

Supreme Court, Constitutional Bench
Rt. Hon. Acting Chief Justice Hari Krishna Karki
Hon. Bishwambar Prasad Shrestha
Hon. Anand Mohan Bhattarai
Hon. Sapan Pradhan Malla
Hon. Tanka Bahadur Moktan

Order

079-WC-0057

Sub: Certiorari

- It appears that the proposed Upper Karnali Hydropower Project is not a multipurpose project but is, in essence, a project of a purely hydropower nature. As the entire volume of water utilized for electricity generation is released back into the Karnali River upon completion of power generation, the use of water remains confined solely to the generation of hydropower. Since the same quantity of water abstracted from the river is returned thereto without any consumptive use, it cannot be said that there is utilization of the water resource in a substantive or consumptive sense. Moreover, the proposed project is to be operated in the high mountainous region of Karnali Province of Nepal and does not appear to be a reservoir-type project. Consequently, it also does not appear to be of such a nature as to involve any special arrangement for water supply through the storage, impoundment, or collection of water. Accordingly, even in relation to the proposed project, no circumstance appears to exist under which it can be said that a “distribution of natural resources and the utilization thereof” has occurred within the meaning of Article 156(2) of the Interim Constitution of Nepal, 2063 (2007), or Article 279(2)(d) of the Constitution of Nepal.

Para

- Upon consideration of the nature and contents of the Project Development Agreement executed for the development of the Upper Karnali Hydropower Project, the said agreement is a commercial agreement relating to the generation of electricity, entered into on behalf of the Government of Nepal by the Investment Board with a company registered in Nepal having a foreign investor. As the agreement has been executed in accordance with the prevailing laws of Nepal and is to be implemented within the territory of Nepal, it does not fall within the category of agreements requiring ratification by Parliament under Article 156 (2) of the Interim Constitution of Nepal, 2063 or Article 279 (2) (d) of the Constitution of Nepal.

Para

- In contractual matters, where the parties to a contract have freely selected the subject matter of the contract and, with due consideration, determined the terms and conditions thereof and entered into a valid agreement, the role of the court is not to examine the wisdom, expediency or fairness of the contractual bargain nor to modify or re-write the contract. Any such approach would be inconsistent with the principle of contractual freedom or autonomy. Contractual freedom is a fundamental attribute of an open market economy. Inasmuch as the Constitution

of Nepal has embraced the concept of an open economy, it is incumbent upon courts to interpret and apply contractual obligations in a manner consistent with the constitutional values. Accordingly, where a contract has been executed by competent parties, is not contrary to public policy, and is not vitiated by coercion, undue influence, misrepresentation, or fraud, the role of the court should not be that of an intervener, but rather that of a positive catalyst facilitating and ensuring the enforcement of the obligations voluntarily assumed by the Parties.

Para

- Courts exercise their constitutionally conferred jurisdiction to adjudicate only where an act is contrary to the Constitution, statutes, or laws, or where it adversely affects the fundamental or legal rights of the people, or the public interest. In respect of purely administrative or policy decisions taken by the Government, the Government alone remains accountable to the people, and, ordinarily, there arises no occasion for judicial intervention. There is no justification for taking a view inconsistent with this principle.

Para

- Rivers, streams, land, forests, biodiversity, and other natural resources within the country constitute invaluable assets of the people. The use of these resources must be carried out in accordance with the principle of sustainable environmental development as enshrined in the Constitution, wherein the public interest is inherently embedded. The Government is the trustee of the public interest and is duty-bound to act at all times in the national interest, consistent with public policy. Assessing whether a particular project conforms to public policy, and determining the measures by which maximum comparative benefit may be derived, fall squarely within the core responsibilities of the executive. The discharge of this responsibility, from the selection of a project to its implementation, must be executed with diligence, prudence, and due care. To secure the greatest comparative advantage from any negotiation, meticulous preparation is essential. A negotiation in which alternative options are effectively presented is more likely to yield beneficial outcomes. To fully realize such benefits, vigilance and careful oversight must be maintained throughout the entire process, from negotiation to the execution and implementation of the agreement. These functions are to be discharged by the executive authority, and, unless it is established that such authority has been directly abused or exercised in a manifestly improper manner, the court must defer to the judgment and discretion of the executive. Such deference aligns with the constitutional principle of separation of powers and the system of checks and balances envisaged by the Constitution.

Para

- The protection of the Karnali River is inextricably linked to the preservation of its watershed. The local communities that have inhabited the Karnali watershed for millennia have rendered invaluable environmental services, conserving the water, land, and biodiversity of the region. In light of the area's geographical remoteness, the declining productivity of arable land, and the additional pressures imposed by climate change, the livelihoods of the residents of the Karnali watershed are becoming increasingly precarious. In this context, ensuring that these communities are able to derive direct benefits from development within their own localities constitutes a fundamental human right. Respect for and protection of this right fall squarely

within the State's obligations under its human rights accountability.

Para

Petitioner: Chakra Bahadur Rokka, resident of Dailekh District, Lalikanda V.D.C. Ward No. 7

Kamal Bahadur Thapa, resident of Dailekh District, Lalikanda V.D.C. Ward No. 5

Rajendra Buda, resident of Dolpa District, Kalika V.D.C. Ward No. 8

Ramlal Biswokarma, resident of Dolpa District, Siu V.D.C. Ward No. 6

Prem Singh Air, resident of Dadeldhura District, Ajaymeru V.D.C. Ward No. 4

Jay Bahadur Bista, resident of Kalikot District, Ruku V.D.C. Ward No. 5

Krishna Chaudhary, resident of Dang District, Urhari V.D.C. Ward No. 4

Khagendra Buda Magar, resident of Dang District Tribhuvan Municipality Ward No. 10

Khusal Raj Khadka, resident of Bardia District Padmanaha V.D.C. Ward No. 2

Tikaram Chaudhari, resident of Bardia District, Badlapur V.D.C. Ward No. 6

Amrit Bahadur Budhathoki, resident of Salyan District, Pipalmeta V.D.C. Ward No. 9

Kumbh Buda, resident of Humla District, Madana V.D.C. Ward No. 9

Rabindra Rawat, resident of Humla District, Simikot V.D.C. Ward No. 5

Dalbir Bhiyal, resident of Mugu District, Ganya V.D.C. Ward No. 8

Majoj Dhami, resident of Mugu District, Bhee V.D.C. Ward No. 1

Sabita Adhikari, resident of Jajarkot District, Pajau V.D.C. Ward No. 5

Janak Prasad Awasthi, resident of Baitadi District, Malladehi V.D.C. Ward No. 8

Nagendra Bahadur Singh Biswokarma, resident of Kalikot District, Malkot V.D.C. Ward No. 5

Uttam Chaulagain, resident of Jumla District, Depalgaon V.D.C. Ward No. 5

Bhuwan Bahadur Rokaya, resident of Jumla District, Sanigaon V.D.C. Ward No. 5

Chakra Bahadur Bista, resident of Bajura District, Barabhisay V.D.C. Ward No. 8

Dambar Bahadur Rawal, resident of Accham District, Putlatola V.D.C. Ward No. 1

Jayram Bajgain, resident of Accham District, Bhastawandali V.D.C. Ward No. 5

Lalit Bahadur Biswokarma, resident of Accham District, Raniban V.D.C. Ward No. 9

Ramesh Bahadur Kadayat, resident of Bajhang District, Kadel V.D.C. Ward No. 7

Laxmi Kant Jaisi, resident of Kailali District, Baliya V.D.C. Ward No. 5

Sita Acharya, resident of Rolpa District, Liwang V.D.C. Ward No. 6

Santosh Khadka, resident of Rukum District, Khalanga V.D.C. Ward No. 9

Santosh Gautam, resident of Bardia District, Gulariya V.D.C. Ward No. 1

Chandra Kumar Thani, resident of Surkhet District, Uttarganga V.D.C. Ward No. 1

Vs.

Respondent: Nepal Government, Office of the Prime Minister and Council of Ministers

Nepal Government, Ministry of Energy, Singha Durbar, Kathmandu

Nepal Government, Ministry of Environment, Science and Technology

Nepal Government, Ministry of Finance, Singha Durbar, Kathmandu

Nepal Government, Investment Board, Kathmandu

Nepal Government, Ministry of Forest and Land Conservation, Singha Durbar, Kathmandu

Department of Electricity Development, Anamnagar, Kathmandu

GMR Upper Karnali Hydropower Lt. Chakupat Patan, Lalitpur

GMR Ltd. Consortium, Chakupat Patan, Lalitpur

079-WC-0058

Sub: Certiorari et.al.

Petitioner: Sharad Singh Bhandari, resident of Accham District, Kuika V.D.C. Ward No. 5 currently residing in Kathmandu District, Kathmandu Metropolitan City Ward No. 10 Baneshwore

Indra Prasad Kharel, resident of Banke District, Bageshori V.D.C. Ward No. 1 currently residing in Kathmandu District, Kathmandu Metropolitan City Ward No. 32, Anamnagar

Amar Bahadur Pun Magar, resident of Kailali District, Tikapur V.D.C. Ward No. 9 currently residing in Kathmandu District, Kathmandu Metropolitan City Ward No. 16, Naya Bazaar

Ang Bahadur Lama, resident of Humla District, Bargaon V.D.C. Ward No. 8 currently residing in Lalitpur District, Lalitpur Sub-metropolitan City, Ward No. 51, Kupondole

Ashok Kumar Rokaya Chhetri, resident of Banke District, Mahadevpuri V.D.C. Ward No. 2 currently residing Kathmandu District, Kathmandu Metropolitan City Ward No. 16 Naya Bazaar

Bhupendra Batala, resident of Kailali District, Jankinagar V.D.C. Ward No. 6 currently residing in Kathmandu District, Kathmandu Metropolitan City, Ward No. 34, Baneshore

Chabi Lal Thapa, resident of Humla District, Saya V.D.C. Ward No. 2 currently residing in Kathmandu District, Kathmandu Metropolitan City, Ward No. 32, Putalisadak

Chirinjibi Oli, resident Banke District, Naubasta V.D.C. Ward No. 8 currently residing in Kathmandu District, Kathmandu Metropolitan City, Ward No; 32, Putalisadak

David Rokaya, resident of Humla District, Simikot V.D.C. Ward No. 4 currently residing in Kathmandu District, Kathmandu Metropolitan City, Ward No. 34, Baneshore

Debu Shrestha, resident of Banke District Nepalgunj Municipality Ward No. 16 currently residing in Kathmandu District, Kathmandu Metropolitan City, Ward No. 16 Nayabazaar

Deviram Timilsina, resident of Dailekh District, Chamunda V.D.C. Ward No. 8 currently residing in Kathmandu District, Kathmandu Metropolitan City, Ward No. 10, Nayabazaar

Devki Kumari Kharel, resident of Banke District, Bageshori V.D.C. Ward No 1 currently residing in Kathmandu District, Kathmandu Metropolitan City, Ward No 10, Nayabazaar

Devki Kumari Kharel, resident of Banke District, Bageswori V.D.C. Ward No 1 currently residing in Kathmandu District, Kathmandu Metropolitan City Ward No. 16, Nayabazaar

Dhananjaya Buda, resident of Humla District, Jairi V.D.C. Ward No. 2 currently residing in Kathmandu District, Kathmandu Metropolitan City, Ward No. 32, Putalisadak

Dinesh Prasai, resident of Ramechhap District, Bhatauli V.D.C. Ward No. 2, relocated to Banke District, Karkadi V.D.C. Ward No. 5 currently residing in Kathmandu District, Kathmandu Metropolitan City Ward No. 32, Anamnagar

Deependra Rawal, resident of Accham District, Pulletola V.D.C. Ward No. 6 currently residing in Kathmandu District, Kathmandu Metropolitan City Ward No. 10 Baneshore

Deepesh Shahi, resident of Accham District, Dhamali V.D.C. Ward No. 1 currently residing in Kathmandu District, Kathmandu Metropolitan City Ward No. 32, Putalisadak

Gagan Singh Pun, resident of Surkhet District, Lagam V.D.C. Ward No. 4 currently residing in Kathmandu District, Kathmandu Metropolitan City Ward No. 16 Nayabazaar

Vs.

Respondent: Nepal Government, Office of the Prime Minister and Council of Ministers, Singha Durbar, Kathmandu

Nepal Government, Ministry of Energy, Singha Durbar, Kathmandu

Nepal Government, Ministry of Law, Justice and Parliamentary Affairs, Singha Durbar, Kathmandu

Nepal Government, Ministry of Irrigation, Singha Durbar, Kathmandu

Nepal Government, Ministry of Finance, Singha Durbar, Kathmandu

Vice Chairperson, National Planning Commission, Singha Durbar, Kathmandu

Investment Board, Office of the Investment Board, New Baneshore, Kathmandu

Radesh Pant, Chief Executive Officer, Investment Board, New Baneshore, Kathmandu

G.M.R. Upper Karnali Hydropower Ltd. (Project Promoter), Chakupat, Lalitpur

Unit Chairman R.V. Sesson on behalf of G.M.R. Hydro Energy Business Unit (Project Promoter)

G.M.R. ITD Consortium (Project Promoter), Chakupat, Lalitpur

G.M.R. Hydro Energy Business

Electricity Authority, Ratna Park, Kathmandu

Department of Electricity Development, Anamnagar, Kathmandu

Nepal Government, Ministry of Science, Technology and Environment, Singha Durbar, Kathmandu

Ministry of Forest and Soil-Conservation, Singha Durbar, Kathmandu

079-WC-0059

Sub: Certorari et.al.

Petitioner: Ratan Bhandari, resident of Bajhang District, Rayal V.D.C. Ward No. 2 Chaudam, currently residing in Kathmand District, Kirtipur Municipality Ward No. 13

Vs.

Respondent: Nepal Government, Office of the Prime Minister and Council of Ministers, Singha Durbar, Kathmandu

Nepal Government, Investment Board, International Conference Center, New Baneshore, Kathmandu

G.M.R. Upper Karnali Hydropower Limited, Chakupat – 10, Lalitpur

Karnali Transmission Company Pvt. Ltd. Chakupat – 10, Lalitpur

Nepal Government, Ministry of Energy, Singha Durbar, Kathmandu

Nepal Government, Department of Electricity Development, Bijuli Bazaar, Kathmandu

Nepal Government, Ministry of Irrigation, Singha Durbar, Kathmandu

Nepal Government, Ministry of Finance, Singha Durbar, Kathmandu

Nepal Government, Ministry of Science, Technology and Environment, Singha Durbar, Kathmandu

Secretariat, Legislative Parliament, Kathmandu

Nepal Electricity Authority, Central Office, Durbar Marg, Kathmandu

079-WC-0060

Sub: Certiorari et.al.

Petitioner:Janmadev Jaisi, resident of Kalikot District, Ruku V.D.C. Ward No. 1 currently residing in Kathmandu District, Kathmandu Metropolitan City Ward No. 32

Lalit Bahadur Biswokarma, resident of Accham District, Raniban V.D.C. Ward No. 9 currently residing in Kathmandu District, Kathmandu Metropolitan City, Ward No. 32

Hemraj Bhattarai, resident of Pyuthan District, Torbang V.D.C. Ward No. 1 currently residing in Kathmandu District, Kathmandu Metropolitan City Ward No. 32

Chudamani Adhikari, resident of Bardia District, Gularia Municipality Ward No. 1 currently residing in Kathmandu District, Kathmandu Metropolitan City Ward No. 32

Dambar Bahadur Rawal, resident of Accham District, Pulletola V.D.C. Ward No. 1 currently residing of Kathmandu District, Kathmandu Metropolitan City Ward No. 32

Vs.

Respondent:Nepal Government, Office of the Prime Minister and Council of Ministers, Singha Durbar, Kathmandu

Nepal Government, Ministry of Energy, Singha Durbar, Kathmandu

Investment Board, Office of the Investment Board, New Baneshore, Kathmandu
Joint-Secretary, Investment Board, New Baneshore, Kathmandu
G.M.R. Upper Karnali Hydropower Limited (Project Promoter), Chakupat, Lalitpur
G.M.R. ITD Consortium (Project Promoter), Chakupat, Lalitpur
Unit Chairperson R.V. Sesson on behalf of G.M.R. Hydro Energy Business Unit
(Project Promoter)
G.M.R. ITD Consortium (Project Promoter), Chakupat, Patan, Lalitpur

079-WC-0061

Sub: Certiorari Mandamu

Petitioner: Janmadev Jaisi, resident of Kalikot District, Sanni Trivedni Rural Municipality Ward No. 1 currently residing at Kathmandu District, Kathmandu Metropolitan City Ward No. 32

Ratan Bhandari, resident of Bajhang District, Kedarsiu Rural Municipality Ward No.1 currently residing at Kathmandu District, Kirtipur Municipality Ward No. 13

Nabin Kumar Shahi, resident of Dailekh District, Chamunda Bindrasaini Municipality Ward No. 8 currently residing at Kathmandu District, Kathmandu Metropolitan City Ward No. 5

Raj Bahadur Kunwar, resident of Jumla District, Sanni Tatopani Rural Municipality Ward No. 7 currently residing at Kathmandu District, Kathmandu Metropolitan City Ward No. 5

Dambar Bahadur Rawal, resident of Accham District, Sanni Panchdewal Binayak Municipality Ward No 7 currently residing at Kathmandu District, Kathmandu Metropolitan City Ward No. 32

Vs.

Respondent: Nepal Government, Office of the Prime Minister and Council of Ministers, Singha Durbar, Kathmandu

Nepal Government, Ministry of Energy, Singha Durbar, Kathmandu

Nepal Government, Office of the Investment Board, New Baneshore, Kathmandu

G.M.R. Upper Karnali Hydropower Limited (Project Promoter), Chakupat, Patan, Lalitpur

G.M.R. ITD Consortium (Project Promoter), Chakupat, Patan, Lalitpur

G.M.R. Hydro Energy Business Unit, Chakupat, Patan, Lalitpur

Upper Karnali Transmission Company Private Limited, Chakupat, Patan, Lalitpur

Sub: Certiorari Mandamus

Ratan Bhandari, resident of Bajhang District, Kedar-siu Rural Municipality Ward No. 1 Chaudam currently residing in Kathmandu District, Kirtipur Municipality Ward No. 6

Vs.

