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South Asia/Oceania & India

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This article surveys significant legal developments in South Asia and Oceania during the calendar year 2019.¹

I. Asian Update on Climate And Clean Energy Policies

A. INDIA

At the UN Secretary General’s Climate Action Summit in New York in September 2019, India launched the Coalition for Disaster-Resilient Infrastructure, a partnership to (1) expand the development of resilient infrastructure, (2) retrofit existing infrastructure for resilience, and (3) enable a measurable reduction in infrastructure losses.² Formed by India, the partnership brings together developed and developing countries. Its founding members include Australia, Bhutan, Fiji, Indonesia, Italy, Japan, Maldives, Mexico, Mongolia, Rwanda, Sri Lanka, and the United Kingdom.³

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1. The information provided in the article is intended for informational purposes only and does not constitute legal opinion or advice. Readers are requested to seek formal legal advice prior to acting upon any of the information provided herein.

2. Delia Paul, *India Launches Global Coalition for Disaster-Resilient Infrastructure*, INT’L INST. FOR SUSTAINABLE DEV. (Oct. 3, 2019), <https://sdg.iisd.org/news/india-launches-global-coalition-for-disaster-resilient-infrastructure/>.

3. *Id.*

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1. *Electric Vehicles*

The Ministry of Heavy Industry and Public Enterprises announced the second phase of the Faster Adoption and Manufacturing of (Hybrid &) Electric Vehicles (FAME-II) program⁴ in March 2019. The objective of this phase is to accelerate the adoption of electric mobility and develop a manufacturing ecosystem in India. Implementation includes promulgating demand incentives, establishing a network of charging stations, and undertaking information, education, and communication activities.⁵ It also establishes an Inter-Ministerial Committee for overall monitoring, sanctioning, and implementation of the Scheme.⁶

2. *Renewables*

India is continuing to strengthen its action on clean energy as Prime Minister Modi announced more than doubling the share of renewable energy to 450 GW.⁷ At the state level, increased ambition is being seen with the state of Gujarat aiming for at least thirty GW of renewable energy generation capacity by 2022.⁸ Gujarat announced that no permits will be issued for new thermal plants in the state, which are largely coal.⁹ Similarly, Chhattisgarh, home to the country's third-largest coal reserves, recently announced that it will not build any new coal power plants.¹⁰

3. *Cooling*

The Ministry for Environment, Forest and Climate Change announced the India Cooling Action Plan (ICAP) in March 2019, one of the first cooling plans in the world.¹¹ The plan has a long-term vision to address the cooling requirement across sectors, and it lists actions to reduce the cooling demand. Specifically, the plan aims to reduce cooling demand across sectors by

4. Pravin L. Agrawal, Gov't of India, *Notification Regarding Scheme for Faster Adoption and Manufacturing of Electric Vehicles in India Phase II (FAME India Phase II)*, GAZETTE OF INDIA, Mar. 8, 2019, at Part-II §3(II) ¶ 8, <https://dhi.nic.in/writereaddata/UploadFile/publicationNotificationFAME%20II%208March2019.pdf>.

5. *Id.*

6. *Id.*

7. Mandvi Singh, *PM Modi's Ambition For 450 GW Renewable Energy Comes Amidst Slowdown*, DOWN TO EARTH (Sept. 26, 2019), <https://www.downtoearth.org.in/blog/energy/pm-modi-s-ambition-for-450-gw-renewable-energy-comes-amidst-slowdown-66961>.

8. *Gujarat Sets 30GW Renewable Energy Goal by 2022, 17% of India's Overall Target*, INST. FOR ENERGY ECON. & FIN. ANALYSIS (July 3, 2019), <https://ieefa.org/gujarat-sets-30gw-renewable-energy-goal-by-2022-17-of-indias-overall-target/>.

9. *Gujarat Govt Not to Issue Permits for New Thermal Plants*, INDIAN EXPRESS (Sept. 9, 2019), <https://indianexpress.com/article/india/gujarat-coal-thermal-power-plants-vijay-rupani-solar-carbon-emission-adani-clean-energy-5975547/>.

10. Akshat Rathi & Kuwar Singh, *One of India's Largest Coal-mining States Says It Will Not Build New Coal Power Plants*, QUARTZ INDIA (Sept. 16, 2019), <https://qz.com/india/1709483/after-gujarat-indias-chhattisgarh-wont-build-coal-power-plants/>.

