

THE ROLE OF THE WORLD BANK UNDER THE INDUS WATERS TREATY 1960

Maham Naweed



About the Author

Maham Naweed is an international lawyer who completed her Bachelors of Law from the Lahore University of Management Sciences and her Masters of Law from Yale Law School. Currently, she is the Chair, Lawfare and International Law at the Islamabad Policy Research Institute. Her areas of interest and research expertise include public international law, particularly international human rights law and laws of conflict.

About IPRI

The Islamabad Policy Research Institute (IPRI) is one of the oldest non-partisan think tanks on all facets of National Security, including international relations and lawfare, strategic studies, governance, public policy, and economic security in Pakistan.

TABLE OF CONTENTS

<i>Abstract</i>	3
I) History of the Dispute.....	4
II) The Involvement of the World Bank in the Indus Waters Dispute	5
III) Jurisdiction of the World Bank under the Indus Waters Treaty.....	7
Financial Administration.....	7
Dispute Resolution Mechanism.....	8
IV) The Current Issue Treaty	9
V) Rethinking the Implications of the Role of the World Bank.....	11

Abstract

The Indus Waters Basin, divided between Pakistan and India, continues to be a source of tension between the two unaligned neighbors. In 1960, the Indus Waters Treaty was signed with the World Bank acting as a broker. The Treaty, while dividing the Indus Basin between Pakistan and India, also lists out the role of the World Bank under it. The implications of the World Bank not fulfilling its role under the Treaty are immense. The “pause” on the dispute resolution mechanism of the Treaty, by the World Bank, for almost six years, has caused irreparable damage to Pakistan.

Keywords: Indus Waters Treaty, World Bank, Neutral Expert, Court of Arbitration, Pakistan, India

D) History of the Dispute

Disputes pertaining to the waters of the Indus have existed before the creation of Pakistan and India. The Government of India Act 1935 transferred water under the jurisdiction of the provinces and issues between Punjab and Sindh began to crop up as a result of that. During the partition of the subcontinent, Sir Cyril Radcliff was appointed to delineate the boundary between the two countries.¹ However, it is understood that Sir Radcliff did not consider the extensive implications surrounding the Indus Basin while making a determination on the boundary delimitation. He was optimistic that “*some joint control and management of the irrigation system may be found.*”² However, the post-partition situation of the water dispute was aggravated because of hostilities erupting following partition.³ This made the Indus Waters Basin just one more point of contention between the newly formed neighboring states.⁴

A “Standstill Agreement” was put in place by the engineers of Pakistan and India, according to which water was allowed to flow from the headworks in India to Pakistan. This agreement expired on 31 March 1948 and on 1 April 1948, India discontinued the discharge of water into Pakistan.⁵

The flow of water to Pakistan was resumed as a result of an Inter-Dominion conference held in Delhi in May 1948 but disputes still existed with regards to whether Pakistan had a right to the water or not.⁶ Although most conflicts remained unsolved, the Delhi Agreement

¹ Hugh Tinker, “Pressure, Persuasion, Decision: Factors in the Partition of the Punjab, August 1947”, *The Journal of Asian Studies*, Vol. 36, No. 4 (Aug., 1977), Pg. 695-704.

² Satya Mehta Rai, “Punjab Since Partition”, Durga Publications, 1986, Pg. 4.

³ For a detailed account of the hostilities and crisis that plagued the partition of the subcontinent, *See* Ian Talbot & Gurharpal Singh, “The Partition of India”, Cambridge University Press, 2009.

⁴ *Ibid.*

“Issues faced by the newly formed states included, amongst others, mass migration of refugees across the border, violence against religious sects that brought the death toll to around two million, sexual violence against women, the division of the Indus waters, the creation of two new governments.”

⁵ Jerome Delli Priscoli & Aaron T. Wolf, “Managing and Transforming Water Conflicts”, Cambridge University Press, 12 January 2009.

