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REVISITING THE 1816 SUGAULI TREATY FOR RESOLUTION OF INDIA – NEPAL BOUNDARY QUANDARY AT KALAPANI

The Kingdom of Nepal came into being in late 18th Century AD and annexed large parts of Indian territory, which included present day Indian State of Uttarakhand. Indian rulers and the British Indian forces started pushing them back and by 1815 a Treaty was concluded at Sugauli, between the Rajah of Nepal and the East India Company on 15 March 1816. The Treaty established Kali River as the boundary between India and Nepal, which is acceptable to both countries even today. However, differing perceptions of origin of the river and geopolitical differences led to it becoming a territorial dispute. Kalapani being a prominent place within the disputed area, it came to be known as the Kalapani Dispute. Large number of maps have been published by both countries from 1816 to 2020, which have made the issue very complex. Indian and Nepalese governments have set up joint boundary commissions to resolve the issue but to no avail so far. Kalapani has become an issue of political contention between India and Nepal and a bilateral resolution not being likely, its reference to ICJ may be necessary.

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RESEARCH CENTRE FOR EASTERN AND NORTH EASTERN REGIONAL STUDIES, KOLKATA (CENERS-K).

Introduction

In June 2020, Nepal Parliament approved publishing of a new map of Nepal, in which about 370 square kms of Indian territory at Kalapani and Susta are included within Nepal¹, purportedly in retaliation to Indian cartographic aggression. These areas have been a part of India according to the existing maps of Nepal and India. A dispute regarding the sovereign rights over this area has been going on since 1998 and Nepal justified unilateral publication of the new map, saying that India was not ready to negotiate for a peaceful settlement of the dispute.

India – Nepal boundary dispute at Kalapani has its root in history and has colonial connotations, which makes it difficult to arrive at a solution acceptable to both sides. India and Nepal share a 1751 kms land boundary and also many centuries of continuously changing areas of influence and changing political dispensations. Nepal had made aggressive forays into neighbouring Tibet and India in 18th and 19th centuries. Incursions into Tibet were always countered by China, who forced Nepal into entering into a tributary relationship and not leaving any unresolved boundary dispute. Incursions into Indian territory was countered by the British Colonial Government, who resolved issues to suit their own political and commercial interests. This resulted in many unresolved boundary issues for independent India and her neighbours. Currently, Nepal claims that boundary disputes with India exist at two places, Kalapani and Susta. This research paper will focus only on the Kalapani dispute as it is more complex and a third country – China - is involved in the issue. The area under contention is at the tri-junction of India, Nepal and China. China has entered in certain bilateral agreements with India and Nepal, which has an effect on the resolution of the dispute between India and Nepal.

Literature Review

Most of the literature available on the Kalapani Dispute has been authored by Nepali scholars and journalists. Buddhi Narayan Shreshta, who had been the Director-General of the Survey Department of Nepal has published a few research papers and a book on the dispute. Having been a part of the

1 Ethirajan A, *India and China: How Nepal's new map is stirring old rivalries*, June 10, 2020, Retrieved July 2020, from [bbc.com: https://www.bbc.com/news/world-asia-52967452](https://www.bbc.com/news/world-asia-52967452).

Nepalese team for the bilateral boundary dialogue with India, he would have had access to the official views on the subject. However, all his publications have been private and came out about five years after his retirement and have not been endorsed by the Government of Nepal. Shreshtha had given an impetus to the research on the subject from 1998 and many of the old maps, that came out in his research, have been used by many authors who have subsequently written on the subject. Mangal Siddhi Manandhar and Hriday Lal Koirala authored an exhaustive research paper, published by the Tribhuvan University in 2001. Dwarika Nath Dungal and Santa Bahadur Pun authored another research paper in 2014. Renowned journalists like Sanjay Upadhyya and Atit Babu Rijal have also written on the dispute. Political leaders of Nepal have frequently been speaking on the dispute but mostly without evidence supporting their claims. Official government statements of Nepal have been restricted to stating the claim.

Indian scholars and journalists have restricted themselves to writing opinion pieces on the issue. SD Muni has written three books on Foreign Policy of Nepal and India – Nepal Relations in 1973, 1992 and 2016 and has been the Indian Ambassador to Nepal. He has mentioned the Kalapani dispute only in the book written in 2016, indicating that the dispute did not exist in the public domain, at least till 1992. Lack of interest in the subject in India, may probably be because the dispute was non-existent till 1996 and it has no rhetorical value to the Indian political leaders. Official government statements have been made many times to say that the Nepalese claims are not valid. Questions regarding the government position on the case and progress in bilateral consultations, go unanswered possibly due to political sensitivities of the issue.

The issue originated in the beginning of 19th Century and all documents prior to 1947 were prepared by the British India Government. Maps for both India and Nepal were published by the Royal Survey of India. Most of the old documents are available in the Volume 2 of Collection of Treaties, Engagements and Sanads Relating to India and Neighbouring Countries, compiled by CU Aitchison and published by the Superintendent of government printing in India in 1909. Historical records of the Survey of India provide valuable insights into the status of survey and printing in India and Nepal in the 19th Century, when maps related to the India–Nepal boundary were initially printed. Sam Cowan's paper published in *The Record*, provides clarity to the issue of administrative control of the disputed territory.

Analysis of various bilateral treaties between British India and Nepal prior to 1947 and thereafter between India and Nepal, along with maps published by both countries in the nineteenth and twentieth centuries, provide an insight into the Kalapani Dispute. Boundary Treaty between Nepal and China in 1961 also provide clarity regarding the positions maintained by these countries on the disputes area, in 1961. As the dispute has become territorial rather than a simple boundary dispute, a solution will depend on a study of cartographic issues and which country has been historically exerting administrative control of the area.

Visiting the disputed area and interacting with the people residing there, gave a unique insight into the issue of administrative and political control over the area. Knowledge shared by the inhabitants of the area and documents shared by the local government institutions have been very valuable in better understanding of the dispute.

Nepal - British India Relations Leading to the Boundary Quandary

The political interaction between Nepal and British India commenced in 1767, when Pokhra based Gurkha King Prithvi Narayan invaded Kathmandu Valley and the Newar King requested for British help². A commercial treaty was signed between British and Nepal Governments on March 1, 1792³ but it became effective only through another Treaty with the Raja of Nepal in October 1801⁴. It included issues like arranging apprehension and surrender of fugitive dacoits and establishment of a British Residency at Kathmandu. Captain Knox became the first British Resident in Kathmandu. Subsequently, Nepalese Darbar⁵ did not fulfil the commitments made in the Treaty and on January 24, 1804, Lord Wellesley dissolved the alliance with the Darbar⁶.

2 Aitchison C, (1909) *A Collection of Treaties, Engagements and Sanads Relating to India and Neighbouring Countries*. Calcutta: Superintend Government Printing India, 122-123

3 Aitchison C, (1909), *A Collection of Treaties*, 91

4 Aitchison C, (1909), *A Collection of Treaties*, 103

5 'Darbar' means the King's court, in Persian and Urdu, also adapted by many Indian and Nepali languages.

6 Aitchison C, (1909), *A Collection of Treaties*, 93

In 1804 Bhimsen Thapa took a young Raja of Nepal under his tutelage and assumed direction of state affairs. He began expanding Nepal's territories by seizing parganas of Butwal and Sheoraj in 1804 and the entire Zamindari of Bhim Nagar and areas beyond Sutlej River by 1808. He had effectively taken control of all usable trade routes between India and Tibet⁷. In 1808 Maharaja Ranjit Singh drove the Nepalese back across the Sutlej River. The British declared war against Nepal on November 01, 1814 and drove them back across Kali River by May 1815 and the Sugauli Treaty was signed between the Honorable East India Company and Maharajah Bikram Shah, Raja of Nepal on March 04, 1816.

