<sup>85</sup>

Until the time that India and Pakistan were involved in bilateral negotiations, they were unable to move away from positional bargaining. This would change with the intervention of the World Bank. The World Bank took steps to comply with each of the four basic points of a ‘principled negotiation’ which resulted in signing of the Indus Water Treaty.

#### *e. Separating the People from the Problem*

A basic fact about negotiation, easy to forget in corporate and international transactions, is that you are dealing not with abstract representatives of the “other side,” but with human beings. They have emotions, deeply held values, and different backgrounds and viewpoints; and they are unpredictable. They are prone to cognitive biases, partisan perceptions, blind spots, and leaps of illogic.<sup>86</sup>

In this context perception plays an important role.

The difference itself exists because it exists in [the thinking of the parties]. Fears, even if ill-founded, are real fears and need to be dealt with. [...] Facts, even if established, may do nothing to solve the problem. [...]

83. *Id.* at 108.

84. FISHER ET AL., *supra* note 53, at 11.

85. *Id.* at 15.

86. *Id.* at 20–21.

useful as looking for objective reality can be, it is ultimately the reality as each side sees it that constitutes the problem in a negotiation and opens the way to a solution.<sup>87</sup>

The birth of Pakistan was the result of Muslims' fear of being prosecuted by a Hindu majority in India. The stoppage of flow of water in Pakistan by India in April 1948 exacerbated this fear. All negotiations concerning the flow of the Indus were marred by this fear. India was never able to perceive this as an impediment to a fruitful negotiation. It is also noteworthy, that while Pakistan feared losing water, India feared having to limit its development. Each side also feared having insufficient water to feed its population. The political representatives of each country also feared losing their power base. The negotiations were haunted by what would be lost by each side, and not what stood to be gained by mutual cooperation.<sup>88</sup> It was to dispel this fog of fear that the intervention of World Bank was so critical.

Firstly, the World Bank brokered several new agreements for the day-to-day transitional regulation of waters between India and Pakistan. These agreements replaced the 'Delhi Agreement,' which the World Bank described as a "chronic irritant to the negotiations." This act quelled a major fear of Pakistan.<sup>89</sup> Secondly, India had, prior to the intervention of the World Bank, applied for loans to the World Bank for development of two major hydro-electric projects, one on the river Sutlej and the other on river Ganges. World Bank had refused to grant these loans pending disputes between India and Pakistan concerning the waters of the river Sutlej.<sup>90</sup> Intervention of the World Bank encouraged India to negotiate in good faith as it was certain that settlement of the dispute will allow it access to funds for development which it would not otherwise manage.

These steps went a long way in changing the perception of the parties to the negotiation and allowing them to concentrate on the problem without being troubled by the fear of a bad agreement. These steps also enabled separating the people from the problem, leading to a meaningful negotiation.

#### *f. Focusing on Interests, Not Positions*

According to *Getting to Yes*, "[t]he basic problem in a negotiation lies not in conflicting positions, but in the conflict between each side's needs, desires, concerns, and fears."<sup>91</sup> "The purpose of negotiating is to serve [a party's] interests. The chance of that happening increases when [a party] communicates [its interests]. [...] One or both of [the parties] may be focusing on past grievances instead of on future concerns."<sup>92</sup> India and Pakistan had numerous interests in the negotiations concerning the Indus Basin, which may be summarized as follows:

---

87. *Id.* at 24–25.

88. Alam, *supra* note 10, at 90.

89. Pitman, *supra* note 49, at 162.

90. Alam, *supra* note 10, at 138.

91. FISHER ET AL., *supra* note 53, at 42.

92. *Id.* at 52.

*i. Interests of India*

The partition of the Indian sub-continent resulted in India inheriting major sections of the Indus River. India, with accelerated development of its economy in mind, intended on utilizing this water to develop its own irrigation system and become self-sufficient in food production. This interest was further strengthened by the inflow of refugees from Pakistan during the partition. “India wanted the additional water, but it did not want to wait indefinitely for a decision nor pay Pakistan handsomely for allocation of this water.”<sup>93</sup> India thus wanted to ensure that it had enough water for itself and give to Pakistan only what it could spare and nothing more.

