

CHAPTER VI

THE TULBUL NAVIGATION PROJECT/WULAR BARRAGE DISPUTE AND THE NEGOTIATION PROCESS

Throughout the fifty two years of India-Pakistan relations, the moment a dispute has arisen between the two, it has been inflamed. However, the Indus Waters Treaty, which was signed in 1960, has withstood the test of time, and the Indus Waters Commission has met at regular intervals, despite war, to deal with the problems that surfaced in the implementation of the treaty. This suggests that despite the intractable nature of the disputes, they can be resolved to mutual satisfaction. This chapter deals with the Tulbul/Wular dispute. It is divided into three sections. The first section traces the history of the dispute. It highlights the different standpoints of India and Pakistan on the dispute. The second section provides a description of the negotiations so far. And the final section is an analysis of these negotiations from the yardstick of the framework of negotiations developed at the start of the study.

A History of the Dispute

India and Pakistan disagree even on the name of the controversy referred to here as the Tulbul Navigation Project. For India, it is the Tulbul Navigation Project; Pakistan calls it the Wular Barrage. At issue is a barrage that is to be constructed by the government of the Indian state of Jammu and Kashmir on the Jhelum River just below Wular Lake.¹ Wular Lake is located about 25 kilometers north of Srinagar on the river Jhelum at about 5,180 feet above sea level. The River Jhelum flows into the

1. A.G. Noorani, *op.cit*, p.95.

lake from the south and flows out of it from the west. The lake is an impediment in the way of the river; hence the name Wular derived from the Sanskrit word "woll" meaning thereby "obstacle."²

According to India, Wular Lake is in a pathetic state - "a patient on the death bed." It has "halved in its size over the past five decades and become shallower and flatter."³ India's contention is that from late October to mid-February the flow in the Jhelum reduces to 2,000 cubic feet per second (cusecs), perhaps less, with a depth of 2.5 feet. A depth of four feet with a flow of 4,000 cusecs is necessary during these months for navigability. During these lean months, the obvious remedy is to control and regulate the depletion from the Wular Lake so as to provide the requisite flow in the Jhelum.⁴

The Wular barrage is located just below Wular Lake, at its mouth, in the town of Ningli, near Sopore, forty kilometers north of Srinagar.⁵ The Tulbul Navigation Project is not intended to add to storage but to solve the problem of navigation over a distance of approximately twenty kilometers between Wular Lake and Baramula, thus making movement easier between Sopore and Baramula.⁶

The lake, at its highest level, has a natural water storage capacity of about 300,000 acre feet. The project is not intended to add storage capacity as such, but to regulate water depletion in order to ensure year round navigability on the Jhelum. The project would attempt to accomplish this by constructing a barrage about 440 feet long, with a navigation lock, on the Jhelum at the mouth of Wular Lake.⁷

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2. Mir Abdul Aziz, 'Wullar and the Proposed Barrage,' The Muslim, 24 October, 1986.
 3. Mirza M. Nasarullah, 'Wular Barrage', Pakistan Horizon, Vol.47, No.1, 4 January, 1994 p.56.
 4. A.G. Norrani, 'The Wullar Barrage Dispute,' Muslim, 20 May, 1989.
 5. See the map in Appendix V.
 6. Ibid.
 7. A.G. Noorani, 'CBMs for the Siachen Glacier, Sir Creek and Wular Barrage', in Michael Krepon and Amit Sevak (eds.) Crisis Prevention, Confidence Building and Reconciliation in South Asia, St. Martin's Press, New York. 1995, p.95.

Pakistan's contention is that the Wular Lake site is not suitable for a dam of any size as it would inundate Srinagar and the Valley. It was for this reason that, during the negotiations on the Indus Waters Treaty, Pakistan eventually gave into the World Bank plan for restricted use by India of the waters of the three western rivers in Indian held Kashmir. The strategic importance of the site lies in the fact that its possession provides India with a means to intimidate Pakistan, as a dam has the potential to ruin the Triple Canals Project,⁸ namely, the Upper Jhelum canal, the Upper Chenab Canal and the Lower Bari Doab Canal. In plain terms, according to Pakistan, control of the river Jhelum through a storage work, irrespective of its purpose, could mean ruination to the vast tracts of agricultural lands in the Punjab and additionally a severe shortage of electricity once India decides to withhold water over an extended period, especially during the dry period.⁹

Some Pakistanis have argued that this is the work not of navigation control but of storage and is a breach of the 1960 Indus Waters Treaty, which assigns the Jhelum River waters to Pakistan. The Indus Waters Treaty divided between the two countries the six great rivers of Punjab: the eastern rivers including the Beas, Ravi and Sutlej, are for the unrestricted use of India. Pakistan received for unrestricted use all the waters of the three western rivers, and India is under treaty obligation to let them flow into Pakistan without any "interference".¹⁰

According to the 1960 treaty, India is allowed four distinct kinds of uses of the western rivers: domestic use (drinking, washing, and so on), agricultural use for

