

The Third Party Involvement in Resolving River Water Disputes between Pakistan and India

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Abstract

Water and related issues are gaining importance in the present world politics. It is believed that water would be the source of some major future conflicts in many regions including South Asia. Water distribution between Pakistan and India has become a serious political issue since independence. The problem has its roots in the partition of the Indian Subcontinent in 1947. Although the issue was resolved amicably by the two states in 1960 and a treaty was signed, even then number of other issues developed after the treaty. One of the important aspects of the settlement route was the Indian refusal and Pakistan's insistence on the presence and participation of any third neutral party. Despite the Indian policy of bilateralism on many regional issues, water disputes and resolution remained a classical example of multilateralism, where at least on four major occasions the settlements were reached with the involvement of a third neutral party.

Key words: Bilateralism, Dispute, Deadlock, Diplomatic procedure, Arbitration

Introduction

Acquisition and control of water is becoming an imperative issue in the present World politics. The South Asian region like other regions of the World has many rivers shared by different riparian states. Even though some of those states are not in cordial relations but the agreements reached were mostly respected by the contracting parties.

Water distribution between Pakistan and India emerged as an issue as early as the independence of the two states in 1947. Two occasions are worth mentioning as they happened before the Indus Water Treaty (IWT). One is the realization on part of the withdrawing British Raj that the newly created states cannot resolve their dispute bilaterally thus they left the Arbitral tribunal for dispute settlement. The adjustment of rights was reached with the involvement of a third party although

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temporarily, nevertheless the third party facilitated in reducing tension leading to the settlement of the issue. Secondly, the involvement of the World Bank in South Asian water issue was ultimately accepted as the guarantor of the IWT.

This paper is an attempt to analyze at least six major junctures where the presence of third neutral party resolved the water related issue. Despite of negotiations sometimes continuous and sometimes disrupted, the deadlock on some issues remained and ultimately the matter was resolved with the involvement of an impartial third party. Thus possibility of a third party presence may also be applied to other unsettled issues between Pakistan and India.

Conceptual foundation

In the *Mavrommatis Palestine Concessions* case, the Permanent Court of International Justice (PCIJ) defined a dispute as: ‘a disagreement over a point of law or fact, a conflict of legal views or of interests between two persons constitutes an authoritative indication. A distinction is sometimes made between legal and political disputes or justice-able and non-justice-able disputes’.¹ While a conflict is pandemic and exists where there is an incompatibility of interests. A ‘Conflict’ is defined as:

... struggle over values and claims to scarce status, power and resources. The efforts to attain desired objects become more intense in the absence of agreed rules prescribing their equitable allocation ... parties to a conflict make attempts to prevent each other from achieving desired objectives, in part, owing to perceptions of divergent interests.

Though in most of the cases tension between the parties develops due to the quest of dissimilar results or variation on the measures to attain same ends.² Dispute may or may not flow from conflict and is associated with distinct justiciable issues. A number of different methods and techniques are used for the dispute or conflict resolution but the best definition is given by the UN Charter Chapter VI Art 33. It says:

1. ‘The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all seek a solution by negotiation, enquiry, mediation,

¹ Malcolm N. Shaw, *International Law (6th edition)*, (Cambridge: Cambridge University Press, 2008), 1012.

² Jacob Bercovitch and Carmela Lutmar, ‘Beyond Negotiation Deadlocks: The Importance of mediation and Leadership Change’, in Amrita Narlikar (ed.), *Deadlocks in Multilateral Negotiations, Causes and Solutions* (Cambridge: Cambridge University Press, 2010), 233.

conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means'.³

These procedures are recognized as the most appropriate way for the peaceful resolution of any dispute. The basic idea behind these techniques is initially to encourage the two sides to resolve the matter by bilateral efforts but if the issue remains, then with the involvement of a third neutral party which is believed to be mostly not emotionally involved in the dispute and may help in reducing the tension, and will also decrease the distrust, strengthen communication and can also promote dialogue.⁴

Out of all these different methods, the easiest inexpensive and without the involvement of third party is negotiation, which is a conflict resolution approach aimed at reaching an understanding between and among the parties in a conflict. It is defined as:

... any form of verbal (or non-verbal) communication direct or indirect whereby parties to a conflict of interest discuss, without resort to arbitration or other judicial process, the form of any joint action which they might to take to manage a dispute between them.⁵

Whereas in Good Office and Mediation the basic idea is the involvement of a third neutral party to support the opposing parties to come to a resolution. It is different from arbitration and adjudication which intend to sway the parties to the dispute to arrive at acceptable terms.⁶ While adjudication procedure involved the impartial third party at the legal level of the issue, either by arbitration or by a judicial organ.

