

# 6,480 MW Pancheshwar Multipurpose Project

## Six Vital Issues on Pancheshwar to be Addressed before Cashing Modi's One Billion US Dollars

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**Abstract:** Prime Minister Narendra Modi's visit to Nepal in August 2014 was instrumental in reinvigorating the stalled 6,480 MW Pancheshwar Multipurpose Project. In particular, the one billion US Dollar soft loan for infrastructures that Modi offered to Nepal has generated much enthusiasm. As the Mahakali Treaty was ratified in September 1996, and as public memory is short, this article reverts back 18 years ago into the heady days when the Water Resources Minister, Pashupati SJB Rana, publicly claimed that the sun would now begin to *'rise from the west'*! At that time, even the leaders in the opposing camp (the CPN-UML), started to count their chickens in billions and billions of rupees accruing from the sale of electricity to India. Today, that *'Som Sharma euphoria'* has again started to percolate among our political leaders. The article, hence, poses six vital issues that need to be **'fixed'** before the Pancheshwar Multipurpose Project can begin to taxi along the runway: *i) validity of Rashtriya Sankalpas/national strictures; ii) re-constituting the all-party Parliamentary Monitoring Joint Committee; iii) export of energy and its pricing principle; iv) formation of Mahakali River Commission; v) equal sharing of Mahakali waters after the completion of the Pancheshwar Project; and vi) determining the origin of Mahakali River.* The author believes that until these vital issues are fixed in an amicable and good faith manner, the viability of the Pancheshwar Multipurpose Project will again be in doubt !

**Key words:** Mahakali Treaty, Panchameshwar Multipurpose project, Nepal

### Background

The newly elected Prime Minister of India, Narendra Modi, landed on a two day visit to Nepal in early August 2014. In typical *'Veni, vidi, vici'* style, Prime Minister Modi enthralled the Nepalese from the high Honorable Members of the Parliament down to the very ordinary Nepalese on the streets. The Modi ripple—in particular the one billion US Dollar soft loan waved in front of the Honorable Members—travelled far and wide. That ripple reached the banks of Mahakali River at Pancheshwar culminating in the following joint press release from the governments of Nepal and India:

*The two Prime Ministers witnessed the signing of the Exchange of Letters regarding Terms of Reference of the Pancheshwar Development Authority. They agreed that the two Governments would set up the Authority within 6 months and finalize the DPR of Pancheshwar Development Project and begin implementation of the Project within one year.*

The Pancheshwar Multipurpose Project was the flagship item of the 1996 Mahakali Treaty. Except for a tiny minority, an overwhelming majority of the Joint Session of the two Houses of Parliament ratified the Mahakali Treaty in a historic<sup>2</sup> fashion on the night of September 20, 1996. In an overt effort to pat their own backs, party leaders publicly made various tall claims<sup>3</sup> about the billions of rupees that would accrue to Nepal from electricity export to India. In fact, a gleeful and euphoric Water Resources Minister, Pashupati SJB Rana, even claimed that the sun would now begin to *'rise from the west'*. However, the Pancheshwar flagship faltered and began to float listlessly, directionless for the last 18 years.

Suddenly, the Modi magic-wand has cranked alive the engines of the listless Pancheshwar Multipurpose Project. The Terms of Reference for the Pancheshwar

Development Authority (*incidentally another PDA!*) and the agreement to establish a PDA within six months have been signed, sealed, and delivered. After finalization of detailed project report (DPR), the Pancheshwar Multipurpose Project is set to begin implementation *'within one year.'* This article attempts to raise a number of vital issues on Pancheshwar vis-à-vis Mahakali Treaty that to the Nepalese public still remain vague, obfuscated, and unsettled. Although the issues may stem from the 1996 ratification of the Mahakali Treaty, they still need to be addressed transparently in *'good faith and trust'* by both the countries. Otherwise, the Pancheshwar project could again falter and float listlessly, despite the availability of one billion US dollars.

### Formation of Parliamentary Monitoring Joint Committee Officially Conveyed to Government of India (GoI) by Government of Nepal (GoN)

Public memory is extremely short. So, for the benefit of discussion, let us return to 1996. After the Mahakali Treaty was ratified on September 20, the Ministry of Foreign Affairs/GoN on November 22 officially informed the Embassy of the Republic of India at Kathmandu about treaty ratification *'as per the provision of the Constitution'* of Nepal. The Nepalese Ministry also requested the Indian Embassy to make necessary arrangements for the exchange<sup>5</sup> of instruments of ratification so that the treaty could come into force. The following is a part of that official letter highlighting the terms of reference of the Parliamentary Monitoring Joint Committee and the eight important Nepal-India related issues that were discussed by the parliament while ratifying the Mahakali Treaty:

*"The Ministry would like to inform that a Parliamentary Monitoring Joint Committee has been*

formed under the chairmanship of the Rt. Hon. Speaker<sup>6</sup> 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. The Terms of Reference of the Committee were as follows:

1. export of energy and its pricing principle;
2. formation of Mahakali River Commission;
3. equal sharing of waters of the Mahakali River after the Pancheswor project; and
4. Status of the Mahakali River.

In addition to advising about the formation of the Parliamentary Monitoring Joint Committee to look into the above issues, the ministry would also like to draw the attention of the Embassy to a number of issues on Nepal-India relations and other matters on the Mahakali Treaty and the utilization of the waters of Mahakali River, such as:

1. determination of the price of energy to be exported to India on the basis of the principle of avoided cost;
2. determination of the source of the Mahakali River;
3. withdrawal of the Indian military personnel from the Nepalese territory;
4. return by India to Nepal of the excess land (36 acres<sup>7</sup>) in Brahmadev Mandi/Tanakpur between pillar Nos. 3 and 4;
5. review of the 1950 treaty;
6. alternate transit route to Nepal to and through Bangladesh;
7. developing river navigation for Nepal for trade purposes; and
8. monitoring the Nepal-India border.