8. Aloys Arthur Michel, The Indus Rivers, New Haven and London, Yale University Press, 1967, pp.201 & 239. The author has written that Pakistan dragged its feet on the World Bank plan to allow India restricted use of the Western rivers in Kashmir in order to get concessions for the construction and payment of dam sites in Pakistan or Azad Kashmir. Ibid., p.240.
9. Ijaz Hussain, Issues in Pakistan's Foreign Policy, Progressive Publishers, Lahore, 1988, P.2
10. See Michel, op.cit. For a detailed first hand description and analysis see Niranjana D. Gulhati, Indus Waters Treaty, Allied Publishers, 1973.

irrigation, restricted use for generation of hydroelectric power through a "run of river" plant, and what is called "nonconsumptive use."¹¹ The non-consumptive use is the key to the present dispute.

The treaty defines nonconsumptive use to mean "any control or use of water for navigation," and other specified purposes, provided, however, that "the water (undiminished in volume within the practical range of measurement) remain in, or is returned to the same river".¹² The expression "interference with the waters" is also defined to mean any act of withdrawal therefrom or "any man made obstruction to their flow which causes a change in the volume... of the daily flow of water" unless it is of an insignificant degree.¹³

Article IV(2) of the 1960 treaty provides that "Each party agrees that any non-consumptive use made by it shall be so made so as not to materially change, on account of such use, the flow in any channel to the prejudice of the uses on that channel by the other party under the provisions of this treaty. In executing any scheme of flood protection or flood control each party shall avoid, as far a practicable, any material damage to the other party, and any such scheme carried out by India on the western rivers shall not involve any use of water or any storage in addition to that provided under Article III."¹⁴

India's permitted non consumptive use of the Western rivers includes the Jhelum and its "connecting lake", Wular. The central issue of the present dispute arises from the treaty's forbidding India, except within certain defined limits, to "store any water of, or construct any storage works on, the western Rivers."¹⁵ Thus, the entire

11. Indus Waters Treaty, 1960, article III (1).

12. Ibid., Article I (11).

13. Ibid., Article I (15).

14. Ibid., Article IV (2).

15. Ibid., Article III (4).

controversy is over whether the Wular Barrage essentially is a project for the "control or use of water for navigation", or a "storage work"? Storage work is defined as a work constructed"... for the purpose of impounding the waters of a stream."¹⁶ This narrows the issue still further. Is the "purpose" of the Wular Barrage to "impound" - collect or confine the waters of the Jhelum - or to "control" the water for "navigation"? India holds the view that the water will indeed be confined for sometime in order to raise the level of the lake and then to regulate supply of the water for navigation.¹⁷

Pakistan's argument is that, from the provisions of the Indus Waters Treaty, India is entitled to construct a proper storage work on the River Jhelum if it does not exceed 10,000 acre feet of water. On the other hand, India is engaged in building a barrage of 300,000 acre feet of water. This is thirty times more than the permitted capacity. Hence, Pakistan considers it clearly in violation of the terms of the Indus Waters Treaty.¹⁸

There is no explicit provision which would prohibit India from constructing a barrage for the purposes of navigation. But the treaty cannot be read in isolation. It has to be interpreted in the light of its objective and purpose. Viewed in this light, the Indian action is in clear violation of the over-riding object and purpose of the treaty, as the upper riparian is under an unambiguous obligation to let flow the waters down stream unhindered and without interference. On the contrary, India, through the barrage, would be in a position to release or withhold water at its discretion.¹⁹

There are two exceptions to the ban on India's storing waters of the western rivers. One concerns certain hydroelectric projects. The other, which is pertinent to the

16. The Indus Waters Treaty, 1960, Annexure E, Paragraph 2(a).

17. 'Wular Barrage Not to be Shelved', Hindu, 29 October, 1987.

18. Hussain, *op.cit.*, p.5; Article III (4); See also 'Wular Barrage Violation of Indus Waters Treaty,' Pakistan & Gulf Economist (Karachi), 16-22 December 1989, p.17.

19. Hussain, *op.cit.*, p.6.

dispute, is a limited permission for India to store waters of the western rivers as spelled out in Annexure E of the treaty. India is allowed "any natural storage in a connecting lake" such as Wular, but this must be "storage not resulting from any manmade works".²⁰ But how far does the treaty permit control of the waters for navigation? Can such control be exercised without some element of storage as defined in the treaty?²¹ Here India has provided three assurances to allay Pakistani fears. The first assurance is that the Tulbul Navigation Project is to control and regulate the depletion from Wular Lake so as to provide the requisite flow in the Jhelum. Second, the volume of water that flows into the Jhelum, as it enters Pakistan, will not be diminished nor will there be any material change in the flow in any channel. Third, these precautions envisaged in the project will be in the interest of Pakistan as well.²²

