

Boon or bane for Bangladesh?

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FOR quite sometime now Tipaimukh Dam has been a subject of discussion, a political issue. Different people are raising it in various forums, providing reasons based mostly on political bias and very little on facts and figures.

On July 18, leader of the opposition Begum Khaleda Zia made some statements on Tipaimukh Dam. She gave a call to all the people of Bangladesh, including the government, to be united against construction of the said dam in India. She also called upon the Indian government to declare immediately that India had abandoned the project.

She said that Tipaimukh Dam when constructed would have a tremendously harmful effect on Bangladesh. She said that it would have an adverse effect on water, life, environment, nature, agriculture, fish etc. She termed the dam as a death trap for Bangladesh and compared it with the Farakka Barrage.

She said that she understood that the government did not have enough data or facts and figures on Tipaimukh Dam. She thought that it was her duty to collect the same from renowned experts and disclose those to assist the government.

A power-point presentation with some information was given by a former power secretary, Mr. Akhter Hossain, after Begum Zia's statement.

Mr. Akhter Hossain expressed that India had been constructing dams on common rivers and withdrawing water unilaterally in the upper riparian region, depriving Bangladesh of its due share. He concluded by stating that by the year 2050 there would be no water in any river in Bangladesh due to construction of the dams on common rivers. He said that Bangladesh was going to become a desert in the long run due to the actions of the Indian government.

Mr. Akhter Hossain accused India of violating the international charter since it was mandatory for India, an upper riparian country, to consult Bangladesh -- the lower riparian country -- and take its consent before building the Tipaimukh Dam.

Engr. Akhter Hossain also said that the proposed dam site fell within the earthquake prone zone. As such, in case

of an earthquake the dam may fail, which would cause havoc like a tsunami and Shilchar, Karimganj of Assam and Sylhet of Bangladesh would be inundated.

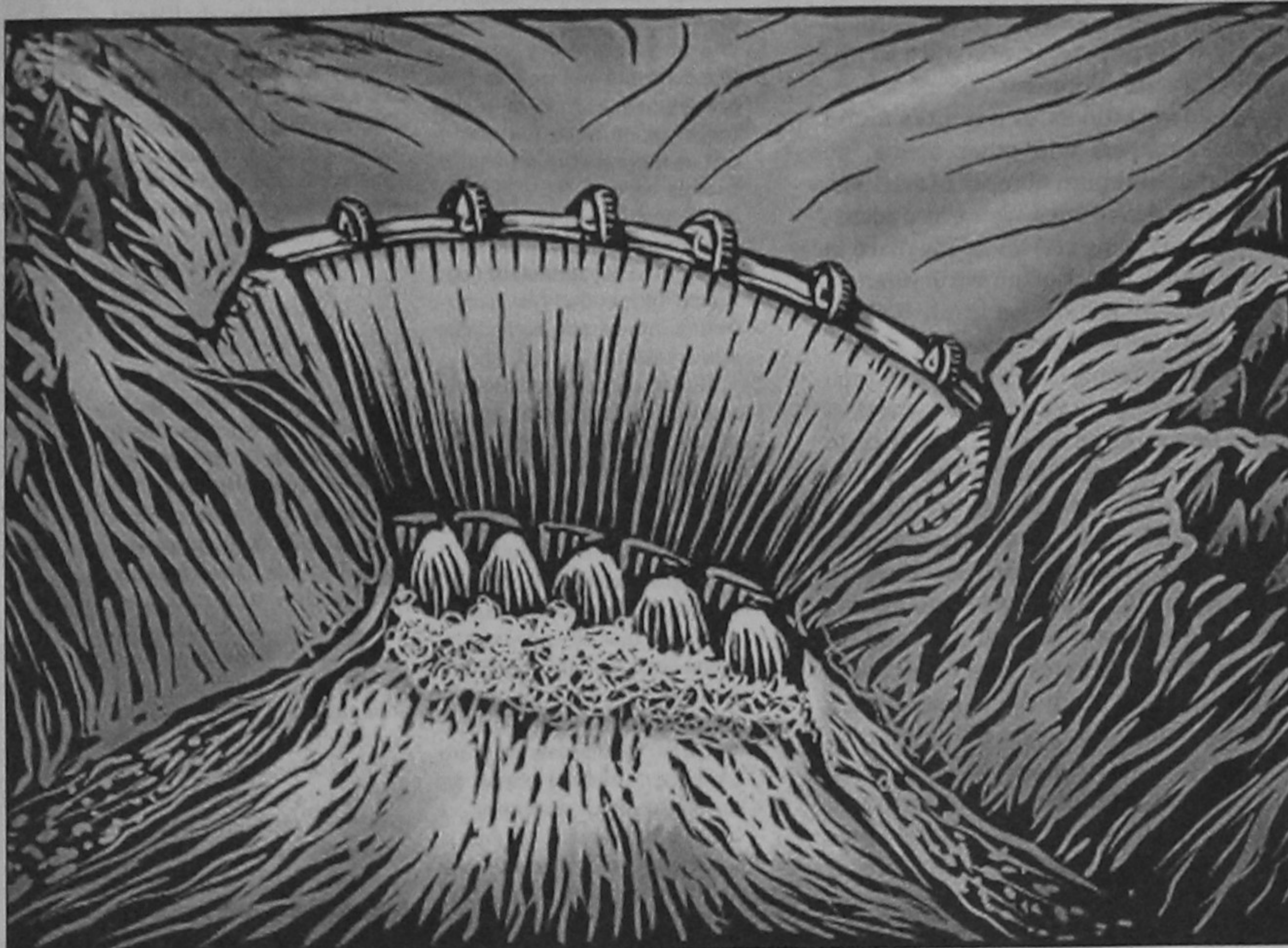
Let us analyse the accusations in the perspective of what we find from different documents.

