Chapter VI

Methods and Machinery for Settling Inter-State Water Disputes in India

A. Adjudicatory Methods for Settling Inter-State Water Disputes in India.

Judicial and Quasi Judicial methods which are generally designated as “adjudicatory method” is a very important and useful method particularly when negotiation and other variety of non adjudicatory methods become ineffective. The adjudicatory methods usually assume three forms, arbitration, decision by a tribunal or by a Court. In municipal level, adjudicatory method may be devised in any agreement or in the constitution of a country or any statute may provide it. As for example, the U.S. Constitution confers original jurisdiction on the United States Supreme Court to decide Inter-State Water Disputes. On the contrary, Indian Constitution though has not provided any particular form of adjudication, but Inter-State Water Disputes Act, 1956 has prescribed adjudication of disputes through tribunal as the method for resolving Inter-State Water Disputes. On the other hand, the River Boards Act, 1956, has envisaged statutory arbitration as a method for settling interstate river water dispute. Besides such statutory arbitration as one form of an adjudicatory method, there
may have been conventional arbitration as adopted in the agreements between the different units in a federation as well as in the treaty between different states under International law. As for example, 1924 agreement between Mysore and Madras over the sharing of Cauvery waters provided arbitration as method for resolving dispute arising under the agreement.¹

Adjudication is a very important method for settlement of Inter-State Water Dispute. There is no doubt about it. But the question is what form of adjudicatory method is really effective for settlement of disputes. Theoretically speaking, one advantage of arbitration as against tribunal is that the parties get the satisfaction of having their own nominees on the adjudicatory body. On the other hand, the difficulty is case of arbitration is that as a preliminary step towards arbitration, parties must agree to arbitration which may not be easy to be achieved in the heat of controversy. The further disadvantage is that the process of nominating arbitrators is usually cumbersome and delaying and the number of arbitrators may have to vary with the number a parties to the dispute. Then it may be difficult to attain consensus amongst the arbitrators deciding the dispute, as the arbitrators representing the parties may have a tendency to stick to the points of view of the respective parties with tenacity which may have repercussions on the implementation of the decision. Therefore, on consideration of

¹ Agreement on Development of Inter-State and International Rivers. Government of India, Ministry of Agriculture & Irrigations, Central Water Commission, New Delhi, 1979, P-229
all the aspects of the matter, adjudication through a tribunal may be preferred to arbitration, if a method can be found to appoint the members of the adjudicatory body in an impartial manner. A tribunal consisting of members who are impartial towards the issues before them is more likely to take an objective view of the matter than a body having nominees of the parties.

As regard adjudication through a tribunal or the court, the former is to be preferred. The main reason for adjudication through a court, is its impartiality to the issues before it. But if this impartiality can be achieved through a tribunal, there is not much to choose between the two on this account. Assuming that impartiality can be assured through tribunal adjudication, it is to be preferred to courts for deciding interstate water disputes. The tribunal offers certain advantages over the courts - expeditious disposal of a case, absence of formality, nonobservance of technical rules of evidence, absence of obligation to follow the precedent, flexibility of approach and specialisation etc. Water disputes raise complicated economic, geographical, topographical and technical issues. Hearing of arguments and familiarity of these factors by a body may take a long time sitting continuously. It may not be possible for a court to give requisite time owing to pressure of other judicial work. Sometimes a body may have to make spot studies which is again a factor going in favour of a tribunal. Then, in case of tribunal the legal talent can be combined with other
talents relevant to the issues. Again the advantage of flexibility is a substantial factor to be counted in favour of a tribunal.

On the other hand, certain advantage of adjudication through courts may not be lost sight of. One major advantage of the court is that there is a readily available forum to decide conflicts, whereas a tribunal is to be constituted for every interstate water dispute. Further, if expert talent is not to be continued with legal talent there is nothing to choose between a tribunal and a court on this score. In such a case one major advantage in favour a tribunal is lost.

Now in the light of such relative merits and demerits of the three forms of adjudicatory methods, an analysis may be made regarding their practical performances in various Inter-State River Water Disputes in India.

In India, the arbitration, as a method for settlement of Inter-State River Water Disputes has never become successful and operative. It may be noted that the 1924 agreement between Mysore and Madras about the River Cauvery dispute did provide for arbitration of disputes arising under the agreement, but the clause had not been made use of inspite of the controversy that was going on between two states. Also, in case of statutory arbitration as provided under the River Boards Act, 1956, the picture is same. The River Boards Act merely arranged for the constitution of an
arbitration without making it clear that whether arbitration will act under Arbitration Act, 1940 or not.²

Like Arbitration, Judicial method is never encouraged in India either by constitution or by any statute. Though Article 262 has emphasised on 'adjudicatory method' in clause (i) but in next clause it has shown aversion towards judicial method by implications giving liberty to parliament to make law for the exclusion of court adjudication and accordingly, the Inter-State Water Disputes Act, 1956 devised tribunal as the sole adjudicatory method of the settlement of the Inter-State Water Disputes in India. But despite such Constitutional and statutory non-recognition of judicial method in India, in reality, the judicial role in case of water dispute has never been marginalised and has never been limited only to functional matter. In many grey areas relating to interpretation of the agreement upon which tribunal's award is based on, the intervention of the court has been asked by the parties concerned.³ Also in case of the implementation and violation of the tribunal award, parties have no alternative but to ask for

² S.N.Jain, Alice Jacob and S.C.jain, Inter-State Water Disputes in India. (Suggestions for Reforms in Law) N.M.Tripathi Pvt.Ltd., Bombay, 1971, P-143.
³ Though Section 11 of the ISDW Act, 1956 bars the jurisdiction of the court in respect of water dispute, that does not by itself preclude an aggrieved party from invoking the jurisdiction of the competent court regarding the fulfilment of the conditions precedent to the constitution of Tribunal, including the condition regarding the opinion of the Central Government under section 4(i) of the Act. Such a view gains support from the well known principles applicable to arbitration law. Phrases such as disputes 'arising out of the contract' in an arbitration clause do not cover dispute as to whether the contract was entered into at all, or whether it was void ab initio or whether it sets out the true intention of the parties. Thus, the fulfilment of a condition precedent regarding the formation of opinion of the Central Government under section 4(i) of the Act can be the subject of litigation in a competent court inspite of the fact that section 11 bars the jurisdiction of the court.
judicial intervention as it was happened in case of interim award given by the Cauvery Water Disputes Tribunal.

