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Mechanism for Solving Water Disputes— Present Scenario and Some Suggestions

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ABSTRACT: Water Dispute Tribunals refer to the Equitable Apportionment theory for apportioning the waters of an interstate river among the basin States. They are guided by Helsinki Rules 1966 which have stipulated certain guidelines and factors. But those Rules are not very definite or clear as how a specific case has to be resolved. Many countries including India have not accepted the Equitable Apportionment theory. The real issue is always between the protection of existing uses and allocation for future uses. The upper riparian States tend to dilute the existing beneficial uses under the pretext of equity which is dangerous to an agrarian country like India. It will go against the policy of the Nation, namely, self-sufficiency in food grain requirement. Therefore, India has to evolve a policy for solving its river water disputes without depending on the policies evolved elsewhere.

In India Tribunals are constituted under the ISWD Act, 1956 with the objective that a special Tribunal would be able to adjudicate early. On the contrary, they take a very long time. There are delays at every stage. The procedures adopted by the Tribunals are also not uniform. In most of the earlier Tribunals in India no witnesses were produced by the disputing party States. But in Cauvery Water Dispute Tribunal 20 witnesses were engaged by the party States and cross examining them took many years. It is suggested that the procedures adopted by the Tribunal have to be studied and modified so that the disputes could be adjudicated as early as possible and implemented.

INTRODUCTION

Disputes between the States over their share of water have long been common in the world. Conflicts are not a feature peculiar to co-riparian States in India. Inter-State disputes in the United States of America, have kept Jurists, Courts, and lawyers busy over a century and individual disputes in that country have lasted for forty or fifty years. Both the Government of India Act of 1935 and the Constitution of India of 1950, have listed irrigation as a State subject, and inter-State rivers as a Union subject. This has to some extent, aggravated the problem. Disputes relating to the waters of inter-State rivers had risen even before the enforcement of the Government of India Act 1935. The dispute as to the sharing of Cauvery waters arose between then Madras and Mysore as far back as 1884, which resulted in 1892 Agreement. Again the dispute cropped up in 1909 and ended with an agreement signed in 1924. The dispute again flared up between the successor States of Madras, now Tamil Nadu, and Mysore, now Karnataka, since 1972, which has been adjudicated recently, in Feb. 2007, by a Tribunal.

The dispute relating to the Palar river between then Madras and Mysore was also resolved in 1892 by an agreement. Sharing of the waters of Sutlej river between then British India and the States of Patiala, Jheend and Nabha was solved by the Agreement entered into in 1873. Water disputes are many in India. These conflicts will grow because the sectoral demands will continue to increase with the swelling population. With the utilizable waters becoming scarer and scarer more disputes arise between the individuals, States and Nations. India has to deal with intra-state, inter-state, and international disputes. To name a few,

- Cauvery water dispute between Kerala, Karnataka, Tamilnadu, and Puducherry, on sharing the waters of the basin;
- Krishna water dispute between Maharashtra, Karnataka and Andhra Pradesh, on sharing of waters of the basin and other issues based on the review clause of the earlier Tribunal award which was pronounced 25 years back;
- Godavari water dispute between Andhra Pradesh and Maharashtra about the construction of a barrage across Godavari by the upper riparian state, Maharashtra;
- Dispute about the construction of Sutlej-Yamuna link canal project between Punjab and Haryana;
- Mandagini river water dispute between Goa and Maharashtra;

- Dispute about storing water up to the full reservoir level in Mullai Periyar Dam between Tamilnadu and Kerala, etc.

Since 1969 five separate Tribunals were constituted under the provisions of Inter State Water Disputes Act 1956, to adjudicate five river water disputes. Many individual water disputes are adjudicated by High Courts/Supreme Court. In this scenario it is worth to look into the existing system of settling the Inter State Water Disputes.

LEGAL FRAMEWORK

India is a Union of States. The constitutional provisions in respect of allocation of responsibilities between the States and the Centre fall into three categories, namely, the Union List (List-I), the State List (List-II), and the Concurrent List (List-III). Article 246 of the Constitution deals with laws to be made by the Parliament and by the Legislatures of the States. As most of the rivers in the country are inter-State, the regulation and development of waters of the rivers is a source of inter-State differences and disputes. In the Constitution, Water is included in Entry 17 of List-II, i.e., State List. This entry is subject to the provision of Entry 56 of List-I, i.e., Union List. Under the provision, Entry 17 of List-II, the States are planning, implementing and using the waters of rivers, largely according to their own priorities.