The question of construction of a water reservoir on the Barak river came up as far back as June, 1972 in the first meeting of the Joint River Commission (JRC) between the experts of India and Bangladesh. The purpose had been moderation of flooding along the Brahmaputra and its tributaries, Barak and other rivers and in Sylhet district in Bangladesh.

Quoted below is the relevant portion of the minutes of the meeting:

"The current flood situation in Assam and the adjoining areas in Bangladesh was reviewed by the Commission. There has been heavy flood along the Brahmaputra and its tributaries, Barak and other rivers and in the Sylhet district in Bangladesh. In considering measures for flood control and flood distress mitigation, the Commission decided to form a Study Group comprising of Shri V.N. Nagaraja (alternate Shri R. Rangachari) and Director, Floods, CWPC or alternate from India and M/s. A. M. M. G. Kibria, Chief Engineer, IWTA and Amjad Hossain Khan, Director, Water Investigation, from Bangladesh to assess immediately the flood situation in the Sylhet area of Bangladesh in Cachar district and other adjoining areas in India in order to formulate short-term and long-term measures for reducing the flood damage in the region. In this connection the Commission noted that a project for the construction of storage reservoir on the Barak river has been investigated. The Commission felt that this was a useful project and formulation of this project should be expedited taking into consideration conditions in Bangladesh."

The subject continued to be discussed, decisions taken and follow up actions persuaded in the subsequent JRC meetings and recorded accordingly e.g. 2nd meeting in Dhaka, September 28-30, 1972 (Para 8), 3rd meeting in New Delhi, December 11-13, 1972 (Para 8), 4th meeting in Dhaka, March 29-31, 1973 (Para 8), 5th meeting in New Delhi, July 19-21, 1973



No adverse effects?

(Para 8), 6th meeting in Dhaka, November 8-10, 1973 (Para 7), 7th meeting in New Delhi, Feb 28-March 2, 1974 (Para 10), 8th meeting in Dhaka, June 6-12, 1974 (Para 8.4.1), 10th meeting in Dhaka, Aug 29-Sept 2, 1974 (Para 10), 13th meeting in Dhaka, June 19-21, 1975 (Para 8).

Quoted below is the extract of the 14th JRC meeting in Dhaka, June 20-24, 1978, when a dam at Tipaimukh site was considered:

"With regard to the flood problem of Sylhet-Cachar and adjoining areas the Commission decided that the concerned superintending engineers of both the countries should jointly examine the scope of the Indian scheme of a storage dam on Barak river at Tipaimukh and study expeditiously the potential flood control and other benefits for Bangladesh and report the progress to the Commission at its next meeting."

Later, the flood plan coordination organisation, Bangladesh Water Development Board, made a study on Flood Action Plan and prepared a report titled "Northeast Regional Water Management Project (FAP 6) in September 1993.

Quoted below are the contents of page 17 of the said study report, which provides an overall assessment of the project as published:

"TIPAIMUKH PROJECT: LOCATION: Manipur State, India.