Boundary or Territorial Dispute

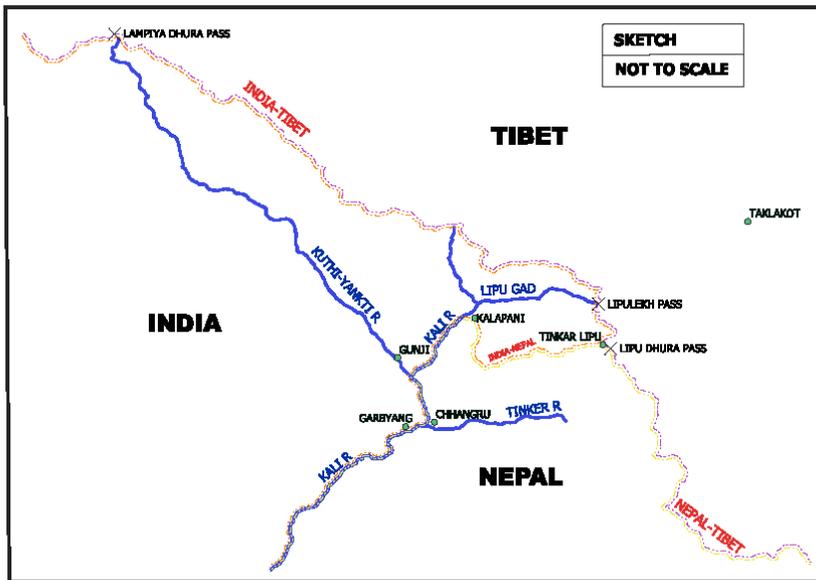


Figure 1: Sketch showing area of dispute at Kalapani (by the Author)

In Figure 1, the Kali River can be seen to originate from the place, where Lipu Gad meets Kalapani and then run in a Southwesterly direction towards Gunji, where the Kuti-Yangti River joins it. Nepal claims that 'Kuti-Yangti River' is the actual Kali River and hence the boundary should run along that up to

⁷ Upadhya S, *Nepal and Geostrategic Rivalry Between China and India*, Routledge, 2012, 126

Lampiyadhura⁸. India – Nepal Boundary comes up along the Kali River and little South of Kalapani, it turns Southwards, moves along the watershed up to Tinker Lipu, which is the highest point between the passes of Lipu Dhura and Lipulekh. China – Nepal Boundary starts from Tinker Lipu.

Nepal officially raised a claim for the first time in 1998, when Nepalese Prime Minister Girija Prasad Koirala said that, ‘he feels’ the area of Kalapani belongs to Nepal and the dispute should be resolved based on historical documents⁹. At that time, they alleged that the Indian security forces at Kalapani had established their posts on the East bank of Kali River, which was on Nepalese territory as per the Treaty of Sugauli. That was a boundary dispute. Subsequently, in 2001, Manandhar and Koirala wrote in the Journal of Tribhuvan University, extending the claim up to Lampiyadhura¹⁰.

The dispute was based on the alignment of the Kali River from Gunji to the origin of the river. India considers the origin to be at Kalapani and Nepal considers it to be at Lampiyadhura. These perceived alignments enclose an area of approximately 335 square kms of territory, thereby making it a territorial dispute rather than a boundary dispute.

Significance of the Study

Territorial claim for the Kalapani area started appearing in Nepali media in 1996¹¹, prior to which the Indian and Nepalese governments had established a Joint Technical Level Boundary Committee and have settled about 98% of the border and along the agreed alignment, they have jointly installed more than 8,500 boundary pillars. Areas remaining, where the boundary is yet to be demarcated are at Kalapani and Susta¹². The dispute at Susta is related to a river changing course and is not in the purview of this paper.

8 The place has been spelt as ‘Lampiyadhura’, ‘Lumpiyadhura’ and ‘Limpiyadhura’, by various sources. ‘Lampiyadhura’ has been used for this paper.

9 Koirala G, *Gorakhpatra Daily*, June 9, 1998

10 Manandhar M S, & Koirala H L, Nepal-India Boundary Issue: River Kali as International Boundary, *Tribhuvan University Journal*, XXIII (No 1), June 2001, 4

11 Upadhya S, *Nepal and Geostrategic Rivalry Between China and India*, 126

12 Saran S, *Indian Express*, April 9, 2020, Retrieved April 2020, from indianexpress.com: <https://indianexpress.com/article/opinion/columns/india-nepal-border-map-kalapani-6138381/>

Leo E Rose said that Nepal never raised the issue of Kalapani till 1997 and it became a convenient controversy for domestic politics in 1998¹³. Nepalese media and scholars have put across the following arguments, to justify their claim to the area:-

- **Cartographic Disagreement.** Sugauli Treaty of 1816 specified Kali River as the boundary between Nepal and India. According to the map attached with the Treaty and other maps available at that time, Kali River originates from Lampiyadhura and not from Lipulekh, as marked in all maps available after 1857. The river named Kuti-Yangti, marked in current maps, is the actual Kali River.
- **Joint Check Posts.** In the 1950s, based on a threat appreciated for Nepal from China, India and Nepal established 18 joint check posts along Nepal - China border, which were removed by 1969. Kalapani / Lipulekh was one of them, which India refused to vacate.
- **Indian Military Post at Kalapani.** During the war with China in 1962, India established a military post at Kalapani / Lipulekh, East of Kali River. Nepal did not object to it at that point in time, as it was a strategic necessity for India to counter the Chinese threat. Since then, India continued holding the post, till today.
- **Administrative Control.** Nepal has been exerting administrative control over the area for many years and there are records existing of Nepal having conducted an election in the area in the 1950s.

In 2020, the Kalapani Dispute has become a serious issue leading to the deterioration of India – Nepal relations, and both countries unilaterally publishing maps with own versions of boundaries. Official bilateral talks are on hold due to restrictions imposed by Covid-19. India and Nepal have to get the bilateral relations back on track, primarily for the economic development of both countries. Early resolution of the Kalapani dispute is essential for that. This research paper endeavours to understand the perceptions of both sides and explore the possibilities of a solution.

13 Rose L, Nepal and Bhutan in 1998: Two Himalayan Kingdoms. *Asian Survey*, 39(1), January – February 1999, 147.

Cartographic Disagreement

The boundary separating Western Nepal and Uttarakhand State of India has been mentioned in the Sugauli Treaty of 1816, to be running along Kali River, which has been accepted by both India and Nepal. Nepal raised a claim to a portion of territory held by India, towards the Northern portion of Kali River, citing lack of clarity as to the origin of the River Kali.

Article 5th of the Sugauli Treaty of 1816 said¹⁴,

“The Rajah of Nepaul renounces for himself, his heirs and successors, all claim to or connexion with the countries lying to the West of the River Kali and engages never to have any concern with those countries or the inhabitants thereof.”

Nepalese Claim with 19th Century Maps

Mangal Siddhi Manandhar and Hriday Lal Koirala, in their research paper titled *‘Nepal-India Boundary Issue: River Kali as International Boundary’*, have elucidated the Nepalese claims on the boundary issue¹⁵. They begin the argument by saying that there was no map attached with the Treaty of Sugauli, but the British maps published between 1816 and 1856, establish beyond doubt that Kali River originates from Lampiyadhura (see Figure 1). However, Manandar and Koirala feel that it has been wrongly marked in maps published after 1856 as Kuti-Yangti River, which was done with a ‘sinister motive’, by the British Indian government. Pre - 1856 maps referred to by them are ‘Western Provinces of Hindoostan 1830, India XII Index Map 1835, published by Baldwin and Cradock and JB Tassin Map of 1837, (Map Numbers 10, 11 and 12 in their paper) which are appended below.

14 Aitchison C, (1909), *A Collection of Treaties*, 110-112

15 Manandhar M S & Koirala H L, *Nepal-India Boundary Issue: River Kali as International Boundary. Tribhuvan University Journal, XXIII(No 1), June 2001, 4*

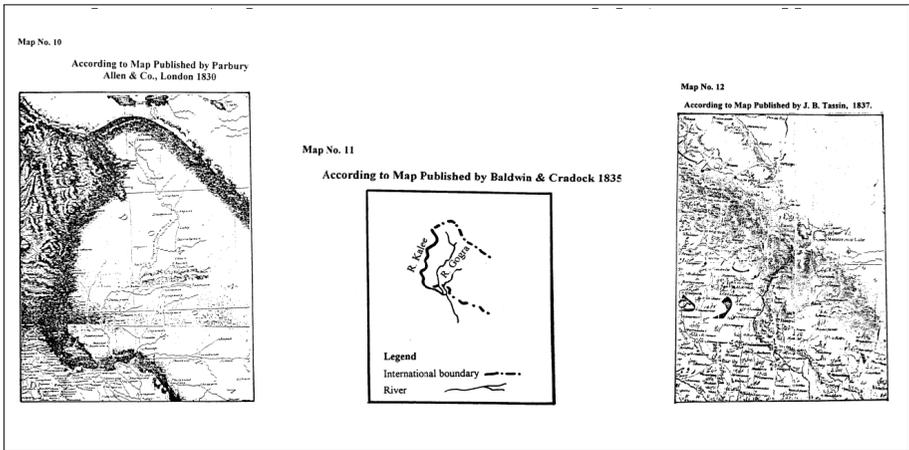


Figure 2: Maps of 1830, 1835 and 1837 (Manandhar and Koirala 2001).