Now, it is necessary to move forward for analysing the performances of various tribunals sofar constituted under the Inter-State Water Disputes Act, 1956 to make a final conclusion as regard to the efficacy of the tribunal system as a method for settlement for the Inter-State Water Disputes in India.

Sofar the Union Government has setup five tribunals under the Inter-State Water Disputes Act, 1956. These are the Ravi-Beas Waters Tribunal, The Narmada Water Disputes Tribunal, The Godavery Water Disputes Tribunal, The Krishna Water Disputes Tribunal and the Cauvery Water Disputes Tribunal. Among these five tribunals, The Ravi and Beas Tribunal, however, initially constituted by an ordinance but subsequently was brought under the ISWD Act, 1956. Also among these five tribunals, three tribunals sofar have given their final award. The Ravi-Beas Tribunal has given only its final conclusion under section 5(2) of the Inter-State Water Disputes Act, 1956 in the year of 1978 pending the announcement of the „Final report” under section 5(3) of the same Act. Similarly, Cauvery Water Disputes Tribunal has only submitted interim report till now.

There is no doubt that these tribunals are the sole adjudicatory machinery for the settlement of the Inter-State Water Disputes as envisaged in the Inter-State Water Disputes Act, 1956.
But Inter-State Water Disputes Act, 1956 does not impose any limitations or fetters either from the viewpoint of the adjudicatory powers of the tribunal or in respect of the nature and principles of law to be applied by the tribunal. Accordingly, such tribunals as an alternative to court adjudication have contributed a lot in evolving various principles norms for the distribution of waters among the states in case to case conflict situation that has been analysed in the research project in the context of origin and nature of the interstate water disputes in India under chapter IV. Now, for the evaluation for the contributions of all the tribunals as a whole may be summarily put forward in the following manner:

i. All the tribunals have held the view that a river is to be treated as an indivisible physical unit and for the purpose of sharing of water resources a river under dispute includes its tributaries and even if the tributaries of a river may be wholly within one state.

ii. A tributary of some river within one drainage basin does not in itself form a unit for the purpose of distribution of water resources of the said basin. The entire basin as such has to be taken as a unit for the said purpose. The Eradi Tribunal applied this principle in 1987 while settling Ravi-Beas Waters Disputes between Punjab, Haryana and Rajasthan.
iii. All most all the Tribunals have opined that once a state is alloted a specific share of water out of the water resources of a drainage basin or a river system, it is free to utilise it in whatever way it may like.

iv. All Tribunals as principle accepted that diversion of water for its use outside the basin was permissible.

v. All most all the Tribunals have adopted the principle of ‘optimum utilisation’ of water resources as the ultimate objective of any exercise in water sharing and water utilisation.

vi. All the Tribunals have asserted the principle of ‘avoidance of unnecessary waste in the utilisation of waters’ of the concerned basin or river system as such.

vii. Some Tribunals have laid emphasis on prevention of pollution of the concerned water resources.

viii. With appropriate consideration to the principle of ‘community of interest’ few Tribunals have recommended the mode of ‘co-operative development’ of the concerned water resources by the disputant states.

ix. Tribunals have set up the principle that “the use of water by any person or entity of any nature,
whatsoever, within the territory of a state, is to be reckoned as use by that state”.

x. Another important principle adopted by these Tribunals is that in an Inter-State Water Dispute concerned states represent all its inhabitants.

xi. Tribunals have also held the view that if there is central legislation (by the parliament), such a law binds all the states and tribunal has no power to override the paramount central legislation. However, the decisions of the tribunal overrides all repugnant state legislation and executive action.

xii. All most all the tribunals have recognised the utility and the value of ‘agreements’ and encouraged the settlement of disputes through ‘agreements’. However, few tribunals have laid down the principle that “shares of water allotted by certain agreements, earlier and not touched by the terms of reference of the present dispute remain untouched and as such unaffected”. But, if the examination of the allocation of water share according to some earlier agreement forms the terms of reference of a tribunal, its award may supersede the earlier agreement. (Eradi Tribunal).

xiii. All the tribunal have shown aversion to apply U.S.A. Supreme Court’s decision to Indian conditions arguing that the nature and
origin of the two federations i.e., Indian and U.S.A. are not the same. The federal units in India do not enjoy the same constitutional position or the extent of autonomy as the federal units in the United States of America.

(xiv) Few tribunals have adopted the principle that unless otherwise agreed upon by the parties or so directed by the concerned tribunals, if any water year a state is unable to use portion of the water allocated to it on account of non-development of its projects or damage to any of its projects or does not use it for any reason, what so ever, that state will not be entitled to claim the unutilized water in any subsequent water year (The Krishna and Godavari water Disputes Tribunal).

(xv) In addition to this principle, few tribunals also adopted that unless otherwise agreed upon by the concerned parties or so directed by the respective tribunals, failure of any state to make use of any portion of the water allocated to it during any water year shall not constitute for failure or abandonment of its share of water in any subsequent water year even if such other state may have used such water during same water year.

(xvi) All the tribunals have emphatically rejected the doctrine of Riparion rights and application of the theory of proprietary rights of a state.
(xvii) Beginning from the Indus commission before Independence, all the tribunals have invoked and applied the principle of equitable apportionment or equitable utilization.

