

Mahakali Impasse and Indo-Nepal Water Conflict

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Introduction

On January 29, 1996 in Kathmandu, after about three days of deliberations, India's external affairs minister Pranab Mukherjee and Nepal's foreign minister Prakash Chandra Lohani initialled the Mahakali Treaty – known formally as the *Treaty Between His Majesty's Government Of Nepal And The Government Of India Concerning The Integrated Development Of The Mahakali River Including Sarda Barrage, Tanakpur Barrage And Pancheshwar Project*. Immediately, there was an unseemly scramble among Nepali politicians to take credit for the Treaty. From the former speaker of Parliament to the general secretary of the Nepal Communist Party (United Marxist-Leninists) then in opposition, from hard-line Panchayati politicians of yesteryears to hardboiled bureaucrats, all claimed a share in the glory or sang hosannas.¹ Today, except for those whose names have been directly enmeshed with the Treaty, one is hard pressed to find a champion who would risk defending Mahakali heart and soul, her fall from euphoric heights of stardom straight into a virtual leper colony having taken barely three years!

There is a need to analyse this predicament because it holds deep lessons for future efforts in collaborative water management in the Ganga basin as well as development in general. The Mahakali impasse has roots deep in Nepal's history, and ramifications beyond water resources into political economy, diplomatic relations between India and Nepal as well as governance in South Asia. While the complex events surrounding it do need much deeper socio-political analyses than is possible in a short article and in so close a time period next to the events, a beginning needs to be made that can serve as a prelude to future studies from a variety of other viewpoints. The purpose of this paper is to put into perspective the complex set of events that led to the signing of the Mahakali Treaty, and the impasse it has since been enmeshed in. It first presents the chronology of events leading up to the Mahakali impasse. With this overview, it then asks some open-ended questions that may uncover a rich agenda for further research. Several undercurrents emerge with this historical overview that need not just further insightful analyses but also some redeeming statesmanship, both in Nepal and India.

Rana-British Days (till 1951)

The Sugauli Treaty of 1816 AD defined the national frontiers of present day Nepal. It forced the Gorkhali Empire, which had extended up to the Satluj in the west, to give up the conquered lands west of Mahakali (called Sarda in India), and fixed this river as the western boundary between Nepal and British India.² Given the remoteness of the headwater reaches where the arms of the Nepali state had only a feeble presence, not much is heard of conflicts in this area. In the southern reaches, however, where the land was gifted back by the British to Nepal in recognition of the services provided by Shogun

Jung Bahadur Rana in suppressing the Sepoy Mutiny of 1857 AD, the braided nature of the river as it debouches onto the plains presented problems. Neither the thalweg nor center line principle could be satisfactorily used to define the boundary, and it was taken as the mid-stream of the river with reference pillars on either side. Because of the shifting nature of the river course, a re-alignment of the boundary was ordered by the British India government in 1909 AD. After much correspondence and meetings, the demarcations were completed in February 1912 during the Shogunate of Rana Chandra Sumshere.³

Soon thereafter, the British India government contemplated building the Sarda barrage to provide irrigation to western United Provinces. After a series of negotiations, it managed to realise a Sarda Treaty in 1920 which transferred 4000 acres of the eastern banks of the Mahakali to India to build the Sarda Barrage in exchange for 4000 acres of forested land in areas to the east as well as 50,000 rupees to Nepal. Furthermore, the Treaty allowed Nepal to withdraw 4.25 cumecs of water in the dry season and 13 cumecs in the wet season, which could be increased to 28.34 cumecs if water were available. What India could withdraw out of the approximately 650 cumecs average annual flow of the Mahakali was, however, not specified. In effect, it was limited only by the scale of the technology it was free to employ.⁴ This left room for critics of the 1920 Agreement to call it an "unequal treaty" and, with perfect economic and technological hindsight of today's, to fault Chandra Sumshere for undervaluing the left bank of Sarda Barrage. There were also questions raised about where the 4000 acres of land received in exchange from the British were located.

Democratic Interregnum (1951-1960)

After a major flood in the Mahakali *circa* 1953, India extended the left afflux bund of the Sarda Barrage about a hundred meters into Nepali territory beyond border pillar BP 6A between 1954 and 1958. This extension of the Sarda afflux bund is physically similar to the case in Tanakpur in 1991. However, it is not known publicly if Nepal government provided permission for this in any form. If it was an incursion, there is no record of any protest over this by any Nepali government then or afterwards – neither during the Panchayat years nor even while the Tanakpur debate raged on after the restoration of democracy during the first half of the 1990s.⁵

During the 1950s, there were no major initiatives on the Mahakali, but major flood control embankment building and irrigation projects were undertaken in north Bihar and Uttar Pradesh plains by the Indian government. To further these initiatives for the North Ganga plains, India entered into two major river treaties with Nepal in this period: the Kosi agreement on 25th April 1954 (revised subsequently on 19th December 1966) and the Gandak agreement on 4th December 1959 (amended on 30th April 1964). These treaties, and the projects they gave birth to, have had their own less than salubrious impact on Nepali polity and popular perceptions of Indo-Nepal water relations, the details of which are beyond the scope of this article.

Panchayat Raj (1961-April 1990)

Nepal, with loan from the World Bank, began the Mahakali Irrigation Project in 1971 to utilise its share of the waters of the Mahakali as allowed under the Sarada agreement of 1920. By the second decade of Panchayat rule, Nepal's water resources development activities had begun to acquire a donor-led, statist bias, precluding other (private or community-based) institutional possibilities. Private initiatives in power generation were discouraged by HMG's new industrial policy of 1972 that nationalised electricity production to make bilateral and multilateral donor involvement easier.⁶ There was extensive World Bank, UN, ADB, USAID etc. involvement in irrigation, power and water supply projects. The Ministry of Water Resources, with irrigation, flood control, electric power, and water supply within its brief, became the largest infrastructure ministry in the country overtaking the Ministry of Works and Transport. With the exception of the 21 MW Trisuli and 14 MW Devighat hydroelectric projects, there was not much inclination for furthering water resources projects that would be mutually beneficial to both India and Nepal.

Heavy investments were made in irrigation and power projects during this period – 66,000 ha Sunsari-Morang on the Kosi (1965-ongoing), 34,000 ha Narayani (1967-ongoing), 7000 ha Kankai (1970-1990), 25,000 ha Kamala (1975-1985), 10,400 ha Chitwan Lift (1973-1988), 36,000 ha Bagmati (1980-ongoing), (60 MW Kulekhani I (1974-1980), and 32 MW Kulekhani II (1977-1987) and 69 MW Marsyangdi (1982-1989), etc. From 1985 onwards, the Ministry of Water Resources was preoccupied with the 402 MW Arun3 (later scaled down to 201 MW, and finally abandoned in August 1995 after the World Bank pulled out of it because of criticism for its excessive cost that was four to five times more than what the private sector was constructing projects for in the Himalayan region).⁷ The significance of Arun3 to Tanakpur and Mahakali episodes is that this project, which had overtaken the entire water and power establishment in Nepal, saw every other alternative to Arun3 such as Sapta Gandaki, Burhi Gandaki, West Seti etc. as rivals to be suppressed or sidelined rather than examined with an open mind. As a result, during the Panchayat rule, Nepal's water establishment was never able to approach India openly, question its plans and propose a cooperative alternative that was better suited to Nepal's interests.

In 1983, India completed the technical study of a 120 MW hydroelectric project on the border river Mahakali near the town of Tanakpur in Nainital district. Nepal raised its concerns with India regarding possible damage to Nepali land and territory, including the Mahakali Irrigation Project. The 120 MW Tanakpur power plant, which uses all the waters of the Mahakali during the dry season, would have emptied its tailwater into the Sarada Canal feeding the UP system and not into the river upstream of the intake of the Sarada Barrage from which Nepal's Mahakali Irrigation Project receives its water. India agreed to redesign its project and release the Mahakali water back into the river so that Nepal's existing irrigation project would not be left high and dry. It also agreed to, and constructed, some river abutments to ameliorate bank cutting on the Nepali side.⁸

By 1988, India had completed the construction of the Tanakpur barrage and the powerhouse with the exception of the left afflux bund that was needed to tie the barrage to the high ground on the left bank in Nepal. Despite its earlier insistence that this was a wholly Indian project in fully Indian territory and thus of no concern to Nepal, it became necessary for India to request for 577m of Nepali land for this purpose. However, around

this period, relations between Nepal and India deteriorated with Nepal importing Chinese light arms and India imposing a peacetime economic blockade of Nepal in March 1989. The matter of extending the left afflux bund was not pursued further in view of other pressing concerns, but the essential strategic thrust of India government vis-a-vis Nepal's water resources made itself felt in its diplomatic proposals.