As far as South Asian politics is concerned bilateralism is one of the major policy objectives of India towards all its neighbors. It remained a prerequisite for any kind of dialogue especially with its South Asian neighbors. As India emphasizes on bilateral resolution of all issues/disputes by excluding external powers, international agencies, international forums and also any third South Asian state, hence making any effort of a multilateral approach to the regional issues would become

³ *UN Charter*, Department of Public Information, United Nations, NY 10017. 24.

⁴ Marks R. Amstutz, *International Conflict and Cooperation* (Ohio Mc-Graw Hill, 1999), 332.

⁵ Jacob Bercovitch and Carmela Lutmar, *op.cit.*

⁶ Malcolm Shaw, *op.cit.*, 1018.

practically impossible.⁷ The policy of bilateralism sustained since independence. India insisted on bilateral resolution on almost all issues whether minor like for trade and transit or on major issues like river water sharing and development. In fact ‘this policy of bilateralism is a complex facet of Indian foreign policy’.⁸ It is rightly observed that since early phase of independence India has been dexterously using varieties of bilateralism ranging from ‘beneficial bilateralism, unilateralism, non-reciprocal gestures, defensive positionalism and hostile bilateralism’.⁹ In fact, for many years insistence on bilateral negotiations this custom has functioned and so has provided an inherent strength to the Indian hegemony in the region of South Asia.

Unlike Indian bilateralism, Pakistan rigorously pursue the policy of embracing any third party in the bilateral issues especially with India. Although there is ‘likelihood that a third party will engage in unobtrusive techniques like good offices and decrease the likelihood that it will engage in more involved mechanism such as arbitration ... the biased third parties are less likely to end dispute than unbiased third parties’,¹⁰ even then it is believed that a third party may help in appropriate resolution of any issue than in its absence. Moreover, Indian rigidity and refusal in dialogue process convinced the policymakers in Pakistan that the best option for a fair and logical solution of bilateral issues with India is with the participation of any third neutral party. The river water dispute is a good example of adopting this approach by Pakistan, necessitating a third party involvement. This paper is an attempt to highlight the same strategy, need for which has been seen at more than one occasion.

⁷ Leo E. Rose, ‘India’s Regional Policy: Nonmilitary Dimensions’, in S.P. Cohen (ed.), *The Security of South Asia: American and Asian Perspectives* (Urbana: University of Illinois Press, 1987), 4.

⁸ Ben crow and Nirvikan Singh, *Impediments and Innovation in International Rivers: the Waters of South Asia* (Santa Cruze: Department of Sociology and Economics, University of California, 1999), 8.

⁹ Mahendra P. Lama, ‘Reimagining India’s Bilateralism’, Kathmandu Post, 28 April 2020, <https://kathmandupost.com/columns/2020/04/28/reimagining-india-s-bilateralism#:~:text=India%20has%20been%20essentially%20an.one%2Dto%2Ddone%20diplomacy>. Last accessed 15 September 2020.

¹⁰ Stephen E. Gent, Megan Shannon, Bias and Effectiveness of the third party conflict management mechanism, Handle: *RePEc:sae:compsc:v:28:y:2011:i:2:p:124-144*, DOI: 10.1177/0738894210396774., <https://ideas.repec.org/a/sae/compsc/v28y2011i2p124-144.html> last accessed 16 September 2020.

First occasion

The water sharing in South Asia is an issue, a continuous and unending challenge to the regional states. The first occasion when the presence of third party played a role was before the independence of the two states. It was the realization on the part of the withdrawing British administration that in situation of conflict of interest between these two newly created states there was a need of a neutral third party. Thus a tribunal was created for the dispute settlement.

The background of the crisis was the Radcliffe Awards for boundary demarcation which cut down the irrigation system of the two giant projects the Bari doab and the Sutlej Valley project. As a result the head-works fell in India while the canals ran through Pakistan. Moreover, after partition, the Indian Union claimed compensation from Pakistan for the canal colonies which were in Pakistan because they had been constructed with the finances of the undivided Punjab and the Central Government of British India and also that the supply of waters from the Ferozpur headwork (East Punjab) to the Bari Doab Canal (in the West Punjab) 'the right to levy of seigniorage charges for water, and the question of capital cost of the Madhyapur head works carrier channels'.¹¹

