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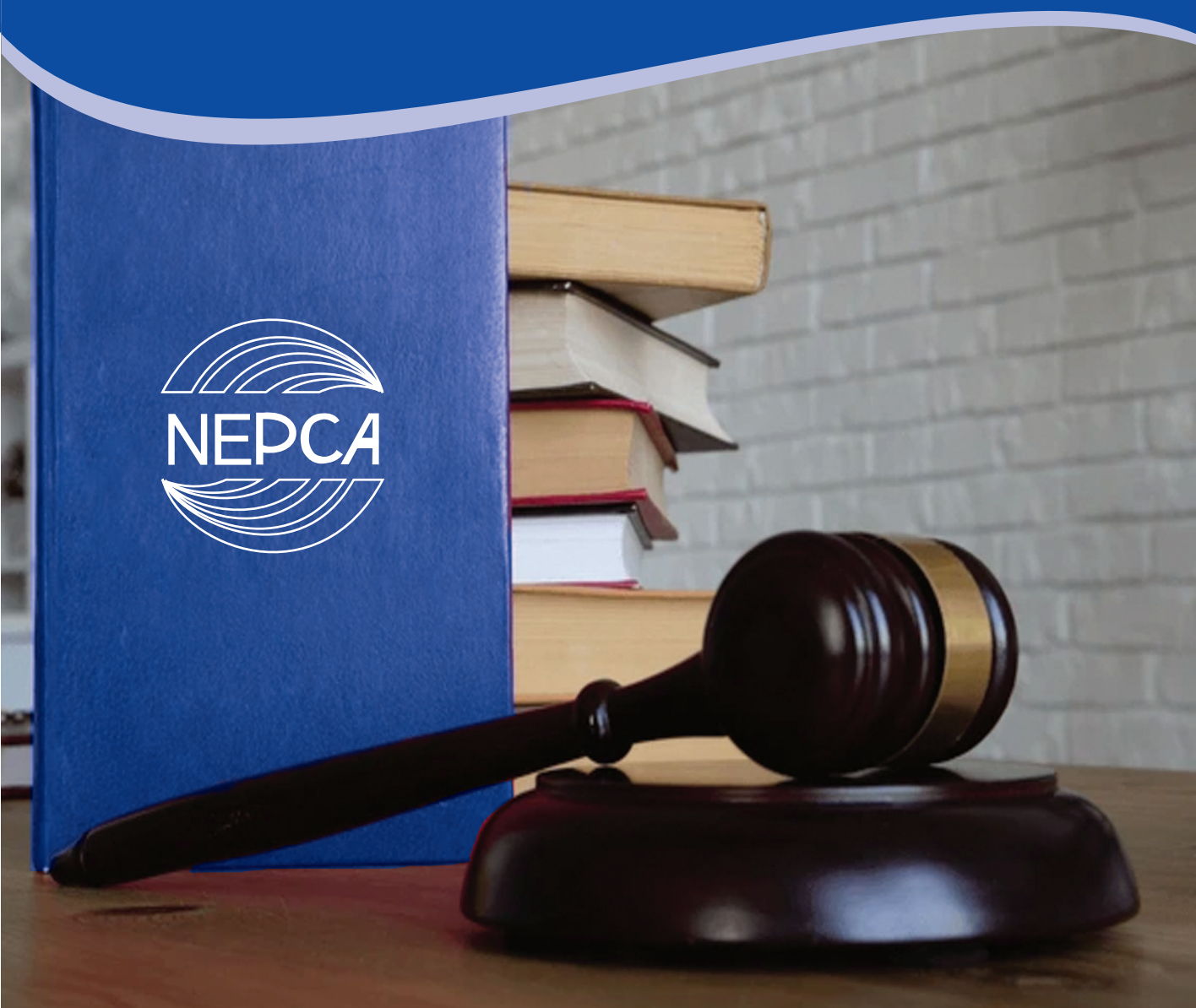
NEPCA INSIGHTS

Resolving Disputes Alternatively



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CONTENT PAGE

NEPCA AT A GLANCE

Nepal Council of Arbitration "NEPCA" founded in 1991 is an autonomous and non-profitable organization, established to administer arbitration and other alternative methods of dispute resolution in an expeditious and less expensive manner by arranging co-operation from the concerned sector. Furthermore, it is committed for the institutional development of Acts and proceedings related thereto, for the settlement of national and international disputes of development, construction, industry, trade and other nature which are to be resolved through arbitration.

NEPCA provides administrative services for arbitrating different kinds of dispute at reasonable fees. The council is not involved in deciding cases but supplies lists of individuals from which the parties mutually select impartial arbitrators. Arbitration is conducted by specific rules and procedures, and the awards by arbitrators are legally binding and enforceable.

NEPCA provides arbitration facilities for settlement of all types of commercial and construction disputes between Nepalese parties or between Nepalese and foreign parties. Arbitration procedures of NEPCA are framed in accordance with international standards and it maintains comprehensive list of Panel of arbitrators.

Experts in various fields and professions renowned for their knowledge, integrity and dispute resolution skills are listed on the council's Panel of Arbitrators for referrals to parties involved in disputes.