The maps shown in Figure 2 as referred by Manandhar and Koirala were available in the period between 1816 and 1856. However, they neither contribute towards bringing clarity about the origin of Kali River nor about the boundary between India and Nepal at that time. These maps were published neither by British Indian Government nor the Government of Nepal and they do not show any interstate boundaries.

Buddhi Narayan Shreshta, an erstwhile Director-General of the Survey Department of Nepal published a research paper in the FIG Report on International Boundary Making in 2013, in which he has said that,

“On the historical maps of 1827, 1850, 1856 and on other maps, the river, the origin of which is at Limpiyadhura is called the Kalee; it was delimited by the Treaty of Sugauli, as the Western border of Nepal!”¹⁶

The same issue was also raised by Atit Babu Rijal, who wrote in *Kathmandu Post* that the British maps of 1827 and 1856 clearly puts the disputed area on Nepalese side. Lampiyadhura from where the Kuti – Yangti tributary of Kali originates has been shown as the origin of the Kali River as per Sugauli Treaty¹⁷. The 1827 map, referred to by Shreshta and Rijal is shown in Figure 3.

16 Shreshta B N, Chapter 7: Demarcation of the International Boundaries of Nepal, *International Boundary Making* (FIG Publication No 59), December 2013, 178

17 Rijal A, *Kalapani Dispute and the Way Forward*, November 19, 2019, Retrieved January 2020, from [kathmandupost.com: https://kathmandupost.com/columns/2019/11/19/kalapani-dispute-and-the-way-forward](https://kathmandupost.com/columns/2019/11/19/kalapani-dispute-and-the-way-forward)



Figure 3: Map of 1827, showing Kuti-Yangti as Kalee River (<https://scroll.in/article/962226/territoriality-amidst-covid-19-a-primer-to-the-lipu-lek-conflict-between-india-and-nepal>)

The map of 1827, in Figure 3 shows the Kuti-Yangti River of current maps as 'Kalee R' (name enclosed in blue oval) and the river originating near Lipulekh has not been given any name. However, the boundary between Nepal and India has been shown to run along a different alignment, which tends to repudiate the claim of Kuti-Yangti being the boundary. Legal value of such a map to validate the boundary between two nations is quite limited. Shreshta has also mentioned that Nepal – India boundary has been delimited by the Treaty of Sugauli, along the Kali River. For a boundary to be delimited, it has to be drawn on a map, unambiguously and accepted by both parties¹⁸. In addition, in the old maps referred to by Shreshta, the boundary is not marked along the alignment of the River originating from Lampiyadhura. Also since the Treaty itself did not have an appended map, Shrestha's claim that the boundary has been delimited, is not correct.

18 Srebro H & Shoshany M, *The Process of International Boundary Making, International Boundary making*, Vol. 59, 2013, Copenhagen: International Federation of Surveyors (FIG), 17

Dwarika Nath Dungal and Santa Bahadur Pun referred to map of 1837 by JB Tassin (see Figure 2) and of 1856 by Surveyor General of India showing the origin of Kali River at Lampiyadhura¹⁹. They say that subsequent Indian maps of 1865-69 and 1871-77 shows the origin of the River to be at Lipulekh and the boundary starting at Om Parbat, West of Tinker.

There was no map attached along with the Treaty, showing exact alignment and point of origin of the Kali River²⁰ and moreover, there were no scientific survey carried out or maps printed by any governmental department, at that time. It was only in 1800 AD, that William Lambton started his trigonometrical survey in Madras Presidency and by 1815 AD spread a network of triangles over Southern India with a central chain from Kanyakumari to Hyderabad. In 1815 AD, the Court of Directors in London appointed Colin Mackenzie as the first Surveyor General of India, and in 1818 AD appointed Lambton as Superintendent of the Great Trigonometrical Survey of India²¹. By 1856 AD the party had only fixed the positions and heights of 36 snow-covered peaks in the Himalayas²². It could be surmised that maps using scientific methods of the survey were published only after 1856.

India considers a map of 1879 as the authentic evidence to depict the India – Nepal Boundary²³, which shows the origin of Kali River to be near Lipulekh (see Figure 4). This was the first official map printed by the Surveyor General of India, showing the India – Nepal Boundary. Unlike other maps before this, it shows Kali River and the Boundary, unambiguously. The boundary goes up North along the Kali River and at the confluence of Kali and Pankha Gad, it turns eastwards and continues along the watershed up to Tinker Lipu. This alignment conforms to the current maps as well.

19 Dungal D & Pun S, *Nepal India Relations: Territorial / Border Issue with Specific Reference to Mahakali River*, *FPRC Journal*, 2014

20 Aitchison, C. (1909). *A Collection of Treaties*, 110-112

21 Phillimore C R, *Andrew Waugh, Historical Records of The Survey of India, Vol V, 1844-1861* (Vol. 5), 1968, Dehradun: Survey of India Printing Group, xiii

22 Phillimore C R, *Andrew Waugh, Historical Records of The Survey of India*, 87

23 Dungal D & Pun S, *Nepal India Relations*, 2014

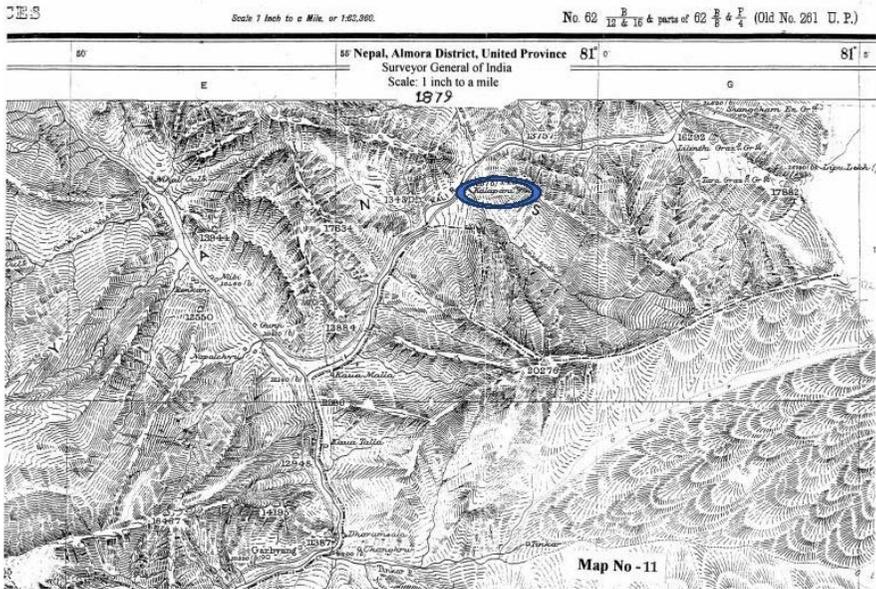


Figure 4: Map of 1879, published by Surveyor General of British India, proffered as evidence of boundary by India (Dungal and Pun 2014)

According to international law, technically correct boundaries, however, could only be mapped when survey and cartographic techniques were adequately advanced to facilitate its demarcation²⁴, which was well after 1856²⁵. In the 19th Century the British Government was expanding and re-drawing boundaries everywhere. On November 01, 1860, they transferred large tracts of land from the Kingdom of Oudh to Nepal as a gift for providing help in crushing the 1857 First War of Indian Independence²⁶. It is apparent that British actions were based on their commercial requirements and drawing and re-drawing of boundaries did not have any sociological or legal basis. The validity of maps drawn under such circumstances by a colonial power, to resolve a boundary dispute in current times between two independent nations, is suspect.