At later stages of the negotiation, India’s interests developed into primarily a concern for the financial liability that it would have to undertake for construction of replacement works in Pakistan. As India was able to secure sufficient water for itself, the same was accompanied with the burden of costs for construction of replacement works for the canals which would become unusable as a result of the allocation of eastern rivers to India. This cost was initially pegged by Pakistan at 1.12 billion dollars. However, finally the cost India was required to pay was 174 million dollars, which was substantially less than what was demanded by Pakistan initially.

*ii. Interests of Pakistan*

If the British had not extended the irrigation system in Punjab to the extent that they did, Pakistan as an independent nation would not have been able to survive. Pakistan was well aware of this. The country’s complete dependence upon the Indus Basin’s rivers and the irrigation canals that used the water therein, was clearly demonstrated in April 1948. Fear of their own existence was the interest that governed the entire negotiations for Pakistan.

Apart from Pakistan’s interest in maintaining its existence by continuous flow of water, the other interests weighing the minds of Pakistani leaders were, (a) ensuring supply of water from existing sources, (b) prevent India from insisting on development of alternate sources by Pakistan, (c) reluctance to undertake any action that could set a precedent, as had happened during the ‘Delhi Agreement’, and (d) account for the dispute between its own provinces qua sharing of the waters.

*iii. Common Interests and Failure to Recognize Them*

What is striking about the negotiations concerning the Indus River Basin is the inability of the parties to work together in identifying common interests. Both India and Pakistan were interested in safeguarding their national security, promoting economic development, and being independent and self-sufficient in their production of food. Both parties also wanted to have an assured and untampered supply of water, independent of an upstream riparian. “Both countries were prepared to use international law to legitimize their position, and both wanted to minimize the

---

93. Alam, *supra* note 10, at 106.

financial costs that might be incurred from alternative approaches to resolving the problem.”<sup>94</sup>

Though India and Pakistan both had made sure to communicate their positions to each other, no attempt was made to communicate or reconcile their interests. Even with so much in common the parties failed to take meaningful steps to ensure that the negotiation proceeds towards a swift resolution of their disputes. The fact that the negotiations dragged on for twelve years is a testimony to their mutual suspicion and wariness.

The World Bank helped India and Pakistan move away from their positions and concentrate on their interest. “Two of the three main principles on which the offer of the World Bank was predicated were:

- (i) The Indus Basin’s resources are sufficient to continue all existing water uses and to meet future needs;”<sup>95</sup> and
- (ii) “The water resources should be cooperatively developed and used in a manner as to most effectively promote the economic development of the Indus Basin viewed as a Unit.”<sup>96</sup>

The acceptance of these principles by both parties assuaged the hard positions of the parties and helped them realize the commonality of their interests. It was in favor of both India and Pakistan to ensure sufficient supply of water and effectively promote the economic development of their people, and agreeing on these principles allowed them to work efficiently towards resolution of their disputes.

#### *g. Insistence on Objective Criteria*

It is always in the interest of parties to settle differences on the basis of independent and objective criteria.

Shifting discussion in a negotiation from the question of what the other side is willing to do to the question of how the matter ought to be decided does not end the argument, nor does it guarantee a favorable result. It does, however, provide a strategy a party can vigorously pursue without the high costs of positional bargaining.<sup>97</sup>

The World Bank, at the time of its intervention sought the parties’ acceptance to the principle that, the problem of development and use of the Indus Basin water resources should be solved on a functional and not a political plain.<sup>98</sup> India and Pakistan had each relied upon its interpretation of principles of international law and their historic rights over the Indus waters, to put forth their positions in the negotiations. The functional approach suggested by the World Bank took the

---

94. *Id.* at 105.

95. Mehsud, *supra* note 35, at 248. (“The third main principle was that ‘The problem of development and use of the Indus Basin water resources should be solved on a functional and not a political plan, without relations to past negotiations and past claims, and independently of political issues.’. Though this was agreed to and was important to ensure the negotiations move forward, it was not a shared interest since Pakistan wanted the discussion to be entail the political consequences of the division of water as well.”).

96. Pitman, *supra* note 49, at 160.

97. FISHER ET AL., *supra* note 53, at 93.

98. Pitman, *supra* note 49, at 160.

dispute out of the political sphere and imposed an independent technical criterion in place. This approach was fortified by the deputation of numerous engineers by the World Bank to assist Indian and Pakistani engineers in resolving the disputes concerning allocation of the waters.

Though some authors have criticized the use of the functional approach as the same appeared to favor India more than Pakistan,<sup>99</sup> the functional approach enabled both parties to approach the problem with a new perspective while ensuring that their interests are accounted for.

