ARBITRATION: MECHANISM TO RESOLVE INTER-STATE BORDER DISPUTES?

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In the backdrop of the border dispute between Assam and Mizoram and with six other inter-state border disputes existing in India, coupled with the fact that there is no mechanism delineated to resolve such disputes, the present article seeks to examine whether arbitration can be used as a mechanism to peacefully resolve inter-state border disputes in India. While it is undeniable that non-adversarial mechanism like negotiation is the preferable method for resolving such disputes, the present article will explore whether inter-state border disputes are arbitrable under Indian law and also study the various forms in which arbitration can be used to resolve inter-state border disputes in India.

Arbitrability of inter-state border disputes

In the first part, it is necessary to examine whether inter-state border disputes are arbitrable under Indian law or not. Arbitration has become the preferred mode for resolving commercial disputes and often a presumption arises that only commercial disputes are amenable to arbitration. A prima-facie examination of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the Act”) makes it evident that the Act does not place any restriction on submitting border disputes to arbitration. The long title of the Act states that the Act has been enacted “to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards”.

Reading the long title of the Act, it is clear that a distinction has been made between domestic arbitration and international commercial arbitration. While in case of international arbitration, the Act restricts itself to only commercial disputes, in case of domestic arbitration, there is no restriction that only commercial disputes can be referred to arbitration.

That fact that there is no restriction to referring inter-state border disputes to arbitration is also borne out from Section 2(4) of the Act. As per this Section, Part I of the Act applies to every arbitration under any other enactment, meaning that if a particular statute provides arbitration as a mechanism to resolve disputes, then such arbitration will be carried out in accordance with the provisions of Part I of the Arbitration and Conciliation Act, 1996. In India, numerous enactments like the Cooperative Societies Act, 1912; the Electricity Act, 2003; etc. provide for

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3 The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)
4 The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996), s.2(4)
5 The Cooperative Societies Act, 1912 (Act No.2 of 1912), s.43(2)(l)
6 The Electricity Act, 2003 (Act No.36 of 2003), s.158
referral of disputes to arbitration. It is important to understand that disputes under such enactments need not necessarily be commercial disputes, yet such disputes are arbitrable under Indian law.

Furthermore, Section 7 of the Act provides that an “arbitration agreement means an agreement by parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not”. This further makes it evident that any dispute can be submitted to arbitration as long as it is in respect of a defined legal relationship. As border disputes fall into the category of disputes which have already arisen, in order to refer such disputes to arbitration, parties (in the case of border disputes, the concerned State Governments) will have to enter into a submission agreement, also referred to as a compromis.

The Hon’ble Supreme Court of India in Booz Allen & Hamilton Inc. vs. SBI Home Finance Ltd. & Ors. has held that “disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration”. It can be argued that border disputes, being in the nature of public disputes and affecting the interests of large number of people, are not amenable to arbitration. However, in the opinion of the author, even inter-state border disputes can be referred to arbitration. This is because the specific question of whether border disputes can be referred to arbitration or not has never come before the Indian judiciary. Further, as will be shown below, it is an accepted international practice to refer border disputes to arbitration.

It is needless to mention that any award resolving an inter-state border dispute will be subject to challenge on the grounds specified under Section 34 of the Act and also “when the terms of submission are departed from or there are fatal omissions, contradictions or obscurities or the arbitrators substantially exceeded their jurisdiction”.

In the next section, an attempt is made to examine the effectiveness of arbitration to resolve inter-state border disputes by relying on cases in the past wherein border disputes have been referred to arbitration. In the examples cited, arbitration was used in a number of ways and it entirely depends of the agreement of the parties as to how they wish to use arbitration to resolve their border disputes. In some instances, the arbitral tribunal was given the power to decide the boundary whereas in other cases the arbitral tribunal examined the boundary determination made by another body.

Jay Treaty, 1794

One of the earliest examples, where a boundary dispute was decided to be referred to arbitration, is found in the Jay Treaty of 1794 between Britain and the United States.  