Planned date of implementation: Proposed to start 1993 but delayed pending resolution of various issues, including impacts on Bangladesh.

Objective: Generate 3,609 GWH of electricity annually and irrigate 1,680 sq/km of Cachar Plain.

Physical works: 161 metre high rock-fill dam at Tipaimukh gorge on the Barak river with an installed generating capacity of 1,500 MW.

Barrage on the Barak at Fulerthal, about 100 km downstream from the dam, irrigation distribution system, Cachar Plain.

Direct impacts: Moderation of flood flows of the Barak, Surma, and Kushiara rivers. Amalshid peak flows reduced by 25%, floodwater volumes reduced by 20%, water levels reduced by 1.6 metres. The Sylhet basin would experience lower floods, less inundation, lower monsoon drainage flows. Surma and Kushiara channel erosion and sediment transport would be less.

Augmentation of dry season flows. Amalshid. Average February flows estimated to increase by a factor of 4.2, total dry season volume +60%, water levels +1.7 metres. Other dry season water levels: Sherpur +1.5 metres, Ajmiriganj +1.0m. Drainage congestion possible in some areas.

Other impacts: Monsoon season: less flood and erosion damage to crops, homesteads, urban areas, infrastructure. Dry season: increased water availability during the critical period for irrigation, fisheries, navigation.

Hazards: reduced flood hazards. Dam failure could have catastrophic effects on the northeast region -- the issue requires further study/environment management planning.

Implementation phase impacts: Reservoir filling could affect hydrology in the northeast region -- the issue requires further study/environment management planning."

[Source Joint Rivers Commission, NER estimates.]

The above clearly indicates that the project would achieve moderation of flood flows of the Barak, Surma, and Kushiara rivers. In addition, it would allow augmentation of dry season flows of the same rivers.

As regards hazard, the project did minimise the flooding, but dam failure could have catastrophic effects on the northeast region. It is also seen that in addition to generation of 1500 mw of electricity, the project has a component for making a barrage on the Barak at Fulerthal, about 100 km downstream from the dam.

In the 35th JRC meeting in New Delhi, September 29-30, 2003 (Para VI)

Bangladesh side raised an objection on the proposed construction of a barrage at Fulerthal for diverting water by India. The Indian side assured that there would not be any diversion of waters from Fulerthal or elsewhere on the Barak river.

The Indian side also gave assurance that if it was ever decided to build a diversion structure on the Barak river it would be done after due consultation with Bangladesh. There was reassurance from the Indian side on the same issue again in the subsequent 36th JRC meeting in Dhaka on September 19-21, 2005.

It is known from newspaper reports that on December 16, 2006, two ministers of the government of India laid the foundation stone of Tipaimukh Dam project. The Bangladesh Ministry of Foreign Affairs requested the government of India vide a note verbal dated January 2007 not to proceed with the construction of Tipaimukh Dam until the water sharing issues with Bangladesh were resolved.

The Indian prime minister, during a meeting with the prime minister of Bangladesh on the sidelines of the 15th Non-Aligned Movement Summit at Sharm El-Sheikh in Egypt on July 15, gave firm assurance that India would not take any action in respect of Tipaimukh Dam which would harm the bilateral relations between the two countries.

In the meantime, the government of India forwarded an invitation for a team from Bangladesh to go to Tipaimukh Dam site to have first-hand understanding of the situation there. Bangladesh is preparing to send an all-party parliamentary delegation to visit the site.

It is clear from the above that the concerned experts from Bangladesh side have all along been very much aware of the situation as regards Tipaimukh Dam. The government of Bangladesh did not show any lack of alertness to safeguard the interest of the country on the issue as well.

No visible sign of unilateral action by the Indian experts or the government of India defying or denying Bangladesh could be traced so far. Is creating unnecessary panic and making the situation complicated with aggressive accusations really needed at the moment? It is evident from the above-mentioned study done by Bangladesh that if constructed properly taking into consideration interest of Bangladesh, the country can be immensely benefited from Tipaimukh Dam.

G.M. Quader is Minister for Civil Aviation and Tourism.

Time for a crackdown

In the wake of growing public consciousness and the government's concern, it is high time for the highest court of Bangladesh to invoke the Public Trust Doctrine (PTD) vigorously to punish those who annihilate our rivers either by grabbing the land or blocking their natural flow.

