

Mahakali Mess: Article 126 and the Cumulative Cost of the Path Not Taken

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Thirteen Year Itch

Before approving the Mahakali Treaty in a chaotic session close to midnight on 20th September 1996 by a 2/3rd majority, Nepal's 2nd parliament unanimously passed four strictures¹ that basically re-defined the treaty. It thus assuaged some the opponents who agreed to vote for it on the understanding that those strictures which met their objections had now been incorporated into the treaty². It can thus be taken that the Nepali parliament, as per Article 126 of the constitution³, passed a motion approving the Treaty upon condition that it meets those obligations. India has not accepted them, hence they do not form part of the treaty; but then the Nepali political parties cannot run away from them because they have unanimously pledged themselves to the strictures in front of the Nepali people. Hence Mahakali becomes a conditionally ratified treaty, which really is no ratification, thus leaving the treaty in a moral limbo. To say it has been ratified is to fool either the international community (since there were strictures attached to it) or the Nepali people (since the Treaty does not incorporate what they think their representatives stood for in the national interest).

Even if one considers it a "ratified treaty" on hair-splitting legalistic grounds, none of the crucial dates stipulated within the treaty have been met. The Detailed Project Report to have been completed in six months has not been done even now into the 13th year, nor has the colossal financing been arranged in two years for building one of the world's highest dams. Obviously, the Pancheshwar project itself, which was stated to have been completed in eight years, is not even on the drawing board. To change these dates and to act according to a new time-table, only the body that passed the Treaty (a 2/3rd majority of a normal parliament) has the requisite authority; and no such changes have been approved by any parliament to date. The Treaty furthermore has a provision that says it would be reviewed in ten years or earlier, ostensibly to take into account difficulties which could unforeseeably have cropped up; but this too has not been done in all these years despite the controversial interpretations between the civil society and governments on the one hand and Nepali and Indian hydrocrats on the other, as well as the serious lapse in agreed time table. Hence the Treaty has essentially expired.

If one stubbornly insists that Mahakali Treaty is still a treaty which continues to have legalistic validity, then one needs to confront the contradictions therein which are too glaring to ignore. To build one of the world's highest dams in one of the seismically and hydro-geologically most active zones on this planet, one needs a firm, broad-based societal consensus that transcends generations: to the already daunting physical challenges, one does not need to add unresolved social conflicts and strongly held countervailing positions. What is the current status of the river in light of the Sugauli Treaty of 1816 which states that the "Rajah of Nipal renounces all claims to land west of the Kali". Does the entire river belong to Nepal or is it a border river shared 50:50? If the river belongs to Nepal but not the right bank, what does that mean for a hydro-technical structure across the river that must abut on the right bank? If the Sarada Treaty of 1920 allowed the eponymous barrage to be built after Nepal swapped the left abutment, where is the swapped land Nepal is supposed to have received? What about the Nepali land at the headwaters of Kalapani, and where does the tri-junction of Nepal-India-China lie? If it is a border river that is shared

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50:50, then why is Nepal's share of the waters limited to as low as four percent (see Gyawali and Dixit, 2000)⁴? Why is India's share of the augmented flow from the not specified? How is electricity from Pancheshwar to be priced and what principles of optimization is to be followed for contradictory aims that require diametrically opposed reservoir optimization rules (maximize irrigation, flood control or power generation)? How is the massive sedimentation, not just suspended silt but massive bed-load movements that result from regular *bishyaris* (landslide-dammed lake outburst floods), to be understood and incorporated into understanding the economics of investment? Where are the displaced to be re-settled and how is it to be assured that they will be better off economically, socially and psychologically than they were before? And what economic and macroeconomic studies justify Nepal putting all its development investments in one basket and risking a serious "Dutch Disease" backlash?⁵

The so-called "integrated" treaty on the Mahakali river basin does not even pretend to answer these highly pertinent questions: it is a construction-focused treaty stemming from a very neo-colonial development paradigm of resource extraction and the assuring of security for the extractors. Had scientific and transparent studies been done first before the treaty was signed in haste, it would have allowed the two countries (and maybe others in the basin as well) to understand the implications of the larger picture and their obligations that need to be fulfilled long before expected benefits could accrue. However, since wild expectations were hyped up before understanding the responsibilities required⁶, the uncomfortable search for which has barely begun, there is resistance in the body social to come to terms with reality, viz. that the foundation built by the treaty is so unsound for the efficient and equitable development of the water resources of the basin that no edifice, physical or institutional, built on it will stand the test of sustainability.