Respondent: Nepal Government, Office of the Prime Minister and Council of Ministers, Singha Durbar, Kathmandu

Nepal Government, Office of the Investment Board, International Conference Center, New Baneshore, Kathmandu

Nepal Government, Ministry of Energy, Water Resources and Irrigation, Singha Durbar, Kathmandu

G.M.R. Upper Karnali Hydropower Limited, Lalitpur Metropolitan City Chakupat – 10

G.M.R. ITD Consortium (Project Promoter), Chakupat – 10, Lalitpur Metropolitan City

Justice Anand Mohan Bhattarai: With regard to the development of the Upper Karnali Hydropower Project, the Government of Nepal entered into Memorandum of Understanding with the GMR ITD Consortium in 2064, and on the basis of that MoU, the Project Development Agreement was executed in 2071, with subsequent extensions granted under that agreement for financial arrangements. Writ petitions bearing numbers 069-WO-1425, 071-WO-0248, 071-WO-0638, 073-WO-0954, 074-WO-0544, and 079-WO-0421 were filed under the extraordinary jurisdiction of this court and are currently under consideration. These petitions raise questions of serious constitutional interpretation under Article 156 (2) of the Interim Constitution of Nepal, 2063, and Article 279 (2) of the Constitution of Nepal. Pursuant to the order of the Division Bench of this court dated 2079/09/18 (corresponding to 2 January 2023) and in accordance with the order issued by the Rt. Hon. Chief Justice under Article 137(3) of the Constitution of Nepal, the petitions have been placed before this Bench. The brief facts of the petitions and the orders thereon are summarized as follows:

Summary of the content of the writ petition 079-WC-0057 (069-WO-1425) against the Letter of Understanding entered by and between Nepal Government and G.M.R.-I.T.D. Consortium in 2064:

Content of the writ petition submitted by petitioner Chandra Kumari Thani and others on 2070/3/30 (corresponding to 14 July, 2013) is as follows: We are residents affected by the Karnali River watershed. We have a direct and substantial interest in filing the present petition concerning this matter of public concern. On 2008/1/24 (corresponding to 2064/10/10), the Government of Nepal and the Indian company GMR-ITD Consortium executed a Memorandum

of Understanding for the survey and construction of the Upper Karnali Hydropower Project with a capacity of 300 megawatts. The Memorandum of Understanding provided that the Government of Nepal would establish a company through joint investment to undertake the construction of the Upper Karnali Hydropower Project, and that, under a Build-Own-Operate-Transfer (BOOT) arrangement, the project would be transferred to the Government of Nepal after thirty years, including provisions for construction, ownership, operation, and handover. Pursuant to the Memorandum of Understanding, the GMR Company has not, to date, submitted progress reports on the electricity survey. Likewise, a letter from the Department of Electricity Development dated 2066/9/05 (corresponding to 20 December, 2009) indicates that, at GMR's request, the project capacity was revised from 300 megawatts to 900 megawatts, and, according to the decision dated 2067/10/9 (corresponding to 23 January, 2011) the survey permit was renewed for a period of one year. In extending the tenure of the said project, the provisions of Section 5 of the Electricity Act, 2049, were not duly observed. While the Memorandum of Understanding was executed, all prior correspondence and decisions of the Government of Nepal had been conducted through the Ministry of Water Resources and subsequently the Department of Water Resources; however, after the establishment of the Investment Board, correspondence appears to have been conducted directly by the Board. Under the provisions of Sections 5 and 9 of the Investment Board Act, 2068, actions initiated by the Ministry of Energy do not automatically vest in the Board. Furthermore, clauses 36 and 37 of the Memorandum of Understanding stipulate that projects constructed upstream or downstream of the main project shall be granted to the same Consortium and that no permission shall be given to others in a manner that would affect the present project. Such provisions appear to confer a monopoly upon GMR over the Karnali River. Although the Karnali River has an estimated potential of 5,400 megawatts for electricity generation, permission has been granted for only 900 megawatts. The Memorandum of Understanding provides that the supply, generation, and pricing of electricity shall be determined according to the Indian market. The arrangement for transmitting the electricity produced by the project to India via a separate transmission line creates a situation in which Nepal will not be able to ascertain the actual quantity of electricity generated. Moreover, the potential environmental degradation and adverse social impacts of the project have neither been studied nor assessed, nor have any such studies been made public. This inherently multipurpose project has been limited solely to electricity generation. The rights of local communities over water and irrigation have been seriously undermined. Contrary to Article 35 (12) of the Constitution, the project discourages domestic investment while establishing undue dominance of foreign capital and foreign technology. In violation of Article 12 (c) of the Interim Constitution of Nepal, 2063, local individuals are being deprived of professions and employment related to the use of Karnali's waters. The Memorandum of Understanding remains silent on the distribution of profits and the question of compensation arising from the project. Furthermore, clear provisions regarding the rehabilitation and compensation of displaced persons have not been made. The citizens of the affected area, as well as all Nepali citizens, have been deprived of their sovereign rights. Accordingly, the Memorandum of Understanding dated 2064/10/10, the Electricity Survey Permit dated 2065/11/5, their respective amendments, and the decisions taken on various dates to extend their validity are contrary to the Constitution, prevailing laws, and international treaties that Nepal is obliged to comply with, and are against the national

interest and the petitioner prays that the court issue an order to nullify the aforementioned actions, restrain the authorities from extending, renewing, or granting any further approvals for the project, and refrain from receiving or processing the Detailed Engineering Report, or executing the Power Development Agreement, and that all agreements, understandings, or arrangements relating to the project to date be rendered inoperative and that the status-quo of the project be maintained.

Summary of the content of the writ petition 079-WC-0058 (071-WO-0248) filed against Project Development Agreement

The contents of the writ petition filed by Dambar Bahadur Rawal and others on 2071/06/08 (corresponding to 24 September, 2014) is as follows: The Promoter of the Karnali Hydropower Project, GMR, and the Investment Board on behalf of the Government of Nepal executed the Project Development Agreement (P.D.A.) on 2071/06/03 (corresponding to 19 September, 2014) under which the project is to be developed. Articles 33 (o) and 35 (4) of the Interim Constitution provide for the utilization of natural resources in the national interest, ensuring that local communities are given priority in such use. Article 156 further stipulates that any agreement relating to natural resources and their utilization, which may have broad, serious, or long-term implications for the nation, must be ratified by a two-thirds majority of the members of Parliament. In a matter of such serious national importance, the agreement was executed without informing the public or conducting a comprehensive discussion. According to the pre-feasibility study conducted in 1989, the Karnali Bend has the potential to generate 4,180 megawatts of electricity. There is no apparent basis or justification for executing an agreement to develop only 900 megawatts. Of the 12 percent electricity allegedly allocated to Nepal, only 36 megawatts would be available during the dry season. The arrangement to transmit electricity generated within the country to India cannot be considered to be in the national interest. Releasing water from the powerhouse all at once without proper regulation would cause serious damage to downstream structures and the environment. The agreement providing for compensation to the project in the event of a shutdown or strike for as long as twenty-one days is improper. Even under circumstances of force majeure, the provision obliging the Government of Nepal to assume liability is not in the national interest. The clause allowing commercial operations to commence at a delayed schedule, with ownership of the project vesting in the Government only after twenty-five years, is not conducive to Nepal's interest. Furthermore, the provision granting tax and revenue exemption in view of electricity being exported for commercial purposes is flawed. It would be difficult to allot the 27% share designated for the Nepal Electricity Authority as stipulated in the agreement. The agreement does not specify the forum for arbitration in the event of a dispute. Moreover, the provision stating that the interpretation of the agreement shall be governed by English law is improper. Accordingly, the agreement executed on 2071/06/03, along with the related survey permits and all associated actions is contrary to Articles 12, 16, 19, 27, 32, 33, 34, 35, 156 (2), and the Preamble of the Interim Constitution of Nepal, 2063, as well as the Electricity Act, 2049, the Preamble of the Investment Board Act, 2068, the Environment Protection Act, 2053, and the Water Resources Act, 2049. In view of this, it is prayed that all permits or licenses issued in favor of the respondents, related documents, the aforementioned agreement (P.D.A.), and all consequential decisions be annulled through an order of certiorari

and that an interim order be issued restraining the respondents not to implement or cause to implement the agreement dated 2071/06/03 until the final disposal of the present case.

Summary of the content of the writ petition 079-WC-0059 (071-WO-0638) filed against Project Development Agreement

The contents of the writ petition filed by Ratan Bhandari on 2071/10/27 (corresponding to 10 February, 2015) is as follows: For the construction of the Upper Karnali Hydropower Project, the Government of Nepal, the Office of the Investment Board, GMR Upper Karnali Hydropower Limited, and Karnali Transmission Company Pvt. Ltd. executed the Project Development Agreement (P.D.A.) for the Upper Karnali Project on 2071/06/03. According to the pre-feasibility study conducted in 1989, it was suggested that the Karnali Bend has the potential to generate 4,180 megawatts of electricity. However, the Project Development Agreement was executed in favor of GMR for the generation of 900 megawatts of electricity in an unlawful manner. Although GMR was initially granted permission to generate 300 megawatts of electricity on 2008/1/24 (corresponding to 10 Magh, 2064), respondent No. 6 unlawfully increased the project's capacity to 900 megawatts on 2066/09/05. Contrary to international practice, Clause 12.5.8 of the Upper Karnali Project Development Agreement provides that in the event GMR suffers losses due to force majeure, compensation shall be paid by the Government of Nepal. The clause further stipulates that if GMR fails to acquire private land at the project site within one year, the Government of Nepal must acquire and provide such land within the following eight months. Similarly, for the construction of the transmission line, the Government is required to acquire the necessary land within twenty months. Should these obligations not be fulfilled within an additional year, it is deemed that the Government has not discharged its responsibilities. These provisions in the P.D.A. raise serious questions concerning the sovereignty of the nation. Clause 9 (2) of the P.D.A. provides GMR with financial incentives that are contrary to law. Financial benefits have been granted to GMR for the export-oriented Upper Karnali Project, which are not extended to the domestically consumed projects or to indigenous promoters. Experts have estimated that GMR stands to gain a total of NPR 7.65 billion on account of such exemptions and incentives. The P.D.A. also classifies strikes and shutdowns as force majeure. Since the electricity generated is to be transmitted to India via a separate transmission line from the powerhouse, with no connection to Nepal's transmission system, it is manifestly unreasonable to deem any disruption of Nepal's transmission line under Clause 12.1.3 (f) of the P.D.A. as force majeure created by the Government. Although any dispute arising from the implementation of the agreement should be adjudicated within Nepal under prevailing laws of Nepal, the P.D.A. provides that technical disputes shall be resolved by experts of the ICC International Centre for Expertise in Singapore, and non-technical disputes shall be resolved under British law through arbitration at the Singapore International Arbitration Centre - SIAC, thereby impinging upon Nepal's sovereignty. In the event that GMR fails to fulfill its obligations, and the Government of Nepal is compelled to terminate the agreement, the P.D.A. stipulates that the project can only be taken over after compensating GMR. Moreover, until financial arrangements are finalized, the costs of the Project Review Group are to be borne equally by the company and the Government of Nepal. In the 2008 Memorandum of Understanding, the Nepal Electricity Authority was treated as a partner in both generation and

transmission of electricity. However, in the subsequent P.D.A., the Authority has been considered a partner only in generation, being excluded from any role in the transmission system. Since there is no plan to construct a transmission line for domestic consumption within Nepal, the electricity that Nepal is supposed to receive free of charge under Clause 10.14 A (1) of the P.D.A. must, in practice, be exported to India by paying transmission line charges. While the Upper Karnali Project could be constructed at an estimated cost of approximately NPR 60 billion, the cost has been artificially escalated to NPR 139 billion, including interest, revealing that the proposed project cost is neither real nor reasonable. Clause 6.1.1(d) of the P.D.A. provides that if additional electricity is generated in this project due to regulated water released from upstream projects, GMR shall be entitled to half of such additional electricity. Under Clause 12A of the P.D.A., even where changes in law result in increased tax and duty obligations, GMR is granted exemption from such additional obligations. Furthermore, the P.D.A. provides for a one percent waiver on the environmental service charge and removes the increased rate of capacity royalty. These provisions are prejudicial to the nation and its people. Allocating a share of the benefits derived from carbon trading under the Clean Development Mechanism to both the Government of Nepal and GMR is not in the national interest. Restricting the flow of water from the Karnali River for 18 hours daily and releasing it for electricity generation only during the four-hour peak period will jeopardize the irrigation of 75,000 hectares of farmland in the downstream areas. This will lead to a reduction in agricultural productivity, forcing local communities to bear economic, social, and environmental losses. Moreover, under the pretext of constructing a re-regulating dam downstream of the Upper Karnali dam site, GMR stands to acquire yet another project, creating an additional cause for concern. The project companies have failed to conduct environmental impact assessments with the informed participation of the local population prior to entering into the agreement. This omission also constitutes a violation of the Convention on Biological Diversity, 1992, to which Nepal is a Party. By retaining river water for eighteen hours to meet peak-hour electricity demand, the downstream areas remain dry for most of the day, and when water is released during the remaining four hours, a daily flood cycle occurs. Such fluctuations are likely to have serious adverse effects on aquatic species, including the rare dolphins, and on wildlife within the Bardiya National Park located downstream. Pursuant to Article 156 (2) (1) of the Interim Constitution, 2063, the Upper Karnali Project Development Agreement (P.D.A.) qualifies as a treaty or agreement relating to natural resources and their allocation and utilization. Nevertheless, it was executed in violation of the constitutional process. Consequently, the agreement infringes upon the fundamental rights conferred by the Interim Constitution of Nepal, 2063, and undermines the sovereign domain and national interest of Nepal. It is prayed that the Project Development Agreement executed on 2071/06/03, which is contrary to Articles 1, 3, 4, 16, 27, 32, 33 (c) (k, m, o), 35 (4, 5, 6, 12), and 156 of the Interim Constitution of Nepal, 2063, be annulled through an order of certiorari. Further, it is prayed that no further action or decision be taken except in strict compliance with the procedure prescribed under Article 156 (2) of the Interim Constitution. Pending the final determination of the matter, it is also prayed that an interim order be issued restraining the implementation of the P.D.A. and all related agreements, understandings, or arrangements, and preventing the creation of any obligations upon Nepal or the people of Nepal.

Summary of the contents of writ petition 079-WC-0060 (073-WO-0954) filed against the first extension granted for Financial Arrangement:

The content of the writ petition filed by Dambar Bahadur Rawal on 2073/11/27 (corresponding to 10 March, 2017) is as follows: For the construction of the Upper Karnali Hydropower Project, a Project Development Agreement (P.D.A.) was executed on 2071/06/03 by and between GMR and the Government of Nepal through the Investment Board. The P.D.A. stipulates that the company must complete its financial arrangements within two years from the date of the agreement. However, GMR was unable to finalize the financial arrangements within the prescribed period and subsequently requested an extension of one additional year from the Investment Board wherein, the Investment Board granted the requested one-year extension. While writ petitions challenging the aforementioned P.D.A. and the 2008 Memorandum of Understanding remain pending before this court, the respondents have unilaterally extended the project timeline, an act that is contrary to the national interest and unlawful. Clause 3.1.3 of the P.D.A. stipulates that the financial arrangements for the generation project must be completed within two years of the execution of the P.D.A. In the event that the company is unable to finalize the financial arrangements within the prescribed period due to reasons beyond its control, the company is required to demonstrate in writing that it has undertaken reasonable and commercially prudent efforts toward the financial management of the generation project, and must submit a detailed plan showing how the project's financial arrangements will be completed within the requested one-year extension. However, the respondent company has violated Clause 3.1.3 of the P.D.A. Despite there being sufficient time remaining, the company submitted a request for an extension on 2072/01/22 (corresponding to 5 May, 2015). In its request, as reasons for the delay in arranging the financial management, the company cited force majeure, such as earthquake and international border blockades. However, the company failed to specify what actions had been undertaken prior to these events and what steps were taken once normalcy was restored. Consequently, the reasons provided for the requested extension cannot be considered reasonable or justified. In the respondent company's request for an extension, there is no clear explanation demonstrating that reasonable efforts were being undertaken to arrange the financial management. The submission fails to provide details regarding meetings, discussions, negotiations, or correspondence conducted with international lenders and advisors. Moreover, in accordance with the provisions of the P.D.A., no detailed plan has been submitted showing how the financial arrangements for the generation project would be completed within the one-year extension period. It is therefore prayed that the Investment Board's decision dated 2073/09/24, granting an extension, along with all related actions, which are contrary to the Preamble and Articles 25, 27, 30, 33, 278, and 279 of the Constitution of Nepal, the spirit and intent of the Electricity Act, 2049, the Preamble of the Investment Board Act, 2068, the objectives of the Environmental Protection Act, 2053, and the Water Resources Act, 2049, and which are prejudicial to the interests of the people of Nepal, be annulled through an order of certiorari and the petitioner also request the issuance of an order of mandamus and any other appropriate orders. It is further prayed an interim order be issued restraining the respondents from implementing or cause to implement the decision relating to the said extension.

Summary of the contents of writ petition 079-WC-0061 (074-WO-0544) filed against the second extension granted for Financial Arrangement:

The content of the writ petition filed by Janmadev Jaisi on 2074/11/02 (corresponding to 14 February, 2018) is as follows: The petitioners are residents of the Karnali River and its associated watershed. With respect to the Upper Karnali Hydropower Project, a Project Development Agreement (P.D.A.) was executed on 2071/6/3 by and between GMR and the Government of Nepal through the Investment Board. Writ petitions challenging the said P.D.A. are currently pending before the Supreme Court. The P.D.A. provides that the company must complete the financial arrangements for the project within two years; however, GMR failed to do so within the prescribed period. Despite the absence of any lawful or justifiable grounds, the respondent Investment Board unilaterally granted a one-year extension on 2073/9/24. The writ petition challenging the said extension is also currently pending before this Court. Notwithstanding the pendency of these petitions, the respondents unilaterally granted an additional one-year extension for the financial arrangements. The P.D.A. explicitly provides that even for the initial one-year extension within the original two-year period, the company is required to provide justification and reasons. It is an express and mandatory condition of the P.D.A. that the developer must complete the financial arrangements within the total period of three years, including any granted extension. Beyond this period, the respondents have no authority to seek or grant further extensions. Accordingly, the right to grant any further extension is not conferred by the P.D.A., the Constitution, or any law. Clause 3.1.3 of the P.D.A. provides that the developer may request an extension of not more than one year, and that the financial arrangements must be completed within that period. Even within this period, if the financial arrangements are not finalized, repeated extensions are not permitted. In the present case, the company, having failed to complete the financial arrangements within the first granted extension and being unable to commence construction of the project, cannot reasonably or truthfully claim that “it is necessary to provide continuity to the project construction” as a valid ground for further extension. Such a basis cannot be considered justifiable or substantiated. The extension granted on November 13, 2017, provided the agreement to be active from September 18, 2017 thereby providing a retroactive effect and this constitutes a violation of the principles of nature justice and fair procedure. In Nepal, where companies fail to mobilize investment, the prevailing practice has been to cancel the permits for such projects. In the case of the Upper Karnali Project, however, repeatedly granting extensions appears to be done in bad faith. Considering the background of GMR/ITD, it is evident that they have obtained multiple project permits both within and outside India and have profited billions by selling such permits to third parties. GMR has not undertaken the project for the benefit of Nepal, but rather has obtained it as a “hunting license” under the pretext of exporting electricity to India. In connection with the Tanakpur Agreement, a status paper had been prepared by the Supreme Court to define the scope of “distribution and utilization of natural resources” and to assess its extensive, serious, and long-term impacts in the context of implementing the court’s order. According to the said status paper, any project in which more than 50 percent of the electricity produced is destined for export beyond the national border, in which the proportion of foreign to domestic investment exceeds 80:20, and in which the investor seeks a sovereign guarantee from the State, falls within the category of projects having extensive, serious, and long-term impacts. Such projects, it is stated, must be approved by a two-thirds

majority of the Parliament. On the basis of the aforementioned status paper, the Karnali Hydropower Project is, by its very nature, a project likely to have extensive, serious, and long-term impacts. Consequently, the understandings, agreements, and extensions of time affected by the respondents constitute a violation of Article 279 (1) (d) of the Constitution of Nepal and are contrary to the national interest. Accordingly, the decision of the respondent Investment Board to grant a second one-year extension, effective from 2074/04/2 (corresponding to 17 July, 2017) and issued on 2074/7/27 (corresponding to 13 November, 2017) along with all related acts and proceedings, contravenes the Constitution of Nepal, including its Preamble and Articles 27, 30, 33, 278, and 279, as well as the Electricity Act, 2049; the Investment Board Act, 2068; the Environment Protection Act, 2053; and the Water Resources Act, 2049. The petitioner prays that the above decision relating to the second extension and all procedures and acts related to it be annulled through an order of certiorari and it was also prayed that an order of mandamus be issued in the name of the respondents directing to perform or cause to perform the activities upon completing the necessary legal procedures, including obtaining survey permits, agreements, and approvals for construction.

Summary of the contents of writ petition 079-WC-0062 (079-WO-0421) filed against the third extension granted for Financial Arrangement:

The content of the writ petition filed by Ratan Bhandari on 2079/07/04 (corresponding to 21 October, 2022) is as follows: I am engaged in research and study concerning Nepal's water resources. For the construction of the Upper Karnali Hydropower Project, a Project Development Agreement was executed on 2071/06/03 by and between the Government of Nepal through the Investment Board, GMR, Upper Karnali Hydropower Limited, and Karnali Transmission Company Pvt. Ltd. The said agreement, concluded without public consultation and through non-transparent means, was executed contrary to the national interest and in violation of Articles 51 and 279 of the Constitution of Nepal. The writ petitions filed against the aforementioned PDA are currently sub-judice before the Supreme Court. GMR failed to arrange the financial closure for the Upper Karnali Hydropower Project within the two-year period stipulated under the PDA. On 2073/09/24 (corresponding to 8 January, 2017), the respondent Investment Board granted an extension of one year without providing any basis or justification. The writ petition filed against this extension is also presently sub-judice. On 2074/07/24 (corresponding to), the Investment Board further extended the period for financial closure by one additional year. The writ petition filed against this extension is also sub-judice before the court. Even after this extension, the financial closure was not achieved within the stipulated period, which placed the PDA effectively in a position tantamount to termination by GMR. However, on 2079/03/31 (corresponding to), the Council of Ministers, through a Cabinet decision, further extended the period for financial closure of the Upper Karnali Hydropower Project by two years, effective from the date of the Cabinet's decision. The law does not confer upon the Prime Minister and the Council of Ministers the authority to decide on the extension of the term of an agreement. Sections 5 (c) and (f) of the Investment Board Act, 2068, expressly provide that the authority to enter into agreements with the proposer and the investor, as prescribed, vests in the Investment Board. Instead of issuing a notice to the respondent developer informing that the agreement had been terminated, the respondent Investment Board unlawfully extended the term by two years without

any legal basis or justification. Repeated extensions of the agreement granted unlawfully and without any factual or legal grounds cannot in any circumstances be regarded as justified or reasonable. Upon reviewing GMR's international track record, it is evident that GMR extracted USD 271 million from the Government of the Maldives without undertaking the construction of an international airport. Following this episode, donor agencies refrained from financing GMR, as a consequence of which it has been unable to raise investment for the projects it had undertaken. Having reached the brink of insolvency, GMR has, in Nepal as well, previously sold the license (permit) of the Upper Marsyangdi-II Project to Sichuan Investment Group of Hong Kong for NPR 3.5 billion. It has been publicly disclosed that, in accordance with its plan to exit the Upper Karnali Hydropower Project by selling its ownership stake, GMR has most recently sold fifty percent of the project's ownership to the French company "Électricité de". Therefore, as the decision of the Council of Ministers dated 2079/03/31 extending the project deadline, the decision of GMR to sell fifty percent ownership of the Upper Karnali Hydropower Project to Électricité de France(EDF), the Project Development Agreement, the related understandings and consents, and all decisions and actions taken by the respondents in this regard are contrary to the Preamble and Articles 27, 30, 51, 278, and 279 of the Constitution of Nepal; the Preamble and Sections 5 and 7 of the Investment Board Act, 2068; the Electricity Act, 2049; the Environment Protection Act, 2076; and the Water Resources Act, 2049, as well as being against the national interest of Nepal, and therefore, the petitioner requests the honorable court to issue an order of certiorari quashing and annulling all such decisions, agreements, consents, and actions. It is further prayed that an appropriate order be issued in the name of the respondents directing them to undertake activities relating to the project strictly in conformity with the prevailing Constitution and laws and in a manner consistent with the protection and promotion of national interest. Pending the final disposal of the present case, it is also prayed that an interim order be issued restraining the respondents or causing them to be restrained from implementing and enforcing the decision of the Council of Ministers dated 2079/03/31.

