

Indian Law and the 'Enron Agreement'

Author(s): Kannan Srinivasan

Source: *Economic and Political Weekly*, Vol. 30, No. 20 (May 20, 1995), pp. 1153-1154

Published by: Economic and Political Weekly

Stable URL: <http://www.jstor.org/stable/4402753>

Accessed: 13/11/2008 01:15

Your use of the JSTOR archive indicates your acceptance of JSTOR's Terms and Conditions of Use, available at <http://www.jstor.org/page/info/about/policies/terms.jsp>. JSTOR's Terms and Conditions of Use provides, in part, that unless you have obtained prior permission, you may not download an entire issue of a journal or multiple copies of articles, and you may use content in the JSTOR archive only for your personal, non-commercial use.

Please contact the publisher regarding any further use of this work. Publisher contact information may be obtained at <http://www.jstor.org/action/showPublisher?publisherCode=epw>.

Each copy of any part of a JSTOR transmission must contain the same copyright notice that appears on the screen or printed page of such transmission.

JSTOR is a not-for-profit organization founded in 1995 to build trusted digital archives for scholarship. We work with the scholarly community to preserve their work and the materials they rely upon, and to build a common research platform that promotes the discovery and use of these resources. For more information about JSTOR, please contact support@jstor.org.



Economic and Political Weekly is collaborating with JSTOR to digitize, preserve and extend access to *Economic and Political Weekly*.

Indian Law and the 'Enron Agreement'

Kannan Srinivasan

The Power Purchase Agreement (PPA) between the Dabhol Power Company and the Maharashtra Electricity Board raises two important issues in law. First, the stipulation in the PPA for settlement of disputes by arbitration in UK is legally untenable. Second, the PPA violates the law of the Indian Constitution on public utilities.

THE Power Purchase Agreement signed by the Dabhol Power Company (DPC) with the Maharashtra State Electricity Board (MSEB) raises two important issues in law. First, since the PPA stipulates that any dispute must be settled by arbitration in the UK, the question arises as to whether a foreign arbitration is appropriate in this dispute; and whether MSEB may subject itself to a foreign jurisdiction. And, secondly, it may violate the law of the Indian Constitution on public utilities.

ARBITRATION

Clause 20.3 of the PPA says: "Where any dispute is not resolved as provided for in Clause 20.2, then the following provisions shall apply:

(a) The dispute shall be submitted to arbitration at the request of either party upon written notice to that effect to the other party (a 'Notice of Reference') in accordance with the provisions of the UNCITRAL Rules for International Arbitration in force at the date of this agreement. Any arbitration pursuant to this clause shall be an international arbitration conducted under the New York Convention of 1958 and shall not be deemed to be a domestic arbitration under the laws of India or any other country.

(b) The place of arbitration shall be London...

(d) (ii) in the event that the parties are unable to agree as aforesaid upon an appointing authority, the arbitrator(s) shall be appointed on the application of either party by the president from time to time of the Electricity Supply Industry Arbitration Association of England and Wales (the 'president') the decision of whom as to the identity of the arbitrator(s) shall be final."

Now this agreement was made by MSEB with Dabhol Power Company – which contrary to popular impression is not a foreign company, but registered in India – and therefore an Indian juridical person. So here we have the unusual situation of two Indian companies – both resident and domiciled and carrying on business in India – choosing a foreign jurisdiction to settle their dispute.

Under private international law the entire question of the choice of law arises when – between two parties of different jurisdictions – the convenient and appropriate forum needs to be decided. The question

then arises, to which jurisdiction the two parties are most closely connected. In that case the forum can then be that of either party or a third, and neutral, forum.

Disputes about the choice of forum have always arisen when parties have belonged to two different jurisdictions, not the same. But the intention of the law is implicit in Supreme Court judgments such as *British India Steam Navigation Co Ltd v Shanmughavilas Cashew Industries*, written by justice K N Saikia in 1990, which quotes *Westlake's Treatise on Private International Law*:

"The principal grounds for selecting a particular national jurisdiction in which to bring an action are that the subject of the action, if a thing, is situate, if a contract, was made or was to be performed, if a delict, was committed, within the territory: hence the *forum situs*, or *rei sitae*, *contractus*, *delicti*, the two latter of which are classed together as the *forum speciale obligationis*. Or that the jurisdiction is that in which all the claims relating to a certain thing or group of things ought to be adjudicated on together, the *forum concursus*; or that to which the defendant is personally subject, the *forum rei*."