Forest, not the Tree

The problem with the Mahakali Treaty is not just with the treaty *per se* or this and that of its clauses, although there is plenty of that too: it is primarily about the bad experiences of past mal-developments as well as an alternative vision of what future development should be like. When Rana Shogun Chandra Sumshere signed the Sarada Treaty with British India, which was already then a "developed colony" fully subjugated by a universal capitalist state, Nepali society had not even begun to experience the wrenching value changes that capitalism's "satanic mill" would impose⁷. Water for dry season irrigation or the importance of land (especially the left bank) for hydro-technical construction was not within the value system of the Rana rulers. For them, land had value if it was forested with commercial timber or could be converted into agricultural land. Hence, a century ago it was logical to see as a good deal the swapping of boulder-strewn riverbank wasteland with equivalent forests. It is only with today's hindsight that we recognize that unique geographical and geotechnical sites are themselves valuable resources without which river waters cannot be harnessed effectively or economically. Even then, one must give credit to the Rana rulers that they did manage to ensure Nepal getting a thousand cusecs of irrigation flow, which the country managed to utilize only some forty years later with the help of the World Bank.

In the mid-1980s, during the last years of Panchayat rule, Nepal raised concerns with India regarding the Tanakpur barrage which was planned upstream of the Sarada barrage and which proposed to divert the Mahakali waters to a power plant whose tailrace would empty into the Sarada canal, thus potentially denying the 1000 cusecs flow to Nepal's Mahakali irrigation project. Upon protests, India agreed to modify the design to empty the tailrace into the Mahakali, but kept denying that this had anything to do with Nepal. However, it was only with the "regime change" in Nepal in 1990 that India began to put pressure on Nepal's transition regimes to complete the left abutment of the Tanakpur barrage on Nepali territory. While the interim prime minister K. P. Bhattarai brushed away Indian pressure by ignoring water and focusing on constitution making as well as the holding of general elections under the new multiparty dispensation, the Nepali Congress

government of Girija Prasad Koirala succumbed to Indian pressure and, in December 1991, agreed to allow India to complete its left afflux bund on Nepali territory⁸.

What rankled Nepalis was the creeping "salami tactics" of India, first by refusing to share any plans and details on the project's potential impact on Nepal by claiming it was a wholly Indian project and none of Nepal's business; second by pretending that the relatively small amount of Nepali left bank required to complete the barrage was actually to prevent flooding in Nepal and ostensibly had nothing to do with the Tanakpur barrage; and third that what was given to Nepal as compensation to get this deal though was a gesture of goodwill on the part of India. What incensed the opposition in Nepal (and there was considerable amount of that) was Koirala's desperate attempt to prevent it from being tabled in parliament. A more transparent process of negotiation by the Delhi mandarins, rather than ham-handed attempt to force agreements upon weak and shaky governments, as well as open public debate in the parliament on what Nepal should rightfully expect in lieu of providing India the chance to complete its unilaterally constructed project on a border river⁹, would have led to a more healthy cooperative development between the two countries. Instead the path followed has been of one mistake covering another that can be mined by any force so interested to stoke up bad feelings on either side of the border.¹⁰ It is not a healthy state of affairs for Nepal or India to be in, but it is a real legacy from the past that continues into the present and probably much into the future unless rectified with ennobling statesmanship.