The Central Government has been given the responsibility under Entry 56 of List-I which states as follows:

> "Regulation and development of inter-State rivers and river valleys to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest"

Law on water disputes is comparatively recent. For centuries the need did not arise since the Nation and the States had not developed these waters to cater to all the needs of the inhabitants and people had enough for their minimum needs.

Article 262 of the Constitution authorises Parliament by law to provide for the adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of, or in, any inter-State river or river valley. This article further states as follows. "Notwithstanding in this Constitution, Parliament may by law provide that neither the Supreme Court nor any other Court shall exercise jurisdiction in respect of any such dispute or complaint as is referred to above".

The Central Legislation so far enacted under the above Constitutional provisions two Acts, one under Entry 56, namely the River boards Act 1956, and the other under Article 262, namely Inter State Water Disputes Act, 1956.

THE RIVER BOARDS ACT

This Act envisages the setting up of River Boards for inter-State river basins as advisory bodies to guide the State Governments in planning and development of inter-State rivers. However, no River Boards have been established under this Act for various reasons. The existing River Boards or Corporations were all formed by separate acts. Thungabadra Board was formed in 1955 to manage the waters of Thungabadra river between Karnataka and Andra Pradesh, Bhakra-Beas Management Board was formed under Punjab Reorganisation Act 1966, Part viii, to regulate the supply of water from Bhakra Nangal project to the States of Haryana, Punjab and Rajasthan, and Dhamodhar Valley Corporation was formed by an Act passed in 1948 which extends to Bihar and West Bengal. These units are functioning with their own problems.

INTER-STATE WATER DISPUTES (ISWD) ACT 1956

The ISWD Act on the other hand is an instrument which has been utilized for the adjudication of disputes between party States in the use of waters in a river basin. Five Tribunals had been set up under this Act, namely, the Krishna Water Disputes Tribunal (KWDT), the Godavari Water Disputes Tribunal (GWDT), the Narmada Water Disputes Tribunal (NWDT), the Ravi Beas Water Disputes Tribunal (RBDT), and the Cauvery Water Disputes Tribunal (CWDT). The Act has provided for step-by-step procedure for adjudicating an inter-State water dispute by a Tribunal which is as below.

Constitution of the Tribunal

Section 3 of the Act (as amended in 2002) provides for any State Government to request the Central Government to refer the water dispute that had arisen or apprehend to arise. When such a request is received and when the Central Government is of the opinion that the water dispute cannot be settled by negotiation, the Central Government within a period not exceeding one year from the date of receipt of such a request (as per Section 4(1) of the Act) shall by notification in the official Gazette constitute a Water Disputes Tribunal for adjudicating the dispute. The Chief Justice of India

then appoints the Chairman and Members of the Tribunal. Thus constituted Tribunal may appoint two or more Assessors to assist them as per Section 4(3) of the Act.

Report and Decision under Section 5(2)

As per the Section 5(2) of the Act the Tribunal shall investigate the matters referred to it and forward to the Central Government a report with its decisions. While the Act was framed in 1956, no time limit was fixed for the Tribunal to give its report and decisions and forward the same to Central government. But in the Act as amended in 2002 a period not exceeding three years has been fixed for giving its report and decisions. However, the central Government may extend this period for a further period not exceeding two years, provided that, if the decision cannot be given for unavoidable reasons.

Further Report under Section 5(3)

The Act under Section 5(3) provides for the Central Government and party States to request the Tribunal to give explanation or guidance upon any point not originally referred to the Tribunal, with in 3 months from the date of the report and decisions of the Tribunal pronounced under Section 5(2) of the Act. On such reference the Tribunal may forward to the Central Government a 'further report' with in one year from the date of such reference. This period (one year) may also be extended by the Central Government for such a period as it considers necessary.

