

Re-negotiating the Mahakali Treaty in the changing geopolitics of Nepal

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Abstract- The Mahakali treaty has created a deadlock situation on the sustainable harvest of not only the water of the Mahakali River but also in different rivers of Nepal for hydropower and other river-related projects between Nepal and India. Even after two decades of the enforcement of the treaty, there is no progress in terms of the agreement yet, rather many provisions of the treaty and the letter exchanged regarding the treaty between the Government of Nepal (GoN) and the Government of India (GoI) is highly criticized in Nepal. Thus, this paper attempt to deal with the most controversial provisions of the treaty and present the views from Nepalese perspective. It also deals with the possibilities of re-negotiating the treaty in the context of changing geopolitical dynamics with the pro-active involvement of China in Nepal.

Index Terms- Nepal-India, Mahakali Treaty, Water resources, Treaty, Geopolitics

I. INTRODUCTION

Nepal owns about 2.27% of the world's water resources, and there are around 6,000 rivers, including rivulets and tributaries (CBS, 2007). Nepal possesses enormous potential for hydropower development and India always has an interest in it (Muni, 2012; Shukla, 2006). Nepal – India water relation goes back to 1874, and there are no significant rivers left where Nepal and India have not signed the collaboration agreement in various form (Dhungel, 2009; Dixit, 2008).

The Mahakali treaty is the most ambitious and controversial treaty enacted between Nepal and India (Gyawali & Dixit, 1999; Shukla, 2006; Subedi, 2006a). It is the first bilateral water resources treaty signed after the end of the Panchayat ruling system and the establishment of Constitutional Monarchical Multiparty Parliamentary system in 1990. Many provisions of the agreement were raised continuously as an issue of debate and disagreement between different stakeholders and also within the political parties in Nepal. Even after two decades of the enforcement of the treaty, there is no progress in the agreed terms in the deal; instead, it has created a deadlock situation in Nepal-India water relations.

Thus, this paper attempts to analyze the provisions of the Mahakali treaty and the subsequent letter of exchange between the Government of Nepal (GoN) and the Government of India

(GoI) from a Nepalese perspective. The article first discusses the ratification process of the Mahakali treaty followed by a detailed discussion of the contentious issues and the conclusion. This paper is based on the literature review, interview with people directly associated with the preparation and the ratification of the treaty, concern stakeholders including representatives from Embassy of India in Kathmandu, water resource experts, and analysts.

II. MAHAKALI TREATY AND THE RATIFICATION PROCESS:

The minority government of the then Communist Party of Nepal (Unified Marxist Leninist) initiated a comprehensive negotiation on the package deal of Mahakali River and prepared a draft treaty on Mahakali Package entitled “agreement between the then Kingdom of Nepal and the Republic of India Concerning the Utilization of the Waters of the Mahakali River, April 4, 1995”. The draft treaty was discussed by GoN with GoI during the visit of Nepal's Prime Minister, Man Mohan Adhikari to Delhi in 1995 but it was never materialized (Dhungel, 2009). The CPN/UML minority government was overthrown, and the coalition government led by Sher Bahadur Deuba of Nepali Congress (NC) was formed on the support of Rastriya Prajantra Party (RPP) and Nepal Sadhvana Party (NSP). The Deuba government further continued the talk between two countries on the Mahakali River Package deal in 1995. Finally, Pranab Mukherjee, the then Minister for External Affairs, GoI visited Kathmandu on January 27, 1996, and discussed the treaty for two days. Finally, Prakash Chandra Lohani, Minister of Foreign Affairs, the then His Majesty's Government (HMG) and Pranab Mukherjee, Minister of External Affairs, GoI respectively signed the treaty entitled Integrated development of the Mahakali River including Sarada barrage, Tanakpur barrage, and Pancheshwar project, hereby called Mahakali treaty on January 29, 1996, in Kathmandu.