Show Cause Notice and Order Relating to Interim Order

- An order had been issued by this court on 2070/04/08 (corresponding to 23 July, 2013) which reads as follows: Should an order as sought by the petitioner be issued? Provided, there are any reasons that the order need not be issued, respondents no. 1, 2, 3, 4, 5, 6, 7 are hereby ordered to submit their rejoinders along with reasons and evidences through the Office of the Attorney General within 15 days excluding the period of travel and respondents no. 8 and 9 are hereby ordered to submit the rejoinder in person or through their agent before this court and it is hereby directed to issue a summon in the names of the respondents and to submit the case upon receipt of the rejoinder or upon expiry of the limitation. With regards to an interim order as sought in the petition, the Bench deems it appropriate to decide on the issue upon discussing with both the Parties and accordingly the Bench directs the respondents to be present on 2070/04/15 (corresponding to 30 July, 2013) for discussion on the said matter. Further in writ no. 079-WC-0057, the Bench hereby issues an interlocutory order in the name of the respondents restraining them from doing or causing to be done the acts stated in the petition until the discussion on the interim order has not been concluded.

- In Writ Petition No. 079-WC-0057, this court, by its order dated 2070/04/27 (corresponding to 11 August 2013), inter alia, held that since the dispute raised by the petitioner is to be adjudicated at the time of the final hearing of the writ petition, it was not necessary to provide continuity to the interlocutory order issued by this court on 2070/04/08. The court further directed that, upon receipt of the rejoinders, and within 15 days, the record file of Writ Petition No. 064-WO-0754, *Gorakh Bahadur B.C. v. Office of the Prime Minister and Council of Ministers* (certiorari-cum-mandamus), which relates to the present matter, be attached within and that the present writ petition be accorded priority and listed for hearing in accordance with law.
- In Writ Petition No. 079-WC-0058, this court, by its order dated 2071/07/23 (corresponding to 9 November, 2014), which reads as follows: What has transpired in this matter? Why should an order sought by the petitioner not be issued? Provided, there are any reasons that the order need not be issued, respondents no. 1, 2, 3, 4, 5, 6, 13, 14 and 15 are hereby ordered to submit their rejoinders along with reasons and evidences through the Office of the Attorney General within 15 days excluding the period of travel and respondents no. 7, 8, 9, 10, 11 and 12 are hereby ordered to submit the rejoinder in person or through their representative and it is hereby directed to provide a copy of the petition along with the summon and inform the Office of the Attorney General and to submit the case upon receipt of the rejoinder or upon expiry of the limitation. With regard to the interim order sought in paragraph 7 of the petition, wherein the petitioner seeks to restrain the implementation and enforcement of the agreement dated 2071/06/03, upon due consideration of the averments contained in the petition, it appears that the said hydropower project pertains to the generation of electricity from water. Electricity so generated is not to be construed as a distribution or apportionment of the natural resource itself; rather, it constitutes electrical energy derived from water, and the water constituting the source continues to flow within the territory of Nepal even after such generation. Accordingly, on a prima facie examination, the petition does not demonstrate that the project is likely to cause any adverse effect upon natural resources. Alongside this, with regard to Article 156 (2) of the Interim Constitution of Nepal, 2063, and the issues raised by the petitioner, this Honorable Court, through its Division Bench, has in previous cases—namely, *Ram Chandra Chatout vs. Office of the Prime Minister and Council of Ministers*, Nepal Law Reporter 2066, Vol. 1, Decision No. 8059, pg. 85; *Ashok Kumar vs. Ministry of Water Resources*, Nepal Law Reporter 2069, Vol. 3, pg. 451; and *Gorkha Bahadur B.C. vs. Office of the Prime Minister and Council of Ministers*, Nepal Law Reporter 2070, Vol. 2, Decision No. 8982, pg. 456 concluded that electricity generated from water cannot be treated as a natural resource, and that its commercial utilization does not contravene the said provision. Similarly, in the decision delivered by the Special Bench of this court on 2071/07/21 in Writ No. 064-WS-0030 (involving Advocate Madhav Kumar Basnet and the Office of the Prime Minister and Council of Ministers), the principle was reaffirmed that electricity produced from water is not to be treated as a natural resource under Article 156 (2) and its commercial use is permissible. Moreover, the agreement referred to above was entered into with the objective of addressing the severe electricity shortage (load-shedding) in the country and also for

commercial purposes, and is directly connected to national development. Accordingly, there is no necessity to issue the interim order sought by the petitioner at this stage. As the issues raised by the petitioner are found to be of national concern, the present matter has been accorded priority in accordance with Rule 63(3) of the Supreme Court Rules, 2049, and is to be listed for hearing in accordance with law.

- An order had been issued by this court in writ petition no. 079-WC-0059 on 2071/12/11 (corresponding to 25 March, 2015) which reads as follows: What has transpired in this matter? Why should an order sought by the petition not be issued? Provided, there are any grounds and reasons as to why the order should not be issued, the respondents' no. 3, 4 and 11 are hereby directed to submit their rejoinder in person or through an agent and other respondents are hereby ordered to submit their rejoinder through the Office of the Attorney General. With regards as to whether or not an interim order should be issued, the Bench deems it appropriate to discuss this matter in the presence of both the Parties and therefore, the Bench orders to inform both the Parties to be present on 2071/12/22 (corresponding to 5 April, 2015)
- An order had been issued by this court in writ petition no. 079-WC-0060 on 2073/12/03 (corresponding to 16 March, 2017) which reads as follows: What has transpired in this matter? Why should an order sought by the petition not be issued? Provided, there are any grounds and reasons as to why the order should not be issued, the respondents' no. 1, 2, 3 and 4 are hereby directed to submit their rejoinder through the Office of the Attorney General within 15 days excluding the period of travel and respondents no. 5, 6 and 7 are hereby directed to submit their rejoinder in person or through a representative and it is hereby ordered to provide a copy of this writ petition along with the summon and notify the Office of the Attorney General and to submit the case file upon receipt of the rejoinder or upon expiry of the limitation period. Further, upon considering the petitioner's request for an interim order, it is noted that the same petitioner had earlier filed a petition before this court in Writ No. 071-WO-0248, seeking to restrain the implementation of the Power Development Agreement (PDA) executed on 2070/06/03 between the respondent GMR, as the promoter of the Upper Karnali Hydropower Project, and the Investment Board on behalf of the Government of Nepal, relating to the construction of the said project. From the records of that writ petition, it is observed that this court, by its order dated 2071/07/23 (corresponding to 9 November, 2014) declined to issue any interim order restraining the implementation of the said agreement. In the Power Development Agreement (PDA) executed between the respondent GMR and the Investment Board, it was stipulated that the company was required to complete financial management within two years, with the provision that, for valid reasons, an extension of one additional year could be granted. It is observed that the 25th meeting of the Investment Board, on 2073/09/24 (corresponding to 8 January, 2017) resolved to grant a one-year extension for this purpose. In view of the above, there appears to be no justification at this stage to restrain the implementation of the decision regarding the extension. Accordingly, there is no need to issue an interim order as sought by the petitioner.
- An order had been issued by this court in writ petition no. 079-WC-0061 on 2074/11/03 (corresponding to 15 February, 2015) which reads as follows: What has transpired in this

matter? Why should an order sought by the petition not be issued? Provided, there are any grounds and reasons as to why the order should not be issued, the respondents' no. 1, and 2 are hereby directed to submit their rejoinder through the Office of the Attorney General within 15 days excluding the period of travel and other respondents are hereby directed to submit their rejoinder in person or through a representative and it is hereby ordered to provide a copy of this writ petition along with the summon and notify the Office of the Attorney General and to submit the case file upon receipt of the rejoinder or upon expiry of the limitation period. Further, upon consideration of the prayer for an interim order, it is noted that the issues raised by the writ petitioner are of a nature that can be adjudicated at the time of the final hearing of the case and therefore, there is no need to issue an interim order. In view of the fact that the matters raised in the present writ petition require expeditious disposal, the petition has been accorded priority for hearing. Further, as writ petitions nos. 071-WO-0248 and 071-WO-0638, which relate to the same subject matter, are also sub-judice before this court, it is hereby ordered to present this writ petition along with the above writ petitions.

- An order had been issued by this court in writ petition no. 079-WC-0062 on 2079/07/17 (corresponding to 3 November, 2022) which reads as follows: What has transpired in this matter? Why should an order sought by the petition not be issued? Provided, there are any grounds and reasons as to why the order should not be issued, the respondents' no. 1, 2 and 3 are hereby directed to submit their rejoinder through the Office of the Attorney General within 15 days excluding the period of travel and respondents 4, 5 and 6 are hereby directed to submit their rejoinder in person or through a representative and it is hereby ordered to provide a copy of this writ petition along with the summon in the name of the respondents and to submit the case file upon receipt of the rejoinder or upon expiry of the limitation period. With regard to the petitioner's prayer for the issuance of an interim order, it is observed that a two-year Project Development Agreement (PDA) was executed on 2071/06/03 between the Government of Nepal, the Investment Board, and the respondent GMR Company. It appears that the obligations under the agreement were not completed within the stipulated period, and that a one-year extension was granted on 2073/09/24. Furthermore, the Investment Board is seen to have granted an additional one-year extension on 2074/07/24 for the purpose of financial management. It is also noted that a writ petition No. 074-WO-0544, challenging the extensions granted under the agreement, is currently sub-judice before this court. It further appears that, in the interim, no action was taken to maintain the continuity of the agreement, nor was any process adopted to keep the agreement in force. The execution of such agreements and the granting of extensions have been carried out by the Investment Board, and the law vests exclusive authority to do so with the Investment Board. However, it is observed that on 2079/03/31, the Council of Ministers of the Government of Nepal purportedly decided to extend the period for financial management of the Upper Karnali Hydropower Project by two years. It is noted that the original period of the agreement had already expired nearly three years prior, and no intervening extensions were granted. In this context, there appears to be no logical or reasonable justification for the purported two-year extension granted from the date of the decision, i.e., 2079/03/31. While, in the past, the granting of

extensions was carried out by the Investment Board, it is questionable why such a decision was now taken by the Council of Ministers. Further, there appears to be no justification for extending the two-year agreement executed in 2071 to a total period of ten years (until 2081). Accordingly, in view of the balance of convenience and the possibility of irreparable harm, it appears just and appropriate to grant the interim relief as prayed for by the petitioner. Therefore, pending the final adjudication of the present writ petition, an interim order pursuant to Rule 49 of the Supreme Court Regulation, 2074, is hereby issued in the names of the respondents not to implement or cause to implement the decision of the Council of Ministers of the Government of Nepal dated 2079/03/31, purporting to extend the period for financial management of the Upper Karnali Hydropower Project, and to maintain the status-quo.

Rejoinders Submitted by Nepal Government, Investment Board

- The rejoinder submitted against writ no. 079-WC-0057 is as follows: On the basis of the survey permit, survey work over a period of five years have been completed and is in the process of obtaining approval for electricity generation wherein the present writ petition has been filed after inordinate delay. Following the establishment of the Investment Board, pursuant to Section 9 of the Investment Board Act and the decisions of the Investment Board, the Upper Karnali Hydropower Project, along with twelve other projects was brought under the jurisdiction and oversight of the Investment Board. As the Letter of Understanding specifies a minimum installed capacity of 300 MW for the project, neither the Letter of Understanding nor the laws of Nepal prohibit the optimization of the project to increase its capacity to 900 MW. Such a decision does not impose any additional obligation or liability upon the Government of Nepal. Further, in accordance with the *Guidelines for Study of Hydropower Projects* issued by the Department of Electricity Development, it appears that the developer is entitled to optimize the project. GMR Upper Karnali Hydropower Limited obtained the survey permit on 2065/02/08 (corresponding to 21 May, 2008) and the Investment Board, in accordance with the prevailing law, granted an extension of the permit until 2070/02/04 (corresponding to 18 May, 2013). The same Letter of Understanding has already been extensively considered and adjudicated upon in the matter involving Gorkha Bahadur B.C. and others. Clauses 36 and 37 of the Letter of Understanding provides that due consideration must be given to the Upper Karnali Project when granting permission for the construction of other projects upstream or downstream. These provisions, however, do not prohibit granting permission to other projects. Since, the writ petition filed by the petitioners is without merit the writ petition should be quashed.
- The rejoinder submitted against writ no. 079-WC-0058 and 079-WC-0059 is as follows: The respondents have not been able to objectively demonstrate that the matter involves any public right or interest. The PDA was executed only after extensive discussion and mutual consent. The Investment Board while concluding the PDA has not violated the Interim Constitution of Nepal, 2063, or any other applicable law of Nepal. It has already been interpreted by this honorable court that agreements executed by the Government of Nepal in accordance with a PDA do not fall within the category of agreements that must

be ratified by the Legislature under Article 156 (2) of the Interim Constitution of Nepal and the Treaty Act, 2047. The PDA does not prohibit any activities that may affect the local population's access to drinking water or their domestic and cultural use. The pre-feasibility study conducted in 1989, which indicated that 4,180 MW could be generated under the relevant Act, was not a detailed study, and conclusions cannot be drawn solely on its basis. Moreover, in developing a project of such capacity, considerations must be given to challenges in raising the required capital and potential adverse impacts on the environment. As the project is to be developed under a peaking run-of-the-river model, Nepal will have access to 108 MW of free energy even during the dry season. Furthermore, the Nepal Electricity Authority has already acquired a 27% free equity stake in GMR Upper Karnali Hydropower Limited. Provisions for studying and mitigating the potential impacts on irrigation projects that may be developed in the lower river basin, as well as on flora and fauna are explicitly included in the PDA. The PDA also explicitly sets out the measures for addressing any impacts arising from the peaking operations of the project. The Letter of Understanding executed between the Ministry of Water Resources of the Government of Nepal and the GMR-ITD Consortium clearly specifies a minimum installed capacity of 300 MW for the project. Accordingly, there is no legal prohibition under Nepalese law against the Government of Nepal granting permission to optimize the project and increase its capacity. By virtue of the increased capacity, it is evident that the Government of Nepal will receive 108 MW of free electricity, as well as enhanced capacity and energy royalties. The PDA is a type of Concession Agreement. Being required to follow international practice and standards, the PDA includes provisions classifying and addressing force majeure. Under the PDA, the Government of Nepal is liable to provide compensation only in cases arising due to actions attributable to the Government or purely political causes. This arrangement is consistent with recognized international practice and standards. It is not appropriate to interpret the subject of force majeure in an arbitrary manner and assert that it is contrary to public or national interest. The claim in the writ petition that the project would automatically vest in the ownership of the Government of Nepal is not clear is entirely speculative. In order to discourage delays and prevent the developer from unduly postponing the construction work, the PDA clearly prescribes that if the construction is not completed within the stipulated period, the developer is obliged to compensate the Government of Nepal at the rate of NPR 1,389 per megawatt per day. Upon the expiration of the term of the agreement, that is, after twenty-five years, the developer is obliged to transfer the project to the Government of Nepal free of cost in a good operating condition. The PDA contains detailed provisions regarding the process of project transfer and the obligations to be fulfilled for such transfer. In order to promote hydropower development, the Government of Nepal, through the Fiscal Act of 2071/72, provided income tax exemptions to hydropower projects and, in accordance with the Budget Speech of 2071/72, granted VAT exemptions. Pursuant to this policy, the Upper Karnali Project was also declared eligible for income tax exemption. The benefits accruing to the Government of Nepal from taxes, revenues, free electricity, and dividends payable by the project developer exceed the financial concessions provided by Nepal to the developer for the Upper

Karnali Project. The 27% free equity shares in the production company of the Nepal Electricity Authority were executed and became effective from 2064/11/09 (corresponding to 21 February, 2008). As the price obtained from the sale of electricity in India is transparently reported to the Government of Nepal, the developer cannot sell electricity at a lower rate in a manner that would deprive the Nepal Electricity Authority of its share of dividends. The PDA designates arbitration as the chosen method for the resolution of disputes. Singapore being considered economically viable, convenient for Nepal, and suitable for the conduct of arbitration proceedings was chosen as the venue for arbitration under the PDA. While British law may apply for purposes of interpreting the agreement, the PDA clearly stipulates that the project developer must comply with the prevailing laws of Nepal. Since, the writ petition filed by the petitioner is devoid of merit the writ petition should be dismissed.

- The rejoinder submitted against writ no. 079-WC-0060 by Nepal Government, Investment Board and Under-Secretary of the Investment Board is as follows: Under Clause 3.1.3 of the Power Development Agreement (PDA) executed for the development of the Upper Karnali Project, the developer was required to achieve financial management within two years, with a provision allowing for a one-year extension for valid reasons. Exercising its authority, the Investment Board, through its 25th meeting resolved on 2073/09/24 to extend the period for financial management of the project by one year. During this period, the developer was fulfilling critical obligations under the PDA, including land acquisition from local landowners, valuation of land, identification of financiers, preparation of resettlement and rehabilitation plans, coordination with stakeholders, and other preparatory tasks. The developer citing force majeure and pursuant to Clause 12 of the PDA, subsequently requested an extension for financial management. The failure to provide the developer with adequate time, even once, could have resulted in the termination of the agreement and would have sent a negative signal to the international investor community interested in investing in Nepal. Since the petitioner's claims are motivated by improper intentions the writ petition should be dismissed.
- The rejoinder submitted against writ no. 079-WC-0061 by Nepal Government, Office of the Investment Board: Pursuant to the 25th meeting of the Investment Board held on 2073/09/24, the period for achieving financial management under Clause 3.1.3 of the Project Development Agreement (PDA) was extended by 1 (one) year, i.e., until September 18, 2017. Both the Investment Board and the developer were clearly committed to implementing the PDA, yet the financial closure could not be completed within the extended period. The developer company, having sufficiently explained the reasons for the delay, submitted a request on July 12, 2017, seeking a further extension of 1 (one) year. Under Clause 8 of the agreement, i.e., the Acquisition Clause, the Government of Nepal is obligated to provide the company with land, including forest areas and other lands, within the time specified in the agreement. The Government of Nepal is, therefore, bound to make the land available as per the terms of the agreement. Further, Clause 8.3.1(d) of the agreement provides for an extension of time on a day-for-day basis. Considering the need for policy, technical, and financial analysis by the Board

to ensure the continuity of project construction, the Investment Board, in its meeting dated 2074/07/27, resolved to extend the period for financial closure of the project by 1 (one) year effective from the expiry date of September 18, 2017. While the project developer was fulfilling critical obligations under the agreement, including valuation of private land with local landowners, identification of financiers, preparation of resettlement and rehabilitation plans, and coordination with stakeholders, the developer requested an extension of time for financial closure under Clause 12 of the PDA, citing force majeure. Failure to grant the developer a reasonable period could have led to the termination of the agreement, triggering potential liability for compensation and sending a negative signal to the international investor community interested in investing in Nepal. Since, the petitioner's claims are unfounded the writ petition should be dismissed.