⁶ D. A. Caponera, “International Water Resources Law in the Indus Basin”, in M. Ali, G. Radosevich and A. Ali Khan (eds), *Water Resources Policy for Asia*, Balkema, Rotterdam, 1987.

was signed, in which India assured Pakistan that it would not cease the flow of water until the later had developed alternate sources.⁷

Matters remained unresolved and at a standstill until 1951 when, David Lilienthal, former chairman of the Tennessee Valley Authority, visited Pakistan and India to provide an expert opinion on the Indus waters matter.⁸ He was of the view that Pakistan and India should jointly manage the water systems, along with the building of new dams and canals with the assistance of the World Bank. This proposal was read by the then President of the World Bank, Eugene Black, and led to the World Bank taking up the mandate to assist in negotiations pertaining to the Indus waters.⁹

II) The Involvement of the World Bank in the Indus Waters Dispute

The involvement of the World Bank in the negotiation process began in September 1951, when Eugene Black wrote to Prime Ministers, Jawaharlal Nehru and Liaquat Ali Khan, to invite both states to engage in talks pertaining to the Indus waters.¹⁰ After the assassination of the then Prime Minister of Pakistan, Liaquat Ali Khan, in November 1951, Eugene Black wrote again to Nehru and the newly appointed Prime Minister of Pakistan, Khawaja Nazimuddin, outlining the focal points of Lilienthal's proposal. In 1952 Eugene Black held meetings with Nehru in Delhi and Nazimuddin in Karachi and stated that he found, "*common understanding as to the basis on which we can go forward with the Lilienthal proposal.*"¹¹

In 1952 a Working Party was created that met in Washington with the agenda of creating an outline for the program that would be implemented to increase the flow of water in

⁷ Ferozsons, "Delhi Agreement, Dated 14th December, 1948 and Minutes of the Inter-Dominion Conference, Karachi 10-13 January, 1949", Ferozsons, 1949.

⁸ Joya Chatterji, "The Spoils of Partition: Bengal and India, 1947–1967", Cambridge University Press, 15 November 2007.

⁹ Dennis Kux, "India-Pakistan Negotiations: Is Past Still Prologue?", US Institute of Peace Press, 2006, Pg. 23.

¹⁰ *Ibid.*

¹¹ Pakistan Safārah (U.S.), "Pakistan: The Struggle for Irrigation Water and Existence", Issue 6, Embassy of Pakistan, 1953.

the Indus basin and provide a way forward for the two countries. However, the next two meetings between the states did not bear any fruit¹² owing primarily to a lack of consensus on the amount of water that should be allocated to each state.

For the following two years not much took place in terms of a solution and the World Bank started to play a more active role in the process. In 1954 the World Bank made its own proposal and submitted it to Nehru and Muhammad Ali Bogra, the then Prime Minister of Pakistan. Whereas the World Bank's proposal was acceptable to India it was not so much to Pakistan. This was because, according to the officials in Pakistan, the proposal was more in line with India's initial recommendation. However, in July 1954, Pakistan made a qualified acceptance of the World Bank's proposal.¹³ This concluded another important round of negotiations.

Pakistan then wrote to the World Bank with a proposal of constructing the Mangla and Tarabela dams that would ensure a sufficient supply of water for use in Pakistan.¹⁴ However, the cost of these projects and who would bear the same became yet another contentious issue between Pakistan and India. Eugene Black visited both countries and proposed that India would cover a fixed amount for the replacement works in Pakistan and the rest would be borne by a consortium of countries.¹⁵ The historic Indus Waters Treaty was eventually signed on 19 September 1960.¹⁶

¹² Undala Z. Alam, "Questioning the Water Wars Rationale: A Case Study of the Indus Waters Treaty", *The Geographical Journal* Vol. 168, No. 4, *Water Wars? Geographical Perspectives*, December 2002, Pg. 341-353.

¹³ Aloys A. Michel, "The Indus Rivers: A Study of the Effects of Partition", New Haven, Connecticut, Yale University Press, 1967.