24 Hill N, *Claims to Territory in International Law and Relations*. New York: Oxford University Press, 1945, 23

25 Phillimore C R, *Andrew Waugh, Historical Records of The Survey of India, Vol V, 1844-1861* (Vol. 5). Dehradun: Survey of India Printing Group, 1968, xiii

26 Aitchison, C. (1909), *A Collection of Treaties*, 122-123

Birendra P Mishra of Nepal wrote in a Nepali Newspaper that even in 1860s, Indian government officials used to travel to Lipulekh regularly for administrative purposes²⁷. His statement adds to the validity of the 1879 map in depicting the boundary, corroborating Indian stance that this map was published after a detailed survey.

“A former Deputy Commissioner of Almora writes, To establish the boundary, the Deputy Commissioner of Almora would each year travel to the Lipulekh Pass to open trade... The first Settlement, under the British Government of Beckett between 1863-1873, measured each cultivated field, reiterated this, and, The Himalayan Gazetteer points out, was used to input local names into the map prepared by the Survey of India, correcting earlier sketchy maps.”

A study of the cartographic claims made by various Nepalese scholars, citing various maps those existed in the 19th Century, highlights the following aspects:-

- There was no map appended to the Sugauli Treaty of 1816, even though it is mentioned that the King of Nepal renounces any claim to the East of Kali River. Origin of Kali River was not specified in the text of the Treaty.
- There were maps available during the period 1816 to 1856, in which Kuti-Yangti River has been named as Kalee River albeit, boundary between India and Nepal has not been marked along the same river, as brought out by the scholars, in the preceding paragraphs.
- Maps printed after 1856 have been consistently showing the origin of Kali River to be near Lipulekh Pass. There is no evidence to suggest attribution of an ulterior motive for this change.
- Maps using scientific methods of survey were published by the Surveyor General of India only after 1856. Map of 1879 (see Figure 4) was the first one to be published after a scientific survey, showing both the alignment of Kali River and the Nepal – India Boundary.

27 Mishra B, Cartographic Conflict: Will India Retreat? *Himalini*, June 28, 2020

Claim with 20th Century Maps

Even though Sugauli Treaty of 1816 has been taken as the basis for the boundary in the disputed area, it became more complex in the 20th Century. In 1923, Nepal and Britain signed a Treaty to formalise their relations. The Treaty cancelled all previous treaties existing between the two countries. It said :

“All previous treaties, agreements and engagements, since and including the Sugauli Treaty of 1815, which have been concluded between the two Governments, are hereby cancelled, except so far as they may be altered by the present Treaty.”

After India attained independence, in 1950, Nepal and India signed a Peace and Friendship²⁸ Treaty, the Article 8 of which said:

“So far as matters dealt with herein are concerned, this treaty cancels all previous treaties, agreements and engagements entered into on behalf of India between the British Government and the Government of Nepal.”

Even though the Treaty of 1816 was cancelled by the subsequent treaties, the issue of the boundary between Nepal and India has not been mentioned in any other treaty. Apropos, the Treaty of 1816 can be taken as a basis for progressing the dispute resolution, if acceptable to both countries. It, however, adds considerable legal complexities to the dispute resolution. Maps published in the 20th Century by India, China and even Nepal do not support the Nepalese claims.

In a research paper published on cartography, Jagat K Bhusal said that before 1970, Nepal's survey and mapping technology were rudimentary and they did not have skilled cartographers. Nepal published its first political map in 1975 and till then, they had been using maps prepared by the Surveyor General of India. Indian map was even used as the reference map to make the map jointly prepared by Nepal and China for their boundary agreement, in which Bhusal alleges that the Lipu stream was 'fictitiously' named as Kali River²⁹. Such statements points to the fact that at the time of making the map, Nepal, China and India were in

28 India & Nepal, *Treaty of Peace and Friendship, July 31, 1950*, Retrieved July 2020, from me.gov.in: <https://me.gov.in/bilateral-documents.htm?dtl/6295/Treaty+of+Peace+and+Friendship>

29 Bhusal J, Evolution of Cartographic Aggression by India: A Study of Limpiadhura to Lipulekh. *The Geographical Journal of Nepal*, March 2020, p 63.

consonance about the source of Kali River and the Trijunction connecting the three countries. The 1961 map being part of an international treaty, is legally valid as implied by Bhusal himself,

“Unless and until, there is any other border treaty signed between two respective highest government authorities that Kalapani as the ending point of borderline by river courses (i.e. Kali river), any attempts in cartographic manipulation do not hold any legal validity in the case of North-West borderline of Nepal.”

Independent India published a map showing its boundaries with all neighbours in 1954 for the first time and another one in 2019 (Figure 5). India – Nepal boundary were identical in both maps. India – Nepal – China Trijunction in both maps was at Tinker Lipu, the highest mountain top between Lipulekh and Tinker Lipu Passes, as can be seen in both maps shown below.



Figure 5: Indian Maps of 1954 and 2019, showing that no change has been made to India – Nepal boundary (Survey of India)

Nepal and China published a map jointly to be appended to their Boundary Treaty in 1961 (see Figure 6) and the survey department of Nepal published a map showing the external boundaries of Nepal in 1975. Origin of Kali River and the India – Nepal – China Trijunction in both maps conform to the Indian map. Manandhar and Koirala³⁰ goes on to explain it as follows:-

“The survey department of Nepal, for the first time came out with its own map published in 1975. The map did not follow the International

30 Manandhar M S, & Koirala H L, Nepal-India Boundary Issue: River Kali as International Boundary. *Tribhuvan University Journal*, XXIII(No 1), June 2001, 4

Boundary as confirmed by Sugauli Treaty nor seems to have consulted maps of the Treaty period. The map showed LipuKhola as Mahakali in 1979. A map showing the delimitation of Nepal – China Boundary also named the LipuKhola as Kali River further compounding the confusion.”

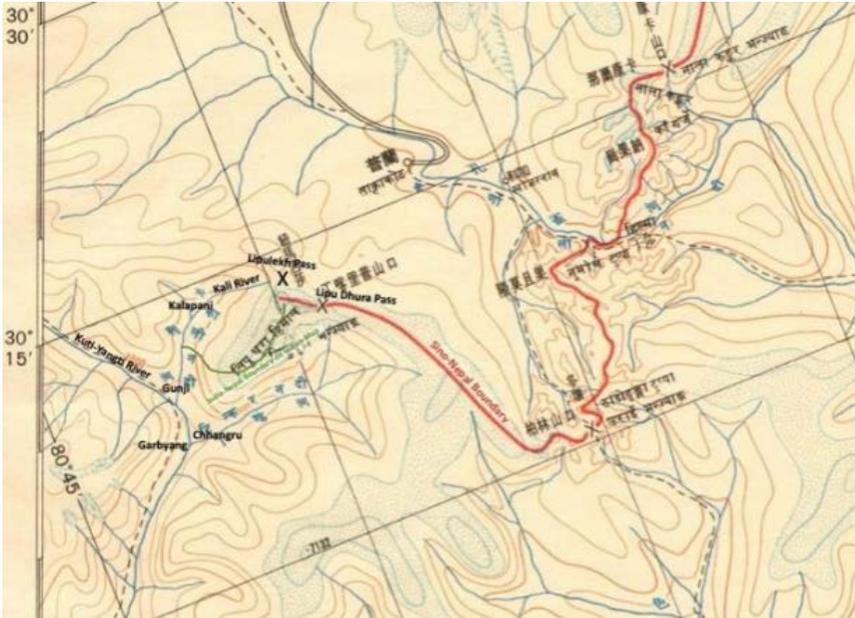


Figure 6: Map appended to China – Nepal Boundary Treaty of 1961 (*Nepal and China 1961*)

Map shown in Figure 6 is an extract of the map appended to the Nepal – China Boundary Treaty of 1961³¹. The thick red line depicts the Nepal – China boundary. It starts from the highest point between the Passes of Lipulekh and Lipu Dhura, which is also the Trijunction marked on Indian maps. Alignment of Kali River starts below Lipulekh pass and has been marked in Nepali and Chinese languages. No 1 boundary pillar between Nepal and China has been placed at the Lipu Dhura Pass³². Boundary between India and Nepal is shown

31 Kingdom of Nepal, & Peoples' Republic of China (1961), *Boundary Treaty, English Version*, Peking, 1

32 Geographer Bureau of Intelligence and Research, USA. (1965). *International Boundary Study No 50*. The Geographer Office, Geographer Bureau of Intelligence and Research, USA, 6

by the green line, which starts from the Trijunction, comes down along the Kali River watershed and joins the Kali River little South of Kalapani.