Pakistan argues that, as to the Indian argument that the barrage in question would actually benefit Pakistan (as it would be used for withholding water supplies during flood season and releasing them during dry season), this cannot be used as a plea for constructing the barrage without the prior consent of the Pakistani government, however well-founded the intentions may be. Actually, this very control over the waters by India is not acceptable to Pakistan, as withholding of them for some weeks during the crucial dry season could spell disaster for the crops. Pakistan has not forgotten what India did to it after independence when, on 1 April 1948, it shut off water supplies at the critical kharif sowing period from the Ferozpur headworks to canals in Pakistan (west Pakistan at that time) with the result that not only did agriculture suffer but in addition the city of Lahore was deprived of the main source of water supply. Power distribution to West Pakistan from the Mandi Hydroelectric scheme was also

20. Indus Waters Treaty, Article III(4).

21. A.G. Noorani raises these questions in his article, *op.cit.*, 1995, p.97.

22. A.G. Noorani, 'The Wular Barrage Dispute', *Muslim*, 20 May, 1989.

stopped.²³ The mistrust sown by this incident later on became the *leitmotif* behind the Indus Waters Treaty. It needs to be emphasised here that given Indo-Pakistani relations in general, which are bedeviled by suspicious and misgivings on both sides, Pakistan cannot afford to let India control water supplies so essential for its agriculture and hydroelectric generation which could play such a decisive role during any future Indo-Pakistani armed hostilities.²⁴ India's intentions in the matter become suspect for Pakistan given that the Wular Barrage project, which dates before independence, was always shelved because of the fear that a dam of any size would inundate a vast tract of land, possibly including Srinagar.²⁵

Apart from the fear that the Wular Barrage could deal a crippling blow to the economies of Pakistan and Azad Kashmir, Pakistan alleges that it could also have severe consequences for Pakistan's defence infrastructure. During the 1965 war, the Indian Army had failed to cross the BRB Link Canal due to its full swing.²⁶ Thus, India would have control of the Jhelum water, coupled with the Chenab River through the Salal Dam (constructed by India in the 1970s), and the three eastern rivers under the Indus Water Treaty. During adverse circumstances such as war, India would have an edge over Pakistan because India would be able to control the mobility and retreat of troops by inundating the battlefield or canals or enhance the manoeuvrability of its own troops by closing the barrage gates, thus rendering the canal system dry and easy to cross.²⁷

23. Michel, op.cit., p.196.

24. Ijaz Hussain has tried to explain Pakistan's stand and its fears on the issue in his book, op.cit., 1998.

25. Michel, op.cit., pp.201 & 239.

26. Chaudhary Muhammad Anwar Ali Sarya, 'Wullar Barrage,' Nation (Lahore), 17 November, 1989.

27. Ibid.

In short, control of the Jhelum through a "storage work" irrespective of its purpose, could mean a serious threat to the vast tracts of agricultural land in the Punjab and Sind and could result in a severe shortage of electricity as well as damage the defence infrastructure, military bases and lines of communication if India decides to withhold water or inundate by controlling water over an extended period.²⁸

Mirza M. Nasarullah writes that the Tulbul Navigation Project will cause the following damage to Pakistan's economy:

- a. India would be able stop the water flow of the river Jhelum for 20 to 30 days completely. This could greatly reduce the production of electricity at Mangla and thereby adversely affect Punjab's agriculture in particular and industrial activity in the country in general.²⁹
- b. The river Jhelum is a very important tributary of the river Indus. With the reduction in the flow of the river Jhelum, water flow in the Indus would be automatically reduced, thereby damaging the economy and agriculture in Sind province.³⁰

Coming back to the Indus Waters Treaty, it lays down three procedures for resolving disputes. First, it establishes a Permanent Indus Commission consisting of two commissioners for the Indus waters appointed from each country. Questions of "interpretation or application" of the treaty are to be submitted to the commission, which serves as a regular channel of communication on all matter relating to the treaty's implementation. If the commissioners do not reach agreement, the dispute is then to be referred to a neutral expert for resolution, at the request of either side, if it concerns any of the twenty-odd questions that fall within the expert's jurisdiction; otherwise, either side may request that the matter be referred to a seven-member court of arbitration.

28. Ijaz Hussain, op.cit., p.47.

29. Mirza M. Nasarullah, 'Wular Barrage,' Pakistan Horizon, Vol.47, No.1, 4 January, 1994, p.59.

30. Ibid.

A.G. Noorani argues that the dispute between India and Pakistan falls neatly within the scope of the neutral expert's competence: "whether or not any use of water or storage in addition to that provided in Article III is involved in any of the schemes referred to in Article IV (2) or in Article IV (3) (b) and carried out by India on the western Rivers".³¹