¹⁴ Brahma Chellaney, "Water: Asia's New Battleground", Georgetown University Press, 25 July 2013, Pg. 224.

"[...] Tarbela, together with associated barrages and diversion works, laid the foundation for Pakistan's agricultural boom and its emergence as an important food exporter."

¹⁵ Syed S. Kirmani & Guy J.-M. Le Moigne, "Fostering Riparian Cooperation in International River Basins: The World Bank at Its Best in Development Diplomacy", World Bank Publications, 01 January 1997.

¹⁶ Indus Waters Treaty, 1960.

The Treaty allocates the Western Rivers (Indus, Jhelum, Chenab) to Pakistan and the Eastern Rivers (Ravi, Beas, Sutlej) to India. At the same time, the Treaty allows each country certain uses on the rivers allocated to the other.

III) Jurisdiction of the World Bank under the Indus Waters Treaty

The role and jurisdiction of the World Bank is spelled out under the Treaty. The World Bank, being a signatory of the Treaty, assumed two roles under the Treaty.

Financial Administration

The first related to the financing of the water works in both India and Pakistan. Under the Treaty, the World Bank agreed to provide financial and logistical support in the formation and functioning of the Indus Basin Development Fund.¹⁷ Under Article V of the Treaty, titled “Financial Provisions”, it was decided that India would pay Pakistan GBP 62,060,000 towards the cost of the water works that needed to be made as part of the replacement of the Western Rivers. This payment, by India, was to be made in ten equal installments and India was supposed to make these payments to the World Bank. Moreover, if required, the Bank would pay India out of the Indus Development Fund.

Moreover, Pakistan required funds for the creation of canals that would transfer water from the Western rivers to Pakistan. India refused to provide financing for this. In light of this, the World Bank helped arrange for external financing for Pakistan. This culminated in the signing of the Indus Basin Development Fund Agreement in Karachi, on 19 September 1960. This Agreement was a treaty between Australia, Canada, West Germany, New Zealand, the United Kingdom, the United States with the International Bank for Reconstruction and Development (IBRD) and Pakistan who agreed to provide Pakistan a combination of funds and loans. This fund was administered by the World Bank.

Lastly, the World Bank also has a limited financial role to play in the workings of the Neutral Expert, under Part III of Annexure F of the Treaty. Following the coming into force of

¹⁷ Indus Waters Treaty 1960, Article V

the Treaty, Pakistan and India were supposed to pay USD 5,000 each to be held in trust by the Bank.¹⁸ The expenses of the Neutral Expert were to be borne by the Bank from this amount. Following the rendering of the decision by the Neutral Expert, both countries are supposed to reimburse the amount spent by the World Bank. Furthermore, if the expense of the Neutral Expert exceeds the amount held by the Bank, both countries need to pay the left over amount in equal share to the Bank.

Dispute Resolution Mechanism

The main function of the World Bank is regarding the dispute resolution mechanism of the Treaty.

Under Annexures F of the Treaty, “*either Commissioner may, under the provisions of Article IX (2)(a), refer to a Neutral Expert any of the [...] questions*”¹⁹. This is followed by a list of Twenty-three technical questions that can be decided by the Neutral Expert. The role of the World Bank comes in the appointment of the Neutral Expert. In the absence of an agreement between Pakistan and India on the Neutral Expert, the Bank, under Part 2(4)(b)(ii) of Annexure F of the Treaty, has the authority to appoint the Neutral Expert. However, the Bank is obliged to consult with both Parties, prior to making such an appointment. Such an appointment by the Bank is made following the receipt of a request for the appointment of a Neutral Expert, either jointly from both Indus Commissioners or from one Commissioner.

