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For members only

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Editorial



The Potential conflicts over transboundary waters are to the tune of 300 major rivers basin covering about 50% of the total land area of the Earth. India is also facing many such water conflicts with the neighbourhood countries. Some are solved by bilateral treaty and some more on Tribunal awards while some other are hotspot of diplomacy. Within India many disputes are settled by negotiations between states while dozens are resolved by formation a of Water sharing mechanism under Inter-state water disputes Act and Water Boards Act.

The international Law on the issue of fresh water, drainage basins, ground water and Non-Navigational Uses of International Watercourses proposed by the International Law Commission are evolving from the Helsinki Rules through International conventions, attempt of International Law Association for Campione Consolidation on the basis of customary international law travelled a long distance and brought out broader aspect of issues in Berlin rules (2004).

Berlin rule Article 1: "1. These Rules express international law applicable to the management of the waters of international drainage basins and applicable to all waters, as appropriate. 2. Nothing in these Rules affects rights or obligations created by treaty or special custom.

Article 2 further says provided for implementation of these Rules: 1. States shall, where appropriate, enact laws and regulations to accomplish the purposes set forth in these Rules and shall adopt efficient and adequate administrative measures, including management plans, and judicial procedures for the enforcement of these laws and regulations."

Fortunately the Cauvery Water Disputes Tribunal (2007) in its award extensively relied on different aspects of the international principle of fair and equitable distribution of water to various stake holders with the obligation of not to cause significant harm, developed from Helsinki rule(1966) leading to Berlin rule (2004). The Supreme Court of India in its famous and land mark judgment (2018) relied on the Tribunal finding but deviated on the "ground water" issues which are even now a matter of many countries concern and hesitation of fully subscribe to UN General Assembly. The Convention on the Law of Non-Navigational Uses of International Watercourses, commonly referred to as the UN Watercourses Convention, is an international treaty, adopted by the United Nations on 21 May 1997, pertaining to the uses and conservation of all waters that cross international boundaries, including both surface and groundwater. "Mindful of increasing demands for water and the impact of human behaviour", the UN drafted the document to help conserve and manage water resources for present and future generations. From the time of its drafting, the Convention took more than 17 years to enter into force on 17 August 2014 with signing of Vietnam to fulfill the need for minimum 36 signatories. Let us hope the Supreme Court land mark judgement on Cauvery water dispute case rectify in its future Judgments in other cases to further expand and apply the international law as and when it evolves with majority of acceptance by the countries.

Dr. E. M. Sudarsana Natchiappan

RECENT ACTIVITIES

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Public Lecture on International Exhaustion in Copyright and Patents

The ISIL organized a Public Lecture on “International Exhaustion in Copyright and Patents” by Prof. Subha Ghosh, Crandall Melvin Professor of Law, Director of the Technology Commercialization Law Program College of Law, Syracuse University, NY, on 12 February 2018. Dr. E. M. S. Natchiappan, President, ISIL welcomed by presenting a bouquet to Prof. Ghosh and Prof. S. K. Verma, Secretary General, ISIL presented a formal vote of thanks.

Visit of Participants of 33rd International Training Programme in Legislative Drafting

The 33rd International Training Programme in Legislative Drafting was organized by the Bureau of



Parliamentary Studies and Training (BPST), Lok Sabha Secretariat from 18 January 2018 to 16 February 2018. 50 foreign participants from 35 countries including Delhi and Manipur Legislative Assembly Secretariats attending the training programme visited the ISIL on

31 January 2018. Dr. E. M. S. Natchiappan, President, ISIL and Prof. S. K. Verma, Secretary General, ISIL addressed them and spoke on “Drafting of Treaties and Importance of International Law”. All teaching faculties of the ISIL were also present on that occasion.



RECENT ACTIVITIES/DEVELOPMENTS

Monthly Discussion Forum

“The Legal Status of Jerusalem: International Law and UN Resolutions”, by Dr. Sujata Ashwarya, Assistant Professor, Centre for West and African Studies, Jamia Millia Islamia, New Delhi on 5 January 2018.