11. Press Release, Ministry of Env't, Forest & Climate Change, *India Cooling Action Plan Launched* (Mar. 8, 2019), <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1568328>.

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twenty percent to twenty-five percent by 2037–2038, reduce refrigerant demand by twenty-five percent to thirty percent by 2037–2038, and reduce cooling energy requirements by twenty-five percent to forty percent by 2037–2038.¹² It also recognizes “cooling and related areas” as a research area and commits to providing training and certification of technicians.¹³

B. NEW ZEALAND

In November 2019, the New Zealand government passed a law that committed the country to reduce all greenhouse gas emissions (except for biogenic methane) to zero by 2050.¹⁴ For biogenic methane, the Act calls for reducing emissions by ten percent below 2017 levels by 2030, and then by twenty-four percent to forty-seven percent by 2050.¹⁵

C. SINGAPORE

The Singapore government approved the Carbon Pricing Act, which came into operation on January 1, 2019.¹⁶ The carbon tax requires all industrial facilities that emit direct greenhouse gas (GHG) emissions equal to or above 2000 tCO₂e annually to be registered as reportable facilities and submit annual emissions reports.¹⁷ Industrial facilities emitting GHG emissions equal to or above 25,000 tCO₂e are subject to a carbon tax.¹⁸ The tax rate is set at a rate of \$5 (SGD) per ton of GHG emissions from 2019 to 2023.¹⁹ Following a review in 2023, the government plans to ramp up the tax rate to \$10 to \$15 (SGD) per ton of GHG emissions by 2030.²⁰

II. Ease of Doing Business in India Has a Competition Law Aspect

A. BACKGROUND

Since 2014, India has been one of the most improved economies in terms of ease of doing business (EODB) in the World Bank’s Doing Business annual report.²¹ India’s massive progress is a result of the Indian government’s continuous efforts to make the country an easier place to do business, and

12. *Id.*

13. *Id.*

14. Climate Change Response (Zero Carbon) Amendment Act 2019 (136-3), sch 2, sec 50 (N.Z.).

15. *Id.*

16. Carbon Pricing Act 2018 (No. 23 of 2018) (Sing.).

17. *Id.* at No. 11.

18. *Id.* at Schedule 2 Part 1.

19. *Id.* at Schedule 3 Part 1.

20. National Environment Agency, Carbon Tax (2019), <https://www.nea.gov.sg/our-services/climate-change-energy-efficiency/climate-change/carbon-tax>.

21. *Doing Business 2020—Sustaining the pace of reforms*, WORLD BANK (Oct. 24, 2019), <https://www.worldbank.org/en/news/feature/2019/10/24/doing-business-2020-sustaining-the-pace-of-reforms>.

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competition law has also been an important part of the changes to the Indian regulatory landscape. Recent noteworthy developments include the Indian government's creation of the Competition Law Review Committee (the CLRC) and the introduction of the "Green Channel" merger control clearance.²²

B. GREEN CHANNEL: EXPEDITION, NOT EXCEPTION

The urgency to close a deal usually starts as soon as the transaction documents are signed, and many times even earlier than that. Parties notifying transactions to the Competition Commission of India (the CCI) must suspend deal consummation until the CCI gives its clearance.²³ In India, a transaction is notifiable to the CCI if no exemption applies²⁴ and certain threshold tests are met.²⁵ The tests involve an analysis of the worldwide and Indian assets and turnover of both (a) the directly transacting parties and (b) the acquiring group and the target.

The CCI can approve, modify, or reject a notified transaction. In the first stage (called Phase I) of the review process, the CCI has thirty working days to form a prima facie opinion as to whether the transaction will, or is likely to, cause an appreciable adverse effect on competition.²⁶ But the Phase I can last considerably longer than thirty working days because the clock stops for the time taken by parties in responding to CCI information requests. The CCI may also decide to conduct, either by itself or through its Director General, an exhaustive Phase II investigation.²⁷

Until 2019, there were no provisions for fast tracking of CCI approval, even for a "no issue" transaction. But on August 13, 2019, the CCI amended its merger control regulations to allow a Green Channel approval for transactions where the acquirer and the target do not overlap horizontally, vertically, or "complementarily."²⁸ If the parties to a notifiable transaction wish to obtain Green Channel approval, they have to declare this in their merger notification form. Upon filing, the CCI would grant a deemed approval immediately.