Referring to the maps prepared by Government of Nepal, before 2020, Sam Cowan³³ said that:

“Maps prepared in Nepal during the Panchayat regime are identical to the post – 1860 maps in showing the border as following the line of the river that flows down from below Lipulekh. Again this indicated an acceptance, whether consciously or not, that the traditional trail to the Pass fell exclusively on the Indian side.”

Nepal did not object to the Indian map published in 1954 and their maps published in 1961 and 1975 conformed to the Indian map, which shows that there was no dispute existing, as regards India – Nepal boundary at least till 1975. When India published a new edition of their map in 2019, Nepal objected to it, stating that Nepal’s territory has been shown inside India, indicating an encroachment. In 2020, Nepal re-published its own map, showing the disputed area inside Nepal, in spite of the India – Nepal boundary remaining unchanged in Indian maps of 1954 and 2019. Nepal had raised the issue of Kalapani dispute officially for the first time only in 1996, while signing the Mahakali hydroelectric project Agreement³⁴. There was no dispute existing for 180 years. A few maps published by Nepal show that there was no dispute existing till 2014.

Analysis of the maps published in the Twentieth Century and the claims and counter claims made there on, following aspects can be surmised:-

- In the map appended to the Nepal – China Boundary Treaty of 1961, alignment of Kali River and the Nepal – China – India Trijunction conformed to the Indian maps. This being an international treaty, could be legally valid to prove territorial claims.
- Alignment of Kali River and the Nepal – China – India Trijunction printed on the political map published by Nepal in 1975 also conformed to the Indian maps, indicating that a boundary dispute did not exist at that point of time.

33 Cowan S, <https://www.recordnepal.com/wire/indian-checkposts-lipulekh-and-kalapani>, December 14, 2015, Retrieved April 2020, from recordnepal.com: <https://www.recordnepal.com/wire/indian-checkposts-lipulekh-and-kalapani>

34 Cowan S, <https://www.recordnepal.com/wire/indian-checkposts-lipulekh-and-kalapani>. Retrieved April 2020

- The only map with the Nepalese perception is the one being published by Nepal in 2020.
- Nepal officially proffered a claim to the Kalapani area only in 1996, 180 years after the Treaty of Sugauli.
- There was no change in India – Nepal boundary in the maps published by India in 1954 and 2019.

Joint Check Posts

In 1950, Nepal and India signed a Treaty of Peace and Friendship. Based on an understanding arrived at after the treaty, 17/18 joint check posts were established along Nepal – China border, which included Indian military personnel. These check posts were later removed with mutual consent by 1969. Atit Babu Rijal, wrote in Kathmandu Post that India had built check posts at 17 places along China - Nepal border in the 1950s, and subsequently all posts were removed in the 1970s except Kalapani, lying South of Lipulekh Pass³⁵.

Buddhi Narayan Shrestha mentions that Nepal and India established 18 joint checkposts on the China - Nepal border, beginning in 1952 and vacating by 1969³⁶. The 18 check posts mentioned in his book, 'Border Management of Nepal' are given in the Table below:-

	Post	District
1	Tinkar Pass	Darchula
2	Taklakot	Bajhang. Located North of Chainpur to cover the Historic trade route to Taklakot over the Pass of UraiLekh
3	Muchu	Humla
4	Mugugaon	Mugu
5	Chharkabhot	Dolpa
6	Kaisang (Chhusang)	Mustang

35 Rijal A, *Kalapani Dispute and the Way Forward*, November 19, 2019, Retrieved January 2020, from kathmandupost.com: <https://kathmandupost.com/columns/2019/11/19/kalapani-dispute-and-the-way-forward>

36 Shrestha B N, *Border Management of Nepal*. Nepal: BhumichitraCo.P.Ltd.2003, 259

	Post	District
7	Thorang	Manang
8	Larkay Pass	Gorkha
9	AtharasayaKhola	Gorkha
10	Somdang	Rasuwa
11	Rasuwagadhi	Rasuwa
12	Tatopani (Kodari)	Sindhupalchok
13	Lambagar	Dolakha
14	Namche (Chyalsa)	Solukhumbu
15	Chepuwa Pass	Sankhuwasabha
16	Olangchungola	Taplejung
17	Thaychammu	Taplejung
18	Chyangthapu	Panchthar

Table 1: Table showing Indo – Nepal joint check posts, on Nepal – China border from 1952 to 1969 (*Shreshta* 2003, 259)

It is important to note that the border check posts were occupied from 1951 onwards based on a bilateral understanding arrived after the 1950 Agreement. However, there is no official document stating the details of these posts and exact timings of their deployment. As claimed by Rijal and many others, Kalapani and Lipulekh are not a part of this list, thereby making the claim that it was a joint post, which India refused to vacate along with all other joint posts in 1969, legally invalid.

Indian Military Post at Kalapani

India and China had fought a bitter war in 1962, in which India had suffered a considerable setback. The war saw troops from both sides deployed along the borders contiguous to Nepal, Kalapani / Lipulekh being one such area. Bhusal says that it was after suffering defeat in the war that India strengthened her defences in Nepalese territory, occupying about 70 percent of the watershed of Lipu Stream and Kalapani³⁷. It has been mentioned by Shreshta too that since

37 Bhusal J, Evolution of Cartographic Aggression by India: A Study of Limpiadhura to Lipulekh. 63

1962, India has deployed her armed forces and constructed permanent defensive structures at Kalapani, East of Kali River, implying that the area was not under Indian control, prior to 1962³⁸. According to the Treaty of Sugauli, area East of Kali River belongs to Nepal. Currently, there are infrastructure built by Indian security forces, on the Eastern bank of Kali River, as can be seen in the photo shown below.

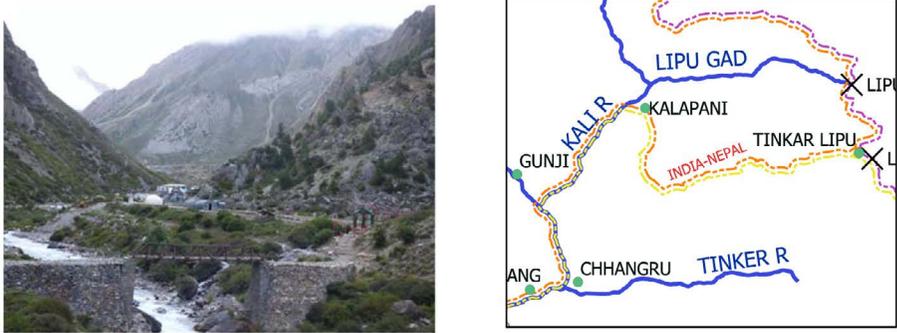


Figure 7: Photograph showing Indian security post on the East of Kali River and sketch showing the location (by the Author)

Sam Cowan refers to Syam Bhatta, writing in *Annapurna Post* on August 05, 2015, that Bahadur Singh Aitwal, former elected member of National Panchayat from Byas had noticed Indian troop deployment at Kalapani in 1959 and he having formally informed the Nepal government about the encroachment in 1974 / 1975³⁹. Cowan also mentions in the same article that a UP State Police post was at Kalapani in 1956 and an Indo-Tibetan Border Police (ITBP) surveillance post has been in existence from 1979. India claims that Kali River originates from the point, where Lipu Gad meets the stream coming from a spring at Kalapani⁴⁰.

38 Shreshtha B N, Chapter 7: Demarcation of the International Boundaries of Nepal. *International Boundary Making* (FIG Publication No 59), December 2013,178

39 Cowan S (2015, <https://www.recordnepal.com/wire/indian-checkposts-lipulekh-and-kalapani>)

40 Gupta A, Kalapani: A Bone of Contention Between India and Nepal. *Institute of Peace and Conflict Studies*, October 17, 2000

The apropos suggests the following:-

- Indian security forces have been deployed in Kalapani from 1956 onwards and it could be surmised that there was no Nepalese deployment in the area, ever. Origin of the Indian troop deployment was not to only cater for a Chinese threat as claimed by Nepalese media, but also an administrative action.
- Kalapani post of the Indian Army is located on the East of Kali River, which puts it on Nepalese territory as per Treaty of Sugauli, according to which, Kali River forms the boundary between Nepal and India in this area.
- Since India also has accepted the Treaty of Sugauli to be the basis of her boundary with Nepal, onus is on India to prove its locus standi, regarding its military post being on the East of Kali River.