“Freedom of Speech: An International and Comparative Law Approach”, by Ms. Shivani Mishra, Independent Researcher, LL.M., Oxford University, 2 February 2018.

“UNCITRAL and the Reform of Investor-State Dispute Settlement”, by Shri M. K. Rao, Former Director, Legal and Treaties Division, MEA on 9 March 2018.

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HCCH 2017 Draft Convention on the Recognition and Enforcement of Foreign Judgments

Efforts have been made by The Hague Conference on Private International Law (HCCH) with regards to the enforcement and recognition of court judgments that result from domestic litigation. HCCH has taken substantial steps toward realizing the conclusion of an international convention to allow judgments rendered by a court in one country to be recognized and enforced in another country. From 13 to 17 November 2017, the Special Commission on the Judgments Project met in The Hague which was attended by 180

participants from 57 States and one Regional Economic Integration Organisation (“REIO”), representing Members of the Hague Conference on Private International Law. Also in attendance as Observers were 5 interested non-Member States, and 14 international governmental and non-governmental organisations. The Special Commission reviewed the February 2017 Draft Convention and completed the November 2017 Draft Convention. This draft Convention shall apply to the recognition and enforcement of judgments relating to civil or commercial matters. It shall not extend in particular to revenue, customs or administrative matters. This Convention shall apply to the recognition and enforcement in one Contracting State of a judgment given by a court of another Contracting State. A Diplomatic Session will be convened in mid-2019 for draft convention adoption.

UNCITRAL Draft Convention and Model Law for the Enforcement of Settlement Agreements Reached through International Mediation

Draft Convention and Model Law for the Enforcement of Settlement Agreements Reached through International Mediation will be considered for finalization by the United Nations Commission on International Trade Law (UNCITRAL) at its next session, which will be held from June 25 to July 13, 2018 in New York. Earlier on February 9, 2018, UNCITRAL Working Group II

concluded negotiations on a convention and model law on the enforcement of settlement agreements reached through international commercial conciliation or mediation. Through the creation of a uniform enforcement process for settlement agreements achieved through international mediation, the new draft convention and the draft amended model law will begin to place mediation on an equal footing with arbitration as a method of international dispute resolution. The convention and model law have been drafted to apply to all international agreements resulting from mediation and concluded in writing by parties to resolve commercial disputes, except for disputes arising out of transactions engaged in for personal, family or household purposes, relating to family or inheritance matters, or arising out of employment law issues. In addition, the instruments, if ratified, would not cover settlement agreements that are approved by a court or have been concluded in the course of proceedings before a court, or those that have been recorded and are enforceable as arbitral awards.

An International Treaty to Protect Environmental Activists

On 5 March 2018, 24 Latin American and Caribbean countries adopted the “Regional Agreement on Access to Information, Public Participation and Access to Justice in Environmental Matters in Latin

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America and the Caribbean” — or the LAC P10 formally called the Latin American and Caribbean countries declaration on Principle 10. The agreement is the first in the world to put in place legally binding rules to protect environmental activists — or, as the UN and many civil society groups call them, “environmental defenders.” The agreement would also increase governmental accountability, and require authorities to investigate more aggressively when defenders are murdered. The agreement also has provisions to encourage countries to share information about environmental conditions, and to involve those who would be affected by a government's decisions on the environment — including indigenous communities — in policymaking.