But this choice is not available to two domestic parties who attempt a foreign forum to resolve their dispute. The UNCITRAL Rules of Arbitration exist for the purpose of resolving disputes between persons of two different jurisdictions. An arbitration could take place under UNCITRAL between Enron and MSEB. But there is in fact no agreement between them.

The arbitration of an agreement between DPC and MSEB under Indian law can only take place in India. The entire PPA is consequently affected by this infirmity.

Moreover, the balance of convenience may demand an Indian forum. The arbitrators cannot compel witnesses to appear in London. Nor can they compel production of all relevant documents. In order to take evidence from overseas, the arbitrators can appoint a commission. On the other hand, such a commission will have very limited powers and can do no more than passively take evidence. Should the award not be given on time, would it still be valid? Would an extension of time be valid? What if it becomes necessary to remove the arbitrator?

Now the argument has been made that DPC is Indian only in a nominal sense since it is an unlimited liability company wholly composed of the holdings of three foreign companies. So, runs DPC's argument, it is in some sense a foreign company and even assuming that one Indian party cannot litigate against another abroad, DPC does not fall within the ambit of this proscription.

But even should we pierce the corporate veil we shall arrive at no more assets than of those shell Mauritius firms. Unlimited liability exists here only to be taxed in India as an Indian company (and not as a mere branch of a multinational in India). So clearly DPC is an Indian juridical person. And DPC and MSEB's clandestine attempt to oust Indian jurisdiction could be held illegal.

The government of Maharashtra has waived its sovereign immunity. Now the limitations to immunity are well recognised – for instance, in the case of ships and aircraft, travelling over the world, carrying on business or trade all over the world. By this, the sovereign has necessarily entered the market place and submitted itself to a foreign jurisdiction. This is not the case here. Here we have the anomaly of a sovereign waiving its immunity to permit itself to be sued by one of its own subjects in a foreign forum.

Moreover, the government of Maharashtra has guaranteed MSEB's payments. And the Indian government has counter-guaranteed Maharashtra's guarantee – a straight line runs from the electricity board's office to the president of India.

Against that, DPC is owned by three shell firms located in offshore tax havens – Enron Mauritius, Enterprises Mauritius (promoted by Bechtel Enterprises Inc) and GE Mauritius. They are insulated by multiple screens from Enron and its US co-promoters. Although DPC is an unlimited liability company, this will not devolve on the US parent.

Evidently, the two parties are dissimilarly situated. On one side, any assets of the Indian state internationally available are at risk – such as, say, its embassy in Washington. The government could have violated its responsibilities in trust by exposing its citizens' interests to disproportionate risk.

ELECTRICITY UNDER INDIAN LAW

Now the agreement says that the assets of the Dabhol Power Company cannot be acquired compulsorily. They can only be purchased if DPC will sell them, and only at 'fair market value'. Few international investors may see anything objectionable in that requirement.

Yet – as Sunip Sen, advocate, Bombay High Court, points out, it goes against the law of the land as laid down by the Supreme Court. So Indian courts may intervene and strike down such an agreement as *ultra vires* the Constitution of India.

In important judgments in recent years, the Supreme Court of India, construing the Directive Principles of State Policy, has laid down that electricity constitutes a "material resource of the Indian people" which can override a private right to ownership of the means of generation and distribution and limit profits so enjoyed. And when such assets are acquired under the statutory provisions of the Electricity Acts of 1910 and 1948 this could be at book value – not market value.

These principles were explicitly stated in 1990 by a Bench headed by chief justice R S Pathak which decided *Tinsukhia Electric Supply Co Ltd v State of Assam*, and *Maharashtra State Electricity Board v Thane Electric Supply Board*. This is what justice Venkatchaliah who delivered both judgments said in the latter:

"The terms on which a franchise is created and conferred are amenable to unilateral alteration to the disadvantage of the licensee include the term pertaining to the quantification of the price payable for the take over...The idea of 'market value' was done away with and was substituted by the concept of an 'Amount' which was to be limited to the 'depreciated book value'. There can be no dispute that electricity supplied by even a private enterprise will amount to 'material resources of the community...'"

Sen argues that DPC's substitution of this scheme of compensation with a private treaty would seem a violation of those statutes as interpreted by the Supreme Court. In the Indian Constitution's scheme of government, the Directive Principles – for the most part general exhortations concerning public welfare – are meant to inform all state action. Now, the court cannot give a mandamus saying implement this or that Principle. But it can intervene and restrain gross abuse. While it may not demand nationalisation with nominal compensation, Sen maintains it can restrain the opposite – especially when it amounts to preferential treatment in relation to other investors.