A person seeking the Green Channel route must, however, exercise caution. The CCI reserves the power to hold a Green Channel approval

22. Press Release, Ministry of Corporate Affairs, Government Constitutes Competition Law Review Committee to Review the Competition Act (Sept. 30, 2018, 12:27 PM), <https://pib.gov.in/PressReleaseDetail.aspx?PRID=1547975>.

23. The Competition Act, 2002, No. 12, Acts of Parliament, 2003 § 6(2A). (India).

24. The most commonly used exemption is the target exemption whereby a transaction is not notifiable if either the value of assets of the target in India is not more than INR 350 crore or turnover of the target in India is not more than INR 1000 crores. *Id.* § 54.

25. *Id.* § 5.

26. *Id.* § 29(1).

27. *Id.* § 29(1A).

28. Competition Commission of India [CCI], Procedure in Regard to the Transaction of Business Relating to Combinations Amendment Regulations, 2019, Gazette of India, § 2 (Aug. 13, 2019).

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void *ab initio*, if, in their view, there are overlaps.²⁹ Extra care should be taken as there is also the risk of gun jumping, which can lead to hefty monetary penalties. Parties must also proceed with caution because, at the time of writing this article, there was no authoritative guidance on the meaning of a “complementary” overlap.

Notably, the CCI allows for a pre-filing verbal and non-binding consultation (PFC) with a CCI case team. With the introduction of the Green Channel, the CCI has also expanded the scope of its guidance on PFCs to include consultations on Green Channel filings.³⁰ A PFC in Green Channel filings is likely to provide some guidance and is recommended in case the notifying parties are not sure of their eligibility for an approval under the Green Channel.

C. MORE EODB: THE CLRC

India is one of the fastest growing economies in the world. The pace of economic growth has been sustained due to a large and vibrant market that thrives on innovation and technological developments. It is, however, recognized that to reap full benefits of a market economy, an effective and modern competition law regime is necessary.³¹ In 2009, India moved to a modern competition law regime under the Competition Act from the “command and control” regime of the now-repealed predecessor legislation, namely the Monopolies and Restrictive Trade Practices Act, 1969.³²

In September 2018, after nearly a decade of enforcement of the Competition Act, the Government of India constituted the CLRC to (a) address challenges that have come to the forefront in the decade-long enforcement experience and (b) recommend appropriate changes.³³ The CLRC’s focus has been to further ease the doing of business in India, to encourage start-ups, and to meet the challenges of the new economy—goals congruent with Government of India’s larger policy initiatives.³⁴

The CLRC submitted its key recommendations to the Indian government in August 2019, which included a proposal to introduce the concept of Green Channel. Other key CLRC recommendations that could see

29. *Id.* at Schedule 4.

30. *Consultation Prior to Filing of Notice of the Proposed Combination Under Sub-Section (2) of Section 6 of the Competition Act, 2002*, COMPETITION COMM’N OF INDIA (Aug. 13, 2019), https://www.cci.gov.in/sites/default/files/cci_pdf/PFCguidancenote.pdf.

31. *Preface to The Report of the Competition Law Review Committee*, MINISTRY CORP. AFF., GOV’T OF INDIA (July 26, 2019), http://www.mca.gov.in/Ministry/pdf/ReportCLRC_14082019.pdf.

32. The Competition Act, 2002, No. 12, Acts of Parliament, 2003 § 66. (India).

33. Press Release, Ministry of Corporate Affairs, Government Constitutes Competition Law Review Committee to Review the Competition Act (Sept. 30, 2018, 12:27 PM), <https://pib.gov.in/PressReleaseDetail.aspx?PRID=1547975>.

34. Press Release, Ministry of Corporate Affairs, Report of the Competition Law Review Committee submitted to Union Finance and Corporate Affairs Minister (Aug. 14, 2019), <https://pib.gov.in/newsite/PrintRelease.aspx?relid=192629>.

implementation include introduction of settlement and commitment mechanisms for enforcement cases under the Competition Act, issuance of penalty guidelines, strengthening of the CCI's governance structure by introduction of a Governing Board, introduction of a dedicated and specialized bench in the appellate tribunal for hearing appeals under the Competition Act, and opening of CCI offices outside of the Indian capital New Delhi. These are all welcome changes, given that they foster an enabling environment for businesses and enhance the efficiency of business regulation in India.