(xviii) It has been emphasized by most of the tribunals engaged in the settlement of inter-state water disputes that the concept of ‘equitable’ apportionment /equitable utilization does not lend itself to precise formulations for being applied to all situations and at all times. Hence, the standard of an ‘equitable apportionment /equitable utilization’ requires an adaptation of the formula to the necessities of the particular situation to make the said apportionment of water rational, just, fair and reasonable in true sense of the word.

(xix) It has been revealed that usually the awards of various tribunals have only given a description of various beneficial uses of water without thereby intending to lay down any norms for the determination of order of priority for various uses of water.

(xx) The tribunals have in their awards, shown the tendency of protecting acquired water rights or existing water rights.

(xxi) In the awards of the tribunals, the use of groundwater has been permitted but the same has not been reckoned as the use of water of that river.

(xxii) As far as the cost of the dispute settlement operation is concerned, all the major tribunals, according to section 9(3) of the
Inter-state water Disputes Act, 1956, ordered that “the state will bear their own costs of appearing before the Tribunal” and that “the expenses of the Tribunal shall be apportioned and paid by the state in equal shares”.

(xxiii) Relating to the cost benefit analysis of the projects involved in the respective order of the concerned tribunal, the practice followed so far reveals that generally the tribunals have confined themselves to allocating the water share of the respective states and that after such allocation the tribunals leave them free to use their water shares in whatever way they like.

However, in course of discussion of the performances of the tribunals, following lapses on their part should not be overlooked.

(a) From the functioning in the three cases where final award were given by the tribunals, it is revealed that the entire process took an unduly long time. Even at present, two tribunals that are functioning have not yet given their award though they started their work long ago.\(^4\)

(b) Tribunals have not shown any consistency regarding the implementation of the awards. Few tribunals have made an half hearted attempt and few of them remain complete silent regarding

\(^{1}\) The Krishna Water Disputes Tribunal was constituted in the year of 1969 and gave its award in 1973. The Narmada Water Disputes Tribunal was constituted in the year of 1969 and gave its award in 1978. The Godavari Water Disputes Tribunal was constituted in the year of 1969 and gave its award in 1979. The Ravi-Beas Water Disputes Tribunal was constituted in the year of 1986 and gave its final conclusion in 1978, pending final award till now. The Cauvery Waters Disputes Tribunals was constituted in the year of 1990 and gave its interim relief in 1991 pending final award.
the implementation of the awards. The Narmada Control Authority is a body set up under orders of the Narmada Waters Disputes Tribunal with limited functions relating to cost allocation and rehabilitation of project affected persons, later enlarged to cover the monitoring of environmental aspects, but is certainly not in the nature of a Narmada Basin Authority. Similarly the Krishna Water Disputes Tribunal envisaged the establishment of the Krishna River Authority but this never came about. Even now after the 1980 amendment of the Inter-state Water Disputes Act, 1956, tribunals cannot suo motu make a scheme for the implementation of tribunals award. Such a defect was exposed when the controversy arose regarding the implementation of the Cauvery Water Disputes Tribunal’s interim award. Also, it is be an interesting point to note that instead of applying the existing legislation i.e., The River Boards Act, 1956, for the implementation of the award of the tribunal, tribunals as well as parliament have argued for amendment of the Interstate Water Disputes Act, 1956.

(c) All the Tribunals, hitherto guided by a mechanical approach and with a wrong assumption that water conflicts are essentially the affairs confined in inter-state level only, have neglected the people as an important party of such disputes. Such state centric approach of the tribunals have generated a lot of controversy as to few fundamental assumptions upon which the awards of the most tribunals are based on. In a recent research, it is highlighted that
the highly sensitive conflict over Cauvery water between Karnataka and TamilNadu is no longer confined to the state level. The Cauvery Dispute itself cannot be understood without an understanding of the multifarious conflicts over water at different levels all over the Cauvery basin. Similarly, assumption by the tribunals that bigger dams constitute development and upon which most water disputes are being adjudicated is no longer held as consensus view and a debate is going on regarding technology driven development versus people centered development as it is revealed in the controversy over the construction of SSP project with a demand for review of the award given by the Narmada Water Disputes Tribunal. Lastly, it has also been revealed that for the settlement of Water Disputes in India, performances of the tribunals are not up to the expectation. Practically speaking in three disputes where tribunals have given their final awards are mainly the product of prior agreements by the concerned states. Also, in respect of construction of substantial principle, tribunals cannot claim exclusive ingenuity. As for example, tribunals borrowed and adopted the most important principle like “equitable apportionment” principle of water distribution from the U.S.A. Supreme Court’s decision in the Kansas vs Colorado case.

Based on above discussion following conclusions may be drawn as to the Tribunal as a method for the settlement of Inter-state Water Disputes in India.

(I) First of all, Tribunals should give final verdict without much delay. One of the difficulties in the expeditious disposal of inter-state water disputes by the tribunal may be the lack of availability of data, or delay in supply the same by the state governments. But in such a situation the tribunal may proceed to give its award on best judgment basis making use of the existing data before it.

(II) Tribunals should give due attention to the peoples demand while pronouncing final award on consideration that water conflict is not merely confined to the states parties and successive governments from the colonial period to the present, have progressively taken away the control over community resources from the people and destroyed traditional systems of the local management of those resources. In this context, it would be better if the tribunals are guided by the public trust theory which holds the natural resource a common property and entrust upon the state the duty to protect such resources as a trustee of the people.

(III) Tribunal in its awards should retain a provision or scope for constant reevaluation of its award.
(IV) Many reports of the tribunals are based on few such assumptions which are not relevant and appropriate in the context of present days reality and hence has become a static document standing still in an era of at least two or three decades ago. So, immediate review of such reports seems to be urgently required so as to cope with changing circumstances.