Under Annexure G of the Treaty, the Bank also has a role to play in the empanelment of the Court of Arbitration. The Court consists of seven members; a Chairman, a highly qualified engineer, a person well versed with international law, two arbitrators by Pakistan and two arbitrators by India. The appointment of the four arbitrators by the Parties is straightforward. The rest of the three panel members, known as umpires, in the absence of an agreement between the Parties, will be selected by individuals listed in the appendix to Annexure G. These individuals themselves will be selected by drawing lots from a list provided in the appendix. These lots will be drawn by the World Bank, in the presence of representatives from both Parties. Moreover, if either Party fails to participate in drawing lots, the Party that is

¹⁸ Indus Waters Treaty 1960, Part 3, Annexure F

¹⁹ Indus Waters Treaty 1960, Part 1, Annexure F

present may ask the President of the Bank to nominate a person to draw the lots. This nominated person will draw the lots after giving both Parties due notice and inviting them to be present at the drawing of the lots. The individuals selected from drawing lots will be responsible for selecting the three umpires of the Court of Arbitration.

IV) The Current Issue

The issue became crucial in 2016, when Pakistan made a Request for Arbitration under Article IX(5) and Annexure G of the Treaty. Within a month, pursuant to Article IX(2)(a) and Annexure F of the Treaty, the Indian Commissioner in the Permanent Indus Commission submitted a request to Pakistan and India that they appoint a Neutral Expert to deal with these same matters.

The “Request for Arbitration” was transmitted to and received by India on 19 August 2016. That is the date on which the proceeding before the Court of Arbitration was instituted in accordance with paragraph 3 of Annexure G of the Treaty.

The “Request for Neutral Expert” was transmitted to and received by India and Pakistan on 6 September 2016. That is the date on which the proceeding before the Neutral Expert was instituted in accordance with paragraph 4 of Annexure F of the Treaty. It should be noted that this date comes after the submission of the Request for Arbitration by Pakistan.

The Bank’s initial response to these two separate requests was to carry out its assigned role under both Annexure F (for a Neutral Expert) and Annexure G (for the Court of Arbitration) of the Treaty. However, after much back and forth in the selection of the candidates for the Neutral Expert and the Court of Arbitration, on 12 December 2016, the Bank’s President wrote to Pakistan and stated,

“[A]fter much thought and deliberation, I have decided to pause the process of appointing the Chairman of the Court of Arbitration and the Neutral Expert. I take this step in the interest of preserving the Treaty and in order to provide a window to further explore whether India and Pakistan can agree on a way forward for resolving the

matter relating to the two hydroelectric power plants, in a manner that is satisfactory to both countries.”²⁰

The dispute resolution mechanism of the Treaty remained “paused” for more than five years, which denied Pakistan access to redressal mechanisms under the Treaty. In the meanwhile India was allowed to complete and inaugurate the Kishanganga Hydroelectric Power Project.

In April 2022, the World Bank announced that, “[i]n the absence of a mutually agreeable solution between the two Parties, the Bank is obliged to find a way forward from amongst the options available to it so as to fulfill its responsibilities under the Treaty. In arriving at this decision, the Bank has carefully considered the Parties’ views. Both Parties have expressed a strong preference for the Bank to respect Treaty-mandated processes and not seek external input.”²¹ Thus, after consultation with both countries, it had decided to “resume the two separate processes requested by India and Pakistan in relation to the Kishenganga and Ratle hydroelectric power plants.”²²

The drawing of lots for the appointing authorities for the umpires had taken place in 2016. The two umpires, apart from the Chairman of the Court, were selected by the appointing authorities. The World Bank resumed the two processes by appointing the Chairman of the Court of Arbitration and the Neutral Expert on 17 October 2022. Pakistan had appointed its two arbitrators but India refused to do so.

The proceedings before the Court of Arbitration began on 27 January 2023, in the Hague, but were boycotted by India. The Court is currently functioning as a five member bench.

²⁰ Letter from Jim Yong Kim (World Bank President) to Mohammad Ishaq Dar (Minister for Finance, Revenue and Economic Affairs, Statistics and Privatization of Pakistan) dated 12 December 2016.

²¹ Letter from Sandie Okoro (Senior Vice President and Group General Counsel) to Mr. P. Kumar (Secretary, Department of Water Resources, River, India) and Khalid Jawed Khan (Attorney General for Pakistan) dated 31 March 2022.