Main objectives

- To initiate, promote, protect and to institutionally develop activities relating to arbitration including other alternative methods of dispute resolution in Nepal.
- To provide necessary suggestions to the concerned agencies for the periodical amendment and alteration to and development of prevailing laws and regulations relating to arbitration, by undertaking study, analysis and research on them, and to generate favourable public opinion for this purpose.
- To arrange and manage all kinds of services, facilities and instruments as required for the settlement of disputes, of national and international nature arising within the territory of Nepal, to be settled through arbitration and other alternative methods of dispute resolution with the assistance of the Council.
- To maintain relation with individuals and institutions involved in different professions and business for arbitration of disputes relating to various nature and subject matters, and to prepare the list of proper arbitrators.
- To prepare code of conduct of arbitrators and to create proper environment for its implementation.

- To maintain relation with individuals and institutions involved in different professions and business for arbitration of disputes relating to various nature and subject matters, and to prepare the list of proper arbitrators.
- To prepare code of conduct of arbitrators and to create proper environment for its implementation. As regards resolving disputes of national and international character occurring within the Nepalese territory that need to be decided by the Council through arbitration and other alternative means, to provide for and ensure all kinds of services, facilities and means, subject to prevailing laws, including framing internal work procedures concerning arbitration and internal rules for all kinds of proceedings including administrative, and to implement or cause to implement them.

Supplementary objectives

- To organize necessary training, instruction, symposium, workshop and talk programs for the development of skilled Nepalese manpower needed for the resolution of all kinds of disputes through arbitration and other alternative methods.
- To establish a well-equipped library having collected books, journals, and rules and regulations of national, international and regional institutions, on arbitration and other alternative methods.
- To acquire membership of other national, international and regional institutions having similar objectives, to provide its membership to them and to maintain relationship, cooperation, exchange experiences and views with such organizations and institutions.
- To receive, earn, acquire, possess and dispose of movable and immovable properties for the uplifting of the Council.
- To hire or give on rent land and building for the purpose of the Council.

Organization structure

The General Assembly is the main deliberative body of the Council which consists of the Members of NEPCA; Ordinary and Life, Individual and Institutional. This general body elects executive committee for a term of three years and provides suggestions/directions to the executive committee as required.The Executive Committee then elects the office bearers.

Membership

Any institution, individual, agency, law practitioner, engineer, jurist, judge, construction contractor etc., directly or indirectly engaged in the activities and proceedings relating to arbitration are eligible for the membership of the Council.

Types of membership

The Council has the following three types of members.

1. Individual Member

   a. Life Member

   b. Ordinary Member

2. Institutional Member

a. Ordinary member

Qualifications for membership

An Individual who is a graduate and has been involved in activities relating to arbitration shall be eligible for individual membership of the Council. Such individual shall be eligible for life membership once he/she has attained the age of 40 years.

Any institution established under the prevailing laws and associated directly or indirectly with the activities relating to arbitration shall be eligible for institutional membership.

Services offered

NEPCA provides administrative services for arbitrating different kinds of dispute at reasonable fees. The council is not involved in deciding cases but supplies lists of individuals from which the parties mutually select impartial arbitrators. Arbitration is conducted by specific rules and procedures, and the awards by arbitrators are legally binding and enforceable.

Arbitration Facilities

NEPCA provides arbitration facilities for settlement of all types of commercial and construction disputes between Nepalese parties or between Nepalese and foreign parties.

Arbitration procedures of NEPCA are framed in accordance with international standards and it maintains a comprehensive list of Panel of arbitrators.

Arbitrators panel

Experts in various fields and professions renowned for their knowledge, integrity and dispute resolution skills are listed on the Council's Panel of Arbitrators for referrals to parties involved in disputes.

Informational Services

NEPCA provides information and advice to interested parties concerning arbitration laws and facilities and maintains cooperative links with national and international bodies throughout the world.

Training

NEPCA conducts trainings, workshops, seminars, conferences, talk programs, skill development program, etc. regularly within the country to promote wider use and better understanding of arbitration, mediation, adjudication, dispute board decision and other conflict resolution processes. Programs can be specially designed as per the need of individual groups and member organizations.

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Trends of Arbitration Proceeding Conducted by NEPCA

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Director, NEPCA

Bipin Paudel
Manager, NEPCA

Abstract

This study provides a comprehensive analysis of arbitration practices administered by the Nepal Council of Arbitration (NEPCA), focusing on recent cases from the fiscal year 2080/81 BS. It examines key aspects including document submission durations, case completion times, financial outcomes, rules applied, industry distribution, and tribunal compositions. The findings reveal that in 42% of cases the Statement of Claim (SOC) was submitted almost in deadline and all SOC were submitted within the stipulated deadline and average duration for submitting Statements of Defense (SOD) is 60.2 days, with substantial variability indicated by a high standard deviation. The average case completion time is 386.025 days, reflecting significant variability, with delays primarily attributed to payment issues. The average claim-to-award ratio is 29.44%, emphasizing the importance of well-substantiated claims to achieve favorable financial outcomes. The analysis also highlights that the majority of cases involve the construction and engineering sectors and are predominantly national, with government entities being the main participants. The study identifies NEPCA Rules, 2016 as the most frequently applied framework, with minimal use of UNCITRAL Rules. Recommendations for improving arbitration processes include streamlining document submissions, enhancing case management practices, and promoting diverse tribunal compositions. The study's limitations include its focus on a single fiscal year and exclusion of cases resolved through amicable settlements. Future research should explore comparative practices, technological advancements, and stakeholder feedback to further enhance arbitration efficiency at NEPCA.