*In the light of the generally positive spirit shown by the Indian side towards the issues mentioned above, the Ministry hopes that the Nepalese concerns would be taken into account in a friendly and positive manner by the Government of India.”*

The Mahakali issues posed in the above official letter by the GoN to the GoI in 1996 are self-explanatory and of vital importance for Nepal. While kick-starting the 18 year old Pancheshwar Multipurpose Project, the Nepalese public has the right to be informed about the present status. This article limits its discussion to the following vital six<sup>8</sup> issues, four of them drawn from the Terms of Reference mandated to the Parliamentary Monitoring Joint Committee by the Parliament of Nepal.

### **Rashtriya Sankalpas/National Strictures**

When the Joint Session of the Nepalese Parliament overwhelmingly ratified the Mahakali Treaty in 1996, it was believed that ratification embodied the four national strictures or “*rashtriya sankalpas*.” Surya Nath Upadhyay, a former Water Resources Secretary, asserted<sup>9</sup> that ‘*records of the parliament showed that there was no sankalpa prastav (strictures of the parliament) put to the house according to the regulations of the*

*House of Representative, 1992 prevailing at that time.*’ GS Chintan queried<sup>10</sup> the Ministry of Energy on this same topic in December 2009 (*Mangsir 23, 2066*). The Ministry skillfully passed the buck by stating “*this Ministry has no record of authoritative information on the passing of Sankalpa Prastav as precondition by the then Parliament prior to the ratification of treaty, please avail all required information through the Legislative Parliament Secretariat.*’ The Parliament Secretariat replied in the usual circumventing manner on August 2010 (*Shrawan 25, 2067*) writing that “*prior to ratification of treaty the then Parliament, as per the regulations of Parliament, has no officially registered Sankalpa Prastav about the above subject. Before ratification of the above treaty by the Joint Session of Parliament, records indicate Water Resources Minister Pashupati Shumsher JBR on behalf of the government with the concurrence of the main opposition CPN-UML presented the “sahamatikabunda/points agreed on.”*” What does all this long-winded legal words mean in the end? Did Prime Minister SB Deuba with his Water Resources Minister Pashupati SJB Rana, Foreign Minister Dr. PC Lohani and the CPN-UML General Secretary MK Nepal merely pass half-baked strictures (*sankalpas*) in the Parliament?

So before kick-starting the Pancheshwar Multipurpose Project, the GoN must immediately declare whether the four strictures (*sankalpas*), supposedly passed by the Joint Session of the two Houses of Parliament, categorically exist or not !

### **All Party Parliamentary Monitoring Joint Committee**

Though Nepal’s Foreign Ministry mentioned the Parliamentary Monitoring Joint Committee, it was, in fact, an All-Party Parliamentary Monitoring Joint Committee that was constituted to provide an overall guidance to the government<sup>11</sup>.

The Terms of Reference of the Committee were as follows:

1. export of energy and its pricing principle;
2. formation of Mahakali River Commission;
3. equal sharing of waters of the Mahakali River after the Pancheswor project; and
4. Status of the Mahakali River.

Over a four year period from November 1996 to August 2000, records indicate that the two Speakers of the House, Ram Chandra Poudel and Taranath Bhat, as Chairmen had conducted 28 meetings of the All Party Parliamentary Monitoring Joint Committee. The Monitoring Joint Committee included<sup>12</sup> top national leaders such as Jhalanath Khanal, Bharat Mohan Adhikari, Bhim Bahadur Rawal, Mahesh Acharya, Subhas Chandra Nembang, Hridayesh Tripathi and the ministers Narhari Acharya, Pashupati SJB Rana, and Dr. Prakash Chandra Lohani. Many of these people still hold important positions in their respective parties. The minutes of those 28 meetings must surely reside now in

the Ministry of Energy as the Pancheshwar Project falls within that Ministry's purview.

Despite the decision to implement the Pancheshwar Multipurpose Project, the GoN has not uttered a single word on reviving the All Party Parliamentary Monitoring Joint Committee (APPMJC). This Monitoring Joint Committee was constituted by the Parliament **“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.”** So the GoN must declare when this APPMJC, ‘to guide the DPR preparation in safeguarding national interest’, would be re-constituted.

### **On ‘Export of Energy and its Pricing Principle’: First Term of Reference of Monitoring Joint Committee**

The following are taken directly from the Mahakali Treaty and the Letters of Exchange on the electricity to be produced by the Pancheshwar Multipurpose Project<sup>13</sup>:

Article 3, Clause 3 of Mahakali Treaty: *‘A portion of Nepal’s share of energy shall be sold to India. The quantum of such energy and its price shall be mutually agreed upon between the Parties.’*

Item 3(a) of the Letters of Exchange: *‘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 the relevant alternatives available.’*

The following<sup>14</sup> are the more pertinent questions (dated August 19 and August 25, 1996) from KP Sharma (Oli), coordinator of CPN-UML’s Mahakali Treaty Study Team. The respondent is PSJB Rana, the Minister of Water Resources. His answers were dated August 22 and August 27, 1996, respectively

**Coordinator, KP Sharma (Oli):** *Does the treaty’s provision that Nepal sell electricity to India create a situation whereby Nepal is forced [to sell] and India has choice [to buy or not buy]?*