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IN the wake of growing public consciousness and the government's concern, it is high time for the highest court of Bangladesh to invoke the Public Trust Doctrine (PTD) vigorously to punish those who annihilate our rivers either by grabbing the land or blocking their natural flow.

Our constitution is silent about the environment. The 1995 Environment Act, read with the 2000 Environmental Court Act, addresses only pollution, but does not speak about containing the damages in case of obstruction of the natural flow of the water bodies. To fill the gap here, PDT may be a golden legal tool since we are disciples of English Common law, which includes the doctrine as part of its jurisprudence. Undisputedly, resources like air and water are either owned by no one (Res Nullius) or by everyone in common (Res Communis).

In the historic Mono Lake case, the California Supreme Court opined that the sovereign owned "all of its navigable waterways and the lands lying beneath them as trustee of a public trust for the benefit of the people." So it cannot be sold or be used in such ways "which infringe directly on public uses and promote private profits." This must be taken into account by the Bangladesh authorities, public or private, who

might face problems in eviction or restoration on the basis of Cadastral Survey (conducted in 1920 at Dhaka) as enshrined by Justice A.B.M. Khairul Haque on June 25 to breathe life into our biologically dead rivers.

The validity of all laws, by-laws, agreements, deeds, leases, etc that may undermine the *Res Communis* must be tested with the touchstone of the ancient Justinian code, which is not only gaining acceptability but also being broadened by the highest judicatures across the globe. In medieval England, wrote Jan S. Stevens of University of California in his erudite article in 2005, "this notion was picked up and turned into a declaration that the shores of the sea are common to all and inalienable. The concept was adopted in the US as early as 1821.

Interpreting the doctrine, Joseph L. Sax, Professor of Law, and the US Environmental Quality Award winner, sets three precincts on governmental authority. "First, the property subject to the trust must not only be used for a public purpose, but must also be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third, the property must be maintained in particular types of uses."

Pending the deadline to achieve the ambitious goal as per verdicts within 2011, the highest courts must use the PDT.

It is hard to believe that the PIEL or the legislature's initiative will pave the way, but I expect that the courts will initiate the proceedings suo moto on the basis of media reports.

In the M.C. Mehta vs. Kamal Nath (present Union rail minister of India) case in 1996, the Indian Supreme Court first invoked this doctrine and awarded Rs.10 lakh as "exemplary damages" for obstructing the natural flow of the Bias, a Himachal Pradesh river. The Indian Supreme Court took notice of the news item appearing in the *Indian Express*, dated February 25 1996, under the caption: "Kamal Nath dares the mighty Beas to keep his dreams afloat."

Mr. Nath managed to encroach on 27.12 bighas illegally to build his Span club in 1990. The *Indian Express* report said that the club represented the minister's dream of having a house on the bank of the Beas. In Bangladesh, we have many influential people who built their scenic villas by encroaching on lakes and rivers. They may have managed to obtain "valid" documents but they are void ab initio. In *Arnold v. Mundy* (1821), a New Jersey court held that "the state could not convey into private ownership the public lands covered by tidal waters, and that any grant purporting to do so was void."

Let me now make the Beas anecdote clear. The encroachment by Kamal Nath diverted the flow of the Beas severely. Interestingly, the illegal lease-deed in favour of 27.12 bighas was "regularised" in 1994, when Mr. Nath was minister of environment and forests. The court quashed the lease on December 13, 1996, and directed the NEERI (Indian counterpart of our DoE) to assess the cost for restoring it to its original-natural conditions. The court served a notice asking why a fine for

pollution and damages should not be not imposed.

