WHEN IS A TREATY A TREATY IN LAW? AN ANALYSIS OF THE VIEWS OF THE SUPREME COURT OF NEPAL ON A BILATERAL AGREEMENT BETWEEN NEPAL AND INDIA

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1. INTRODUCTION

“For a small country, Nepal has produced more than its share of political oddities. It has a constitutional monarch, worshipped by many as an incarnate deity. It is also one of the few countries to have freely voted communists into power . . . On August 28th Nepal discovered it also had a Supreme Court prepared to overrule both king and party. The Court decided that King Birendra’s decision in June to dissolve parliament and call an election was unconstitutional.”¹

These lines were written recently in *the Economist*, after the Supreme Court of Nepal had delivered an extraordinary decision stating that the decision of the King of Nepal of June 1995 to dissolve parliament and call an election on the recommendation of the Prime Minister was unconstitutional. In 1992 this Court also delivered a very interesting decision, touching upon the law of treaties and affecting Nepal’s relations with India. The latter judgment is the subject of analysis in this paper.

A number of rivers originate in the Nepal Himalayas and flow through the valleys and plains of Nepal to India and ultimately to the Bay of Bengal. They can provide a great deal of hydro-electric power, a cheap and durable form of energy, much needed by the countries of South Asia. It is estimated that Nepalese rivers could generate up to 83,000 megawatts of hydro-electric

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¹ ‘The Monarch and the Marxists’, *The Economist*, 2 Sept. 1995, p. 53.

power,² which is more than the combined total hydro-electric power produced by USA, Canada, and Mexico. For instance, a single hydro-electric power project, the Karnali Project, would have an installed capacity of 10,800 MW, the second largest in the world.³ These rivers have also been very useful to irrigate the low-lying parts of Nepal as well as the fertile Indo-Gangetic plains in India. That is one reason why India became interested from as early as the 1950s to utilise the Nepalese rivers in the interests of both India and Nepal.

However, many Nepalese took the view that India was keen to exploit Nepal's hydropower potential to its advantage. Their opinion was based on Nepal's experience with the Kosi and Gandak projects in the early 1960s under which India secured disproportionate benefits to Nepal's detriment. It was this hang-up of the past that led to the insertion of a clause in the new 1990 Constitution of Nepal, at the insistence of all nationalist forces in the country, to ensure that no government in Nepal concludes a treaty to exploit water resources of Nepal without securing a two-thirds majority in parliament.⁴ Such a majority is very difficult to secure without taking all major parties in confidence. Nevertheless, a newly elected government of the Nepali Congress Party, which critics characterised as government supported and favoured by India, in 1991 concluded an agreement with immediate effect with India (hereafter the 'Tanakpur Agreement'), allowing it to build a 577-metre long afflux bund⁵ on Nepalese territory to ensure the success of an Indian hydro-electric power project being built at Tanakpur, located on the Indian side of the Indo-Nepal border river, Mahakali, using the water of this river. The agreement was to enter into force without awaiting or requiring the approval of the parliament of Nepal. A case was brought before the Supreme Court of Nepal challenging the validity of the agreement.⁶ The Prime Minister, who endorsed the 'Agreed Minutes' through a Joint Communique, contested the case stating

² "Only 0.64% of that potential is now harnessed. Foreign consultants say 25,000 MW are easily exploitable if and when India and Nepal reach some agreement on pricing." *Far Eastern Economic Review*, 8 March 1990, p. 26.

³ XXXVII *The Foreign Affairs Record* No. 3 (March 1991), p. 35 (Ministry of Foreign Affairs, Government of India).

⁴ See *infra*.

⁵ Anglo-Indian for: quay.

⁶ The case was brought before the Supreme Court under writ jurisdiction as a public interest litigation by Mr. B.K. NEUPANE, an Advocate of the Supreme Court of Nepal, asking the Court to review the decisions of the Government to go ahead with the Tanakpur Project without seeking parliamentary approval. The reason for bringing the case directly to the Supreme Court was to seek under certiorari jurisdiction judicial review of the agreement with India, in accordance with the rights granted to the citizens of Nepal to go directly to the Supreme Court to have any decision of the Government quashed if the decision is unconstitutional or if the fundamental rights of individuals have been violated.

that the Agreed Minutes did not constitute an agreement in law but were a mere understanding reached between the two countries to allow India to build the afflux bund on Nepalese territory for the Indian Tanakpur project in return for certain concessions. Hence, in his opinion, it was not necessary to table this understanding before parliament since the Constitution of Nepal and the Nepal Treaty Act required the Government to table only treaties and agreements and not understandings.

It is interesting that the Government of the day did not try to argue that the deal was an executive agreement and therefore not subject to the requirement of being tabled before parliament. What the Prime Minister in fact was saying was that the documents exchanged between Nepal and India were of a technical and administrative nature and related to matters for the regulation of which the executive was competent. The Government of Nepal focused all its efforts on denying that the instruments concluded between the two countries constituted a treaty.

