

PANEL DISCUSSION REPORTS  
**INDIA AND  
INTERNATIONAL  
ARBITRATION-  
EMERGING TRENDS**  
8<sup>th</sup> February 2016



Centre for Economy Development and Law

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# INDIA AND INTERNATIONAL ARBITRATION – EMERGING TRENDS

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**LECTURE  
SERIES  
REPORT**

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# **Report of Lecture Series on INDIA AND INTERNATIONAL ARBITRATION: EMERGING TRENDS**

**8<sup>th</sup> February 2016**

*Lecturers:*

1. Mr. Imba Vijayan (International Arbitrator, Director CI Arb.(India), ICCA, The Hague)
2. Mr. Harishankar (Research Scholar, National University of Singapore)

*Necessity for the Lecture:* Arbitration is an emerging trend in the field of Law. In fact the seminar was an opportunity for the students of GLCT to get enlightened on Arbitration and its carrier scope.

*What is Arbitration?*

Arbitration is a procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision on the dispute. In choosing arbitration, the parties opt for a private dispute resolution procedure instead of going to court. Hence an arbitrator is not necessarily a lawyer.

Negotiation + Convince + Mediation = Arbitration

- There should be a contractual relation or sales contract between Parties
- There should be a dispute between Parties.
- Choice of law between Indian or any other International Law in Arbitration.

## **Mr. Imba Vijayan**

The international arbitrator who started his carrier in arbitration with the only passion of traveling eventually discovered that Arbitration is one of the most important avenues in Law. Mr.Vijayan gave a brief introduction to Arbitration as a subject.

## **Five Main Principles of Arbitration:-**

1. Arbitration is consensual

Arbitration can only take place if both parties have agreed to it. In the case of future disputes arising under a contract, the parties insert an arbitration clause in the relevant contract. An existing dispute can be referred to arbitration by means of a submission agreement between the parties. In contrast to mediation, a party cannot unilaterally withdraw from arbitration.

2. The parties choose the arbitrator(s)

The parties can select a sole arbitrator together. If they choose to have a three-member arbitral tribunal, each party appoints one of the arbitrators; those two persons then agree on the presiding arbitrator. Alternatively, the Centre can suggest potential arbitrators with

relevant expertise or directly appoint members of the arbitral tribunal. The Centre maintains an extensive roster of arbitrators ranging from seasoned dispute-resolution generalists to highly specialized practitioners and experts covering the entire legal and technical spectrum of intellectual property.

### 3. Arbitration is neutral

In addition to their selection of neutrals of appropriate nationality, parties are able to choose such important elements as the applicable law, language and venue of the arbitration. This allows them to ensure that no party enjoys a home court advantage.

### 4. Arbitration is a confidential procedure

It protects the confidentiality of the existence of the arbitration, any disclosures made during that procedure, and the award. In certain circumstances, It allows a party to restrict access to trade secrets or other confidential information that is submitted to the arbitral tribunal or to a confidentiality advisor to the tribunal.

### 5. The decision of the arbitral tribunal is Enforceable

The parties agree to carry out the decision of the arbitral tribunal without delay. International awards are enforced by national courts under the New York Convention, which permits them to be set aside only in very limited circumstances. More than 140 States are party to this Convention.

## **Steps to become an Arbitrator:-**

1. Start enhancing arbitration skills by reading arbitration journals.
2. Try to publish articles on arbitration.
3. Do internships at arbitration firms.
4. Expose yourself with arbitration institutions.
5. Spend a couple of hours with lawyers to enhance your drafting skill.

## **Thrusts of ‘The Arbitration and Conciliation (Amendment) Act,2015’ :-**

The main thrust of amendments is to minimise the delays in arbitration process and Court’s intervention by,

- Empowering arbitral tribunal with the same powers of the Court for the purpose of granting interim measures/relief.
- Fixing time limits for passing of arbitral awards and disposal of application by Courts.
- Mandating detailed disclosures/ guidelines for disqualification for ensuring impartiality, Independence of arbitrators.
- Suggesting indicative model fee structure for Arbitral Tribunal.

## Highlights

- An arbitrator will have to give a "no conflict of interest" declaration.
- An arbitrator's judgement cannot be questioned.
- If an Arbitrator finishes the task (one case) within 6 months, he would be paid an incentive. If the task is not completed in 12 months then the arbitrator will have to pay back a portion of his fee.

## Mr.Harishankar

The research scholar focuses on India's exposure on International Investment Arbitration as well as the connection between *International Investment Arbitration* and *International Commercial Arbitration*.