Publishing in the Official Gazette

The Central Government as per Section 6(1) of the Act shall publish the report and decisions of the Tribunal in the official Gazette. Only then the decision shall be final and binding on the parties to the dispute and shall be given effect to, and it shall have the same force or as an order or decree of the Supreme Court. The decisions of the Tribunal is expected to be published in the official Gazette immediately after the Tribunal sends its 'further report' under Section 5(3) of the Act to the Central Government. However, in the Act no time limit has been fixed for the above action.

Implementation of the Decision

The Central Government to give effect to the decision of the Tribunal has to frame a Scheme or Schemes and it has to be notified in the official Gazette as per Section 6A(1) of the Act. Scheme thus framed and every regulation made under a Scheme shall be laid before each House of Parliament while it is in session for a total period of thirty days which may be comprised of one or more successive sessions. Both the Houses may modify the Scheme and or the regulation. Only the modified form will be given effect to. For framing a Scheme no time limit is fixed in the Act. In the Cauvery dispute it took seven years for framing a Scheme to implement the Interim order dated 25th June 1991. Thus framing a Scheme itself may take considerable time depending on the political balance between the Central Government and party States.

Though the Act provides for a mechanism to solve the water-sharing dispute, there are still ways and means by which the dispute could be prolonged within the framework of the Act. For example, Tribunal Proceedings under Section 5(3) of the Act could be extended beyond one year, since the extension period is not fixed, or the Central Government may take considerable time to frame a Scheme for implementation. Perhaps if the Act could be amended suitably the implementation of the decisions of the Tribunal under Section 5(2) and 5(3) would not get delayed.

NEGOTIATIONS

In the past some inter-State water disputes had been dealt with through a process of negotiations under the good offices of the Central Government. Upper Yamuna accord for sharing Yamuna waters upto Okhala, and Bansagar agreement for sharing Sone River waters, Bhakra-Nangal, the Tungabhadra, the Chambal, the Damodar Valley, Parambikulam Aliyar Project, and Krishna (Telugu Ganga) water supply project are evidences of inter-State co-operation.

No doubt negotiation is the best form of settlement of disputes. The problems relating to the sharing of the inter-State waters sometimes prove intractable. The conflict of interest between contending riparian States has frequently defied amicable settlement through negotiation, and has called for the intervention of the Union Government or recourse to adjudication.

There is also the complicating factor of politics. No State is willing to run the political risk of appearing to be a willing party to a questionable bargain. In such a situation, the benevolent intervention of the Union Government becomes inevitable. There are many ways in which the Union Government can intervene in, where two or more riparian States claim the waters of an inter-State river for irrigation and other sectoral uses. A solution may possibly be found in transferring water from another basin where there is a surplus to

meet the needs of one or other of the contending States. Here again, if a part of the cost of this transfer were to be borne by the Centre, it would facilitate Agreement. Negotiation compromise among the disputing States is still the best mode, but in many cases the product of negotiation is postponing the settlement. It was possible in the past to settle any dispute between the States through negotiations, whether it is Water Dispute or Border Dispute or any other commercial activity.

Present Scenario

In the present political scenario it is seldom possible through negotiations. Sometimes small issues are blown up and made to be a sensitive issue, in such a manner, that even if the political parties wish to go for negotiations and arrive at a settlement, they may not be able to do that. They hesitate to present the facts to the people considering their own interest and of the party they belong to.

In the Cauvery Water Dispute, talks were held between the party States 26 times over a period of 18 years (1972 to 1990) before referring the dispute to the Tribunal. Practically no settlement could be reached through those negotiations. Recently, in the dispute between Tamil Nadu and Kerala regarding storing of water in the Mullai Periyar reservoir up to a level fixed by the Supreme Court, when Kerala refused to allow Tamil Nadu to store water up to that level the Supreme court suggested to the Party States to go in for talks, if necessary in the presence of the Union Government. Accordingly, the two States met twice in the presence of the Union minister for Water Resources at Delhi, first time at the Chief Ministers level and second time at the respective water resources/irrigation ministers level, without any result. These directions/suggestions, though given with good intention, result in delay to settle the disputes.