In November 1989, with the main architect of the blockade Rajiv Gandhi not faring well in the Indian parliamentary elections, the foreign ministers of the two countries were able to meet in New Delhi in January 1990. Even as the anti-Panchayat agitation led by the Nepali Congress and the United Left Front continued in the country, the royal regime toned down both its promotion of "Nepal as a Zone of Peace" concept and its opposition to the 1950 Treaty of Peace and Friendship with India, and agreed to India preparing a new draft agreement on mutual cooperation. In a bid to extract maximum benefit out of the political turmoil in Nepal, India put forth a draft proposal on March 31, 1990 that included more stringent demands on Nepal vis-a-vis Indian security concerns than the 1950 Treaty. It was reminiscent of what one scholar has described as the "Krishna Menon syndrome".⁹ It included Article III of Part VI Economic, Industrial and Water Resources Cooperation that stated:

"The two Contracting Parties being equally desirous of attending complete and satisfactory utilisation of the waters of the commonly shared rivers, undertake to (i) plan new uses or projects subject to the protection of the existing uses on the rivers and (ii) cooperate with each other to formulate and modify the planned new uses or project taking into consideration the water requirement of the parties."

The phrase "commonly shared rivers" was to make a comeback later during K. P. Bhattarai's interim government, and the prior rights issue expressed as "existing uses on the rivers" was to be resurrected in the "package deal" on the Mahakali with the UML government.

Interim Government (April 1990 to May 1991)

On 9th April 1990, King Birendra lifted the ban on agitating political parties and multi-party democracy was restored in Nepal. The post-Panchayat interim government was under pressure from the Indian government to allow the construction of the left afflux bund of Tanakpur Barrage, especially after the economic blockade was relaxed following the restoration of democracy in April 1990. Soon after becoming prime minister of the interim government consisting of Nepali Congress and the communist United Left Front, Krishna Prasad Bhattarai visited New Delhi on the invitation of Indian prime minister V. P. Singh with an entourage that included Mrs. Sahana Pradhan then chairperson of the United Left Front and a minister in the interim government. On 10 June 1990, a joint communiqué was issued at the conclusion of his visit that included the phrase "common rivers" and the expediting of their development. It was to become an election issue in May 1991 as an alleged example of Nepali Congress's "sell-out" to India.

With the restoration of *status quo ante* of the pre-blockade days following prime minister Bhattarai's successful visit to India, the diplomatic initiatives from Delhi for Nepal's acquiescence to building Tanakpur's left afflux bund inside Nepali territory

began to gather momentum. Meanwhile, the issue of Tanakpur, which had been wrapped within bureaucratic secrecy, began to unfold slowly in the public arena. Because the interim government's primary agenda was to frame the new constitution and hold elections, the matter of Tanakpur's left afflux bund was not pursued with any alacrity, but it continued to have its effect on Nepal's body politic. The new constitution of Nepal, which was being drafted in the meanwhile, was promulgated on 9th November 1990. It included a constitutional provision in Article 126 that required any resource sharing agreement to be ratified by a two-thirds majority in parliament if it was of "pervasive, serious and long-term nature".

The interim government subsequently did try to find a way out of the difficulty brought about by India's unilateral decision to construct a barrage on a common border river. Because of the geometry of the land swapped in 1920, if India tied the afflux bund to the high ground in its territory, significant portion of Brahmadeo Mandi in Nepal would be submerged. There was a need to look for a variant which would cause the least submergence in Nepal, and Water Resources Minister of the interim government Mahendra Narayan Nidhi asked his technical team, on 28th December 1990, to make a review of the Tanakpur problem. This team recommended, on 22nd February 1991, the best variant that Nepal could agree to so as to meet Indian requests. The team also mentioned Nepal's needs for additional irrigation in Kanchanpur District as well as highway connection to the Mahakali barrage that functions as the only AA class bridge over the river in this area.

On 15th April 1991, the cabinet of the interim government – which included members of the communist United Left Front – authorised HMG's negotiating team to conduct discussions with India within certain parameters, including the least harmful afflux bund variant, provision of 1000 cusecs of irrigation water and "some electricity" in return for agreeing to provide India 577m of Nepali land for building the left afflux bund of the Tanakpur barrage.¹⁰ On 17th May 1991, Indian Prime Minister Chandra Shekhar wrote to his Nepali counterpart Krishna Prasad Bhattarai asking for Nepal's permission to build the afflux bund, especially since the monsoon would be soon approaching. (If a record flood occurred, it could – unless prevented by an afflux bund – outflank the barrage with devastating consequences.) Because general elections were going on in Nepal, the matter remained unattended.

Centrist Majority Government (June 1991–October 1994)

Nepali Congress won a majority in the general election even though its interim prime minister Krishna Prasad Bhattarai lost to the general secretary of the UML, partly due to the "common rivers" issue. The new Congress government was headed by Girija Prasad Koirala as prime minister. He replied to Indian prime minister Chandra Shekhar, on 10th June 1991, that the permission requested from the Bhattarai government regarding Tanakpur's left afflux bund could only be given after detailed study and an agreement between the two governments.

Prime minister Koirala visited India between December 5-10, 1991 at the invitation of India's prime minister Narasimha Rao. Possibly because inadequate homework was done as regards Tanakpur, a decision seems to have been made not to discuss the matter with India in Delhi. This is highlighted by the fact that neither the

water resources minister, nor the secretary of water resources, nor any other water resources experts were included in the 72-member strong official delegation that accompanied the prime minister to New Delhi. However, despite a possibility of breakdown of talks, a last-minute set of agreements was entered into with the Government of India, which included trade and transit and development issues, as well as plans to develop major high dams in the Nepal Himalaya.¹¹ Among other things, this December 1991 agreement, explained as a mere "understanding" and not a treaty that would have to be presented before parliament, allowed India the use of 577m of Nepali territory to complete the construction of the left afflux bund of the Tanakpur Barrage. Nepal was to receive "free of cost" ten million units of electricity as well as 150 cusecs of water for irrigation.

On December 15, 1991 prime minister Koirala gave a public speech about his India visit at Kathmandu City Hall. In the interest of transparency, and to counter allegations of any "secret treaty", he promised to make public the agreements via the official Nepal Gazette, which was subsequently done on 24 December 1991. The details of the "understanding" that began to emerge after Koirala's return to Kathmandu raised a lot of suspicion and hackles. It allowed India to hastily start the construction of the left afflux bund by 15th December, which is before details of the "understanding" had been made public in Nepal. Construction of flood protection works was stated to start in November 1991 even before the "understanding" was initialled in Delhi. The newspaper reports and gazetted notices continued to confuse 10 million units (kWh) of electricity with 10 Mega Watts of power, prompting a debate of what Nepal had actually received for allowing its left bank to be used for the project.

On December 17, 1991 Advocate Bal Krishna Neupane filed a writ at supreme Court challenging this "understanding" and appealing to the Court to have it declared a treaty requiring Parliamentary ratification by a two-thirds majority as per Article 126(2) of Constitution of Nepal. On 28th February 1991, during the winter session of the parliament, the communist opposition *gheraoed* the rostrum of the lower house for eight hours and prevented parliamentary proceedings in a bid to force the government to table before the house all documents relating to the Tankapur "treaty". The treasury bench, on the other hand, maintained that it was only an "understanding" and everything relating to it had already been published in the Nepal Gazette of 24th December 1991. A 19-member all-party special committee of the parliament was formed to try and find a consensus. On March 11 1991, prime minister Girija Prasad Koirala presented written reply to the Supreme Court defending his government's position. Street agitation against the treaty dominated national politics and newspapers for months. In end-July beginning August, prime minister Koirala attended the Non-Aligned summit meeting in Jakarta where he is understood to have met India's prime minister Narasimha Rao and discussed the Tanakpur imbroglio.¹²

The all-party special committee of the parliament held extensive meetings and invited external specialists as well as government experts to the hearings. It was, however, unable to reach a consensus as sharp divisions remained regarding the actions of the government and the interpretations of the constitutional provision. Instead of a single document, there were three different reports presented by the committee to the lower house of parliament on 7th September 1992. In a memorandum submitted to the chairman of the upper house dated 9th September 1992, eight communist factions

(including the UML, Unity Center, United and Masal) state that the Tanakpur "understanding" signed by prime minister Koirala is a treaty which can only be implemented after ratification by a two-thirds majority in parliament. They demand to know from the government where the 4000 acres of land swapped with British India in 1920 is located. The communists stated very clearly that it was wrong to link the Pancheshwar project with Tanakpur. Pancheshwar high dam, they wrote, is a separate project requiring a separate treaty with parliamentary ratification, and there is no need for Nepal to compromise her future bargaining position at this stage.

In October 1992 India's prime minister Narsimha Rao visited Nepal during which the Tanakpur "understanding" was re-negotiated. The quantum of electricity that Nepal was to receive from the project "free of cost" was raised from ten to twenty million units. Future upstream water developments such as Pancheshwar Multipurpose Projects were delinked from the agreement on Tanakpur with the provision that both countries were free to negotiate on upstream projects independent of whatsoever is agreed to at Tanakpur.

