



The Indian Society of International Law

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For members only

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Editorial



In 1975 Morocco invaded Western Sahara to prevent Spain -- the colonial power since 1885 -- from organizing a UN-mandated referendum on independence. Since then, the Western Saharan independence movement, the Polisario Front (founded in 1973), has challenged Morocco's attempt to annex the territory by force. The right to self-determination for Non-Self-Governing Territories and the Western Sahara in particular, as well as, the need for an immediate transfer of powers to the Sahrawi people, has been stressed several times by the UN Resolutions 1514, 2625 and 34/37. However, Morocco continues to occupy large parts of the Western Sahara until today, while Polisario is controlling the remainder. In February 2012, Front Polisario seeks the annulment of the EU Council decision

approving a Liberalisation Agreement that amends the Association Agreement between the EU and Morocco before the General Council. The Liberalisation Agreement aims at progressive liberalisation of trade in agricultural and fishery products. The background is that the EU and Morocco successively concluded an association agreement in 1996, a partnership agreement in the fisheries sector ('the Fisheries Agreement') in 2006 and a liberalization agreement with respect to agricultural and fisheries products in 2012. And then recently the Fisheries Agreement is supplemented by a protocol setting out the fishing opportunities which it lays down, and expires in July 2018.

Polisario filed claims before UK Courts [before the High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court)] seeking that the Fisheries Agreement did not cover the waters off Western Sahara. The High Court then referred the matter up to the ECJ which gave verdict on 21 December 2016.

Meanwhile Advocate General Wathelet of the Court of Justice of the EU on 13 September 2016 issued an opinion that the Fisheries Agreement between Morocco and the EU was invalid because it was in violation of self-determination, as the Agreement applied to the territory and waters of Western Sahara.

By judgment of 21 December 2016, the Court of Justice, hearing an appeal in the dispute between the Front Polisario and the Council of the European Union and the European Commission, held that the association agreement and the partnership agreement concluded between the EU and Morocco had to be interpreted, in accordance with international law, as meaning that they were not applicable to the territory of Western Sahara. That case did not, however concern the Fisheries Agreement, and consequently the Court gave no ruling on the validity of that agreement in its judgment.

Again, the European Court of Justice (ECJ) on 27 February 2018 concludes that the "Moroccan fishing zone" under the Protocol does not include the waters adjacent to the territory of Western Sahara. The Court therefore holds that, since neither the Fisheries Agreement nor the Protocol thereto are applicable to the waters adjacent to the territory of Western Sahara, the EU acts relating to their conclusion and implementation are valid. In brief, Western Sahara does not form part of the territory of Morocco, the waters adjacent to Western Sahara "are not part of the Moroccan fishing zone referred to in the Fisheries Agreement".

Pravin H. Parekh

RECENT ACTIVITIES

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47th Annual Conference of the ISIL

The Indian Society of International Law (ISIL) organized its 47th Annual Conference on 12-13 May 2018 at its premises. More than 200 delegates comprising law faculty members, researchers, students and lawyers from different parts of the country and representatives from several embassies and the ministries participated in the Conference. H.E. Prof. Dr. Kennedy Gaston, Secretary General, AALCO inaugurated the Conference. Prof. Kennedy highlighted the importance of identified themes of the Conference and wished the Conference a great success. Dr. E. M. S. Natchiappan, President, ISIL welcomed the Chief Guest

and the participants. Prof. S. K. Verma, Secretary General, ISIL briefly outlined the scheme of the Conference and proposed a formal vote of thanks.

Four sessions were organized to discuss the four themes. The first session (morning) held on 12 May 2018 focusing on "Trade and Investment" was chaired by Prof. V. G. Hegde, Professor, JNU, New Delhi and Treasurer, ISIL. Eminent panelists namely Shri M. K. Rao, Former Director, Legal & Treaties Division, MEA, Govt of India, Prof. James Nedumpara, Centre for Investment and Trade Law, New Delhi, Prof. Rashmi Salpekar presented their paper on "Role of Investment Courts: India's Response"; "Brazil's Proposal for Investment Facilitation Agreement: An Analysis in light of Exiting WTO Law & Jurisprudence"; and

"Investment Dispute Arbitration and Compensation: Current Trends and Challenges for India" respectively. Second session of the Annual Conference was held on "International Dispute Settlement" chaired by Prof. A. K. Koul, Former Vice Chancellor, NUSRL, Ranchi who also presented a paper titled "Understanding of WTO Dispute Settlement System from the Developing Country Perspective: An Overview". Eminent panelists namely Dr. Bipin Kumar, Assistant Professor, NLU, Jodhpur and Dr. Vijay Kumar Singh, Professor, UPES Dehradun presented their papers "WTO DSS Reforms: India's Position"; and "Inter-national Dispute Settlement: Role of 'Mediation' in Resolving Inter-national Commercial Disputes: India's Initiatives" respectively.