**Minister PSJB Rana:** *Article-3 clause-4 of the Mahakali treaty states that a portion of Nepal’s share of energy shall be sold to India and not the entire amount. Nepal’s portion of electricity from the Pancheshwar project is about 5 arab 30 crore units annually. As such large amount of electricity cannot (sic) be consumed internally; it is in Nepal’s interest to provision some amount for sale to India. But as the treaty’s same clause has stipulated a mutually agreed quantum and price of electricity, this will not create a choice for India. Both parties are equally bound by the mutually agreed quantum and price. Besides, as both parties have signed the treaty, when Nepal sells electricity India will be automatically bound to buy.*

**Coordinator, KP Sharma (Oli):** *On what principle is the price of Nepal’s electrical energy to be sold to India determined on? And where and how has this principle been incorporated in the treaty? Is*

*‘savings in cost to the beneficiaries as compared with the relevant alternatives’ as stipulated in the treaty applicable in this case? And does this mean the same as ‘avoided cost principle’?*

**Minister PSJB Rana:** *To determine the price of electrical energy, various principles like cost plus, avoided cost of alternatives, willingness to pay and resources use tax are used. Among these, except for the ‘avoided cost of alternatives’ the wordings in the assessment of power benefit in item-3(b) of the Treaty’s Letters of Exchange do not agree with the other three principles. In other words ‘savings in cost to the beneficiaries as compared with the relevant alternatives’ and ‘avoided cost of alternative principle’ mean the same. The Columbia River Treaty of 1959 AD<sup>15</sup> between America and Canada used the same kind of language for the same purpose. Based on the evaluation of this benefit and the individual share, the price of electricity export will be determined. As per the treaty’s Article-12 clause 4, this will be provisioned in a separate Pancheshwar project agreement.*

So while the Water Resources Minister PSJB Rana interprets that **‘savings in cost to the beneficiaries as compared with the relevant alternatives’** and **‘avoided cost of alternative principle’** mean the same thing, the street-smart KP Sharma (Oli) rebuts **‘The wordings of the letter are for assessing the benefit of the Pancheshwar project and not for determining the energy price that Nepal sells to India.’** There are many people in Nepal who do not disagree with KP Sharma (Oli) on this point.

Most intriguing is the following answer<sup>16</sup> from Prime Minister SB Deuba to CPN-UML General Secretary MK Nepal:

*The treaty’s provision, that a portion of Nepal’s share of energy shall be sold to India with the quantum of such energy and its price mutually agreed between the two parties, forces India to buy Nepal’s power. This is automatic and clear! Saving in costs of energy as compared with generation from other alternative sources (like thermal plant, gas turbine, etc.) excluding hydropower will be the basis for determining electricity price. This is called the avoided cost principle on which the government is clear.*

These are the official interpretations of the GoN’s Water Resources Minister and the Prime Minister. It is indeed most intriguing why Prime Minister Deuba and his Water Resources Minister Rana failed to get the official interpretation in writing from the GoI regarding the **‘savings in Cost as compared with generation from other alternative sources (like thermal plant, gas turbine etc.) excluding hydropower’**. Equally intriguing is why both Coordinator KP Sharma (Oli) and CPN-UML General Secretary MK Nepal did not pursue this matter further.

Before kick-starting the Pancheshwar Multipurpose Project, it is fervently hoped that the GoN gets in writing from GoI her interpretation of Prime Minister Deuba’s



'other alternative sources (like thermal plant, gas turbine etc.) excluding hydropower'.

### **On 'Formation of Mahakali River Commission': Second Terms of Reference of Parliamentary Monitoring Joint Committee**

Article 9 of the Mahakali Treaty stipulated the formation of a Mahakali River Commission guided by the principles of equality, mutual benefit, and no harm to either Party. The function of the Commission was to: *seek information on... inspect all structures included in the Treaty and make recommendations to both the Parties.....to implement the provisions of this Treaty....To provide expert evaluation of projects....To coordinate and monitor plans of actions.....To examine any differences arising between the Parties concerning the interpretation and application of this Treaty.* Article 10 stipulated that project specific joint entity/ies for development, execution, and operation of projects in the Mahakali River like Pancheshwar Multipurpose Project may be formed for mutual benefit.

Without constituting the Mahakali River Commission and in the absence of All Party Parliamentary Monitoring Joint Committee much water has flown down the Mahakali River. After the Constituent Assembly election of 2008, none of the five Prime Ministers of Nepal deemed it necessary to reconstitute the Parliamentary Monitoring Joint Committee. Instead Prime Minister Madhav Kumar Nepal deemed it necessary to bifurcate the Water Resources Ministry into that of Irrigation and Energy. Again Prime Minister MK Nepal determined that the Secretary of Energy (not Irrigation) should lead Nepal's delegation to the Indo-Nepal meeting of Joint Committee on Water Resources (JCWR). Without constituting the Mahakali River Commission, the Fifth JCWR meeting in November 2009 finalized the Terms of Reference for the Pancheshwar Development Authority (PDA). While approving the ToR of the Pancheshwar Development Authority, Nepal surprisingly acquiesced to the following selection criteria for the Chief Executive Officer of PDA: *'either from India or Nepal on competitive basis having **required qualification, relevant experience, and proven track record.**'* Such **'relevant experience and proven track record'** clearly prevents Nepal from having the opportunity to have a Nepalese CEO for the PDA. Nepal, by virtue of her own default, would forever man the Additional Chief Executive Officer at PDA. As Pancheshwar is a bi-national project, the CEO post, shared on a rotational basis, turn by turn, would have been guided by the *'principles of equality, mutual benefit and no harm to either Party'*. The only crowning victory of the Nepalese delegation was that the headquarters of PDA will be based at Mahendranagar.