Western Sahara Case in the CEJU

Advocate General Wathelet of the Court of Justice of the EU delivered his opinion on 10 January 2018 in Case C-266/16, *Western Sahara Campaign UK, The Queen v Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs*. This opinion dealt with numerous issues of international law, above all the principle of self-determination; the AG concluded 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. The A-G has just invited the Court of Justice of the European Union (CJEU) to conclude that an EU agreement with Morocco about fishing is invalid on international law grounds. The case arises out of the long-running conflict between Morocco, as occupying power, and the Western Sahara as occupied territory. Spain had exercised its colonial powers over both Morocco and the Western Sahara, and in the 1960s had come under pressure to divest and allow Western Sahara a referendum to decide its political fate. In 1975, the UN International Court of Justice declared, in an Advisory Opinion, that Western Sahara was not terra nullius (a coloniser's favourite concept, meaning no-one owns it and therefore the colonial power could take it over) and therefore the Western Saharan people could exercise their right to self-determination. Spain moved out. Morocco moved in and asserted historical ties of allegiance between the Sahrawi people and the Sultan of Morocco — rendering, a referendum unnecessary. Morocco has maintained since the 1970s that Western Sahara is part of its state. Internal strife between Morocco and the inhabitants of Western Sahara (via their liberation organisation, Front Polisario) continued until 1988, when a ceasefire was reached. The respective territories are divided by a wall of sand guarded by the Moroccan army, with Polisario controlling the area to the south of the sand wall.

On 28 February 2018, the Court of Justice of the European Union (CJEU) delivered a judgment. Earlier in the C-104/16 P *Council v Front Polisario* judgment, the Court was faced with the question of the validity of the EU-Morocco Association Agreement (AA) and Liberalisation Agreement (LA). This time the CJEU was tasked with determining the validity of the EU-Morocco Fisheries Partnership Agreement (FPA), the 2013 Protocol thereto and the EU implementing acts in the context of a preliminary ruling procedure requested by the British High Court. In fact, the national proceedings were brought by the voluntary organization Western Sahara Campaign UK, which sought to challenge certain British policies and practices implementing the aforementioned legal acts, as far as they pertained to goods originating in and fisheries policy related to Western Sahara. As in *Front Polisario*, the main issue was the application of these agreements to the territory of and products originating in Western Sahara, a non-self-governing territory to be decolonised in accordance with the principle of self-determination, but considered by Morocco to be an integral part of its sovereign territory (for background, see our Article on T-512/12 *Front Polisario v Council*). Given that this is the first request for a preliminary reference concerning the validity of international agreements concluded by the EU and

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their acts of conclusion, it also raised some new procedural questions, especially concerning the Court's jurisdiction. In this case, the Court readily accepted that it has jurisdiction to give preliminary rulings on the interpretation and validity of all EU acts, 'without exception'. The CJEU held that the 2013 Protocol does not contain specific territorial scope provisions, but refers generally to 'Moroccan fishing zones'. Thus the CJEU declared that the phrase must also be understood as excluding Western Saharan waters. The CJEU considered whether the EU and Morocco had intended to give a special meaning to the territorial scope provisions of the FPA and the 2013 Protocol in the sense of Article 31(4) VCLT. When considering a special meaning of the expression 'waters falling within the sovereignty' of Morocco as including Western Saharan waters, the Court pointed out that agreeing to such a special meaning would be contrary to the EU's obligations under international law, ie self-determination and the relative effect of treaties, stopping short of reprimanding the EU for potentially recognising Moroccan sovereignty over Western Sahara (Judgment paras 63, 71). Instead, the CJEU appeared to indirectly remind the EU of its duty not to recognise as lawful the situation resulting from Morocco's breach of the right to self-determination of Western Sahara, by stating that the EU 'could not properly support' any intention of Morocco to include the

waters of Western Sahara.

Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)

On 25 February 2014, Costa Rica instituted proceedings against Nicaragua with regard to a "[d]ispute concerning maritime delimitation in the Caribbean Sea and the Pacific Ocean". In 2010, Nicaragua sent soldiers to open an artificial waterway to divert water from the San Juan River that divides both countries to a nearby Nicaraguan lake, in what Costa Rica saw as a move to shorten its territory. Nicaragua said it was dredging a natural waterway. Noting that the two States had exhausted diplomatic means to resolve their maritime boundary disputes, Costa Rica requested the Court to determine the complete course of a single maritime boundary between all the maritime areas appertaining, respectively, to Costa Rica and to Nicaragua in the Caribbean Sea and in the Pacific Ocean, on the basis of international law. By an Order of 16 June 2016, it appointed Mr. Eric Fouache and Mr. Francisco Gutiérrez as the two independent experts, whose task was to determine the state of the coast between the point suggested by Costa Rica and the point suggested by Nicaragua in their pleadings as the starting-point of the maritime boundary in the Caribbean Sea. In view of the claims made by Costa Rica in the case concerning the Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua) and the close link between those claims and certain aspects of

the dispute in the case concerning Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua), by an Order of 2 February 2017, the Court joined the two proceedings. After holding hearings on the merits of the joined cases from 3 to 13 July 2017, the Court delivered its Judgment in the joined cases on 2 February 2018 in which it, *inter alia*, determined the course of the single maritime boundaries between Costa Rica and Nicaragua in the Caribbean Sea and the Pacific Ocean. In its ruling, the court found that Costa Rica has "sovereignty over the whole northern part of Isla Portillos, including its coast (with the exception of Harbor Head Lagoon and the sandbar separating it from the Caribbean Sea), and that Nicaragua must remove its military camp from Costa Rican territory." As part of the border settlement, the ICJ drew a new maritime boundary between the two countries, which have had rival claims since 2002 when Nicaragua published maps detailing oil concessions, some of which were in waters claimed by Costa Rica. In a separate case heard at the court, Nicaragua was ordered to pay Costa Rica nearly \$379,000 in reparations for environmental damage to parts of its wetlands at the mouth of the disputed San Juan River. In a statement, Nicaragua's government called the environmental verdict a "major defeat for Costa Rica" as the compensation awarded was far below their original claim which totalled millions of dollars.

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Guyana Filed an Application against Venezuela in ICJ

Guyana, on March 29, 2018, filed an application with the International Court of Justice (ICJ) against Venezuela – requesting, among many things, that Venezuela refrain from threatening or using force against any person and/or company licensed by Guyana or engage in economic or commercial activity in Guyanese territory as determined by the 1899 Award and 1905 Agreement. Moreover, in its application, Guyana requested the court “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.” “The applicant claims that 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 affirms that, between November 1900 and June 1904, a joint Anglo-Venezuelan Boundary Commission “identified, demarcated and permanently fixed the boundary established by the Award” before the signing of a Joint Declaration by the Commissioners on 10 January 1905 (referred to by Guyana as the “1905 Agreement”).” Guyana contends that in 1962, for the first time, Venezuela contested the Award as “arbitrary” and “null and void” and according to them, this led to the signing of the Agreement to resolve the controversy between Venezuela and the United Kingdom

of Great Britain and Northern Ireland over the frontier between Venezuela and British Guiana at Geneva on 17 February 1966, which “provided for recourse to a series of dispute settlement mechanisms to finally resolve the controversy”. On 30 January 2018, UN Secretary-General António Guterres determined that the Good Offices Process had failed to achieve a peaceful settlement of the controversy.

United States Initiated WTO Complaint against India Over Export Subsidy Programmes

The United States has requested WTO consultations with India concerning alleged export subsidies provided by India through five programmes harm US companies by creating an uneven playing field. These programs are: merchandise exports from India scheme, export oriented units scheme and sector specific schemes, including electronics hardware technology parks scheme. It also has alleged that earlier India was under limited exception rule under WTO specified for developing countries. It allowed specified countries to continue to provide export subsidies temporarily until they reach defined economic benchmark. But now it has surpassed benchmark in 2015. India's exemption has expired, but India has not withdrawn its export subsidies and in fact it has increased size and scope of these programs. US request was circulated to WTO members on 19 March 2018. Developed countries have argued at different fora that since India has crossed the USD 1,000 threshold of per capita gross national income

(GNI) for three consecutive years, so it is no longer eligible to extend subsidies for exports. India believes that a clause in WTO's agreement on subsidies and countervailing measures provides a period of eight years for graduating countries (crossing the USD 1,000 mark) to phase out export subsidies. "Our presumption is that India also has a similar period of eight years to graduate out of the subsidy regime and this is what we would be placing before the US" India said. India maintains, "We are hopeful that they would recognise this time-frame and during this time frame, we would commit ourselves and meet our obligations. There is a confusion over the year from which the eight-year period will be calculated. India wants that the reference year should be 2015".