Initially, a number of committees were set up, including 'Committee B', consisted of eight members, four each from India and Pakistan. This Committee B agreed on the previous formula of distribution of hydrographic resources, but failed to reach any consensus on the evaluation of canals or on the value of the land. Its report was submitted to the Punjab Partition Committee for solution. But when the committee's report was submitted to the Central Punjab Committee, there were differences of opinion. Hence, ultimately the committee decided to refer the case to the Central Arbitral Committee.¹²

Third Party involvement

This was the very first incident when the third neutral party performed a pertinent role in the resolution of issue. The Arbitral Tribunal Order 1947, constituted a Central Arbitral body.¹³ The Tribunal consisted of

¹¹ 'Terms of Indo-Pakistan agreement over supply of water to West Punjab', *Daily Dawn* (Karachi) 8 May 1948, 6.

¹² Tufail Javed, 'The World Bank and the Indus Basin Water Dispute: Background-1', *Pakistan Horizon* (Karachi) 18:3 (1965), 229-230.

¹³ The responsibilities included to give awards regarding division of assets and liabilities of the undivided India and the divided province (Punjab, Bengal and Assam) on the references made to it before first December 1947 or

three men of high judicial caliber, Sir Patrick Spence, the then Chief Justice of India (1943-1947) was nominated as the Chairman of the Tribunal, and the two parties also accepted to nominate one judge each as their representatives.¹⁴

The Standstill Agreement (among other things) provided that the allocation of water in the basin area would be maintained as it was in the pre-Partition days.¹⁵ The Arbitral Tribunal on 28 March 1948 gave its awards in all the 33 disputes between two Punjab (East and West).¹⁶ The water supply continued from the Indian side till the completion of one year life of the Arbitral Tribunal. On 1st April 1948, the very next day when the tribunal completed its life, India suspended the water supply from the canals on its side.¹⁷ This was the first occasion after the independence when Indian policy forced and convinced Pakistan, the

before first January 1948 but it would be by the permission of the Chairman.

¹⁴ 'The British India Authority was reluctant to include the Arbitral Tribunal in the independence Act. Because the responsibility for enforcing its decision after Aug 15 would also rest with the British government which it was not interested in keeping. Separately, the Secretary of State advised the Viceroy to explore the possibility of finding an agreement between the two Parties to set up a Tribunal with agreed terms of reference before August 15, with both undertaking to accept its decisions as Awards unless the two should agree among themselves otherwise... It was to eliminate any possibility of controversy in the period after 15 August'. The Tribunal had the power to adjudicate disputed matters both at the center and at the level of provinces and was binding on both the successor countries. The Tribunal was given the power of a Civil Court. Avtar Singh Bhasim, *Some Called it Partition, Some Freedom* (New Delhi: Siba Exim, 1998), 169-170

¹⁵ Standstill agreement signed between India and Pakistan on 18 December 1947, Aloys Arthur Michel, *The Indus Rivers* (New York: Yale University Press, 1967), 196.

¹⁶ According to the 40: 60 ratios, East Punjab would have to receive about Rs/ 16 crore [one crore being equal to Rs/10 million] for canals alone. The Award had fixed East Punjab's share of the assets and liabilities of the undivided Punjab at 40 per cent. The Tribunal had also fixed the value of the canals at twice the amount spent in their construction.¹⁶ It was also accepted that the official division of waters between the two zones would not be changed. This decision was taken on the previous formula of distribution of waters that the existing flow be respected and that the two zones would continue to receive the same revenue as before, by providing the same quantity of water. Javed, *op. cit.*, 230-32.

¹⁷ Ajay Saksena, *India and Pakistan: Their Foreign Policies* (Delhi: Anmol Publishers, 1987), 57-65.

importance and presence of a third neutral party in any future conflict with India.

The serious repercussions of water suspension were immediately felt in Lahore which was deprived of its main source of municipal water. Moreover the supply of power to West Pakistan from the Mandi Hydroelectric scheme was also cut off. Due to this water suspension 'about 5.5 per cent of the sown area and almost 8 per cent of the cultivable area in West Pakistan was left without water at the beginning of the kharif [summer] sowing season'.¹⁸

Second occasion: Pakistan proposed for the third party involvement

There were no signs of progress in the negotiation and most of it proved inconclusive and practically a deadlock was created. During this time out of the three types of deadlocks two were present that is, a valid impasse in the process of negotiation; an unmitigated suspension in the process; while it was moving towards the third type—a complete breakdown in the process.