III. An Overview of the New Consumer Protection Regime in India

As a growing economy with the third largest consumer market,³⁵ India offers huge markets for businesses (domestic and international) to trade their products and services. Acknowledging this, the Indian parliament decided to relook at the consumer protection policy in India and enacted the Consumer Protection Act 2019³⁶ (New Act or CPA 2019), replacing the previous Act of 1986 (Old Act).

The New Act defines a consumer as a person who buys any good or uses any service for a consideration.³⁷ But it does not include a person who obtains a good for resale or a good or service for commercial purpose. It covers transactions through all modes including offline, and online via electronic means, teleshopping, multi-level marketing, or direct selling.³⁸ The New Act essentially focuses on the concept of *Caveat Venditor*.

The New Act has introduced several reformatory measures and is focused on tightening the existing rules for product manufacturers, sellers, and service providers to safeguard the interests of consumers. The following are some of the crucial legal developments that have been introduced under the New Act.

A. ESTABLISHMENT OF THE CENTRAL CONSUMER PROTECTION AUTHORITY (CCPA)³⁹

CPA 2019 provides for establishment of the CCPA to promote consumer rights and to investigate matters of consumer welfare concerning unfair trade practices or false advertisements wherein consumers are affected as a class. The CCPA has been further empowered to (a) take matters *suo motu* if it is of the opinion that consumer welfare is being affected in any manner and (b) file a complaint before the respective consumer courts post

35. World Economic Forum [WEF], *Future of Consumption in Fast-Growth Consumer Markets: India*, at 8 (Jan. 2019), http://www3.weforum.org/docs/WEF_Future_of_Consumption_Fast-Growth_Consumers_markets_India_report_2019.pdf.

36. See Consumer Protection Act, 2019, No. 35, Acts of Parliament, 2019 (India).

37. *Id.* § 1(7).

38. *Id.* § 2(7).

39. *Id.* § 10.

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conducting a preliminary investigation. The CCPA, based on its investigation, can give orders to recall goods, reimburse consumers, and discontinue unfair trade practices and misleading advertisements.⁴⁰ It is pertinent to note that the CCPA is a new authority being established under the New Act.

B. PRODUCT LIABILITY⁴¹

Unlike the Old Act, the New Act has introduced the concept of product liability. The New Act has provided comprehensive provisions to segregate the liability of product manufacturer, product seller, and service provider and has specified parameters to determine on whom the liability will be imposed in case of any default. But CPA 2019 also provides certain exemptions with regard to the liability imposed on the product manufacturer, product seller, and service provider, such as: at the time of use, the product was misused, altered, or modified by the consumer; at the time of selling the product, proper warning, or instructions were provided to consumers about the way the product is to be used; the product was sold as a component to be used in the end product, and consumer has faced problems due to the use of such end product; the product was meant to be used or dispensed only by or under the supervision of an expert, and the product manufacturer had employed reasonable means to give the warnings or instructions for usage of such product to such expert or class of experts; the consumer used the product under influence of alcohol or any other drug; and the manufacturer or seller failed to inform or warn about a danger that was obvious or commonly known to the consumer of such product.⁴²

C. UNFAIR CONTRACTS⁴³ AND UNFAIR TRADE PRACTICES⁴⁴

CPA 2019 provides exhaustive definitions of the terms “unfair contracts” and “unfair trade practices” and aims to protect consumers from unilaterally skewed and unreasonable contracts that lean in favor of manufacturers or service providers. Unfair trade practices include electronic advertising that is misleading, refusal to take back or withdraw defective goods, refusal to withdraw or discontinue deficient services, or refusal to refund the consideration within the period stipulated or in the absence of such stipulation, within a period of thirty days.⁴⁵ The definition further prohibits and punishes manufacturers, sellers, or service providers for disclosing personal information of a consumer to any third person without his/her consent.⁴⁶ In view of the above, product manufacturers, sellers, and service

40. *Id.* § 18.

41. *Id.* §§ 82-87.

42. Consumer Protection Act § 87.

43. *Id.* § 2(46).

44. *Id.* § 2(47).