The Tanakpur debate in Nepal, both within the parliament and in the press and streets, did ask pertinent questions regarding both the substance and procedures for negotiating water treaties with India. It asked that treaties in the future be done in a publicly transparent manner and not behind closed doors; that Nepal's long-term interests not be sacrificed for short-term political support from the successor state to the colonial British Raj; and that the democratic provision of Article 126 of the constitution be refined to clarify what kind of water agreements can be done by a government with a simple majority and what would need its 2/3rd provision to come into effect. Unfortunately, several committees formed in the parliament to tackle these momentous issues never came to a closure, since Nepali politics fell into a "musical chair" series of coalition governments where the attention of political leaders was confined to acquiring ministerial berths. The Supreme Court too, in its incomplete decision, did not help matters: it agreed with the petitioners (and against Mr Koirala) that the Tanakpur 'Understanding' was a treaty that required parliamentary approval but failed to provide a definition of what constitutes 'pervasive, serious and long-term' mentioned in Article 126. On the contrary, it asked that the government and parliament define it themselves, but that it would reserve judgment as to whether such a definition was correct or not for the future. Thus the Supreme Court, instead of helping bring a controversy to judicious closure, set the scene for an infinite loop of litigation and counter-litigation. It is this that inhibited the parliamentary committees from pressing ahead with their task of discussing the strictures and working out a viable *modus operandi*.

An honest public debate in Nepal needs to have the water resources establishment interrogate itself: why do we want to develop our supposed water wealth? Some of the pertinent questions can be bulleted as follows:

- Do we need the products that flow from dam construction – regulated water for dry season irrigation and downstream flood control as well as electricity, navigation and fisheries – in Nepal for ourselves or for our neighbor across the border?
- If it is for ourselves, what are the real requirements – in terms of place, time, quantity, quality and scale – of our commerce and industry for electricity, of our agriculture for regulated dry season water and of our roads, bridges and settlements for flood protection? Do these large dams meet those requirements most effectively or are there other options that

need to be assessed prior to taking decisions that would inflexibly lock the country onto a sub-optimal path of development?

- If it is for export (both as benefits from electricity as well regulated water for irrigation, domestic and industrial use, as well as flood control) what is a fair price for the resource, which includes not just the water but the site where the dam can be built and the valleys and villages that need to be permanently flooded to produce the storage?
- If they are meant to be developed jointly for bilateral or even regional benefits, what benefit sharing principles are to be adopted? Is there a danger that there is too much downstream "free-ridership" in the deals, with Nepal failing to get its due share of the benefits that accrue downstream? Can they be dealt with through cross-sectoral and cross-basin tradeoffs?
- In both cases, what are the risks that Nepali economy and social fabric are capable of bearing and what are the risks that should not be borne by this generation nor should they be passed on to our future generation?
- In a 'federal' Nepal, what is going to be the case for 'ownership' of these sites, decisions regarding their exploitation including the level of investment contribution and the sharing of benefits that would accrue from them between the different units?
- Besides the social and economic risks, what are the physical risks such as from seismicity in this tectonically active area, from mass-wasting of Himalayan geology, from cloudbursts and *bishyaris*¹¹ etc? What will be their risk assessment consequences to their economics? How will mega-dams such as Pancheshwar, Karnali and Kosi High be assessed properly in light of these concerns?

It is Article 126 (old)/156(interim) of the constitution was primarily such an institutional mechanism that would, indeed should, have facilitated the assessment of questions such as those raised above. Unfortunately, this provision was never properly used by the political parties either with due diligence or due honesty; rather it was used by them *against* one another rather than *for* assuring the overall maximum benefit to the country.

Whither, Cooperative Development?

Cooperative development¹² would be distinguished from its alternatives, competitive and coercive developments, by two important factors: a high degree of volunteerism and a strong sense of mutual benefits. In contrast, coercive development is that imposed by a strong power over those incapable of resisting, i.e. a colonial power over a colony helpless to put forth indigenous views; and a competitive development is that brought about by a strong sense of "other-ness" and the unacceptability of being worse off than one's neighbor. India's current economic strength is the result of forcible colonial infrastructure building, including its market institutions, while the ethos of competition against the Japanese underlies much of the development initiatives in Korea.