On December 15, 1992 the Supreme Court of Nepal decided that the Tanakpur agreement was indeed a treaty and not just an "understanding", and that it would have to be presented to the parliament for ratification as per Article 126 of the Constitution of Nepal. The Court, however, failed to provide a ruling on the second point of the petitioner, which was to require parliamentary ratification by a two-thirds majority as per clause (2) of Article 126. It left it upon the parliament to decide whether the ratification should be by a simple majority or, if the matter was deemed to be "pervasive, serious and long-term", to be ratified by a two-third majority.

A month after the Supreme Court decision, the government constituted a committee (Baral Commission) to evaluate the impact of the agreement. The committee fixed six criteria to define whether this river development initiative and the agreement associated with it constituted "all encompassing, serious and long-term" issues. They were:

- a) *If a single treaty were done to regarding use of several different river basins of Nepal, the treaty should be considered "all encompassing, serious and long-term";*
- b) *If a treaty is made for an entire river basin, then the treaty should be considered "all encompassing, serious and long-term";*
- c) *Run-of-river hydroelectric projects (with no water storage) will be excluded from this definition;*
- d) *This definition would apply to storage projects of capacity greater than 1000 MW and capacity factor less than 0.3;*
- e) *This definition would also apply to projects whose costs would be large compared to economic indicators such as annual GDP, and where sovereign loans are involved which would have to be paid back not just by the current generation making the decision but by future generations or which would be difficult to pay given the state of the economy; and*
- f) *The definition would apply to projects with large reservoirs where resettlement is difficult to handle within Nepal's finance, land availability etc.*

Based on these criteria, the compensation that Nepal received for allowing India to use 577 m of Nepali land to complete the 120 MW run-of-river, the re-negotiations that occurred during the visit to Kathmandu of Indian Prime Minister Narasimha Rao that de-linked Tanakpur from future developments upstream at Pancheshwar, as well as other benefits that would accrue to Nepal from the barrage such as transport, irrigation as well as diplomatic goodwill, the Baral Commission concluded that the Tanakpur Agreement was of a simple nature and not an "all encompassing, serious and long-term" one.

Subsequent to this report and other consultative works, the government made a move to present the Tanakpur Treaty to the Parliament. It is suspected that the government intended to present it as a treaty of a simple nature that needed ratification only by a simple majority. It is also not clear if the government had set forth any criteria, new or otherwise, for defining the nature of the treaty as such. A meeting of the parliamentary committee of the Nepali Congress had been called. The Nepali Congress Supreme Leader Ganesh Man Singh refused to attend the meeting and fired what is popularly known as a "Letter Bomb" to the chairman of the Nepali Congress. In this epistle of 8th March 1992, the Congress Supremo declared: "*Passing the Tanakpur Treaty by a simple majority of the Lower House of parliament would be the equivalent of signing a death warrant. My conscience prevents me from putting my signature to it. Please do not compel me to go against my conscience.*"¹³

His letter, just as the Supreme Court's decision, skirted the difficult but germane issue of defining the criteria for calling Tanakpur Treaty an "all encompassing, serious and long-term" matter. The Ganesh Man faction of the Nepali Congress had been clamouring for Koirala's resignation on moral grounds after the Supreme Court decision. The speaker of the parliament (who came from the Bhattarai faction of the Congress) had compromised his non-partisanship by declaring that the House belonged to the opposition and by not cooperating with the Koirala government in this matter.¹⁴ Ganesh Man Singh's letter effectively derailed any political chance of the issue being resolved politically in parliament by any initiative from the Koirala camp. It was thus left hanging in limbo. Even the very first meeting of the newly formed high level National Water Resources Development Council – held on the eve of V. C. Shukla's visit to Nepal, chaired by the prime minister and including in its composition all important politicians and bureaucrats – did not discuss at all projects of controversy such as Tanakpur and Arun3.¹⁵

In December 1993 the Indian Water Resources Minister V. C. Shukla visited Nepal and managed to extract from the Nepali Government an "action plan" on how to proceed with the implementation of the Tanakpur agreement even when the main treaty had not been approved by the Parliament as was required by the Supreme Court verdict of December 1992.¹⁶

Soon thereafter, Nepal government – which was embroiled in the Arun3 controversy – granted a private Australian company a "hunting license" to build the approximately 750 MW West Seti hydroelectric storage project upstream of the Karnali Chisapani dam site and to sell the electric power to India. The matter was not presented to Parliament, no questions were asked about the benefits of regulated flow that would accrue to India, and no political party or figure showed any interest or need to raise the matter, even though this issue had implications regarding Article 126(2) of Nepal's constitution. Another attractive scheme, the Sapta Gandaki run-of-river hydroelectric

project, found the site of its powerhouse and desilting basin given away to a private medical college for setting up its campus. It was speculated that this was done to remove these projects from the list of contenders to Arun3.

Meanwhile, the special all-party committee of the parliament failed to make any headway. Because of strong personal animosities among political leaders of different parties, this special committee was also unable to define what constitutes "all encompassing, serious and long-term" water sharing issue as per clause 126(2) of the Nepali constitution. During the agitation against the Tanakpur "understanding" by the Koirala government, his opponents from the opposition as well as from within his own party had hyped up the rhetoric to such an extent that an acceptable resolution of this impasse was well-nigh impossible. Committee discussions became a lacklustre buying of time and parties began to exhibit early signs of "Tanakpur fatigue".

In July 1994, the Koirala government fell when MP's of its own party boycotted the House and a bill elaborating his government's policy was voted down. The row over Tanakpur and the Supreme Court's verdict were considered among the significant factors that contributed to the brewing of this situation. Mid-term general elections were held in November 1994 which resulted in the Nepali Congress losing the majority it commanded in the outgoing house.

Communist Minority Government (Nov. 1994-Sept. 1995)

The communist UML, which had vociferously opposed the Tanakpur agreement, emerged as the single largest party in a hung parliament and formed, on December 9, a minority government. In the heat of the debate, both the communist UML and the RPP had called for re-negotiating the Tanakpur agreement. India saw no reason why it should live up to the hype of Nepali opposition leaders. To resolve the impasse, the UML government, ostensibly after receiving signals from India's CPM, put forth in April 1995 a "package deal". This plan proposed increasing the quantum of electricity and water to be made available to Nepal, but requires Nepal agreeing to the construction of a massive (315 m high, 6480 MW) storage high dam at Pancheshwar in the mountains upstream of the Tanakpur site on the border Mahalaki river. It was this very linkage of Tanakpur with Pancheshwar that the UML had opposed previously.

Pancheshwar was a dam that India had wanted all along for over two decades but for which Nepalis had not shown much interest because of their smaller requirements for water and power. There was also a lack of clarity from the Indian side regarding power purchase price as well as valuation of irrigation benefits and India's security concerns over control of the dam that would have compromised Nepal's sovereignty. Former prime minister Kirti Nidhi Bista had warned the powerful general secretary of the UML and deputy prime minister Madhav Kumar Nepal before the latter left for talks with New Delhi that he not agree to the Indian demand on Mahakali. He said that he had turned down Mrs. Indira Gandhi's request for a pact on the Mahakali in 1972.¹⁷ The minority UML government, however, was not able to push it ahead because of differences within its ranks about the implications of the "package deal". Also, it soon got embroiled over the controversial Arun3 hydroelectric project from which the World Bank withdrew support in August 1995 during its tenure, allowing the Nepali Congress to blame it for "setback to development".

Center-Right Government (Sept. 1995 -Feb. 1997)

The minority UML government fell in September 1995 and a three-party coalition of the Nepali Congress, the RPP and the Sadbhawana Party formed a new government headed by Sher Bahadur Deuba. Because of the need to accommodate as many MPs as possible in a shaky coalition, Deuba formed the largest cabinet in the history of Nepal and also created a new ministry of science and technology. By now, "Tanakapur fatigue" had overtaken all parties in small or great measure and Nepali politicians were too embroiled in infighting among parties and groups for perks and privileges to worry about long-term interests.

During November-December 1995, in what has subsequently come to be known as the Pajero scandal, the Deuba government allowed initially MPs and later senior bureaucrats and judges the favour of importing luxury vehicles duty free without disclosing their sources of income. It was seen as a violation of Article 67 of the Constitution as well as Facilities for Members and Officials of the Parliament Act 2052 that specifies what members are entitled to as perks and privileges. The said Act does not allow MPs the facility to import luxury vehicles duty free. Only a handful of MPs did not avail of this facility, and an even smaller number openly criticised the government's move, which was seen as institutionalising corruption and buying of parliamentary votes.

On January 26, 1996, just before the arrival of Indian Foreign Minister Pranab Mukherjee to Kathmandu, a meeting was called between two representatives each of three major parties – the Nepali Congress, the UML and the RPP – who put their signatures on what is called a "National Consensus On The Use Of The Waters Of The Mahakali River".¹⁸ This so-called "consensus agreement" was done outside of the Parliament and its committees, including the All-Party Committee on Tanakpur; the smaller parties as well as opposing factions within parties were not represented; and it basically furthered the earlier UML-proposed "package deal" on the Mahakali.