- The rejoinder submitted against writ no. 079-WC-0062 by the Investment Board is as follows: The Project Development Agreement constitutes a legal document creating contractual obligations. In such matters, no third party has the right to invoke the writ jurisdiction of the court to seek relief. It is evident that a definite period is necessary to instill confidence in financiers for arranging the debt portion of the financial resources required for the project. Regarding the period for achieving financial closure for the present project, Clause 3 of the PDA explicitly incorporates it as a *Condition Subsequent*. The provisions of the same clause create the legal basis for granting an extension of time. While the financial closure was originally required to be completed within two years from the date of the agreement, the promoter company was unable to achieve this, and a one-year extension was granted. Any further delay in performing the obligations stipulated under the agreement was accommodated on a day-by-day basis. This decision was taken based on the legal rights conferred by the provisions of the PDA. The legally sanctioned extension remained in effect until 2075/06/02 (corresponding to 18 September, 2018). It is noted that, with regard to the present project, Bangladesh had expressed interest in purchasing the electricity to be generated, and the promoter subsequently requested an extension for financial closure before the Investment Board on 2075/03/24 (corresponding to 8 July, 2018). In response to this request, the Investment Board constituted a study committee under the coordination of the Vice-Chairperson of the National Planning Commission. Following the committee's review, and upon the recommendation of the Investment Board, the Government of Nepal executed an Addendum to the PDA in accordance with Clause 3.4.1 (C) of the agreement, which provides that amendments may be made with the written consent of the Parties. Both the Government of Nepal and the promoter company have made every effort to implement the provisions of the PDA. The agreement continues to remain in force as the promoter company requested an extension within the timeframe prescribed under the PDA. It is noted that the true party to the PDA is the Government of Nepal, with the Investment Board acting solely as its representative. Pursuant to Clause 3.4.2(C) of the PDA, any extension of time requires the consent of the Government of Nepal, the Council of Ministers. In accordance with the provisions of the PDA, the extension granted through an Addendum was contingent upon the company complying with additional conditions and completing financial closure within the prescribed period. Accordingly, the writ

petition filed challenging the said extension is without merit and should therefore, be quashed.

Rejoinders Submitted by Project Developer G.M.R. Upper Karnali Hydropower Limited

- The rejoinder submitted against writ no. 079-WC-0057 by G.M.R. Upper Karnali Hydropower Limited is as follows: With regard to the Letter of Understanding sought to be annulled, a writ petition previously filed by Gorkha Bahadur B.C. and others has already been adjudicated, and it was held that the Letter of Understanding need not be annulled. Writ jurisdiction does not extend to matters of contractual obligations. The Letter of Understanding provides for numerous benefits, including 12% free electricity, 27% free shares, and the transfer of the entire project to the Government of Nepal after 30 years. Pursuant to this Letter of Understanding, the respondent, GMR Upper Karnali Hydropower Ltd., registered as a Nepali company, obtained a survey permit and completed the survey work and no detriment has occurred to Nepal or the Nepali people. The GMR-ITD Consortium was selected through International Competitive Bidding, having secured the highest score. At the stage when the survey work had been completed and the project was about to enter the production phase, the petition was filed with undue delay. The claims of the petitioners are therefore, wholly irrelevant. The respondent, in its rejoinder has regularly furnished progress reports throughout the survey period. The increase in project capacity from 300 MW to 900 MW has been carried out in accordance with applicable laws, regulations, and procedures. It is evident that the capacity augmentation will result in additional benefits to Nepal. Public hearings were conducted, and the Environmental Impact Assessment (EIA) report was prepared and duly approved. Exercising its powers under the Investment Board Act, the Investment Board brought the present project under its jurisdiction. The respondent has no other projects besides the Upper Karnali Project. Various other projects upstream and downstream of this project have been allocated by the Government of Nepal to other parties. The provisions of Clauses 36 and 37 of the Letter of Understanding do not grant exclusive rights to the GMR-ITD Consortium. Furthermore, the generation of electricity from the project does not entail the complete utilization of the water resources. Water required for drinking, irrigation, and aquatic life in the lower riparian areas must be reserved. It is not feasible to construct a 5,400 MW project in the area made available to the respondent company; a capacity of 900 MW is considered appropriate. A main meter will be installed when the electricity generated from the project is fed into the grid, and check meters will be provided at each outgoing bus bar. As the Government of Nepal exercises direct oversight over the project, it will at all times be aware of the quantity of electricity generated. It is not clear what constitutional or legal issue the petitioners want to adjudicate through the present dispute. Accordingly, it is prayed that the writ petition be dismissed.
- The rejoinder submitted against writ no. 079-WC-0058 by G.M.R. I.T.D. Consortium is as follows: The direct involvement of the respondent, GMR Upper Karnali Hydropower Ltd., in the Upper Karnali Hydropower Project commenced only when, pursuant to a competitive process announced by the Government of Nepal, it obtained the highest score among all competitors and executed the Letter of Understanding in 2008, and was

formally registered as a Nepali company on 2065/01/20. Since its registration, all work related to the Upper Karnali Hydropower Project has been carried out exclusively by this Company. The writ petitioners had accepted the International Competitive Bidding process and are now raising objections only with regard to its outcome. Having established GMR Upper Karnali Hydropower Ltd. and completed the survey work without objection, the petition has been filed with undue delay and therefore, the writ petition should be quashed.

- The rejoinder submitted against writ no. 079-WC-0058 by G.M.R. Upper Karnali Hydropower Ltd. is as follows: Among the three parties to the disputed agreement, Karnali Transmission Company Pvt. Ltd. has not been made a respondent in the writ petition and therefore, no order can be issued without affording it an opportunity to be heard. The Department of Electricity Development, upon review and consideration of the feasibility and technical study reports of the project, approved the increase in capacity from the original 300 MW to 900 MW without expanding the project's geographical area, and the survey permit was accordingly amended. The earlier pre-feasibility study indicating the potential for a 4,180 MW project in the same area was merely a preliminary study. Such study reports can only serve as reference material for feasibility assessment. The petitioners appear to have adopted a double standard, contending that while a 900 MW capacity could be allocated to others for developing projects, the present company should be restricted to a 4,180 MW capacity. On one hand, they argue for constructing a high dam to achieve a 4,180 MW project, while on the other hand, they claim that releasing water for three hours from the project would cause damage to structures and the environment in the lower riparian areas, thereby revealing the manifest confusion the petitioners. It is clarified that water is released from the project solely in accordance with the quantities prescribed under Government of Nepal regulations for use in the lower riparian areas. Complete retention of water does not occur; normal downstream flows are maintained. During the approval of the Environmental Impact Assessment, the Government of Nepal duly took the above factors into consideration and explicitly specified the mitigation measures. Considering that a substantial investment has already been made in the project, the petition, filed nearly six years after the execution of the Letter of Understanding, constitutes undue delay. The Supreme Court has previously rendered authoritative guidance regarding Article 156 (2) of the Interim Constitution of Nepal, 2063. The agreement is clearly in the national interest, as Nepal will receive 12% free electricity, 27% equity shares, royalties, taxes, and substantial revenue, and, upon expiration of the concession period, the entire project will be transferred to the Government of Nepal without any additional investment. The agreement also provides for plans to ensure local benefits, industrial development, employment generation, and skill development, demonstrating that the project is structured to maximize benefits for the local population. The matters raised by the petitioners regarding force majeure and tax incentives are issues to be determined by the Parties to the agreement. Writ jurisdiction does not extend to purely contractual matters. As GMR does not possess a separate legal entity under the designation "Hydro Energy Business Unit," no rejoinder has been filed on its behalf. Accordingly, the writ should be quashed.

- The rejoinder submitted against writ no. 079-WC-0059 by G.M.R. Upper Karnali Hydropower Ltd. and Karnali Transmission Company Pvt. Ltd. is as follows: The matters set forth in the Project Development Agreement constitute purely contractual issues and are not subject to writ jurisdiction. Under Section 5 of the Investment Board Act, 2068, the Investment Board is empowered to determine the terms of investment and to enter into or facilitate agreements concerning projects. Similarly, Section 35 of the Electricity Act, 2049, empowers the Government of Nepal to enter into contracts with any person or entity for the purpose of generation, transmission, or distribution of electricity in accordance with the terms specified therein. A contract executed in accordance with the due legal process cannot be annulled. G.M.R. Upper Karnali Hydropower Ltd., while remaining within the area specified in its permit, conducted the survey and feasibility studies for the project and proposed an increase in capacity from 300 MW to 900 MW, which was duly approved by the Department of Electricity Development. The survey and Environmental Impact Assessment for the 900 MW capacity project have been completed, and the Project Development Agreement was executed accordingly. The pre-feasibility study conducted by the consultant, Himalayan Power Consultants indicating the possibility of developing a 4,180 MW project constitutes only a preliminary assessment. The Project Development Agreement clearly stipulates the circumstances under which a force majeure event may arise and the remedies available to the affected party. Contrary to the contentions of the petitioners, the occurrence of a force majeure event does not entitle the affected party to claim compensation automatically. As per Clause 5.5.1 of the Agreement, the expenses of the Project Review Panel are to be borne equally by the Government of Nepal and the respondent until financial closure is achieved, after which the respondent shall bear the entire cost. There is no legal provision stipulating that the Government shall take only the benefits of the project without sharing in any of the expenses. Clauses 8, Schedule-5, and Schedule-19 of the Agreement clearly allocate responsibilities regarding the acquisition of land necessary for the project. There is no law providing that the Government of Nepal is exempt from the responsibility of facilitating land acquisition. Section 5 (g) of the Investment Board Act, 2068, explicitly empowers the Investment Board to make available or facilitate the acquisition of government land required for the project. Similarly, Section 33 of the Electricity Act, 2049, and the Land Acquisition Act, 2034, provide for the Government of Nepal to facilitate land acquisition for the project. Accordingly, this matter does not fall within the purview of writ jurisdiction. Section 5(e) of the Investment Board Act, 2068, empowers and obligates the Investment Board to determine and provide economic or non-economic incentives for any project. Similarly, incentives provided by the Government of Nepal cannot be challenged so long as they do not contravene the national budget, policies, programs, or the Financial Procedure Act. The petitioners contention that the agreement was executed without conducting an environmental study of potential adverse impacts on the downstream areas is factually incorrect. The comprehensive environmental study for the project was completed and the report was duly approved by the Government of Nepal on 2069/12/30 (corresponding to 12 April, 2013). Any dispute arising under the Project Development Agreement is to be resolved through arbitration in Singapore under British

law, which bears no impact on the sovereignty of Nepal. Since the project's equity investor is a foreign entity, it has been agreed that disputes will be resolved in a neutral country under the applicable law of that jurisdiction. This is also consistent with international practice. The respondents' assertions regarding the project cost are misleading, as the project cost cannot be finally determined until financial closure is achieved. Furthermore, should the Upper Karnali Hydropower Project generate higher electricity than anticipated, there will be no additional financial burden on the Government, while the Government will continue to receive half of the benefits free of cost. Since all investment is to be made by the respondents, the provision that the Project Company shall receive half of the benefits arising from carbon credits cannot be interpreted otherwise. The petitioners have failed to demonstrate how the matters raised pertain to issues of public concern. In the petition, the petitioners on one hand contend that a high dam should be constructed to generate a 4,180 MW capacity project, and on the other hand argue that releasing water for the downstream irrigation structures would cause serious harm to wildlife and the environment, which only reflects the petitioners' own confusion. In a Peaking Power Project, water is released for the use of the downstream areas only in the quantities prescribed by the rules; not all water is impounded. The agreement clearly provides for studies and appropriate arrangements regarding the potential impacts on downstream areas. Considering the substantial investment already made in project development, and the undue delay in filing the petition, it is prayed that the writ petition be dismissed.

- The rejoinder submitted against writ no. 079-WC-0060 by G.M.R. Upper Karnali Hydropower Ltd. is as follows: Under Clause 3.1.3 of the Project Development Agreement, in the event that financial closure is not achieved within two years despite diligent efforts due to force majeure beyond the control of the Company, an extension of one year may be granted. Financial closure entails the assessment of the project's technical aspects by an independent team of international experts, commissioning of additional surveys and investigations, conducting environmental and social impact assessments in accordance with international standards, and a comprehensive evaluation of land acquisition. While the obligation to provide the necessary land rests with the Government of Nepal, such provision has not yet been completed. Since the Project is primarily export-oriented, long-term PDAs with the purchasers are required. Prior to signing the investment documents necessary for financial closure, the lenders must be fully satisfied with all the matters mentioned above. During the period allocated for financial closure, Nepal experienced major earthquakes, which rendered it impossible to complete all preparatory activities within the stipulated time. The Project Development Agreement recognizes such events as force majeure which is beyond the control of the Company. The Government of Nepal, through the Investment Board, has also formally acknowledged in writing that the earthquakes constituted force majeure. Clause 12.1.2 of the Project Development Agreement explicitly defines earthquakes as force majeure beyond the control of the Company. In the occurrence of a force majeure, the time period within which the affected party is required to fulfill its obligations is automatically extended on a day-to-day basis. Following the earthquake, politically motivated violent

incidents and a prolonged border blockade constituted additional force majeure making it impossible to complete financial closure within the stipulated two-year period. Consequently, the delays in fulfilling the obligations of the Government of Nepal further contributed to the postponement of the financial closure. Delays in land acquisition and in the formulation of policies and laws relating to cross-border electricity trade constituted force majeure. The respondent on 24 April, 2015, requested an extension of at least one year following which the Investment Board pursuant to Clause 3.1.3 of the Project Development Agreement granted a one-year extension. Matters concerning the financial closure, its timeline, and any extensions thereof pertain exclusively to contractual rights and obligations and do not fall within the writ jurisdiction and therefore, the writ petition should be dismissed.

- The rejoinder submitted against writ no. 079-WC-0060 by G.M.R. I.T.D. Consortium is as follows: The direct involvement of the respondent in the Upper Karnali Hydropower Project was limited to its registration as a Nepali company, GMR Upper Karnali Hydropower Ltd., pursuant to the Memorandum of Understanding executed in 2008. Following the company's registration on 2065/01/20 (corresponding to 2 May, 2008), all activities pertaining to the Project have been undertaken solely by GMR Upper Karnali Hydropower Ltd. The Investment Board's decision to extend the period for financial closure by one year, made under the terms of the Project Development Agreement, does not warrant annulment. Accordingly, the writ petition should be dismissed.
- The rejoinder submitted against writ no. 079-WC-0061 by G.M.R., Upper Karnali Hydropower Limited, Upper Karnali Transmission Company Limited and G.M.R. I.T.D. Consortium located in India is as follows: Under Clause 3.1.3 of the Project Development Agreement, the period for completing financial closure may be extended by one year following the initial 24-month period. Clause 12.5 of the Agreement further provides that if a force majeure event occurs, or if the Government of Nepal fails to discharge its obligations within the stipulated time, any contractual obligations that cannot be performed within the prescribed period shall be suspended, and the duration of such obligations shall be extended accordingly to allow their fulfillment under the Agreement. Clause 3.4 of the Project Development Agreement further provides that the period for financial closure may be extended with the mutual consent of the Parties. The progress of the Project was impeded due to the 2015 earthquake and the subsequent border blockade. Additionally, the absence of a foundational framework for electricity exports created circumstances beyond the control of the respondent, rendering financial closure unfeasible. Notwithstanding the continuous efforts made by the respondent, the delay in financial closure occurred due to such force majeure events and the Government of Nepal's failure to complete its requisite obligations within the stipulated time. In view of these circumstances, the Investment Board, at its meeting on 2074/07/27 (corresponding to 13 November, 2017), approved a further extension of one year for financial closure. The Project Development Agreement explicitly stipulates matters such as which projects may be developed, how progress is to be measured, and the circumstances under which extensions of time may be granted. It is a well-established principle, as affirmed by this honorable court in various cases, that contractual matters do not fall within the

jurisdiction of a writ petition. The request for an extension made on 12th July 2017 was subsequently granted with effect from 18th September 2017, pursuant to the decision of the Investment Board dated 2074/07/27. Since, there is no ground to deem the extension of a lapsed period otherwise; the writ petition should be quashed.

- The rejoinder submitted against writ no. 079-WC-0062 by G.M.R., Upper Karnali Hydropower Limited, Karnali Transmission Company Private Limited and G.M.R. I.T.D. Consortium is as follows: Regarding the third extension of time for financial closure of the Project, it is noted that the second extension of time was granted for one year, i.e., up to 18th September 2018, by letter dated 6th December 2017. The key tasks and plans required for financial closure were communicated to the Investment Board on 5th January 2018. Due to force majeure the respondents, financial closure could not be completed within the extended period, and the respondents had been continuously updating the Board on progress regarding land acquisition and power sales since July 2012. Requests for further extensions were made periodically. Meanwhile, the Department of Electricity Development informed that the preliminary environmental assessment report for the transmission line project had been approved by the Secretary-level decision dated 2075/08/15 (corresponding to 1 December, 2018). As the Project is export-oriented, discussions, negotiations, and correspondence with Bangladesh were ongoing regarding power sales. On 30th January 2020, the Bangladesh Power Development Board issued a Letter of Intent for the purchase of 500 MW of electricity. An initialing of the Power Purchase Agreement was done on 7th January 2022, and the updated agreement was initialed on 3rd September 2022. In the absence of unforeseen circumstances, financial closure is expected to occur within the current two-year extension period. For the sale of 500 MW to Bangladesh, the Applicant Company, the Bangladesh Power Development Board, and NTPC Electric Trading Corporation Limited have reached final agreement on the Power Purchase Agreement. The extension granted duly considers the efforts, progress, and obstacles encountered by the Respondents in achieving financial closure. It is emphasized that the contracting party under the Project Development Agreement is the Government of Nepal, not the Investment Board. Even where extensions are granted, the approval of the Council of Ministers is required for signing the Addendum. The independent choice of contracting parties cannot be overridden. Contrary to the petitioners' claims, no shares of the Applicant Company have been sold to any third party. To provide the bank guarantees required for the Power Purchase Agreement, the company commenced capital enhancement and submitted the request for approval to the Investment Board, which has initiated the necessary process for approval. Cancellation of the financial closure decision at this stage would jeopardize Nepal's power sale plans to Bangladesh. Clause 3.1.3 of the Agreement provides that financial closure must occur within 24 months from the execution of the Agreement, with a possible one-year extension. Clause 3.4.1 (c) allows further extension with written consent of the parties. While previous extensions did not alter the terms of the Agreement, this time the extension incorporates new conditions. Addendum Clause 1.1.1 stipulates that the Power Sale Agreement must be executed and submitted to the Investment Board within six months from 15th July 2022. Clause 1.1.2 requires financing agreements with lenders

within 23 months, and Clause 1.1.3 requires submission of detailed financial closure information within 24 months. These new conditions were approved by the Government of Nepal, the contracting Party. Therefore, the extension under the Agreement is a matter of contractual right and cannot be examined under the writ jurisdiction. Accordingly, the writ petition should be dismissed.

Rejoinder Submitted by Nepal Government, Ministry of Energy

- The rejoinder submitted against writ no. 079-WC-0057 by Nepal Government, Ministry of Energy is as follows: At the time of execution of the Memorandum of Understanding, all actions and proceedings were carried out in accordance with the Electricity Act, 2049, the Electricity Regulations, 2050, and the Hydropower Policy, 2050. G.M.R. was selected on a competitive basis. Upon generation of electricity, Nepal shall be entitled to make full use of the water for all required purposes. Since permits for hydropower survey and generation have also been granted to other promoters both upstream and downstream of the Project, there is no requirement to seek consent from the GMRIID Consortium India for the development of other projects on the Karnali River. Since the promoter is required to provide the Government of Nepal, in addition to royalties and taxes, 12 percent electricity free of cost, and to transfer 27 percent shares free of cost to the Nepal Electricity Authority, the present Memorandum of Understanding is in the interest of Nepal. As the Project proponent sought to develop the Project by enhancing its capacity without altering any other terms and conditions stipulated in the Memorandum of Understanding and the license, and since the enhancement would be beneficial to Nepal, approval was granted to increase the capacity to 900 MW. Monitoring of the unit of power generation may be carried out by the investors, the purchaser, the Nepal Electricity Authority, and the Project. The promoter submitted an application stating that, despite having undertaken the works, it was not possible to complete the entire survey within the prescribed period of 30 months, which appears to be justified. Furthermore, the promoter submitted all documents required under the Memorandum of Understanding within the stipulated time, and the status of work progress appears satisfactory. Therefore, in accordance with contractual principles since an extension of time was granted for the survey works, the writ petition should be quashed.
- The rejoinder submitted against writ no. 079-WC-0058 by Nepal Government, Ministry of Energy is as follows: Matters arising out of a lawfully executed contract do not attract the application of Article 156 (2) of the Interim Constitution of Nepal, 2063. Several issues raised by the writ petitioners have already been adjudicated upon and settled by the court, with principles having been laid down in earlier writ petitions, including those filed by Gorakh Bahadur B.C. and Ram Chandra Chataut. Therefore, the present writ petition should be dismissed.
- The rejoinder submitted against writ no. 079-WC-0060 by Nepal Government, Ministry of Energy is as follows: Clause 3.1.3 of the Power Development Agreement provides that if, despite making commercially reasonable and necessary efforts, the promoter company GMR fails to achieve financial closure within twenty-four months from the execution of the Agreement due to force majeure, and submits a plan demonstrating that

financial closure can be achieved within one additional year, an extension of up to one year may be granted for the purpose of financial closure. Since the Agreement has been entered into by mutual consent of the contracting parties, it is evident that the promoter is entitled, in accordance with the Agreement, to obtain such one-year extension for financial closure. In view of the prevailing earthquake and blockade, no further elaboration on those circumstances is necessary. A decision taken by the competent authority in accordance with the provisions of the Agreement is not liable to be annulled. Therefore, the writ petition is liable to be dismissed.