Negotiations on the Dispute

Pakistan first came to know about the construction of the barrage in March 1985 through a tender notice which was published by the Government of India in the press. The Pakistani High Commissioner in India informed his government about this development. As a result President Zia-ul-Haq directed his government to try for a settlement of the issue at the Secretary level. Diplomatic circles in Pakistan, which found Zia's reaction "very strange", claim that Zia did not want to take any measures that would jeopardise efforts which were being made to normalise relations with India.³² Some hold the view that Zia regarded the issue with the utmost seriousness and directed the Foreign Office to approach India immediately. Pakistan's High Commissioner lodged a formal protest against the construction work, to which India's response was very cool and hence construction carried on.³³

Since the dispute was linked to the Indus Waters Treaty, it was brought up for discussion between the Indus Waters Commissioners of India and Pakistan in May 1986. During these discussions India argued that the Wular Barrage could be built on Wular Lake for navigational purposes. It also assured Pakistan that the stored water

31. A.G. Noorani, *op.cit.*, p.98.

32. 'Wullar Barrage-II: Clear Violation of Indus Waters Treaty', *Nation*, 11 January, 1991. This article gives a good description of why Pakistan considers the project a violation of the 1960 Treaty.

33. *Ibid.*

would not be used for power generation. Despite these assurances, Islamabad feared that under the cover of a "navigational project", India wanted to control the Jhelum's water and subsequently use it for the generation of hydro-electric power.³⁴

In December 1987, the Commissioners met again for further discussions. In these talks, India argued that since Wular Lake was not a part of the river Jhelum, India had every right to construct a "dam" or "barrage" on it. In reply, Pakistan wrote to New Delhi on 2 January 1988 saying that the Jhelum Main starts from Verinag. As clearly stated in the 1960 Treaty, all tributaries join each other in Wular Lake and the river Jhelum flows from the lake. Therefore, building a dam on the Jhelum Main would constitute a violation of the Treaty.³⁵ After the talks between the Commissioners failed, the two parties decided refer the matter to the respective governments for resolution at the political level. This decision was an acceptance on the part of India and Pakistan that a dispute existed.

In the meantime Pakistan also sought the advices of a committee of British and American experts on the subject, who suggested that Muhammad Khan Junejo, the then Prime Minister, should approach the International Court of Justice. However, Junejo did not implement the report of the committee. On the other side, in a significant move, India abandoned the construction work until any agreement was reached, through direct talks and discussions.³⁶ India also disallowed its Commissioner from referring the problem to the neutral expert and thereby left open only two options - of signing an accord, or referring it to the court of arbitration. It should be noted here that in case of differences over the implementation of the Indus Waters Treaty, both Pakistan and India are entitled to refer the matter to international arbitration.³⁷ The

34. Ibid.

35. Mirza M. Nasarullah, *op.cit*, p.61.

36. Indus Waters Treaty Art. IX(5).

37. Ibid.

treaty also enables either government to take up any particular issue directly with the other government and thereby avoid the Indus Water Commission altogether.

In 1988, the political situation took a drastic turn in Pakistan, as the Pakistan People's Party (PPP) came to power under the leadership of Benazir Bhutto. After assuming power, she updated here self on the dispute and was told by her advisors that India was willing to settle the issue through negotiations. The Indian Ambassador later called on Ms. Bhutto and informed her about India's willingness to hold negotiations around February 1989. Benazir accepted the offer and paved the way for the first ever round of bilateral talks on this dispute between the Indian and Pakistani government in March 1989.

During the discussions, India again assured Pakistan that the barrage would be used only for navigational purposes and neither for storage nor power generation. But Pakistan suspected that the barrage would be used for electricity generation and alleged that the Indian government had already completed feasibility reports for the setting up of a power plant near the Wular barrage. Two other Indian plants, they said, were already working at Mohra and lower Jhelum, only a few kilometers from the proposed barrage.³⁸

Nasarullah writes that if the Indian position was so weak, legally, then why did Pakistan choose to indulge in futile negotiations instead of referring the case to the International Court for arbitration?³⁹ The reasons cited for Pakistan choosing to negotiate were as follows:

First, Pakistan wanted good relations with India, and Prime Minister Benazir Bhutto had categorically declared:

The government is cognizant of this vital issue which relates to the economy of the country and negotiations

38. Mirza M. Nasarullah, *op.cit.*, p.62.

39. *Ibid.*

with India are being continued in the spirit of the Simla Agreement. The present government is following the policy of co-existence with all its neighbours, especially with India, but not at the cost of compromising Pakistan's interest. It is wrong to assume that Pakistan has given its consent to India to construct the Wular Barrage, in occupied Kashmir.⁴⁰

Second, Pakistan expected a better deal through negotiations with India and calculated that, in the worst case, even if it lost in the negotiations, it could go the International Court. Besides, since the work had been suspended on the barrage, Pakistan did not lose in any way if the talks continued for a long period.⁴¹

Third, Pakistan also feared that the International Court might not necessarily adhere to the Indus Waters Treaty under which the bilateral talks were being held. Though Pakistan considered the construction to be in violation of the Treaty the Indus Treaty itself could be challenged under the law of equity.⁴²

