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## LAW IN FOCUS

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## ARTICLE:

### Arbitration Under International Law \*\*

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The modern history of international arbitration is generally recognized as dating from the so-called Jay Treaty of 1794 between the United States of America and Great Britain. Under the Treaty of Washington of 1871, the United States and the United Kingdom made few head of states as appointing authority of a five-member tribunal.

*International law provided mechanism by which a state can bring claim before an international court or arbitral tribunal. The international legal system is traditionally constructed as sovereign state being supreme. Individuals or corporations are only considered as participants, who do not share same aim or value as state. It is only in the second half of the 20th century international law provided very limited mechanism by which' an individual can bring claim before an international court/ tribunal/ arbitration against state. Initially the arbitration was mostly on ad-hoc basis. Later arbitral institutions like ICSID were created by multinational treaties on particular area providing access to individual/ corporation along with states. This article will only cover international economic law aspects covering different sectors. Where states, corporations & individuals can bring claims against states through arbitration*

The Hague Peace Conference of 1899, convened on the initiative of the Russian Czar Nicholas II, marked the beginning of a third phase in the modern history of international arbitration. Accordingly, Permanent Court of Arbitration (PCA), was established by 1899 Convention for the Pacific Settlement of International Disputes. The aim of the PCA being the first global mechanism for the settlement of disputes between states was to facilitating an immediate recourse to arbitration for international differences which it has not been possible to settle by diplomacy. The Conventions says arbitration is the "most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle". Unlike arbitral tribunals, the Permanent Court of International Justice (PCIJ) formed by Covenant of the League of Nations in 1920 later abolished and replaced by International Court of Justice (ICJ) established by the Charter of the United Nations in 1945 is a permanently constituted body governed by its own Statute and Rules of Procedure, whose judgments are binding on parties and proceedings were largely public. However, it was 19<sup>th</sup> century practice where the President of the International Court of Justice (ICJ), under many investment treaties, is made an appointing authority.

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On the other hand, under many bilateral investment treaties parties including state submitted to the jurisdiction of a number of independent, mostly not-for-profit institutions like ICC the International Court of Arbitration, Singapore International Arbitration Centre, London Court of International Arbitration, Stockholm Chamber of Commerce (SCC) etc. due to their established track record for providing best in class arbitration services. On the other hand, PCA also administers arbitration and regularly acts as an appointing authority under UNCITRAL and other rules.

International law provided mechanism by which a state can bring claim before an international court or arbitral tribunal. The international legal system is traditionally constructed as sovereign state being supreme. Individuals or corporations are only considered as participants, who do not share same aim or Value as state. It is only in the second half of the 20th century international law provided very limited mechanism by which an individual can bring claim before an international court /tribunal / arbitration against state. Initially the arbitration was mostly on ad-hoc basis. Later arbitral institutions like ICSID were created by multinational treaties on particular area providing access to individual/corporation along with states.

Similarly, South Asian Association for Regional Co-operation (SAARC), comprising the Member States Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka, created a separate arbitration institution by Agreement for Establishment of SAARC Arbitration Council of 2005 creating SAARC Arbitration Council (SARCO) to resolve disputes allowing access to both member states and individual/corporation

Under SARCO Rules of Procedure for Arbitration, "Arbitration" means an arbitration relating to disputes arising out of, legal relationships considered to be referred to SAARC Arbitration Council for settlement and where at least one of the parties is a national of the member states of SAARC and "Party" means a party to the arbitration agreement. It shall include any individual, firm, company, Government, Government organization or Government undertaking. The parties can choose SARCO as a forum for dispute resolution with or without involving state or signing treaty.

Individual participation is largely dependent upon the state to which they belong, derived from different treaties conferring such rights and responsibilities upon individuals or corporations. It does not automatically mean that they have the ability to bring international claim to assert their rights. The position is somewhat different with human rights treaties which created different disputes resolution mechanism, international court & tribunals.

This article will only cover international economic law aspects covering different sectors, where states, corporations & individuals can bring claims against states through arbitration.

## INTERNATIONAL TRADE

Majority of state-state disputes are handled by the World Trade Organization (WTO) system, the primary body governing international trade created under the Marrakesh Agreement, signed by 123 nations on 15 April 1994. Each of its 164 members has agreed to rules about trade policy, such as limiting tariffs and restricting subsidies. A member can appeal to the WTO if it believes another member is violating those rules. The main stages to the WTO disputes settlement process (i) consultations between the parties (ii) adjudication by panels and, if applicable, by the appellate Body; and (iii) the implementation of the ruling, which includes the Possibility of countermeasures in the event of failure by the losing party to implement the ruling.

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The United States, for instance, has repeatedly brought WTO cases against China over its support for various export industries, including one in early 2017 alleging that Beijing unfairly subsidizes aluminum producers. While that case has not been decided, the trump administration retaliated by unilaterally imposing tariffs on some individual Chinese aluminum imports to the United States that are also meant to target Chinese overproduction.

## INTERNATIONAL INVESTMENT

Investor State Dispute Settlement (ISDS) is a mechanism contained in investment and trade agreements that allows an investor of a state party to bring a claim against another state party that is hosting the investment, if that state has allegedly breached a standard in the agreement. ISDS was originally envisaged as a way to protect investors from arbitrary state abuse. This had the ultimate goal of promoting foreign investment between state parties. Usually, the consent of the State is contained in international investment agreements between States. These agreements can be bilateral (between two countries), or multilateral (between more than two countries). There are currently more than 3,300 international agreements providing for ISDS. Consent to ISOS can also be found in the domestic investment laws of some States and in contracts between a foreign investor and a State, or a State-affiliated agency.