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7 The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996), s.7
8 (2011) 5 SCC 532
9 The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996), s.34
10 Magnabhai Ishwarbhai Patel vs. Union of India, 1969 AIR 783
11 Treaty of Amity Commerce and Navigation, between His Britannick Majesty; and The United States of America, by Their President, with the advice and consent of Their Senate, available at: https://avalon.law.yale.edu/18th_century/jay.asp (last visited on August 28, 2021)
Article 5 of the said Treaty provided that in case doubts arise regarding which river formed the boundary of the United States of America as mentioned in the Treaty of Peace\(^\text{12}\), then that question shall be referred to a body of three commissioners whose decision shall be final and conclusive. The Treaty of Peace made reference to the St. Croix River and a dispute arose as to which river was truly intended to be the St. Croix River under the Treaty of Peace. The said dispute was referred to arbitration and the arbitral tribunal vide award dated 25\(^\text{th}\) October 1798\(^\text{13}\), determined the river, which was truly intended to be the St. Croix River. Therefore, in this arbitration, the mandate of the arbitral tribunal was limited to determining a factual position on the ground, that is which river was referred to as the St. Croix River and therefore formed the boundary between the two parties.

**Italy – Switzerland arbitration**

By way of arbitration agreement dated 31\(^\text{st}\) December, 1873, the governments of Italy and Switzerland decided to refer the issue “concerning the definitive fixing of the Italian–Swiss frontier at a place called Alpe de Cravairola”, to an umpire, George P. Marsh. In his decision dated 23\(^\text{rd}\) September 1874, the Umpire concluded that Italy had established prima-facie title over the said territory and did not accept the claim of Switzerland that since the territory is much more accessible from Switzerland therefore it can be more conveniently administered by Swiss authorities\(^\text{14}\).

**Rann of Kutch arbitration**

The Rann of Kutch arbitration pertained to the demarcation of boundary between India and Pakistan in the Rann of Kutch. The background of the arbitration was that India claimed that there was no territorial dispute, as according to India, there was a well-established boundary, which needed to be demarcated on the ground. On the other hand, Pakistan claimed that the border ran roughly along the 24\(^\text{th}\) parallel and therefore the dispute involved some 3,500 square miles of territory\(^\text{15}\). Hostilities between Indian and Pakistan broke out in the Rann of Kutch in 1965\(^\text{16}\). In order to effect a cease-fire and restore the status quo as on 1\(^\text{st}\) January 1965, India and Pakistan entered into an agreement on 30\(^\text{th}\) June 1965\(^\text{17}\). Article 3(iii) of the said

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\(^{12}\) The Definitive Treaty of Peace 1783, available at: https://avalon.law.yale.edu/18th_century/paris.asp (last visited on August 28, 2021)

\(^{13}\) Declaration under Article V of the Treaty of 1794, between the United States and Great Britain, respecting the true River Saint Croix, decision of 25 October 1798, available at: https://legal.un.org/riaa/cases/vol_XXVIII/1-4.pdf (last visited on August 28, 2021)

\(^{14}\) Decision of arbitration concerning the definite fixing of the Italian-Swiss frontier at the place called Alpe de Cravairola, available at: https://legal.un.org/riaa/cases/vol_XXVIII/141-156.pdf (last visited on September 23, 2021)


\(^{16}\) Carla S. Copeland, “The Use of Arbitration to Settle Territorial Disputes”, 67 Fordham L. Rev. 3073 (1999). Available at: https://ir.lawnet.fordham.edu/flr/vol67/iss6/7

\(^{17}\) Agreement Between The Government Of India And The Government Of Pakistan Relating To Cease-Fire And The Restoration Of The Status Quo As On 1 January 1965 In The Gujarat/West Pakistan Border And Determination Of The Border In That Area, available at:
agreement provided that in case, agreement was not reached between the two governments on the determination of the border, the two Governments shall have recourse to an arbitral tribunal for determination of the border and the decision of the Tribunal shall be final and binding on the parties.\(^\text{18}\)