Objective

To analyze and present the trends and patterns in arbitration cases handled by NEPCA, with a focus on document submission durations, case completion times, financial outcomes, rules applied, industry categories, contract types, provincial distribution of projects in Arbitration, tribunal combinations, and the nature of parties involved.

Keywords— *Arbitration Trends, Arbitration Rules, Arbitration Efficiency, Dispute Resolution,*

Introduction

Founded in 1991, the Nepal Council of Arbitration (NEPCA) is an autonomous, non-profit organization dedicated to administering arbitration and other alternative dispute resolution methods. NEPCA

aims to resolve disputes efficiently and cost-effectively, leveraging cooperation from relevant sectors. The organization is committed to the institutional development of arbitration laws and procedures, facilitating the settlement of national and international disputes in development, construction, industry, trade, and other fields through arbitration.

With a notable increase in case registrations and the rising importance of arbitration, this study examines the practices administered by NEPCA, focusing on their impact on dispute resolution in Nepal.

NEPCA, a pioneering institution in Nepal, has significantly advanced the arbitration sector and is recognized by esteemed international arbitration institutions. This study aims to provide a comprehensive overview of arbitration at NEPCA, offering insights into the current state of arbitration in Nepal. It identifies opportunities for improvement and the adoption of best practices, making it a valuable resource for parties involved in arbitration, scholars, law practitioners, engineers, and arbitration enthusiasts. This article seeks to provide both national and international audiences with a clear and detailed picture of how arbitration is conducted and its current state in Nepal, making it a valuable resource for anyone interested in the subject.

Methodology

Explanation of Data Collection and Analysis Methods

- **Data Collection:**

1. **Source of Data:** The primary data for this study was obtained from the records of the Nepal Council of Arbitration (NEPCA). This includes official documents submitted by parties involved in arbitration, case management records, award documents, and tribunal composition records.
2. **Data Extraction:** Information was systematically extracted from maintained NEPCA's database and case files, ensuring all relevant data points such as submission durations, case timelines, financial details, and tribunal compositions were captured.
3. **Verification:** The collected data was cross-verified with case managers and involved parties to ensure accuracy and completeness.

- **Data Analysis:**

1. **Quantitative Analysis:** Statistical methods were employed to analyze the numerical data. Descriptive statistics such as mean, median, standard deviation, and range were calculated for durations, financial amounts, and case timelines.
2. **Comparative Analysis:** Data was categorized based on different variables like industry type, provincial location, and tribunal composition. Comparative analysis was performed to identify patterns and differences across these categories.
3. **Visualization:** Data visualization techniques were used to represent the findings graphically. This included bar graphs, pie charts, scatter plots, and maps to provide clear and comprehensive insights.

- **Description of the Arbitration Case Size and Period Covered**

Arbitration Case Size:

1. **Total Cases Analyzed:** The study analyzed a total of 40 arbitration cases handled by NEPCA which were completed during the FY 2080/81 BS.
2. **Selection Criteria:** Cases were chosen based on their completeness of records ensuring a balanced and comprehensive analysis.

- **Period Covered:**

1. **Timeframe:** The study covers arbitration cases from 1st Shrawan 2080 to 31 Asar 2081. This period was selected to capture recent trends and practices.
2. **Limitations**

- **Data Exclusions:** Cases resolved through amicable settlements and those with incomplete records were excluded wherever necessary, potentially affecting the comprehensiveness of the analysis.

Documents Submission Trends

The analysis was conducted on 35 Arbitration cases. Cases that were resolved through amicable settlement (3 cases) and those where the SOD was not submitted (2 cases) were excluded. Initially, there were 40 cases, but the sample was refined to ensure meaningful conclusions.

Timely submissions of key documents, such as the SOC and SOD, are crucial for maintaining the efficiency of the arbitration process. The adherence to deadlines ensures that proceedings progress without unnecessary delays. [1] Delays in the submission of these documents can disrupt the arbitration timeline and increase the overall case duration. [2]

Line Graph showing the SOC, SOD and Rejoinder submission trends in arbitration cases where the Y-Axis represents the number of days.

P-C: Actual Duration of Preliminary Meeting to SOC Submission.

P-C Norm1: Submission of SOC as per Arbitration Act, 1999 i.e. 90 days.

P-C Norm2: Submission time of SOC in accordance with NEPCA Rules, 2016 i.e. 60 days.

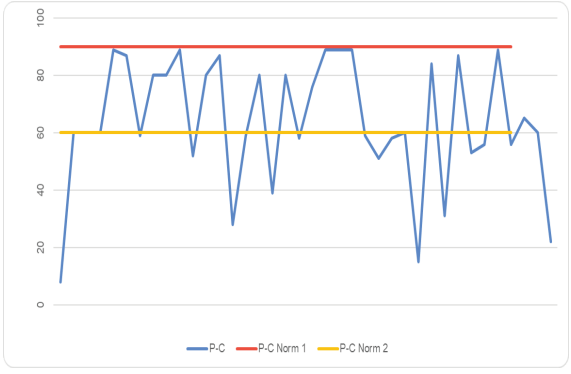

Fig 1: Submission Trend of SOC

C-D: Actual Duration of SOC Submission to SOD Submission.