*International Arbitration* is a new territory in arbitration. It was post 1965, After the Washington Convention that the ICSD(International Centre for Settlement of Disputes) was established. Investment arbitration is not commercial arbitration, when it comes to an international arena an Investment arbitration involves a State (Respondent) and there is no consensus or a contract only BIT (Bilateral Investment Treaties). Here a public law dispute mechanism is applicable since the public is international.

## What is a BIT?

A bilateral investment treaty (BIT) is an agreement establishing the terms and conditions for private investment by nationals and companies of one state in another state. This type of investment is called foreign direct investment (FDI). BITs are established through trade pacts. It's a means of Diplomatic protection.

Mr.Harishankar refers to an article on a Case namely 'Southern Pacific Properties (MiddleEast) Ltd. V. Arab Republic of Egypt' It is this Pyramids Oasis Case that was registered first in the history of International Investment Arbitration.

There are few exceptions, those disputes which come under Public Law (Law of a State), Constitutional Issues, Tax Issues etc. National Courts can intervene at any stage of arbitration (Anti-Arbitration Injunction)

## International Arbitration is of 3 Types:-

### 1. Public-Private Arbitration

There are two types, Contract-based arbitration of individual claims against the State and arbitration pursuant to investment treaties. The former is broadly limited to the private sphere of the State's activity, whereas the latter gives arbitrators a comprehensive jurisdiction over public law.

➤ Two major Cases Discussed:

- 1. Yukos Universal Ltd. v. The Russian Federation [UNCITRAL, PCA Case No. AA 227]

The Yukos Oil Company's former shareholders and management filed a series of claims in courts and before arbitration panels in various

countries, seeking compensation for their expropriation. The largest, for over \$100 billion, was filed at the Permanent Court of Arbitration in 2007 and resulted in the arbitrators awarding Yukos majority shareholders over US\$50 billion in damages. Shortly after, the European Court of Human Rights ruled for Russia to pay the former owners Yukos €1.87 billion (\$2.51 billion) in compensation for unfair proceedings of the tax evasion case.

- Philip Morris v. Australia

Philip Morris Asia challenged the tobacco plain packaging legislation under the 1993 Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments (Hong Kong Agreement). This is the first investor-state dispute that has been brought against Australia.

## 2. Private-Private Arbitration

These are arbitration of disputes between two private parties.

## 3. Public-Public Arbitration

These are arbitration of disputes between two States

## **Discussion based on United Nations Convention on the Law of the Sea (UNCLOS 1982)**

### **Key features of the Convention:-**

- \* Coastal States exercise sovereignty over their territorial sea which they have the right to establish its breadth up to a limit not to exceed 12 nautical miles; foreign vessels are allowed "innocent passage" through those waters;
- \* Ships and aircraft of all countries are allowed "transit passage" through straits used for international navigation; States bordering the straits can regulate navigational and other aspects of passage;
- \* Archipelagic States, made up of a group or groups of closely related islands and interconnecting waters, have sovereignty over a sea area enclosed by straight lines drawn between the outermost points of the islands; the waters between the islands are declared archipelagic waters where States may establish sea lanes and air routes in which all other States enjoy the right of archipelagic passage through such designated sea lanes;
- \* Coastal States have sovereign rights in a 200-nautical mile exclusive economic zone (EEZ) with respect to natural resources and certain economic activities, and exercise jurisdiction over marine science research and environmental protection;
- \* All other States have freedom of navigation and overflight in the EEZ, as well as freedom to lay submarine cables and pipelines;
- \* Land-locked and geographically disadvantaged States have the right to participate on an equitable basis in exploitation of an appropriate part of the surplus of the living resources of

the EEZ's of coastal States of the same region or sub-region; highly migratory species of fish and marine mammals are accorded special protection;

\* Coastal States have sovereign rights over the continental shelf (the national area of the seabed) for exploring and exploiting it; the shelf can extend at least 200 nautical miles from the shore, and more under specified circumstances;

\* Coastal States share with the international community part of the revenue derived from exploiting resources from any part of their shelf beyond 200 miles;

\* The Commission on the Limits of the Continental Shelf shall make recommendations to States on the shelf's outer boundaries when it extends beyond 200 miles;

\* All States enjoy the traditional freedoms of navigation, over flight, scientific research and fishing on the high seas; they are obliged to adopt, or cooperate with other States in adopting, measures to manage and conserve living resources;

\* The limits of the territorial sea, the exclusive economic zone and continental shelf of islands are determined in accordance with rules applicable to land territory, but rocks which could not sustain human habitation or economic life of their own would have no economic zone or continental shelf;

\* States bordering enclosed or semi-enclosed seas are expected to cooperate in managing living resources, environmental and research policies and activities;

\* Land-locked States have the right of access to and from the sea and enjoy freedom of transit through the territory of transit States;