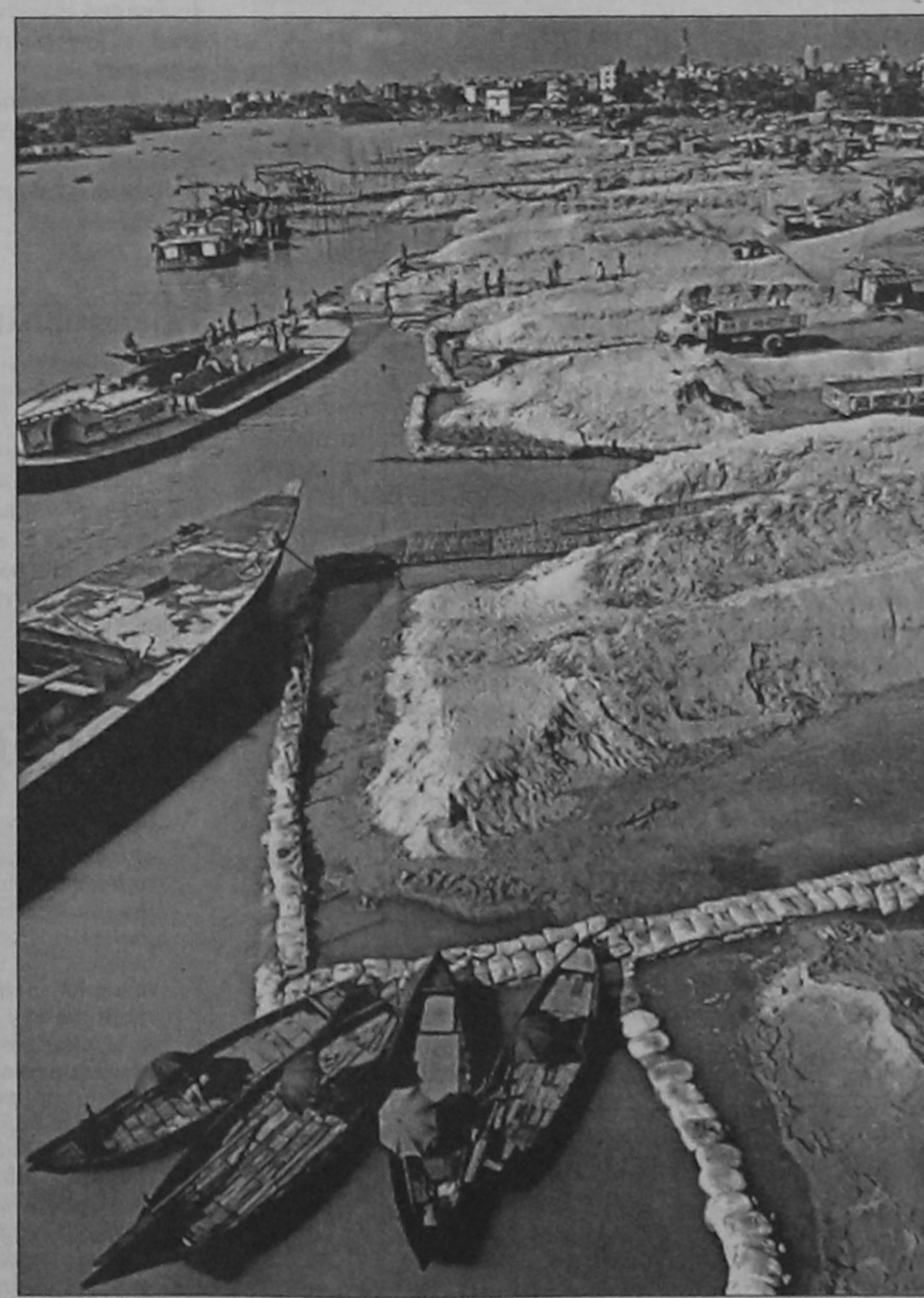
After four years, the court withdrew the notice of pollution-fine on technical grounds, and a fresh notice was issued to show cause "why in addition to damages, exemplary damages should not be awarded." The court stated: "Pollution is a civil wrong, it is a tort committed against the community as a whole. A convict-polluter has to pay damages for restoration of the environment and pay those who have suffered loss on account of the act of the offender."

On March 15, 2002, the court directed that special damages of Rs.10 lakhs be remitted to the state irrigation and public health department only for the flood protection works in the area of Beas. Indeed, the court stated that the quantum of liability for damages on the principle of "polluter pays" would be determined separately, and left it open for the time being.

I could not know what happened thereafter, but Dr. Zafar Ahmad Khan, the newly appointed DG of DoE, confirmed on July 22 that they had filed a Tk.2.5 crore lawsuit against an industrial giant, and served final notices to seven enterprises, for damages caused by reckless pollution of water bodies. The assessment regarding the cost of effluent treatment was made on the basis of an Indian court verdict.

These developments are the first of their kind, thanks to the on-going save rivers campaign.

Neither the DoE of Bangladesh nor the environment courts have ever filed any case for exemplary damages. So it is for the highest courts to be vigilant since the celebrated US jurist Oliver Wendell Holmes said in the *Hudson County Water v. McCarter* (1908): "The public



Make the encroachers pay.

interest is omnipresent wherever there is a state, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private prop-

erty of riparian properties cannot be supposed to have deeper roots."

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