On January 29, 1996 the foreign ministers of Nepal and India (Prakash Chandra Lohani and Pranab Mukherjee, respectively) signed the "*Treaty Concerning the Integrated Development of the Mahakali River, Including Sarda Barrage, Tanakpur Barrage and Pancheshwar Project.*" The treaty provides 50 million units of electricity to Nepal from the Tanakpur Powerhouse and Barrage over and above the 20 million agreed between Girija Koirala and Narasimha Rao. It also provides more water for irrigation as well as environmental needs below Sarda barrage but wrests from Nepal the consent to build the Pancheshwar high dam – which would generate nine billion units of electricity that would be consumed mostly by India. It also had some water and cost sharing provisions, which subsequently became controversial as their implications began to unfold. The agreement was clearly and without doubt of an "all encompassing, serious and long-term" nature and needed two-thirds ratification by parliament. However, it became clear that Nepal's rights to fifty percent share of the waters of a border river had again been compromised by article 3 of the treaty as well as clause 3 of the accompanying Lohani-Mukherjee exchange of letters.¹⁹

The Prime Ministers of Nepal and India re-initialed the treaty during the visit to India of Nepali prime minister Sher Bahadur Deuba on February 12, 1996. A day later, on February 13, 1996, the Communist Party of Nepal (Maoist) led by Puspa Kamal Dahal

(Comrade Prachanda) and the United Peoples' Front led by Dr Baburam Bhattarai declared the Maoist "peoples' war", an insurgency which has taken more lives than most past revolutions in Nepal. Among their many demands was, and is, the abrogation of the unequal treaty on the Mahakali.

On 17th February 1996 in Bombay, during a continuation of the Nepali Prime Minister's India visit, the Nepali Secretary of the Ministry of Water Resources and the Indian Secretary of the Ministry of Power signed an umbrella "*Agreement between His Majesty's Government of Nepal and the Government of India Concerning the Electric Power Trade*". This agreement allows any governmental, semi-governmental or private enterprise in Nepal or India to buy and sell power to each other determining, in the process, their terms and conditions. Meanwhile, public debate began to heat up prior to the parliamentary ratification of this treaty. This debate was very strong within the left and right parties. There was, however, practically no debate or discussions within the centrist Nepali Congress that had, since coming to power in 1991, jettisoned the principles of "democratic socialism" in favour of economic liberalism.

Two weeks after the treaty was initialled On April 10, 1996, because of public pressure, the 26th Central Committee Meeting of the UML formed a working group to study the treaty and its implications, even though its Janakpur meeting welcomed the signing of the treaty. Meanwhile, on 20th August 1996, Water Resources Minister Pashupati Sumsher Jung Bahadur Rana tabled the Mahakali Treaty for parliamentary discussion and ratification.

In what is widely seen as an effort to pressurise the UML into ratifying the Mahakali Treaty, the British Minister of State for Parliamentary Affairs Mr. Liam Fox and the US Assistant Secretary of State for South Asia Mrs. Robin Raphael hint during their visits to Nepal around August 26, 1996 that non-ratification of the Mahakali Treaty would send a wrong signal driving away private international investments in Nepal.²⁰

September 2-20, 1996

On September 2, UML's study committee on the Mahakali Treaty (Oli Commission) presented its report to the General Secretary, which highlighted 26 flaws with the Treaty. Among the flaws reported (for the first time) was the presence of Indian troops at Kalapani in Nepal near the headwaters of the Mahakali.²¹ In terms of seriousness regarding matters pertaining to Nepal-India relations, it subsequently overshadowed the Pancheshwar High Dam issue. This report virtually split this main opposition party (without whose votes the Treaty would not muster the required two-thirds majority in Parliament) into two – the majority Bolsheviks who felt that the treaty should be ratified first and the negative points taken care of during the preparation of the engineering report (DPR) of the high dam project, and the minority Mensheviks who thought the treaty should not be ratified until all the flaws had been cleared up with India (and who later split off as the ML faction).

The Working Committee and Central Committees met in almost continuous sessions to iron out the differences between the Bolsheviks and the Mensheviks. The 28th meeting of the Central Committee of the UML was held from 4th to 9th September 1996. This meeting decided that the Treaty can be ratified only after HMG and the Government of India give written commitments to rectify the following items:

- Demarcate Nepal's western border with India within a fixed time frame
- Remove Indian military check post from Darchula
- Give to Nepal 36.67 acres of land that should have been given when the Sarda barrage was constructed
- Declare Mahakali river as basically a border river
- Have written commitment from India that it will buy Nepal's share of the electricity from Pancheshwar Dam on the principle of avoided costs.
- Assure that Nepal will have half the rights to the water produced from Pancheshwar Dam, that Nepal will have unhindered right to use her share of the her water, and that India will not raise any objections to Nepali irrigation projects in the Tarai
- Review 1950 Treaty
- Assure alternative transit point for Nepal through Bangladesh
- Assure that the transit treaty between Nepal and India will be for long term
- Manage scientifically Nepal's border with India
- Regulate Nepal-India border
- Assure Indian help in solving the problem of the Bhutanese refugees
- Assure that India will provide Nepal navigational access to the sea

The UML wrote a letter to HMG asking for its and Indian government's written commitments on these points before it would consent to ratifying the Mahakali treaty. On 11th September prime minister Deuba replied to the UML that all these issues are either covered in the Treaty or will be done by technical teams to be constituted between two governments. The Indian ambassador, in letters of 10th and 19th September, declined to comment on these issues as diplomatically inappropriate to him; but he assured "that the Government of India would be happy to discuss these and other relevant matters and reach mutually satisfactory understandings on them after ratification of the Treaty, at the time of finalising the Detailed Project Report." The Bolsheviks are satisfied that this letter is enough of a written commitment on the above issues, whereas the Mensheviks call it a worthless receipt.²²

At the penultimate moment before the parliamentary vote for ratification, an equally split 29-member Central Committee of the UML approved with 17 vote's majority against 16 votes to ratify the treaty. The chairman of the party, former Prime Minister Man Mohan Adhikari – who had spoken out against the Treaty – claimed indisposition, and he was replaced temporarily by an alternate member of the general secretary's choice who voted in favour of ratifying the Treaty. The party's Mensheviks called this a "counterfeit majority". Students ransacked UML parliamentary party office and locked up leaders who had to be rescued by the police. There was an attempt by small parties opposed to the Treaty to encircle the parliament but police action, including arrest of some opposition politicians, including former prime minister Kirti Nidhi Bista, prevented this from happening.²³

September 20, 1996

The Mahakali Treaty was ratified close to midnight by a more than two-third majority of the joint upper and lower houses of the Nepali Parliament, as per the constitutional requirement of Article 126.²⁴ However, before the Treaty was ratified, the Parliament unanimously passed a stricture on the treaty (*sankalpa prastav*) that is binding on the Nepali government. The stricture, *inter alia*, redefines water rights, especially as stated in Article 3 in the main treaty text as well as in Clause 3 in the letter exchanged with the treaty. The four elements of the stricture are:

- (1) Nepal's electricity to be bought by India will be sold as per the "avoided cost" principle;
- (2) When the Mahakali Commission is constituted, it will be done only upon agreement with the main opposition party in parliament as well as parties recognised as national parties;
- (3) "Equal entitlement in the utilisation of the waters of the Mahakali River without prejudice to their respective existing consumptive uses of the Mahakali river" means equal rights to all the waters of the Mahakali; and
- (4) Saying that "Mahakali is a boundary river on major stretches between the two countries" is the same as saying it is "basically a border river".²⁵

In the debate leading to the voting on the Treaty, UML parliamentarian Khadga Oli said that the Mahakali Treaty was done to correct the treason (*Rastraghaat*) committed in Tanakpur by the Government of Girija Prasad Koirala. This allegation was not countered or challenged by the Nepali Congress, which *en masse* votes in favour of the Treaty, even though senior leaders such as Sailaja Acharya had voiced misgivings. The unanimous passage of this stricture essentially means that the treaty has been given conditional ratification. The argument was put forward by those in favour of the ratification that the defects in the Treaty, as well as the provisions of the parliamentary strictures, would be taken care of during the preparation of the Detailed Project Report (DPR) of the Pancheswar High Dam project. As per article 3 (a) of the Lohani-Mukherjee exchange of letters with this Treaty (re-initialised again by Narasimha Rao and Sher Bahadur Deuba on February 12, 1996 in Delhi) this DPR had to be prepared within six months of the entry into force of the Treaty, i.e. March 19, 1997.²⁶

Because of the controversy surrounding the Treaty, and the fact that it had been passed with an unanimous parliamentary stricture, the parliament constituted a joint parliamentary committee to monitor the Mahakali Treaty on October 10, 1996. Its objective was to guide the implementation of the Treaty and assure the inclusion of those points that have been missed in the Treaty such as the *sankalpa prastav*. There were 10 members from different parties in the committee, which was chaired by the Speaker of the House of Representatives Ram Chandra Paudel.²⁷ Like the previous all-party parliamentary committee on Tanakpur, this committee too was unable to provide any guidance. The members visited the site and came back as confused as before. To add to their worries, India's joint secretary of water resources, responding to questions from Nepali journalists regarding the *sankalpa prastav*, said that India is not concerned with what such *prastavs* say. Rather, India is only concerned with the wordings in the Treaty itself.²⁸ The much heralded statements by political leaders that all defects in the Treaty

would be taken care of during the preparation of the DPR and that India has agreed to do so, is thus proved wrong.