Fourth, as the case in the Court might take as long as three to five years to be decided, it would cost Pakistan around Rs. 5 to 10 crores in foreign exchange.⁴³

Fifth, even if Pakistan ultimately won the case in the International Court, the latter has no coercive mechanism to implement the decision. Therefore, Pakistan felt that a mutually beneficial settlement through negotiations was the most feasible option.⁴⁴

As a result the two sides chose to solve the dispute bilaterally through negotiations and decided to hold talks in March 1989. Pakistan sent a delegation to

40. Cited in Pakistan and Gulf Economist, op.cit., p.62.

41. Ibid, p.63.

42. Ibid.

43. Ibid.

44. Ibid.

New Delhi, which presented a proposal by which India would be permitted to construct the barrage under various conditions and restrictions. India, reportedly, refused to accept the draft and said that their views on the draft would be soon conveyed.⁴⁵

After the talks, Sardar Nasrullah Dreshak, the then Punjab Minister for Irrigation and Power, wrote to the Federal Government of Pakistan and advised it to approach the International Court for arbitration. The Federal Minister, Farooq Leghari, replied that the dispute should not be exploited for political mileage. He also reiterated that the option of arbitration would be exercised only in the end, as a last resort, in case of the final breakdown of the talks.⁴⁶ Again, in April 1989, however, the Punjab Ministry for Power and Irrigation requested the Federal government to suspend any further talks with India, which was turned down. On 16 August 1989, Pakistan constituted a new Drafting Committee which comprised Abdul Rahim, Commissioner Indus Waters Commission Pakistan, Ghulam Rasool, deputy legal advisor, Ministry of Foreign Affairs, and advocate Zein Sheikh, a legal expert from Karachi. The committee was entrusted with the task of reviewing the draft given to India during the New Delhi talks and to submit a revised one to the Ministry of Water and Power by 31 August 1989 for its review by the ministry and as well as by the Advocate General of the Punjab. On 18 August 1989, the Punjab Chief Minister, Mian Nawaz Sharif requested the President, Ghulam Ishaq Khan, to mediate in the issue but by then the Pakistan People's Party had already postponed its plan of signing an agreement with India.⁴⁷

However, in 1989 some progress was made. It was reported that "India has agreed to surrender 0.30 million acre [ft.].. of the total general storage capacity of the

45. Munir Ahmed, 'Wullar Barrage : Pakistan's Case,' Nation, 26 February, 1990.

46. Mirza M. Nasarullah, op.cit., p.64.

47. Ibid.

Jhelum tributaries, allowed to it under the Indus Waters treaty, if Pakistan gives it the go-ahead for the construction of the Wular dam. The total storage capacity of the dam is equivalent to the storage capacity India is prepared to forego."⁴⁸ During the negotiations India had presented a twelve article draft to Pakistan and Pakistan produced a six article draft for India.

A.G. Noorani comments that the draft presented by Pakistan seemed to have consented to India's construction of the barrage though on certain terms. The draft was revised later on but it removed the basic disagreement and it was now only a matter of stipulations.⁴⁹

Highly placed Pakistani sources disclosed, "The Pakistan Government has decided to arrive at a negotiated settlement on the Wular project with India, allowing it to build the disputed barrage if India agrees to keep 6.2 meters of the structure as ungated with crest level at EL 1,574.90 meters, forego general storage capacity of 0.30 million acre [ft].. out of the provision of 75 million acre feet, permitted to it on the Jhelum, and does not construct the Kishenganga (390 mw) hydro-power generating unit." ⁵⁰

The *News* reported :

India agreed to surrender on the first two points but consensus on the Kishenganga project is still to be reached. This is the only disputed issue left for the amicable settlement of the Wular Barrage melodrama. Pakistan is of the view that if India constructed Kishenganga project, it would affect the construction of Pakistan's Neelum Jhelum power generating project. If we compromise on other points then India would compromise here, and construction on Neelum Jhelum held up, due to this dispute, could begin as it was in Pakistan's interest.

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48. Ashraf Mumtaz, 'Wular Barrage Constructions: Pakistan's Conditions', Dawn, 22 September, 1989.
49. A.G. Noorani, op.cit., 1995, p.98.
50. 'Pakistan Conditionally Allows India to Build Wullar Barrage' News, 9 February, 1992.