The presence of a third party may not lead to a breakdown of dialogue but deadlock may occur with or without the presence of a third party. A deadlock is not restricted to such a condition where parties to a conflict show their least to reduce or resolve the conflict. It may also be created due to lack of flexibility in their position so also due to dearth of commitment or craving to resolve a conflict.¹⁹ At that particular phase of history the Indian side was not ready to show flexibility though Pakistani leadership stressed on the presence of a third neutral party for the settlement of the issue. This was submitted by the Pakistani Prime minister Liaquat Ali Khan in one of his letters to Prime Minister Nehru. He wrote on 14 July 1950:

What is most urgently needed is to set at rest the fear operating in the minds of people likely to be affected that the dispute may drag on indefinitely, while their welfare and prosperity are progressively put in jeopardy. They must be assured that in the event of dispute not being resolved by the method now being pursued, it will be settled by adjudication of tribunal best fitted to resolve it. Since you are prepared to

¹⁸ As Prof. Kazi S. Ahmad remarks with justifiable bitterness: '*There was no water dispute to be referred to the Arbitral Tribunal set up by the British parliament to settle disputed arising out of the partition till 31 March 1948, when the Tribunal ceased to exist. The dispute arose on the very next day, 1st April 1948*'. Michel, *op. cit.*, 196.

¹⁹ Jacob Bercovitch and Carmela Lutmar, *op. cit.*, 236.

accept arbitration, there should be no objection to designation [of] the International Court of Justice as the arbitral authority.²⁰

This proposal remained un-catered in India. The Indian argument was based on the grounds that:

... when partition was being effected all the points of dispute were referred to the Arbitration, and Pakistan had already agreed that East Punjab government had become the owner of Bari Doab canal. So there was no legal point left to refer the case to [the] ICJ. Apart from the question of law, India was prepared to look at the problem from a practical point of view to arrive at a practical solution on which Pakistan was not prepared to do so. So far as unilateral submission of the question to the ICJ was concerned India knew that Pakistan could not do so.²¹

Third occasion: World Bank involvement

Nehru met David Lilienthal (former head of the Tennessee Valley Authority and later on Chairman of the US Atomic Energy Commission) in New York in 1949 and invited him to visit the subcontinent. Nehru was keen in utilizing and applying Mr. Lilienthal's experience with the TVA in irrigation planning and development in India. After his visit to the region he published a research in *Collier's* (American journal) which attracted international attention and the then World Bank chairman Mr. Eugene Black offered World Bank good offices for the settlement of the problem.

The diplomatic procedure includes 'good offices, mediation and conciliation'. This non-judicial 'procedure aims at persuading the parties to a dispute to reach satisfactory terms for its termination by themselves'. When a third neutral party endeavors to incite the opposing sides to enter into negotiations it is called good offices, while in mediation the third party itself actively participate in the negotiating process.²²

The World Bank good offices initially proved effective and the two states reached an agreement on 13 March 1952. From June 1952 to September 1953, a number of meetings and surveys of the sites were held by the engineers of Pakistan India and the World Bank but there

²⁰ 'Liaquat –Nehru Correspondence dated July 14, 1950', *Morning News*, (Karachi), 1 December 1950, 6.

²¹ See Indian Minister for Works, Minerals and Power, Mr Gadgil's statement in *Daily Dawn* (Karachi), 8 September 1949.

²² Malcolm Shaw, *op. cit.*, 1018.

were serious differing perspectives and also high chances of another deadlock. At this moment the World Bank entered as mediator and offered its own plan.

The World Bank plan was presented to the two parties in February 1954. It gave three eastern rivers Sutlej, Beas and Ravi, to India, while Pakistan was given the riparian rights on the three western rivers, i.e., Chenab, Jehlum and Indus and a proposal for reservoir storage to be built in Pakistan. Pakistan had some apprehensions with regard to the Bank proposal and it wanted to discuss those reservations with India but it was officially said by the Indian side that it had closed the chapter of negotiations for the solution of canal waters. It agreed to have any further negotiations only on the Bank proposal, which was more or less similar to the 1948 agreement signed between India and Pakistan.

The deadlock situation between the two continued. Deadlock stands for a major hurdle in the success of any conflict resolution process. They depict a high degree of improbability along with a very slow degree of advancement:

There is the issue of uncertainty. This occurs where disputants are uncertain about aspects of the negotiations process such as the preferences, perceptions and beliefs of their opposition or uncertainty about the actual effects of certain proposals. When uncertainty is high, parties will fail to realize possible shared interests and gains, and thus increase the likelihood of a deadlock. Secondly, and related to the issue of uncertainty is the idea of imperfect information as a possible cause of deadlocks. Both imperfect information and un-certainty will make disputants cautious about moving away from the status quo and particularly skeptical about making any commitments.