- The rejoinder submitted against writ no. 079-WC-0061 by Nepal Government, Ministry of Energy, Water Resources and Irrigation is as follows: Clause 3.1.3 of the PDA provides that if, despite making commercially reasonable and necessary efforts, the promoter company GMR is unable to achieve financial closure within 24 months from the execution of the Agreement due to force majeure, and submits a plan demonstrating that financial closure can be achieved within one year, an extension of up to one additional year may be granted for the purpose of financial closure. With respect to the decision to grant an extension, taken at the meeting of the Investment Board dated 2074/07/27, this Ministry had no role whatsoever. As no decision has been taken by this Ministry that infringes upon or adversely affects the rights or interests of the petitioner, the writ petition should be quashed.
- The rejoinder submitted against writ no. 079-WC-0062 by Nepal Government, Ministry of Energy, Water Resources and Irrigation is as follows: In large-scale hydropower projects such as the Upper Karnali Hydropower Project, arranging financial resources and achieving financial closure naturally requires a considerable period of time. In addition to complying with Nepal's legal framework, the promoter company is also required to comply with the legal regimes of its home country, India, as well as that of Bangladesh, the country purchasing electricity generated by the Project, which has further contributed to the extension of the financial closure period. At the Fourth Meeting of the Nepal–Bangladesh Joint Working Group and Joint Steering Committee, held in Kathmandu on 24–25 August 2022, discussions were also held regarding the progress of the Power Sales Agreement proposed to be executed among the Bangladesh Power Development Board (BPDB), NTPC Vidyut Vyapar Nigam Ltd. (NVVN), and GMR Karnali Hydropower Company Limited for the purchase of 500 MW of electricity from the Upper Karnali Hydropower Project. During the meeting, the Bangladesh side informed that the Power Sales Agreement would be signed in the near future. If the interim order issued on 2079/07/17 is allowed to continue, it would delay the construction of the Project and adversely affect economic development. As no act or omission attributable to this Ministry has infringed upon or adversely affected the constitutional or legal rights of the writ petitioners, the writ petition should be dismissed.

Rejoinder Submitted by the Office of the Prime Minister and Council of Ministers

- The rejoinder submitted against writ no. 079-WC-0057 by Nepal Government, Office of the Prime Minister and Council of Ministers is as follows: Pursuant to Section 35 of the Electricity Act, 2049, the Government of Nepal is vested with the authority to enter into

contracts with any person or institution for the generation, transmission, or distribution of hydroelectric power. The Electricity Act, 2049 and the Electricity Regulation, 2050, also encompass hydropower projects intended for the export of electricity. In accordance with the said legal framework, necessary actions including the invitation of proposals through competitive processes have been continuously undertaken with the objective of implementing hydropower projects such as the Upper Karnali Hydropower Project through domestic and foreign promoters. A Negotiation Committee constituted by the decision of the Government of Nepal (Council of Ministers) dated 2064/09/15 (corresponding to 30 December, 2007) conducted negotiations, and based on the recommendation of the said Committee, a Memorandum of Understanding was duly executed in accordance with the prevailing laws and therefore, the petitioners writ petition should be quashed.

- The rejoinder submitted against writ no. 079-WC-0058 by Nepal Government, Office of the Prime Minister and Council of Ministers is as follows: Pursuant to the proposal of the Ministry of Energy, the Council of Ministers, in its meeting dated 2071/06/02 (corresponding to 18 September, 2014), resolved to approve the draft Project Development Agreement of the Karnali Hydropower Project, to authorize the Chief Executive Officer of the Investment Board Nepal, Mr. Radhesh Pant, to sign the Agreement on behalf of the Government of Nepal, and to constitute a High-Level Coordination Committee, with the Joint Secretary of the Ministry of Energy serving as Member-Secretary, for the purpose of facilitating the implementation of the Project. The said Project was awarded to GMR through an international competitive bidding process initiated by the Government of Nepal, and a Memorandum of Understanding relating to the development and operation of the Project was executed on 2064/01/10 (corresponding to 23 April, 2007). On the basis of the said MoU, the Project Development Agreement was subsequently concluded in a manner most conducive to the overall national interest. Under the Project, the Government of Nepal is entitled to receive 12 percent free electricity and 27 percent free equity shares. After twenty-five years, the ownership of the Project shall vest in the Government of Nepal free of cost. As this is a hydropower project, issues concerning natural resources and their allocation are not relevant for the purposes of this agreement; accordingly, it cannot be contended that the agreement contravenes Section 156 (2) of the Interim Constitution. The matter of whether a total of 4,180 MW of electricity can be generated is a technical issue that does not require judicial determination. Therefore, the writ petition should be dismissed.
- The rejoinder submitted against writ no. 079-WC-0059 by Nepal Government, Office of the Prime Minister and Council of Ministers is as follows: In the interest of the nation, and in accordance with the guidance provided under the Investment Board Act, 2068, the Project Development Agreement was executed with the developer based on the principles of public-private partnership and the Hydropower Project Development Guidelines prepared by the Secretariat of the Investment Board. It has been clarified by the Supreme Court that agreements executed by the Government of Nepal in accordance with a PDA do not fall within the category of agreements that require approval by the Legislature under Section 156 (2) of the Interim Constitution, 2063, or under the Treaties Act, 2047.

The PDA does not deal with the allocation or use of natural resources, and as it is not a treaty or agreement with a foreign state or government, there is no binding constitutional requirement to seek parliamentary endorsement for its enactment. Further, the PDA ensures that the use of water resources is in the national interest and does not infringe upon the priority rights of local communities over water resources. Accordingly, the writ petition is liable to be quashed.

- The rejoinder submitted against writ no. 079-WC-0060 by Nepal Government, Office of the Prime Minister and Council of Ministers is as follows: Under Clause 3.1.3 of the Project Development Agreement the developer company is required to complete the financial closure of the project within two years, but in the event that the company, despite making proper efforts, is unable to do so, an extension of one additional year is permissible. The Government of Nepal remains proactive and sensitive regarding the timely completion of the project. It is a practical reality that, due to various natural and other challenges encountered during project implementation, achieving the target timeline may sometimes be difficult. The issue of whether the grounds taken by the Company for seeking the extension of time were adequate or not is not a matter to be entertained within the writ jurisdiction. The writ petition is liable to be quashed.
- The rejoinder submitted against writ no. 079-WC-0061 by Nepal Government, Office of the Prime Minister and Council of Ministers is as follows: The Upper Karnali Hydropower Project is a project promoted by the Investment Board under the Investment Board Act, 2068. Given that this project is a large and significant initiative for the development of hydropower in the country, the Government of Nepal remains proactive and sensitive to ensuring that the project is completed in the national interest and on schedule. It cannot be disputed that, during project implementation, various natural and other challenges may arise, which in some cases make it difficult to complete the project within the targeted timeframe and this should not be deemed otherwise.
- The rejoinder submitted against writ no. 079-WC-0062 by Nepal Government, Office of the Prime Minister and Council of Ministers is as follows: The 25th meeting of the Investment Board pursuant to Clause 3.1.3 of the PDA approved for the first time, an extension of the timeframe with the condition that financial closure be completed by 2074/06/02 (corresponding to 18 September, 2017). The 28th meeting of the Board pursuant to Clause 3.4.1 (B) approved a second extension on a day-for-day basis, with the condition that financial closure be completed by 2075/06/02 (corresponding to 18 September, 2018). Subsequently, the 51st meeting of the Board resolved to recommend to the Government of Nepal a third extension of the timeframe for financial closure of the Upper Karnali Hydropower Project, subject to the fulfillment of certain conditions. Under Clause 3.4.2 (C) of the PDA, it is stipulated that, with the written consent of the Parties, the timeframe for the Condition Subsequent specified in the agreement may be extended. When the Government of Nepal, through the Council of Ministers, approved the third extension of the timeframe for financial closure, additional conditions were set out in an Addendum in accordance with Clause 3.4.2 (C) of the PDA. This Addendum forms an integral part of the PDA between the Government of Nepal and the developer company. The Government of Nepal, through the Council of Ministers, on 2079/03/31

(15 July, 2022) stipulated the following conditions for GMR Upper Karnali Hydropower Limited: to complete the Power Sale Agreement within 6 months and submit it to the Investment Board; to execute the Financial Agreement with lenders within 23 months and submit it to the Investment Board; to complete the financial closure of the project within 24 months and submit it to the Investment Board; and to submit a detailed project schedule to the Investment Board within 7 days. The third extension of the timeframe was granted not merely under the provisions of the PDA, but with additional conditions incorporated as an integral part of the PDA. Consequently, the extension required a decision from the Government of Nepal, the same authority that approved the PDA. It should be noted that the PDA timeframe and the time allowed for financial closure are two distinct matters. The expiration of the financial closure timeframe does not release the parties from their other contractual obligations. Since entering into the PDA, GMR has made significant progress in the development of the project. This includes: obtaining the necessary land for project development; securing the commitment from Bangladesh to purchase the electricity produced by the project; and receiving positive responses regarding the use of Indian territory for electricity export to Bangladesh. If the extension for this work were not granted, the efforts already undertaken in Nepal's electricity trade sector would fail to materialize, potentially causing long-term adverse effects. Moreover, the non-implementation of the PDA provisions would result in a significant financial liability for the Government of Nepal. Accordingly, the writ petition should be dismissed.

Rejoinder Submitted by Nepal Government Department of Electricity Development

- Rejoinder submitted by Nepal Government, Department of Electricity Development against writ no. 079-WC-0057 is as follows: In accordance with the prevailing Electricity Act and Rules, the promoter was selected on a competitive basis and an Agreement was executed accordingly. Several of the issues raised by the petitioners have already been adjudicated by the Supreme Court. After electricity is generated from the power plant, the water is discharged back into the same river and remains available for use for other purposes. There is no requirement to seek consent from GMR ITD Consortium India for the development of other projects on the Karnali River. Permissions for other projects both upstream and downstream of the project have been granted to other promoters. The programs to be implemented for the local population are specified in the Environmental Impact Assessment report. Provisions have been made for the distribution of royalties generated from the hydropower project to the local levels. Upon the expiry of the project's generation license, the promoter is required to hand over the project to the Government of Nepal, free of cost and in good operating condition and therefore, the present Agreement is not detrimental to the national interest but is, rather, in conformity with the interests of Nepal. Although the Agreement specifies a minimum installed capacity of 300 megawatts, the Guidelines for the Study of Hydropower Projects provide for determination of the project capacity, and since the enhancement of the capacity is beneficial to Nepal, approval was granted to increase the capacity to 900 megawatts. As the promoter submitted an application stating that it was not possible to complete the entire survey work within the prescribed period of 30 months, and as the status of work

progress was satisfactory, an additional period was granted. The respondent requests the writ petition to be quashed.

- Rejoinder submitted by Nepal Government, Department of Electricity Development against writ no. 079-WC-0058 is as follows: The Project Development Agreement executed in relation to the construction of the Upper Karnali Hydropower Project does not constitute an allocation or distribution of natural resources; rather, it pertains to the commercial utilization of electrical energy generated from water. Even after electricity is generated from the project, the water from the said source continues to flow within Nepal, and therefore no adverse impact on the natural resource arises. As the agreement has been concluded in accordance with law and is not contrary to the prevailing laws or the national interest, the writ petition is liable to be dismissed.
- The Project Development Agreement is not in the nature of an allocation or distribution of natural resources; rather, it relates to the commercial utilization of electrical energy generated from water. Even after electricity is generated from the project, the water of the said source continues to flow within Nepal, and therefore no adverse impact on the natural resource arises. As the agreement has been concluded in accordance with law with the objective of national development and the overall development of the electricity sector, and is not contrary to the prevailing laws or the national interest, there is no basis to issue a writ as prayed for by the petitioner. Accordingly, the writ petition is liable to be dismissed.

The contents of the rejoinder submitted by Nepal Government, Ministry of Finance against writ no. 079-WC-0057 is as follows: As this Ministry has no role or involvement in respect of the contentions raised by the respondent, there is no justification for making this Ministry a respondent. Accordingly, the writ petition filed by the petitioner is liable to be dismissed, as stated in the written reply submitted by the Government of Nepal, Ministry of Finance in Writ No. 079-WC-0057.

The rejoinders having substantially similar contention submitted by Nepal Government, Ministry of Finance against writ no. 079-WC-0058 and 079-WC-0059 is as follows: With respect to the implementation of the Upper Karnali Hydropower Project, the Government carried out extensive discussions and preparatory work, and, after analyzing and evaluating the benefits and advantages to be derived by Nepal from the project, entered into the agreement for its implementation. In executing the agreement for the implementation of the project, no provision of the Interim Constitution of Nepal or any prevailing law of Nepal has been violated. The objective has been to complete the project in a timely manner within the framework of the Constitution and the legal system, generate electricity, and provide a certain degree of economic relief, and to ensure that the project is completed as expeditiously as possible. In order to ensure that no obstruction arises in the construction works and that force majeure do not occur, and to provide assurance to the other party to the agreement and enable the project to be completed expeditiously in the event such circumstances do arise, certain *force majeure* provisions have been incorporated in the agreement. Concessions and exemptions in respect of taxes, duties, and similar charges have been granted to the project strictly in accordance with the prevailing laws. The writ petition lacks merit and is liable to be dismissed.

The rejoinders having substantially similar contention submitted by Nepal Government, Ministry of Science, Technology and Environment against writ no. 079-WC-0057 and 079-WC-0058 and 079-WC-0059 is as follows: It appears that the Environmental Impact Assessment (EIA) for the project was approved by this Ministry on 2069/12/30. During the approval process, a detailed study was conducted on the potential economic, social, cultural, biological, and physical environmental impacts of the project, measures for their mitigation, and the efforts to be undertaken by the project for environmental protection. The opinions, suggestions, and responses of subject-matter experts were incorporated, and discussions and consultations were held at various stages. The EIA report was approved only after its final preparation following these processes. Therefore, the claim that the Environmental Impact Assessment was not conducted is without merit.

The written replies, substantially identical, submitted by the Government of Nepal, Ministry of Irrigation, in Writ Nos. 079-WC-0058 and 079-WC-0059 state that the writ petition does not specify what actions or proceedings of this Ministry allegedly violated the fundamental rights of the petitioner. As such, the writ petition has been filed against this Ministry without any basis or justification and is therefore liable to be dismissed.

The rejoinders substantially identical submitted by Nepal Electricity Authority against writ no. 079-WC-0058 and 079-WC-0059 is as follows: The writ petition fails to clarify or substantiate what actions the Nepal Electricity Authority has undertaken in relation to the generation and distribution of electricity from the Upper Karnali Project, and on what basis such actions allegedly contravene law or public interest. Similar petitions concerning the same subject matter have previously been filed by various individuals as matters of public concern, rendering the present petition redundant. The Supreme Court has already established the principle that the provisions of Article 156 of the Interim Constitution of Nepal, 2063, are not attracted to the generation and distribution of electricity from water resources. The fact that electricity generated from water resources is produced and sold as a commercial commodity clearly demonstrates its commercial nature. The proper utilization of water resources and their allocation under different ownership is a distinct matter. Section 3 of the Water Resources Act, 2049, vests the ownership of water resources within Nepal with the Government of Nepal. Accordingly, the Government is empowered to make necessary decisions regarding the proper and effective use of water resources. Matters involving economic resources, investment arrangements, and commercial or policy considerations for facilitating such use are not subject to judicial review unless expressly prohibited by law. Therefore, since the writ petition is devoid of merit, the writ petition should be dismissed.

The writ petition fails to clearly specify how and to what extent the provisions of the agreement allegedly conflict with the Constitution or any law. The Supreme Court, in Nepal Law Reporter 2070, Decision No. 8982, has recognized that the Government of Nepal has the authority under the prevailing electricity-related Acts, Rules, and Policies to enter into agreements for the operation of hydropower projects with any party. It has also been observed that matters concerning such agreements fall within the scope of general law and contracts. In this context, the court has held that it is not appropriate to assume extraordinary jurisdiction to intervene in

issues governed by prevailing law and valid contractual agreements. Therefore, the contentions raised by the respondent are without basis, and the writ petition is liable to be dismissed.

The rejoinder submitted by National Planning Commission against writ no. 079-WC-0058 is as follows: There is no clear basis or justification for declaring the P.D.A. null and void, as the Committee constituted in accordance with law studied the P.D.A. and submitted its report with recommendations to the Board, which was prepared and presented in accordance with the Constitution and the law. Pursuant to the decision of the Government of Nepal (Council of Ministers) dated 2071/6/2, a Committee was formed under my Chairmanship to facilitate the implementation of the Upper Karnali Hydropower Project. The Committee's role was limited solely to facilitation during project implementation and did not extend to taking any additional actions. Therefore, the claims made in the writ petition are baseless, and the petition should be quashed.

The rejoinder submitted by Nepal Government, Ministry of Forest and Soil Conservation against writ no. 079-WC-0057 is as follows: This Ministry has been implementing its annual programs with priority in accordance with the provisions of Article 35 of the Interim Constitution of Nepal, 2063. As no action has been undertaken by this Ministry that contravenes the said constitutional provisions, the writ petition is baseless and is therefore liable to be dismissed.

The rejoinder submitted by Secretariat of the Legislature Parliament against writ no. 079-WC-0059 is as follows: None of the matters relating to the Upper Karnali Hydropower Project, as referred to by the petitioner, have been submitted to the Legislature-Parliament for discussion, nor has any action been taken on its part. Therefore, the writ petition naming the Legislature-Parliament as a respondent is liable to be dismissed. Since the matters raised by the respondent can be clarified by the relevant Government authorities responsible for entering into the agreement, there is no basis or justification for making the Legislature-Parliament a respondent. Accordingly, it is prayed that the writ petition be quashed.

An order had been set aside by this court on 2079/09/18 (corresponding to 2 January, 2023) which reads as follows: In relation to the Upper Karnali Hydropower Project, after the Project Development Agreement (P.D.A.) was executed between the Government of Nepal, Investment Board, and G.M.R. Company on 2071/06/03, and prior to the P.D.A., following the Memorandum of Understanding (MOU) executed on 2064/10/10 between the Government of Nepal, Ministry of Water Resources, and G.M.R. Company, writ petitions were filed in this court challenging the agreement and MOU. These include writ nos. 069-WO-1425, 071-WO-0248, 071-WO-0638, 073-WO-0954, 074-WO-0544, and the most recent 079-WO-0421, raising constitutional and legal questions concerning the use and allocation of Nepal's primary natural water resources. Under the framework of Sub-article 2(d) of Article 156 of the Interim Constitution of Nepal, 2063, and Sub-article 2(d) of Article 279 of the Constitution of Nepal, constitutional provisions are made regarding the decision-making process on the utilization and allocation of natural resources. In this context, the following issues concerning the use and allocation of Nepal's water resources appears to be of a nature that continues to be raised over the long term:- (1) whether an electricity generation agreement between the Government of Nepal, Investment Board as one Party and a foreign investor as the other party is an agreement

that, under Sub-article section 2 (d) of Article 156 of the Interim Constitution, 2063 and Sub-article 2 (d) of Article 279 of the Constitution of Nepal, requires parliamentary ratification? (2) According to the proviso clause of Sub-article 2 (d) of Article 156 of the Interim Constitution, 2063 and Sub-article 2 (d) of Article 279 of the Constitution of Nepal, what kind of treaties or agreements are to be considered of ordinary nature, such that they do not have a broad, serious, or long-term impact on the nation. Before implementing the Project Development Agreement (P.D.A.) executed on 2071/06/03 between the Government of Nepal, Investment Board, and G.M.R. Company, is it necessary to complete the procedure under Sub-article 2 (d) of Article 156 of the Interim Constitution of Nepal, 2063, or Sub-article (2) of Article 279 of the Constitution of Nepal? Since water resources are one of Nepal's principal natural resources, and questions repeatedly arise regarding whether treaties or agreements concerning their utilization and allocation require parliamentary ratification, the present petition also raises a serious constitutional interpretation issue under Sub-article 2 of Article 156 of the Interim Constitution, 2063, and Sub-article 2 of Article 279 of the prevailing Constitution of Nepal. Considering that such questions merit interpretation by the Constitutional Bench for guidance in the future, the Bench pursuant to Article 137 (3) of the Constitution of Nepal, hereby orders that all petitions filed on this matter be consolidated and submitted to the Rt. Honorable Chief Justice for hearing and management by the Constitutional Bench.