In a very interesting judgment of far-reaching implications, the Supreme Court of Nepal held that the understanding reached between India and Nepal was a treaty for all purposes and that the Government of Nepal was under an obligation to table it before parliament for its approval for ratification.

2. PROVISIONS OF THE CONSTITUTION OF NEPAL AND THE TREATY ACT

The 1990 Constitution of Nepal provides in Article 126 that:

(1) The ratification, accession, acceptance and approval of treaties or agreements to which the Kingdom of Nepal or His Majesty's Government is to become a party shall be done in the manner prescribed by law.

(2) The law to be made pursuant to clause (1) shall, *inter alia*, require that the ratification, accession, acceptance or approval of treaties or agreements on the following matters be approved by a majority of two-thirds of the Members present in the joint session of both Houses of Parliament:

- (a) Peace and Friendship;
- (d) Defence and strategic alliance;
- (c) Boundaries of the Kingdom of Nepal;
- (d) Natural resources and distribution in the utilisation thereof.

Provided that out of the treaties and agreements referred to in sub-clauses (a) and (d), if any treaty or agreement is of an ordinary nature and does not affect the country in a pervasively grave manner or on a long-term basis, such treaty or agreement may be approved for ratification, accession, acceptance or

approval by the House of Representatives by a simple majority of the Members present and voting.

(3) A treaty or agreement not ratified, acceded to, accepted or approved as the case may be pursuant to this Article shall not bind the Kingdom of Nepal or His Majesty's Government after the commencement of this Constitution.

(4) Notwithstanding anything mentioned in clause (1) or (2), no treaty or agreement shall be concluded which compromises the territorial integrity of the Kingdom of Nepal.⁷

Pursuant to clause (1) of this Article, the 1990 Nepal Treaty Act was enacted.⁸ Article 4 of the Act requires the Government of Nepal to table before the House of Representatives all treaties and agreements (other than those referred to in Article 126 paragraph 2 of the Constitution) that need to be ratified, acceded, accepted or approved by Nepal. Such treaties may be ratified, acceded, accepted or approved with the consent of the House of Representatives by a simple majority of the Members present and voting. The Treaty Act also provides that once ratified, acceded, accepted or approved, the provisions of such treaties and agreements will be applicable as the law of Nepal and will prevail over other laws in the event of inconsistency with those laws.

Given these provisions of the Constitution and the Treaty Act, the issues before the Supreme Court were whether the Indo-Nepal agreement on Tanakpur constituted an Agreement for the purposes of the Constitution and the Nepal Treaty Act and, if so, whether it affected Nepal "in a pervasively grave manner or on a long-term basis" and was not "of an ordinary nature". The definition of a treaty provided in the Nepal Treaty Act is identical to that of the 1969 Vienna Convention on the Law of Treaties: "'Treaty' means an agreement concluded between two or more States or between a State and an international organization in written form and this word encompasses any document of this nature whatever its particular designation".

⁷ Translated by the author from the Nepali text of the 1990 *Constitution of the Kingdom of Nepal*, (Ministry of Law and Justice, Kathmandu), 2047 KARTIK 23 [October 1990], p. 73.

⁸ *Nepal Gazette*, 8 Poush 2047 (Dec. 1990), pp. 77-79.

3. THE NATURE OF THE DOCUMENT CONCLUDED BETWEEN NEPAL AND INDIA

An Indo-Nepal Joint Commission had been established in order to help identify areas for mutual economic co-operation between the two Governments and advise them on the feasibility and modalities of such cooperation. This Joint Commission had been asked, *inter alia*, to examine the possibilities of co-operation in harnessing Nepal's water resources in the interests of both India and Nepal and to make appropriate recommendations to the Governments. In order to facilitate its work on co-operation in matters relating to water resources, the Commission had set up a Sub-Commission on Water Resources. Upon the recommendation of the Sub-Commission the Joint Commission took certain decisions in the form of Agreed Minutes on 5 December 1991 which included the following provisions on the Tanakpur barrage project:

"(i) The site at Mahendranagar municipal area in the Jimuwa village will be made available for tying up of the Left Afflux Bund, about 577 meters [in] length (with an area of about 2.9 hectares) to the high ground on the Nepalese side The availability of land for construction of [the] Bund will be effected in such a way by HMG/N [Nepal] that the work could start by [the] 15th of December 1991.