A third factor which may produce:

... a deadlock in negotiations is the tendency for the process to reinforce certain stakes, when negotiations begin in this fashion, the likelihood of deadlock is pretty high ... finally, some negotiations are destined simply to reach a deadlock or fail simply due to the absence of a [politically acceptable solution model].²³

India refused to bear the cost of construction of link canals in Pakistan. India vowed that Pakistan should first declare acknowledgement in principle of the Bank's proposal of 1954 before question of the cost of

²³ Jacob Bercovitch and Carmela Lutmar, *op.cit.*, 236-237.

link canal, while Pakistan was keen on settling important matters before giving its acceptance.

Fourth Occasion: on East Pakistan side

During the same period another issue developed in the East Pakistan in 1962. India started the construction of Farrakha Barrage on river Ganges. Pakistan' concerns were instantaneously communicated to India. At the official level Pakistan objected on the construction of barrage on Ganges as the violation of its legal lower riparian rights according to international law. Moreover, Pakistan for the second time proposed for involving any neutral party in the issue.

Pakistan government already frustrated by Indian policy on the Indus Basin issue and the delaying tactic on the eastern side on Farrakha barrage issue again proposed to call for the arbitration of the Farrakha barrage dispute. Pakistan recommended to India that the planning of the utilization of the 'Shared resources' be made by a UN body and also that the area under discussion must be examined by experts of both the countries.²⁴ But this proposal could not get much fascination in India except in the Pakistani press. New Delhi overruled Pakistani idea and also the objections. Prime Minister Nehru told the Lok Sabha, 'It is our view that there should be no real injury caused to Pakistan by this scheme'.²⁵ When the Pakistan government did not receive a positive response at the bilateral level attempted to internationalize the issue. The foreign minister of Pakistan after visiting the region told the press that 'Farrakha Barrage threatens the entire ecological pattern of the delta region of East Pakistan'.²⁶ Pakistan also attempted to approach the superpowers of the World and also initially obtained some support. The Soviet Foreign minister Kosygin wrote a letter to India Gandhi, the Indian PM, asking for a solution along the lines of the Indus Waters Treaty which was rejected by India.²⁷ India also publically rejected World Bank offer of a similar role it played in the negotiation leading to

²⁴ The proposal from Pakistan was: 1) A United Nations technical program should be requested to assist in the development of the eastern river system; 2) the projects in both the countries should be examined jointly by experts from both sides before implementation; and 3) the U.N. Secretary General should be requested to appoint an engineer to participate in expert meetings. For reference see Government of Bangladesh, *White Paper on Ganges Water Dispute*, September 1976, 12.

²⁵ End note# 16, Ben crow and Nirvikan Singh, *op.cit.*, 20.

²⁶ *Daily Dawn* (Karachi), 15 December 1967.

²⁷ News report, 'India rejects Kosygin's suggestions on Farrakha', *Dawn* (Karachi), 16 July 1968.

the IWT (18). Even then Pakistan Foreign Minister Arshad Hussein raised the same question when he was visiting the US to attend the UN meeting.²⁸

For nearly six years progress towards any solution was negligible. Bank involvement was on surface in facilitating the two sides in accepting the Bank formula. While American interest was also present but was behind the scene. The US sponsored several rounds of talks of the engineers of the two states in Washington.

With the accession of power by President Ayub Khan in Pakistan in October 1958, the hurdles were removed one after another. The two sides finally reached to a landmark treaty in 1960. The treaty was based on the earliest formula presented by the Bank in 1954 with slightest modification. The Bank played a vital role in settling the issue. The Bank's Chairman's report to the UN Economic and Social Council on the issue of Indus waters treaty is noteworthy. He said:

Significant developments have occurred in the last few months in another important matter. Almost eight years ago, I reported to this Council that the Bank had taken an initiative in seeking a solution of the Indus Water dispute between India and Pakistan. I referred to [the] dispute as a 'knotty' problem. This phrase turned out to be an understatement. The Bank has in fact, been engaged in studies and discussion of the problem with the two governments ever since. Now however, I think we are near the end of the process. The solution which the two governments have accepted in principle includes vast engineering works to effect an equitable division of the river waters. The plan will take ten years to carry out and will cost in all about \$1000 million.²⁹

Treaty provisions for the Third Party

The Indus waters Treaty itself is a very good example of taking off from the Indian bilateralism to multilateralism. It was Pakistan's consistent efforts throughout the decade in keeping the issue at the international level and incorporating a comprehensive mechanism in the treaty for the involvement of a third party in any future dispute.