So is this Mahakali River Commission stipulated by the Mahakali Treaty a mere appendage to be scissored off at an appropriate time?

### **On 'Equal Sharing of Waters of the Mahakali River after the Pancheswor Project': Third Terms of Reference of Parliamentary Monitoring Joint Committee.**

The following passages have been taken verbatim from the Mahakali Treaty and Letters of Exchange on the controversy about 'equal sharing' of the waters of Mahakali River.

Article – 3 paragraph – 1 of the Treaty *'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.'*

**Item 3 (b) of the Letters of Exchange:** *'[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...'*

In response, KP Sharma (Oli), Coordinator of CPN-UML's Mahakali Treaty Study Team, submitted<sup>17</sup> the following questions (August 19 and 25, 1996) to Pashupati SJB Rana, Minister for Water Resources, who responded (August 22 and 27, 1996) on the controversial issue of 'equal entitlement in the utilization of the waters of the Mahakali River.'

**Coordinator Oli:** *Articles 1, 2, and 4 of the treaty quantifies the amount of water Nepal gets from the Mahakali river but this is not done so in the case of India. Why?*

**Minister Rana:** *Article-1 of the Mahakali treaty quantifies the amount of water Nepal gets because this is as per the Sarada barrage agreement of 1920 AD. The quantity of water, as stipulated by Article-2 of the treaty for Nepal, had to be mentioned to establish Nepal's right in lieu of the Nepalese land availed to India for the left afflux bund of the Tanakpur barrage. Article-4 quantifies Nepal's water for use in the Dodhara-Chandani area which was most appropriate from the Sarada canal itself.*

India has officially claimed in writing 326 cumecs as her maximum existing consumptive uses (Sarada canal's maximum capacity). This consumption differs from month to month and the average minimum flow of the Mahakali River is only 136 cumecs. Questions have arisen on the Sarada canal's maximum capacity and only after resolving these issues would it be appropriate to quantify on a monthly or daily basis India's water consumption. The two countries have agreed only on the 582 cumecs flow at the Pancheshwar dam site. As inflows from the watershed below the Pancheshwar dam still need to be ascertained and agreed upon, India's existing consumptive uses can be finalized and included when a separate Pancheshwar project agreement is signed. Unless and until the Pancheshwar DPR is prepared and mutually agreed upon by both the countries, it is difficult

to quantify India's actual existing consumptive uses from the Mahakali river and hence India's quantity has not been indicated in the treaty.

**Coordinator Oli:** *The answer to Question 6 '...the Pancheshwar DPR is prepared and mutually agreed upon by both the countries, it is difficult to quantify India's actual existing consumptive uses...' has been given. Not applicable in Nepal's case but applicable only in the case of India. What difficulty is there? Could you explain?*

**Minister Rana:** *The 1920 AD agreement for constructing the Sarada barrage quantified Nepal's water from the Mahakali River. To establish Nepal's right for permitting India to tie her left afflux bund to the Nepalese high ground, additional amount of water was quantified. **The treaty recognizes Nepal's as well as India's existing consumptive uses as prior use right.** In order to determine India's prior use quantity, the Mahakali River's monthly flows, the minimum flow, Sarada canal's capacity, and the quantity of water used previously need to be studied to quantify it. As both parties need to agree, the aim has been for a separate agreement on Pancheshwar project **only after detailed discussion and agreement with the Indian side.***

**Coordinator Oli:** *What is Nepal's existing consumptive use and how much is India's?*

**Minister Rana:** *While the 1920 AD agreement provides Nepal on an annual average basis 8 cumecs of water from the Mahakali River, the present Mahakali treaty with Tanakpur's additional water, prior to construction of the Pancheshwar project, makes Nepal's annual average existing consumptive uses as 41 cumecs. Due to the reasons given above in Answer 6, **both parties have yet to mutually finalize India's existing consumptive uses.***

**Coordinator Oli:** *Arrangements be made to release water for Nepal from Tanakpur at 241.5 m sill level?*

**Minister Rana:** *His Majesty's Government has already requested<sup>18</sup> the Indian Government accordingly.*

**Coordinator Oli:** *How do you interpret item (b) of clause 3 of the treaty's Letters of Exchange '...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...?'*

**Minister Rana:** *A commonly accepted principle, when interpreting a treaty, requires that good intention and the spirit and objectives of the treaty must be understood in a simple manner. The treaty's clause 3 (b) of the Letters of Exchange's wording '...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.' This must be interpreted by putting together the treaty's Article-3 line 3 in one place. This must not be interpreted independently. When interpreted in this manner, Nepal has full authority*

*over her portion of the water and how Nepal desires to use it is also protected.*

**Coordinator Oli:** *After construction of the Pancheshwar project, over how much of the increased regulated water will Nepal have the right? And India over how much?*

**Minister Rana:** *As stipulated by Mahakali treaty's Article-3, **Nepal and India have half-half entitlement<sup>19</sup> over the increased regulated water of the Mahakali river** after construction of the Pancheshwar project.*