\* States are bound to prevent and control marine pollution and are liable for damage caused by violation of their international obligations to combat such pollution;

\* All marine scientific research in the EEZ and on the continental shelf is subject to the consent of the coastal State, but in most cases they are obliged to grant consent to other States when the research is to be conducted for peaceful purposes and fulfils specified criteria;

\* States are bound to promote the development and transfer of marine technology "on fair and reasonable terms and conditions", with proper regard for all legitimate interests;

\* States Parties are obliged to settle by peaceful means their disputes concerning the interpretation or application of the Convention;

\* Disputes can be submitted to the International Tribunal for the Law of the Sea established under the Convention, to the International Court of Justice, or to arbitration. Conciliation is also available and, in certain circumstances, submission to it would be compulsory. The Tribunal has exclusive jurisdiction over deep seabed mining disputes.

➤ Case discussed:

- Italian Marine Case or Enrica Lexie Case

On 15 February 2012, Italian marines operate as part of an anti-piracy Vessel Protection Detachment (VPD) on-board Italian-flagged commercial oil tanker MT Enrica Lexie, allegedly opened fire on the St. Antony killing two Indian fisherman

on board. Ballistics tests undertaken subsequently linked weapons used by two members of the VPD team aboard the MT Enrica Lexie to fragments of the bullets that killed the two Indian fishermen. The incident occurred about 20.5 nautical miles from the Indian coast according to the Italian submission to the Permanent Court of Arbitration (PCA). The incident has sparked a conflict of opinions over legal jurisdiction and functional immunity between the governments of India and Italy. In addition, it continues to cause diplomatic tension between the two nations.

## **ANNEX VII. ARBITRATION**

### *Article 1*

- Institution of proceedings

Subject to the provisions of Part XV, any party to a dispute may submit the dispute to the arbitral procedure provided for in this Annex by written notification addressed to the other party or parties to the dispute. The notification shall be accompanied by a statement of the claim and the grounds on which it is based.

### *Article 2*

- List of arbitrators

1 A list of arbitrators shall be drawn up and maintained by the Secretary-General of the United Nations. Every State Party shall be entitled to nominate four arbitrators, each of whom shall be a person experienced in maritime affairs and enjoying the highest reputation for fairness, competence and integrity. The names of the persons so nominated shall constitute the list.

2. If at any time the arbitrators nominated by a State Party in the list so constituted shall be fewer than four, that State Party shall be entitled to make further nominations as necessary.

3. The name of an arbitrator shall remain on the list until withdrawn by the State Party which made the nomination, provided that such arbitrator shall continue to serve on any arbitral tribunal to which that arbitrator has been appointed until the completion of the proceedings before that arbitral tribunal.

### *Article 3*

- Constitution of arbitral tribunal

For the purpose of proceedings under this Annex, the arbitral tribunal shall, unless the parties otherwise agree, be constituted as follows:

(a) Subject to subparagraph (g), the arbitral tribunal shall consist of five members.

(b) The party instituting the proceedings shall appoint one member to be chosen preferably from the list referred to in article 2 of this Annex, who may be its national. The appointment shall be included in the notification referred to in article 1 of this Annex.



(c) The other party to the dispute shall, within 30 days of receipt of the notification referred to in article 1 of this Annex, appoint one member to be chosen preferably from the list, who may be its national. If the appointment is not made within that period, the party instituting the proceedings may, within two weeks of the expiration of that period, request that the appointment be made in accordance with subparagraph (e).

(d) The other three members shall be appointed by agreement between the parties. They shall be chosen preferably from the list and shall be nationals of third States unless the parties otherwise agree. The parties to the dispute shall appoint the President of the arbitral tribunal from among those three members. If, within 60 days of receipt of the notification referred to in article 1 of this Annex, the parties are unable to reach agreement on the appointment of one or more of the members of the tribunal to be appointed by agreement, or on the appointment of the President, the remaining appointment or appointments shall be made in accordance with subparagraph (e), at the request of a party to the dispute. Such request shall be made within two weeks of the expiration of the aforementioned 60-day period.

(e) Unless the parties agree that any appointment under subparagraphs (c) and (d) be made by a person or a third State chosen by the parties, the President of the International Tribunal for the Law of the Sea shall make the necessary appointments. If the President is unable to act under this subparagraph or is a national of one of the parties to the dispute, the appointment shall be made by the next senior member of the International Tribunal for the Law of the Sea who is available and is not a national of one of the parties. The appointments referred to in this subparagraph shall be made from the list referred to in article 2 of this Annex within a period of 30 days of the receipt of the request and in consultation with the parties. The members so appointed shall be of different nationalities and may not be in the service of, ordinarily resident in the territory of, or nationals of, any of the parties to the dispute.