#### *h. Inventing Options for Mutual Gains*

“As valuable as it is to have many options, people involved in a negotiation rarely sense a need for them. In a dispute, people usually believe that they know the right answer – their view should prevail.”<sup>100</sup> In such a complex situation, inventing creative options becomes an absolute necessity. Inventing options opens doors and produces a range of potential agreements satisfactory to each side.<sup>101</sup>

India in the bilateral phase of the negotiations was content on threatening to stop flow of water and burdening Pakistan with the task to invent alternative solutions. Pakistan on the other hand was bogged down by the fear of non-existence and was unable to provide any solution to the problems of the Indus Basin. Here again the intervention of the World Bank made a massive impact.

The World Bank initially started with the idea of setting up a joint development plan for the Indus Basin. However, it soon became evident to the World Bank that joint development was a distant dream. It then asked the parties to submit their proposal on the division of water.<sup>102</sup> Both parties submitted divergent views which the other would not have agreed to. The World Bank reconciled both proposals and came out with its own. This proposal came to be accepted by India, but Pakistan was still hesitant considering that it would have to spend a large amount to replace old canals and develop new storage structures.

The negotiations again were at an impasse. The World Bank, then convinced India to pay for a portion of the replacement cost and sought underwriting of the remaining financing by Australia, Canada, New Zealand, West Germany, the UK, and the USA. The estimate of 1.12 billion dollars as the replacement cost put forth by Pakistan, made India reconsider its commitment.<sup>103</sup> India further challenged that the replacement cost also included cost of development which India could not be burdened with. Before this could escalate into a problem, the World Bank assured India that it would be liable only for a fixed sum and not for the entire replacement cost.<sup>104</sup>

This active and inventive role of the World Bank helped ensure that there were always multiple options available to overcome any impasse in the negotiations. Neither India nor Pakistan at the inception of the negotiations would have imagined the Indus Water Treaty to turn out the way it did. It was possible only as a result of the innovative approach adopted by the World Bank that the negotiations could be

99. See Mehsud, *supra* note 35, at 254–55.

100. FISHER ET AL., *supra* note 53, at 59.

101. *Id.* at 13.

102. Alam, *supra* note 10, at 233.

103. Pitman, *supra* note 49, at 162.

104. Biswas, *supra* note 8, at 208.

successful with the parties agreeing to such a comprehensive agreement. It has rightly been said that the “Bank provided support staff, funding, and, perhaps most important, its own proposals when negotiations reached a stalemate.”<sup>105</sup>

#### IV. CONCLUSION

The Indus Water Treaty was an arrangement to bring two countries together, enter a compromise and work for better future and developmental avenues. “It was a compromise to ease the situation and let the two countries initiate their practical arrangements for the appropriate water management projects under their control.”<sup>106</sup> The treaty was not only beneficial to India and Pakistan, but the World Bank too benefitted immensely from it. “For example, between 1960 and 1970 the World Bank approved five water-related projects in the Indus Basin, totaling” to 220.7 million dollars at that point of time.<sup>107</sup> The Treaty “has survived three Indo-Pakistan wars (1965, 1971, and 1991) and the vicissitudes in the troubled relationship between the two” parties.<sup>108</sup> There have been some disputes concerning the flow of the waters, but the robust dispute resolution mechanisms<sup>109</sup> have come to the rescue of the treaty and prevented escalation by either of the parties.

Apart from being an ideal resolution to a decade long dispute, the process of negotiation of the Indus Water Treaty also highlights the efficacy of ‘principled negotiation.’ While the bilateral negotiations between India and Pakistan suffered from positional bargaining by both sides, the intervention of the World Bank saw the shedding of positional bargaining and utilization of theories of ‘principled negotiation.’ To that extent the negotiations of the Indus Water Treaty are an ideal case study demonstrating all that goes wrong in positional bargaining as well as the immense benefits of ‘principled negotiation.’

---

105. WOLF & NEWTON, *supra* note 19, at 7.

106. Ali, *supra* note 12, at 173.

107. DINAR, *supra* note 6 at 280.

108. Kakakhel, *supra* note 11, at 55.

109. The Indus Water Treaty sets forth distinct procedures to handle issues which may arise: “questions” are handled by the Commission; “differences” are to be resolved by a Neutral Expert; and “disputes” are to be referred to an ad hoc arbitral tribunal called the “Court of Arbitration.” *See id.*, at 50.