In the Rann of Kutch arbitration, the arbitral tribunal was required to decide whether there exists a historically recognized and well-established boundary between the erstwhile State of Kutch and the province of Sind; that whether Great Britain, as the paramount power had accepted the claim of the erstwhile State of Kutch that the Rann was its territory and whether the British authorities in Sind performed acts over the disputed territory which were sufficient in law to confer title of the territory upon Sind.\(^\text{19}\)

The arbitral tribunal relied upon maps, official pronouncements and statements and past incidents when the boundaries in the region were in issue to arrive at its decision. The tribunal awarded 90% of the disputed territory to India by holding that there was no specific evidence regarding display of authority by Sind over such areas. With respect to the remaining area, the Tribunal held that it has been established that there was continuous and intensive activity over such areas by Sind, resulting in Pakistan making out a better title over such areas.\(^\text{20}\) The arbitral award was duly accepted and implemented by both the parties and consequently helped in avoiding hostilities between the two countries.

**Taba Area arbitration**

On 26\(\text{th}\) March 1979, a peace treaty was signed between the Arab Republic of Egypt and the State of Israel. Article IV of the said Treaty provided for the establishment of a Joint Commission for facilitating the implementation of the Treaty. One of the responsibilities of the Joint Commission was to organize the demarcation of the international boundary between the two countries. Disputes arose between the two countries regarding the location of 14 boundary pillars demarcating the international boundary. In order to resolve the dispute regarding the location of the said 14 boundary pillars, Egypt and Israel entered into an arbitration compromis dated 11\(\text{th}\)


September 1986\textsuperscript{22}. The said compromis requested the arbitral tribunal to decide the location of the said 14 boundary pillars and made the award of the tribunal final and binding on the parties. It is clear from the above, that unlike in the Rann of Kutch arbitration, wherein the arbitral tribunals had to determine the entire boundary, the mandate of the arbitral tribunal in the Taba area arbitration was restricted to determining the location of the 14 boundary pillars over which a dispute had arisen between the parties.

In its award dated 29\textsuperscript{th} September 1988, the arbitral tribunal after thoroughly examining the contentions of the parties and taking into consideration the restrictions imposed on its authority by the parties as well as the maps and evidences placed on record, decided the location of the 14 boundary pillars and specified the means by which the award was to be executed\textsuperscript{23}.

The political structure of Bosnia and Herzegovina comprises of two entities, i.e. the Federation of Bosnia and Herzegovina and Republika Srpska. Apart from these two entities, it also comprises the Brcko District\textsuperscript{24}. The Brcko area arbitration is unique because unlike the other arbitrations mentioned in this article, in the Brcko area arbitration, the arbitral tribunal did not limit itself to delimiting the disputed boundary but rather provided for measures affecting the governance, education and military of the Brcko district.

As per the Agreement on Inter-Entity Boundary Line and Related Issues between the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and

\textsuperscript{22} Arbitration Compromis, available at: https://legal.un.org/riaa/cases/vol_xx/1-118.pdf (last visited on August 28, 2021)

\textsuperscript{23} Case concerning the location of boundary markers in Taba between Egypt and Israel, available at: https://legal.un.org/riaa/cases/vol_xx/1-118.pdf (last visited on August 28, 2021)

\textsuperscript{24} Brcko District, available at: https://alchetron.com/Brcko-District (last visited on September 24, 2021)

\textsuperscript{25} Bosnia and Herzegovina, available at: https://en.wikipedia.org/wiki/Bosnia_and_Herzegovina (last visited on September 22, 2021)
the Republic Srpska\textsuperscript{26}, the parties agreed to refer to arbitration the disputed portion of the Inter-Entity Boundary Line in the Brcko area. The dispute essentially revolved around which of the two parties would exercise control over the Brcko area\textsuperscript{27}. Given the complexity and sensitive nature of the dispute and recognizing that it had a very wide jurisdiction under the arbitration agreement, the arbitral tribunal in its award dated 14th February 1997 did not demarcate the boundary but rather provided for supervision of the peace agreement in the Brcko area under the leadership of the Office of the High Representative\textsuperscript{28}.