C-D Norm: Submission time of SOD in accordance with Arbitration Act, 1999 and NEPCA Rules, 2016 i.e. 30 days.

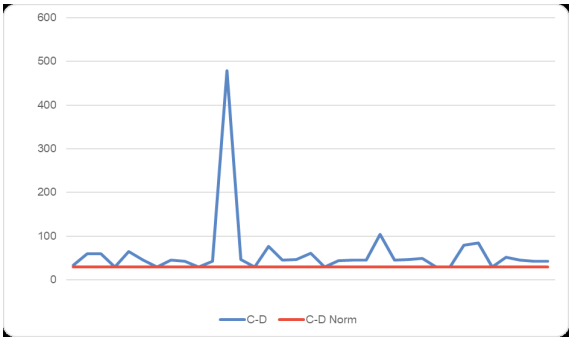

Fig 2: Submission Trend of SOD

D-R: Actual Duration of SOD Submission to Rejoinder Submission.

D-R Norm: Submission time of Rejoinder in accordance with Arbitration Act, 1999 and NEPCA Rules, 2016 i.e. 15 days.

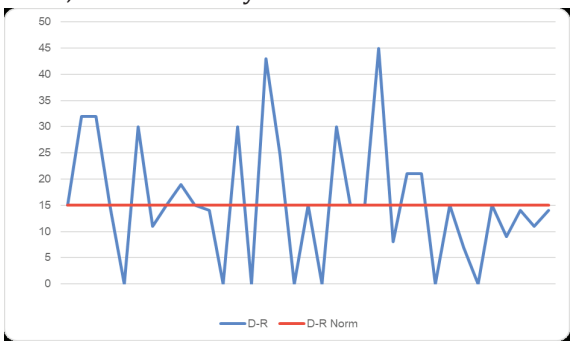

Fig 3: Submission Trend of Rejoinder

Findings

- **In Statement of Claim (SOC):** In 42% of cases the SOC was submitted almost in deadline
- **In Statement of Defense (SOD):** An extension of time for submission was requested in nearly 77% of cases.

The average days of submission of SOD is 60.2 days. This value gives an overall sense of the typical duration, but it can be influenced by extreme values (very high or very low durations).

The median time is 45 days, which means that half of the cases take less than 45 days and half take more.

A standard deviation of 74.88 days signifies high variability in submission durations. This high standard deviation compared to the mean suggests substantial variability, with some cases taking considerably longer to submit SOD, leading to a wide range of case durations.

The longest delay observed was 479 days, attributed to the respondent's reluctance to participate in the arbitration proceedings.

- **In Rejoinder:** In 31 % cases where Extension of Time was applied.

The average days of submission of Rejoinder is 16 days

The median time is 15 days and the standard deviation is 11.96 days.

A standard deviation of 11.96 days reflects moderate variability in submission durations.

3. Case Completion Trend

This section examines the duration from the preliminary meeting to the date when an award is rendered, highlighting the variability in arbitration case completion times.

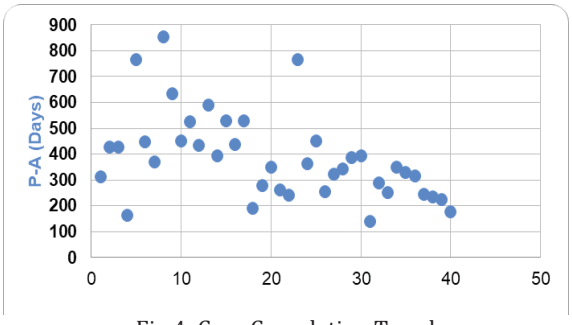

Fig 4: Case Completion Trend

Findings:

- **Average time for completion is 386.025** days
- **The median duration is 355 days**, indicating that half of the cases are resolved in less than 355 days, and half take longer.
- **The standard deviation is 165.68 days** which is high indicating significant variability in the durations of cases, suggesting that the time taken to reach an award can vary widely.

- **Reasons for Delay:**

Reasons	Percentage
Delay in Payment	70%
Court Process	10%
Due to Party	10%
Other	10%

- **Extreme Cases:**
- Maximum duration for case completion: 855 days, due to delays in payment from a party.
- Minimum duration for case completion: 138 days, achieved through expedited processes such as swift submissions of the Statement of Claim (15 days), Statement of Defense (30 days), and Rejoinder (10 days), along with timely payments by both parties. Additionally, this case involved a tribunal with a sole arbitrator, which likely contributed to the faster resolution.

Financial Outcomes Of Arbitration

This section explores the relationship between the claim amounts submitted and the awards rendered in arbitration cases. The analysis was conducted on a sample of 37 cases. Cases that were resolved through amicable settlement (3 cases) were excluded.

The relationship between claim amounts and awarded amounts in arbitration has been extensively studied. Research suggests that arbitral tribunals often award amounts significantly lower than the claims presented, which reflects a balancing act between the claimant's expectations and the evidence provided. [2]

Findings:

- **Claim to Award Ratio:** The average ratio of awarded amounts to claim amounts is 29.44%.
- **All Rejected Claims:** In approximately 5% of the cases, all claims were rejected, underscoring the importance of presenting well-substantiated and justified claims in arbitration.
- **All Accepted Claims:** In approximately 8% of the cases all claims were accepted, where the Claims were well-substantiated and justified during the course of Arbitration.