Dr. Vinod Paul: First Indian to Receive WHO's Ihsan Dogramaci Family Health Foundation Prize

NITI Aayog member Dr. Vinod Paul became first Indian to be awarded prestigious IhsanDoğramacı Family Health Foundation Prize by World Health Organisation to be held in Geneva, Switzerland in May 2018. He was selected unanimously for the prestigious award by WHO Board from six other shortlisted candidates from Algeria, China, Malaysia, Mexico, Russia Federation, Uzbekistan for distinguished contributions towards improving the health and well-being of families, especially in developing countries. Prior to joining as Member, NITI Aayog, he was head of the Department of Pediatrics at AIIMS,

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New Delhi.

ISA, India Signed Host Country Agreement

The International Solar Alliance (ISA) and Ministry of External Affairs (MEA), Govt of India signed Host Country Agreement in New Delhi. The agreement gives ISA juridical personality an power to contract, acquire and dispose off movable and immovable properties and also to institute and defend legal proceedings. Under this agreement, ISA will enjoy such privileges, applicable tax concessions and immunities that are necessary for ISA's Headquarter to independently discharge its function and programmes. It will derive its status, privileges and immunities as per Article 10 of Framework Agreement. ISA is initiative jointly launched by India and France in November 2015 at Paris on side lines of COP21 UN Climate Change Conference. Its Framework Agreement came into force in December 2017. It celebrated its founding day on 11th March, 2018. It is headquartered at campus of National Institute of Solar Energy (NISE), Gurugram, Harayana, making it first international intergovernmental treaty based organization to be headquartered in India.

JS Rajput Nominated as India's Representative to Executive Board of UNESCO

The Ministry of Human Resource Development has nominated

former NCERT director JS Rajput as India's representative to Executive Board (EXB) of United Nations Educational, Scientific and Cultural Organization (UNESCO). Professor JS Rajput is known for his contributions in reforms in school education and teacher education. He has held several assignments which include Professor in NCERT, 1974, Principal of Regional Institute of Education Bhopal 1977-88, Joint Educational Adviser, Ministry of Human Resource Development, Chairman, National Council for Teacher Education (NCTE) 1994-99 and Director of the NCERT (1999-2004).

Cabinet Approved Revision of DTAA between India & Qatar and Entered DTAA between India & Iran

The Union Cabinet, on 21 March 2018, has given its approval for revision of existing Double Taxation Avoidance Agreement (DTAA) between India and Qatar. The purpose of revision is for avoidance of double taxation and for prevention of fiscal evasion with respect to taxes on income. The existing DTAA between India and Qatar was signed in April 1999 and came into force in January, 2000. Main features of Revised DTAA are: updates provisions for exchange of information to latest standard. It includes Limitation of Benefits (LOB) provision to prevent treaty shopping and aligns other provisions with India's recent treaties. It meets minimum standards on treaty abuse under Action 6 and Mutual Agreement

Procedure under Action 14 of G-20 OECD Base Erosion & Profit Shifting (BEPS) Project to which India is participating. Earlier on 15 March 2018, the Union Cabinet has approved Agreement for Avoidance of Double Taxation and Prevention of Fiscal Evasion with respect to taxes on income between India and Iran. It also meets treaty related minimum standards under G-20 OECD Base Erosion & Profit Shifting (BEPS) Project, in which India participated on equal footing.