45. *Id.*

46. *Id.*

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providers should be mindful of the aforesaid at the time of drafting agreements/terms and conditions. It is also important to note that CPA 2019 does not expressly cover online contracts, and judicial interpretation will be required in cases of click wrap contracts that are entered on e-commerce platforms wherein consumers do not have an opportunity to negotiate.

D. MISLEADING ADVERTISEMENTS⁴⁷ AND LIABILITY OF ENDORSERS⁴⁸

CPA 2019 expressly prohibits all sorts of false and misleading advertisements. It provides a thorough definition of what constitutes misleading advertisements and provides a stringent penalty of up to two years of imprisonment or a fine up to INR ten lakhs (USD 14,000) for an initial offense, and imprisonment of five years or fine of INR fifty lakhs (USD 70,000) for subsequent offenses.⁴⁹ Further, endorsement of goods and services by celebrities is also covered within the ambit of the CPA 2019. An additional onus has been placed on endorsers, apart from manufacturers and service providers, to prevent false or misleading advertisements by exercising due diligence to verify the veracity of claims made in the advertisement. Failure to do so may result in consequences including being prohibited from endorsing other products for a period of one year; subsequent offenses may extend such prohibition up to three years.⁵⁰

Apart from the above-mentioned changes, the New Act has brought numerous other changes that might affect the business strategies of entities dealing in Indian jurisdiction. Business entities will have to be mindful of the newly introduced regulatory framework to protect themselves from hefty penalties. But, it is still to be seen if the New Act has been successful in keeping the pace with the evolving consumer protection regime and is able to cover in its ambit the developments in commerce and technology that might come in the near future.

IV. Survey on Arbitration Law in India

The article surveys significant legal developments in India in the field of arbitration law in 2019.

47. *Id.* § 2(28).

48. Consumer Protection Act § 18.

49. *Id.* § 89.

50. *Id.* § 21(3).

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A. LEGISLATIVE DEVELOPMENTS

Significant changes were made to the Arbitration and Conciliation Act, 1996 (i.e., the Act)⁵¹ because of the 2019 amendments. The previous amendments to the Act were made in 2015.

Amongst the noteworthy changes, the 2019 amendments propose an “Arbitration Council of India” in Delhi,⁵² which would grade arbitral institutions based on infrastructure, the quality of arbitrators, and the performance and compliance of time limits for disposal of domestic or international commercial arbitrations.⁵³ Based on the grading, the Supreme Court/ High Court would designate arbitral institutions for appointing arbitrators.⁵⁴ An application for appointment will have to be filed before such institutions.⁵⁵ Qualifications and general norms of Arbitrators have been prescribed,⁵⁶ primarily to deal with impartiality, independence, and competence, among other things.⁵⁷

In cases where New York Convention is applicable, reference to an Arbitrator would be refused only if it appears prima facie that the arbitration agreement is null and void, inoperative, or incapable of being performed.⁵⁸ Earlier, the courts had to decide objections on merits. An award can now be challenged “on the basis of the record of the arbitral tribunal”⁵⁹ and not through additional evidence.

Some of the provisions first introduced in 2015 were also amended in 2019. For example, the timeline for arbitration proceedings has been modified.⁶⁰ An arbitral tribunal has power to pass interim measure only until the passing of an award.⁶¹ Thereafter, the power is with the concerned court only.

51. The Arbitration and Conciliation (Amendment) Act, 2019, No. 33, Acts of Parliament, 2019 (India).

52. *Id.* § 43B.

53. *Id.* § 43D.

54. *Id.* § 11(3A).

55. *Id.* §11(4).

56. *Id.* § 43J.

57. *See* Arbitration and Conciliation (Amendment) Act § 43J (The amendments regarding arbitrator appointment have yet to be notified, though).

58. The Arbitration and Conciliation Act, 1996, No. 26, 1996 (India), § 45.

59. *Id.* § 34(2)(a).

60. The Arbitration and Conciliation (Amendment) Act § 5 (noting that pleadings to be completed within six months when arbitrator/s get written notice about appointment); *Id.* § 6 (noting that award to be passed within twelve months after completion of the pleadings and this period is mandatory for international commercial arbitration).

