

Integrated Mahakali Treaty: *A perspective into UN Convention on the Law of the Non-Navigational Uses of International Waters*

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Abstract

The Integrated Mahakali Treaty between Nepal and India is a treaty governing the use of the international watercourse for irrigation, flood control, and hydro generation. The paper analyses the Mahakali treaty through the UN Convention on the Law of the Navigation Uses of International Waters (UN Watercourses Convention) based on the principles of equitable and reasonable utilization, no significant harm, prior notification, and cooperative management of information sharing. It also analyses that though Nepal and India are not parties to the convention has however incorporated the customary international principles such as Articles 7, 9 and 11, such as the obligation not to cause significant harm, the principle of notification, consultation and negotiation, and the peaceful settlement of disputes.

Keywords: Equitable and reasonable utilization, hydro generation, Mahakali Treaty, UN Watercourse

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INTRODUCTION

A treaty was signed with Nepal in 1996, known as the Mahakali Treaty, which focuses on the integrated development of the Mahakali River (referred to as the Sarda River in India). This treaty includes provisions for the Sarda Barrage, the Tanakpur Barrage, and the Pancheshwar Project. Additionally, the Kosi Agreement of 1954 (amended in December 1966) and the Gandak Agreement of 1959 (amended in April 1964) were established with Nepal for the construction of the Kosi Project and

the Gandak Project, respectively.¹

The term paper analyses in part II Integrated Mahakali Treaty, 1996, in Part II it shall incorporate the features of the United Nations Convention on the Law of the Non-Navigational Uses of International Water and Part III shall include the analysis of Mahakali Treaty in comparison with UN Convention on the Law of the nonnavigational Uses of International Water.

¹ Herath Gunatilake, Priyanka Wijayatunga and David Roland, 'Hydropower Development and Economic Growth in Nepa. Asian Development Bank'. 2020

INTEGRATED DEVELOPMENT OF THE MAHAKALI TREATY, 1996

The Mahakali Treaty is an Integrated Development of water resources in the Mahakali River which includes Sarada Barrage, the Tanakpur Barrage and the Pancheswor Project. The Sarada Agreement was signed in 1920 between Nepal and British Indian Government, where they agreed on water sharing and transfer of 4000 acres of land to build Sarada Barrage². The article 1 of the Mahakali Treaty stipulates about the Sarada Agreement, while article 2 mentions about the Joint Communiqué of Tanakpur barrage and the article 2 incorporates about the Pancheswor Multiple Project.

According to Upreti and Salman, 1999, the Mahakali treaty from structural vantage point, the treaty includes three distinct treaties related to water sharing of the Mahakali River.

Mahakali Treaty is one of the most controversial treaties signed between India and Nepal. On January 29, 1996 the foreign ministers of Nepal and India signed the 'Treaty concerning the integrated development of the Mahakali River, including Sarada barrage, Tanakpur Barrage and Mahakali Treaty'. And then after, on 12th of February 1996, the Mahakali Treaty was signed by the Prime Minister of India, Mr P.V.Narasimha Rao, and The Prime Minister of Nepal, Mr. Sher Bahadur Deuba.³

The provisions of Mahakali Treaty are as follows:

The preamble of the Mahakali Treaty emphasizes on the determination of India and Nepal 'to promote and strengthen their relations of friendship and close neighborliness for cooperation in the development of water resources'. One of the pertinent issues that the preamble recognizes is that the Mahakali River is a boundary river on major stretches between the two countries, and emphasizes on the need of both the countries to enter into a treaty on the basis of equal partnership to define their obligations and corresponding rights and duties thereto with regards to the utilization of the waters of the Mahakali River⁴.

Upreti and Salaman states that '*The Mahakali Treaty provides a false impression that the two governments have taken a "basin approach" to water resource management. However, given the fact that the considerations used to negotiate the treaty were limited to the tributaries covered by the future Pancheshwar Multipurpose Project (PMP), and that the initial investigation was limited in its examination of other water resource management options, it is clear that the treaty only seeks to develop water resources at the Pancheshwar Barrage. Status of Sarada and Tanakpur Barrages.*'

Thus, the comparative analysis of Mahakali treaty with provisions of the United Nations Convention on the Law of the Non-Navigational Uses of International Water provides the comprehend understanding of the position of Nepal under International Law.

2 Dipak Gyawali and Ajaya Dixit, 'Mahakalli Impasse and Indo-Nepal Water Conflict, Economic and Political Weekly', Feb. 27- March 5, 1999. Vol.34. No.9

3 Kishwor Upreti and Salman M.A. Salman, Hydro-Politics in South Asia: A Comparative Analysis of the Mahakali and the Ganges Treaties, 23rd Aug 1999,

<https://ssrn.com/abstract=171394> accessed on Oct 10, 2024.