Prime Minister Nawaz Sharif has given the green signal to the Ministry for Water and Power to go ahead for the negotiated settlement of the issue and a high-powered delegation of the ministry would soon be visiting Delhi to reach an agreement acceptable to both countries.⁵¹

The finalised draft agreement that the two sides came up with after the October 1991 discussions in Islamabad was as follows:⁵²

"The Government of Islamic Republic of Pakistan and the Government of Republic of India

Desirous of promoting and strengthening friendly relations between the two countries on the basis of sovereign equality and mutual benefit;

Re-affirming their continued commitment to the Indus Water Treaty, 1960 (herein referred to as the Treaty) and their sincere desire to maintain its sanctity; and

Desirous of arriving at a negotiated settlement on the Wular Navigation Project (hereinafter referred to as the Project) on the Jhelum Main,

Have in accordance with the provisions of the Treaty, agreed as follows;

1. The salient features of the Project shall conform to the features as laid down in the Annexure to this agreement.
2. India agrees to keep 6.2 m of the structure as ungated with a crest level at EL1574.90 m (5167 ft).
3. India shall not make any alteration in the salient features of the Project specified in Articles 1 and 2 except by mutual agreement between India and Pakistan.
4. India shall forego a General Storage Capacity of 0.30 million acre-feet out of the provision permitted to it on the Jhelum (excluding the Jhelum Main) under item (b) Paragraph 7 of the Annexure E to the treaty.
5. In consideration of India foregoing a General Storage Capacity of 0.30 million acre feet (maf) in terms of Article 4 above, the Project shall be entitled to attain full operational level of 5177.90 ft. each year. The annual filling of the lake upto the full operational level and initial filling below the Dead Storage Level should be carried out at such times and in accordance with such rules as may be agreed upon between the commissioners. In case the commissioners are unable to reach agreement, India may carry out the filling during 21 June and 20 August.

51. Ibid.

52. The draft is mentioned in J.N. Dixit, Anatomy of A Flawed Inheritance, Konark Publishers, New Delhi, 1995, Annexure 3, p.314.

6. Except for the uses specified in Article III (2) of the treaty and subject to the provisions of Article 5 of this Agreement, India shall be under an obligation to let flow all the waters entering Wullar lake.
7. Any question which arises between the parties concerning the interpretation and application of this Agreement or the existence of any fact which, if established, might constitute a breach of this Agreement shall be dealt with under the provisions of Article IX of the Treaty.
8. Matters not expressly provided for in the Agreement shall be governed by the provisions of the Treaty.
9. The terms used in this Agreement shall have the same meanings as in the Treaty".⁵³

From 1987 to 1992 eight rounds of Secretary level talks were held between India and Pakistan. After 1992 there was a long break in the talks, only to be resumed six years later. The ninth round of talks were held in New Delhi on November 5, 1998. These talks were held as a part of the 1997 agenda of composite and integrated dialogue between the two countries. Tulbul was the first of the six agenda items to be discussed. At these talks the Pakistani delegation was led by Syed Shahid Husain, Secretary, Pakistan Ministry of Water and Power, and the Indian side was led by the Water Resources Secretary, Z. Hasan. During the talks Pakistan suggested that the entire project should be looked into afresh whereas India insisted that the threads should be picked up from 1992, when a draft agreement was reportedly reached.⁵⁴

The Pakistani delegation wanted a fresh draft altogether to be negotiated, but the Indian side prevailed upon the Pakistanis to work on the same draft and make it agreeable to both, as eight rounds of energy had been put into it. While reiterating its stand, the Pakistan side raised the issue of how the Wular Barrage was affecting their downstream power projects, though it declined to mention the names of those affected projects. To this India argued that any increase in the flow during the lean months

53. Ibid.

54. 'India, Pak to Continue Talks on Tulbul Project,' Hindu, 6 November, 1998.

would be beneficial to all power projects anyway. Both sides cited different clauses and provisions of the Indus Waters Treaty to make their points. Both again debated whether the Wular Barrage was a navigation project or a storage facility.

In the end, the talks proved inconclusive and failed to yield any result. On being asked as to why no breakthrough was achieved at the talks, Z. Hasan said, "Maybe because of some political reasons" (without clarifying the reasons explicitly).⁵⁵ According to Hasan, the Indian position was that revival of the construction of a barrage at the base of the Wular Lake in Jammu and Kashmir was for navigation and non-consumptive use for which there was provision in the Treaty. He said, "we impressed upon them (Pakistan) that Wular is an existing natural Lake and that we were not creating a storage facility. The barrage would help regulate the flows so that there was enough water in the river to make navigation possible along the 20-km stretch between Wular and Baramulla via Sopore."⁵⁶

During the lean season, the flow in the Jhelum is quite meagre and the project aimed at raising the flow from 2000 to 4000 cusecs and making it navigable, which would also be beneficial for the countries downstream for their power plants and rabi crops. For India, the project is of great value because of the economic benefits that would accrue from it after Jhelum becomes navigable in the lean months as well. Work on the project had started in 1984 but was suspended in 1987 after Pakistan protested against it.

At the conclusion of the talks, the Indian head of delegation, Z. Hasan, observed, "Differences are still there, but we are working towards a solution. It is a very complex issue."⁵⁷ A joint statement released at the end of the talks said that the

55. Ibid. Also see 'Pak-India Talks Stumble at 1st Hurdle', Frontier Post, 6 November, 1998, Anees Jilani, 'Deadlock over Wular Barrage', News, 1 December, 1998.