The CWDT also during the course of final arguments suggested whether the States could arrive at any settlement through negotiations, at least on certain issues, like dependability of flows, considering the return flows, etc, though not on bigger issues. Unfortunately nothing happened. Thus, in the present political scenario, directions of the Tribunal/Supreme Court suggesting to go in for negotiations cause further delay and justice is being delayed to the aggrieved party. It helps the State, which does not want to arrive at any settlement.

However, when the States cannot agree among themselves over sharing the waters of an inter-State river the Tribunals have shown striking sensible accommodation among the competing demands.

BROAD ASPECTS OF EQUITABLE APPORTIONMENT OF INTER-STATE RIVER WATERS

The Riparian Rights theory based on the English common law held sway for a long time in resolving water disputes between individuals, and between Governments. This is now giving way to the theory of Equitable Apportionment. It does not mean equal division. The objective is to apportion the waters available in a river basin equitably to all the States lying with in the basin and dependent on such water resource, giving due consideration to all water related aspects including existing uses, their social needs, and future demands, at the same time aiming at the most beneficial and optimum use of the available waters in the basin.

No State has a proprietary interest in a particular volume of water of an inter-State river on the basis of the contribution or irrigable area. Origin of the river is not a relevant factor. In fixing the equitable shares of the States, the claims of existing uses should be allowed before claims for future uses are taken up for consideration.

In case of competition between new or proposed beneficial uses and old lawfully established beneficial uses, there is no instance in which a State, under the principle of equitable apportionment, has been required to relinquish, without full replacement from other sources, a lawfully established beneficial use in order to enable a co-riparian State to develop a new use or uses of the same kind. Helsinki Rules lay down guidelines for equitable apportionment of a river basin, as under:

Helsinki Rules

In the conference of International Law Association held at Helsinki in 1966, the question of framing principles and laying down guidelines for the settlement of water disputes and the sharing of water between riparian States were taken up.

The complexity of the issue is evidenced by the factors listed in the Helsinki Rules, for consideration in working out a reasonable and equitable share of a riparian State. The factors are:

(a) The geography of the basin including, in particular, the extent of the drainage area in the territory of each basin State;

(b) the hydrology of the basin, including in particular, the contribution of water by each basin State;
(c) the climate affecting the basin;
(d) the past utilisation of the waters of the basin, including in particular existing utilisation;
(e) the economic and social needs of each basin State;
(f) the population dependent on the waters of the basin in each basin State;
(g) the comparative costs of alternative means of satisfying the economic and social needs of each basin State;
(h) the availability of other resources;
(i) the avoidance of unnecessary waste in the utilisation of the waters of the basin;
(j) the practicability of compensation to one or more of the co-basin States as a means of adjusting conflicts among uses; and
(k) the degree to which the needs of a basin State may be satisfied without causing substantial injury to a co-basin State.

The factors listed are not exhaustive and the weight to be given to each factor has to be determined by its importance in comparison with other relevant factors. These factors are not clear or definite and they are interpreted by the States to suit to their requirement.

In the UN convention, 1997, a resolution was made to adopt the 'Laws of the Non-Navigation uses of International Water courses' which is almost similar to Helsinki Rules on the use of the waters of International rivers. India is not a party to it. Hence, Helsinki Rules need not be followed in deciding water disputes in India. Those Rules have also not been adopted so far by the Government of India while formulating projects.

In the earlier water disputes other than Cauvery water dispute the water sharing was mostly on sharing the surplus waters. The respective Tribunals in their report and decision have only mentioned the theory of Equitable Apportionment, as an academic exercise, and they did not dislodge any of the existing uses to accommodate a new use.

But in the case of Cauvery water dispute the CWDT has directed to curtail the age old irrigation uses for the sake of accommodating new uses, even though the Tribunal has reckoned the area of irrigation developed under the 1924 Agreement between Mysore (Karnataka) and Madras (Tamil Nadu). The Agreement is fair, just and equitable. However, the Tribunal after having specifically stated that the 1924 Agreement can not be held invalid, has reduced the area of irrigation that existed in 1972 in Tamil Nadu, to accommodat new uses in Karnataka and Kerala. The newly areas developed in TamilNadu for the benefit of the Nation about fifty years ago with a big investment of the taxpayers money and hard labour of millions, have been reduced by the Tribunal. Poor farmers and landless labourers who have no other avocation are left in lurch. Tamil Nadu which has been irrigating from Cauvery waters for centuries cannot be equated with the new developments in the other party States in the name of equity or Equitable Apportionment.