²² The World Bank Group, “World Bank Resumes Processes Under the Indus Waters Treaty”, 6 April 2022, retrieved from <[IPRI](https://www.worldbank.org/en/news/press-release/2022/04/06/world-bank-resumes-processes-under-indus-waters-treaty#:~:text=On%20December%2012%2C%202016%2C%20the.to%20seek%20an%20amicable%20resolution.>></p></div><div data-bbox=)

On 25 January 2023, India sent a notice to Pakistan, asking it to agree to modify the Treaty, brokered by the World Bank. India also blamed Pakistan, and now the World Bank, for sabotaging the Treaty, and instituting the concurrent proceedings. India's External Affairs Spokesperson Arindam Bachi stated, "*I do not think they (World Bank) are in a position to interpret the treaty for us.*"²³

V) Rethinking the Implications of the Role of the World Bank

A plain reading of the Treaty suggests that the role of the World Bank is only procedural in nature, in that it is merely tasked with assisting in the empanelment of the Court of Arbitration and the appointment of the Neutral Expert. The World Bank has said as much by stating that,

*"The World Bank Group has a strictly procedural role under the Indus Waters Treaty and the treaty does not allow it to choose whether one procedure should take precedence over the other. This is why we drew the lots and proposed potential candidates for the Neutral Expert today," said Senior Vice President and World Bank Group General Counsel Anne-Marie Leroy. "What is clear, though, is that pursuing two concurrent processes under the treaty could make it unworkable over time and we therefore urge both parties to agree to mediation that the World Bank Group can help arrange. The two countries can also agree to suspend the two processes during the mediation process or at any time until the processes are concluded."*²⁴

This statement was made by the World Bank in 2016, following which it proceeded to "pause" the dispute resolution mechanism of the Treaty for more than five years. The World Bank's unwillingness to fulfill the seemingly "procedural" role led to a stalemate on the resolution of the disputes that resulted in irreparable damage to Pakistan. In these five years, India was allowed to complete and inaugurate the Kishenganga dam, whereas Pakistan was not

²³ The Times of India, "Indus Waters Treaty: India questions World Bank's decision to start two separate processes to resolve India-Pakistan differences", retrieved from <https://timesofindia.indiatimes.com/india/indus-waters-treaty-india-questions-world-banks-decision-to-start-two-separate-processes-to-resolve-india-pakistan-differences/articleshow/97559842.cms>>

²⁴ The World Bank, "World Bank Urges Mediation for India, Pakistan over Indus", retrieved from <https://www.worldbank.org/en/news/press-release/2016/11/10/world-bank-urges-mediation-for-india-pakistan-over-indus>>

allowed to access the dispute resolution mechanism of the Treaty to address its grievances. This was the case even after Pakistan repeatedly asked the World Bank to fulfill its role under the Treaty and proceed with the appointment of the Court of Arbitration.

Moreover, in the statement made by the World Bank itself, the Bank stated that the two countries can agree to suspend the two processes to make room for negotiations. Even after making such a statement, the Bank proceeded with “unilaterally pausing” the dispute resolution mechanism of the Treaty.

This forces one to think of the impact of a “seemingly” procedural role of the Bank. The role of the Bank may be strictly procedural, but the Bank’s decision on when and if to fulfill the role has dire consequences for both countries, as has been seen in the past five years. It needs to be realized that the Treaty is silent on what the situation will be if the Bank decides not to fulfill its role under the Treaty. As such, there is no alternative to the Bank acting according to the mandate of the Treaty. This means that if the Bank decides not to act, there is no alternative provided in the Treaty for the Bank’s role. The Bank’s inability to act causes a stalemate.

The problem lies in the Bank understating its role and the impact of its actions. It is time that the strength and impact of the Bank’s role is recognized by the Bank itself and by the larger international community so that neither country is adversely impacted as was Pakistan in the last six years.