(V) No Federal problem can be resolved only on by consideration of the view points of central and state governments. The advent of Panchayat as a third tier in the federal structure has became a reality. Therefore, to resolve any inter-state water dispute, co-operation of such a body is highly needed. Tribunals therefore, to make its award more acceptable to people, at first instance, should ensure the participation of the Panchayat and other bodies in its decision making process. At the same time, Tribunals should also explore the means so that non-governmental organization and other groups at the micro level can also participate in such decision making process because the grievances and negleets of the demand of these groups and organisation, as revealed, sometimes instigate water conflict at the macro i.e., interstate level.
B. Alternative Dispute Settlement Methods for Resolution of the Inter-State Water Disputes in India

Adjudicatory model of inter-state water dispute is based on "Winner take it all Principles" and consensual method of resolving water disputes is grossly neglected here. But inter-state river water dispute by nature is such a kind of dispute, the settlement of which is not possible only through the determination of winners and losers only. Therefore, combined with adjudicatory method, conflict resolution technique which emphasizes compromise, consensus and co-operation should be the appropriate method for revolving inter-state water disputes. In Indian context, it is additionally desirable because, as revealed in previous discussion, Indian cultural assumption demands it. In this respect, instead of state imposed common law technique of conflict resolution through adjudication, alternative dispute resolution methods, if used properly, can produce better result.

The typical forms of nonadjudicatory or alternative dispute resolution methods are negotiation, conciliation, good offices and mediation. But these are not the exclusive variety of non-adjudicatory method. Water policy, water administration along with water law which in combination constitutes water institution is equally helpful to resolve water dispute in a non-adjudicated way.
Now, in order to have a grasp regarding to the efficacy of the aforesaid methods in Indian soil, it is better to proceed towards a microfine analysis of various sorts of non adjudicatotory methods so far developed and used in India to resolve her inter-state water dispute.

(I) Negotiation

Negotiation as a method for settlement of water dispute may be either direct between the parties or may proceed in conjunction with good offices or mediations, both of which involve third party interference, however, in a different degree. In case of good offices, it extends only to bring the parties together without itself actually participating in the negotiations whereas, in case of mediation, the mediating party has a more active role, and participates in the negotiations and directs them in such a way that a peaceful solution may be reached, although any suggestions made by it are of no binding effect upon the parties. In fact, as methods of settlement of inter-state water disputes, the scope of good offices and mediation is limited; there is a lack of procedure in both methods for conducting a thorough investigation into the facts or the law. To overcome such limitation, of late, a more specialized techniques of ‘concilation’ is being employed for the settlement of inter-state water disputes. In conciliation method a dispute is usually settled either with the aid of impartial bodies of inquiry or
advisory committees and commission making a report with proposals to the parties for settlement, not being a binding character.

Though the term mediation and conciliation may be used synonymously in that mediation (or conciliation) is the non-binding intervention by a neutral third party who helps the disputants to negotiate an agreement but there are differences between the two. A mediator generally makes his proposal informally and on the basis of information supplied by the parties rather than his own investigation. On the other hand conciliation implies a group of individuals will hear the viewpoints of both sides, inquire into the facts underlying the dispute and, possibly after the discussion with the parties issue a formal but non-binding proposal for considerations by the parties as a solution for the dispute.

Negotiation both direct and through third party undoubtedly constitute the best means to solve the inter-state water dispute. Negotiation can no long be viewed as a chess game in which one party steers the other into a check mate position. Negotiations, today, are means of accurately diagnosing the interests of both parties and arriving at an accommodation of these interests which would be equally satisfactory to both. Here, equity lies in what the parties agree upon as equitable. Settlement of the water disputes by negotiations removes the bitterness among the parties, create an environment of voluntary agreement and provides some sort of guarantee that the negotiated settlement will be implemented
faithfully. The best gain behind negotiation is the immediate resolution of a dispute.

In another respect, negotiations are the best methods for the settlement of inter-state water dispute because this methods are less formal than adjudicatory methods. The judicial and quasi - judicial process which is accustomed to applying a some what definite standard or a rule may not be of much help in the case of inter-state river water disputes because each river dispute is a law unto itself and present complex, social, economic, technical, geographical and topographical problems and involve a fine balancing and adjustment of these difficult factors. Further, the imperative character of judicial method reduces its effectiveness. The award of the adjudicator cannot satisfy all the parties concerned.

Because of such a number of advantages, negotiation has been held as a potent and useful means for the settlement of both international and inter-state river water disputes. Truly speaking, in order to resolve water disputes on international river. as noted in previous chapter, bilateral negotiations among the nation states have become an inevitable means having no alternative. Plethora of treaties related with water disputes directly concluded by the parties through negotiation also justify the point. Mainly because of this fact. Helsinki rule s in Article 30 give first priority to

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negotiation for the settlement of international river water disputes. Besides all such advantages, to count more, agreements through negotiations also provide a number of commissions and committees to administer and implement negotiated treaties and agreements. The International Boundary and waters commission under the treaty of 1944 between Mexico and the United States, the permanent joint technical committee under the Nile Water Agreement of 1959 between the Republic of Sudan and the United Arab Republic, the Mahakali River Commission under the Mahakali Treaty of 1996 between India and Nepal and joint committee under the Indo-Bangladesh Treaty on water sharing of the Ganga at Farrkka of 1996 between India and Bangladesh are a few illustrations of the joint commissions set up to administer the agreements or treaties between the nation states.

Similarly, in respect of disputes on national or inter-state rivers, negotiations and agreements have also been hitherto recognised as the best method. In the United States of America, the constitution has provided two alternative methods for the settlement of inter-state water disputes, that is, adjudication through the Supreme Court or settlement through compact or agreement without making any preference of one over other. But the experience of the United States suggests that there the

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10 The Statesman, Calcutta, December 13, 1996, PP-1 & S.
adjudication of inter-state water disputes through court is beset with difficulties like excessive delay etc. and mainly to overcome the difficulties a large number of interstate compact have been concluded between the states with regard to the equitable distribution of waters on interstate rivers. However, all the waters compacts are not strictly concerned with water distribution. Few of them are concluded for integrated development of river basin.