²⁸ News report, 'Jagjivan to discuss other issues besides Farrakka', daily *The Hindu*, 15 April 1977.

²⁹ 'Indus Waters Dispute: Mr. Black Reports to UN Body', *Times of India* (Mumbai), 8 April 1960.

The treaty has three level dispute resolution set-up. At the first level the 'question' will be examined and will be resolved by the Indus Water Commission having representations from both sides.³⁰ But if the commission members are unable to reach any solution of the existing 'question', which means 'difference' has developed. The treaty in article IX 2(a) gives option of the neutral expert. The article says, 'if the commission does not reach agreement on any of the question ... then a difference will be deemed to have arisen', the issue will then be dealt in manner discussed in the clause (a) of the same article; 'any difference which in the opinion of either commissioner ... shall, at the request of either Commissioner, be dealt with by a Neutral Expert'.³¹

At the last stage when despite the involvement of a neutral expert the matter is not resolved then there is also a possibility of involving the arbitral court. This is in the article IX 2(4) and (5), which says:

'either government may, following receipt of the report referred to in paragraph (3), or if it comes to the conclusion that this report is being unduly delayed in the commission, invite the government to resolve the dispute by agreement. In doing so it shall state the names of its negotiators and their readiness to meet with the negotiators to be appointed by the other government at the time and days to be indicated by the other Government. To assist in these negotiations, the two governments may agree to enlist the services of one or more mediators acceptable to them'.

IX 2(5) says: 'A Court of Arbitration shall be established to resolve the dispute in the manner provided by Annexure G'.³²

The first two issues were resolved bilaterally by the two states. The first was the Indian construction of Salal Dam on river Chenab, although the construction started in 1970 but due to the 1971 war and independence of Bangladesh the negotiations began in 1975. When several rounds of talks remained inconclusive, Pakistan official disclosed that Pakistan has decided to move according to the treaty article IX 2(a) for the appointment of a neutral expert. At this stage India asked for another attempt to resolve the issue politically. By that time political changes had occurred in India. Janta Party government came in power in March 1979, had criticized the policies of the former and introduced the policy of beneficial bilateralism. The policy aimed to building bridges of

³⁰ Article IX(1) of the IWT.

³¹ Article IX 2 (a), Text of the *The Indus Waters Treaty, 1960, op.cit.*

³² Ibid.

trust and cooperation with the neighbors with diligence and trust. One of the dimensions of this beneficial bilateralism was economic accommodation. India signed number of treaties with its neighbors; Bangladesh, Nepal and also with Pakistan on the construction and design of Salal Hydroelectric Plant. Under the agreement India agreed on Pakistan's demand on the height of the spillway gates at 30 ft. On Pakistan's repeated objection India paid 250 million as compensation to Pakistan against the dislocation of agricultural activity and other incidental hardship.³³

The Wullar Barrage/Tulbal Navigational Project also created many differences. Both parties entered into dialogue and on Pakistan's objections India temporarily suspended work on the project.³⁴ But despite 13 rounds of talks the stance of the two sides are at two opposite ends. The issue remained unresolved till this time.

Fifth occasion: the Baghliyar Dam project

The issue where serious differences of approach and policy appeared was on the Baghliyar Dam project. Construction work on the project started in the catchment areas of river Chenab upstream of the Salal dam. It was a giant project which aimed to provide for submerged gate spillways. These spillways under the project allowed India to store water up to 164000 acres feet. Pakistan objected on the storage capacity believing that was more than allowed by the Treaty. Moreover, the spill gateways would also empower India to stop the water for about 26 days during December, January and February.

Since 2003, Pakistan has officially raised objections on the Baghliyar project.³⁵ But despite several rounds of intense but inconclusive talks the deadlock remained. Finally the Government of Pakistan on 15 January 2005 filed a request to the World Bank to appoint a Neutral Expert, with the information that a 'difference' had arisen

³³ S. D. Muni, India's 'Beneficial Bilateralism in South Asia, *India Quarterly*, 35:4, October–December 1979, 417-422

³⁴ Alok Kumar Gupta, 'Bagliar Project: Another bone of contention', Indo-Pak article # 1619, Institute of Peace and Conflict Studies, New Delhi, 20 January 2005, http://www.ipcs.org/comm_select.php?articleNo=1619 last accessed 7 June 2018.