56. Hindu, 6 November, 1998, op.cit.

57. Ibid.

discussions would continue at the next round of the dialogues with a view to find a solution to the issue, consistent with the provisions of the Treaty. During the discussions, described as being conducted in a "frank" and constructive atmosphere", both sides reaffirmed their commitment to the Indus Waters Treaty of 1960.⁵⁸

Analysis of the Negotiations

India and Pakistan have, since 1987, held nine rounds of talks on Wular but no agreement has been reached. So far, the talks have revolved around the Indus Waters Treaty and its provisions and their application in the dispute. The failure of the talks gives the impression that there are certain factors which are not being addressed by the two parties or perhaps that the approach of the two parties has shortcomings. This section aims at looking into the dynamics of the negotiations which ultimately may have influenced the outcome.

Ripeness. The negotiation history of Wular shows that ever since the issue was brought to the agenda for discussion, India and Pakistan have been keen on settling it bilaterally through negotiation and compromise. When Pakistan's High Commission to India had written to Zia-ul-Haq about the construction of the barrage, the latter had clearly directed his officials to settle the issue through negotiations. Zia-ul-Haq had taken the issue seriously but directed his Foreign Office to settle it with India.

In 1988, after a couple of rounds of talks, India and Pakistan had agreed to the fact that a dispute existed, which was a significant development in the process of conflict resolution. India also had suspended construction work in 1986 at the request of Pakistan. This was the first serious indication by India of its desire and commitment to settle the issue. In 1988, when Benazir came to power, she was approached by the Indian Ambassador to convey India's willingness to settle the dispute through bilateral

58. Ibid.

talks. This request eventually resulted in the first round of Secretary-level talks in March 1989. Benazir took a personal interest in seeing the talks through and followed its progress with great interest.

India wants to settle the issue because the navigation project would make the Jhelum navigable during the lean months and thus bring considerable economic benefits. India also somewhat succeeded in convincing Pakistan that increase in the flow during the lean months would be beneficial to it as well. However, in Pakistan, there was a view that since negotiations were not getting results, the case should be referred to the International Court of Justice for arbitration. Nevertheless, Pakistan preferred to stick to bilateral negotiations. In essence, Pakistan concluded that getting a verdict in the Court in its favour at considerable expense and subsequently not being guaranteed that the Court's verdict would be implemented would not be a wise decision.

Thus, even a hawkish Benazir categorically declared she would hold discussions in the spirit of the Simla accord to settle the dispute. Again, after the breakdown of talks in March 1989, the Federal Minister, Farooq Leghari, was requested by the Punjab Minister for Irrigation and Power to suspend further talks with India and refer the case for arbitration. But Leghari said firmly that resorting to arbitration would be the last option exercised. He also cautioned that the dispute should not be exploited domestically by opponents of the government.

India too has shown a willingness to settle the dispute through bilateral negotiations. That is why New Delhi suspended work on the barrage and also agreed to surrender 0.30 million acre feet of water out of the total general capacity at the Jhelum tributaries, if Pakistan allowed the construction works to go ahead. Thus, there was a will on both the sides to sit and discuss the issue and settle it through peaceful negotiations.

After 1992, when talks had resumed after a six-year gap, both sides showed interest in addressing the issue and resolving it. Under I.K. Gujral and Nawaz Sharif,

a decision was taken at the SAARC Male summit to constitute six Working Groups dealing with six issues in a composite dialogue process. In November 1998, the talks were finally held through the renewed cooperative efforts of Nawaz Sharif and Atal Behari Vajpayee. Both leaders acknowledged the need to address the unresolved dispute and resolve it through talks. So, it can be said that because of the nature of the dispute, and because India and Pakistan realised the benefits which resolution of the dispute could provide, the two countries decided to settle it in a spirit of compromise. Also, like the Indus waters negotiations, the Wular Barrage dispute also has been kept away from excessive media coverage and insulated from propaganda efforts. Both sides have refrained from using it for domestic political gain.

Another major factor which made the dispute ripe for settlement is that both the parties agreed to adopt a mutually acceptable process to resolve the issue. Both India and Pakistan have so far refused to refer the case for arbitration to the International Court. As a result, India and Pakistan have engaged themselves in bilateral negotiations ever since 1987 and tried to settle it in the spirit of the Simla accord. The Tulbul navigation project/Wular Barrage has, as a result, been included in one of the six agenda items to be settled through a composite and integrated dialogue process.

By 1992, India and Pakistan had discussed the issue in detail and had come to some agreement regarding their respective standpoints and stakes. Both had been able to narrow down their differences to a great extent by accommodating the other's views. But in 1998 the talks failed to produce any results, as Pakistan insisted on looking at the dispute afresh. India wanted to pick up the threads from 1992 when a draft agreement was reportedly reached. These latest developments have again stalled the process. It would appear that just as India reportedly did not acknowledge the 1989 Siachen agreement and insisted on discussing the issue afresh, so Pakistan has insisted on going back on an agreement seemingly reached on Wular.