The arbitral tribunal was faced with three alternatives: (1) transfer the Brcko area to the Federation of Bosnia and Herzegovina; (2) confirm the Republic Srpska’s right of permanent governance or (3) place the governance of the Brcko area in the hands of an independent District government\textsuperscript{29}. The tribunal decided to adopt the third alternative and provided for the establishment of “a new multi-ethnic democratic government to be known as ‘The Brcko District of Bosnia and Herzegovina’”\textsuperscript{30}. The tribunal also provided the manner in which the new district government was to function by providing for a District Assembly, an Executive Board, an independent judiciary and a police force. With respect to the Inter-Entity Boundary Line, the arbitral tribunal stated that “when the Supervisor concludes that the IEBL has ceased to have any legal significance within the District, it will cease to exist within the District”\textsuperscript{31}. Consequently, the arbitral tribunal ordered a status quo on the Inter-Entity Boundary Line. What is interesting to note is that the mandate of the arbitral tribunal did not end with the issuance of the award and the tribunal stated that it shall retain jurisdiction “to modify this Final Award as necessary in the event of serious non-compliance by one or the other of the entities”\textsuperscript{32}. It specifically provided that the tribunal shall remain in existence until such time “(a) that the two entities have fully complied with their obligations to facilitate the establishment of the new institutions herein described, and (b) that such

\textsuperscript{26} Agreement on Inter-Entity Boundary Line and Related Issues between the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republic Srpska, available at: http://hrlibrary.umn.edu/icty/dayton/daytonannex2.html (last visited on September 22, 2021)

\textsuperscript{27} Arbitral Tribunal For Dispute Over Inter-Entity Boundary In Brcko Area, available at: http://www.ohr.int/ohr_archive/brcko-arbitral-tribunal-for-dispute-over-the-inter-entity-boundary-in-brcko-area-award/?print=pdf (last visited on September 22, 2021)

\textsuperscript{28} Arbitral Tribunal For Dispute Over Inter-Entity Boundary In Brcko Area, available at: http://www.ohr.int/ohr_archive/brcko-arbitral-tribunal-for-dispute-over-the-inter-entity-boundary-in-brcko-area-award/?print=pdf (last visited on September 22, 2021)

\textsuperscript{29} Arbitral Tribunal For Dispute Over Inter-Entity Boundary In Brcko Area, available at: http://www.ohr.int/ohr_archive/brcko-arbitral-tribunal-for-dispute-over-the-inter-entity-boundary-in-brcko-area-award/?print=pdf (last visited on September 22, 2021)

\textsuperscript{30} Arbitral Tribunal For Dispute Over Inter-Entity Boundary In Brcko Area, available at: http://www.ohr.int/ohr_archive/arbitral-tribunal-for-dispute-over-inter-entity-boundary-in-brcko-area-final-award/ (last visited on September 22, 2021)

\textsuperscript{31} Arbitral Tribunal For Dispute Over Inter-Entity Boundary In Brcko Area, available at: http://www.ohr.int/ohr_archive/arbitral-tribunal-for-dispute-over-inter-entity-boundary-in-brcko-area-final-award/ (last visited on September 22, 2021)

\textsuperscript{32} Arbitral Tribunal For Dispute Over Inter-Entity Boundary In Brcko Area, available at: http://www.ohr.int/ohr_archive/arbitral-tribunal-for-dispute-over-inter-entity-boundary-in-brcko-area-final-award/ (last visited on September 22, 2021)
institutions are functioning, effectively and apparently permanently, within the Brcko Opstina” 33. Ultimately, the Brcko District was created by the Decision of the High Representative dated 8th March 200034. Finally, a separate “Statute of the Brcko District of Bosnia and Herzegovina35” was enacted. The Statute in Article 1(6) provided that the award of the arbitral tribunal was to prevail in case inconsistencies arise between the award and the statute36. As per Article 4(2) of the Statute, public officials in the Brcko District are required to take an oath that they will uphold the award of the arbitral tribunal37. Similarly, the District Courts in the Brcko District are mandated to render justice in accordance with the awards of the arbitral tribunal38. It is pertinent to understand that in light of the complexity of the dispute and the significant economic and social ramifications that could have arisen on account of the dispute, the arbitral tribunal did not limit itself to delimiting the disputed portion of the boundary.