International Center for Settlement of Investment Disputes (ICSID) is the leading institution that provides for settlement of disputes by arbitration. ICSID was established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. The ICSID process is designed to take account of the special characteristics of international investment disputes and the parties involved, Maintaining a careful balance between the interests of investors and host States. The ICSID has 162 member states.

Unlike the WTO, the ICSID has no permanent tribunals and does not directly rule on cases. Rather, it administers the process by which disputants choose an independent, ad hoc panel of arbitrators to hear their case. The arbitrators are generally legal experts, including professors, practicing lawyers, and former judges. The specifics on the sorts of conflicts that can be referred to an ICSID panel are set out in individual trade or investment agreements. The ISCID has administered more than six hundred disputes in its half-century existence.

A number of institutions as provided in different treaties adjudicate investor-state disputes, such as the Permanent Court of Arbitration or the London Court of International Arbitration.

## MARITIME

United Nations Convention on the Law of the Sea (UNCLOS) entered into force in 1994, is an international treaty that provides a regulatory framework for the use of the world's seas and oceans, *inter alia*, to ensure the conservation and equitable usage of resources and the marine environment and to ensure the protection and preservation of the living resources of the sea. UNCLOS also addresses such other matters as sovereignty, rights of usage in maritime zones, and navigational rights. As of 2019, 168 States are member of UNCLOS. An International Tribunal for the Law of the Sea located in Hamburg, Germany is an independent judicial body was established by UNCLOS to adjudicate disputes arising out of the interpretation and application of the Convention. It is open to state, entities other than States Parties, i.e. States or intergovernmental organizations which are not parties to the Convention, and to state enterprises and private entities "in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case."

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## BANKING & FINANCE

Established in 1930 by Hague Agreement, the Bank for International Settlements is an international organization and the world's oldest international financial institution. The Bank at present seeks to promote the co-operation of central banks and to provide additional facilities for international financial operations. A standing Tribunal for the Bank for International Settlements was established at the Hague. The Tribunal exercises jurisdiction over disputes arising from the interpretation or application of the Hague Agreement and the Statutes of the Bank for International Settlements Pursuant to the 1930 Hague Agreement, parties with standing to seize Tribunal include the Contracting Parties to the Hague Agreement and the Bank for International Settlements. Article 54 of the Statutes of the Bank extends standing before the Tribunal to any central bank, financial institution, or other bank referred to in the Statutes as well as shareholders of the Bank. The International Bureau of the PCA acts as secretariat to the Tribunal.

Similarly, SAARC Development Fund agreement signed amongst SAARC member states in 2008 to promote the welfare of people of the SAARC region, to improve their quality of life and to accelerate economic growth social progress and poverty alleviation in the region by extending finance for approved projects in SAARC Member States, leverage funding, arrange and mobilize financing and/or co-financing projects and provide grants for projects of strategic importance to SAARC. SAARC Development Fund agreement referred to SAARC Arbitration Council for settlement of disputes.

## ENERGY

The Energy Charter Treaty (ECT) 1994 created a legal framework for energy trade, transit and investment among member states. The ECT, a multilateral investment treaty, aims to unite its signatories behind the common goals of setting up open energy markets, securing and diversifying energy supply and stimulating cross-border investment and trade in the energy sector. The Energy Charter Treaty provides a comprehensive and tailor-made system for settling disputes on matters covered by the Treaty.

The two basic forms of binding dispute settlement are ad hoc arbitration for disputes between Contracting Parties on the interpretation or application of almost all aspects of the Treaty (except for competition and environmental issues), and investment arbitration for disputes between an investor and a Contracting Party. The most commonly chosen forum for investor-state disputes arising under the ECT is international arbitration. ICSID, Arbitration Institution of Stockholm Chamber of Commerce (SCC), PCA under UNCITRAL rules mostly administer such Arbitrations under respective rules, Energy Charter Secretariat located in Brussels, Belgium Can Facilitate Parties in a conflict to establish contact and to begin to explore ways to reach an amicable settlement.

SAARC Framework Agreement for Energy Cooperation (Electricity) 2014 were signed with a view to facilitate cross border electricity exchanges and trade among the SAARC Member States leading to optimal utilization of regional electricity generating resources, enhanced grid security, and electricity trade arising from diversity in peak demand and seasonal variations.

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Article 16 of the Agreement provides "Any dispute arising out of interpretation and/or implementation of this Agreement shall be resolved amicably among the Member States. If unresolved, the Member States may choose to refer the dispute to SAARC Arbitration Council." SAARC Energy Centre has been created as the Special Purpose Vehicle to realize the vision of SAARC leaders to establish an Energy Ring in South Asia.

## ENVIRONMENT

The International Court of Justice (ICJ) was initially the only permanent international tribunal dealing with environmental disputes. Later, in the second half of the 20th century ITLOS, WTO directly or indirectly played role in settling disputes relating to environment. Environmental concerns also arise in investor-State disputes, for example, under the North American Free Trade Agreement (NAFTA). Under Article 1120 provides alternatively for arbitration under the ICSID. NAFTA investor-State arbitrations often address environmental concerns. Environmental issues also arise under bilateral free trade agreements. ICC, The American Arbitration Association (AAA), sec and LCIA also administer commercial arbitrations involving environment related issues.

The PCA has been regularly included as the forum for dispute resolution under bilateral and multilateral treaties, contracts, and other instruments concerning natural resources and the environment, and offers specialized rules for arbitration and conciliation of these disputes. Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment (PCA Optional Rules), is an important resource to handle international environmental disputes.

In conclusion, it can be said that much awareness initiatives are required to introduce businessman with the corporate opportunities which are available in our laws.

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