PRIOR APPROPRIATION

Helsinki Rules speak only about the allocation of water in a basin in a normal year. They do not speak about allocating the waters especially during distress period which is the crux of the problem in any water sharing dispute. But the Article V(II) sub clause 4, Article VII and VIII(2) of Helsinki Rules are as under.

(4) The past utilization of the waters of the basin, including in particular existing utilization.

Article VII

"A basin State may not be denied the present reasonable use of the waters of an international drainage basin to reserve for a co-basin State a future use of such waters".

Article VIII(1)

"An existing reasonable use may continue in operation unless the factors justifying its continuance are outweighed by other factors leading to the conclusion that it be modified or terminated so as to accommodate a competing incompatible use"

These Articles though protect the existing uses, they are silent on giving priority to them during distress period.

In India, the settled law relating to apportionment of waters is that existing rights of irrigation should be protected. No project was dispensed with for implementing a new project unless it proved to be a failure or un-economical. Priority has been given to the earlier uses/irrigation projects, over a later one.

Earlier Tribunals in India Protected the Existing Uses

The question of sharing waters during distress period was neither a serious issue nor a contesting issue in the earlier disputes unlike in Cauvery basin. The river basins, namely, Krishna, Godavari, Narmada and Rabi-Beas were all identified as surplus basins by the respective Tribunals at the time of allocation and few of them were even virgin basins.

The Krishna Water Disputes Tribunal has stated that there should be ranking with regard to the protection of the existing uses. It has stated that in the case of competition between new or proposed uses and old lawfully established uses, there is no instance in which the State under the principle of equitable apportionment has been required to relinquish the existing uses without full replacement from other sources. It has further stated as follows:

> *Existing use of a State is an important evidence of its needs. Demands for potential uses are capable of indefinite expansion. Equitable apportionment can take into account only such requirements for prospective uses as are reasonable having regard to the available supply and the needs of the other States.*
>
> *xxx xxx xxx*
>
> *An allocation of water may be made so as to maximise economic gains, but an established use may have to be protected, though the same amount of water may produce more in other sections of the river.*

Thus the earlier Tribunals in India have adopted the principle of protecting existing uses. Protection in deficit years is more relevant than in normal years. World wide there is no known single case in which an existing use was replaced by a new use.

U.S. Case Laws

In the U.S. case laws on water disputes which are often referred to by the Tribunals in India, the existing reasonable uses have been protected. For example in sharing the waters of Laramine River the U.S. Supreme Court stated as under.

In Wyoming V. Colorado, the U.S. Supreme Court applied the doctrine of Priority of appropriation in equitable allocation of waters of inter-State streams. As the available supply of the Laramine river was not sufficient to satisfy Wyoming's prior appropriations dependent thereon and the proposed Colorado appropriations, the Court determined Wyoming's share of the water on lumping up the reasonable requirements of Wyoming's prior appropriations and allocated the remaining water to Colorado.

In another case, viz., Kansas V. Colorado, the U.S. Supreme Court observed that whatever has been effective in bringing about the development of irrigation should not be destroyed or interfered with.

In contrast to the above Case Laws, in the Cauvery water dispute the areas developed legitimately under the provisions of the Agreements of 1924, and the areas developed by violating the Agreement without the concurrence of the party States and Government of India, are treated equally, especially during the distress years which is against the established principles followed by Government of India. If the Rule of priority is not adopted, in the long run the established old uses in the lower riparian States will suffer in many years and disputes will continue to exist.

NATIONAL WATER POLICY

The Policy formulated in 1987 and revised in 2002, regarding water resources development in a river basin and sharing the waters of the basin by the Riparian States state as under:

'All individual developmental projects and proposals should be formulated with in the frame work of such an overall plan in keeping with existing Agreements/Awards for a basin or a sub-basin so that the best possible combination of options can be selected and sustained.'

'The water sharing/distribution amongst the States should be guided by a National perspective with due regard to water resources availability and needs with in the river basin. Necessary guidelines, including for water short States even out side the basin, need to be evolved for facilitating future agreements amongst the basin states.'