Even as the two governments remained unable to prepare the DPR of the Pancheshwar project under the Mahakali Treaty, the Deuba government signed a memorandum of understanding with India to study the mammoth Kosi high dam project in January 7-9, 1997. This agreement, signed by Dr. Anand Bahadur Thapa, Executive Director of HMG/N Water and Energy Commission and Mr. Ramesh Chandra, Chairman of the India's Central Water Commission, allowed the establishment of liaison offices in Nepal by India for the purpose of preparing these projects, committed Nepal to providing data to India on its water projects within this area from Birganj to Biratnagar within a month without India reciprocating along the same lines, and agreed to India paying for the perks and privileges of Nepal government employees on this exercise.²⁹

Politicians of Nepal seem to have been guided by the view that large water resources projects are synonymous with Nepal's development. Nepali party functionaries fear political allegations that a project, any project, is not moving forward due to their action or inaction regardless of technical, economic or development demerits of such projects. Hence they prefer to be seen "for" projects rather than questioning them. With the collapse of Arun3, Nepali politicians have gone overboard blaming the opposition for its cancellation by the World Bank. To be seen as promoting water resources development the Deuba government continued its "distress sale" type of approach to large-scale water resources development.

It proposed giving a "hunting license" to Enron Renewable Energy Corporation of Texas for the Karnali Project. Enron highlighted in its proposal that it was willing to build the Arun3 as part of the Karnali-Arun3 package, with Arun3 costing only 700 million US dollars as opposed to the aborted World Bank/HMG plan which required 1.1 billion US dollars of which approximately 42% was to be borne by the Nepali consumer through stiff tariff hikes. His cabinet minister for water resources Pashupati Rana opposed Deuba in this attempt because the matter involved downstream irrigation and flood control benefits that would accrue to India and upstream costs such as submergence to Nepal.³⁰

In end February 1997, again because of party indiscipline, the Center-Right Deuba government collapsed and an incongruous right-left coalition formed the government.

Right-Left Government (Mar. 1997-Sept. 1997)

Lokendra Bahadur Chand of the RPP become prime minister on 3rd March 1997 after Sher Bahadur Deuba's government collapsed when some Nepali Congress MPs refused to show up during a crucial vote. Chand led a right-left coalition government of ex-Panchas and the communist UML with Bam Dev Gautam as the deputy prime minister. This government exchanged the instruments of ratification of Mahakali Treaty with the Indian government on June 4, 1997 without including the provisions of the *sankalpa prastav* of the parliament. It also went ahead with an agreement with the private Australian Snowy Mountain Engineering Company regarding the export-oriented multipurpose West Seti storage project without discussing downstream water rights issues. The powerful deputy prime minister claimed in Parliament that this was done because it is only a hydroelectric project and that "claiming downstream benefits from

India may lead to India claiming damages from flooding from the waters released from the reservoir".³¹

The state of affairs of the body politic is highlighted by the following statement in Kathmandu Post:

Ex- and Soon-to-be Prime Minister Surya Bahadur Thapa's interview given to Kathmandu Post's Akhilesh Upadhyay:

TKP: What could be the interests of "unseen forces" trying to destabilise democracy?

SBT: The biggest destabilising force is the politics of commission. [Agents of] Arun3, Karnali, Enron etc. have come to play a crucial role in the frequent changes in government and the distribution of portfolios within a given government. For this class, its petty economic interests prevail over the national interests. This force has no scruples.³²

The joint parliamentary monitoring committee came to an impasse. It directed the government to do a thorough homework regarding the source of the Mahakali and the status of the western border of Nepal.³³ After a long silence since the People's Movement in 1990 that overthrew the Panchayat System, its last Prime Minister Marich Man Singh Shrestha broke his silence and gave an interview. He accused the government of caving in before India and claimed that his government had rejected the Mahakali project proposed by India because of the border problem at the headwaters. He further claimed that because of his government's nationalistic stance regarding Tinkar (Kalapani) and Mahakali, India imposed the economic blockade of 1989.³⁴

Pashupati Sumsher J.B. Rana, erstwhile water resources minister in several governments but not in this Right-Left one, in an interview given to Binod Dhungel, executive editor of Janata Saptahik, on 17th June 1997 expressed amazement that the very forces who opposed the Mahakali Treaty now move forward to exchange the instruments of ratification without incorporating the provisions of the *sankalpa prastav*.

In what has come to be known as the "Good Bye, Monika!" episode, two otherwise warring newspapers, Dristi of the UML and Punarjagaran of the Ganesh Man-Bhattarai (or alternatively anti-Girija) faction of the Nepali Congress jointly hosted a farewell reception for a press officer of the Indian embassy at the pricey Shangrila hotel. The press officer had been responsible for assuring favourable press during the passage of the Mahakali Treaty. What was even more incongruous diplomatically was the presence of senior UML and NC leadership of ministerial rank at this reception.³⁵

An all parties' meeting of August 3, 1997 wanted the government to write a letter to Enron of Texas for investment in the 10,800 MW Karnali-Chisapani hydro-project. Enron publicised its intention to sell electricity to China some 3500 kms across the Himalaya to the north to the delight of left-wing comrades and to build the Arun3 project.³⁶

By September 17, 1997, the much talked about and publicised completion of the preparation of DPR of Pancheswar Multipurpose project ran into deep waters after a proposal of water sharing put forth by a Indian technical team. Highly placed government sources who participated in the meeting of joint group of experts are reported as telling Kantipur daily that India came forward with an altogether new and unheard of proposal during the talks which stunned the Nepali technicians. Their proposal was that the sharing

of Mahakali waters should be done only after ensuring that the flow of water to the lower Sarda project situated about 160 km downstream from the Sarada barrage at the Nepal-India border is assured as prior use. In fact, India made prior rights claims based on the size of its canals (built without Nepal's cooperation or permission) which amounts to more water than there is in the river itself. India thus used Article 3 of the Mahakali Treaty to its advantage as suspected by many when the treaty was initialled.³⁷

Right-Center Government (Oct. 1997-mid-April 1998)

Lokendra Bahadur Chand's government collapsed between October 4-6, 1997 when differences arose in the RPP about the wisdom of unprincipled coalition with the communists. A government led by Surya Bahadur Thapa of the RPP was formed with the largest parliamentary party, the Nepali Congress, as junior coalition partner. On December 4, 1997, the six-month period for the preparation of the DPR stipulated in the Letters exchanged with the Mahakali Treaty and counted from the date of exchange of instruments of ratification lapsed with no progress. Those who opposed the treaty as unequal and flawed in 1996 argued that the treaty has lost its legitimacy and can be considered as having lapsed. There was talk that this is a "procedural" matter, which can be sorted out bureaucratically, but the counter argument made is that only the body, which ratified the treaty (two-thirds of the parliament), has the right to change it.³⁸

On January 9, 1998 the RPP split into the Thapa faction which is seen as pro-Mahakali Treaty and the Chand faction which is seen as opposed to it. On 5th March 1998, the Menshevik faction of the communists, most of whom abstained from voting for the Mahakali Treaty, broke away from the UML to form the Nepal Communist Party (Marxist-Leninists) or ML for short as opposed to the UML who were responsible for ramroding the treaty through Parliament.

Center-Left Government (mid-April 1998-current)

Between April 10-12, 1998 the Nepali Congress forced Surya Bahadur Thapa to resign and formed a minority government headed by Nepali Congress president Girija Prasad Koirala with support by the Mensheviks from the outside. In the new cabinet, Sailaja Acharya became Deputy Prime Minister and Minister of Water Resources. She openly advocated the "Small is Beautiful" philosophy and mentioned flaws with the Mahakali Treaty for which she was attacked by the pro-Mahakali Thapa faction of the RPP and the UML.

In May 19, 1998 the Chinese deputy minister for water use and vice-president of Chinese Federation of Commerce and Industry Yan Kikung visited Nepal. In reply to questions of China buying electricity from Nepal from the Karnali and Arun3 projects, the minister said categorically that China had no intention of doing so, that for Tibet she was going to develop solar energy because of the dispersed nature of the settlements.³⁹ This came as a jolt to those Nepali politicians and policy makers who have been sold on the dream of exporting electricity to China as well as India. The presence of Indian troops at Kalapani on the Mahakali is protested by students of the ML faction. Former foreign minister Rishikesh Shah said that the Indian troops moved in when he was in the ministry

during the reign of King Mahendra who did not wish to irritate India any more than he already had.⁴⁰

There was a campaign to discredit deputy prime Minister Shailaja Acharya because of the letter she has had her ministry write to Enron on July 24 effectively not giving it the Karnali project survey license it had asked for. She and her ministry argued that Karnali was a multipurpose project and the issues involved were not just of electricity exports but also significant downstream flood control and irrigation benefit issues in India. This matter needed further discussions with the lower riparian and was related to how much progress was made in the difficulties regarding the Pancheshwar project and the Mahakali treaty.