Abyei Area arbitration

The status of the Abyei area has been a source of conflict between Sudan and South Sudan for over 50 years39. As per the Protocol signed between the Government of Sudan and the Sudan People’s Liberation Movement / Army on the Resolution of the Abyei Conflict dated 26th May 200440, the geographic boundaries of the Abyei area were to be determined by the Abyei Boundaries Commission (ABC). Clashes and disputes arose over the boundaries demarcated by the ABC and it was agreed to refer the same to arbitration at the Permanent Court of Arbitration41.

33 Arbitral Tribunal For Dispute Over Inter-Entity Boundary In Brcko Area, available at: http://www.ohr.int/ohr_archive/arbitral-trial-for-dispute-over-inter-entity-boundary-in-brcko-area-final-award/ (last visited on September 22, 2021)
As per the arbitration agreement dated 07th July 2008, the arbitral tribunal was called upon to decide whether or not the Abyei Boundaries Commission (ABC) had exceeded its mandate which was to "define (i.e. delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905, based on the submissions of the Parties". The arbitral tribunal in its award dated 22nd July 2009 held as follows: that the ABC had reasonably determined the northern boundary of the Abyei area; that there was no dispute regarding the southern boundary and that the western and eastern boundaries were not drawn by the ABC in compliance with its mandate. The arbitral tribunal thereafter delimited the eastern and western boundaries of the Abyei area.

It is therefore evident that the mandate of the arbitral tribunal was two-fold. In the first instance, it had to examine the delimitation made by the ABC and decide whether the ABC had exceeded its mandate. Only if the arbitral tribunal held that the ABC had exceeded its mandate, would it get the jurisdiction to delimit the boundaries on its own.

Why border disputes should be referred to arbitration

There are number of reasons why border disputes should be referred to arbitration. Firstly, as each border dispute is sui generis, it is not possible to evolve a uniform procedure to be applied for resolving every border dispute. In such a situation, the ability of an arbitral tribunal to decide its own
procedure and the power of the parties to agree on a procedure to meet any unforeseen contingencies, gives the arbitral tribunal the flexibility to mold the procedure as per the needs of the situation. Secondly, as border disputes affect the day-to-day lives of people, it is desirable that such disputes are resolved in as little time as possible. In arbitration, it is possible for the parties to agree to strict time-frames and impose an obligation on the arbitral tribunal to render the award within a certain period of time. Thirdly, parties to an arbitration are free to impose restrictions on the authority of the tribunal, for example, in the Taba Area arbitration, the arbitral tribunal could not “establish the location of a boundary pillar other than a location advanced by Egypt or by Israel”. This is particularly relevant as such restrictions cannot be placed on the authority of a judicial body. A point of concern in arbitrating boundary disputes could be that as arbitration is by its nature a confidential process, all parties interested in the award, would not be able to witness the proceedings as they could if the dispute had been referred to a judicial tribunal. It is however important to bear in mind that confidentiality can be waived and arbitration proceedings can be broadcasted as was done in the Abeyi arbitration.

Conclusion

With border disputes festering in India for a long time, there is always the possibility that such disputes may lead to hostilities. As border disputes affect the daily lives of a large number of people, there is a need to resolve such disputes amicably and urgently. As examined above, arbitration has long been recognized as a means to resolve border disputes between countries and there appears to be no restriction under Indian law to referring inter-state border disputes for settlement by arbitration. It is needless to mention that the arbitration agreement forms the fulcrum of the scope, jurisdiction and final decision of the arbitral tribunal. The arbitral tribunals can be given the power to demarcate the entire boundary or to delimit only the disputed portions of the boundary or to examine the delimitation done by a boundary commission. Furthermore, if the agreement is widely worded, an arbitral tribunal can also provide for supervision of the disputed area by an independent third party. In light of the same, arbitration can be explored as a means to peacefully resolve inter-state border disputes in India.

45 Case concerning the location of boundary markers in Taba between Egypt and Israel, available at: https://legal.un.org/riaa/cases/vol_xx/1-118.pdf (last visited on September 22, 2021)