So it is questionable whether the 'material resources of the nation' as declared by the Supreme Court can be awarded to foreign investors for very substantial profit – when Indian firms have been taken over at a nominal price. So recent amendments to the Electricity Acts, made in haste only to assure the returns of a handful of investors, may on this ground be struck down. And, secondly, whether the state can create a situation when the acquisition of the assets of international investors in electricity generation would, if taken over, have to be compensated at market not book value, in direct contravention of the Supreme Court judgment.

It may not be enough for the government to say that in 1990 it believed electricity to

be a public good; but by 1991 decided that it should be private. The government will have to amend the Constitution if it wishes to secure this result.

And what would be the cost of cancellation? Two months ago, Enron issued a statement that should the government seek cancellation, it would cost it \$ 100 million. Last week, a company official said in the press that this could amount to \$ 200

million. Now under Section 74 of the Indian Contracts Act, payments in the event of a breach must be "reasonable compensation". But the principle is well accepted in common law. There cannot really be penalty clauses. Such an agreement would be void *in terrorem* – for attempting to intimidate and terrorise a contracting party.

DPC can lawfully only obtain the actual costs incurred should the PPA be cancelled.

Ethnicity, Communalism and State Barpeta Massacre

Monirul Hussain

Internal power struggles goaded the Bodo movement into acts of ethnic chauvinism, culminating in the massacre of Muslims in Barpeta.

THE post-colonial society in Assam has been experiencing very significant social transformation. Apodictically, the society in Assam has transformed very distinctly into a notoriously violent society without any tangible sign of abnegation. Violence has been an inseparable part of Assam's social and political development since independence. Apart from communal violence in the wake of India's partition, particularly in districts of lower Assam, society again experienced violence during the two important movements based on the linguistic-cultural identity of the Assamias in 1960 and 1972. Further, since the AASU agitation in the early 1980s, Assam has been churned in the cauldron of communal, ethnic and state violence. The situation has worsened due to the violence perpetrated by various insurgent outfits fighting for secession from the Indian union without any tangible mandate from the people whom they claim to represent. Besides, the state has successfully shifted its burden of the insurgents to the civil society however after lumpenising them thoroughly. The 'surrendered' elements of the United Liberation Front of Assam (ULFA) now known as the SULFA, too have been indulging in violence, except of course, without challenging the state authority. Significantly, violence has been institutionalised parallel to the state. Obviously, therefore, the state violence too has multiplied simultaneously. In the process, severe strain has been exercised on human and democratic foundations of contemporary Assamese society.

In July 1994, the northern parts of the Barpeta district in lower Assam witnessed a series of massacres of the Muslim peasants of East Bengal origin, and now largely Assamised by Bodo militants. It is estimated that about 1,000 people, mostly women and children, were killed, thousand injured and about 60 villages burnt down to ashes. A few weeks prior to the Barpeta massacre, the

Bodo militants organised systematic massacre of Muslim peasants in Kokrajhar and Bongaigaon districts. The massacres of Kokrajhar and Bongaigaon failed to adequately alert the state and the civil society. By and large, both these massacres remained inconspicuous. However, the Barpeta massacre gained limelight mainly because the militants not only killed the innocents in their homes, fields, forests and villages, they did not spare even those who took shelter at the Banhbari relief camp run by the state. They were gunned down in the midnight by militants with sophisticated arms and ammunition. The Banhbari camp became one of those rare relief camps wherein the unarmed inmates were killed mercilessly. Obviously, the state failed to protect the very fundamental human right to live. Even people in a relief camp opened by the state had no protection, not to talk of inaccessible scattered villages. Ironically, these traumatised people were assured of all kinds of protection by the head of the state government on the very day of the massacre.

THE MASSACRE

Since all the victims were Muslims the massacre was labelled as communal, as if whenever victims are Muslims, it is to be characterised so. Though communalism played a role, it would be erroneous to characterise the Barpeta massacre as simply communal one. Here, it is imperative to understand how emerging ethnic movements have politicised Assamese society, and what the state response has been to these ethnic movements and the victimised religious minority.

In India, political violence has both general and specific characteristics. The Barpeta massacre, too, is no exception. The general character of the massacre is that the victims were innocent people who had been struggling hard for survival like most other victims of politically-oriented violence