Given the skewed relations between Nepal and India, coercive development is a great temptation for the latter while the former, being a late-comer to development, has not seen its nationalistic fervor translated into a healthy competitive streak. Even if Nepalis did acquire a competitive streak by some rare miracle, parity in conventional development indicators would be difficult to assure with the larger neighbours. However, since coercive development is not easily sustainable nor necessarily capable of giving maximal results¹³, cooperative development remains the most judicious choice for countries of the Ganga basin. However, developments of the last century, from the Sarada barrage with British India till the first decade of the 21st Century have not followed the principles required for pursuing such a path. In the past, decisions on the nature of development to be undertaken were already done in Delhi, whether it was Tanakpur, Gandak or Kosi, and Nepal was only

approached later to acquiesce to them. Nepali concerns were never part of the initial planning and design, only later add-ons or concessions. The result has been rancour and often impasse. A more transparent and early engagement would have allowed for a slew of alternative solutions to be considered, including decisions on trade-offs, perhaps even transcending the watershed and moving into the larger "problemshed"¹⁴.

The first requirement in this direction would be for Nepal to clear internally regarding the provision of Article 126 in its constitution. The Tanakpur/Mahakali issues were merged for political expediency without considering the larger political-economic and technical aspects of water resources development. That wrong approach has resulted in wasted years and a stymieing of creative efforts, which has to be accounted for as cumulated costs of not doing things right. It is only when there is clarity in the Nepali body politic that a cooperative approach can be initiated with confidence and the other riparians approached for joint endeavours. Along these lines, an effort in this direction was made in 2002/2003, through a "Situation Paper" to bring forth a set of criteria that would allow a proper and wholesome use of Article 126. They still seem valid, maybe with some modification, and will be discussed below as well as in the appended annex.

The main questions addressed by the Situation Paper was on how to decide if the 2/3rd provision of Article 126 of the constitution would be attracted. Conversely, what criteria would help decide if a normal government enjoying a simple majority in parliament could initiate development activities with other basin riparians. There were two main principles to help address the issue:

- Has a resource such as electricity or regulated water produced by development activities in Nepal, i.e. building a dam, a storage reservoir or diversion structures, crossed a boundary?
- And do the quantum of such resource crossing trigger any of the following nine criteria?

If no resource crosses the boundary, i.e. all of the produced resource are used within Nepal, then Article 126 does not apply as there is no resource sharing. If it does, then does it do so in quantity sufficient to deem it a "pervasive, serious and long term" matter? What must be noted is that it is irrelevant where the money to develop these hydro-technical structures come from, whether the capital is private or public, foreign (international as well as Indian) or Nepali. What matters is only if a resource goes outside the boundary of Nepal and that too in quantity sufficient to trigger any of the nine criteria outlined.

While these criteria could change with the years as Nepal's own capacity to build and utilize these resources, there is still a need for developing such a set of triggers if a healthy path of international cooperation on water resources development is to be brought about. It must not only enjoy broad political consensus, but it must also be broadly understood that they must be continuously monitored, discussed and improved upon. It is only then that Nepal can move away from a chronic and debilitating sense of having received a bum deal. Trying to push through water projects, electricity sales and other agreements with the lower riparians without first clarifying when and how the provisions of Article 126 (156 of the interim constitution) would apply will mean more mishaps and a rising tally of cumulative costs for the overall cooperative development of water resources in the region.

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Situation Paper Related to Evaluating "Pervasive, Serious or Long Term" Impact Stipulated in Article 126(2) of the Constitution of the Kingdom of Nepal 1990[□]

Article 126 (clause 2) of the constitution of the Kingdom of Nepal 1990 stipulates that treaties or agreements that have a 'pervasive, serious or long-term' impact on the nation must be ratified, acceded to, approved or supported by a two-thirds majority of the members present in a joint sitting of both the houses of Parliament. However, if the impact is of an ordinary nature, a simple majority of the lower house would suffice for the purpose. Thus, before any treaty or an agreement on any subject can be tabled in the joint sitting of both houses or only the lower house of parliament, it is imperative that its impact be subject to evaluation. Because the constitution as well as existing cases and the decisions of the Supreme Court are not clear on this matter, it has become difficult to move ahead with activities related to water resources development.

- 1) In the writ petition no 1851 filed in 2048 (1991AD) relating to the Tanakpur barrage, the decision of the Supreme Court on 2049/8/30 (1992/02/15) states that, besides legal and constitutional considerations, economic, technical and other aspects must be taken into account before deciding whether the agreement on the project was of a 'pervasive, serious or long-term' nature, and places the onus for the same on His Majesty's Government and the Parliament. The Supreme Court's decision itself is silent on the question of what constitutes 'pervasive, serious or long term' nature. It states that the full decision of the court would be written later, but this has not been done so far.