The third session was held on the theme "Private International Law" and was chaired by Shri P. K. Malhotra, Former Law Secretary, Ministry of Law and Justice, Govt of India and Co-chaired by Prof. Lakshmi Jamholkar, Former Professor, Delhi University, Delhi. Eminent panelists namely, Prof. Monica Chawla, Punjabi University, Patiala and Dr. Sai Ramani Garimella, Assistant



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Professor, SAU, New Delhi presented papers on the following topics “Problems relating to Inter-country Adoption”; “OBOR and Private International Law” respectively. The fourth and the last session was held on 13 May 2018 on the theme “Environmental Law” chaired by Prof. B. C. Nirmal, Vice Chancellor, NUSRL, Ranchi. Panelists including Shri Sanjay Parikh, Advocate, Supreme Court of India, Dr. Anwar Sadat, Assistant Professor (Senior), ISIL, Dr. Anupam Jha, Assistant Prof. (Senior), Delhi University, Delhi presented their papers. Finally, Dr. E. M. S. Natchiappan, gave valedictory address and proposed a formal vote of thanks. The Annual Conference concluded with Triennial General Body Meeting held at 2.30 pm on 13 May 2018.

Election of the Executive Council of the Indian Society of International Law

Election of the Executive Council (EC) of the Indian Society of International Law was held on 13 May 2018 at the ISIL premises. Following are the members of the newly elected EC: President – Shri Pravin H. Parekh; Executive President – Shri A. K. Ganguli; Vice Presidents – Prof. Manoj Kumar Sinha, Prof. Y. S. R. Murthy, and Prof. T. S. N. Sastry; Treasurer – Prof. Dabiru Sridhar Patnaik; other 12 members of EC are – Prof. Monica Chawla, Prof. V. G. Hegde, Shri Sanjay Parikh, Dr. Anupam Jha, Dr. Banerji Chakka, Shri M. K. Rao, Dr. Srinivas Burra, Dr. G. G. Hegde, Maj. Gen. Nilendra Kumar, Shri C. K. Chaturvedi, Prof. D. N. Jauhar and Prof. J. L. Kaul.



17th Summer Course on International Law

The ISIL organized its 17th Summer Course on International Law at its premises from 4 – 15 June 2018 and the Course was attended by 288 participants from many parts of India. The Course was intended to update the knowledge of international law among students. The Course was inaugurated by Hon'ble Justice Madan B. Lokur on 4 June 2018. Shri Pravin H. Parekh, President, ISIL and Prof. Manoj Kumar Sinha, Vice President, ISIL also addressed the participants. A Panel Discussion was conducted on the last day of the Summer Course on “Western Sahara Case” chaired by H. E. Prof. (Dr.) Kennedy Gastron, Secretary General, AALCO, New Delhi along with two panelists Ms. Ruchita Beri, IDSA and Dr. Santosh Upadhyay, Delhi University, Delhi. Hon'ble Justice Rajiv Shakti, Judge, Delhi High Court gave valedictory address and also distributed certificates to the participants.



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Co-operative Republic of Guyana v. Bolivarian Republic of Venezuela

On 29 March 2018, Guyana requested the International Court of Justice (ICJ) to confirm the legal validity and binding effect of the Award Regarding the Boundary between the Colony of British Guiana and the United States of Venezuela, of 3 October 1899 (“1899 Award”). Pursuant to the Treaty of Arbitration between Great Britain and the United States of Venezuela, signed 2 February 1897 at Washington 2 (“Washington Treaty”), the 1899 Award was “a full, perfect, and final settlement” of all questions relating to determining the boundary line between the colony of British Guiana and Venezuela. Guyana claimed that she enjoys full sovereignty over the territory between the Essequibo River and the boundary established by the 1899 Award and the 1905 Agreement, and Venezuela enjoys full sovereignty over the territory west of that boundary; Guyana and Venezuela are under an obligation to fully respect each other's sovereignty and territorial integrity in accordance with the boundary established by the 1899 Award and the 1905 Agreement.