³⁵ Khaliq Kiyani, 'Pakistan demands inspection of Baghlihar power project', *Daily Dawn* (Karachi), 5 February 2003. <https://www.dawn.com/news/81021/pakistan-demands-inspection-of-baglihar-power-project>, last accessed 10 June 2018

under Article IX 2 (a) of the Treaty on the issue of the Baghliyar Project.³⁶

The World Bank on 10 May 2005, acting under the requisites of the 1960 IWT and along with the consent of the two governments, appointed Professor Raymond Lafitte as the neutral expert, ‘to render a decision on a difference between the two governments regarding the Bagliyar project’.³⁷ This was the first time since the conclusion of the Indus Waters Treaty in 1960 that the provision on differences and disputes had been used. Professor Raymod visited the site and after intense surveys gave his verdict in February 2007.

The neutral expert observed that the contemporary technical information with improved knowledge in dam plan which had not developed when the treaty was concluded should be used in dealing with the present day problems. Although both the parties claimed to win the case but the decision favored India.³⁸ Pakistan accepted the decision as it was bound to under the provision of the treaty. Very soon another important situation developed when the requisite of the neutral third party involvement was desired as the differences developed on the Kishenganga Dam Project.

Sixth Occasion: the Kishenganaga Dam

On Kishanganga dam there were serious differences on treaty interpretation.³⁹ Since 2009, on a hydroelectric project construction was started by India. The project could only be made possible by rerouting the waters of the Kishanganga/Neelum River through a 23-km-long tunnel. Pakistan had serious objections on the design and especially on the redirecting of the Neelum River. The main objections were on the inter-tributary diversions which would ultimately deprive Pakistan of the

³⁶ Executive summary of the neutral expert's determination on Baglihar hydroelectric project, 12 February 2007, 1, available at <http://siteresources.worldbank.org/SOUTHASIAEXT/Resources/223546-1171996340255/BagliharSummary.pdf>. Last accessed 7 June 2018.

³⁷ ‘World Bank ruling on Baghliar on Feb 12’, *Hindustan Times*, (New Delhi) 9 Feb 2007, <https://www.hindustantimes.com/india/world-bank-ruling-on-baglihar-on-feb-12/story-M95WCBKVX36oHCVRJKNbxH.html>. Last accessed 26 July 2019.

³⁸ Baghliar Dam cleared by the Neutral Expert, Ministry of foreign affairs Government of India, <http://www.mea.gov.in/press-releases.htm?dtl/2287/Baglihar+Dam+cleared+by+neutral+expert>. Last accessed 10 March 2018.

³⁹ The Kishenganga river, rising near Gurez, is a tributary of the Jhelum. Flowing through J&K it crosses the Line of Control to enter Pakistan as the Neelum river before merging with the Jhelum near Muzaffarabad.

river's natural flows, and would also harmfully destroy the irrigated area in the Neelum valley.⁴⁰

In the case of Kishenganga, as Pakistan was distressed that the Neutral Expert earlier misinterpreted the IWT in respect of the sluice spillway, therefore, using the clause IX 2(5) of the treaty, it decided to approach the Court of Arbitration (CoA). This was the very first time that a dispute has been referred to a Court of Arbitration. The Arbitration Court gave its final award on 20 December 2013.⁴¹ The final award put certain limitation on unrestricted use of water by India. It also gave consideration to the environmental challenges to be faced due the diversion of the river.⁴² Unfortunately the differences on the issue did not stop here. With the construction of the project completed in May 2014,

⁴⁰ Lt. Gen P. K. Grover, 'Impact of wording on Kishenganga', *Hindustan Times* (New Delhi), 14 Jan 20114. <https://www.hindustantimes.com/chandigarh/impact-of-verdict-on-kishanganga-project/story-A7t55uqlwMDmFmfqyM1V3O.html>. Last accessed 8 March 2108.

⁴¹ Baglihar hydroelectric plan-issue between Pakistan and India, Water diplomacy, [http://aquapedia.waterdiplomacy.org/wiki/index.php?title=Baglihar Hydroelectric Plant - Issue between Pakistan and India](http://aquapedia.waterdiplomacy.org/wiki/index.php?title=Baglihar_Hydroelectric_Plant_-_Issue_between_Pakistan_and_India), last accessed 7 March 2018.