The quick questions and answers between Oli and Rana suggest urgency. Further review of this correspondence gives the impression that Coordinator Oli had already assented to Article 3 of Mahakali Treaty's 'without prejudice to their respective **existing consumptive uses.**' Both Minister Rana and Coordinator Oli show little concern at the inclusion of that clause in the Treaty. This was a crowning victory for India, having far reaching implications for future Nepal-India water dialogues. India sought recognition of this principle from Nepal since late 1970s blocking World Bank and ADB funds for Kankai, Babai and West Rapti. In fact, India proposed and was rebuffed by the dying Panchayat regime in March 1990 this 'subject to the protection of the existing uses on the rivers' clause in the draft Treaty<sup>20</sup> on Mutual Cooperation. While Prime Minister Deuba and his Minister Rana readily succumbed to this 'protection of existing uses' clause by initialing the Mahakali Treaty in February 1996, Coordinator Oli suffered no bad conscience about the inclusion of that damaging 'prior use' clause. Coordinator Oli more concerned with limiting further damages questioned why only Nepal's and not India's water<sup>21</sup> requirements were quantified. Furthermore, Minister Rana admitted that India had already officially claimed<sup>22</sup> in writing 326 cumecs as her existing consumptive uses (*Sarada canal's maximum capacity*) when Mahakali River's average minimum flow is only 136 cumecs.

Hence, Coordinator Oli asked the most important question on how much of the increased regulated water does Nepal and India get after construction of the Pancheshwar Project. Minister Rana in typical bureaucratic fashion replied that Nepal and India have half-half entitlement as stipulated by the Mahakali treaty's Article-3.

On the other controversial clause '...precludes the claim, in any form, by either party on the unutilized portion of the shares of the waters of the Mahakali River...' Coordinator Oli was kind to Minister Rana for refusing to grill him more intensely. Besides the 'without prejudice to existing consumptive uses' clause, this 'precludes the claim in any form' clause will have far reaching implications in all future Nepal-India water resources dialogues. That India fully protected herself through this clause can be ascertained from the South Africa-Lesotho agreement on the Lesotho Highland Water Project. The agreement entitled Lesotho an annual

water royalty from South Africa for using water stored in Lesotho. In 1998 alone South Africa paid Lesotho US\$ 25.3 million for the use of 0.58 billion cubic meters of water. The Pancheshwar project has a live storage of over 6.6 billion cubic meters of freshwater. The royalty from 3.3 billion cubic meters of stored freshwater would have surely helped to build the dire infrastructures necessary for Nepal's most impoverished far western region.

#### **On 'Status of the Mahakali River': Fourth Terms of Reference of Parliamentary Monitoring Joint Committee**

To the query from the CPN-UML on the Mahakali Treaty's skillful wording 'recognizing that the Mahakali River is a boundary river on major stretches between the two countries', the government responded that the 'boundary river on major stretches between the two countries' and 'basically a border river' mean the same. To another query from the CPN-UML as to which is the main branch of Mahakali River, the government deftly replied that the main branch is the Kali River. CPN-UML then questioned from where did the Kali River originate? The government finally conceded that the origin of the Kali River from Kalapani Tal (lake) as indicated by India to be on the Nepal-India border is categorically NOT the Kali River origin.

Regarding the Mahakali river origin and Kalapani occupation, Prime Minister Deuba promised Secretary General Nepal in September 1996: 'The two countries have already signed an agreement wherein a three year program has been chalked to demarcate the Nepal-India border scientifically .... already decided to send a Joint Survey Team in the **coming winter to the Mahakali river origin region** and demarcate the border in a scientific manner .... No foreign military or police will be permitted within the Nepalese territory so demarcated.'

The Nepalese in general are still ignorant what has happened to our venerable Prime Minister's promise to send a joint survey team in the winter of 1996 with an agreed 'three year program' to demarcate the border. Now in 2014, we do know that nineteen cold winters have elapsed for Indian security forces manning the heights of Nepal's Kalapani!

The December 1816 Anglo-Nepal Treaty of Sugauli states 'The king of Nepal renounces for himself, his heirs, and successors, all claim to the countries lying to the **West of the River Kali**, and engaged never to have any concern with those countries or the inhabitants there of. 'The exact interpretation of this 'west of the River Kali' was tested very early on March 8, 1817 when the Zamindars of By as Praganna petitioned the Kumaon Commissioner, GW Traill: 'We are now informed that the villages situated east of Kalee are now [to] be attached to the Pargunnah of Dotee [Nepal]. There are only two villages so situated, Tinkar and Changroo, the remaining six villages of the Pergunnah namely Boodhe[Budhi], Gurbhuyan[Garbyang], Goonjee,

Nabhee, Rokutee[Nihal...?], Kuthee[Kuti], however, derive the support of their inhabitants almost entirely from the produce of land situated on that side of the land.' This correspondence indicates that, while the Zamindars resided on the west side of Kali in British India, their tenants lived on the east of the Kali River in Nepal. The Zamindars, fearing the loss of valuable revenue, immediately petitioned the Kumaon Commissioner who then asked his superior for direction. On March 22, 1817, J. A dams, the Acting Chief Secretary of the government of India, directed his Kumaon Commissioner that 'The letter and spirit of the Treaty of Peace given to the Nepalese Government (to) **the undoubted right to all lands situated to the eastwards of the Kali.....it is extremely undesirable to manifest any reluctance to give prompt and full effect to those stipulations of the Treaty.....**' Thus, when the Chief Secretary of the GoI declared in 1817 that the villages of Goonjee, Nabhee and Kuthee belonged to Nepal, this clearly manifests that the Kali River originates from Limpiyadhura.