Thus, the National policy is for protecting and sustaining the existing uses with a National perspective. The irrigation projects which have been developed over the years cannot be thrown out of gear for accommodating a new use unless it proves to be more beneficial both socially and economically.

FOOD SECURITY

As per the recent assessment by 2050 India may need about 400 million tones of grains, while its present production hovers around 210 million tons. To meet that, irrigation and agriculture have to be developed tremendously. This needs very sharp increase in public investments in irrigated agriculture.

In India more than 70% of population depends on agriculture directly or indirectly for their livelihood. This situation may not change much in the years to come, reasonably in a century. In this scenario destabilising the existing agricultural areas will only add to the problem of already suffering rural population consequently food situation of the Nation will be affected. Hence, India has to evolve its own

policy in solving river water disputes, without following the policies or guidelines evolved elsewhere.

FUNCTIONING OF THE TRIBUNALS IN INDIA

For each inter-State river water dispute a separate Tribunal is constituted under the ISWD Act. Procedurally speaking a Tribunal is more informal, it need not strictly adhere to the rules of evidence, it can adopt a more flexible approach and it can combine in both legal and technical talents, which give it certain advantages. There is no essential or substantial difference between a decision of the Supreme Court and that of the Tribunal. As per Section 6(2) of the Act amended in 2002, the Decision/Award of the Tribunal is equivalent to the decree of the Supreme Court. However, its Awards or Decisions, labour under the same disabilities as those of a Court. There are reasons for the inadequacy of the judicial approach to the intricate problems of Inter State Rivers. For one or the other contending party, there is an element of compulsion in a judicial Order, to which it cannot be reconciled.

The earlier Tribunals in India have taken considerable time for delivering their Report and decisions for various reasons. Table 1 gives the years taken by the Tribunals for conducting the proceedings of the dispute and to deliver the Reports and decisions/Award under Section 5(2) of the Act.

Table 1: Time Taken for Conducting the Proceedings and Pronouncing the Award under Section 5(2) of the ISWD Act, 1956

Tribunal	*Party States*	*Period*
Godavari Water Disputes Tribunal (GWDT)	Maharashtra, Karnataka, Madhya Pradesh, Andhra Pradesh & Orissa.	10.04.1969 to 27.11.1979 (10 years & 7 months)
Krishna Water Disputes Tribunal (KWDT)	Maharashtra, Karnataka, & Andhra Pradesh.	10.04.1969 to 24.12.1973 (4 years & 8 months)
Narmada Water Disputes Tribunal (NWDT)	Madhya Pradesh, Maharashtra, Gujarat & Rajasthan.	06.10.1969 to 16.08.1978 (8 years & 10 months)
Ravi Beas Water Disputes Tribunal (RBWDT)	Haryana, Punjab & Rajasthan.	02.04.1986 to 30.01.1987 (9 months)
Cauvery Water Disputes Tribunal (CWDT)	Tamil Nadu, Karnataka, Kerala & Puducherry.	02.06.1990 to 05.02.2007 (16 years & 8 months)

In all the disputes 5(3) reference petitions were made by the party States and the Government of India. The Tribunals have taken sometime to deliver the clarifications/explanations under the Act as detailed in Table 2.

Table 2: Time Taken for "Further Report"

Tribunal	*Period*
Godavari Water Disputes Tribunal (GWDT)	26.02.1980 to 07.07.1980 (5 months)
Krishna Water Disputes Tribunal (KWDT)	16.09.1975 to 27.05.1976 (8 months)
Narmada Water Disputes Tribunal (NWDT)	16.11.1978 to 07.12.1979 (1 year)
Ravi Beas Water Dispute Tribunal (RBWDT)	19.08.1987 (Continuing)
Cauvery Water Disputes Tribunal (CWDT)	04.05.2007 (Continuing)

In all the above disputes the respective Tribunals took not less than 4 and half years to pronounce their decisions under Section 5(2) provisions of the ISWD Act., except in the case of RBWDT. In this dispute between the States of Punjab, Haryana and Rajasthan, though the Award was pronounced in nine months, unfortunately the decisions of the Tribunal under Section 5(3) provision have not been awarded yet. There is a stalemate because of political reasons. Out of the five Tribunals, the CWDT has taken a very long time, 16 years and 8 months, to pronounce its verdict. The reasons can be mainly attributed to two aspects as detailed below.