The Mahakali treaty was denounced in national politics, and at the same time Baburam Bhattarai, the then Chairman of United People's Front Nepal issued 40 points demand to the coalition government of Sher Bahadur Deuba to address immediately. Among 40 points demand, point number 2 was about the Mahakali treaty, which states, “The so-called Integrated Mahakali Treaty concluded on January 29, 1996, should be repealed immediately, as it is designed to conceal the disastrous Tanakpur Treaty and allows Indian imperialist

monopoly over Nepal's water resources". In spite of louder voice against the treaty at the different levels and the threat of armed struggle, Prime Minister Sher Bahadur Deuba visited India and further signed the treaty at the Prime Minister Level on February 12, 1996. The treaty was tabled by Minister of Water Resources, Pashupati SJB Rana for parliamentary discussion and ratification on September 20, 1996 and it was ratified by two-thirds majority of the Parliamentarian of Nepal as per the provision of Sub – clause 'd' of Clause '2' of article 126 of the then constitution of Kingdom Nepal of 1990 along with the Sankalpa Prastav (Structure). The instrument of ratification of the Mahakali treaty was exchanged when Indra Kumar Gujral, Prime Minister India visited Nepal on June 4, 1997. Finally, the agreement entered into force from 5 June 1997.

III. CONTENTIOUS ISSUES:

The Mahakali treaty was highly criticized since the inception of the package deal, and the controversy flamed further as a result of the differences in the interpretation of the provisions of the treaty (Gyawali & Dixit, 1999). There is a provision to review the deal after ten years and also the provision of arbitration in the event of disputes, but the treaty was neither discussed nor any of the signatory parties yet entered into arbitration in spite of enormous public pressure and criticism. Pancheshwor Multipurpose Project (PMP) is the center of attraction of the treaty, but up until now even detail project report (DPR) of the project has not been finalized which was agreed to complete within the six months of the enforcement of the treaty.

British India constructed Sarada Barrage in the Mahakali River in 1928 after getting permission from GoN in 1920. India built Tanakpur barrage on a stretch of Mahakali River without obtaining the consent of Nepal stating Tanakpur as an alternative to the Sarada barrage. The unilateral establishment of the Tanakpur barrage portrayed the hegemony of India towards smaller neighboring sovereign state at international community (Dhungel, 2009). Thus, India with a smart move brought both the barrages; Sarada and Tanakpur, under the Mahakali treaty to portrait the consent of Nepal on the construction of the Tanakpur barrage. The Mahakali treaty has reestablished Sarada barrage which had already outlived its useful life and legitimized Tanakpur barrage which was unilaterally and forcefully initiated by India (Gyawali & Dixit, 1999; Pun, 2012). The most notable and highly criticized provisions of the Mahakali treaty and letter of exchange between GoN and GoI are analyzed and discussed below.

IV. ORIGIN OF THE MAHAKALI RIVER AND THE LAND OWNERSHIP OF KALAPANI AREA:

The Sugauli treaty of 1816 between Nepal and British India demarcated the boundary between Nepal and British India where the east of Kali River is Nepal and the west of Kali River as British India. The Mahakali treaty was ratified without resolving the issue on the origin of Mahakali River, of which there are three different interpretations; the stream coming from Limpiyadhura, the stream from Lepulek and artificially created a small stream from Kalapani Lake. The map published by the

Government of India in 1856 which was approved by Prime Minister Jung Bahadur Rana of Nepal clearly shows the origin of Kali river from Limpiyadhura (Dhungel & Pun, 2014). Furthermore, based on the treaty between China and Nepal of October 5, 1961, the place, triangular in position is a boundary between Nepal, China, and India at the far northwest corner of Darchula district is called Limpiyadhura (Siwakoti & Bhandari, 2006). However, India is claiming the stream coming from the artificially created Kalapani Lake as the origin of the Mahakali River without considering any historical documents (Lumsali, 1996; K. L. Shrestha, 1996).

Indian army has camped at the Kalapani since 1962, and it is one of the contested places regarding the ownership of land between Nepal and India. India has claimed that place at Kalapani as Indian Territory, whereas Nepal believes that India has encroached 19500 hectares of Nepalese territory in that area (Lumsali, 1996). Thus, both the parties should have used the Mahakali treaty as an opportunity to finalize the origin of the Mahakali River, so that the Kalapani issues could have solved. In contrast, Indian claims Kalapani as the territorial dispute, and it should be resolved separately (Iyer, 1999). However, the fate of land ownership of the Kalapani area will be determined by the origin of the Mahakali River, because the Mahakali River is the border river between Nepal and India. Thus, it would have been better to finalize the issue on the origin of the Mahakali River and also the Kalapani issue before any deal relating with such contentious issues.