The Survey of India resorted to 'cartographic aggression' when they prepared the map of Almora District during the periods 1865-69 and 1871-77. Contradicting its own 1856 map, the Survey of India re-named the river originating from Limpiyadhura as Kuti Yangdi (*Kali Nadi in local dialect*) and named the river originating from Lipulekh as Kali River. But the border, when approaching the Lipulekh Pass, deviated from following the so-called Kali River and conveniently followed the watershed ridge. British India resorted to this 'cartographic aggression' so that the ageless Kailash-Manosarovar pilgrimage-cum-trading route<sup>23</sup> through the Lipulekh Pass would be entirely within its control. Apparently both the Governments of Nepal and India after 1947 were totally unaware of this cartographic aggression. India, rudely shaken by the October/November 1962 Sino-Indian border clashes at Ladakh and NEFA, hurriedly referred to the old maps and resorted to 'physical aggression' by posting her paramilitary Indo-Tibetan Border Police Force from 1963.

Interestingly, just prior to India's intrusion into Nepal's territories east of the Kali River, the country-wide Nepal census<sup>24</sup> of 1961 was undertaken. The veteran journalist, Bhairab Risal<sup>25</sup>, was the census officer in charge of the Mahakali zone. Risal vividly recalls taking the census of the villages of Gunji, Nabhi and Kuti in the beginning of July 1961. All these villages are on the eastern side of the river locally known as Kuti Yangdi (Kali Nadi). This categorically confirms that the origin of the Kali River is Limpiyadhura and the territories to the east of Kuti Yangdi belong to Nepal. Thus, despite the Mahakali Treaty and the August 2014 decision to implement Pancheshwar Multipurpose Project, the fate of 372 square kilometers of Nepalese territory (310 sq. km in Limpiyadhura and 62 sq. km in Lipulekh/Kalapani) encroached by India in 1963 !



## Conclusion: Six Vital Issues to be Sorted Out:

With the Joint Press Release of the two Prime Ministers of Nepal and India directing their governments to 'set up the (Pancheshwar Development) Authority within 6 months and the DPR of Pancheshwar Development Project and begin implementation of the Project within one year', the following six vital issues need immediate attention:

**i) Validity of Rashtriya Sankalpas:** When the former MOWR Secretary/former Chief of CIAA with legal background (SN Upadhyay) questions the very validity of the Rashtriya Sankalpas, it is for the GoN to immediately come forward with its position. So far, the government has not done that. The Mahakali Treaty was ratified by the following people who still hold important positions in their respective political parties: former Prime Minister SB Deuba, Water Resources Minister Pashupati SJB Rana, Foreign Minister Dr. PC Lohani, CPN-UML General Secretary MK Nepal, KP Sharma (Oli) Coordinator of CPN-UML's Mahakali Treaty Study Team, Ram Chandra Poudel, Jhalanath Khanal, and Bharat Mohan Adhikari. Before the Pancheshwar Multipurpose Project kicks off, the nation awaits the answer from these luminaries.

**ii) Formation of All Party Parliamentary Monitoring Joint Committee:** The rationale behind the formation of this All Party Parliamentary Monitoring Joint Committee under the Chairmanship of the Speaker of the House of Representatives was primarily 'to give guidance to 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.' Note the carefully crafted wordings 'to give guidance....during preparation of DPR....resolution and commitments as expressed by the Parliament in safeguarding national interest....' This again is the responsibility of the GoN and hopefully it will act fast to reconstitute this important committee. They have not met since August 2000!

**iii) Determination of the Price of Energy to be Exported to India on the Basis of the Principle of Avoided Cost:** On this most vital issue, the then Prime Minister SB Deuba answered the then CPN-UML General Secretary MK Nepal as follows: 'Saving in costs of energy as compared with generation from other alternative sources (**like thermal plant, gas turbine etc.**) excluding hydropower will be the basis for determining electricity price. This is called the avoided cost principle on which the government is clear.' This is clearly the GoN's interpretation. What needs to be clarified very clearly is whether this is also the interpretation of the GoI or not. During the discussion on the Pancheshwar DPR, it is imperative that the GoI provides in writing, not verbal, its interpretation of this 'alternative sources

(like thermal plant, gas turbine etc.) excluding hydropower.'

## iv) Formation of Mahakali River Commission:

The formation of Mahakali River Commission has been superseded by the Pancheshwar Development Authority, for reasons best known to the former Water Resources Secretaries of the two governments. Already the Pancheshwar Authority CEO's criteria of 'relevant experience and proven track record' rules out Nepal CEO at PDA. As Pancheshwar is a bi-national project, Nepal must insist that the CEO post be shared on a rotational basis. In parallel with the All Party Parliamentary Monitoring Joint Committee, the Mahakali River Commission must be constituted. Once the DPR is finalized and implementation of Pancheshwar goes into full swing, the Monitoring Joint Committee should fade away and the Mahakali Commission should take over completely.

## v) Equal Sharing of Waters of the Mahakali River after the Pancheshwar Project:

On the issue of equal sharing of waters after the Pancheshwar Project, Water Resources Minister Pashupati SJB Rana deftly answered Co-ordinator KP Sharma (Oli): 'Nepal and India have half-half entitlement over the increased regulated water.' This is not that simple as Minister Rana supposes to be. Minister Rana had informed Coordinator Oli that after the Pancheshwar construction the regulated flow of Mahakali River would be 582 cumecs. Minister Rana had also informed Coordinator Oli that 'India has officially claimed in writing 326 cumecs as her maximum existing consumptive uses (Sarada canal's maximum capacity).' So in cold figures, half and half of 582 cumecs would mean 291 cumecs each for Nepal and India. But if this half and half is arrived at after deducting India's existing consumptive uses (assuming that India sticks to her gun of 326 cumecs), it would entitle (582 minus 326 = 256/2 = 128 cumecs) Nepal only 128 cumecs while India would receive 454 cumecs (326 + 128 = 454). So what exactly is the interpretation<sup>26</sup> of the GoN? This equal sharing of the Mahakali waters after Pancheshwar construction is still very obfuscated and confusing. Before finalizing the Pancheshwar DPR, this needs to be sorted out.