The experience and federal practice in Australia over the past half century also suggest that differences among the states over inter-state rivers have been effectively settled not by resort to adjudication in the court but by the inter-state compact between the states and the Commonwealth though the constitution has provided these two alternative modes of settlement without making any preference of one over other.

After discussion at this length, it appears that for the settlement of any river water dispute, be it national or international, negotiation seems to be most appropriate and extensively used method. Further, in the discussion, it is also revealed that negotiation is avowedly recognised in the constitution of U.S.A and Australia and is deeply rooted in federal practices of these two countries.

Now to have a discussion on the similar method in Indian context, at first it would be appropriate to go through constitutional provisions. In India, the constitution is silent on the subject of
inter-state agreements. Under Article 262 of the constitution Inter-state Water Disputes is not an ordinary federal dispute. Under the article, such a dispute has been recognized as a 'special class'\textsuperscript{11} of dispute where both legal and non legal elements are present. Thinking on this line, Constitution perhaps deliberately has given the parliament the power to exclude the jurisdiction of the Supreme Court to resolve such disputes. Up to this extent Constitution seems to be correct but under the same article, it is strange enough, that the Constitution only prescribing adjudication by tribunal excludes other methods like negotiation, conciliation which are likely to be more suitable for resolving of disputes pertaining to both legal and non legal issues like inter-state river water disputes. So, in India, the use of non-adjudicatory modes of settlement of disputes is not constitutionally recognized and constitutionally there is no scope for alternative use of other modes either before the adoption of quasi judicial method like tribunal or after the failure of such method.

But the method for resolving any federal problem anywhere in the world cannot be confined within the framework of the constitution and strictly on adjudicatory method. Inter-state water dispute may be resolved with the help of statutory; non statutory bodies and administrative machineries. The best example is the Inter-state Water Dispute Act, 1956 passed in Indian Parliament

where first priority is given on negotiation for the settlement of inter-state river water dispute. Further, the definition of a water dispute under the Act includes, inter alia, a dispute about the interpretation of agreement relating to use, distributions, or control or inter-state river waters or implementation of such agreement. It is to be noted that inspite of absence of express enabling provision in the constitution for the states to enter into agreements with other states through negotiation, the Inter-state Water Disputes Act, 1956 which is enacted under article 262 of the constitution gives appropriate emphasis on negotiation even exceeding the mandate of Article 262 which only speaks for adjudicatory method. Along with the Inter-state Waters Disputes Act, 1956, another statute i.e., the States Recognition Act, 1956 under section 108(1) contemplates the possibility of inter-state agreements relating to water. But the major fault of these two statutes is that any where in the Acts neither the procedure nor the forms for entering into such agreements is laid down. Also, The Inter-state Water Disputes Act, 1956 primarily and essentially concerns itself with the settlement and adjudication of disputes. The Act becomes operative whenever a dispute in justiciab le and any matter or dispute which do not contain an element of prejudicial effect, though negotiable, cannot be the subject of adjudication under the ISWD Act, 1956.

To overcome such statutory weaknesses for facilitating negotiation another complementary statute was passed in the year of 1956 as already stated in previous chapter. The statute is the
River Boards Act, 1956. Though not based on Article 262 of the constitution and not directly concerned with settlement of dispute through negotiation, as a supplementary to the Interstate Water Disputes Act, the River Boards Act, 1956 has a great potentiality to be used for the service of negotiation. The modus operandi of the river boards as provided under the Act may create an environment for negotiated agreement between the states and even if the boards fail to secure agreement between the states, their objective reports relating to the technical issues to be prepared after a detailed examination, and through co-operation seems to be much helpful in building up public opinion necessary for reaching political settlements. Apart from the main provisions of the Act, the revised rules under the Act also speaks for the settlement of the dispute by negotiation, before approaching the Chief Justice of India for appointment of an arbitrator by the Central Government.

However, the Central Government has not yet availed the Authority given to it under the River Boards Act and no River Board has yet been setup. In effect, therefore, the possibility of the River Boards to be used for the settlement of disputes through negotiation remains unexploited.

This account shows that despite the scope for its potentiality to be used, negotiation has never been used systematically. Past pattern of its use shows that negotiation as a method virtually has become a dilatory negotiation and has not followed any time frame. As for example, in Cauvery Waters Dispute long years of
negotiations between 1968 and 1990 was inefficacious. However, such delay cannot discard the fact that water allocation of most of the inter-state rivers in India have been made primarily by through inter-state agreement and negotiation. Even in three disputes where tribunals have given their final awards so far, are substantially the product of prior negotiated agreement by the concerned states.\textsuperscript{12} In respect of Subernarekha, the Mahi, the Damodar and the Barakar system, there are inter-state agreements in force. In the Ganga basin, there are inter-state agreements on the Betwa, the Sone and to some extent Chambal also.

Such reality suggests that for resolving interstate water disputes in India, combined application of adjudicatory and non-adjudicatory methods would be better course of action. Non adjudicatory and adjudicatory methods is not the alternative and the substitute of each other, rather they are the complementary to each other. However, the centre in the past has shown vascillating attitude giving sometimes a preference to a negotiated settlement and in another time to adjudication. For instance, even after the Narmada Tribunal was established in 1969, Ms. Indira Gandhi suggested further negotiations among the states; this resulted in a delay in the commencement of the adjudication process without any fruitful results. Eventually, the tribunal went to work and gave its award in 1979. Therefore, there is really no either/or method:

\textsuperscript{12} In Cauvery dispute also, Combined use of negotiation and adjudication by judiciary can produce good result as opined by S. Guhan. See for Comment, “The brawl over water.” The Economic Times, Calcutta, Thursday, 11January,1996 at P-9.
both the route of negotiation and the adjudication process are needed. Certainly, it would be a matter for satisfaction if the states concerned could reach an amicable settlement through negotiation. But if the negotiation method fails to produce any result, it would surely be sensible to have recourse to adjudication under the Inter-state Water Disputes Act, 1956.