Thus the above decision of the, Supreme Court leaves the burden of defining 'pervasive, serious or long-term' on the government and the representatives of the people. It also points to the necessity of including legal, constitutional, economic, technical, political, and diplomatic considerations in such an evaluation.

- 2) With regard to Tanakpur barrage treaty, the Supreme Court's verdict basically mentions the following:
 - a) The agreed minutes and the documents of the joint commission indicate the need to accept that an agreement has been reached on issues related to Tanakpur barrage between His Majesty's Government and the Government of India (verdict page no 10); and with regards to this agreement, clause 2 of Article 126 is attracted as mentioned in section 'd' of the same clause concerning the 'sharing and utilization of natural resources' (verdict page no 15).
 - b) With regard to the issue of ratification, acceding to, approval or support of the treaty or agreement, the existing laws lack uniformity; and, for the sake uniformity it is essential that the laws be brought in harmony with the constitution and a proper process be established (verdict page no 16).
 - c) It is the responsibility of His Majesty's Government and the representatives of the people to evaluate the effects of the treaty or agreement on the nation. Such an

□ {Unofficial translation of *Nepal Adhirajyako Sambidhan, 2047 ko Dhara 126 ko Upadhara (2) ma Ullekhit 'Byapak, Gambhir wa Dirghakaleen' Asar Jaisrot Bikasko Sandarbham Mulyankan Garne Aadhar Tayar Garne Sambandhi Sthitipatra*. Original in Nepali prepared by the Ministry of Water Resources and circulated to over seventy experts (cha.na.35 of MoWR of 2059/12/13 (27/03/2003) for discussion on the subject at WECS Hall Singha Darbar on 5/1/2060 (18/04/2003) at 14:30 pm. However, Prime Minister Lokendra Bahadur Chand resigned at 1PM of the same day and the discussion meeting was postponed. Despite the fact that the task of defining these three qualifiers is fundamental, it has remained in limbo ever since. The Nepali version of the Sthitipatra was published soon thereafter in full in *Majdoor*, the mouthpiece of Nepal Majdoor Kishan Party, and the nine criteria developed in the Situation Paper have been discussed in Dhungel and Pun (2009) as well as Dixit, A., Adhikary, P. and Bisanghke, S. (2004).}

evaluation must also include legal, constitutional, economic, technical and diplomatic considerations (verdict page no 16-17).

- 3) According to the Supreme Court verdict, documents associated with Tanakpur barrage were to be ratified by the parliament. Moreover, the verdict also notes that "sharing and utilization of natural resources" has occurred with this agreement, as a consequence of which His Majesty's Government has been ordered to ratify the agreement according to Article 126(2). As a consequence of this order issued by Supreme Court, treaty on the Mahakali river, Pancheshwar project and Sarada Barrage concluded between His Majesty's Government of Nepal and the Indian Government has been ratified by the joint sitting of the parliament on 2053/6/4 (20th September 1996).
- 4) It is not in easy task to assess the impact of a treaty on the nation or to determine whether such treaty is of a 'pervasive, serious, long-term' nature, or to reach a decision on whether the treaty is of an ordinary nature or not. However, the terms "pervasive", "serious" or "long-term" nature" are interpreted in a relative manner in common parlance. Consequently, it is improper to assign absolute meaning or reach hasty conclusion. Even a short term agreement where little is lost and much gained has long term, serious and pervasive consequences. On the other hand even a treaty, despite being of say 50 to 100 years span that gives up much to get a lot less, may not have severe impacts. Furthermore, whether the evaluation of the impact of the agreements should be carried out based only on physical resources or on the abstract level of bilateral and friendly relations can be a moot point. Friendly relation among the nations and international goodwill (*comitas gentium*) are not likely to be evaluated on a material level. Besides, classification of treaties between nations as 'ordinary' or 'extraordinary' may not be valid. Hence, while assessing the impact of agreements, these aspects too need to be evaluated.
- 5) With regards to sharing and utilization of natural resources, the Constitution of the Kingdom of Nepal does not make explicit the nature of agreement as of "ordinary" and "serious" ones. Moreover, it also remains mute regarding the magnitude of the effects. Defining 'pervasive, serious, long-term' and using them as classifying standards to evaluate the effects of the agreement is a complicated task. Interpretation of 'pervasive, serious, long-term nature' can vary from individual to individual and also over time and among different groups of people. Passage of time can also make something seen as of a 'pervasive, serious, long-term nature' not quite so in due course. Present day interpretation of 'pervasive, serious, long-term nature' may not remain valid if technological breakthroughs are introduced in the future resulting in economic affluence. Hence, the interpretation of 'pervasive, serious, long-term' may not be as exact and objective as a mathematical figure; but it does not seem impossible, however, to present a set of criteria as a basis of defining 'pervasive, serious, long-term' in an integrated manner taking into account not just the letter but the spirit inherent in the formulation is not an impossible task.
- 6) The verdict of the Supreme Court has made it imperative to developed the basis for defining what constitute 'pervasive, serious, long-term' effects and reforming our legal mechanism accordingly. Programs associated with water resources demand colossal funding which is beyond the expenditure capacity of His Majesty's Government alone. Hence the role bilateral co-operation, donor community and the private sector is essential; but future collaboration with private and bi-lateral agencies will be facilitated only if what is meant by 'pervasive, serious, long-term' effects are clearly communicated. However, it is difficult to say that 'pervasive, serious, long-term' effects occur from the use of natural resources and their sharing in all cases. The verdict of the Supreme Court already indicates that the use of natural resources required the safeguarding of national interest, as the following excerpt indicates:

"Even from practical expediency, if we follow the cumbersome exercise of obligatory parliamentary ratification of any treaty or agreement with the mere mention of natural resources, parliamentary ratification may be deemed essential even for the study, survey and investigation of the natural resources such as forest, mountain, river and rivulets, water, air etc. Besides, parliamentary ratification that is seen as mandatory even to fly in experts or to seek simple assistance will create an extremely difficult and impossible situation. It cannot, therefore, be the purpose of the clause (2) of Article 126 to place before His Majesty Government such an impractical burden as regards natural resources exploitation.

"This special arrangement of parliamentary ratification in the Constitution was necessitated to assure that the nation would not be deprived of its just share in such agreements and that national interests would be protected. This clause does not intend to create unnecessary impediments for the studies, survey or research for Nepal's development efforts."

In examining the provision of Article 126 of the Constitution of the Kingdom of Nepal and the aforementioned excerpts from the verdict of the Supreme Court, evaluation of the 'pervasive, serious, long-term' effects of the agreements should concentrate on the magnitude of possible adverse impacts on the nation. What is important ultimately is to realize that the evaluation of any such treaty will have to be based on whether its adverse impacts are of an ordinary nature or have within it serious consequences of a 'pervasive, serious, long-term' nature.

- 7) The utilization of river water does not merely mean the water in the river: it also includes the place and its topographical features that allow the construction of infrastructures. A dam constructed on a narrow gorge helps to accumulate water in the reservoir behind it, which allows the generation of peak hour electricity. Without the requisite physical feature allowing such constructions, the waters in the flowing river cannot be exploited to a greater optimal degree. In the Tarai plains, it is not possible to accumulate water in a reservoir like in the hills or to have it flow from height to generate electricity. Allocation of the benefits which accrue through the use of a dam site is, in fact, sharing and distribution of the resources (such as electricity, irrigation, flood control, navigation, fisheries, tourism, etc). These benefits and their use may take place wholly within a country's boundary among different groups. If the distribution and use of the resources takes place across the national border, sharing can be deemed to have taken place with another country. The flow of resources at a particular topography is defined by the physical structure over a flow regime and organizational control maintained over it. Construction of the physical structure can be by the government as well as national or international investors. Such areas of investments are governed by the law and policies in place.

While interpreting the effect of 'pervasive, serious, long-term' consequences, drawing on the concepts of 'magnitude, extent and duration' used in environment impact assessment would provide additional insights.