**vi) Status of the Mahakali River:** Records and maps clearly indicate that the origin of Mahakali River is Limpiyadhura. It was only in the mid-1870s that the British resorted to 'cartographic aggression' to keep under her control the ageless Kailash-Manosarovar pilgrimage-cum-trading route through the Lipulekh Pass. 'Physical aggression' for strategic purposes by Republic India occurred only in mid-1963 after her debacle in the 1962 Sino-Indian border clash. Thus, without the return of 372 square kilometers of Nepalese territory (310 sq. km in Limpiyadhura and 62 sq. km in Lipulekh/Kalapani) physically encroached by India in 1963, an atmosphere of

mutual trust and faith can never develop. This is very detrimental to the interests of both the countries.

In conclusion, it is hoped that the above six vital issues together with the 'cost of the project in proportion to the accrued benefits' regarding the Pancheshwar Multipurpose Project are amicably finalized 'reflecting the resolution and commitment as expressed by the Parliament in safeguarding the national interest of Nepal' within the one year time frame stipulated by the directive of the two Prime Ministers (Sushil Koirala and Narendra Modi) of Nepal and India.

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#### Foot Notes:

1. Julius Caesar, after defeating Pharnaces of Pontus in 47 B.C. at the battle of Zela (in present day north-eastern Turkey), sent these three famous Latin words 'Veni, vidi, vici – I came, I saw, I conquered' to his Senators in Rome.
2. Historic in the sense that 220 MPs voted for the treaty with only 8 MPs voting against, and 31 abstaining (26 of the abstentions came from CPN-UML) thus resulting in an overwhelming 96.5% of the MPs present at the Joint Session voting for the ratification of the Mahakali Treaty.
3. Water Resources Minister, Pashupati SJB Rana, claimed electricity export from Pancheshwar would net Rs. 21 billion annually, while Foreign Minister, Dr. PC Lohani, said Nepal would gain Rs 24 billion per annum. However, these projections paled next to KP Sharma (Oli), the Coordinator/CPN-UML Task Force on Mahakali Treaty, who predicted Nepal would earn in excess of Rs. 120 billion annually. The then Prime Minister's MK Nepal predicted far more modest some of Rs 34.5 billion annually. Curiously, all these revenue calculations were based on the 'avoided cost' principle. No one deemed it necessary to ask India what price it was willing to buy for!
4. Article 126 of the 1990 Constitution, now Article 156 of the Interim Constitution.
5. Treaty came into force on June 5, 1997 after exchange of instruments of ratification between the two countries. Strangely Bam Dev Gautam, who abstained during the treaty ratification, was the Deputy Prime Minister when the instrument of ratification was exchanged.
6. Ram Chandra Poudel, the present Vice-President of Nepali Congress, was the then Speaker.
7. Actually this is **36.68 acres**, indicating a lack of due diligence by Nepalese bureaucracy. This mistake of 36.68 acres excess land was made during the

swapping of lands for the 1920 Sarada barrage at Banbasa. India agreed on July 23, 1946 to return this excess land but has not done so even after 68 years!

8. The author refrained from discussing the seventh vital issue on '...cost of the Project...in proportion to the benefits accruing to them.' This is an extremely contentious issue and very little has spilled to the media. While some assert that India has already agreed to bear 63% of the project cost, many believe that India bearing 70% of the cost would be more equitable as Nepal has already agreed to '...precludes the claim, in any form, by either Party on the unutilized portion of the shares of the waters of the Mahakali River....'
9. SN Upadhyay. December 2009. The Mahakali Treaty: View from the Negotiating Table. Prof. Ananda P Shrestha and Dr. Pushpa Adhikari edited Mahakali Treaty Pros and Cons for Nepal, Sangam Institute Kathmandu.
10. The author wishes to thank Gopal Shivakoti 'Chintan' for availing this letter as well as the one from the Legislative Parliament Secretariat.
11. Parliamentary Secretariat's Verbatim Recordings of the Joint Session of two Houses of Parliament on Ashwin 4, 2053 (September 20, 1996).
12. The following were the members of the Committee for the First Meeting with the Speaker of the House of Representatives, Ram Chandra Poudel, as Chairman:  
1. Amar Raj Kaini 2. Urba Dutta Pant 3. Jhala Nath Khanal 4. Prem Bahadur Singh 5. Bhakta Bdr Balayar 6. Bharat Mohan Adhikari 7. Bhim Bdr Rawal 8. Mahesh Acharya 9. Mahesh Chaudhary 10. Rabindra Nath Sharma 11. Ram Janam Chaudhary 12. Surendra Pd Chaudhary 13. Subash Chandra Nembang 14. Hridesh Tripathi with Permanent Invitees i. Water Resources Minister, Pashupati SJB Rana ii. Foreign Minister, Prakash Chandra Lohani and iii. Parliamentary Minister, Nara Hari Acharya – Letter dated 2053/7/16 of Parliamentary Secretariate to Water Resources Ministry.
13. Official publication of the Ministry of Water Resources, His Majesty's Government of Nepal dated Kartik 29, 2053 (Nov. 14, 1996) on the Treaty between His Majesty's Government of Nepal and the Government of India concerning the Integrated Development of the Mahakali River including Sarada Barrage, Tanakpur Barrage, and Pancheshwar Project.
14. The questions of KP Sharma (Oli)/Coordinator of CPN-UML Mahakali Treaty Study Team and the answers of PSJB Rana/Water Resources Minister are extracted in to and translated into English by the author from the official publication in Nepali of the Ministry of Water Resources, His Majesty's Government of Nepal dated Kartik 29, 2053 (Nov. 14, 1996) on the Treaty between His Majesty's Government of Nepal and the Government of India concerning the Integrated Development of the Mahakali River including Sarada Barrage, Tanakpur