61. The Arbitration and Conciliation (Amendment) Act § 4.

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B. NOTABLE JUDICIAL DECISIONS

The Delhi High Court consistently refused to pass anti-arbitration injunctions in 2019.⁶² The Supreme Court and the Delhi High Court indicated a clear preference for dispute resolution through arbitration. The Supreme Court emphasized the composite nature of transaction, single economic entity, and intention of parties to bind a non-signatory party to arbitration proceedings.⁶³ The Supreme Court relied on “Group of Companies” doctrine, akin to principles of agency or implied consent. But where the Supreme Court was not able to establish clear intention on the part of a Foreign Affiliate to assent, the doctrine was not applied.⁶⁴ In a pending civil proceeding, the Delhi High Court referred the matter for arbitration once it was satisfied that a commonality of interest existed amongst non-parties to an arbitration clause.⁶⁵

In *Giriraj Goel vs. Coal India Ltd.*,⁶⁶ the Supreme Court held that incorporation by general reference in a single contract is valid, but in a “two-contract case,” reference to the arbitration clause of the referenced contract must be specific. Likewise, disputes arising out of separate agreements having distinct clauses were referred to a joint arbitration, because the agreements formed a composite transaction.⁶⁷

In *M/s. Mayavti Trading Pvt. Ltd. vs. Pradyut Deb Burman*, the Supreme Court reiterated that after the amendment in 2015, while appointing an arbitrator, the role of the Court is strictly confined to examining the existence of an arbitration agreement.⁶⁸

An arbitration clause in an agreement, which is not stamped as per law, was held to be ineffective until duly stamped.⁶⁹ But a non-stamped foreign award is enforceable because “foreign awards” are not included in the Stamp Act.⁷⁰

In *Glencore International AG vs. Indian Potash Ltd.*,⁷¹ the foreign arbitration was conducted under the rules of an institution not agreed upon by the

62. Republic of India vs. Agusta Westland International Ltd., (2019) 257 DLT 171, ¶ 41 (No interim injunction was passed even though allegations of fraud, bribery and corruption were made.); Union of India v. Khaitan Holdings (Mauritius) Ltd. & Ors., 2019 SCC Online Del 6755, ¶ 1 (India) (interference in arbitral proceedings under BIT was held permissible only in “compelling circumstances” in “rare cases.”)

63. Mahanagar Tel. Nigam Ltd. vs. Canara Bank, 2019 SCC Online SC 995, ¶ 10.3 (India).

64. Reckitt Benckiser (India) v. Reynders Label Printing India Private Limited, (2019) 7 SCC 62, ¶ 9.

65. R.V. Solutions Pvt. Ltd. v. Ajay Kumar Dixit, 2019 SCC Online Del 6531, ¶ 13 (India).

66. Giriraj Garg v. Coal India, Ltd., 2019 SCC Online SC 212, ¶ 4.6 (India).

67. Global Infonet Distribution Pvt. Ltd. vs. Lenovo (India) Pvt. Ltd., 2019 SCC Online Del 9980, ¶ 18 (India).

68. M/S Mayavti Trading Pvt. Ltd. V. Pradyut Deb Burman, AIR 2019 SC 4284, ¶ 4 (India).

69. Garware Walls Ropes Ltd. v. Coastal Marine Constrs. & Eng'g Ltd., 2019 SCC Online SC 515 (India).

70. Shriram RPC Limited vs. Rioglass Solar SA, (2018) 18 SCC 313 (India); Glencore Int'l AG vs. Indian Potash Limited, 2019 SCC Online Del 9591, ¶ 18.5 (India).

71. Glencore Int'l AG vs. Indian Potash Limited, 2019 SCC Online Del 9591, ¶ 18.5 (India).

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parties, yet execution of the award was allowed. In a domestic arbitration award, a plea for unconditional stay, merely because the applicant is the government, was rejected because “the Act” does not provide for any differential treatment.⁷²

Before the Amendment Act of 2019 was brought into force, the Supreme Court held that irrespective of the commencement date of an arbitration, an award challenged after October 23, 2019,⁷³ would be considered as per law prevailing after 2015 amendments.⁷⁴

Section 87 in the Amendment Act of 2019, on the other hand, stated that only those arbitration proceedings that commenced after the 2015 amendments would be covered by the amended law.⁷⁵

The Supreme Court, however, struck down Section 87 as being manifestly arbitrary and unconstitutional. It held that the new provision would result in a delay of disposal of arbitration matters and increase interference by courts, defeating the very object of arbitration law.⁷⁶ Thus, the amendments made by the 2015 Amendment Act will continue to apply to all court proceedings initiated after October 23, 2015, irrespective of the date of initiation of the arbitration proceedings.