V. CLAUSE '1' OF ARTICLE 2

"For the construction of the eastern afflux bund of the Tanakpur Barrage, at Jimuwa and tying it up to the high ground in the Nepalese territory at EL 250 M, Nepal gives its consent to use a piece of land of about 577 meters in length (an area of about 2.9 hectares) of the Nepalese territory at the Jimuwa Village in Mahendranagar Municipal area and a certain portion of the No-Man's land on either side of the border. The Nepalese land consented to be so used and the land lying on the west of the said land (about 9 hectares) up to the Nepal-India border which forms a part of the pondage area, including the natural resources endowment I in within that area, remains under the continued sovereignty and control of Nepal and Nepal is free to exercise all attendant rights thereto." (Mahakali Treaty, 1996)

Clause '1' of Article 2 states that "...construction of the eastern afflux bund of the Tanakpur Barrage, at Jimuwa and tying ...", However, the name of the place where GoI constructed Tanakpur barrage in Nepal side is called Bhrmhadev, not Jimuwa. Thus, the Mahakali treaty being an international treaty between two nations, the correct name should be stated.

VI. ARTICLE 3:

"Pancheshwar Multipurpose Project (hereinafter referred to as the "Project") is to be constructed on a stretch of the Mahakali River where it forms the boundary between the two countries and hence both the Parties agree that they have equal entitlement in the utilization of the waters of the Mahakali River

without prejudice to their respective existing consumptive uses of the waters of the Mahakali River..." (Mahakali Treaty, 1996).

The article 3 of the treaty states "...have equal entitlement in the utilization of the waters of the Mahakali River without prejudice to their respective existing consumptive uses of the waters of the Mahakali River...". It is one of the most controversial provisions of the treaty.

According to MoWR (1996), the then Minister of Water Resources, Pashupati Sumsher Rana interpreted the above provision as "equal entitlement to all the waters of Mahakali River" during the joint meeting of parliament. However, he interpreted the same provision as "equal half between Nepal and India on the remaining water after preserving existing consumptive use of both Nepal and India" on a different occasion. Furthermore, the point 3 of Strictures (Sankalpa Prastav) interprets the provision of article 3 as "equal rights to all the waters of the Mahakali."

Similarly, when I asked to interpret the understanding of Nepal on the provision of article 3 to Prakash Chandra Lohani, the then Minister of Foreign Affairs and the signatory of the treaty during an interview, he explained as below:

Let us assume that the total flow of the Mahakali River is 24,000 cusecs. Now, as per the statement "...without prejudice to their respective existing consumptive uses" the share of water of Mahakali River between India and Nepal will be 12000 cusecs for each country. He further describes, according to the provision of the treaty, out of 12000 cusecs share of India, India will now get only 4000 additional cusecs of water because India is using 8000 cusecs of water from Mahakali River via Sarada Canal since the time of Chandra Sumsher. He added if the water of Mahakali River is only 10000 cusecs then the share of water between Nepal and India is not 5000 cusecs each; instead India can claim 3000 cusecs of water from Nepal to maintain her existing consumptive use of 8000 cusecs. However, the water flow of the Mahakali River being 24,000 cusecs, there is no problem for Nepal.

When I further asked, whether equal entitlement indicates only on the remaining water after India's claim of existing consumptive use, Lohani replied, according to the language used in the treaty, the current existing right will get affected only if India receives less than what she is consuming before the Mahakali treaty.

The treaty was signed without a common understanding of the provisions, and it vulnerable to Nepal than India. Nepalese believe that the article 3 of the treaty has strengthened the demand of water that India has been using for irrigation not only from Mahakali River but also from all other rivers as the Precedent established by the Mahakali treaty (Pun, 2008; Siwakoti & Bhandari, 2006). According to Pun (2008) if India demands its prior existing consumptive uses of Kosi and Gandak rivers based on the Precedent established by the Mahakali treaty, then Nepal will not even get a drop of water from these rivers during the lean season. So the question arises what will happen to

the water resources of Nepal to Nepalese if India demands her existing consumptive uses based on the probable Precedent established by Mahakali treaty?