Administrative Control of Disputed Area

Area above Garbyang along the Kali River is the disputed area and Kuti – Yangti drains into Kali at Garbyang (see Figure 1). Sam Cowan mentions about claims from Indian official sources that UP State Government is in possession of records showing India's administrative control over the Kalapani area from 1830s, which show that Kalapani area has traditionally been a part of India. A UP State Police post was at Kalapani in 1956 and an Indo-Tibetan Border Police surveillance post has been in existence from 1979⁴¹. These records show that historically India has been in possession of the area, while there are no records of Nepal having administered this area ever. This information has also been corroborated by Gupta⁴².

Interview of a sample of 10 inhabitants each of the villages located in the disputed area was carried out in July 2020⁴³. They were asked the following questions:-

41 Cowan S, <https://www.recordnepal.com/wire/indian-checkposts-lipulekh-and-kalapani>

42 Gupta A, Kalapani: A Bone of Contention Between India and Nepal. *Institute of Peace and Conflict Studies*.

43 A visit was carried out to the villages of Kuthi, Nabi, Rongkong, Gunji and Garbyang, located within the area claimed by Nepal. 10 persons from each village were interviewed. Names of prominent villagers interviewed were Padam Shree Gunjiyal, aged 70 years from Gunji, Vikram Singh Nabiyal, aged 48 from Nabi, Santosh Garbyal, aged 37

- Which government jurisdiction does your village come under and has there ever been a change, which you may have heard from your forefathers? *The answers in all cases were that the area was always under Indian jurisdiction. Nearest government officer is the Deputy Revenue Inspector located at Gunji and he comes under the District Magistrate of Pithoragarh in India.*
- Do you know of Nepal government ever having collected taxes, carried out census or conducted elections in your village? *Everyone answered that Nepal had not carried out these activities ever and they have always been under Indian jurisdiction. One of them, however, remembered that someone from Tibet collected tax from them in early 1940s and the King of Askote collected taxes in early 1950s. The area was under the Kumaoni King of Askote, till the Kingdom was amalgamated into the Union of India in 1967.*
- Where do you perceive the boundary lies between India and Nepal, near your village? *All of them replied that the boundary comes down from Kalapani to Gunji.*
- Who has been using the Lipulekh Pass for trade with Tibet and pilgrimage to Kailash – Mansarovar in Tibet? *They answered that Indians have always been using the Lipulekh Pass. However, foreigners including those from Nepal had been using the route via Lipulekh pass, with permit from Indian Government, prior to 1962.*
- Are there any Nepali citizens residing in your village? *Kuthi Village had three people of Nepali origin settled there. Hans Bahadur and Nandu Singh since 1981 and Chandu Ram since 2012.*

Bhusal wrote that in 1961, the census of Nepal included the settlements located on East of Kali River, to include the villages of Kuti, Nabi and Gunji⁴⁴. Interaction with people living in these villages, however, repudiates the claim.

from Garbyang and Lakhan Singh, aged 51 from Nayal. The persons were selected at random from among those available in the villages at the time of visit, which was between 15 to 25 July.

44 Bhusal J, Evolution of Cartographic Aggression by India: A Study of Limpiadhura to Lipulekh, 63

Moreover, according to maps published by Government of Nepal in 1960s, the villages of Kuti, Nabi and Gunji falls on the Western side of the Kali River.

Prem Punetha wrote in *Times of India*⁴⁵ quoting the Sub Divisional Magistrate of Dharchula, that land records clearly show that Nabidhang and Kalapani were part of Dharchula tehsil of Pithoragarh District. It included 4,500 to 5,000 agricultural plots, grazing land, forest and van panchayat⁴⁶ land of Garbhyang village. Local residents have been saying that Kalapani and Nabidhang always belonged to the native Garvyals, as per land records of Dharchula tehsil. Chhangru, lying to the east of Kali River (see Figure 1) also belong to Garvyals but are on the Nepal's side of boundary. Interview of a few officials from the Office of the District Magistrate of Pithoragarh District corroborated the report of Punetha. However, they refused to make an official statement.

India has a counterclaim on some areas that fall on the East of Kali River. Raghunandan Singh Tolia, a former Chief Secretary of State of Uttarakhand, where Kalapani falls, said in his correspondence that Indian claims are based on Revenue maps of Garbyang, which he had produced for the Joint Boundary Commission, whereas Nepal has not produced any document to support their claim of administrative control over the area⁴⁷. He goes on to say that the area East of Kali River is the Gauchar⁴⁸ of Garbyang and there are revenue documents to prove it. The Gauchar falls in the place called Changru, which is on the Nepalese side of the boundary, even in Indian maps (see Figure 1). Reports made by Lieutenant Henry Strachey during his visit to these places in September and October 1846 also points to this fact that the area adjacent to Kali River on the East and across Garbyang (Changru) is geographically and ethnically linked to

45 Punetha P, *Old Land Records Contradict Nepal Claim*, June 3, 2020, Retrieved July 2020, from Times News Network: <https://timesofindia.indiatimes.com/city/dehradun/old-land-records-bely-nepal-claim-show-nabidhang-kalapani-part-of-ukhand-dist-officials/articleshow/76162990.cms>

46 'Van Panchayat' stands the local administrative set up for villages falling within forest land.

47 The issue came to light through email correspondence with late Raghunandan Singh Tolia in 2010, however, there is no evidence to show that India had made a claim to these areas.

48 Gauchars are traditional seasonal grazing grounds of villages in mountainous regions in India.

the Indian side⁴⁹. Even though, Changru is in Nepal as marked on the Indian maps, officials dealing with the Kalapani Issue in the Indian Government have confirmed that India has not proffered any claims to this area⁵⁰. Strachey goes on to narrate:

“Changrew and Tinkar [located East of the Kali] belong geographically to Byans, and are inhabited by Bhotias, the same in every respect as the other Byansis, and sharing in the traffic with Purang by the Lipu Pass. It was a mistake leaving this little valley to the Gorkhas, when the rest of the district was brought under British rule; the true frontier line was the range of snowy mountains on the East, Tinkar, Napa, and Api, on the other side of which lies the district of Marma, the Northernmost division of Doti, and the inhabitants of which, like those of Dung, next south, are Khasia and not Bhotia.”

Analysis of the issues discussed, regarding administrative jurisdiction points to the following facts:-

- The area claimed by Nepal, which they unilaterally included as part of Nepalese territory in their map published in 2020, has never been under their administrative control. India has always exercised jurisdiction there, as confirmed by the people living in the area of dispute.
- People living in the disputed area confirms that they have always been Indian citizens and possess documents to substantiate that.
- India is in possession of documents to prove that they have been exercising administrative control over the area at least from 1830, whereas Nepal is not in possession of any such documents.

49 Strachey H, Narrative of a Journey to Cho Lagan, Cho Mopan and the Valley of Pruang in Gnari, Hundes in September and October 1846. *Journal of the Asiatic Society of Bengal, XVII, Part II*, July to December 1848,112

50 Officer dealing with Nepal in the Indian Ministry of External Affairs has verbally clarified Indian stand on Changru, during a series of telephonic conversations in the month of August 2020. Name of the official is being withheld, on request.

Indian Claims at Kalapani

Indian perception of their boundary with Nepal has been printed on the Survey of India maps of 1954 and 2019. In the new edition printed in 2019, there is no change in the external boundaries that were shown in the 1954 map. India also accepts the 1816 Sugauli Treaty and considers the Kali River as the India-Nepal Boundary⁵¹. Difference of opinion with Nepal is only regarding the origin of Kali River. In Indian maps and Nepalese maps, origin of Kali River is shown to be at Lipulekh. Kuti – Yangti River (see Figure 1), which Nepal claims is the actual Kali River, joins Kali River at Gunji, about 15 kms south of Kalapani. It refutes the Nepalese claim, because the River is called Kali even before Kuti – Yangti meets it, even on the map jointly prepared by Nepal and China in 1961 (see Figure 6).