The Maximum Amount awarded in an Arbitration Case for the Fiscal Year 2080/81 is NRs. 28,85,45,410/-.

Rules Applied

Arbitration cases administered by NEPCA typically follow a combination of NEPCA Rules, the Arbitration Act, 2055, and the UNCITRAL Rules. This section analyzes the distribution of these rules in recent arbitration cases, highlighting the preferences and trends in rule application.

The choice of rules often reflects the nature of the dispute, the parties involved, and their familiarity with specific arbitration frameworks. [3]

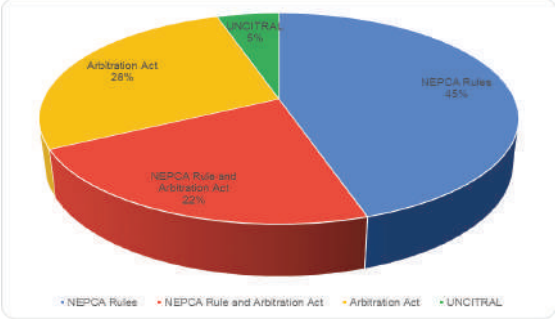

Fig 5: Distribution of Rules Applied in Arbitration Cases

Findings:

In Awards rendered in the fiscal year 2080/81 B.S., the majority of arbitration cases utilized the

NEPCA Rules, 2016, followed by the Arbitration Act, 1999, and the combined use of both. The UNCITRAL Rules were applied in a minority of cases, mainly those involving international elements. These findings highlight the preference for NEPCA's tailored approach to arbitration within Nepal, while still accommodating international standards when necessary.

Industry Category

This section examines the distribution of arbitration cases across various industry sectors, highlighting trends and the predominance of specific industries in arbitration proceedings in NEPCA.

Studies indicate that the choice of dispute resolution mechanism in various industries is influenced by factors such as contract size, complexity, and the international nature of the parties involved. [4] The prevalence of arbitration in different industries often reflects the complexity and contractual nature of the disputes involved. The construction and engineering sectors, known for their intricate contracts and frequent disputes, commonly rely on arbitration for efficient resolution. [5]

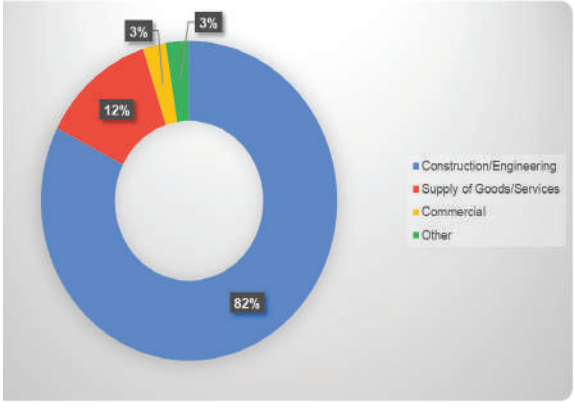

Fig 6: Cases in Each Industry Category

Findings:

- **Construction and Engineering:** In the fiscal year 2080/81 B.S., approximately 82% of arbitration cases involved the construction and engineering sectors. This high percentage underscores the complexity and frequent disputes in this industry.
- **Supply of Goods/Services:** These cases constituted 12% of the total, reflecting the industry's less frequent reliance on arbitration compared to construction and engineering.
- **Other Categories:** Only 3% of cases fell into other categories, indicating that industries outside of construction, engineering, and goods/services are less commonly involved in arbitration proceedings. whereas only 13% are of Supply of Goods/Services. Only 3% cases of other category.

National And Interaction Cases

This section analyzes the ratio of national to international arbitration cases, shedding light on the scope and nature of disputes handled by NEPCA.

The distinction between national and international arbitration cases often hinges on the nature of the contract and the parties involved. National Competitive Bidding (NCB) cases typically involve domestic parties and projects, whereas International Competitive Bidding (ICB) cases engage international parties and may be subject to additional complexity and cross-border considerations. [1]

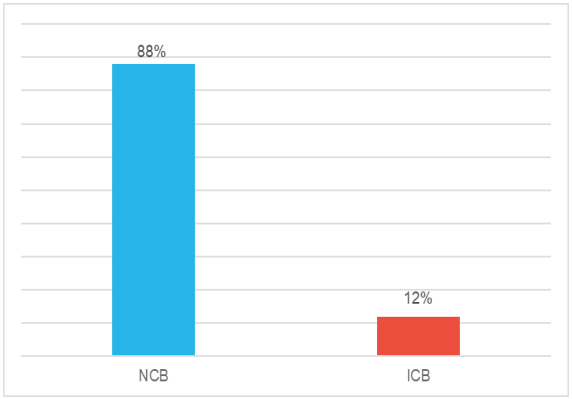

Fig 7: NCB and ICB Contracts Cases in Arbitration.

Findings:

The overwhelming majority of arbitration cases are national, indicating a predominant focus on domestic disputes. The lower percentage of international cases suggests that while NEPCA is equipped to handle international arbitration, the demand for such services remains limited compared to national cases. This distribution may reflect the growing confidence in NEPCA's ability to resolve domestic disputes effectively.