Decision of this Court

As these writ petitions pertain to the same subject, the survey permit for the Upper Karnali Hydropower Project, the subsequent Project Development Agreement, and its extension, they were consolidated and heard together on 2079/10/25 (corresponding to 8 February, 2023), 2079/12/22 (corresponding to 5 April, 2023) and 2080/01/06 (corresponding to 19 April, 2023). Mr. Ratan Bhandari, Mr. Sharad Singh Bhandari on behalf of the petitioners and learned Senior Advocate Mr Ekraj Bhandari, Dr. Punya Prasad Khatiwada, Mr. Khagendra Adhikari, Mr. Rabi Narayan Khanal and learned Advocates Mr. Dhananjaya Khanal, Mr. Kapil Chandra Pokharel, Mr. Madhav Kumar Basnet, Ms. Shanti Devi Khanal, Mr. Manohar Lamichhane, Mr. Dayaram Pokharel argued on behalf of the petitioners. Likewise, Learned Deputy Attorney General Mr. Padam Prasad Pandey and Joint-Government Attorney Mr. Sanjeeb Raj Regmi argued on behalf of Nepal Government. Likewise, learned Senior Advocates Mr. Harihar Dahal, Mr. Yubaraj Bhandari and learned Advocates Mr. Semant Dahal, Mr. Sagar Raj Gautam and Mr. Pramesh Khanal argued on behalf of the respondent Investment Board. On behalf of respondent G.M.R. Upper Karnali Hydropower Limited learned Senior Advocates Mr. Shambhu Thapa, Mr. Purnaman Shakya, Mr. Tulasi Bhatta, Mr. Mahesh Thapa, Mr. Narendra Prasad Gautam, Mr. Shiva Prasad Rijal and learned Advocates Ms. Aayesha Sharma and Dr. Mr. Amarjibi Ghimire presented their arguments. In addition, the written briefs submitted on behalf of the petitioner and the respondents were also examined and studied.

On behalf of the petitioner, the learned Senior Advocate and other learned Advocates primarily contended that the Agreement between the Government of Nepal and G.M.R. contains provisions contrary to the national interest; the agreement was executed in haste, bypassing Parliament, without properly informing the public; the procedure under Article 156 of the Interim Constitution of Nepal was not followed; the survey of the project and extensions for financial

management were granted repeatedly through unlawful means; all these actions were taken during the transitional period when Parliament was not in session; while earlier extensions were granted by the Investment Board, the recent extension for financial management was granted by the Government of Nepal; the Government of Nepal does not have the authority to undertake such actions. The petitioners further contended that: even though the project's capacity was increased from 300 megawatts to 900 megawatts, and the site was relocated and expanded, no M.O.U. was executed to reflect these changes; although studies indicated that the same site could generate 4,180 megawatts, the project was limited to 900 megawatts; uncontrolled discharge of water from the project would adversely affect the lives of local people, irrigation, wildlife, and the environment in the downstream areas; G.M.R. Company does not have a strong international track record, and therefore may not be able to mobilize the investment on time; Nepal itself could mobilize investment for such a project. Accordingly, the petitioner sought that the M.O.U., the agreement, and the extensions granted, along with other related actions, be declared illegal and contrary to national interest, and be annulled.

Similarly, on behalf of the respondents, the learned Deputy Attorney General and Joint-Government Attorney during the course of arguments, contended that: the M.O.U. and the P.D.A. are not contrary to the national interest; the provisions of Article 156 of the Interim Constitution of Nepal do not apply to agreements of a commercial nature; several issues raised in the petition have already been adjudicated by the Supreme Court; in the writ petitions filed by Gorakh Bahadur B.C., Ashok Kumar, and Madhav Kumar Basnet, the court has interpreted that Article 156 of the Interim Constitution does not apply to such disputes, writ jurisdiction is not applicable in matters concerning contractual obligations, and although water is a natural resource, electricity generated therefrom is not considered a natural resource. In the present dispute, since the river water continues to flow entirely within Nepal, there is no allocation of a natural resource involved. A treaty, by definition, must be concluded between states or between a state and an international organization. The law applicable to the P.D.A. is Nepalese law, and the reference to British law applies only for interpreting the contract in the context of arbitration. Thus, an ordinary agreement entered into by the Government of Nepal with a company, within the framework of national law, cannot be treated as a treaty so as to attract Article 156 of the Interim Constitution. The project itself is not objectionable; Nepal receives 12% of the electricity and a 27% share from the project without financial investment. A delay in the process or the occurrence of certain issues does not render the arrangement contrary to the national interest. The report claiming that the project could generate 4,180 megawatts is not a detailed feasibility study; the Memorandum of Understanding itself specifies a capacity of 300 megawatts, and therefore, increasing it to 900 megawatts is permissible under the law through proper optimization. The extensions for financial management were granted in accordance with the law. The first and second extensions were made as per the provisions of the P.D.A. Before granting the third extension, the Government had constituted a Committee. Among the options provided by the Committee's report, granting an extension with conditions was considered the most appropriate. If the agreement were unilaterally annulled, Nepal would be liable to pay compensation amounting to billions, and in the event of international arbitration, the project could not be transferred to any other Party until the dispute is finally resolved. During the forthcoming extension period, if the investor fails to mobilize the required investment, the

Government of Nepal may unilaterally terminate the agreement, and the company would have no claim. Financial institutions cannot provide loans to investors if the Government has not fulfilled obligations such as land transfer. The Upper Karnali Project has not obstructed the construction of other projects in the downstream or upstream river areas; projects such as Phukot Karnali and Betan Karnali are underway. The agreement, executed in accordance with law, and the extension granted for financial management cannot be declared null and void. The interim orders issued by the court have caused hindrances in financial management. Accordingly, it was contended that the writ petition should be dismissed.

On behalf of the respondent, G.M.R. Upper Karnali Hydropower Limited, the learned Senior Advocate and other learned Advocates contended that: G.M.R. was selected to develop the project through a transparent and competitive process; contrary to the petitioner's claim, the company has not occupied more land than necessary; errors in latitude and longitude in the earlier permit were corrected as per the submitted request; in accordance with the understanding with the Government of Nepal, the D.P.R. was prepared within five years and submitted on 2067/02/06; the EIA was also completed on time and submitted on 2070/01/05; G.M.R. has fulfilled its obligations within the five-year period; financial closure is a major condition subsequent under the P.D.A., other conditions are required to be fulfilled only after financial closure; a period of two years was provided for financial closure, and accordingly, it was expected to be completed by 2073; however, following the earthquake in 2072, the Government of Nepal itself issued a letter to G.M.R. notifying that force majeure applied; Clause 3.1.3 of the P.D.A. provides for a regular time extension, which only requires the parties to demonstrate due diligence; accordingly, an extension was granted until 2074/06/02; nevertheless, even during this period, activities such as land acquisition could not be completed, and therefore financial closure could not be achieved; thereafter, the extension was granted until 2075/06/02; the agreement does not prohibit extensions by mutual consent of the parties; the project would not be completed merely because the financial closure period has expired; the parties to the agreement may, by mutual consent and considering the obligations already performed, grant an extension, as provided in Clause 3.4.1 (C) of the P.D.A.; even after the expiry of the second extension period, financial closure could not be achieved; nevertheless, the agreement did not become null and void after the expiry of that period; during this time, both parties continued to perform their respective obligations; correspondence between both parties also took place regarding the purchase of electricity generated from the project by Bangladesh; the Forest Office issued an order for tree felling; therefore, the P.D.A. had not become null and void; the first and second extensions were actions in themselves, whereas the third extension was merely a consequence of the amendment (addendum) to the P.D.A; the third extension was granted by the Government of Nepal based on a study and report it had prepared; the report also considered the advantages and disadvantages of terminating the agreement: if the agreement were annulled, Nepal would have to pay substantial compensation, and the dispute could go to international arbitration; it is in the interest of both parties to commence and complete the project expeditiously; the most recent extension was determined after assessing what work could be completed and within what timeframe; Bangladesh has submitted a Letter of Intent to purchase electricity, and the Indian company has provided a guarantee for electricity transmission; this project establishes a new precedent that Nepal can export electricity to a third country; the project must be technically,

financially, and environmentally sustainable; it is not possible to conclude, without a detailed study, that a project of over four thousand megawatts can be developed in the same area; the project also benefits local residents; the P.D.A. itself specifies a local benefits sharing plan, and a separate two-megawatt plant has been allocated solely for local use; litigation has been filed at every stage to prevent the project from moving forward; moreover, the petitioner's specific demands are not clearly stated; the P.D.A. is a matter of contractual obligation; third parties cannot intervene in this matter; issues such as financial closure are not matters for the Constitutional Bench to adjudicate; since the present matter does not constitute a treaty-like agreement, the constitutional provisions requiring parliamentary approval are not attracted; international law does not apply to this understanding; it is merely a written document for the purchase and sale of electricity; if the P.D.A. were considered a treaty, our rights would be unduly limited; this agreement falls under the authority of the Government of Nepal; since no actions contrary to the national interest, Constitution, or prevailing laws and regulations have been undertaken in relation to the project, it was contended that the writ petition should be dismissed.

The written arguments (briefs) submitted on behalf of both the petitioner and the respondents also shed further light on these same matters.

Before entering into the questions that need to be adjudicated in the various writ petitions filed for decision, it is deemed appropriate to briefly state the facts pertaining to the Upper Karnali Hydropower Project that have been brought into dispute in the present petitions. In this context, reviewing the facts related to project development, on 2063/09/03, the Ministry of Energy, Government of Nepal, issued a public call for expressions of interest to develop simultaneously the Upper Karnali Hydropower Project (300 MW), Arun-3 Hydropower Project (402 MW), and Budi Gandaki Hydropower Project (600 MW). For the development of the Upper Karnali Hydropower Project, the GMR-ITD Consortium, which later became the respondent, proposed to provide 12% free electricity and 27% free shares. Accordingly, on 2064/10/10, a Memorandum of Understanding for project development was signed between the Consortium and the Ministry of Energy. Subsequently, on 2065/01/20, GMR Upper Karnali Hydropower Limited was incorporated under the Companies Act of Nepal, with the Nepal Electricity Authority holding a 27% share. On 2065/02/08, the company was granted a survey permit for the project under Section 5 of the Electricity Act, 2049, initially for a period of 30 months. Thereafter, on 2066/09/05, at the request of the project developer company, the project capacity was increased from 300 MW to 900 MW, and the survey period was extended multiple times until the survey work was completed. During the survey phase itself, on 2069/10/19, the Government of Nepal, Council of Ministers decided to bring projects of national priority under the Investment Board for implementation. Pursuant to the authority vested by the Government under Sections 5, 7, and 9 (1) (i) of the Investment Board Act, 2068, a Project Development Agreement (P.D.A.) was executed on 2071/06/03 between the Investment Board, GMR Upper Karnali Hydropower Limited, and Karnali Transmission Company Pvt. Ltd. According to the agreement, the Upper Karnali Hydropower Project would be developed, owned, operated, and eventually transferred under a Build, Own, Operate, and Transfer (BOOT) model. The Concession Agreement stipulates that after 25 years from the commencement of commercial production, the entire project (hydropower properties) will be transferred free of cost to the

Government of Nepal in a good operating condition. A key aspect of the Project Development Agreement (P.D.A.) was financial closure. Under Clause 3.1.3 of the agreement, financial closure was to be achieved within 24 months. As it could not be completed within this period, the first extension was granted for one year, until 2074/06/02 on 2073/09/24. The second extension was granted on 2074/07/27, extending the deadline to 2075/06/02. As the project developer company still could not achieve financial closure within this period, it requested a third extension on 2075/04/12. Since neither the Investment Board nor the Government of Nepal made any decision regarding this request, the Government of Nepal, Council of Ministers, on 2079/03/31, decided to grant another two-year extension for financial closure. Under the authority conferred by the Government, the Investment Board executed an Addendum to the agreement regarding the extension.

Since the signing of the Memorandum of Understanding for the development of the Upper Karnali Hydropower Project, eight writ petitions have been filed before this court. Of these, two petitions have already been decided, while six writ petitions remain sub-judice and have been presented before this Bench for adjudication. As these writ petitions are being considered by a Division Bench, the Bench observed that questions repeatedly arise regarding whether, under Sub-article 2 (d) of Article 156 of the Interim Constitution of Nepal, 2063, and Sub-article 2 (d) of Article 279 of the Constitution of Nepal, an agreement concerning electricity production between the Government of Nepal / Investment Board on one side and a foreign investor on the other requires parliamentary ratification, and whether this process must be completed before the agreement becomes operative. Given that these questions have been raised repeatedly, including in the present petitions, the Division Bench deemed it appropriate for the Constitutional Bench to provide interpretation and guidance for future cases. Accordingly, the matter was submitted to the Rt. Honorable Chief Justice for referral to the Constitutional Bench for determination of these issues.

Among the six writ petitions submitted to the Constitutional Bench for determination of the above questions: In the writ petition (079-WC-0057) filed by Chanda Kumari Thani and 29 others, the petitioners sought an order of certiorari to nullify the Memorandum of Understanding (M.O.U.) dated 2064/10/10 entered between the Government of Nepal and the GMR-ITD Consortium, the electricity survey permit issued on 2065/02/05, and all subsequent amendments and extensions. They also requested a prohibitory order preventing submission of the Detailed Engineering Report (DER) and execution of the Project Development Agreement (P.D.A.). Similarly, in the writ petition (079-WC-0058) filed by Sharad Singh Bhandari and 36 others, the petitioners sought an order of certiorari to nullify the Upper Karnali Hydropower Project Development Agreement dated 2071/06/03, the formation of any project implementation task force, and all related decisions. Likewise, in the writ petition (079-WC-0059) filed by Ratan Bhandari, the petitioner requested the Project Development Agreement (P.D.A.) dated 2071/06/03 between the Government of Nepal, the Investment Board, GMR Upper Karnali Hydropower Limited, and Karnali Transmission Company Pvt. Ltd. be nullified through an order of certiorari, and that any further decisions regarding the project be taken only after completing the process under Article 156 (2) of the Interim Constitution. In the writ petition (079-WC-0060) filed by Janmadev Jaisi and 4 others, the petitioners sought to nullify through an order of

certiorari the request submitted by the respondent company on 2072/01/22 for financial closure and the Investment Board's decision on 2073/09/24 to extend the financial closure period by one year, as well as all related actions and to issue final orders and also sought for an order of mandamus and any other appropriate orders. In the second writ petition (079-WC-0061) filed by the same petitioners, the petitioner had requested issuance of an order of certiorari to nullify the second extension of the financial closure period granted by the Investment Board on 2074/07/27, effective from 2074/06/02 (18 September 2017). In the second writ petition (079-WC-0062) filed by Ratan Bhandari, the petitioners challenged the Council of Ministers' decision dated 2079/03/31 to extend the financial closure period by two years for the Upper Karnali Hydropower Project, arguing that the decision and all related actions were contrary to Nepal's national interest and sought an order of certiorari to nullify these actions. In all these petitions, the petitioners sought an order of certiorari and mandamus and any other appropriate orders to nullify the agreements, extensions, and related actions.

Reviewing the main issues raised in these writ petitions, the following contentions were made by the petitioners: that the Memorandum of Understanding (M.O.U.) and the Project Development Agreement (P.D.A.) allegedly contained provisions contrary to the national interest, citizens affected by the project were not adequately informed, as the agreements concerned the allocation and use of natural resources, they should have been approved by Parliament under Article 156 of the Interim Constitution and Article 279 of the current Constitution, but the parliamentary process was allegedly bypassed, the agreement was made for 900 MW electricity generation in the Karnali River, which has a potential of 4,180 MW, allegedly neglecting other possibilities, the project was claimed to have adverse impacts on both the lower and upper riparian areas and could affect future projects in those areas, the agreement allegedly caused negative effects on lower riparian structures and the environment, financial closure, which was supposed to be completed within two years, was repeatedly extended in violation of the law, tax exemptions and other fiscal benefits were granted to a company that was allegedly delaying construction, and despite increased flows from upper-riparian projects boosting potential production, the agreement provided for only partial benefits, even when the agreement had effectively lapsed, the Council of Ministers granted further extensions. These were the primary issues highlighted in the petitions. In the rejoinder submitted by the respondents, it was stated that the petitioners repeatedly filed writ petitions of the same nature in an attempt to prevent the project from being implemented, the Project Development Agreement was executed under Nepalese law between the Government of Nepal and a company established in Nepal, and therefore, it did not involve the allocation or division of natural resources or their utilization, so there was no requirement for parliamentary approval, furthermore, the agreement was made only after extensive discussions and consensus with the concerned stakeholders. The rejoinder further explains that the Memorandum of Understanding specified a minimum installed capacity of 300 MW, but the developer designed the project for 900 MW in accordance with the Hydropower Project Guidelines, as optimization was possible, the 4,180 MW generation figure was derived only from a pre-feasibility study and was not established through a detailed study, since the project is a peaking project and other hydropower projects such as Baten Karnali in the lower riparian area and Phukot Karnali in the upper riparian area are being constructed, the project does not adversely affect the lower riparian area or the construction of other projects, as

the Government of Nepal is a party to the Project Development Agreement, the extension of the agreement granted by the Council of Ministers on 2079/03/31 was within the scope of the agreement, and the Addendum to the Agreement was executed accordingly. It was further submitted that, in accordance with the Fiscal Year 2071/072 Finance Act, other projects were granted VAT exemptions and incentives following government policy, and the project was also provided similar tax and fiscal benefits. Through the project, the Government of Nepal receives, without any investment, 12% free electricity and 27% free shares, in addition to revenue and tax benefits, and the project opens the possibility of exporting electricity to Bangladesh. Since the project is commercially operated and will be transferred to the Government of Nepal after 25 years, it cannot be considered treasonous.

After perusal of the submissions from both parties, the Project Development Agreement and other related documents, as well as the arguments and written notes submitted by both the parties, it appears that the following questions need to be addressed and resolved:

- (1) As to whether or not the writ petitions filed can be considered as public-interest petitions;
 - (2) As to whether or not, in the context of Article 156 (2) (d) of the Interim Constitution, 2063 and Article 279 (2) (d) of the Constitution of Nepal, a power generation agreement between the Government of Nepal Investment Board and a Company registered in Nepal with foreign investment requires parliamentary approval, and if so, whether this process must be completed before the agreement comes into force;
 - (3) What is the legal validity of the Project Development Agreement (PDA) for the Upper Karnali Hydropower Project and the subsequent extensions of the financial closure period beyond the initially prescribed time;
 - (4) As to whether or not the disputed agreement is in the national interest;
 - (5) As to whether or not an order as sought by the petitioners' need to be issued, or any other appropriate order need to be issued?
2. Regarding the question as to whether or not the writ petitions filed can be considered as public-interest litigation, it is noted that several of the petitioners are residents of various districts in the Karnali region. The petitioners have stated in their writ petitions that they are individuals who are involved in the study, research, and have interest in the Karnali River and the Karnali Province. The Karnali River is not merely one of Nepal's three major rivers; it is a river intrinsically linked to the lives, livelihoods, culture, and civilization of the Karnali region. Originating near Mount Kailash in Tibet, the river flows approximately 671 miles from north to south, eventually merging with the Ganges in Uttar Pradesh, India, and is therefore regarded as a highly sacred river for Hindus. Millions of people living in the Karnali River basin rely on the river for their daily life, the local environment, agriculture, fisheries, and tourism, making it a critical natural and socio-cultural resource. Water is indispensable for life. In this sense, the Karnali River has served as a foundation for life for centuries, and therefore its protection and use also become matters of human rights. Given its multidimensional connection to human life, it cannot be considered

unnatural for individuals to have concern or interest regarding hydropower projects constructed on the Karnali River, or to wish that its utilization benefits the country. This court has previously expressed the view that “any citizen, in the capacity of a member of the general public, may legitimately approach the court to examine the potential impacts and effects that large-scale projects may have on the lives of the people in the area¹.” In this context, the issues raised in the petitions submitted for adjudication cannot be dismissed on the ground that they do not constitute a matter of public interest.