Reconstitution of the Tribunal

The constitution of the CWDT itself was changed twice. Firstly the Chairman of the Tribunal himself resigned in July 1996, (i.e.) after hearing the case for about 5 years. Secondly a Member of the Tribunal who heard the case for about 12 years passed away. Government of India took about 5 months to appoint a new chairman and to reconstitute the Tribunal and 3 months to appoint a new Member, totally it took eight months. The reconstituted Tribunal, in the second instance, had to hear the final arguments of the party States, then done, for the benefit of the new Member, which took about six months. Thus the reconstitution of the Tribunal twice resulted in a delay of fourteen months to deliver the Award.

GWDT was reconstituted twice since one member resigned within 8 months after constituting the tribunal, and for the second time due to the demise of a

member after hearing the case for about 6 years. Similarly the NWDT was reconstituted thrice. Delay in reconstitution of a Tribunal generates further delay in delivering the Award.

Thus, whenever a Tribunal was reconstituted the opening of the cases, arguments of the respective party States, then done, have to be repeated so that the new Member can follow the proceedings. As per section 4(2) of the Act only Sitting Judges are appointed to the Tribunal. In all the Tribunals only Judges with a balance service of about six months have opted for and appointed. Perhaps if Judges with a longer balance of service are appointed the unavoidable reconstitution of the Tribunal could be minimised.

Expert Witnesses on Technical Issues

Another reason for the delay may be attributed to the procedure adopted by the CWDT. The Tribunal had appointed two Learned Assessors to assist them as per Section 4(3) of the Act. Apart from that it directed the party States to produce expert witnesses of their choice in support of their case on various technical aspects, like assessment of yield of the basin, availability of ground water, cropping pattern, crop water requirement, etc., and requested them to file their affidavits. The expert witnesses were also cross-examined by the Counsels of the party States, one after another. Table 3 shows the number of witnesses produced by the basin States and the time taken for cross-examinations.

Table 3: Time Taken for Cross-Examination in CWDT

Basin States	*Number of Expert Witnesses*	*Days and Period of Cross Examination*
Tamil Nadu	9	24 (06.01.1994, 28.09.1995)
Karnataka	6	103 (08.05.1997 to 27.09.2000)
Kerala	4	58 (28.09.2000 to 13.12.2001)
Puducherry	1	2 (28.04.1997 to 30.04.1997)
Total	20	187

Out of 570 days of Tribunal Sittings 187 days have gone for cross-examining the witnesses over a period of 8 years (January 1994 – December 2001), which is 48% of the total period of 16 years and 8 months.

It is quite but natural that the witnesses, however reputed they may be in their field, had to support the State which has requested them to file the Affidavit. In the cross-examinations also they had to use their expert knowledge and intelligence in supporting the State's case for which they appear. It was a tough task for the Senior Counsels and the technical team of the respective party States to cross examine them, and to bring out the correct information, which can be relied by the Tribunal. The number of technical man-days spent both for preparing and to cross-examine the witnesses are quite enormous.

After the final arguments of the party States were over the CWDT gave a copy of the Report of the Assessors on certain vital issues to the party States for their comments and cross comments. In that Report only a few percent of the deposition of the witnesses have been referred. The Tribunal in their Award has accepted most part of the Assessor's Report. CWDT has thus, utilized the depositions of the witnesses to a minimum extent only.

Expert Witnesses Engaged by the Earlier Tribunals

In KWDT the party States engaged few expert witnesses on certain issues. The Tribunal did not have any Assessor as requested by the party States. Maharashtra and Karnataka engaged one witness each and Andhra Pradesh engaged six witnesses, two on technical issues and four on non-technical issues, viz., availability of records, photographs, files, data, etc., On the determination of the dependable flow one from Maharashtra and one from Andhra Pradesh appeared as expert witnesses. The other main contending State, Karnataka, did not employ any witness on this issue. However, the Learned Counsels and the Engineers of the States finally arrived at a settlement and the water resources of the basin was decided to be assessed at 75% dependability.