Philippines Withdraws from International Criminal Court

Philippines, on 18 March 2018, has announced to withdraw from International Criminal Court (ICC) citing reason of international bias and held that ICC was being utilized as a political tool against it. It will make Philippines only second country to withdraw from the Rome statute, following Burundi in 2017. South Africa attempted to leave in 2016, but its withdrawal was revoked by UN. Philippines had ratified Rome statute related to Hague-based ICC in 2011.

Supreme Court Allowed Passive Euthanasia, Living Will

The Supreme Court (SC), on 10 March 2018, allowed passive euthanasia and right to give advance medical directives or 'Living Wills', stating that human beings have the right to die with dignity as part of fundamental right, but made sure to set out strict guidelines that will govern when it is

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permitted. The ruling was given by five-judge Constitution Bench led by Chief Justice of India Dipak Misra. Passive euthanasia is act of withdrawing or withholding medical support to dying patient who has no hope for revival or cure. It also laid down principles for execution of advance directives and spelt out guidelines and safeguards to give effect to passive euthanasia. The directive and guidelines shall remain in force till Parliament brings a legislation in the field.

Mohammad Samilullah & Anr. v. Union of India & Others (Writ Petition [Civil] No. 793 of 2017)

The Government of India, on 15 March 2018, reiterated its stand before the Supreme Court of India that it cannot allow Rohingya refugees from Myanmar to enter India, refuting the application filed by noted lawyer Prashant Bhushan. In an affidavit filed by the Ministry of Home Affairs, the Centre asserted that India is already facing a “serious problem of infiltration because of its porous border with other countries which is the root cause of spread of terrorism in the country. It then submitted, “Securing the border of any sovereign nation in accordance with law is an essentially executive function and this Court would not issue a writ directing not only the Central government but all the state governments having a common border to ensure foreigners enter the territory of India.”

The Government of India further refuted allegations that the Border Security Forces (BSF) was using chili and stun grenades to push the refugees back, submitting that the claims have been found to be “completely false, incorrect and far from the truth”. It asserted “the steps being taken by any border guarding force is strictly in accordance with the law, in larger public interest and in the interest of nation.....all agencies tasked with the function of guarding the borders of our nations are discharging their duties strictly in accordance with law and complying with the human rights in larger national interest.” Addressing the prayers made in the Petition, the Government of India pointed out that India is not a signatory to the United National Convention of 1951 relating to the Status of Refugees and the Protocol of 1967 issued thereunder. It then shirked off any responsibility under the Convention, submitting, “The obligation of *Non-Refoulement* is essentially covered by the provisions of the aforesaid convention to 1951 to which India is not a signatory. It is submitted that considering the very peculiar geographical situation existing namely India sharing its land border with China, Pakistan, Bangladesh, Bhutan, Nepal, Myanmar, it is not in the interest of national security for this Hon'ble Court to issue a direction as sought for.” In the same vein, it submitted that it cannot issue any identification cards to the refugees, as India is not a signatory to the Convention. It further contended that as far as the Rohingyas who have

already entered the country are concerned, there has been no reported case wherein medical help or education was denied to them. The Affidavit went on to counter the reliance placed on relief facilities granted to Sri Lankan Tamil refugees, contending that the grant of these facilities has its genesis in the Indo- Sri Lankan Agreements of 1964 and 1974. Under these Agreements India had agreed to repatriate and grant Indian citizenship to six lakh persons of Indian origin, together with their natural increase, by 1981-82. The Affidavit was filed in response to Petitions filed by Mohammad Salimullah and Mohammad Shaqir, challenging the Centre's move to deport Rohingya Muslims back to Myanmar. Representing the petitioners, Mr. Bhushan had recently filed an application before the Apex Court, seeking a direction restraining the Government from preventing more Rohingya Muslims from entering India by crossing the Myanmar border. Mr. Bhushan had also demanded better living conditions for Rohingyas currently in the country.

Forthcoming Events

47th Annual Conference of the ISIL: **12 - 13 May 2018**

17th Summer Course on International Law: **4 June - 15 June 2018**

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