- Barrage and Pancheshwar Project
15. The Columbia River Treaty was actually signed on January 17, 1961. Minister Rana's reference to 1959 must be the report submitted in March 1959 by the International Columbia River Engineering Board (ICREB) to the International Joint Commission of the Governments of Canada and the United States of America – Booklet of British Columbia Hydro and Power Authority, October 1964.
  16. The September 11, 1996 written answers of Prime Minister SB Deuba to CPN-UML General Secretary MK Nepal's letter of September 10, 1996 (note within just one day ! – writer) are extracted into and translated into English by the author from the official publication in Nepali of the Ministry of Water Resources, His Majesty's Government of Nepal dated Kartik 29, 2053 (Nov. 14, 1996) on the Treaty between His Majesty's Government of Nepal and the Government of India concerning the Integrated Development of the Mahakali River including Sarada Barrage, Tanakpur Barrage and Pancheshwar Project.
  17. MOWR/HMGN Publication in Nepali dated Kartik 29, 2053 (November 14, 1996) on Mahakali Treaty.
  18. At the 7th JCWR meeting of 24-25 January 2013 at Kathmandu '...review the technical details of the new **Sill Level of 244.25 m of Head Regulator at Tanakpur for Nepal Canal and finalize it.**' Whither the 241.5 meter request? SN Upadhyay, former Water Resources Secretary, in his article The Mahakali Treaty: View from the Negotiating Table writes 'India withdraws the Mahakali waters from the Tanakpur Barrage at EL 241 metres [241.5 m] whereas for the supply of water to Nepal it provided unilaterally an inlet at the level of EL 245 meter. This means that the water to Nepal would not be available until the water to Tanakpur [India] is not supplied..... India constructed the inlet unilaterally to the disadvantage of Nepal.' 2009, Mahakali Treaty Pros & Cons for Nepal edited by Prof. Ananda P Srestha, Dr. Pushpa Adhikari, Sangam Institute, Kathmandu.
  19. Note Minister Rana's statement 'Nepal and India have **half-half entitlement over the increased regulated water**' – NOT half-half **after deducting the existing consumptive uses!**
  20. Bhasin, AS. 1994. Nepal's Relations with India and China. Delhi. Siba Exim Pvt. Ltd.
  21. SN Upadhyay, former Water Resources Secretary, asserts in his article The Mahakali Treaty: View from the Negotiating Table '...the lack of precise mentioning of the amount of water as "existing consumptive uses" is the greatest folly of the Mahakali Treaty.' 2009, Mahakali Treaty Pros & Cons for Nepal edited by Prof. Ananda P Srestha, Dr. Pushpa Adhikari, Sangam Institute, Kathmandu.
  22. India made additional 'existing use' claims from Lower Sarada Barrage, 160 km downstream of Sarada Barrage.
  23. 'The British encounter with Kailas and its environs stemmed from altogether more hardheaded motives. They wanted to know what was happening in the territories immediately adjacent to their prized Indian possessions. They were very interested too in the **possibility of opening up trading connections.**' The Sacred Mountain by John Snelling, 2006. Moti lal Banarsidass, New Delhi.
  24. During that time, the Rana system of administrative division was still intact, using terms such as Thum, Praganna, Garkha, etc. The villages of Gunji, Nabhi and Kuti fell under the Byas Garkha. At that time there were only 35 districts (32 districts outside of Kathmandu and three districts of Kathmandu valley) in Nepal and the present Darchula fell under the Baitadi administrative division. It was not until the early 1960's that 75 districts were created.
  25. The spritely 87 year old journalist, Bhairab Risal, is still around and remembers visiting that area towards the third week of Asar 2018. He stands by the census he carried out in the villages (Kuti, Nabhi, Gunji etc.) east of Kuti Yangdi (Kali River) in 1961. This is while individuals and their memories last. Alas! Our leaders are both deaf and amnesiac!
  26. According to former Water Resources Secretary, SN Upadhyay, in his article The Mahakali Treaty: View from the Negotiating Table '...the post-Pancheshwar water flow in the river would be in the average of 582 cumecs at Pancheshwar and 726 cumecs at Tanakpur. Out of this water according to the treaty 10 cumecs is to be left in the river to flow for environment purpose. The remaining (716 cumecs) is to be shared between the two countries, that is 358 cumecs each to India and Nepal.....the amount of water that would fall in the share of India would be higher than what it is withdrawing at present in Banbasa and hence would not affect adversely.' 2009, Mahakali Treaty Pros & Cons for Nepal edited by Prof. Ananda P Srestha, Dr. Pushpa Adhikari, Sangam Institute, Kathmandu. S N Upadhyay further quotes professor S. P Subedi who argued 'by defining the equal rights of Nepal and India only on the water less than the amount already in use does not seem to be compatible with the principle of equality or equitable utilization with regard to the water of Mahakali River'. Furthermore S. N Upadhyay states that the two lawyers, Salman and Upreti, found the provision confusing in its applications.