In our present constitutional and legal framework there is nothing to prevent the states concerned from pursuing the path of negotiation (or conciliation with the assistance of mediations by an individual or a small group to be chosen by themselves or to be appointed by Prime Minister), and then reporting an agreement to the tribunal; the tribunal could make that agreement its award. This has happened in the past and further if any issue or issues remains unresolved after such mediation that can also be left to the same tribunal for adjudication. Even if the conciliation process is not fully successful it would have made the parties talk to each other (at least at arms length) in an effort to narrow the gap between them. By doing so, mediation can make it easier for the tribunal to arrive at a final award.

(ii) National Water Policy And National Water Grid

To resolve inter-state river water disputes in India and at least to contain such disputes on a sustained basis, along with legal and adjudicatory methods, the need for non-adjudicatory methods and mechanisms other than negotiation, mediation and conciliation
has long been felt in the administrative level at the Centre. With this line of thinking, an idea had long been mooted at Central Government’s administrative level that a National Water Grid can solve inter-state river water disputes in India. To materialize the idea, during 70’s two schemes were formulated. These were the National water Grid\textsuperscript{13} proposed by Dr. K.L. Rao and the Garland anal Project\textsuperscript{14} of captain Dastur. But unfortunately both schemes were rejected by the Central Government during 1970’s as not being feasible for implementation on cost and other grounds.\textsuperscript{15}

Abondonement of these two master plans for the development and utilization of water resources on a national scale made it transparent that without a National Water Policy no effective and sustainable solution of water dispute is possible. Such

\textsuperscript{13} The National Water Grid Proposed by Dr.Rao envisaged the linking of the Ganga and the Cauvery, apart from subsidiary links, like the Ganga and the Brahmaputra. The main Ganga Cauvery link would withdrawn 60,000 cusecs of flood Waters from the Ganga at Patna for about 150 days in the year. Of this, 50,000 cusecs would be transferred into the peninsular region and the balance used in the Ganga basin itself. In all, four million hectares would be brought under additional irrigation. The original cost of the project was meant to be Rs. 12,500 Crore. The Plan was rejected after examination by the Central Water Commission because it would require a large amount of electricity(5-7million KW) for lifting the Water over a head of 1,800 feat for transfer into the peninsular region and because it had no flood Control benefits.

\textsuperscript{14} Captain Dastur’s Garland Canal Proposal Consisted of building two Canals. The first was to be build at a constant level between 335 metres and 447 metres above Mean Sea level and was to be aligned along the southern slopes of the Himalays, extending southwards beyond the Brahmaputra; the second was to be a Central and southern garland canal at an elevation of 244 metres to 305 metres above Mean sea level. The Garland Canal Project was rejected as technically unsound and economically7 unviable. Central water commission studies found that the Dastur plan would cost Rs.12 million crore or 500times Dastur’s estimate.

\textsuperscript{15} Chittaranjan Alva, “Mismanaged water policy needs straightening out and only a riverine grid can end state rows.” Financial Express, at Calcutta, January 11, 1996. P-7.
awareness for the need of a National Water Policy along with disenchantment with adjudication as a method for resolving inter-state water disputes in India urged the Central Government to establish the National Water Resource Council in 1983 entrusting upon it the task of formulation of a National Waters Policy. Subsequently, a draft National Water Policy was adopted at the meeting of Water Resource Council when it met for the first time in 9th September, 1987, under the Chairmanship of the Prime Minister. In the meeting, decision was taken to formulate a guideline under the National Water policy. The cardinal principles as adopted under the policy may be stated as under :-

(I) Water is a scarce and precious national resource, to be planned, developed, and conserve as such, and in an integrated and environmentally sound basis keeping in view the needs of the state concerned.

(II) The whole river basin would be considered as a single unit for allocation of the waters of an inter-state river or river valley. However, in the case of large basins like the Indus, the Ganga-Brahmaputra, Meghna, part of the basin may also be considered.
(III) The available resources, both surface and ground water, should be made utilisable to the maximum extent and allocating river water, ground water availability should be accounted for.

(IV) Water should be made available to water short areas by transfer from other areas including transfer from one river basin to another, after taking into account the requirements of the areas / basins.

(V) Project planning for development of water resources should, as far as possible, be for multiple benefits based on integrated and multi-disciplinary approach having regard to human and ecological aspects, and special needs of disadvantaged section of the society.

(VI) The unit of planning should be hydrological unit such as a drainage basin or sub-basin. Appropriate organizations should be established for planned development and management of the river basins.

(VII) In Water allocation, ordinarily first priority should be for drinking water, with irrigation, hydro power, industrial and other uses following in that order.
(VIII) The ground water potential should be periodically re-assessed and its exploitation regulated with reference to recharge possibilities and considerations of social equity.

(IX) Due care should be taken right from the project planning stage to promote conjunctive use of surface water and ground water.

(X) There should be close integration of water use and land use policies and distribution of water should be with due regard to equity and social justice.

(XI) Efficiency of utilization should be improved in all the diverse uses of water and conservation consciousness promoted through education regulation, incentives and disincentives.

(XII) Water rates should be such as to foster the motivation for economy in water use and should cover maintenance and operation charges and a part of the fixed cost of hydraulic projects.

(XIII) Farmers should be progressively involved in the management of irrigation systems.

(XIV) Needs of drought prone areas should be given priority in planning water resources development projects. These areas
should be made less vulnerable through soil moisture conservation measures, water harvesting practices, development of ground water potential and transfer of surface water feasible. Less water-demanding modes of development such as pastures and forestry should be encouraged in these areas.

(XV) A national information system on water resources should be established with a network of data banks and data bases integrating and strengthening the existing central and state level agencies.

(XVI) Training and research efforts should be intensified as integral parts of water resources development programmes.