3. Now, let us examine the question in the context of Article 156 (2) (d) of Nepal’s Interim Constitution, 2063 and Article 279 (2) (d) of the Constitution of Nepal, namely as to whether or not an electricity generation agreement entered into between the Government of Nepal the Investment Board and a foreign-invested company registered in Nepal is subject to ratification from the Parliament and as to whether or not the approval process be completed before the agreement can be implemented? At the time when majority of the petitions were filed, the Interim Constitution of Nepal, 2063 was in force, and the current Constitution of Nepal has since come into effect and is being implemented. Both Article 156 of the Interim Constitution and Article 279 of the current Constitution contain nearly identical provisions regarding the ratification, approval, or endorsement of treaties or agreements. In the context of this constitutional provision, it is necessary to first clarify the meaning of the terms “treaty or agreement” and “natural resources and its allocation and use thereof” in order to determine whether the Project Development Agreement (PDA) signed on 2071/06/03 between the Investment Board of Nepal, representing the Government of Nepal, and the project developer companies GMR Upper Karnali Hydropower Limited and Karnali Transmission Company Pvt. Ltd., must be approved by the Federal House of Representative or by the Federal Parliament or by other the Houses.
4. Just like previous constitutions, the current Constitution also uses the terms “treaty or agreement”. However, Section 2 (a) of the Nepal Treaty Act, 2047 defines only “treaty”, stating that: “Treaty means an agreement concluded in writing between two or more States, or between any State and an inter-governmental organization.” From this, it is clear that for an agreement to qualify as a treaty, its parties must be either two or more States, or a State and an intergovernmental organization. In other words, only agreements between sovereign states or between a state and an intergovernmental organization are recognized as treaties. Such treaties or agreements may be concluded in a single instrument or multiple instruments, but their character is international, and the governing law must also be international. Within this definition, the terms “treaty” and “agreement” are often used interchangeably; however, for a written instrument labeled as an agreement, its nature, characteristics, and governing law must be examined to determine whether it qualifies as a treaty or merely as a contractual agreement under domestic law. In other words, an agreement described as a synonym for a treaty is considered a treaty-like instrument only if it does not represent a commercial contractual relationship but rather reflects a relationship between states or between a state and an international organization. The

¹ Gorakh Bahadur B.C. et.al., vs. Nepal Government et.al., Nepal Law Reporter 2070, Vol. 3, Decision No. 8982

definition, classification, analysis, interpretation, and implementation of such an instrument are all governed by international law. For example, Article 2 (1) (a) of the Vienna Convention on the Law of Treaties, 1969 defines a treaty as follows: *"‘Treaty’ means an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, whatever be its particular designation."*

5. Looking at this definition, for a document to be considered a treaty, it must possess an international character or nature. However, the term “treaty” may also be used in various contexts, such as agreements between the federal government and a province or between provinces. To determine whether it is indeed a treaty, one must examine its purpose, intent, the parties involved, and the relationship between those parties. A treaty can exist between a state, multiple states, or parties subject to international law. The question of whether a concession agreement entered into with a foreign company rather than a foreign state constitutes a treaty arose in the Anglo-Iranian Oil Company case, where the International Court rejected treating a concession agreement for oil extraction as a treaty, because the company was not a subject of the treaty-making power of a state². Similarly, in another case, the court held that even if certain or all provisions of an agreement between a state and a company may, in interpretation, follow rules of international law that alone does not make the agreement a treaty³. The phrase “governed by international law” mentioned in the definition under Article 2 (1) (a) is interpreted by the International Law Commission to mean that the agreement must have an intention to create obligations under international law⁴. Since such agreements are regulated and controlled by international law, this is what distinguishes a treaty from contractual agreements made under domestic law.
6. In the above theoretical context, considering the present dispute, the “Project Development Agreement” of the Upper Karnali Hydropower Project was not entered into with any foreign State, but rather with a Company incorporated in Nepal under Nepali law. The Agreement explicitly acknowledges that ownership of all water resources and other natural resources within Nepal vests in the State of Nepal⁵ and includes a commitment to comply with all applicable provisions of Nepali law. Therefore, the question of the agreement requiring approval, ratification, endorsement, or sanction by the legislature does not arise. Except for the provision regarding dispute resolution and the applicable law under British law in the context of arbitration, which is common in agreements involving foreign investment, all other aspects of the Agreement are governed by Nepali law. The agreement does not directly or indirectly manifest any intention to create obligations under international law. In this sense, the Agreement under consideration cannot be classified as a “treaty” under Article 156 of the Interim Constitution or Article 279 of the current Constitution.

² Anglo-Iranian Oil Company (UK v Iran) ICJ Reports (1952) p. 89, at p. 112, 19 ILR 507 as cited in ANTHONY AUST, MODERN TREATY LAW AND PRACTICE (2nd ed. Cambridge Univ. Press 2007) at p. 18.

³ The Libyan Oil Arbitrations (1982) BYIL 27-81 cited in Id.

⁴ Draft Articles on the Law of Treaties with Commentaries, Report of International Law Commission to UN, 1966.

⁵ See Project Development Agreement, Recital

7. Under Article 156 of the Interim Constitution and Article 27 (2) (d) of the current Constitution, the requirement for parliamentary approval applies to treaties concerning the allocation and use of natural resources. The petitioners argued that, since the Upper Karnali Hydropower Project involves such resources, the Project Development Agreement (PDA) should have been submitted to Parliament for approval. However, in previous cases, notably Gorakh Bahadur B.C.⁶, Madhav Kumar Basnet⁷, and in the Ram Chandra Chautaut⁸ concerning the West Seti Project, the court rejected the classification of hydropower-generated electricity as a natural resource. In essence, to determine what counts as a natural resource and what does not, one must examine the extent of human intervention or effort applied. Generally, naturally occurring entities like water, air, forests, coal, or minerals are considered natural resources. However, once human effort transforms these resources into commercial products for buying and selling, they no longer retain the status of natural resources. For example: water in a river is a natural resource, but mineral water bottled for sale is not a natural resource, it becomes a commercial commodity. Similarly, naturally occurring gas and mineral substances are considered natural resources, but once they are processed and made marketable for buying and selling, they no longer retain the status of natural resources. Regarding electricity, the Supreme Court in the case of Ram Chandra Chautaut clarified that: *“Electricity is not a natural resource in itself, but rather a product or service derived from a natural resource in the form of water. ... The matter brought into dispute in the present petition concerns the commercial use of electricity produced from water resources, not the allocation of the natural resource itself. The petitioners appear to have confused the conversion of natural resources into energy with the allocation of natural resources. It is necessary to understand these aspects separately.”* Similarly, in the context of the Upper Karnali Hydropower Project, the Supreme Court in the case of Gorakh Bahadur B.C. held that: *“Electricity is a product derived from water as a natural resource, and is not itself a natural resource. If electricity were to be considered a natural resource, then by the same logic, grain produced from land would also have to be considered a natural resource, and its export would have to be prohibited.”* In this way, the positions previously expressed by this court regarding electricity are consistent with the Constitution and require no alteration in the concept.
8. As far as the question of whether there has been a distribution of natural resources is concerned, the proposed Upper Karnali Hydropower Project appears to be solely a hydropower project rather than a multi-purpose development. Since all water is released back into the Karnali River after electricity generation, the water is merely used for hydropower production, and the same amount taken from the reservoir is returned to the river. Therefore, it appears that there is no actual utilization of the water resource in the sense of permanent appropriation. The proposed project is a hydropower development to

⁶ Gorakh Bahadur B.C. et.al., vs. Office of the Prime Minister and Council of Ministers, Nepal Law Reporter 2070, Vol. 3, pg. 416

⁷ Advocate Madhav Kumar Basnet et.al., vs. Office of the Prime Minister and Council of Ministers, Nepal Law Reporter 2072, Vol. 6, pg. 942, Decision No. 9412

⁸ Ram Chandra Chautaut vs. Office of the Prime Minister and Council of Ministers et.al., Nepal Law Reporter 2066, Vol. 1, pg. 59, Decision No. 8059

be operated in the high mountainous region of Karnali Province, Nepal, and does not appear to be a reservoir-type project. Accordingly, it does not involve any special arrangements for water supply through storage. Therefore, it cannot be said that the proposed project constitutes a “distribution of natural resources and their utilization” under Article 156 (2) of the Interim Constitution of Nepal, 2063, or Article 279 (2) (d) of the current Constitution of Nepal.

9. In summary, the disputed Project Development Agreement for the development of the Upper Karnali Hydropower Project appears to be a commercial agreement relating to electricity production, executed by the Investment Board on behalf of the Government of Nepal with a foreign investor registered in Nepal. The agreement has been executed in accordance with Nepalese law and is to be implemented within Nepal. Therefore, this Project Development Agreement does not fall within the category of agreements requiring parliamentary approval under the constitutional provisions cited. Accordingly, the claim by the petitioners that the parliamentary approval process must be completed before the agreement takes effect cannot be accepted.
10. Regarding the validity of the Project Development Agreement (PDA) for the disputed Upper Karnali Hydropower Project and the repeated extensions granted after the expiration of the time period set for financial closure, it appears from these writ petitions that the writ petition filed by Chanda Kumari Thani et al. (079-WC-0057) seeks the annulment of the Memorandum of Understanding dated 2064.10.10 for the Upper Karnali project and the subsequent survey permit issued on 2065.02.05. Similarly, the writ petitions filed by Sharad Singh Bhandari (070-WC-0058) and Ratan Bhandari (079-WC-0059) seek the annulment of the Project Development Agreement itself. Similarly, the writ petitions filed by Janmadev Jaisi et al. (079-WC-0060 and 079-WC-0061) and the second writ petition filed by Ratan Bhandari (079-WC-0062) challenges the decisions and the agreement concerning the repeated extensions of the financial close period. Regarding the Memorandum of Understanding dated 2064/10/10 for the development of the Upper Karnali project, Clause 17.16.1 of the Project Development Agreement (PDA) dated 2071/06/03 provides that the PDA constitutes the complete and comprehensive agreement on this matter and that it supersedes all prior agreements⁹. Accordingly, for the purpose of developing the Upper Karnali Hydropower Project, the Memorandum of Understanding dated 2064/10/10 no longer exists and has been superseded by the Project Development Agreement; therefore, there is no necessity to adjudicate on the validity of that MoU.
11. As far as the validity of the Project Development Agreement for the development of the Upper Karnali Hydropower Project is concerned, it appears that the said Agreement was executed by the Government of Nepal through the exercise of its executive authority. The authority to enter into such an agreement seems to vest in the Government of Nepal under

⁹ Each of the Parties confirm that this Agreement (and the documents referred to in it) represents the entire understanding, and constitutes the whole agreement, in relation to this subject matter and supersedes any previous agreement between the Parties with respect thereto...

Section 12 of the Water Resources Act, 1992 and Section 35 of the Electricity Act, 1992¹⁰. Both of these provisions confer upon the Government of Nepal the power to contract with any domestic or foreign company for the purposes of utilizing water resources to generate, transmit, and distribute electricity. The authority vested in the Government of Nepal is arranged, under Sections 5 and 9 (1) (i) of the Investment Board Act, 2011, to be exercised by the Investment Board on behalf of the Government for the purpose of implementing investment in hydropower projects with a capacity of 500 megawatts or more. On this matter, the rejoinder of the Investment Board indicates that: “The Investment Board, in accordance with its decision taken at the 15th meeting held on 2014/09/17, and pursuant to the decision of the Government of Nepal (Council of Ministers) dated 2014/09/18, and the authority granted thereunder, entered into a tripartite Project Development Agreement with the GMR-ITD Consortium, the Nepal Electricity Authority’s Nepal-based joint venture GMR Upper Karnali Hydropower Limited, and GMR Group’s Nepal-based subsidiary Karnali Transmission Company Pvt. Limited for the development and construction of the 900-megawatt Upper Karnali Hydropower Project and its associated transmission line.” It thus appears that the Investment Board acted under the authority conferred upon it by law to conclude the tripartite agreement with the developers¹¹. Therefore, as the Project Development Agreement was executed on 2014/09/19 between the Investment Board and GMR Upper Karnali Hydropower Limited and Karnali Transmission Company Pvt. Ltd., pursuant to the authority vested in the Government of Nepal, in accordance with the decision of the Government of Nepal, and under the mandate conferred by the Investment Board Act, 2011, no ground is found to question the validity of the said agreement.

12. Now, as regards the issue of repeated extensions of time granted after the project developer failed to achieve financial closure within the stipulated period of twenty-four months under the Project Development Agreement, this matter must be examined strictly within the framework of the said Agreement itself. In essence, when two parties enter into a contract, the parties remain autonomous in determining the nature and subject matter of the contract, the consideration, the quantum of consideration, the contractual terms, the nature of remedies in the event of breach, and the mechanisms for resolution of disputes arising under the contract. This principle is recognized by Section 4 of the Contract Act, 2000, which was in force at the time the Project Development Agreement was executed, and by Section 507 of the currently prevailing National Civil Code, 2017. Although the Government of Nepal is one of the parties to the Project Development Agreement entered into for the Upper Karnali Hydropower Project, the agreement pertains to a situation in which the

¹⁰ Section 12 of the Water Resource Act, 2049 Contract may be Entered into for the Utilization of Water Resources: Notwithstanding anything written elsewhere in this Act, Nepal Government may, subject to the prevailing law, enter into a contract with any national or foreign company, corporate body or person to develop or cause to develop, utilize and extend the services of any water resources on such terms and conditions as mentioned in such contract.

Section 35 of the Electricity Act, 2049: Government of Nepal may enter into contract for Generation, Transmission or Distribution of Electricity: Notwithstanding anything written elsewhere in this Act, Government of Nepal, by entering into a contract with any person or corporate body, may do or cause to do the generation, transmission or distribution of electricity subject to the terms and conditions as mentioned in such contract.

¹¹ Paragraph 2 of the rejoinder submitted by the Investment Board against writ no. 079-WC-0058 submitted by Sharad Singh Bhandari

Government, in the exercise of its contractual authority, has entered into a contract with a private-sector project developer company. Viewed thus, the matter falls within the conceptual domain of private law and concerns the freedom of contract, to be examined within that framework.

44. In contractual matters, where the parties to a contract have freely selected the subject matter of the contract and, with due consideration, determined the terms and conditions thereof and entered into a valid agreement, the role of the court is not to examine the wisdom, expediency or fairness of the contractual bargain nor to modify or re-write the contract. Any such approach would be inconsistent with the principle of contractual freedom or autonomy. Contractual freedom is a fundamental attribute of an open market economy. Inasmuch as the Constitution of Nepal has embraced the concept of an open economy, it is incumbent upon courts to interpret and apply contractual obligations in a manner consistent with the constitutional values. Accordingly, where a contract has been executed by competent parties, is not contrary to public policy, and is not vitiated by coercion, undue influence, misrepresentation, or fraud, the role of the court should not be that of an intervener, but rather that of a positive catalyst facilitating and ensuring the enforcement of the obligations voluntarily assumed by the Parties.
13. Upon examining the Project Development Agreement relating to the disputed Upper Karnali Hydropower Project, it is found that, pursuant to Clause 2.3.1 thereof, the Agreement shall commence from the date of its execution and, unless terminated earlier or extended, shall expire upon the completion of twenty-five years from the date of commencement of commercial operation of the project. In this manner, the Agreement treats the commencement of commercial operation of hydropower as a crucial milestone for the purpose of computing the contractual term. In this sense, the term of the Project Development Agreement is to be understood as extending for twenty-five years after the commencement of electricity generation. There is also no dispute that the same Agreement designates financial closure as a key milestone in the project's overall schedule. As the project cannot proceed in the absence of financial closure, it is understandable that the parties sought to bind this requirement within a definite timeframe. Clause 3 of the Agreement, while providing for the conditions subsequent to be fulfilled after the execution of the agreement, sets out the conditions to be fulfilled by the Government of Nepal (GON Conditions Subsequent) and those to be fulfilled by the Company (Company Conditions Subsequent). Among the conditions to be fulfilled by the Company is the requirement to achieve financial closure within twenty-four months. It is further provided that where, despite the Company having made due and commercially reasonable efforts, financial closure cannot be achieved within the said period due to force majeure beyond the Company's control, the period for achieving financial closure may be extended for a maximum of one additional year¹². It is pertinent to note that even after the first extension of time, the Company failed to achieve financial closure, and, in accordance with Clause

¹² 3.1.3 no later than twenty-four months from the Agreement Date, effective Generation Project Financial Close, provided however that, such period shall stand extended upon its expiry by a maximum additional period of one year if the Companies are unable to achieve Generation Project Financial Close for reasons beyond Companies' control despite the Companies making diligent and commercially reasonable efforts to achieve Generation Project Financial Close within such period.....

3.4.1(B) of the Agreement, a second extension for achieving financial closure was granted on 2074/0727), extending the deadline up to 2075/06/02 (corresponding to 18 September, 2018)), as is evident from the rejoinder. Clause 3.4.1(B) further provides that an extension may be granted where it is established that the Company was unable to fulfill its obligations due to the failure of the Government of Nepal to fulfill its conditions subsequent or due to a breach of the Agreement by the Government¹³. In the present case, no assertion has been made that the Government, as such, breached the Agreement. It has, however, been contended that the Government failed to discharge its obligation to acquire land for the project, which constituted a condition precedent, and the Government has not demonstrated that this obligation was duly fulfilled. Similarly, events such as the 2015 earthquake, the subsequent blockade, and the COVID-19 pandemic have been invoked in connection with the extensions of time. Nevertheless, upon a request from one Party to the contract the project developer, the Investment Board, vested with authority to act on behalf of the Government of Nepal, was satisfied with the request and granted the extension. In view of Section 81 of the Contract Act, 2000, which permits such extensions, there appears to be no basis for sustaining a dispute regarding the extension of time.

14. The most contentious issue here concerns the decision of the Government of Nepal, Council of Ministers, dated 2079/03/31 (corresponding to 15 July, 2022) granting a third extension of two years. This situation appears to have arisen because, even after a second extension had been granted for the purpose of financial closure up to 2075/06/02 (corresponding to 18 September, 2018), no significant progress was achieved in attaining financial closure within the extended period. Furthermore, although the company had submitted a request on 2075/04/12 (corresponding to 28 July, 2018) seeking a one-year extension, it appears that no decision was taken on that request for a considerable length of time. In relation to the same subject matter, in the writ petition (2079-WC-0062), the petitioner Ratan Bhandari has contended that the agreement stood in a state equivalent to termination, and has further asserted that the extensions previously granted by the Investment Board were themselves without authority, and that the subsequent extension was granted by the Council of Ministers. Likewise, while issuing the interim order, the Single Bench of this court also observed that the time limit had already expired nearly three years earlier and that there had been no extension in the interim; nevertheless, by the decision dated 2079/03/31, a two-year extension was granted with effect from that very date. It has also been noted that whereas extensions had previously been granted by the Investment Board, the decision dated 2079/03/31 granted the extension through the Council of Ministers, and that, as a result, the original two-year period for financial closure fixed in 2071 was extended in such a manner as to reach up to ten years thereafter, for which no reasonable justification appears

¹³ 3.4 Extension of timelines for compliance with Conditions Subsequent

3.4.1 For the avoidance of any doubt, it is clarified that the applicable timelines for satisfaction of the applicable Companies Conditions Subsequent by the Companies shall stand extended in the following circumstances:

(A) in case of a Force Majeure Event or Change in Law, in accordance with Section 12 (Force Majeure) and Section 12 A (Change in Law), respectively;
 (B) on a day-for-day basis, if the Companies have not been able to satisfy the Companies Condition Subsequent due to a breach of this Agreement by GON or a GON Event of Default; or
 (C) if Parties agree (in writing)

to exist. Considering that the Project Development Agreement was executed on 2071/06/03, and that, when calculated from that date, nearly ten years have elapsed solely for the purpose of achieving financial closure, it is not unreasonable to harbor the apprehension that this amounts to a repetition of the proverb “*putting a river into a bag*,” signifying an exercise in futility. For this very reason, while issuing orders upon hearing a unilateral application, the Bench appears to have raised questions regarding the justification for granting further extensions, and such scrutiny cannot be regarded as entirely unwarranted. However, upon a deeper examination of the records received, certain additional facts emerge in relation to the present dispute. **First**, financial closure under the agreement constitutes only one aspect of the Project Development Agreement, and the mere expiration of the time limit prescribed for that purpose cannot be construed to mean that the entire term of the Project Development Agreement itself has expired. **Second**, in the present dispute, none of the parties to the agreement has notified the other party that the agreement has been terminated. Rather, it appears that the parties have remained in mutual contact and communication. For instance, upon examining the rejoinder and the application of the respondent Company, it is noted that even after the extended deadline had expired on 2075/06/02, the IEE report relating to the transmission line was submitted to the Department of Electricity Development under the Ministry of Energy in 2018 and was approved in January 2019; the Department of Industry extended the company’s term on 5 April 2019; the Investment Board, on 31 December 2019, requested the submission of a letter of intent for the sale of electricity; on 30 January 2020, the letter of intent issued by the Bangladesh Power Development Board was submitted to the Investment Board along with a request for an extension of the deadline for financial closure; in accordance with the terms of the letter of intent, a bank guarantee in the amount of USD 5 million was furnished to the Bangladesh Power Development Board; a Power Sale Agreement was initiated in April 2022 among GMR Upper Karnali Hydropower Limited, the Bangladesh Power Development Board, and NTPC Vidyut Vyapar Nigam Limited; pursuant to the approved Environmental Impact Assessment report, orders for the felling of trees in community forests were issued in 2022 and, in accordance therewith, tree-felling activities in two community forests were completed; and the technical evaluation of shortlisted contractors was also completed. Moreover, the respondent company has asserted in its rejoinder against writ no. 079-WC-0062 that, as substantial and noteworthy progress has been made toward achieving financial closure of the project, it is highly likely, unless unforeseen circumstances arise, that financial closure will be attained within the currently extended two-year period. The details of the progress made with respect to the export of 500 megawatts of electricity generated by the project to Bangladesh have also been mentioned in the rejoinders submitted by the Investment Board and the Ministry of Energy, Water Resources and Irrigation. These illustrations collectively demonstrate that the parties to the agreement have remained in continuous mutual communication and coordination. **Third**, after the expiration of the deadline for financial closure, the parties to the agreement appear to have examined how the challenges and complexities arising therefrom could be addressed. In this context, when the question arose as to whether or not to grant an extension of time for financial closure, the 48th meeting of the Investment Board held on