Against her were aligned not just the Thapa faction of the RPP but also her rival in the Nepali Congress led by ex-prime minister Sher Bahadur Deuba, the latter accusing Ms Acharya of "murdering" Karnali. In perhaps what could be the only event of its kind world wide of a communist leader openly advocating for a multinational company, leader of the opposition UML and former prime minister Man Mohan Adhikary accused the government of cold-shouldering Enron and threatened to make this an issue.⁴¹

The deputy prime minister was made to stand at the rostrum of the lower house and heckled for two hours. In her reply, she quoted the joint parliamentary committee members monitoring the Mahakali Treaty as saying that the treaty is as good as dead, which infuriated the pro-Mahakali lobby. She, however, claimed that without adequate progress on the Mahakali Treaty, a new project such as Karnali Chisapani cannot be initiated since the issues in both are linked in terms of downstream water rights.⁴² While she stuck to her ground, her party's Central Committee decided that Pancheshwar and Karnali Chisapani projects are not linked and that Enron should be invited for talks to give it the survey license.

On 26th August 1998, the breakaway Menshevik communist faction of the ML formally joined the Koirala government and took up cabinet assignments. In an article in a local weekly, former foreign minister and Nepal's permanent representative to the United Nations Shailendra Kumar Upadhyay mentioned that the commission agents against Shailaja Acharya were the very forces which ousted minister D.P. Adhikari from the water resources ministry during the Panchayat days in 1979 when he initiated the small hydro development projects.⁴³ Deputy prime minister Acharya mentioned in an interview in the official daily that the "water mafia" which has benefited from kickbacks in foreign aid projects would like to see her removed.⁴⁴ In a continuing bout of national amnesia, despite the Chinese deputy minister's statement six months earlier, Prime Minister Girija Prasad Koirala said to Japanese businessmen during his visit to Japan on the 5th of November 1998 that they should invest in hydropower development in Nepal and sell electricity to Indian and Chinese markets.⁴⁵

The ML, which was ideologically closer to other communist factions, came under pressure from the other eight left groups (*Aath Baam Samuha*) to either force its Congress coalition partner to curb police activities against the Maoists and agree to other left demands or to quit the government. On 10th December 1998, all its ministers in the cabinet resigned *en masse*. On 24th December 1998, Girija Prasad Koirala again formed another government, this time with the UML as coalition partners on the condition that he recommends dissolution of the House and the hold fresh elections.

The leaders of the UML had met Indian prime minister Atal Bihari Vajpaye in Delhi on 19th September 1998 and assured him that they would cooperate in furthering the Mahakali treaty as they had done during its ratification. They assured him that they were doing this not for petty interests or a few billion rupees but for furthering friendship and bilateral relations with India.⁴⁶ The UML, in its Bhairawa meeting had passed a resolution demanding the DPR of Pancheshwar project be prepared forthwith. Immediately upon assuming the portfolio of water resources minister in the new coalition, UML politburo member Pradip Nepal called for a meeting of senior officers of the water resources ministry as well as finance and foreign affairs secretaries of HMG and authorized the transfer of fifteen million rupees from various projects to the Pancheswar project office for the preparation of the DPR.⁴⁷ This action was criticised by other left parties as unbecoming of a government which was effectively an interim government that was only mandated to hold fresh elections.⁴⁸

Larger Questions

The three-year saga of the Mahakali Treaty presents itself as a forensic resource to study and understand Nepali polity and its relationship with its big southern neighbour. The Treaty is a classic case of "marry in haste and repent at leisure", as the current impasse over its implementation amply demonstrates. It is standing proof that, for the major political forces in Nepal and their leaders, international treaties have value more for their outward form than for their internal substance, more to look "nice" as "development-oriented" politicians in the short-term than to have the nation benefit from their substance in the long-term. Given the unseemly haste with which the Treaty was rammed through Parliament and the barrage of pejoratives that was fired at those raising caution regarding the highest rockfill dam in the world in seismic Himalaya, it may be safely predicted that conflict and paralysis will probably mark the way forward unless redeemed by farsighted statesmanship. However, selective amnesia that filters out difficult questions of resource management seems to be pandemic among Nepal's political set, which does not leave much room for sanguinity.

The fact is that Nepalis are prisoners of their own hype. There is the pervasive and naive belief that global capital and/or the foreign aid machine would do the needful for harnessing the Himalayan waters and selling the electricity generated to India, after which they could be rich as the sheikhs of Araby. Without adequate homework on the details of costs and benefits, as well as on the intense and complex bargaining required to realise these dreams, they will find themselves ill prepared to face the forces of the market. As in the past, it will lead them to a perpetual *post facto* feeling of having always received a raw deal. More fundamentally, the idea of generating electricity by harnessing Himalayan water, exporting it and developing the country from the revenue generated is simplistic on several counts, from hydro-geology to macroeconomic finances. There has never been any serious articulation of what the multiple risks are, how much the actual revenue will be, or what linkage there is between water resources development and the eradication of pervasive poverty in the Himalaya-Ganga. Indeed, without such upstream-downstream linkages with the economy's overall capacity and development, the experiences of other countries from Ghana to Laos to Paraguay point to the possibility of such high-risk projects leading straight to impoverishment instead.⁴⁹

A fundamental flaw of those “marrying in haste” is to be unable to distinguish between the purpose of a Treaty and that of a DPR under the Treaty. The former is a political document that defines rights and the boundaries of those rights on the entire Mahakali basin. It is the job of politicians to secure those rights, and their success or failure is judged by how well they do this job. By demonstrating casualness and carelessness regarding the implications of Article 3 of the Treaty as well as Clause 3 of the Lohani-Mukherjee exchange of letters that form an integral part of the Treaty (re-initialised subsequently by two prime ministers), the current crop of leaders have not fared well their task of protecting Nepali rights and interests.

By contrast, the Pancheswar DPR on which all aspirations are now pegged (or to put it more bluntly, behind which skirts major political leaders are currently hiding) is a technical engineering document regarding the construction of a very high dam – one of the highest in the world – within the framework of the Treaty. It cannot change or challenge that framework. It cannot negotiate rights on water nor can it negotiate the modality for fixing the price of electricity (‘cost plus’ or ‘avoided costs’). Political leaders alone can do that, but being prisoners of their past, they show little will in being able to do so. The all-party parliamentary committees formed to find a consensus and guide the DPR preparation is “as good as dead” and along with it the Treaty it ratified three years ago with such fanfare.

Even on professional matters, government expertise and organisations that are supposed to do the expert homework on the technical issues have eroded their own credibility with their past unprofessional performance on Arun3 and other water resource-related issues. This sad state of affairs has come about because of political interference, failure of senior bureaucrats to stand up for professionalism, as well as the rampant growth of a culture of *zamindari* research, an attitude wherein in-house homework is substituted with a total reliance on expatriate consultants. This has not only sapped their intellectual vigour but also made them incapable to providing sound professional advice to the medley of political masters of the day.

There has also been a less than satisfactory performance by other constitutional organs of the State. The crux of the matter from Tanakpur to Mahakali lay in defining the three adjectives of Clause 126 of the Constitution of Nepal – what constitutes “pervasive, serious and long-term” issues in a resource sharing treaty – and the Supreme Court was asked to do so in a writ petition. While the Court ruled that the “understanding” reached by Prime Minister Koirala in December 1991 was a treaty that needed parliamentary ratification, it failed the petitioner on his second point, i.e. whether the matter constituted an issue of “all encompassing, serious and long-term” and thus required ratification by a two-third majority. The Court sent the matter back to the parliament for it to decide, and the parliament has, to this day with all their all-party committees, failed to do. Once the Court has been asked to provide judgement on this issue, it should have done so (taking the help of appropriate *amicus curie* of experts if necessary) without saying, let the parliament decide and then we will judge whether the parliament’s decision is correct or not. This is a major reason why the matter hangs in political and judicial limbo.

The Mahakali impasse has also forced upon us questions regarding the role of the *Durbar*. While it is fashionable not to see any wrong with the *Durbar* since monarchy went constitutional in 1991, several things are worth noting. First, the current constitution gives joint executive powers to the *Durbar* and the Executive, and the *Durbar’s* role does

include warning the Executive of what it would see as improper in the larger national interests. Given that both the Tanakpur and Kalapani issues originated during the "active and dynamic leadership" of the *Durbar* pre-1990, and the fact that it functioned as the *de facto* secretariat of the country where much of the relevant documents resided (as opposed to the *de jure* secretariat, especially since the 1975 second and the 1980 post-referendum third amendment of the constitution), its role in providing timely warning to the new Executive system was essential. This was not done.