Provincial Distribution Of Projects In Arbitration

This section analyzes the geographic distribution of projects involved in arbitration across Nepal's provinces, highlighting regional trends in dispute resolution.

The geographic distribution of arbitration cases often correlates with regional economic activity, infrastructure development, and industrial concentration. Provinces with higher economic activity and larger infrastructure projects tend to have more disputes requiring arbitration. [7]

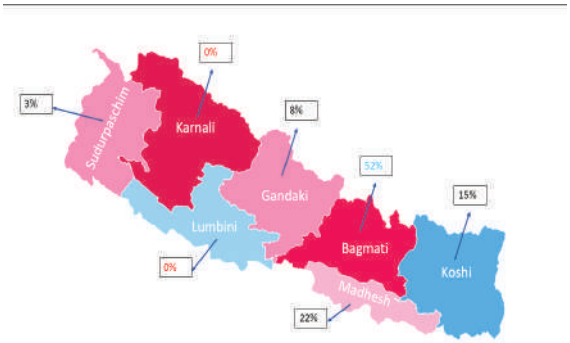

Fig 8: Map of Nepal Indicating the weightage of projects involved in arbitration per province.

Findings:

The provincial distribution of arbitration cases highlights Bagmati Province has the highest number of projects in arbitration, reflecting its economic prominence and concentration of development projects. Other provinces show varying levels of arbitration involvement, correlating with their economic activities and project scales. This distribution underscores the importance of regional economic dynamics in influencing arbitration trends within Nepal. Subsequently, there was no cases in arbitration related of the projects from the Karnali and Lumbini Provinces.

Tribunal Composition

This section analyzes the composition of arbitration tribunals in NEPCA - administered cases, focusing on the professional backgrounds of tribunal members.

Studies suggest that mixed tribunals, such as those combining legal and technical experts, can offer balanced perspectives, leading to more informed and equitable decisions. [8]

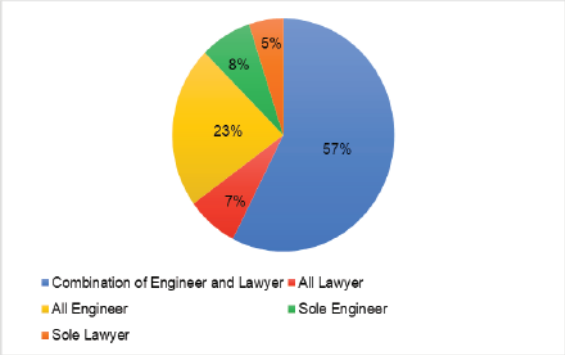

Fig 9: Frequency of each tribunal combination

Findings:

The Lawyer-Engineer combination is the most common tribunal composition, used in 57% of cases, offering a balanced approach by integrating legal and technical expertise, making it ideal for complex disputes. The Engineer-Engineer combination is used in 23% of cases, while the Lawyer-Lawyer combination accounts for 7%. A Sole Arbitrator Engineer in 8% of cases, and a Sole Arbitrator Lawyer in 5% of cases, either nominated by a party or appointed by NEPCA.

Nature Of Parties Involved

This section examines the involvement of government (either Claimant or Respondent) and non-government entities (both Claimant and Respondent) in arbitration cases administered by NEPCA, highlighting the dynamics and trends in party participation.

The involvement of government entities in arbitration reflects the growing trend of utilizing alternative dispute resolution mechanisms for public sector disputes. Government participation often brings increased scrutiny and the need for transparency in arbitration processes. [9]. Non-government entities, including private companies, engage in arbitration with a focus on preserving business relationships and minimizing litigation costs. [10]

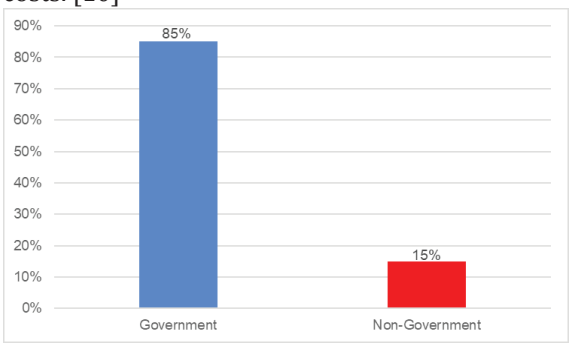

Fig 10: Distribution of Government and Non-Government Parties Involved in Arbitration

Finding:

- **Government Entities:** Government parties are involved in 85% of arbitration cases, indicating a strong reliance on arbitration for resolving public sector disputes. This high percentage underscores the importance of arbitration in managing disputes related to government projects and contracts.
- **Non-Government Entities:** Only 15% of cases involve both the Parties being non-government organizations, reflecting a smaller but significant participation of private entities in arbitration proceedings.