4 Preamble of Mahakali Treaty

Sarada Barrage

Article 1 of the treaty is about the Sarada Barrage. The article stipulates that Nepal shall have the right to a supply of 1,000 cusecs of water from the Sarada Barrage in the wet season, that is, from May 15 to October 15, and 150 cusecs in the dry season, that is, from October 16 to May 14.

Likewise, Article 1.02 mentions that India is required to maintain a flow of not less than 350 cusecs downstream of the Sarada Barrage in the Mahakali River to maintain and preserve the river ecosystem.

Article 1.03 of the Mahakali Treaty provides assurances to Nepal that in case the Sarada Barrage becomes nonfunctional for any reason, Nepal shall continue to have the right to a supply of 1,000 cusecs of water by using the head regulator(s) constructed by India near the left undersluice (an artificial passage of water fitted with a gate for stopping or regulating flow) of the Tanakpur Barrage.

Tanakpur Barrage

According to Article 2, as per the decisions taken in the Joint Commission dated December 4-5, 1991, and the Joint Communiqué issued during the visit of the Prime Minister of India to Nepal on October 21, 1992 was to construct the eastern afflux bund of the Tanakpur Barrage at Jimuwa, Nepal. The Mahakali Treaty mentions that the 577 meters of land provided to use, no Man's land on either border or a tract of about 9 hectares of land to the West up to the Indo-Nepalese border, continue to be under the sovereignty and control of Nepal, and that Nepal would continue to be free to exercise all attendants' rights⁵.

⁵ Article 2, Integrated Development of the Mahakali Treaty

In lieu of construction of the eastern afflux bund of the Tanakpur Barrage at Jimuwa, Nepal obtained the right to a supply of 1,000 cusecs of water during the wet season, and 300 cusecs of water during the dry season.⁶ In accordance with the agreement between India and Nepal, India will undertake the construction of head regulators adjacent to the left under sluice of the Tanakpur Barrage and establish waterways with adequate water capacity extending to the Indo-Nepali borders. Both India and Nepal will collaboratively manage the operation of these head regulators and waterways⁷. The agreement stipulates that Nepal receives an annual supply of 70 million kilowatt-hours continuously free of cost, from the effective date of the Mahakali Treaty. For this purpose, India agreed to build a 132 KV transmission line all the way to the Indo-Nepalese border from the Tanakpur Power Station.⁸

Also, further arrangements such as

- a. A jointly operated additional head regulators and other necessary waterways required upto the Nepal-India border would be constructed to supply additional water to Nepal⁹.
- b. Nepal would have energy equal to half of the incremental output generated by the Tanakpur Power Station, starting from the date the Mahakali River's flow is augmented. In this agreement, Nepal is responsible for covering half of the additional operational

⁶ Article 2, Integrated Development of the Mahakali Treaty

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

costs associated with the Tanakpur Power Station to facilitate this incremental energy generation.¹⁰

Pancheshwar Multipurpose Project

Article 3 stipulates about the Pancheswor Multipurpose Project that is to be constructed on a stretch of the Mahakali River, a boundary river, and India- Nepal have equal entitlement in the utilization of the waters of Mahakali River.

Mahakali Treaty established the various general principles along with water distribution, power generation and energy sharing between India and Nepal.

- a) The project designed to produce the maximum total net benefit and all benefits accrue like power, irrigation, flood control shall be assessed.
- b) The project envisaged to implement power station of equal capacity on each side of Mahakali River and the total energy generated shall be shared equally between India and Nepal
- c) The cost of project shall be borne in proportion to the benefits accruing to India and Nepal
- d) Nepal shall sell a portion of its energy to India.

Article 4 of the agreement stipulates that India shall supply 350 cusecs of water for the irrigation of Dodhara-Chandani area of Nepali Territory. Also, Article 5 mentions that Nepal's water requirement is given prime consideration in the utilization of water.

The Mahakali Treaty establishes a general principle for maintaining the natural flow and water levels of the Mahakali River. According to Art. 7, both India and Nepal have agreed not to use, obstruct, or divert the river's waters in a way that would negatively impact its natural flow and levels.

Article 9 mentions about Mahakali River Commission. The commission shall be guided by the principles of equality, mutual benefit and no harm to both India and Nepal.