The boundary marked in Indian maps follows Kali River, South of Kalapani. From Kalapani to the India-Nepal-China Trijunction, it follows the watershed between Kali and Lipukhola (see Figure 1). Technically this stretch is on the East of Kali River and hence contentious. Since the Indian map was printed in 1954 and Nepal has not raised any objection till 1996, the Nepalese claims may not be legally valid. It may also be pertinent to note that at higher altitudes, it will be more logical to take the watershed as the boundary. This, however, has to be bilaterally resolved.

Lipulekh Pass has been used by the Kumaonis, who are the original inhabitants of the Indian region bordering Nepal for trade with Tibet and for pilgrimage to Mansarovar Lake, from times immemorial. This had continued even when Nepal occupied Kumaoni territory for a short while. British India continued using Lipulekh in 19th and 20th centuries⁵². After becoming independent in 1947, India continued using the Pass for trade and pilgrimage. There is no doubt that Lipulekh Pass has been in India's possession physically

51 Gupta A, *Kalapani: A Bone of Contention Between India and Nepal*. Institute of Peace and Conflict Studies.

52 The information was shared by SS Pangtey, former Chief Secretary of Uttar Pradesh State and an author in an Interview on December 24, 2019. He was born at Munsiry, a place close to India – Nepal Border, in 1940 and is an expert on the History of the Region

and cartographically for a long period of time and Nepal initiated a claim for it only after 1995⁵³.

Even after attaining independence in 1947, India continued to exert administrative control along the route to Lipulekh. This is a fact accepted even by China⁵⁴. Article IV of The Sino-Indian Trade Agreement over Tibetan Border, 1954 mentions the passes through which traders and pilgrims of India and China are allowed to travel⁵⁵. Lipulekh Pass is one of them. As per Nepalese claim, Lipulekh Pass is well within Nepal and the India – Nepal – China Tri-junction should be much to the West at Lampiyadhura.

In 1988, India and China agreed to resume border trade and Lipulekh Pass was one of the designated trading point. Again in 2005, both countries signed another agreement to enhance Confidence Building Measures along the Line of Actual Control. Article V, (2) of the Agreement mentioned Lipulekh Pass as one of the border meeting points⁵⁶. All agreements that China has had with India and Nepal points to the fact that they agree with the Indian stance on the India -Nepal boundary.

Bilateral Dialogue to Resolve Dispute

India and Nepal constituted a Joint Technical Level Boundary Committee in November 1981, which was mandated to maintain the boundary pillars. Its mandate expired in 2007⁵⁷. In July-August 2000, India and Nepal had agreed to

53 Upadhya S, *Nepal and Geostrategic Rivalry Between China and India*, 126

54 Cowan S, <https://www.recordnepal.com/wire/indian-checkposts-lipulekh-and-kalapani>

55 Article IV, 'Agreement Between The Republic of India and the People's Republic of China on Trade and Intercourse Between Tibet Region of China and India', April 29, 1954. Retrieved April 2020, from mea.gov.in: <https://www.mea.gov.in/bilateral-documents.htm?dtl/7807/Agreement+on+Trade+and+Intercourse+with+Tibet+Region>

56 Article V (2), 'Protocol between the Government of the Republic of India and the Government of the People's Republic of China on Modalities for the Implementation of Confidence Building Measures in the Military Field Along the Line of Actual Control, April 11, 2005, Retrieved April 2020, from mea.gov.in: <https://www.mea.gov.in/bilateral-documents.htm?dtl/6539/Protocol+between+the+Government+of+the+Republic+of+India+and+the+Government+of+the+Peoples+Republic+of+China+on+Modalities+for+the+Implementation+of+Confidence+Building+Measures+in+the+Military+Field>

57 Baral T, Border Disputes and its Impact on Bilateral Relations: A Case of Nepal - India International Border Management. *Journal of APF Command and Staff College*,

complete field work for demarcation of the boundary by 2002 and prepare final strip maps by 2003. The Joint Technical Committee for Boundary Demarcation decided that if they were unable to find a mutually acceptable solution, they will try to submit a compilation of available evidence to the two governments for consideration⁵⁸.

India and Nepal have been having joint commissions trying to find a solution to the problem, but to no avail. Apparently, Nepal is not confident enough about the veracity of their claim. Shyam Saran, who was the Indian Ambassador to Nepal from 2000 to 2004 and later The Foreign Secretary India, said that⁵⁹,

“While I was in Nepal as ambassador, a request was made to put the issue on the agenda of the foreign secretary level talks held in 2003 but without any expectation of actual discussion. When we conveyed our readiness to have a substantive discussion on the treaty revision, the agenda item was dropped by the Nepali side. The purpose was to merely show that the Nepali side was taking up the issue seriously with India.”

In August 2014, the India and Nepal had agreed to set up a Border Working Group(BWG) to undertake the construction, restoration and repair of boundary pillars. The BWG is headed by the surveyors general of both sides and includes representatives from relevant Ministries of Home Department, External Affairs and State Governments to progress the works that remained after the expiry of the mandate of the Joint Technical-level Nepal-India Boundary Committee in 2007. The BWG was mandated to find a technical solution to the boundary disputes, among other tasks. It was appreciated that the BWG would provide necessary inputs to respective foreign secretaries to resolve the outstanding boundary disputes at Kalapani and Susta⁶⁰. The BWG has so far not made any progress towards resolving the boundary dispute at Kalapani. India and Nepal have established mechanisms to discuss border related issues

December 14, 2018

58 Gupta A, Kalapani: A Bone of Contention Between India and Nepal. *Institute of Peace and Conflict Studies*.

59 Saran S, <https://indianexpress.com/article/opinion/columns/india-nepal-border-map-kalapani-6138381/> , April 9, 2020

60 *business-standard.com*, September 17, 2014, Retrieved August 2020, from First Meeting of Nepal - India Boundary Group Begins: <https://www.business-standard.com/article/>

including demarcation through border pillars, joint survey and construction/repair of border pillars. The Boundary Working Group (BWG) and Survey Officials Committee (SOC) are two such mechanisms which hold regular meetings. The need of a SOC at a technical level was felt in order to support BWG in technical matters and mobilise the survey teams for field work. Both sides agreed to constitute India-Nepal Boundary Survey Officials' Committee in 2014. It was agreed that SOC meeting would be held every six months at least a month before BWG meeting alternatively in India and Nepal. Even though 11 meetings of SOC have taken place till date, no progress has been made towards a resolution of the Kalapani Dispute⁶¹.

Legal Issues of the Dispute

As India and Nepal have not come to an agreement on the dispute at Kalapani, one way out will be to consider taking a legal recourse under the International Court of Justice (ICJ). International boundary disputes generally may be of a legal or political nature. Legal disputes are based on relevant factual evidence. Political ones are based on non-legal arguments, such as geography, history, and geopolitics⁶². In most situations, as also in the case of India and Nepal boundary dispute, non-legal arguments are mixed with *realpolitik*⁶³.

International tribunals may resort to both legal and non-legal genre of arguments, while adjudicating on disputes. The Kalapani boundary dispute apparently falls under '*uti possidetis juris*'. The expression '*uti possidetis juris*' is a general principle that serves to preserve the *pre-independence boundaries of states*,

[news-ians/first-meeting-of-nepal-india-boundary-group-begins-114091700947_1.html](https://www.news-ians.com/news/first-meeting-of-nepal-india-boundary-group-begins-114091700947_1.html)

- 61 Update on the current status on the bilateral dialogue on Kalapani dispute was provided by the official dealing with Nepal in the Indian Ministry of External Affairs in a series of telephonic conversations during August 2020 and email in September 2020. Name has been withheld on request of the officer.
- 62 Munkman A, Adjudication and Adjustment - International Judicial Decision and Settlement of Territorial and Boundary Disputes. In *The British Year Book of International Law*, Oxford University Press, 1972, 21-25
- 63 Antunes N, Estoppel, Acquiescence and Recognition in Territorial and Boundary Dispute Settlement. *Boundary and Territory Briefing*, 2(8), 2000,30.

which emerged out of former Colonial Powers⁶⁴. The principle of *uti possidetis* need to be considered in light of “the rules of international law governing, for example, succession, self-determination, acquisition of title to territory, frontiers and other territorial régimes, treaty law, inter-temporal law”⁶⁵. The boundary line in the extant case was handed down by the British Colonial Power to India and Nepal in 1947. Moreover, the application of this principle may give rise to difficulties in situations where there is no line, there is a dispute in relation to the *de-facto* location of the line or where the location of the line is not supported by *effectivités*⁶⁶. India and Nepal, both acknowledge the ‘Sugauli Treaty of 1816’, which indicates that Kali River forms the boundary between the two countries. The dispute is based on the alignment of the Kali River near its origin, administrative control of territory in the disputed area and maps published by both countries.