(f) Any vacancy shall be filled in the manner prescribed for the initial appointment.

(g) Parties in the same interest shall appoint one member of the tribunal jointly by agreement. Where there are several parties having separate interests or where there is disagreement as to whether they are of the same interest, each of them shall appoint one member of the tribunal. The number of members of the tribunal appointed separately by the parties shall always be smaller by one than the number of members of the tribunal to be appointed jointly by the parties.

(h) In disputes involving more than two parties, the provisions of subparagraphs (a) to (f) shall apply to the maximum extent possible.

#### *Article 4*

- Functions of arbitral tribunal

An arbitral tribunal constituted under article 3 of this Annex shall function in accordance with this Annex and the other provisions of this Convention.

#### *Article 5*

- Procedure

Unless the parties to the dispute otherwise agree, the arbitral tribunal shall determine its own procedure, assuring to each party a full opportunity to be heard and to present its case.

#### *Article 6*

- Duties of parties to a dispute

The parties to the dispute shall facilitate the work of the arbitral tribunal and, in particular, in accordance with their law and using all means at their disposal, shall:

- (a) provide it with all relevant documents, facilities and information; and
- (b) enable it when necessary to call witnesses or experts and receive their evidence and to visit the localities to which the case relates.

#### *Article 7*

- Expenses

Unless the arbitral tribunal decides otherwise because of the particular circumstances of the case, the expenses of the tribunal, including the remuneration of its members, shall be borne by the parties to the dispute in equal shares.

#### *Article 8*

- Required majority for decisions

Decisions of the arbitral tribunal shall be taken by a majority vote of its members. The absence or abstention of less than half of the members shall not constitute a bar to the tribunal reaching a decision. In the event of an equality of votes, the President shall have a casting vote.

#### *Article 9*

- Default of appearance

If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to make its award. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. Before making its award, the arbitral tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law.

#### *Article 10*

- Award

The award of the arbitral tribunal shall be confined to the subject-matter of the dispute and state the reasons on which it is based. It shall contain the names of the members who have

participated and the date of the award. Any member of the tribunal may attach a separate or dissenting opinion to the award.

#### *Article 11*

- Finality of award

The award shall be final and without appeal, unless the parties to the dispute have agreed in advance to an appellate procedure. It shall be complied with by the parties to the dispute.

#### *Article 12*

- Interpretation or implementation of award

1. Any controversy which may arise between the parties to the dispute as regards the interpretation or manner of implementation of the award may be submitted by either party for decision to the arbitral tribunal which made the award. For this purpose, any vacancy in the tribunal shall be filled in the manner provided for in the original appointments of the members of the tribunal.

2. Any such controversy may be submitted to another court or tribunal under article 287 by agreement of all the parties to the dispute.

#### *Article 13*

- Application to entities other than States Parties

The provisions of this Annex shall apply mutatis mutandis to any dispute involving entities other than States Parties.

#### **Case Discussed:-**

- ***Kishenganga Project- Arbitration between Republic of India and Pakistan***

On December 20, 2013, the Court of Arbitration constituted in the matter of *Indus Waters Kishenganga Arbitration (Pakistan v. India)* rendered its Final Award in the dispute between Pakistan and India regarding the Kishenganga Hydro-Electric Project (KHEP) located on the Kishenganga/Neelum River. Pakistan instituted arbitral proceedings against India in 2010, challenging, in particular, the permissibility of the planned diversion by the KHEP of the waters of the Kishenganga/Neelum and the effect that this diversion would have on Pakistan's own hydro-electric project under construction downstream of the KHEP. The Final Award decided the issue of "minimum flow" that was left unresolved in the Court of Arbitration's February 2013 Partial Award. According to the press release, with the Final Award, "the Court of Arbitration unanimously decided . . . that India shall release a minimum flow of 9 cumecs into the Kishenganga/Neelum River below the KHEP at all times." Although the Final Award is binding on the parties without appeal, "the Court also decided that either India or Pakistan may seek reconsideration of this decision through

the Permanent Indus Commission and the mechanisms of the Indus Waters Treaty after a period of seven years from the first diversion of water from the Kishenganga/Neelum River.”

### **India`s Exposure to International Investment Arbitration Law Cases:-**

At present India has signed on to a 100 international investment agreements that include 83 BITs and 17 Investment chapters in various Free Trade Agreements. Despite this substantially large BIT scheme, India`s encounter with investment treaty arbitration remained absolutely minimal until the end of 2011. However an investment treaty award against the country and the subsequent BIT claims against the government have thrust India in the limelight of international arbitration.

- (MSEB) Maharashtra State Electricity Board vs Sterlite Industries (India) Ltd. on 17 February, 2000
- White Industries Australia Ltd. vs Republic Of India