The draft national water policy was adopted and approved by the NWRC in 1987, wherein it was decided to formulate National Water policy guidelines. Thereafter the NWRC council meet has came and gone without any substantial achievement in this respect. Even in its latest meet in February 6, 1996 the draft proposal before the council was neither discussed at length nor put to vote due to differences of opinion between states on the drafts at the National Water Board stage itself. As a rule the council meet would be followed up with a
meeting of the National Water Board of which the
secretary is the chairman and the chief secretaries of all
states are members to at least reach a consensus on the
guidelines.

Madhya Pradesh, Tamil Nadu, Orissa, Andhra
Pradesh and Maharashtra have opposed the draft
guidelines on the ground that each basin had its own
peculiarities and many of the inter-state rivers were
already covered by tribunal awards. Bihar, Andhra-
Pradesh, Maharashtra, Rajasthan and West-Bengal felt
that ground water should not be included as a component
of the basin water for consideration of water allocation.16

Bihar, Andhra-Pradesh, Orissa, Haryana and Punjab
did not agree with the proposal that the claim of non-
basin states for allocation of water should be considered
only on the concurrence of all the co-basin states.
Haryana also wanted that the hydro power benefits of a
joints project be made available to all the basin states.
Clearly, national interests were far from consideration.
Andhra-Pradesh questioned the proposal for making the
centre a party to the process of allocation of water

The objections of the planning commission were more serious. Declining to support the draft guidelines, the commission held that the guidelines had several constitutional weaknesses as far as their ultimate enforceability was concerned. It said that the provisions of the national water policy relate only to transfer of water from other areas including inter-basin transfer of water for the benefit of water short areas. It does not stipulate any thing on the allocation of inter-state river waters among the basin states, whereas guidelines are for allocation of the waters of inter-state rivers among the basin states.

The Commission opined that rather than base the guidelines on the Helsinki rules, it would be more appropriate and realistic if the guidelines were based on the common principles as adopted by various tribunals so as to take the benefit of (indigenous) wisdom built up over a long period. It even questioned the wisdom of evolving such guidelines and said, “as it stands today, the water allocation for most of the inter-state rivers have been finalized through either tribunals or inter-state agreements. In the peninsular region, the only major inter-state river without any formal allocation of water are the Mahanadi and the Tapti. The Water disputes of the Cauvery are already before the Tribunal. In respect
of the Subernarekha, the Damodar and the Barakar systems and the Mahi rivers, there are inter-state agreements in force. In the Ganga Basin, there are inter-state agreements on the Betwa, the Sone and to some extent for the Chambal also. The position of the Yamuna is well known”. The Commission further said that “the main inter-state rivers for which allocation of water in full remains to be done are the Ganga and the Brahmaputra which have international basin and therefore, are out of the scope of the guidelines”. Considering this, the planning Commission expressed doubt whether such policy guidelines at this stage would be appropriately and widely used except, for a very few river basins and in that case whether it would be worth going in for such national guidelines.

Tamil Nadu also held that no executive guidelines could be so framed at this juncture as this could have the effect of interfering with the adjudicatory process pending before the (in the case of the Cauvery dispute) Tribunal and the Supreme Court. On the other hand, the Karnataka Government has been demanding since the early sixties, the framing of National Water Policy guideline in arriving at an objective and satisfactory solution of the sharing of river waters.

17 Ibid.
The Discussion, therefore, reveals that the attitudes of the state governments to the question of framing of a national water policy guideline are not consistent. Those which are short of water would support the idea of a transfer of water from surplus to deficit areas. Indeed, from time to time few states have put forward the proposition that all major rivers should be declared as national assets. On the other hand, the states from which the transfers could possibly be made tend to assert proprietary rights to the river in question, deny that there is any surplus and express apprehensions about the erosion of state rights and the enlargement of the Central Government's role. The differences of opinion also reveal that in India almost all disputant state only wants to share rivers, and sans policy. But legal policy based on equitable apportionment or equitable utilization is very much imperative in arriving at an objective and satisfactory solution to the sharing of river waters. In India, the absence of written rules of equitable apportionment has been a serious handicap in the satisfactory adjudication or settlement of inter-state water disputes particularly in case of fully appropriated river basin like Cauvery river where the water is fully appropriated usually by the lower basin state having flat terrain and dispute arise out of the irrigation demands of the basin state which has a mountainous and undulating terrain.

The Indus Commission appointed prior to the Independence to resolve dispute between the Punjab and Sind province has held that the rules of equitable apportionment is the governing law in
India. The Krishna and Narmada Tribunals have also endorsed this view in resolving water disputes of a nature which involves semi appropriated river basin where there is a surplus water over and above the committed utilization and disputes relate to the claiming of surplus water.

But these unwritten rules of equitable apportionment are not clear about the relationship between the old user of waters acquired by prior appropriation as prescriptive rights and the new or proposed user. In this respect the rules under the 1997 U.N. convention appear to be satisfactorily balancing the interest of old users usually represented by the lower basin state and new users represented by the upper basin state. Therefore, demand for the framing of the National Water Policy guideline is not without substance. In the absence of such a legal policy statement, a meaningful resolution of the Cauvery dispute or any similar row will remain a far cry.

**(III) Water Administration**

As has been pointed out earlier in the study that no country can remain dependent only upon legislature and judiciary for resolving her water dispute. A complete water administration based on sound national water policy is likely to be much helpful for the settlement of water dispute. India, though cannot claim much credit in this respect but recently effort has been made to use constitutional
instrumentalities like inter-state council as a forum for exchange of views for administrative solution of the inter-state water disputes. At the same time, for the same purpose a number bodies, agencies, boards are now constituted either by statutory direction or by the resolution of parliament, Central Cabinet or by the executive order of the Parliament.

Among such statutory bodies, Zonal Councils setup under the State Reorganization Act, 1956 at times has brought the matter like inter-state water disputes in its agenda for discussion and to ease tension over interstate water disputes and other statutory bodies like Bhakra management Board, Beas construction Board, Betwa River Board constituted by Punjab Reorganization Act, 1966 and the Betwa river Board Act, 1976 respectively also act as administrative mechanism to solve the specific problem of water dispute laid down in these statutes.