V. India Advocates For and Against Military Tribunal Intervention

July 2019 was a singularly busy month for South Asia’s international legal advocates. India both advocated to prosecute foreign nationals in its domestic military court and received a decision on its request to annul the conviction of an Indian national in a foreign military court—at once demanding and denying jurisdiction for international input in domestic criminal proceedings. Each case bid jurists to probe how far they may reach into domestic courts and whether the rules change amidst purported matters of national security.⁷⁷

On July 17, 2019, the International Court of Justice (ICJ) issued its ruling in *India v. Pakistan*, the Jadhav Case, finding Pakistan in violation of Article 36 of the Vienna Convention on Consular Relations (Vienna Convention) and ordering Pakistan to review and reconsider the ruling.⁷⁸

From July 8 to July 20, 2019, India and Italy arbitrated before the Permanent Court of Arbitration (PCA) in a case known as the *Enrica Lexie*

72. Pam Devs. Private Ltd. vs. State of West Bengal, (2019) 8 SCC 112, ¶ 25 (India).

73. The Arbitration and Conciliation (Amendment) Act § 13 (noting that the amendments made in the year 2015 were made operative from October 23, 2015).

74. Ssangyong Eng’g & Constr. Co. Ltd. vs. NHAI, 2019 SCC Online 677, ¶ 10 (India).

75. The Arbitration and Conciliation (Amendment) Act § 13.

76. Hindustan Constr. Co. vs. Union of India, 2019 SCC Online SC 1520, ¶ 48 (India).

77. See Jadhav Case (India v. Pak.), Judgment, 2019 I.C.J. 1, 20–25 (July 17) (the ICJ rejected Pakistan’s argument that Article 36 does not apply to alleged spies.) [hereinafter Jadhav Judgment]; See PCA is considering which of Italy and India’s military tribunals have jurisdiction. See *infra* n.79.

78. *Id.* ¶ 147.

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Incident.⁷⁹ Just as Pakistan challenged the jurisdiction of the ICJ in the Jadhav Case, India unsuccessfully challenged the jurisdiction of ITLOS in the initial provisional measures and initially withheld the jurisdiction of the PCA Arbitral Tribunal to proceed on the merits in the *Enrica Lexie Incident*.⁸⁰ The incident began in either Indian or international waters, then moved into Indian and Italian courts; both proceedings were stayed by the International Tribunal for the Law of the Sea (ITLOS), and the PCA will now decide where jurisdiction lies.⁸¹

India was not the only South Asian sovereign with split attention in international law. Also in July 2019, the World Bank's arbitral forum, ICSID, issued a multi-billion dollar arbitration award against Pakistan concerning an ill-fated mining contract in Balochistan—the very province in which Pakistan maintains Jadhav was arrested.⁸² Later in the year, Pakistan made headlines for settling a separate \$846 million ICSID award.⁸³

A. THE JADHAV CASE

Pakistan arrested an Indian national named Jadhav in 2016, then charged and convicted him of terrorism and espionage before a military court and sentenced him to death in 2017—all without alerting him to his consular rights, timely notifying India of his arrest, or permitting India to make contact with him.⁸⁴ The ICJ found that each omission violated Article 36.⁸⁵

India won preliminary measures in 2017: the ICJ required Pakistan to stay execution while the case was pending.⁸⁶ And while the Court found it lacked jurisdiction to grant India's requested relief, vacating the conviction and sentence, the Court ordered Pakistan to reconsider the case “by means of its own choosing”—even enacting new legislation to enable judicial action if necessary—and to stay execution in the process.⁸⁷

79. Opening Statements Transcript, *Enrica Lexie Incident (Italy v. India)*, Case No. 2015-28, at 15:5-6, 20:1-2 (Perm. Ct. Arb. 2019), <https://pcacases.com/web/sendAttach/3976> [hereinafter PCA Transcript]; see also Molly Quell, *India & Italy Fight Over Jurisdiction in International-Waters Shooting*, COURTHOUSE NEWS (July 20, 2019), <https://www.courthousenews.com/india-and-italy-fight-over-jurisdiction-in-international-waters-shooting/>.