On 18 June 2018, Venezuela notified the International Court of Justice that it intends not to participate in the proceedings before the Court in the case over the Essequibo region brought by Guyana. Earlier the US ceased participating in the Nicaragua case 1986 following the decision on jurisdiction more than thirty years ago, there have only been rare incidents of (temporary) non-participation in contentious proceedings before the ICJ (Bahrain was not represented when the second judgment on jurisdiction and admissibility in Maritime Delimitation and Territorial Questions was delivered, nor at a later meeting of the Court when time limits for submissions at the next stage were fixed; note also in the different context of advisory proceedings Israel's refusal to take part in the Wall case). Recently, however, Pakistan who had submitted a counter-memorial did not appear in the oral hearings in the Marshall Islands case. Croatia only partially participated in the ad hoc arbitration with Slovenia. And Venezuela's announcement comes only relatively shortly after China and Russia did not take part in major UNCLOS proceedings (the South China Sea and the Arctic Sunrise cases).

Interpretation and Application of the International Convention on the Elimination of All Forms of Racial Discrimination

(The State of Qatar v. The United Arab Emirates)

On 11 June 2018, Qatar initiated proceedings (“Application”) against the United Arab Emirates (“the UAE”) at the International Court of Justice under the Convention on the Elimination of all Forms of Racial Discrimination (CERD) and requested provisional measures. This Application concerns a legal dispute between Qatar and the UAE regarding the UAE's deliberate and flagrant violations of the CERD. Qatar claims that the UAE, unlawfully seeking to pressure Qatar to allow it to interfere in Qatari sovereignty over its affairs, has targeted Qataris and their families for discriminatory treatment. In the process, the UAE has caused severe and irreparable harm to Qatar and Qataris. The UAE's chosen approach to international affairs contravenes core principles of international human rights law, including the protections contained in the CERD. The UAE has enacted and implemented a series of discriminatory measures directed at Qataris based expressly on their national

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origin—measures that remain in effect to this day. In its Application, Qatar claims the expulsion of Qatari nationals from the UAE's territory violating General Recommendation 30, adopted by the CERD Committee in August 2004 (para. 59), and has led to human rights violations.

United States – Certain Measures on Steel and Aluminium Products request for Consultations by India

India made communication on 18 May 2018 to the United States seeking consultations with respect to certain measures by the United States to adjust imports of steel and aluminum into the United States, including but not limited to, imposing additional ad valorem rate of duty on imports of certain steel and aluminum products and exempting certain selected WTO Members from the measures. The United States imposed 25 percent and 10 percent of additional import duty on certain steel products and aluminum products respectively from all countries except Canada, Mexico, Australia, Argentina, South Korea, Brazil and the European Union, which took effect from 23 March 2018. The measures at issue in this request include, but are not limited to: adjusting imports of

Steel into the United States, including the Annex, To Modify Chapter 99 of the Harmonized Tariff Schedule of the United States (Presidential Proclamation 9705, issued on 8 March 2018) and also adjusting imports of Aluminium into the United States, including the Annex, To Modify Chapter 99 of the Harmonized Tariff Schedule of the United States (Presidential Proclamation 9704. Only imports of steel, and not those of aluminium, from South Korea have been exempted from the measures at issue by the United States.

These inconsistencies appear to nullify or impair the benefits accruing to India under the WTO provisions cited above. In addition to, and independently of, the multiple violations of the WTO obligations identified above, India considers that benefits accruing to India directly and indirectly under the GATT 1994 are being nullified and impaired as a result of the application of the measures identified above within the meaning of Article XXIII: 1(b) of the GATT 1994. India reserves the right to raise additional factual and legal claims and matters regarding the above-mentioned measures during the course of the consultations and in any future request for the

establishment of a panel in these proceedings.

There are six WTO consultations requests filed so far against the U.S. Section 232 tariffs on steel and aluminum products. These are by Norway, Mexico, Canada, EU, India and China. And only Mexico and India included a non-violation claim under GATT Article XXIII:1(b):

Mexico: "In addition to, and independently of, the multiple violations of the WTO obligations identified above, Mexico considers that the benefits accruing to Mexico directly and indirectly under the GATT 1994 are being nullified or impaired as a result of the application of the measures identified above within the meaning of Article XXIII:1(b) of the GATT 1994."