Treaties, political control over disputed territory and the *uti possidetis* doctrine are likely to play an important role in resolving the Kalapani Dispute. The relative legal positions of the contenders and political and emotional value of the dispute, sometimes cloud a clear perception of the dispute. Bilateral relations and conduct of states may, in such cases become very important. *Acquiescence*, *recognition* and *estoppel* have been used by international tribunals to *interpret* that conduct, thereby deciding disputes between states. While analysing the conduct of states likely to lead to acquiescence, recognition or estoppel, ICJ has been attributing relevance to following forms of evidence⁶⁷:-

- International conventions and non-binding agreements. *India and Nepal agree to accept Sugauli Treaty of 1816 to be the basis for Kali River being the boundary.*
- Governmental and diplomatic correspondence. *There has been no governmental claims or diplomatic correspondence regarding the dispute upto 1996.*

64 Cornell Law School. (n.d.). *Uti Possidetis Juris*. Retrieved February 2020, from cornell.edu: https://www.law.cornell.edu/wex/uti_possidetis_juris

65 Bernadez S, The *Uti Possidetis Juris* Principle in Historical Perspective. In K. G. (eds), *Volkerrecht zwischen normativem Anspruch und politischer Realität*, Berlin: Duncker & Humblot, 1994, 436

66 Shaw M, The Heritage of States: The Principle of *Uti Possidetis Juris* Today. In *The British Year Book of International Law*, Oxford University Press, 1996, 153

67 Antunes N, *Estoppel, Acquiescence and Recognition in Territorial and Boundary Dispute Settlement*, 30.

- Internal legislative and regulating acts. All *Indian and Nepalese maps, clearly showed the alignment of the boundary, as conforming to the Indian position on the dispute, which was not disputed by Nepal till 1996.*
- Maps, journals or other publications with an official nature. *The map published by Nepal and China in 1961 as part of China-Nepal Boundary Agreement, conformed to the Indian map. Origin of Kali River has been shown to be at Lipulekh in this map and marked as such in Nepalese and Chinese languages. This being part of an international agreement, can be legally taken as Nepalese Government's view.*
- Statistical records and archives. *Nepal does not possess any records of having exercised political or administrative control in the claimed area West of Kali River.*
- Unilateral acts, particularly political acts or statements with external relevance. *In 2020, Nepal unilaterally published a map, showing the disputed territory within Nepal.*
- Most importantly, the reaction, and lack of reaction, in relation to any relevant facts. *The fact that from 1816 to 1996, Nepal did not dispute the boundary line printed on the maps of both countries, deny them any legal standing in the dispute. Maps published by Nepal also indicated that there was no dispute that existed till 1996.*

Acquiescence, recognition and estoppel are juridical concepts that stem from the principle that *allegancontraria non estaudiendus*⁶⁸. The law.com Dictionary defines it as,

*“Legal maxim and Latin for one making contradictory statements is not to be heard. It is a principle of good faith that a person should not be allowed to testify hot and cold at different times about the same event, denying today, affirming tomorrow. It is a concept of common sense and used to bring cross examination to an abrupt end”*⁶⁹.

In this context, it has to be remembered that map published jointly by Nepal and China in 1961 as part of an international agreement (Sino-Nepal

68 Antunes N, Estoppel, Acquiescence and Recognition in Territorial and Boundary Dispute Settlement, 36

69 thelaw.com Dictionary, <https://dictionary.thelaw.com/allegans-contraria-non-estaudiendus/>, (accessed on February 15, 2020)

Boundary Agreement of 1961) and all maps published by Government of Nepal, conforms to the maps published by the Surveyor-General of British India in 1879 and Government of India in 1954. Nepal did not stake any claim or raise a case of dispute till 1996. That in itself could be a ground for rejection of their claim in the ICJ. Furthermore, in ordering territorial stability and territorial changes, the fundamental rule of *quieta non movere* must always be kept in sight. This concept, which states that *de facto* situations that have remained stable for a long time should not be disturbed, is a key principle⁷⁰. From 1816, when Sugauli Treaty was signed and till 1996, when Nepal officially staked a claim on the Kalapani Area for the first time, the origin of Kali River was *de facto* considered by India and Nepal to be near Lipulekh. Changing it now may not be logical and legally sound.

The issue has been made more complex by two more treaties signed by Nepal. In 1923, Nepal and Britain signed a treaty, which cancelled all previous treaties, signed by the signatories. Further, in 1950, Nepal and India signed a Treaty of Peace and Friendship⁷¹, which again cancelled all previous treaties signed by the signatories. These treaties could purportedly negate the importance of the Treaty of Sugauli and situation existing from 1950, legally more sound. This could make all claims of Nepal, null and void.

Conclusion

The people of India and Nepal have been close to each other from times immemorial. Ruling dispensations of both countries, however, have been having serious differences from 1804, when Nepal occupied large tracts of territory that belonged to Indian kings. It continues even today, even though, Nepal has become a democracy like India. India baiting has been the main election plank for all political parties in Nepal. However, a boundary dispute between the two, is a recent phenomenon. The Kalapani dispute came into being in mid 1990s. King Gyanendra initially and the political parties subsequently raised considerable nationalistic fervour in Nepal against India, using this issue.

70 Antunes N, Estoppel, Acquiescence and Recognition in Territorial and Boundary Dispute Settlement, 2

71 India, & Nepal. (1950, July 31). *Treaty of Peace and Friendship*. Retrieved July 2020, from [mea.gov.in: https://mea.gov.in/bilateral-documents.htm?dtl/6295/Treaty+of+Peace+and+Friendship](https://mea.gov.in/bilateral-documents.htm?dtl/6295/Treaty+of+Peace+and+Friendship)

Historical and geographical facts are inconclusive, as is the case in many international boundaries, that are colonial legacies. Only way out appears to be an adjudication by the ICJ and that can happen only if both India and Nepal agree to take the matter to the ICJ and also accept the verdict even if it doesn't conform to their respective claims. An analysis of legal standing of the issue, puts the Indian claim on a stronger ground.

Sugauli Treaty of 1816, which made Nepal renounce any claim to the area West of Kali River has tacitly made Kali River as the boundary acceptable to both countries. The Treaty, however, does not specify the origin of the Kali River. All maps published by Nepal and India showed the origin of Kali River to be near Lipulekh and so did the map published jointly by Nepal and China in 1961, as part of their bilateral boundary agreement. There is no record existing of Nepalese claim against Lipulekh being the origin, till 1996, because of which the Nepalese claim is legally not sound.

Even if origin of Kali River is accepted to be at Lipulekh, there are Indian security posts located to its West at Kalapani, which is technically an intrusion into the Nepalese territory (see Figure 8). India considers the Kali River to originate from the point where Lipu Gad (a stream flowing down from Lipulekh) meets another stream originating from a spring at Kalapani. On the maps, India – Nepal boundary has been shown to deviate eastwards from a point on Kali River near Kalapani and follows a watershed up to Tinker Lipu, which is the India – Nepal – China Trijunction. Even though India can justify the alignment cartographically, it has not been bilaterally agreed upon between Nepal and India. Sugauli Treaty mentions only Kali River, which if originates at Kalapani, there is a need for an agreement on the alignment of boundary thereafter up to the Trijunction. This confirms the existence of a boundary dispute and the need for dialogue to resolve it.

In 2014 Indian Prime Minister visited Nepal, when the necessity for a dialogue to resolve the boundary dispute was established and a Border Working Group was setup to assist the respective foreign secretaries in resolving the dispute. Unfortunately, political relations between the two countries deteriorated from 2015 and the process of boundary dispute resolution got stalled. In 2020, Nepal published a map, unilaterally showing the disputed areas within Nepal. The dispute has now become political and emotional and a resolution delayed by the Corona Virus.

The dispute has to be resolved through a bilateral dialogue, with experts from both sides considering historical, geographic and legal issues of the case. In case the political situation in the region does not improve, precluding an amicable bilateral solution, the case should be referred to the ICJ.

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