2078/06/23, upon a request made by the developer regarding the extension of the deadline for financial closure of the Upper Karnali Hydropower Project, decided to constitute a study Committee under the coordination of Mr. Bishwo Paudel, Vice-Chairperson of the National Planning Commission, to study the matter and submit a report to the Investment Board. It is seen that the said Committee submitted its report on 2078/12/14. Upon examining the report received by the court, it is observed that the study Committee, taking into account the fact that the project developer company, by a letter dated July 28, 2018 (2075/04/12) issued in accordance with Schedule-13, had requested a one-year extension on the ground that financial closure could not be achieved within the then-extended period, reviewed the actions undertaken by the developer up to that time, particularly the progress made with respect to the export of 500 megawatts of electricity to Bangladesh and the comprehensive plan submitted by the developer. The Committee also held discussions with the developer company, analyzed the obligations and joint obligations to be discharged by the Government of Nepal and the developer company under the agreement, and examined the potential consequences of termination of the agreement, including compensation and its implications. On that basis, the Committee is seen to have presented two alternatives to the Investment Board: (1) termination of the agreement on the ground of the developer company's failure to fulfill its obligations; and (2) extension of the deadline for financial closure by prescribing preconditions and phased milestones¹⁴. With regard to Option 2, the opinion of the study Committee notes that, "as the principal challenge for achieving financial closure lay in ensuring a market for the electricity to be generated by the project, the developer company had taken steps to secure the necessary arrangements for selling electricity to the Bangladesh Power Development Board (BPDB) in Bangladesh via India. In that context, the Committee observed that the electricity sale price had been determined and that the consent and cooperation of India's power trading corporation had been obtained. Emphasizing that, in light of the circumstances whereby electricity exported from Nepal would gain access to the Bangladeshi market, an immediate termination of the Project Development Agreement (PDA) could adversely affect the prospects of electricity sales to Bangladesh the Committee underscored the need to consider how the time period for financial closure could be extended in accordance with the PDA". Thus, upon a study of the report, it appears that the study Committee's opinion was inclined toward the Investment Board selecting the second option. In the same vein, the Committee is also seen to have suggested that, should the Board decide to proceed with Option 2, the office should be directed to enter into negotiations on the following points¹⁵:

- The developer company must complete the Power Sale Agreement (PSA) with the Bangladesh Power Development Board (BPDB) and the National Vidyut Vyapar Nigam (NVVN) by June 2022;

¹⁴ Reference: Report submitted by Study Committee of Upper Karnali Hydropower Project, 2078, pg. 34

¹⁵ Ibid pg. 34-35

- All conditions precedent specified in the PSA concluded with NVVN and BPDB must be fulfilled within 12 months so that the PSA is fully operational;
 - Within 17 months from the date of the PSA concluded with NVVN and BPDB, the developer company must finalize the loan agreements with lenders for financial closure;
 - Financial closure must be completed within 18 months from the date of the PSA concluded with NVVN and BPDB;
 - The developer company must specify the dates on which the land required for the project needs to be made available, and the Government of Nepal must facilitate the provision of such land. Except in cases where the Government fails to facilitate land provision as specified, termination of the PDA shall not obligate the Government or the developer company to pay compensation (sunk costs) or any other damages;
 - If financial closure is not achieved within the extended period, the Government of Nepal may automatically terminate the agreement, and in such a case, the company shall not be entitled to raise any claim or objection.
15. Viewed in this perspective, the report of the study Committee led by Bishwo Paudel recommended that, even if Option 2 were adopted, the Government should not simply impose an extended deadline but should amend the agreement accordingly to effect the extension. Pursuant to this recommendation, it appears from the letter dated 2079/04/01 sent by the Office of the Prime Minister and Council of Ministers to the Investment Board that the Government of Nepal, through the Council of Ministers, made the following decision on 2079/03/31:

The developer company, GMR Upper Karnali Hydropower Limited, shall comply with the following conditions, and the deadline for financial closure (Financial Close) of the Upper Karnali Hydropower Project shall be extended by two years from the date of the decision of the Council of Ministers:

- (a) To conclude the Power Sale Agreement within six months and submit it to the Investment Board;
- (b) To finalize the Financing Agreement with the lenders within 23 months and submit it to the Investment Board;
- (c) To complete the financial closure (Financial Close) of the project within 24 months and submit it to the Investment Board; and
- (d) In relation to financial closure, to submit to the Investment Board, within seven days, a detailed schedule in accordance with the conditions set out in sub-clauses (a), (b), and (c)

Pursuant to the above decision of the Council of Ministers, the Government of Nepal, through its representation on the Investment Board, is seen to have executed an addendum with GMR Upper Karnali Hydropower Limited on 7 Bhadra 2079 (corresponding to 23 August, 2022), containing the following conditions:

1. Addendum

1.1 Subject to the compliance of the following terms and conditions by the companies, the timeline to achieve Financial Close shall be extended for a period of two (2) years from 15 July 2022:

1.1.1 Within six(6) months from 15 July 2022, the Companies shall submit the concluded Power Sales Agreement (Export PPA) to the Investment Board

1.1.2 Within twenty-three(23) months from 15 July 2022, the Companies shall submit the concluded Financing Agreement (Financing Documents) with the Lenders to the Investment Board; and

1.1.3 Within twenty-four(24) months from 15 July 2022, the Companies shall submit the details for achievement of the Financial Close to the Investment

16. In this way, regarding the third extension, it is observed that Clause 3.4.1(C) of the Project Development Agreement provides that the time period for fulfilling the subsequent obligations under the agreement may be extended if both parties agree in writing, and it is noted that the extension for financial closure was granted in accordance with this provision, as contended by the respondent Investment Board. Although the Addendum does not specifically refer to Clause 3.4.1(C) of the PDA and, therefore, it cannot be said that the Addendum was executed under this provision, it is, in principle, acknowledged that the parties to the contract may amend any term of the agreement if they so desire. Accordingly, as one of the parties to the agreement, the Council of Ministers, on the date it decided on financial closure, set a period of 24 months and executed the Addendum in this regard. Whether such action was appropriate or not may give rise to differing opinions among the petitioner, the respondent, or the general public. However, as noted above, the Project Development Agreement is a commercial contract between the Government of Nepal and the project developer company, and the parties to such an agreement are, by mutual consent, free and autonomous to stipulate or amend appropriate terms under Sections 4 and 81 of the Contract Act, 2056, and Sections 507 and 533 of the National Civil Code, 2074. Since they are independent and autonomous in exercising this right, the autonomy has been exercised in the present dispute and hence no question arises as to the validity of the extension granted.
17. As regards the fact that previous extensions were granted by the Investment Board, whereas this time it was granted by the Council of Ministers, the respondent project developer company, in its rejoinder, observes that “this time, it is not merely a continuation of the previous extensions; rather, there has been a modification in the terms of the agreement itself. Clause 1.1.1 of the Addendum provides that, from 15 July 2022, the Power Sale Agreement must be concluded and submitted to the Investment Board within six months. Similarly, Clause 1.1.2 requires the Financial Agreement with the lenders to be finalized and submitted to the Investment Board within 23 months, and Clause 1.1.3 stipulates that details of the financial closure must be submitted to the Investment Board within 24 months.” It is further noted that, even though the current extension incorporates the above-

mentioned new conditions, it was approved by the Government of Nepal, that is, the Council of Ministers, as a party to the agreement. From the records, it also appears that the agreement executed on 2071/06/03 was, in accordance with the decision of the Council of Ministers dated 2071/06/02, concluded through the Investment Board. It has already been noted that pursuant to Section 12 of the Water Resources Act, 2049, and Section 35 of the Electricity Act, 2049, the authority to enter into such an agreement vests solely with the Government of Nepal. The Investment Board appears to have executed the agreement under the powers conferred upon it as the Government's representative. Even prior to executing the Addendum on Bhadra 7, 2079, the Government of Nepal, through the Council of Ministers, by its decision dated 2079/03/31, had already decided to extend the period for financial closure subject to the specified conditions. Moreover, Clause 3.4.1(C) of the Project Development Agreement also vests the contracting parties with the authority to enter into a new agreement. Taken together, it cannot be said that the contracting party, the Government, was precluded from exercising its authority to enter into an Addendum to extend the period for financial closure by stipulating terms that supersede the existing provisions of the Project Development Agreement.

18. Turning now to the question as to whether or not the **disputed agreement is in the national interest**, it is undisputed that any project involving Nepal's water resources must promote the sovereign rights over such resources, safeguard Nepalese nationality, serve the national interest, and contribute to the overall development and progress of the country. Since the issue of Nepal's sovereignty over its water resources has also been raised, it is desirable to examine it in light of the writ petition, the rejoinders, and the facts and figures reflected in the Project Development Agreement. The writ petitioners have contended that the agreement between the respondent project developer company and the Government is not in the national interest, raising issues such as the project's capacity, the period and circumstances under which the agreement was executed, the benefits expected to be realized, existing alternatives, and comparative advantages. In response, the rejoinders rejects these contentions, affirming that the project acknowledges Nepal's ownership over the country's water and natural resources, that the project's capacity has been optimized, that the agreement was discussed openly in both the Government and parliamentary committees, that Nepal has obtained reasonable comparative benefits, and that after 25 years of commercial operation, the project will be transferred to the Government of Nepal in its operational state. Accordingly, from economic, technical, and environmental perspectives, the agreement is stated to be aligned with the national interest. In fact, the determination of the size and scale of a project depends on numerous technical factors, including river flow, the height difference between the dam and the powerhouse, available technology, as well as geographical, geotechnical, and environmental risks. This is a matter to be assessed by the executive authorities, not the Court, and falls squarely within their jurisdiction. It is noted that discussions regarding the proposed project have taken place both at the executive level and within the Legislature¹⁶. In the case of Gorakh Bahadur concerning the Upper Karnali

¹⁶ Regarding the discussions at the legislative level, in the case of Gorakh Bahadur v. S.C., it was observed: "The writ petitioners' assertion that there was no discussion regarding the project in the Natural Resources Committee of the Legislature-Parliament does not appear to be accurate. It is evident that a policy was in place allowing more than one large project to be awarded to the

Project, this court observed that the classification, selection, or implementation of hydroelectric projects involves policy matters in which the court does not have any direct or substantial role. Determining which projects are necessary for the nation, ensuring that such projects are implemented in accordance with existing laws, and managing their classification, selection, operation, maintenance, and regulation are routine executive functions carried out by the relevant authorities under the prevailing legal framework in the interest of the nation and the public. In such ordinary circumstances, the court is not expected to intervene. **Courts exercise their constitutionally conferred jurisdiction to adjudicate only where an act is contrary to the Constitution, statutes, or laws, or where it adversely affects the fundamental or legal rights of the people, or the public interest. In respect of purely administrative or policy decisions taken by the Government, the Government alone remains accountable to the people, and, ordinarily, there arises no occasion for judicial intervention. There is no justification for taking a view inconsistent with this principle.** However, what must not be forgotten is that rivers, streams, land, forests, biodiversity, and other natural resources within the country constitute invaluable assets of the people. The use of these resources must be carried out in accordance with the principle of sustainable environmental development as enshrined in the Constitution, wherein the public interest is inherently embedded. The Government is the trustee of the public interest and is duty-bound to act at all times in the national interest, consistent with public policy. Assessing whether a particular project conforms to public policy, and determining the measures by which maximum comparative benefit may be derived, fall squarely within the core responsibilities of the executive. The discharge of this responsibility, from the selection of a project to its implementation, must be executed with diligence, prudence, and due care. To secure the greatest comparative advantage from any negotiation, meticulous preparation is essential. A negotiation in which alternative options are effectively presented is more likely to yield beneficial outcomes. To fully realize such benefits, vigilance and careful oversight must be maintained throughout the entire process, from negotiation to the execution and implementation of the agreement. These functions are to be discharged by the executive authority, and, unless it is established that such authority has been directly abused or exercised in a manifestly improper manner, the court must defer to the judgment and discretion of the executive. Such deference aligns with the constitutional principle of separation of powers and the system of checks and balances envisaged by the Constitution. However, it is important to note that, in the present dispute, considering the benefits projected to be received by Nepal and, comparatively, the agreements executed for other projects of a similar nature, such as Arun-3, there is no indication that any action was taken contrary to the national interest or that the executive

same company. If parliamentary approval were required under Section 156(2), such questions could have been raised in the Legislature-Parliament at the time. However, there is no indication that this issue received any attention. If the process under the Legislature-Parliament was to be followed, the right and duty to initiate and present such proposals rests with the Parliament or its members. The petitioners appear to have made no effort, even minimally, to activate that process. Furthermore, there is no written response suggesting that parliamentary approval under Section 156(2) was sought from the Legislature-Parliament. In this way, merely invoking the provisions of Section 156 of the Interim Constitution, 2063, under the pretext of public interest to obstruct the operation of the project, without making even minimal efforts to engage the relevant authorities to follow or implement the legislative process, cannot be deemed acceptable.” (Para. 19)

authority was exercised arbitrarily. In light of the Project Development Agreement for the Upper Karnali Hydropower Project, along with the extensions granted for financial closure and the subsequent Addendum, the third extension is viewed as the final extension. Accordingly, there appears to be no basis at this stage to question the decision or the prudence of the executive authorities.

19. Turning to the final question **as to whether or not an order as sought by the petitioners or any other order is warranted**, it is noted, as mentioned in the various preceding cases, that following the understanding dated 2064/10/10 between the Government of Nepal and the GMR-ITD Consortium for the development of the Upper Karnali Hydropower Project, the survey permit granted to GMR Upper Karnali Hydropower Limited on 2065/02/08 was completed. Thereafter, the Project Development Agreement (PDA) executed on 2071/06/03 between the Investment Board, GMR Upper Karnali Hydropower Limited, and Karnali Transmission Company Pvt. Ltd., pursuant to the decision of the Government of Nepal, Council of Ministers, dated 2071/06/02 replaced the earlier understanding and the survey permit. Accordingly, there is no need or necessity to deliberate further on the said understanding and survey permit. Similarly, the Project Development Agreement dated 2071/06/03 does not appear to be a treaty or agreement requiring parliamentary approval under Section 156 of the Interim Constitution of Nepal or Section 279 of the current Constitution. Rather, it is a commercial agreement executed between the Government of Nepal and a company established under Nepalese law, governed by Nepalese law. The parties to the agreement, in exercise of the authority permitted by the agreement and their own autonomy, extended the period for financial closure twice under the provisions of the agreement. For the third time, the period for financial closure was extended through a further amended agreement (Addendum) executed on 2079/05/07, pursuant to the decision of the Government of Nepal, Council of Ministers, dated 2079/03/31. As this matter is now governed by the Addendum, and the assessment of the project's prudence falls within the executive authority, it does not appear to be a subject for determination by the court. Since there is no indication that the Upper Karnali Project Development Agreement or the extensions granted for financial closure contravened the Constitution or any law, there is no basis to issue the writs of mandamus or certiorari as sought by the petitioners. However, as to whether any other order may be appropriate, it is noted that the Government of Nepal is a party to the agreement and also acts as the sovereign representative of the Nepalese people and trustee of the public interest. Taking into account the various issues arising in the context of project implementation, a directive order is hereby issued in the name of the Government of Nepal, Council of Ministers, instructing that the matters outlined below be carried out accordingly.

- (a) Considering that the developer company has been unable to achieve financial closure for nearly ten years since the agreement for the development of the proposed Upper Karnali Hydropower Project, it is neither appropriate to withhold the project nor to grant indefinite extensions for financial closure contrary to the recently executed Addendum, especially since the developer has already been afforded sufficient time and any delay caused by the court's interim order has been accounted for. In order

to safeguard the inherent development and prosperity, public interest, and policy objectives of the project, no further extensions shall be granted for this purpose, except to adjust for the time lost, and the project work shall be carried out diligently and expeditiously.

- (b) While most of the obligations under the agreement related to coordination for land acquisition and purchase, which were to be fulfilled by the Government of Nepal for financial closure, have been completed, it is noted that some hectares of land in Achham District have not yet been acquired due to the lack of proper ownership titles. The Government of Nepal is therefore directed to immediately take the necessary measures to facilitate or cause to facilitate the acquisition of such land and ensure that the process is completed without delay.
- (c) It was brought to the court's attention during the hearing that the Environmental Impact Assessment report prepared for the project has already been approved by the Government of Nepal, and that the Initial Environmental Examination report for the transmission line expansion has also been accepted. It was further revealed during the proceedings that some families will need to be relocated and that others will be directly affected by the proposed hydropower project. Accordingly, it is hereby directed to take or cause to take necessary measures to protect the environment so that there is no significant adverse impact, to ensure proper resettlement and compensation for families to be relocated and those directly affected, and to provide employment opportunities arising from the project.
- (d) In accordance with Section 7 of the Water Resources Act, 2049, which prioritizes the use of water resources, no actions shall be taken or cause to be taken that obstructs or adversely affects the development of drinking water projects or existing irrigation projects within the Karnali River basin.
- (e) The aforementioned writ petitions appear to have been filed as public interest litigation by citizens studying and researching the resources, and heritage of the Karnali River basin in Karnali Province. As noted above, the Karnali River is not merely a river but also a legacy of Karnali civilization; hence, the development of hydropower on this river and the revenue generated therefrom must benefit the people of the river basin as much as possible, making it a matter of public interest. However, upon examining the Project Development Agreement, it is observed that, apart from the construction of a 2 MW hydropower plant under Clause 11.8, there is no specific provision detailing how the project would contribute to the broader development of the river basin and benefit the local population. **The protection of the Karnali River is inextricably linked to the preservation of its watershed. The local communities that have inhabited the Karnali watershed for millennia have rendered invaluable environmental services, conserving the water, land, and biodiversity of the region. In light of the area's geographical remoteness, the declining productivity of arable land, and the additional pressures imposed by climate change, the livelihoods of the residents of the Karnali watershed are**

becoming increasingly precarious. In this context, ensuring that these communities are able to derive direct benefits from development within their own localities constitutes a fundamental human right. Respect for and protection of this right fall squarely within the State's obligations under its human rights accountability. The Upper Karnali Project can serve as a model for other projects in terms of safeguarding the people of the river basin. Accordingly, a fair proportion of the benefits accruing annually to the Government of Nepal, from free electricity, dividends from shares, and revenue generated by the project shall be or cause to be allocated and channeled annually through the local governments for the education, health, agriculture, enterprise, economic, educational, and social development, as well as the environmental protection, of the people residing in the Karnali River basin.

20. For information and implementation of this order, a copy shall be sent to the respondent, the Government of Nepal, through the Office of the Attorney General. For monitoring of the compliance of this order, a copy of this order shall be provided to the Judgment Execution Directorate of the Supreme Court. It is hereby ordered to enter this order into the electronic system of this court and to remove the case from the case registry and to submit the case file accordingly.

Concurring with the above Opinion

Acting Chief Justice Hari Krishna Karki

Justice Bishwambar Prasad Shrestha

Justice Sapan Pradhan Malla

Justice Tanka Bahadur Moktan

Bench Office: Anjanraj Sapkota/Imanath Paudel

Research Assistant: Shreya Sanjel and Pranjali Kandel

Computer Operator: Harka Maya Rai

Dated: Year 2080 of the Month of Baisakh Date 24 Day 1

(Corresponding to Year 2023 of the Month May Date 7 Day 1)