Unfortunately, the developments at the ninth round of talks have revealed that whatever ripeness had evolved in the dispute over the past few years of talks had

withered away in the six year hiatus when talks were not held. Yet, it is encouraging to find the leadership in both countries displaying considerable will and desire to resolve the dispute and remove one of the irritants in India-Pakistan relations.

Prenegotiation. In the last nine rounds of talks what India and Pakistan have done amounts to prenegotiation. Both the parties have expressed their commitment to bilateral negotiations. They also have refrained from referring the case to the International Court of Justice for arbitration.

The talks initially had started on a very contentious note with wide differences on the issue. It was only gradually that both were able to understand each others' standpoints and objections. Pakistan has certain fears regarding the diminished flow of the Jhelum as a result of the Barrage and also of inundation, which were allayed by India. The delegation of the two countries after listening to each other over several rounds of talks were able to gauge how far apart they stood on the issue and how close they could come. It was after years of discussions that both the parties outlined their basic differences and defined what the problem was and how they needed to go about resolving it. However, at the ninth round of talks in 1998, the differences still persisted and so they agreed to talk again at a later date. They have, over the years, narrowed their differences and set guidelines for themselves.

After the conclusion of the ninth round of talks the representatives of India and Pakistan observed that both were working towards a solution in tandem and that discussions would continue in the future. Between 1984 and 1986, Pakistan was very concerned because construction work was proceeding at the site. This was causing a lot of tension and unease during the initial round of talks. India, for its part, in the beginning, thought that the construction of the barrage in no way violated the Indus Waters Treaty and hence did not inform Pakistan of its plans. When Pakistan protested over the construction of the barrage, India decided to suspend the work and sit down to negotiations. Suspension of the work helped to a great extent in lowering tensions and

making the atmosphere relaxed enough for negotiations. In the meantime, Pakistan had assessed the possibility of settling the dispute at the International Court. Ultimately, it decided that bilateral negotiations was the more effective and feasible option, a choice that coincided with India's preference.

Negotiations. When the talks were initiated in 1987 at the Indus Waters Commissioners' level, there were huge and serious differences between India and Pakistan. Gradually, between October 1987 and August 1992, and again in November 1998, all the technical and legal aspects of the dispute were addressed during the talks. In 1992, the various technical issues were included in a draft. When the talks resumed in 1998, Pakistan discarded the 1992 draft agreement and insisted on looking into the dispute 'afresh.'

Until 1992, through bilateral discussions, the dispute revolved around the fact that India would store more water than is permitted in the Treaty. This, in turn, would diminish the water flow in the Jhelum and thus deny Pakistan its share of water. By 1992, however, a compromise was worked out, and India agreed to forego 0.30 million acre feet of water from the rivers allotted to it and compensate the loss of water to Pakistan. Pakistan was also convinced by India that her treaty rights would not be violated and that it would get its share of water according to the Treaty specifications. The draft agreement of 1992 was a major breakthrough in eliminating basic differences among the two, which was made possible only through the accommodating and compromising attitude of the two parties.

In between the various rounds of negotiations, a notion gained strength in Pakistan that since the discussions and talks were proving futile, Pakistan should refer the case to arbitration. However, the leadership in Pakistan showed exemplary statesmanship by sticking to bilateral talks. Their decision got strength from the fact that at the talks India argued that construction of a barrage was for navigation and non-consumptive use for which there was a provision in the Treaty. The Indian

argument that the project would be beneficial for both countries downstream for their power plants and the rabi crops also resonated with the Pakistani team. The Indian side pointed out that the project was for the welfare of the people of Jammu and Kashmir and Pakistan. This appeared to be accepted by the Pakistani delegation. India was thus able to transform the dispute from a zero-sum situation into a non-zero sum situation.

Pakistan initially had several fears and apprehensions relating to the barrage, as noted earlier. As the talks progressed, India tried to allay its fears by assuring Pakistan that the project is not a violation of the Treaty and, more importantly, that Pakistan would benefit in a major way. In addition, India's willingness to forego 0.30 million acre feet allotted to her by the Treaty was vital. All these very specific arguments and arrangements pertaining to the future operation of the project were put down in the 1992 draft agreement. It should be emphasised that India and Pakistan have shown a far more compromising and accommodating attitude in the Wular/Tulbul dispute than they have shown in the Siachen and Sir Creek disputes.

Agreement. So far, the only agreement reached between the two has been the 1992 draft agreement. Unfortunately Pakistan has declined to acknowledge the existence of this agreement at the ninth round of talks in New Delhi in November 1998. Indian delegate Z. Hasan attributed this development to "political reasons" though he did not elaborate. The dispute does not seem as intractable as Siachen and so there is a chance that it will be resolved in the relatively near future. The issue has been ripe for resolution for several years, both have prenegotiated intensely and worked at the technical and legal details and negotiated in a give and take manner with seriousness. The leaders of both countries have shown a commitment to maintain a dialogue over six years. The pieces for success have therefore been assembled. An agreement may not be as distant as may appear.