India: "In addition to, and independently of, the multiple violations of the WTO obligations identified above, India considers that benefits accruing to India directly and indirectly under the GATT 1994 are being nullified and impaired as a result of the application of the measures identified above within the meaning of Article XXIII: 1(b) of the GATT 1994."

India's Statement on Third Party Funding: UNCITRAL

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and ISDS Reforms

The first two meetings (from 27 November - 1 December 2017 in Vienna and then from 23-27 April 2018 in New York) of the UNCITRAL Working Group sessions in which states have shown their concerns relating investor-state dispute settlement about Costs, Transparency, Third Party Funding and Counterclaims. India on the problem of pro-investor and pro-state arbitrators for impartiality and independence: "The very fact that there are investors' arbitrators and there are states' arbitrators is a testimony that impartiality and independence is lacking in the system. The system is lacking in adequate ethical requirements. And there's a lot of conflict of interest in this system which needs to be corrected. Third party funding is a problem as well. The mix of third party funding, multiple hatting and lack of adequate ethical standards has the potential to derail the system."

Legally Binding Instrument to Regulate in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises

Legal instrument addressing on business and human rights

has been released on 16 July 2018 in Geneva by Ecuador's Ambassador acting as Chair of the process. This "zero draft" came out in the context of the establishment by the United Nations Human Rights Council in Geneva through resolution 26/9, in 2014 of an Intergovernmental Working Group created to elaborate a "legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises" (a draft treaty on business and human rights). The Working Group has held three sessions, with its next session scheduled for October 2018. The "zero draft" strongly focuses on the key issue of access to justice and remedy for those who allege harm by a business enterprise and it is likely to please many and displease others, but it will surely contribute to a change of tone and character of deliberations so far focussed primarily on political and procedural considerations.

US Withdraws from UN Human Rights Council

The US withdrew on 19 June 2018 from the UN Human Rights Council (HRC) and condemned its "shameless hypocrisy" in absolving wrongdoers through silence and falsely condemning those committing no offence, saying

America will not take lectures from hypocritical institutions. The decision to pull the US out of the UN HRC was announced by US ambassador to the UN Nikki Haley who also criticised the council for a "disproportionate focus and unending hostility toward Israel". Also reacting to the US decision, UN human rights chief Zeid Ra'ad Al-Hussein described it as "disappointing, if not really surprising". Vojislav Šuc, President of HRC said that the poll would take place once US "notification of withdrawal is formally received".

India-Sao Tome and Principe: Cabinet Approves MoU for Cooperation in field of Traditional Medicines

On 26 April 2018, the Union Cabinet has approved Memorandum of Understanding (MoU) between India and Sao Tome and Principe for Cooperation in field of Traditional System of Medicine and Homoeopathy. The MoU was signed in March, 2018. The MoU will enhance bilateral cooperation between two countries in areas of Traditional Systems of Medicine. This will be of immense importance to both countries considering their shared cultural heritage.

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India Inks Legal Agreement with the World Bank

The Union Government has entered into agreement with World Bank for flexible financing arrangement to accelerate research towards early development for biopharmaceuticals under National Biopharma Mission. The agreement was signed between project implementing agency, Biotechnology Industry Research Assistance Council (BIRAC), a PSU of Department of Biotechnology, Department of Economic Affairs, Ministry of Finance and International Bank for Reconstruction and Development (IBRD) on behalf of World Bank.

Ordinance for Death Penalty for Child Rapists

The Union Cabinet has approved promulgation of Criminal Law (Amendment) Ordinance to provide death penalty for rapists of girls below 12 years. The ordinance amends Indian Penal Code (IPC), Criminal Procedure Code, Protection of Children from Sexual Offences (POCSO) Act and Indian Evidence Act. It provides for stringent punishment of jail term of minimum 20 years or life imprisonment or death for rape of girl less than 12 years. It

provides punishment with imprisonment for rest of life or death sentence in case of gang rape of girl below 12 years.