(ii) India will construct a head regulator of 1,000 cusecs capacity near the left under-sluice of the Tanakpur Barrage, as also the portion of [the] canal up to [the] Nepal-India border for supply of up to 150 cusecs of water to irrigate between 4,000 to 5,000 hectares of land on [the] Nepalese side

(iii) In response to a request from [the] Nepalese side, as a goodwill gesture the Indian side agreed to provide initially 10 MW of energy annually free of cost to Nepal in spite of the fact that this will add to further loss in the availability of power to India from [the] Tanakpur Power Station . . .".⁹

The decision of the Joint Commission was endorsed by the Prime Ministers of India and Nepal in a joint press communique issued during the Nepalese Prime Minister's visit to India between 5-10 December 1991. The Supreme Court of Nepal had to decide whether the two instruments formed a treaty for the purposes of the Constitution of Nepal and the Nepal Treaty Act.

⁹ See *Nepal Gazette*, 8 Poush of B.S. 2049 (Dec. 1991), Part VI, Section 41, No. 36, pp. 9-10.

4. THE FACTUAL BACKGROUND TO THE TANAKPUR BARRAGE PROJECT

The site on which the main project is located is the land ceded to British India by Nepal after the two-year (1813-1815) war between the two countries.¹⁰ The land on which Nepal permitted India under the Tanakpur Agreement to build the 577-metre long afflux bund is the land returned to Nepal by British India in 1860 in return for Nepal's assistance in crushing the Indian Sepoy Mutiny against the British Raj.¹¹ It appears that as early as 1983 India had already started construction work of the Tanakpur barrage project on its soil to harness the water of the Mahakali River, without consulting Nepal.¹² It seems that only when the Indian side realized that without constructing an afflux bund on the Nepalese side of the border the project could not deliver the desired amount of electricity or water for India, the Government of India approached the Government of Nepal with a view to securing Nepal's prompt approval for the construction of an afflux bund. The political party that was in power in Nepal at the time was often characterised by critics as a party supported and favoured by India. It was against this background that the Prime Ministers of India and Nepal decided to conclude an agreement (without calling it an agreement) with immediate effect through an informal document entitled 'Agreed Minutes' in order to avoid the parliamentary procedure of ratification of treaties and agreements.

Many observers believed that the agreement itself was not after all a bad deal for Nepal, but the manner in which the agreement was concluded aroused nationalist sentiments in Nepal. If the Prime Minister of Nepal had come clean and tabled the agreement before parliament for approval as a normal bilateral transaction, the agreement could perhaps have been easily endorsed since the Government had a majority in parliament. Trying to avoid parliamentary scrutiny, however, he was forced to submit to the scrutiny of the judiciary.

5. THE DECISION OF THE SUPREME COURT

Delivering its judgment on the case on 15 December 1992, the Supreme Court stated, *inter alia*:

¹⁰ D.B. BARAL, *Tanakpur: From the Beginning to the End* (Pairavi Publications, Kathmandu, 1993) p. 4.

¹¹ *Ibid.*

¹² As mentioned in the written pleadings (Memorial) submitted to the Supreme Court on behalf of the Government. See *ibid.*, pp. 39-57.

“[that the documents in question concluded between Nepal and India] do not appear to have been concluded in any formal and traditional form. However, the joint press statement and the Joint Press Communiqué issued at the end of bilateral talks between the two Prime Ministers as well as the notice published to this effect in the Nepal Gazette on behalf of the Ministry of Water Resources and Energy of His Majesty’s Government demonstrate that the recommendations of the Joint Commission were endorsed by the two Prime Ministers and the Governments of the two countries. Thus, there is no logical reason to believe that the decisions included in the Agreed Minutes concerning water resources and endorsed by the two Prime Ministers and the Governments of the two countries did not amount to an agreement or a treaty and were mere recommendations or understandings.

The argument of the Attorney General that since there was no treaty or agreement of any formal or customary form concluded between the two countries the Agreed Minutes or understandings cannot be regarded as a treaty or an agreement is not consistent with the definition of a treaty or an agreement provided in section (a) of Article 2 of the Nepal Treaty Act, 1990. According to this definition, whatever its particular designation may be, if there has been concluded an agreement between two countries in written form that agreement has to be regarded as a treaty. After all, a treaty is a mutual agreement between two parties to create legal rights and obligations.

Neither the Vienna Convention on the Law of Treaties of 1969 nor the opinion of publicists or the decisions of international courts and tribunals require that a treaty be concluded in any particular form. In international practice, in addition to formal treaties, all other instruments known as memorandum, protocol, exchange of notes, declaration, convention, charter, covenant, final act, statute, *modus vivendi*, agreed minutes etc., have been regarded as treaties and agreements. Depending on the situation even a joint press statement or a joint press communiqué can constitute a treaty.

It happens every now and then that States enter into transactions akin to treaties but having no legally binding force because they create moral or political obligations rather than legal obligations and rights between States and are often known as political or moral understandings. But the decisions in question in this case were made through Agreed Minutes between Nepal and India which include provisions designed to create mutual rights and obligations between the two countries. For instance, the Agreed Minutes provide that Nepal will make its land available to India for the project but will not give up its right to exercise its continuous control and sovereign rights over such land and the natural resources therein. In return, Nepal will receive electricity and water for irrigation from India.