80. Jadhav Judgment, at ¶ 36; *Enrica Lexie Incident (Italy v. India)*, PCA Case No. 2015-28 (2016), Provisional Measures Order of 29 April 2016, at ¶ 51.

81. *Enrica Lexie Incident (Italy v. India)*, Case No. 2015-28, Provisional Measures Order of 24 August 2015, ITLOS Rep. 186, 204 (ITLOS Trib.) [hereinafter *Enrica Lexie ITLOS Provisional Measures Order*].

82. See Tethyan Copper Company Pty Limited, Case No. ARB/12/1, Certified Award, ¶ 1847, (ICSID Trib. 2019).

83. See Caroline Simson, *Pakistan Settles \$846M Dispute with Turkish Energy Co.*, LAW360, (Nov. 5, 2019, 6:15 PM), <https://www.law360.com/energy/articles/1216990/pakistan-settles-846m-dispute-with-turkish-energy-co->.

84. Jadhav Judgment, at 8–13.

85. *Id.* at 25–33.

86. *Id.* at ¶ 147; *Enrica Lexie Incident*, Order of 18 May 2017, I.C.J. Reports 2017, 246, para. 61 (I).

87. Jadhav Judgment, at ¶ 148.

B. THE ENRICA LEXIE INCIDENT

In 2012, twenty miles off the Kerala coast, two Indian fishermen aboard an Indian vessel were killed by two Italian marines acting in a quasi-official capacity aboard an oil tanker flying an Italian flag.⁸⁸ Indian authorities took the Italian nationals into custody, and within one week, Italian and Indian authorities each charged the marines with serious crimes.⁸⁹ The case is understandably personal on both sides: two Italian men have been detained for years without adjudication of the charges against them; two Indian men lost their lives.

Italy unsuccessfully petitioned the Kerala High Court to quash its charges, asserting exclusive jurisdiction because the marines acted in a quasi-official capacity.⁹⁰ India's Supreme Court found Kerala lacked jurisdiction and that a special Indian court should try the marines.⁹¹ The Indian National Investigation Agency asserted jurisdiction and charged the Italians with maritime terrorism, a capital offense in India—though amidst diplomatic fervor, India's central government ordered the charges reduced to the non-capital offense of murder.

After two years of trial deferrals, Italy filed a case before the ITLOS in July 2015, requesting provisional measures pursuant to Article 290(5) of the Convention on the Law of the Sea (UNCLOS).⁹² ITLOS found the requisite urgency and prima facie jurisdiction to determine preliminary measures, ordering both states to suspend domestic legal procedures during the pendency of the international debate.⁹³ Pursuant to ITLOS procedure and the parties' differing ascension to the UNCLOS, the Permanent Court of Arbitration's Arbitral Tribunal has jurisdiction to determine the merits.⁹⁴

While most of July's arbitral proceedings were confidential, the sovereigns' opening statements were public and remain available online.⁹⁵ Italy's Ambassador Francesco Azzarello was adamant that the marines be looked on as "members of the Italian armed forces on official duties," such that they were immune to any domestic charges within India.⁹⁶ As he explained, "the rights that Italy seeks to vindicate in this arbitration are rights that belong to Italy as a matter of international law."⁹⁷ Joint Secretary (Europe West) for India's External Affairs Ministry, G. Balasubramanian, advocated that the marines were arrested on Indian territory, and that Italy

88. Enrica Lexie ITLOS Provisional Measures Order, at 7.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 24.

93. *Id.* at 14, 27

94. Enrica Lexie ITLOS Provisional Measures Order, at 14.

95. Opening Statements, Enrica Lexie Incident (Italy v. India), Case No. 2015-28 (Perm. Ct. Arb. 2019)), <https://files.pca-cpa.org/pcadocs/PCA%20Case%20No%202015-28.mp4>.

96. PCA Transcript at 15:5-6, 20:1-2.

97. *Id.* at 20:9-11.

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thwarted and delayed India's rightful domestic proceedings through interlocutory appeals.⁹⁸

Where the *Jadhav Case* quietly reminded the international community about the limits of pooled sovereignty, lacking jurisdiction to reverse a domestic military court's holding,⁹⁹ jurists now wait to learn how far the PCA perceives its authority to reach into domestic military courts' proceedings before a decision is reached.

98. *Id.* at 25:1, 25:4-26:7.

99. *Jadhav Judgment*, at 36-39.

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