- 8) Reservoir projects have (besides direct) indirect downstream benefits. In ensuring a nation's proportionate share of such benefits, what is to be borne in mind is where the regulated water is utilized. Hence, if the benefits from the regulated flow of the reservoir is guaranteed to be fully utilized within the territory of Nepal, and projects have been framed to ensure such benefit utilization, it becomes questionable if such projects need to be framed within the definition of 'pervasive, serious, long-term' effects for the purpose of ratification.

9) When considering the 'pervasive, serious and long-term' effects on the nation due to the sharing and use of natural resources, both direct and indirect adverse consequences have to be borne in mind. With regard to water resource development, it is essential to formulate some of the objective trigger criteria to determine whether such agreements have caused 'pervasive, serious and long-term' effects to the nation or not. Occurrence of even a single criteria, enumerated below, might attract the Article's provision of 'pervasive, serious and long-term' effects. They will be equally applicable to government or private sector projects as long as the benefits from the project cross Nepal's border and accrue on the other side.

- (a) If a project is greater than 1000 MW capacity.
- (b) If there is going to be trans-basin transfer of water.
- (c) If more than 10,000 people were to be potentially displaced.
- (d) If more than 25 km² of agriculture, grazing or forest lands would be submerged.
- (e) If the ratio of foreign investments to Nepali investment is greater than 80:20.
- (f) If the investor asked for sovereign guarantee.
- (g) If there are possibilities of inter-sectoral (water for water) or cross-sectoral (water for something else) benefit sharing.
- (h) If more than 50 per cent of the electricity produced is to be exported across the border, and
- (i) If the river on which the reservoir has been built produces regulated water that increases the dry season flow at the point where the river crosses the national boundary by 10 per cent or similarly reduces peak flood flow by 10 per cent.

Notes:

¹ Since these strictures have been dealt with in detail in chapters by other authors (e.g. S. B. Pun), they are not described in detail here. They are also mentioned in the Letter of the Ministry of Foreign Affairs, His Majesty's Government of Nepal to the Embassy of the Republic of India, Kathmandu on the Stricture of the Nepalese Parliament on the Mahakali Treaty, November 22, 1996 as follows:

"... The Ministry would like to inform that a Parliamentary Monitoring Joint Committee has been formed under the chairmanship of the Rt. Hon. Speaker of the House of Representatives to give guidance to [the] Nepalese side, during the preparation of the detailed project report, with a view to monitor the process reflecting the resolution and commitment as expressed by the parliament in safeguarding the national interest of Nepal. ..." (See Dhungel and Pun, 2008, pg 412).

² Personal communication from the then MP from the main opposition UML Hirannya Lal Shrestha who, despite the passage of the strictures, chose to vote against the Treaty as one of those still dissatisfied by the substantive and procedural flaws therein.

³ Article 126 requiring resource sharing treaties to be ratified by parliament, with a 2/3rd majority if deemed 'pervasive, serious and long-term' was in the 1990 Constitution. It was incorporated in toto in the current interim constitution as Article 156 after strong public pressure as well submissions by both the NCP(UML) as well as the NCP(Maoists). The arguments in this essay, which refers to the provision as Article 126, are equally applicable to concerns surrounding Article 156 of the interim constitution.

⁴ The wordings of the treaty are so ambiguous that Nepal's dry season share can be subject to seven different interpretations, from four to 41 percent (Dixit, quoted in Gyawali and Dixit, 2000).

⁵ The "Dutch Disease" implications of such large projects and supposed revenue flow to a small and undiversified economy such as Nepal's have been dealt with by Thapa (1997) and Dhungel (1999). "Dutch Disease" impact results in the distortion of the national economy and eventually the tearing up of the social fabric, as happened with Nigeria and oil (see Ibeanu and Luckham, 2007).