The Pertinent Features under UN Convention on Law of the Non-navigational Uses for International Waters, 1997

Principle Equitable Utilization and Participation

Article 5 stipulates the principle of equitable utilization and participation where watercourse states shall participate in the use, development, and protection of an international watercourse equitably and reasonably. The principle of equitable utilization is concerned with the apportionment and allocation of water sharing. The principle incorporates the concept of sustainable use and adequate protection of the watercourse. It expresses the duty of states to participate equitably in the use, development, and protection of an international watercourse¹¹.

Obligation Not to Cause Significant Harm

Article 7 sets forth the obligation not to cause significant harm. Paragraph 1 of Article 7 states that "in utilizing an international

10 Ibid.

11 United Nations Convention on the Law of the Non-navigational Uses for International Waters(Book Unit 2)

watercourse in their territory take all appropriate measures to prevent the causing of significant harm to other watercourses". This paragraph highlights that states should take measures to prevent significant harm to other watercourses.

Paragraph 2 provides that "where significant harm nevertheless is caused to another watercourse state, the state whose uses cause such harm shall in the absence of agreement to such use, take all appropriate measures... to eliminate or mitigate such harm and where appropriate to discuss the question of compensation".

According to this principle, no state within an international drainage basin is allowed to use the watercourses in its territory in a manner that would cause significant harm to other basin states or to the environment. This includes harm to human health and safety, beneficial uses of the water, or the living organisms within the watercourse system¹².

Principle of Notification, Consultation and Negotiation

Article 11 stipulates the exchange and consultation of information and possible negotiation on the effect of the planned measures. Article 12 mentions about the notification of possible concerned negative effects upon the watercourse state and article 13 provides 6 months to study and evaluate the effects and reply for the notification. Likewise, article 14 provides that notifying states shall cooperate by providing additional data and information for accurate evaluation.

Also, article stipulates about consultation and negotiation concerning planned measures.

Peaceful Settlement of Disputes

Article 33 of the convention advocates that all states in an international watercourse should seek as settlement of the disputes by peaceful means such as negotiation, good offices, mediation or conciliation or agree to submit disputes in International Court of Justice.

Analysis of Mahakali Treaty

Articles 3(1) and 3 (3) emphasizes on the notion of sharing of benefits from water uses in Pancheshwor Project which acknowledges the principle of mutual benefit and Article 9 (1) acknowledges the principle of equitable utilization of benefits¹³ is the peremptory principle of UN Convention on the Law of the Non-Navigational Uses of International Waters¹⁴.

As Article 33 of the UN Convention on Law of the Non-navigational Uses for International Waters, Article 11 of the Treaty provides a detailed dispute resolution and arbitration mechanism if the disputes are not resolved by the Mahakali Commission under Article 9 of Mahakali Treaty.

As Article 7 of the Mahakali treaty envisages to 'not to use or obstruct or divert the waters of the Mahakali River adversely' both India and Nepal has obligation to maintain the flow and level of the waters of the Mahakali River. This article and Article 8 acknowledge

12 Muhammad Mizanur Rahama, Principles of Transboundary Water Resources Management and Ganges Treaties: An Analysis, Water Resources Management, Vol. 25, 2009

13 Ibid.

14 Article 5, U.N. Convention on the Law of the Non-Navigational Uses of International Waters 1997

an obligation not to cause harm¹⁵.

Article 7, 8 and 9 (1) accept the theory of limited territorial sovereignty, where each party has the right to use the water as long as it does not preclude the rights and interests of the co-riparian¹⁶. As said by Salman & Uprety, 2002, however, the terms ‘no harm’ and adverse effect are not defined in the treaty and thus leave room for controversy.¹⁷

CONCLUSION

The Integrated Development of the Mahakali Treat was signed in 1996. This treaty includes provisions for the Sarda Barrage, the Tanakpur Barrage, and the Pancheswor Project. The Mahakali River is recognized as a boundary river, and the treaty between

India and Nepal incorporates relevant international norms. Notably, Article 9(1) emphasizes the principle of equitable and participation.

Additionally, the treaty includes several key principles in Articles 7, 9, and 11, such as the obligation not to cause significant harm, the principle of notification, consultation and negotiation, and the peaceful settlement of disputes. Although this agreement was made prior to the United Nations’ adoption of the Law of the Non-Navigational Uses of International Watercourses in 1997, it effectively incorporates international principles designed to benefit both India and Nepal.

15 Muhammad Mizanur Rahama, Principles of Transboundary Water Resources Management and Ganges Treaties: An Analysis, Water Resources Management, Vol. 25, 2009

16 Ibid

17 Kishwor Uprety and Salman M.A. Salmann, ‘Hydro-Politics in South Asia: A Comparative Analysis of the Mahakali and the Ganges Treaties’, 23rd August, 1999, <https://ssrn.com/abstract=171394> accessed on 20 October, 2024