Apart from such statutory bodies, few non-statutory bodies are also at work and their allied activities to a great extent create an overall impact upon the course of administrative solution of the inter-state river water disputes in India. Few such important bodies are, Central Water Commission (1945), National Water Resource Council, (1983) Central Board of Irrigation and Power(1927), National Water Development Agency (1982), Control Boards for Inter-state River Projects (established in different years, by the resolutions of the Government of India).
Now, to gain more insights into the matter, to some extent, detail analysis of the functioning of these bodies seems to be appropriate here.

**Central Water Commission (CWC)**

Since its creation in 1945, the Central Water Commission has come a long way in furthering and promoting measures for the control, conservation and utilization of Water resources for the development of irrigation and Water Power generation, flood control and protection measures.

The commission is headed by a chairman and ex-officio secretary to the Government of India. The Commission performs its activities through four wings, i.e. Design and Research wing, Planning and Progress wing, Water Planning Wing, River Management Wing.

Among these wings, River Management Wing provides guidance to states in technical matters, relating to river morphology of flood protection, drainage which in turn becomes much helpful for the administrative solution of the inter-state river water disputes.

**National Water Resource Council (NWRC)**

National Water Resource Council (NWRC) was established in 1983 by a resolution of the Central Government. It was established at the instance of the National Development Council.
and has a composition similar to that of the latter, with the Prime Minister as Chairman and several Central Ministers and all the Chief Ministers of the states and the lieutenant governors of the Union Territories as members. A National Water Board was also setup comprising secretary as the chairman and the chief secretaries of all states as members.

The main functions of the council as listed in the Government Resolution are

(i) to prepare draft policy guidelines for water management and pricing of water for Industrial purposes,

(ii) to prepare irrigation management policy

(iii) to prepare plan for conjunctive use of surface and groundwater in irrigation projects etc.

Such assigned functions upon Council shows that it has an opportunity to act as a forum for Centre-State co-operation for resolving inter-state water disputes in India.

Central Board of Irrigation and Power

The Central Board of Irrigation and Power set up in 1927 functions as the National Institution for coordinating all the research activities in the field of irrigation flood control and power and disseminating results thereof. The Chief Engineers in charge of irrigation and power departments are members of the Board. The
Board continuously gets feedback regarding problems in the field of design, construction, and maintenance and management of irrigation and power projects, which requires research studies, analysis of data, and formulation of rational and practicable solutions. It further plays an important role as a forum where engineers and scientists from all over the country meet and discuss the problems. Dissemination of technical knowledge through publication is one of the important functions of the Board. The Board also functions as the Indian National Committee for the International Commission on Large Dams (ICOLD), International Commission on Irrigation and Drainage (ICID), International Association for Hydraulic Research (IAHR), International Water Resources Association (IWRA).

**National Water Development Agency**

The National Perspectives of Water Resources Development formulated by the Ministry of Water Resources, envisage optimum development of the major river systems of the sub-continent. It is estimated that at least 2,22,000 million cubic metres more water could be utilized in our country, providing an additional irrigation potential of 35 million hectares, besides generation of 40 million kilowatts of power. This would be feasible by providing storages at appropriate locations and interlinking of the various river
systems. The perspective comprises two components, viz. Himalayan Rivers Development and Peninsular River Development.

It was decided that initially investigations and studies for establishing the feasibility of the peninsular rivers development components should be taken up and for this purpose, the National Water Development Agency was established in July, 1982. The Agency has two field organizations headed by Chief Engineers, 5 circles headed by Superintending Engineers and 19 Divisions headed by Execution Engineers.

**Control Boards for Inter-State River Projects**

Control boards provide a forum for Centre-State cooperation for construction of various river valley projects. These control boards, being non-statutory bodies created by the executive action of the government, function only as advisory bodies.

The first Control board was setup for the Bhakra-Nangal project in 1950 by the resolution of the Government of India. Following the establishment of the Bhakra Control Board many Boards with similar kind were established for big inter-state project like Tungbhadra Control Board, Chambal Control Board etc.

The general pattern of the composition of these boards except in Bhakra Control Board, is that a board consists of representatives of the state concerned, the central Government and
chief engineer of the project. The states are generally represented by either the Chief Minister or Minister in charge of the project in the state or by both. The Union Government is generally represented by the Ministry of Irrigation and Power, the Ministry of Finance and the Central Water and Power Commission. The composition of the Bhakra Control Board was slightly different from the others in that there were no ministers in the Board. The Centre was represented as in the case of other Control Boards.

The Performance of these administrative bodies however, is far from satisfactory. Inter-State council, in its second meeting for the first time brought inter-state river water disputes into its agenda with a proposal to modify the existing River Boards Act, 1956 but the proposal unfortunately was abandoned due to opposition of number of states. Similarly Zonal Councils occasionally in a very casual manner delt the subject without taking any serious view. The inter-state governmental pulls and pressures between bigger and smaller states, upper and lower riparians, and even Centre and States have locked the performance of such bodies.

Non-statutory administrative bodies also face different kind of problems. These bodies were established by the resolutions of the Central Government and therefore, lack statutory backing. In addition to it, these bodies are inadequately structured and have no co-ordination with each other. For example, the CWC remains primarily an engineering body in which other expertise not

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represented. The CWC and the Central Groundwater Board are the separate organizations without having any co-ordination between them.

The survey of the non-adjudicatory methods for resolving inter-state river water disputes shows that negotiation had been and has increasingly been recognised almost as an inevitable method for resolving inter-state river water disputes in India. The analysis of the methods also highlights the fact that existence of National Water Policy seems to be a pre-condition because of its all pervasive need for durable solution of any inter-state river water dispute in India. In the discussion it is also revealed that different sorts of administrative machinaries which are engaged in various specified water related fields or activities, directly and indirectly help for resolving Inter-state Water Disputes in India, but for more effective use of the services of these organizations for the purpose, co-ordination of their activities are highly needed.