⁴² On February 18, 2013, the Court had issued a Partial Award, 'in which it unanimously decided that the KHEP is a Run-of-River Plant within the meaning of the Indus Waters Treaty and that India may accordingly divert water from the Kishenganga / Neelum River for power generation. However, the Court also decided that India is under an obligation to construct and operate the KHEP in such a way as to maintain a minimum flow of water in the Kishenganga / Neelum River, at a rate to be determined subsequently. Also in its Partial Award, the Court decided a second dispute relating to the permissibility of reducing the water level in the reservoirs of Indian Run-of-River Plants on certain tributaries of the Indus for the purpose of flushing sediment accumulated in the reservoir. In its Final Award dated 20 December 2013, which is binding upon the Parties and without appeal, the Court of Arbitration unanimously decided the question of the minimum flow that was left unresolved by the Partial Award. The Court decided that India shall release a minimum flow of 9 cusecs into the Kishenganga / Neelum River below the KHEP at all times. However, the Court also decided that either India or Pakistan may seek reconsideration of this decision through the Permanent Indus Commission and the mechanisms of the Indus Waters Treaty after a period of seven years from the first diversion of water from the Kishenganga/Neelum River'. Permanent Court of Arbitration, press release 21 December 2013, <https://pcacases.com/web/sendAttach/1683>. Last accessed 10 March 2018.

the Indian Prime minister inaugurated the dam.⁴³ Pakistan again raised its serious concern on the project, and the 'Pakistan foreign office warned that water issues can lead to a dangerous situation'.⁴⁴

Conclusion

The water dispute between Pakistan and India is a sensitive and technical having its origin in the partition plan. This water dispute could be analyzed in three phases; the pre partition, the post-independence and the post IWT.

In the pre-partition phase there was no Indian policy of bilateralism and, therefore, it had not rejected the dispute resolution mechanism. Moreover, it was also under obligation of the partition plan and, therefore, accepted the presence of the British created Arbitral Tribunal, but as soon as one year life of the Arbitral tribunal completed in 1948, Indian suspended water supply from its side.

In the post-independence phase from 1948-54 when the negotiation were not moving forward and almost deadlock situation was created, Indian Prime Minister Nehru invited an internationally renowned expert. The idea of the visit probably came when Nehru met Mr. Lilienthal in New York. Nehru was interested in developing an irrigation development. Mr. Lilienthal came with the blessings of the State Department. His interest in the visit was to help the United States to revitalize its relations with India. With the involvement of Lilitneal World Bank offered its mediation which turned in to conciliation and later World Bank became the guarantor of the treaty.

The IWT also provides for a structured third party involvement in case of dispute develops between the two parties. The question arises how and why India agreed for a neutral expert and the World Bank as guarantor. The treaty reached to its final shape because of continuous involvement of the World Bank and behind the scene American diplomacy. The Salal Dam treaty had Simla Agreement in the background where Pakistan also agreed that both parties shall prevent the

⁴³ *India's Modi inaugurates hydro project in Kashmir, Pakistan protests. Reuters*, 19 May 2018. <https://www.reuters.com/article/us-india-power-pakistan/indias-modi-inaugurates-hydro-project-in-kashmir-pakistan-protests-idUSKCN1IK07Q>. Last accessed 10 March 2018.

⁴⁴ *Pakistan Foreign Office warns of dangerous situation over water issues Times of Islamabad* (Islamabad) 25 May 2018, <https://timesofislama bad.com/25-May-2018/pakistan-foreign-office-warns-of-dangerous-situation-over-water-issues>. Last accessed 8 June 2018.

organisation, assistance or encouragement of any acts detrimental to the maintenance of peaceful and harmonious relations.

In the last phase the dynamics of the dispute changed and so also the techniques of conflict resolution. The Treaty itself provides for three-tier dispute resolution mechanism. There are two important points to be noted in this entire study of water dispute. First is Pakistan's insistence on the presence and role of a third neutral party. It is based on Pakistan's deep and profound mistrust with India. Pakistan experienced Indian hegemony and expansionist policy in Kashmir and elsewhere. Indian policy rigidity not only with Pakistan but with other South Asian states has convinced the policy-makers in Pakistan to involve any third party for amicable and favorable resolution of the any dispute. Secondly, despite of its policy of bilateralism India accepted the third party role of the World Bank and also the inclusion of the provision for third party as a guarantor or as an adjudicating authority in the treaty. This is actually policy victory of Pakistan at least in the form of IWT. Although Pakistan has not been successful in obtaining the desired result on issues came out after the IWT, but what is important is the treaty obligation which will remain there.

The region is suffering because of several bilateral disputes of India with its neighbors. The IWT is the best available regional model which could be used for political issues to be resolved in future.