In recent interviews, former Foreign Minister Rishikesh Shah has opined that Mahakali Treaty is not a treaty but only a *note verbale* since it has not been approved by the *Durbar*.⁵⁰ The point is moot since the treaty laws in force do not have such a provision; but the legal right as well as moral responsibility to provide timely warning does rest with it under the present arrangements. This provision has not been used to benefit the nation in a timely fashion as far as the Tanakpur-Mahakali issue is concerned.

Second, the issue of Mahakali is now inextricably linked with that of the presence of Indian troops at Kalapani. How this relates to the *Durbar* is in the following. Foreign troops were stationed on Nepali soil during the period of active and absolute monarchy, and the army – one of whose elementary functions is to guard the country's frontier from encroachment – is still under the *Durbar* and not fully under the elected government under the present democratic dispensation. For such institutions not to have done anything about foreign troops on its soil raises many disturbing questions, and the *Durbar's* attempted aloofness on this matter can leave it open to interpretation of reluctant cooperation with the new dispensation.

In resolving the Mahakali impasse, national exercises are needed which rise above partisan interests not only of political groupings but also of the *Durbar* and the rent-seeking bureaucracy in Singha Durbar; but how can that be achieved? While one can debate various ways of achieving it, one can at least begin by outline those activities that must NOT be done if a way out is to be found:

- Nepalis should stop reflexively blaming the Indians. They are only taking advantage of an attractive bargain at throwaway price offered by Nepalis with their lack of effective homework. Such a favourable situation would be something any party on the other side of the bargaining table would avail of.
- Those who wish to see the Pancheswar high dam built should not continue to deny the obvious. A good beginning could be made by admitting that the Mahakali Treaty done in haste has serious flaws in it. A treaty ratified with strictures is no ratification, especially since the Indian side has not accepted those strictures and the Nepali side cannot move away from those strictures. Very pertinent in this regard is the near absolute lack of any debate within the Nepali Congress on this issue. While both the RPP and the UML/ML have seen debates on Mahakali, this silence on the part of the oldest and major centrist party of Nepal does not bode well for an open and democratic polity.
- Certain statesmen-like norms need to be established that do not misuse provisions of the constitution for partisan ends. If the Court and the Constitution demand that a criteria for defining "all encompassing, serious and long-term" is required, parties in parliament should not shirk from that responsibility, but get that task done before moving forward with other resource sharing agreements whether bilaterally,

multilaterally or through the private sector. Otherwise one merely exports Tanakpur-Mahakali type imbroglios into the future for other projects.

- There is no need to continue being prisoners of hot political rhetoric and hype. It has only divided the nation and put national leaders up for ridicule. The homework that should have been done before the treaty was formalised has not been done even into this third year after it was signed (even though it was rather thoughtlessly promised in ratified writing to be done in six months); and given the complexity of the issues involved, both technical and socio-economic, there is little chance of its being completed well into the life of the next parliament. All indications point to the possibility that the hyped up benefits projected for this treaty are just not there.
- The bureaucracy and their political masters should not shut off their ears to civil society voices. The Mahakali Treaty has been characterised, among other things, by the refusal of those in power to listen to any alternative arguments. Those arguments have now come to haunt all the three fractured parties in Nepal.
- If development is to be real and sustainable, there must no longer be any shirking from an honest assessment of the real capacity of national institutions and the need to build up these capacities. The project that the Mahakali Treaty aims to execute – Pancheswar High Dam – is, at 315m, the second if not the highest rockfill dam in the world. The implementation of an engineering project of such a magnitude is replete with challenges and uncertainties, for meeting which the managerial and technical capacities of Nepali and possibly Indian water related institutions in their current stage of evolution are questionable.

There are also major lessons for India's water bureaucracy as well. Water resource management in the semi-arid tropics that is the Himalaya-Ganga, albeit punctuated by short monsoon cloudbursts, is a slow proposition which not only needs to assure fairness with the societies it is dealing with, but must be perceived and accepted as being fair as well. Agreements through political pressure, diplomatic manoeuvring and legal point scoring from a strong and large neighbour may bring forth agreements in the short-term but, as Mahakali has shown, nothing will move forward in the long-term. Even if it did, the social and political costs may make the victory too expensive. Since India is to be the major beneficiary of reservoirs in Nepal, she will have to go the extra length in providing creative leadership that is not just legally but morally unassailable. The need of the region and the times is for sagacious water management at the micro- and meso-levels so that agricultural, health and sanitation securities are assured, and its impact can be translated into quick and tangible economic benefits. However, given the continuing preoccupation of the Indian water establishment with new constructions and a failure to conduct a credible review of past mistakes, there is little hope that South Asia's largest water bureaucracy can provide the required statesmanship. This job is made all the more difficult because of the colossal vested interests built into the political economy of embankment and canal construction industry in India.

The answer therefore probably lies in growing activism, not only of the environmentalists but also of the judiciary, journalism and the sections of the bureaucracy that are concerned with issues of equity such as social and rural development wings. Therefore reassess, reconsider and re-negotiate in good faith. Indian water and energy requirements on the ground are quite different from that which is projected by its

construction-oriented water bureaucracy. Those requirements cannot be met at reasonable costs from the type of technology and programs offered by the high dam option, at least in the short to medium term of the next twenty years. The same is true of Nepal's own needs.

Proper water management in the Himalaya-Ganga is a pressing need of today which has to be done based on principles of low cost options, short gestation projects, contractual reliability especially for industrial and agricultural consumers, national capacity building for effective maintenance and technology transfer, and a balance of equity in regional and urban-rural contexts. Given what has happened around the world, both in developing and industrialised countries in this regard, it is quite easy to see how the Mahakali option fails on these criteria compared to other paths and options.

The de-legitimisation of mainstream political actors in Nepal, despite democratic polity, has its genesis in their inability to conceptualise modalities of ushering security to the Nepali people by addressing the eco-structural contradictions that the country is enmeshed within. The process is further aggravated by their inability to define the path of harnessing the country's resource, particularly water, to the advantage of the country's disadvantaged sections. The response by all political parties across the board to harness water resource *vis-a-vis* India has so far in the last half-century been one-track and rooted in the notion of sharing of the largesse from a mega "project". The end result has been many words but little or no deeds to show for the hype, leading to erosion of the state as an institutional resource and the crises in governance that the country currently faces.

The alternative approach of national capacity building, local government participation, use of cheap and reliable electricity to give national industries a competitive edge etc. would obviate much of the current ills in Nepali body politic. This approach (as opposed to that of only inviting external contractors and consultants) will enhance local resilience that will contribute to demonstrable societal well being. The difficulty, however, is in transcending the clogged filters within the water establishment as well as the current set up of political leadership in the country.

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Notes:

- 1 General Secretary of CPN(UML) Madhav Kumar Nepal (who said on Nepal TV that the mango tree had really been planted by the UML but when time came for plucking the ripe mango, the Nepali Congress happened to be in power); Former Speaker of Parliament Daman Nath Dhungana (who wanted credit for not allowing Tankapur Treaty to be passed by the Girija Koirala government); and former Royal Palace bureaucrat responsible for the water resource portfolio during the Panchayat years Govinda Das Shrestha (who wrote in Kathmandu Post of Feb. 1, 1996 that “[the new Treaty] is indeed a happy occasion for all Nepalis. ... But it is an undertaking and obligation no political party or government can or should possibly balk at or withdraw from”.)
- 2 Regmi, M. C. 1995: *Kings and Political Leaders of the Gorkhali Empire 1768-1814*; Orient Longman, Hyderabad, India.
- 3 Gyawali, D., 1993: *Tanakpur on the Thames*; Himal, vol. 6 no. 4, Jul-Aug, Kathmandu
- 4 Gyawali, D. and Schwank, O., 1994: *Interstate Sharing of Water Rights – An Alps Himalaya Comparison*; WATER NEPAL vol. 4 no. 1; Kathmandu.
- 5 Gyawali and Schwank, *ibid.*
- 6 See case study of Butwal Power Company in Gyawali, D., Dixit, A., Sharma, S. and Dahal, N. 1999: *Fractured Institutions and Physical Interdependence – The Challenges to Local Water Management in the Tinau River Basin in Nepal*; study by Nepal Water Conservation Foundation, Kathmandu with support from IDRC/Canada.
- 7 Gyawali, D., 1997: *Foreign Aid and the Erosion of Local Institutions – An Autopsy of Arun3 from Inception to Abortion*, in C. Thomas and P. Wilkin (eds) *Globalization and the South*, International Political Economy Series, Macmillan Press, London.
- 8 The statist bias in all of this, both in Nepal and India, is obvious when one considers that amelioration measures were only limited to civil engineering structures: during the construction of the barrage, the bank cutting in Nepal from diversion works affected about 80 families, but they were not compensated. See Report of the Commission formed to assess the impact of the Tanakpur Barrage agreement, also known as the Baral Commission Report (in Nepali: *Tanakpur Bandh Pariyojana Sambandhi Samjhautako Asar Mulyankan Sujhav Samity Dwara Prastut Nepal Ra Bharat Beech Tanakpur Bandh Pariyojana Sambandhi Samjhauta Ko Asar Mulyankan Pratibedan*, Falgun 3, 2049 (14 February, 1993), His Majesty's Government, Kathmandu.).
- 9 See Dhruva Kumar 1992: *Asymmetric Neighbours* in D. Kumar (ed) *Nepal's India Policy*; Center for Nepal and Asian Studies, Tribhuban University. This publication also contains the draft Indian proposal of 31 March 1990 entitled “Agreement Between the Government of India and His Majesty's Government of Nepal on Mutual Cooperation”.
- 10 See Baral Commission Report, *ibid.*