Conclusion

This study offers a comprehensive examination of arbitration practices and outcomes at the Nepal Council of Arbitration (NEPCA) during the fiscal year 2080/81 BS, highlighting significant variability in NEPCA's arbitration practices, particularly in document submission and case completion times, indicating a need for process

optimization. Financial outcomes of arbitration reveal an average claim-to-award ratio of 29.44%, emphasizing the importance of presenting well-substantiated claims to achieve favorable outcomes. NEPCA's preference for its own rules, especially in national cases involving government entities, reflects its tailored approach to domestic arbitration. The construction and engineering sectors predominate the caseload. Regional disparities are evident, with Bagmati Province leading in arbitration activity. The common Lawyer-Engineer tribunal composition balances legal and technical perspectives. To enhance effectiveness, continuous improvements in case management, and tribunal diversity are essential. Future research should explore comparative practices, technological advancements, and stakeholder feedback to further boost arbitration efficiency in Nepal.

Way Forward

- **Streamlining Document Submission:** Implementing stricter timelines and automated reminders for document submissions.
- **Reducing Case Completion Times:** Exploring alternative dispute resolution methods and enhancing case management practices.
- **Customized Rules Application:** Developing industry-specific arbitration rules to better cater to the unique needs of different sectors.
- **Geographic Outreach:** Increasing awareness and accessibility of arbitration services in underrepresented provinces.
- **Tribunal Composition:** Encouraging diverse and balanced tribunal compositions to leverage varied expertise.
- **Stakeholder Engagement:** Conducting regular workshops and feedback sessions with parties involved to continuously improve the arbitration process.

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Challenges and Opportunities in Contract Management in Hydropower Projects in Nepal

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Abstract

Nepal is rich in water resources and has huge potential for hydroelectricity generation. Harnessing this hydropower potential is essential for the nation's energy security, economic growth and sustainable development. The development of hydropower projects in Nepal possesses challenges and opportunities. Due to various reasons, only a miniscule of total potential has been harnessed so far.

This article explores the various challenges, risks and opportunities from the perspective of contract management in hydropower projects and dives into different practices in contract management and other aspects specifically in the context of Nepal. Further, it will suggest solutions to overcome the challenges, mitigate the potential risks and complete the hydropower project within the estimated budget and timeframe.

Introduction

Nepal is endowed with abundant water resources. It has an extensive river network and varying topography ranging from 60m in flat Terai to 8,848m at the summit of Mount Everest. This makes Nepal rich in hydropower potential. Nepal's theoretical hydropower potential is estimated to be 83,000 MW and economic potential to be 42,000 MW (Shrestha, 1966). This hydropower potential is a great opportunity for renewable energy development and the overall economic growth of the country.

So far only a fraction of the hydropower potential i.e. 2,800 MW has been exploited (NEA, 2023). Proper strategic planning, technical expertise, investment and effective contract management are required to harness the country's hydropower potential.

This article dives into various challenges and opportunities in Contract Management in Nepali hydropower projects.

Challenges

There are numerous challenges in hydropower development. It ranges from legal frameworks to socio-economic constraints. However, this article focuses only on the aspects directly related to construction contract management.

Complexity

The hydropower project is in itself complex in nature. It consists of numerous stakeholders and requires various types of specialized disciplines. The complexity of a hydropower project is multifaceted, demanding precise design and coordination across various disciplines. There are various types of complexities such as geological uncertainties, hydrological parameters and engineering design complexities, but this article focuseson complexities that are related to contract management. Hydropower project involves intricate engineering design and innovative construction methodologies. Based on the nature and technologies required, various types of FIDIC conditions of contracts are employed in a single hydropower project.

Civil works involve the construction of foundational structures like dams, waterways (i.e. headrace pipes, canals or tunnels), and powerhousesetc. governed by FIDIC's Red Book. This type of contract is suitable for traditional construction projects in which design is done by the employer and constructed by the contractor.

Electromechanical components encompass turbines, generators, and transmission systems, where the FIDIC's Yellow Book is commonly utilized to manage the complexities of design, installation, and commissioning. In this Contractor is responsible for the design and build of the electromechanical components.

When the hydropower projects are built on an EPC (Engineering Procurement and Construction) modality, an EPC/Turnkey Contract (Silver Book) is employed to manage the project. In EPC modality, the contractor is responsible for engineering, construction to commissioning.

Within a single hydropower project, the necessity to employ different types of FIDIC contracts shows the scale of the complexities of the project.

Risk Allocation

Hydropower consists of numerous stakeholders, such as clients, consultants, contractors, the local public, regulatory authorities, investors and financial institutions. Each has their interest and expectations. This diverse interest creates a unique environment for risks and conflict.

In general, the Client bears the risks associated with project feasibility, financing, regulatory compliance and market conditions. The responsibility of acquiring land, resettling or displacing the community if any, stakeholder engagement and communication falls on the Client. Additionally, the Client has to obtain any necessary permits or licenses or approval pursuant to law for the project development.

The Consultant is the technical expert who provides services for engineering design and project management. The Consultant is liable for any risk related to errors in design, inadequate studies and delays in project planning and approval.

The Contractor undertake the construction, installation and commissioning of the hydropower project facilities as per the client's specifications and requirements. They bear risks associated with construction delays, cost overruns and performances during the execution phase. They are responsible for ensuring compliance with safety standards, quality control measures and environmental regulations at the site.

However, in practice, very little or no attention is paid to the clear-cut division of roles, responsibilities and risks among client, consultant and contractor. Due lack of proper allocation of risks among clients, consultants and contractors will create confusion and delay in the construction works.