India, Finland Settle Nokia Tax Dispute under MAP

On 20 April 2018, India and Finland have reached an agreement on the tax dispute with Nokia under Mutual Agreement Procedure (MAP) system. The resolution covers disputes pertaining to Nokia India as well as Nokia Corp. This involves payment of Rs 1,600 crore, a sum that was deposited with government by Nokia in March 2018. This paves way for the sale of Nokia's Chennai (Sriperumbudu) plant, which has been shuttered since November 2014. Software giant Microsoft had kept Sriperumbudur factory out of the deal when it acquired Nokia's mobile device business in 2014 due to Income Tax notice and asset freeze imposed on the factory.

Nokia India was issued tax demand notice for Rs. 2,500 crore in 2013 by Income Tax Department, which was thereafter reduced to Rs. 1,600 crore over royalty payments made to its parent company in Finland since 2006. The IT Department also raised tax demand of Rs.10,000 crore tax on Nokia Corporation for same transaction, but was dropped under MAP agreement. The tax

claim was related to Nokia's import of software from its head office in Finland. Nokia India had showed payments made for software as 'purchase transactions' and not 'royalty payments' and held that payment was made without keeping back any withholding tax. The India-Finland Double Taxation Avoidance Agreement (DTAA) has set 10% rate for royalties, which the IT Department was demanding. In tandem, at Nokia India's request, Finland had initiated MAP process under DTAA in 2013. Nokia India also had sought to initiate arbitration under Bilateral Investment Promotion and Protection Agreement (BIPPA) in 2014, but did not pursue it after Indian Government's response through MAP avenue for solving cross-border tax dispute instead of arbitration. MAP is alternative dispute settlement mechanism that allows multinational companies (MNCs) to settle transfer pricing disputes with tax authorities and eliminate double taxation.

Law Commission Recommends to Make BCCI Public Body

On 18 April 2018, the Law Commission of India (LCI) has recommended to declare Board

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of Control for Cricket in India (BCCI) as a public body. It also recommended BCCI and its all member cricket associations to be brought under Right to Information (RTI) law regime.

India Won Six Elections in UN Economic and Social Council

India has won six elections to United Nations (UN) Economic and Social Council (ECOSOC) bodies, five of them unanimously. In these polls, India won places on executive boards of four UN bodies, three commissions and committee. NGO Committee India faced an election within the Asia-Pacific group only for Non-Governmental Organisations (NGO) Committee. India polled highest number of votes, receiving 46 votes, followed by Pakistan with 43, China received 39. Elections were conducted from 16 April to 18 April 2018. The NGO committee of UN is considered influential because it scrutinises NGOs applying for consultative status with UN ECOSOC and can recommend or block them. India will serve four-year term on panel starting January 2019. India won elections to Executive Boards of UN Development Programme (UNDP), UN Population Fund (UNFPA) and UN Office for Project

Services (UNOPS). India will serve three-year terms from January 2019 on those executive boards. Executive Board of UN-Women India was also elected separately on this executive board for three-year term starting January 2019. UN-Women work for Gender Equality and the Empowerment of Women. India was elected on UN Commission on Population and Development and it will have term till September 2021. India was also elected on the UN Commission for Social Development and shall have four-year term starting immediately. It was also elected UN Commission on Crime Prevention and Criminal Justice and will serve three-year term starting January 2019.

Generalized System of Preferences: US Announces Eligibility Review of India

The United States Trade Representative (USTR) has formally announced that it is reviewing eligibility of India, Indonesia and Kazakhstan in Generalized System of Preferences (GSP) based on concerns about countries' compliance with program. The reviews are based on Trump administration's new GSP country eligibility assessment process as well as GSP country eligibility petitions Key Facts For India, GSP

country eligibility review is based on concerns related to its compliance with GSP market access criterion and two petitions related to same criterion. The petitions filed by US dairy industry and US medical device industry requested review of India's GSP benefits, given Indian trade barriers affecting US exports in those sectors. GSP is largest and oldest US trade preference programme introduced in 1976. It is designed to promote economic development by allowing duty-free entry for thousands of products from designated beneficiary countries both developing and developed countries. Under it, a wide range of industrial and agricultural products originating from certain developing countries are given preferential access to US markets.

Forthcoming Events

Convocation and Inauguration of the P G Diploma Courses of the ISIL, Inaugural Address by Hon'ble Justice L. Nageshwara Rao, Judge, Supreme Court of India: **4 September 2018**

18th Henry Dunant Memorial Moot Court Competition (National Round): **13-16 September 2018**

16th V. K. Krishna Menon Memorial Lecture by Hon'ble Former President Shri Pranab Mukherjee: **5 October 2018**