- 11 Information from delegation members who were told to come down for breakfast packed for departure while the two Prime Ministers had a one-on-one meeting. It is said that upon assurances from his bureaucrats that such an “understanding” would not need to be presented to Parliament that Prime Minister Koirala decided to initial such an “understanding” on Tanakpur.
- 12 Report in Nepal Post: “Tanakpur Now To Be Resolved In Jakarta?”, 2nd August 1992.
- 13 See Punarjagaran: “Ganesh Man Singh’s Historic Letter – There Is No Alternative To National Consensus”, 9th March 1993.
- 14 See Hindu Dainik: “Allegations that Speaker is the Opposition”, 3rd September 1992.
- 15 See editorial in Suruchi Saptahik: “Need for Understanding in Water Resources Development”, 26 December 1993.
- 16 See Gorkhapatra: “Nepal-India Relations – Signing of the Water Resources Development Action Plan”, 29 December 1993.
- 17 See interview: “I Turned Down Mrs. Gandhi’s Request” in *CROSSLINES*, 2-8 February 1998, Kathmandu.
- 18 The members who put their signature on the so-called “national consensus” were: Madhav Kumar Nepal and Khadga Prasad Oli of the UML (who are with the Bolshevik UML and not the Menshevik ML); Prakash Chandra Lohani (then foreign minister) and Pashupati Sumsher Rana (then water resources minister) of the RPP (both of whom subsequently became part of the Thapa faction of the RPP as opposed to the Chand faction); and Chiranjivi Wagle and Bimalendra Nidhi of the Nepali Congress (both known to be of the anti-Koirala Chhattise camp (“Group of 36”, which abstained from voting and led to the fall of the Koirala ministry).
- 19 The wordings of Article 3 of the Treaty: “... and hence both the parties agree that they have equal entitlement in the utilisation of the waters of the Mahakali rivers without prejudice to their respective existing consumptive uses of the waters of the Mahakali river”. Paragraph 3 of Article 3 of the Treaty: “The cost of the project shall be borne by the Parties in proportion to the benefits accruing to them ...”. Clause 3 of the exchanged letters: “It is understood that Paragraph 3 of Article 3 of the Treaty precludes the claim, in any form, by either party on the unutilized portion of the shares of the waters of the Mahakali River of that Party without affecting the provision of the withdrawal of the respective shares of the waters of the Mahakali River by each party under this Treaty.” This wording basically prevents Nepal from claiming financial benefits from its equal entitlement of the waters of the border river if it does not use it within Nepal and allows it to flow downstream.
- 20 Aug. 29, 1996 Samakalin and Aug. 31, 1996 Janasatta
- 21 This was the issue that led to the item in the parliamentary stricture, during the Treaty’s ratification, about the status of the Mahakali (of where and how it is a border river).

- 22 September 4, 1996 Jana Aashtha, September 6, 1996 Bimarsha, September 10, 1996 Drishti, September 17, 1996 Drishti. See also Keshav Lal Shrestha 1996: Mahakali Sandhi Ra Rashtriya Heet Ko Sawal, Kathmandu.
- 23 September 21-30, 1996 Himalaya Times, Prakash Weekly etc.
- 24 As per voting records in the joint session of both the houses (total strength of 206+60 members), UML chairman was absent, 8 MPs voted against the treaty (3 from UML, 3 from Workers and Peasants' Party, and 2 from Masal), 31 MPs abstained (26 from UML, 1 from RPP, and 4 nominated members of the King), and 220 MPs voted in favour of the treaty.
- 25 See WATER NEPAL, vol. 6, no. 1, July 1998.
- 26 What exactly is the DPR or when and how it should be completed are points of intense debate. Water resources minister (at the time of the treaty) Pashupati Rana mentioned in an interview to Kathmandu Post of 21 January 1997 stated: "The DPR on the Pancheshwar was all ready at the time the treaty was signed". He also said in the same interview that the Nepali version of the DPR had been sent to India but that India had not responded, and that the formal instruments of ratification of the treaty had not been exchanged between the two governments and was expected to be done during the forthcoming Nepal visit of Indian prime minister H. D. Deve Gowda. On the other hand, in a separate interview to Kathmandu Post on 25th April 1997, foreign minister Prakash Chandra Lohani stated that HMG had formally informed India of the passage of the treaty together with the *sankalpa prastav* already in November 1996!
- 27 October 11, 1996 Himalaya Times
- 28 November 19, 1996 Gorkhapatra. Also Himalaya Times of 24 November 1996.
- 29 See "Minutes of the Second Meeting of the Joint Team of Experts of Nepal and India on the Sapta Kosi High Dam Multipurpose Project (Nepal) Held in Kathmandu, Nepal on January 7-9, 1997".
- 30 Dahal, R., 1998: As Enron Came, It Went, Himal South Asia, Kathmandu
- 31 Kedar Subedi: "Maha Adhiveshan Ma Emale Le Ke Payo, Ke Gumayo", in Saptahik Bimarsha of 6 February 1998. Subedi claims to be quoting Gautam's reply in parliament on West Seti.
- 32 The Kathmandu Post 28 March 1997.
- 33 April 21, 1997 Kantipur
- 34 In Tarun Rashtriya Saptahik 16 June 1997.
- 35 News and photo published in Punarjagaran of 29th July 1997.
- 36 The representatives at this meeting are Dr. Ram Sharan Mahat, Govinda Raj Joshi and Dr. Binayak Bhadra from the Nepali Congress, Khadga Prasad Oli, Jhalanath Khanal and Bim Rawal from UML, and Kamal Thapa, Sarbendra Nath Shukla and Rajiv Parajuli from the RPP.(August 4, 1997, Kantipur)
- 37 September 18, 1997, Kantipur. See also Dixit, A., 1997: *Mahkali Sajha Ho Pani adha Ko Adha Ho*, in Mulyankan and Gyawali, D. 1997: Mahakali Sandhi – Aba Ke Garne?, in Nepali Himal of May/June.
- 38 December 15, 1997, The Kathmandu Post
- 39 May 20, 1998, Kantipur

- 40 See interview in Budhabar Weekly with Rishikesh Shah: "Kalapani Ma Bharatiya Fauj Rakhna Diekai Raja Mahendra Le Ho", 29 July 1998.
- 41 Kathmandu Post of 3rd August 1998. It is surprising that this issue was raised because Pashupati Sumsher Rana, in an interview with Himalaya Times when asked if Enron had gone back because of his intransigence, replied that he was willing to give the survey license to Enron provided the issue of downstream benefits ("which would extend all the way to Bangladesh") could be resolved before the production license would be given. (Himalaya Times, 10th May 1998)
- 42 August 8, 1998, The Kathmandu Post
- 43 September 17, 1998, Samakalin
- 44 See Gorkhapatra: "I am having a difficult time because of the 'water mafia'"; of 29th November 1998.
- 45 November 6, 1998, Kantipur
- 46 See Khanal, Jalanath 1998: "*One Visit Many Benefits*", in UML party monthly Navayug, Mangsir (Nov/Dec), Kathmandu. The UML was heavily criticised for this action by both the left as well as right parties.
- 47 See Kantipur: "Decision to Speedily Prepare the DPR of Pancheshwar", of 2nd January 1999, Kathmandu.
- 48 See Mulyankan 1999: "Why Does An Election Government Want To Implement the Mahakali Treaty?", of Poush (Dec/Jan), Kathmandu.
- 49 For discussion of pitfalls in water-led development strategy for Nepal see Thapa, P. J., 1997: *Water-led Development in Nepal – Myths, Limitations and Rational Concerns*; WATER NEPAL vol 5 no 1, July, Kathmandu. Also Dhungel's examination of the Dutch Disease impact on Paraguay's economy with Itaipu and Yacyreta mega-hydroelectric projects are instructive in this regards. See Dhungel, H., 1996: *Macroeconomic Adjustments to Large Energy Investments in a Small Controlled Open Economy – A Policy Analysis of Hydropower Development in Paraguay*; unpublished PhD dissertation, University of Pennsylvania.
- 50 See interview with Shah in Budhabar Weekly, *ibid*.