The Agreed Minutes also provide that India will be allowed to build a canal up to the Nepalese border and to carry out a survey with a view to constructing a road, etc. These decisions were included in the joint press statement and press communique issued after bilateral talks between the Prime Ministers of the two countries and published by the Ministry of Water Resources and Energy of His Majesty's Government in the Nepal Gazette. Thus, these decisions cannot be regarded as mere non-binding instruments of political and moral character; they appear to be the type of treaties which create mutual rights and obligations."¹³

Thus, the Supreme Court of Nepal seems to have subscribed to the view that the Agreed Minutes and the Joint Communique do not merely give an account of discussions and summarise points of agreement. They enumerate the commitments to which both India and Nepal have consented and thus create rights and obligations in international law for these two countries. That is how the public and the official and semi-official media understood the texts when they described the deal between India and Nepal as "a breakthrough on the vexed issue of water resources development" between the two countries.¹⁴ Consequently, the agreement written in the form of Agreed Minutes and included in the Joint Press Communique should be submitted to parliament for approval in accordance with the Constitution of Nepal before the agreement could legally enter into force.

5. CONCLUDING OBSERVATIONS

Although it is rare to find a municipal law court in a developing country that challenges the power of the executive branch of the State with regard to its conduct of foreign policy affairs, the above-mentioned views of the Supreme Court of Nepal are consistent with the views of international courts and tribunals. For instance, the International Court of Justice stated in 1978 in the *Aegean Sea Continental Shelf* case that the Court "knows of no rule of international law which might preclude a joint communique from constituting an international agreement".¹⁵ Similarly, in 1994 the ICJ in the case between Qatar and Bahrain concerning a maritime delimitation and a territorial dispute

¹³ Author's own translation from the Nepali text of the Judgment as published in D.B. DARVAL, op. cit. n. 10, p. 91.

¹⁴ See, for instance the front page coverage of the deal in *The Times of India*, 12 Dec. 1991, p. 1, under the heading: 'Indo-Nepal talks: water resources issue resolved'.

¹⁵ ICJ Rep. (1978) p. 39, para. 96.

held that the Agreed Minutes of 1990 between these two countries constituted an international agreement since they created rights and obligations in international law for the Parties by enumerating the commitments to which the Parties had consented.¹⁶

Indeed, in its commentary to the definition of 'treaty' which was incorporated without change in the final text of the 1969 Vienna Convention on the Law of Treaties, the International Law Commission of the United Nations stated that "[t]he term 'treaty' is used throughout the draft articles as a generic term covering all forms of international agreement in writing concluded between States". The ILC went on to remark that "very many single instruments in daily use, such as an 'agreed minute' or a 'memorandum of understanding', could not appropriately be called *formal instruments*, but they are undoubtedly international agreements subject to the law of treaties".¹⁷

There are a number of instruments concluded between two or more states and termed 'agreed minutes' which have been recognized by the international community as legally binding international agreements. For instance, the 1963 boundary agreement between Iraq and Kuwait was concluded in the form of 'agreed minutes'. During and after the Gulf War in the wake of the Iraqi invasion of Kuwait the UN and the international community treated this instrument as a legally binding international agreement. In its resolution 687 (1991) the Security Council of the UN demanded that

"Iraq and Kuwait respect the inviolability of the international boundary and the allocation of islands set out in the 'Agreed Minutes between the State of Kuwait and the Republic of Iraq regarding the restoration of friendly relations, recognition, and related matters', signed by them in the exercise of their sovereignty at Baghdad on 4th October 1963 and registered with the United Nations . . .".¹⁸

The decision of the Supreme Court of Nepal can be regarded as a bold decision which acts as a check against any excesses by the executive in foreign policy matters. Such decisions of municipal courts are quite helpful in ensuring that relations between States are based on transparency and democracy and that the Government of the day does not conclude an agreement with a foreign Power under a different and an informal instrument in order to avoid parliamentary and constitutional scrutiny. This is particularly so in a country such

¹⁶ ICJ Judgment of 1 July 1994, General List No. 87, p. 13, para. 25.

¹⁷ II Yearbook of the International Law Commission (1966) p. 188.

¹⁸ See, generally, M.H. MENDELSON and S.C. HULTON, 'The Iraq-Kuwait boundary', 64 BYIL (1993) p. 135 et seq.

as Nepal whose leaders have in the past concluded certain lopsided treaties with India without properly weighing the long term pros and cons of the treaty for the future of the country. Therefore, the present decision is likely to strengthen not only the constitutional system of parliamentary scrutiny of executive acts on foreign policy matters but also the democratic process that is under way in the country since 1990.