⁶ Benefit claims by hydrocrats and politicians championing the treaty included "Sun rising in the west", "Nepal becoming, if not an Asian Tiger economy, at least a leopard", "Annual revenue for Nepal to be 120 billion rupees"

- etc. (see Gyawali and Dixit, 2000).
- ⁷ The term "satanic mill" is from Karl Polanyi (1944) who, in his classic work *The Great Transformation*, describes the difference between a society that uses market as a valuable tool and one which places everything on the auction block, including human labour stripped of its social assets and land stripped of its ecology.
- ⁸ It must be mentioned, in defense of Koirala who was beginning to appreciate the complexity of water issues, that he had decided not to discuss water with India on his first visit (personal communication from the then ambassador to New Delhi Chakra Prasad Bastola, who was summoned at the last minute to the External Affairs Ministry and told that, if Koirala would not discuss water, India would not discuss other issues of interest to Nepal). Even with this warning, Koirala persisted with his stubbornness and did not include in his almost six dozen strong entourage either the water resources minister Basu Risal or the water resources secretary. He thus had no knowledgeable expert to fall back on for advice when the Indian pressure became intense. He, however, did ask the the law secretary with him if the "understanding" he was about to sign required going to the parliament as per Article 126 of the constitution. The law secretary said (wrongly on substance as well as subsequently with the Supreme Court decision) that there was no need to get parliamentary approval as this was only an "understanding" and not a treaty. That it was done in haste at the last minute was also highlighted by the fact that dates mentioned in it that was circulated were wrong and million units of electricity (MkWh) were referred to as mega Watts.
- ⁹ It is this author's considered opinion that the Tanakpur controversy, after the rectifications made to it subsequently, needed to face closure at that point. This is also essentially what the Baral Commission recommended. What Nepal received in compensation in terms of electricity, additional irrigation waters and transport linkage for west Nepal to trade across the border was sufficient in light of Nepal's having made no investment and was also a lesson to the New Delhi hydrocrats not to act in such a high handed manner. However, attempts to pass the Tanakpur treaty in the parliament through a simple majority (as it was a treaty but not of a 'pervasive, serious and long-term' nature) was torpedoed by infighting within the ruling Nepali Congress and its supremo Mr Ganesh Man Singh firing off a "letter bomb" that termed its passage a "death warrant". In reality, it's non-passage, and even more seriously the attempt to pass this without first defining and coming to a consensus with the opposition regarding what 'pervasive, serious and long-term' are, has been the death warrant for cooperative development of water resources between Nepal and India.
- ¹⁰ On the Indian side, in Bihar and UP, Nepal is constantly portrayed, very contradictorily, on the one hand as the "dog in the manger" that does not build its own dams to control floods but does not allow India to do so either, while on the other a country that "opens the gates of the dams to release floodwaters to UP and Bihar. These claims have been made at various times by not just newspapers but also prime minister Atal Behari Vajpayee and chief ministers Mayawati and Rabri Devi. As the first water resources minister to visit Bihar, this author had to point out to Indian journalists that "we don't even have storage or other dams that could release floodwaters to India, and the two barrages that are at the border with India (Kosi and Gandak) are fully under Indian control and management". (See Prabhat Khabar, Patna of 16 April, 2003 and Hindustan Times, Patna of 17th April, 2003).
- ¹¹ *Bishyari* is a Nepali term evolved over the ages to denote the cataclysmic deluge that results when a landslide creates a temporary rock-and-mud filled dam, which, when it inevitably is overtopped, causes the catastrophe. In terms of lives lost and property damage, they are more severe than the glacial lake outburst floods (GLOFs).
- ¹² The need for re-thinking international cooperation as the Age of Aid ends is discussed in Gyawali(2004). Rather than one-way, first World donor to Third World recipient money transfer, a more respectful mode of two-way give and take needs to be devised. This would require that the definition of the "developmental problem" not be confined just to aid bureaucrats from government ministries but also include other social solidarities such as local market and civil society players, and that the cooperation be carried out between likes of the North and the South.
- ¹³ See Gyawali (2000) as well as Thompson and Gyawali (2007) for a discussion of the role of power and risk perceptions in public policy.
- ¹⁴ The "problemshed" would include a larger set of considerations from trade to transport to education and many more. If Pancheshwar produced more regulated water than Nepal could use in its Far West, she could trade her 50:50 rights there for the use of more water in the drier basins such as Babal or even Kankal, or she could trade her share of outputs from the multipurpose dams for coal, or navigational access to the sea! This would entail the "voluntarism" enshrined in "cooperative" development as opposed to the coercive one. For a discussion of the concept of the "problemshed" see Gyawali, Allan et al (2006) as well as WWAP (2009).