On deciding the percentage of return flow from irrigation use, one expert witness engaged by Maharashtra alone deposed. Maharashtra, Mysore, and Andhra Pradesh argued for 10%, 20% and 4% of utilization as return flow respectively. The Tribunal fixed the return flow as 7.5% of the use in the projects using 3 TMC or more annually and allowed that as an additional use in that project. However, under 5(3) reference when Karnataka prayed for increasing the return flow the Tribunal increased it to 10%.

The other technical witnesses were on reservoir carry over storage and model studies, which were not

contesting issues. Thus, in the KWDT the oral evidence was considered only for one issue out of seven main issues.

In GWDT no expert witness was engaged. But it had the benefit of two Assessors.

In NWDT, the party States viz., Gujarat, Madhya Pradesh, Maharashtra and Rajasthan did not lead any oral evidence. NWDT had appointed one full time Assessor and three-part time Assessors including two agriculture experts. The Tribunal received a report from the part time Assessor who is an expert in Agriculture and that report was circulated to the Party States. Based on that report and evidence and the technical assistance provided by the other Assessors, the Tribunal decided the quantum of crop water requirements for the party States. In other words, a witness was employed by the Tribunal and not by the Party States.

Thus in all the earlier Tribunals oral evidence was used to the barest minimum. The Tribunals assisted by the Learned Assessors have considered the reports prepared by Government of India organizations and other reliable data and information furnished by the party States and took decisions on the vital issues.

Employing witnesses by all the disputing party States on many issues as done in CWDT may not be necessary. At best one or two witnesses may be employed by the Government of India or the Tribunal itself on certain vital issues which would be sufficient to take a decision. When a witness is not from any of the disputing party State one can expect that he won't be biased. Perhaps if such a procedure had been adopted in the CWDT too which had the benefit of two Assessors, the time consumed especially for cross-examining the witnesses would have been less.

CONCLUSIONS

- Government of India has not adopted the Equitable Apportionment theory. India is not a party to the U.N. resolution, viz., U.N. conventions on the Non-Navigational uses of International water courses (July 1997), which is similar to the Helsinki Rules, 1966. Hence the Tribunals/Courts in India need not be necessarily guided by that.
- Helsinki Rules, 1966 are not even taken for guidance while framing the irrigation (both major and medium) projects in India. National water policy, 2000 also did not consider that.
- If the existing beneficial uses are not protected it will jeopardize the life of millions who depend on the irrigation projects constructed and developed prior to independence, and post independence under several Five Year Plans for their lively hood.
- Nowhere in the world existing beneficial uses have been disturbed while apportioning waters for new uses, except in the case of Cauvery water dispute.
- Equitable Apportionment may perhaps be considered in a river basin for appropriating the surplus waters among the basin States. In a water deficit basin it cannot be adopted unless the existing uses were proved to be a non-beneficial use.
- When an Inter State River basin develops, fresh problems arise due to the dynamics of changes and it may generate friction. Unless they are analysed and solved by adjustments in time, in a democratic setup the dispute will be blown up to an unreasonable level affecting the National economy.
- Union Government should play an effective role in solving the Inter State water disputes and should be able to enforce the decisions of the Courts. It cannot be a mute spectator. If needed the Constitution may have to be amended to take over the control and regulation of Inter State Rivers for the benefit of the Nation.
- Agriculture will remain an important source of livelihood for the large population of India, either directly or indirectly, for a long time to come, as the majority of the work force are engaged in farming and related activities. Hence, Government of India should bestow its attention on this vexed issue and make necessary amendments to the ISWD Act 1956, to systematise the procedures to be adopted to arrive at an adjudicated decisions, without ambiguity in a shorter period, and to implement the Award for the benefit of the basin States and also in the larger interest of the Nation.
- To reduce the Tribunal's time considerably it is suggested that, Central Government or the Tribunal may engage one or two expert witnesses on important issues and the States may be allowed to cross examine them, instead of directing the disputing States to produce their own witnesses.

Note: The opinions and suggestions expressed in this paper are that of the author of this paper. They have nothing to do with the organisation he belongs to.

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