VII. LETTER EXCHANGED WITH THE MAHAKALI TREATY:

Clause 'a' of Para '3'

The DPR shall be finalized by both the countries within six (6) months from the date of the entry into force of the entry into force of the treaty. For this purpose, necessary data and reports shall be exchanged expeditiously. While assessing the benefits from the Project during the preparation of the DPR, net power benefit shall be assessed on the basis of, inter alia, saving in costs to the beneficiaries as compared with relevant alternatives available. Irrigation benefit shall be assessed on the basis of incremental and additional benefits due to augmentation of river flow and flood control benefit shall be assessed on the basis of the value of works saved and damages avoided. (Subedi, 2006b)

Clause 'a' of Para '3' of letter exchanged with the Mahakali treaty states, "...net benefit shall be assessed on the basis of, inter alia, saving in costs to the beneficiaries as compared with the relevant alternatives available..." Here concerning the provision of the treaty, GoN has stated that there are different methods of power benefit assessment; cost-plus, avoided cost of alternatives, willingness to pay, and resource use tax. Moreover, as per the interpretation of Nepal, among the above options "... relevant alternatives..." don't get matched with any options than avoided cost of alternatives. So Nepal believes that avoided cost of alternatives refers to the cost of alternatives like Thermal plant, gas turbine, etc (MoWR, 1996). However, India interprets that relevant alternatives need not to be only a thermal plant or gas turbine; instead, it could also be other hydro-electric projects (Iyer, 1999). Here, the contradicting view of GoI has ruled-out the possibility for Nepal to get benefit by selling a portion of its share of electricity generated from PMP in reasonable price to India. This provision of the letter of exchange is unclear and still needs more discussion between both the parties.

VIII. CLAUSE 'B' OF PARA '3'

"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 water of the Mahakali River by each Party under this treaty." (Subedi, 2006b)

The Clause 'b' of Para '3' states "...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..." This provision prohibits Nepal's claim of royalty on use of her share of water resources by India. Former secretary of India, Iyer states that "...in particular, any doctrine of ownership of flowing water and the implied right of the upper riparian to 'sell' the water so owned to the lower riparian (who would, in any case, receive that water naturally by gravity flow) seems non-maintainable..." (Iyer, 1999). Here, the statement of the Iyer might be right before implementation of PMP, but it is not rational in the scenario after

PMP. It is so because the natural flow of the river will get regulated after constructing the dam and India will get year around water which is not possible during the lean season at a natural flow of a river. Also, Nepal will be investing in the project. Thus, Nepal should get some incentives from India for getting a regular flow of the water.

IX. CONCLUSION

The sustainable harvest of Nepal's immense water resource for different purposes; hydropower development, irrigation and river linking project is not only beneficial to Nepal; instead, it is equally beneficial to India. Nepal and India have already wasted long period, and now it is high time to work together not either in big brother-small brother relations as blamed by Nepal to India or playing China card as blamed by India to Nepal, instead, partner with equal status for the mutual benefits of both the countries.

India seems giving strategic importance to Nepal since the rise of Narendra Modi as the Prime Minister of India in May 2014. He visited Nepal on August 3, 2014, after a visit of the then Indian Prime Minister Inder Kumar Gujral in June 1997, breaking a long gap of 17 years. India pledged the most significant aid amount worth the US \$ 1 billion for post-earthquake reconstruction (Shrestha, 2015). The economic blockade of India to Nepal in 2015 has significantly eroded the mutual trust. So the cooperation of India to re-negotiate the Mahakali treaty not only initiates the Nepal-India water relations that have been inactive since a long time, but also helps to generate the positive feelings among the Nepalese on addressing the feelings of Nepal to revisit the unequal treaty.

Nepal has two-thirds majority government of Communist Party of Nepal, and the party has a long history of criticizing the Mahakali treaty. The then Communist Party of Nepal (Unified Marxist-Leninist) and the then Communist Party of Nepal (Maoist Centre) merged on 17 May 2018 after landslide leftist victory in the election and formed Communist Party of Nepal (CPN). The UML faction of the CPN always pointed Nepal Congress for the enforcement of the unequitable Mahakali treaty and the Maoist faction always used to make Mahakali treaty as a political agenda. Most importantly, one of the reasons for the initiation of the armed struggle in Nepal was due to enforcement of the Mahakali treaty. Interestingly, K. P Sharma Oli, the then coordinator of the team to study the Mahakali treaty is the current most powerful Prime Minister of Nepal. So the initiation to re-negotiate the Mahakali treaty preserves not only the nationalist image of K. P Sharma Oli, his government and the party but also the deadlock situation on the harvest of Nepal's enormous potentials on water resources for prosperous Nepal will take a forward move.

Thus, it is very high time to re-negotiate the Mahakali treaty keeping every option, even the option to scrap the existing agreement, open for discussion and begin the new initiative for the sustainable use of the water of the Mahakali River with an objective to benefit both the nation equitably.

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