Contract Interface

Based on the nature of the works, there are different contractors, such as civil contractors, electromechanical contractors, hydromechanical contractors and transmission line contractors. They all work according to different contractual documents and they have their own timeline.

The interface between different types of FIDIC contracts, such as the Red Book (for construction) and the Yellow Book (for plant and design-build), can significantly impact hydropower project delays. In a typical hydropower project, the civil, electromechanical and hydromechanical works are interconnected and overlapped. In such a situation, proper communication, coordination and interface management are required. Delays in one component or one section will have ripple effects on other contractors and will cause cascading delays.

The Red Book and Yellow Book of FIDIC conditions of contracts assigned different roles and responsibilities to the different stakeholders. When multiple FIDIC books are used simultaneously, it will create some overlap and interface that needs to be properly managed. Failures to address contract interface issues in a timely and orderly manner can lead to cost overrun, claims from contractors, disputes among contractors and/or disputes between contractors and clients.

In the Nepali hydropower sector, this contract interface management always takes the back seat. Not enough attention and due consideration is given to this. The schedule of different works are prepared by different stakeholders and they do not align with each other. Due to this improper interface management, the project gets hindered and delayed, consequently resulting in cost and time overrun.

Socio-economic factor

Besides technical and financial factors, the socio-economic factor plays a crucial role in the successful completion of the project. While planning and designing the project, in most of the cases, this aspect is neglected. Because of this several unforeseeable events occur and consequently delay the project.

In the context of developing nations like Nepal, the society has big expectations from the hydropower projects. The local public expects hydropower projects to carry out works that are supposed to be done by the government such as Roads, Irrigation, Hospital, Schools etc. With limited budget and resources,

all these expectations are unlikely to be met. These expectations from society playa significant role in project development both in positive and negative ways. Therefore, it is very crucial to engage, consult and communicate with the local stakeholders from the beginning. Lack of proper communication, consultation and engagement, the demand of the community which always may not be possible to address by the project alone will resent the community. Thus, the project will lose public support and get opposition or resistance. The community may oppose the project due to issues related to land acquisition, environmental impacts, livelihood restoration, compensation, resettlement etc. Therefore, it is crucial to address these socio-economic factors in a proactive way with proper communication, consultation and engagement plan and failing to address these issues will prolong the project construction timeline or even halt the whole project.

Opportunities

Capacity Building

The unique nature of the hydropower project and its challenges create the opportunity to build the capacity of all the major stakeholdersengaged in the project. The client, consultant and contractors need to build the capacity to successfully complete the project within the stipulated timeframe and budget.

Engagement in such a project allows stakeholders to enhance their knowledge, skills and capabilities in various domains. This serves as an opportunity to learn new skills from engineering, legal and regulatory provisions to project management.

The hydropower projects involve diverse stakeholders and require strong collaboration and coordination among them. This creates a platform for knowledge sharing, mentorship and cross-sectoral learning. The capacity-building initiative can include training programs, workshops, On-the-Job-Training (OJT), livelihood upliftment programs and other training tailored to address specific needs and requirements.

For the successful implementation of hydropower projects in Nepal, capacity-building initiatives are essential. For the Client, the capacity-building activities include developing expertise in project planning and management, contract administration, risk management, stakeholder engagement and regulatory compliance.

For the Consultants,capacity-building efforts should be focused ontraining workshops, seminars and knowledge-sharingplatforms on the best engineering practices, innovative technologies and sustainable design principles.

Similarly, capacity-building initiatives for contractors should be centered on workforce training, skill development, Operation Health and Safety (OHS) compliances, and Environmental Safeguards.

For the local public involvement in hydropower projects, awareness raising, education, participatory decision making and empowering the communities-related programs should be carried out.The capacity

building for the local public may also include programs related to entrepreneurship and community-led initiatives for job creation and poverty alleviation.

Standardization and harmonization

The successful implementation of the hydropower projects requires a harmonized and standardised framework for contract management and dispute resolution procedures. Standardized framework helps to streamline processes, mitigate risk and resolve conflicts efficiently. Standardized contract documents such as FIDIC documents will provide clear and consistent language, and well-defined roles, responsibilities and deliverables for all concerned parties. Furthermore, it will establish dispute resolution mechanisms that will reduce ambiguity and minimize the likelihood of disputes arising during the implementation of the project.

Additionally, standardization will facilitate consistency and comparability among different projects. This will greatly help in replicating lessons learned, best practices and industry standards from one project to another. This will make a supporting environment for accountability and transparency and provide a way to address disagreement in time without resorting to litigation procedures. Furthermore, the harmonization will help in managing the interface between different types of contracts and align the timeline of the works and milestones so as to complete the whole project within time and cost.

Collaboration

Hydropower project has multiple facets and requires input from different stakeholders including clients, consultants, contractors, the local public, investors and financial institutions. For successful implementation, collaboration among different stakeholders is a must. In many Nepali hydropower projects, lack of collaboration has caused confusion, disagreement and disputes among stakeholders. Which in turnhas delayed the project. Effective collaboration begins with a clear communication channel, mutual respect and shared goals among the stakeholders. The collaboration also helps in sharing risks, demarking clear roles, responsibilities and obligations and ultimately helps in the timely completion of the project. This collaboration playsa crucial role among the different contractors when there is a contract interface. For example, in the construction of a powerhouse the foundation is prepared by the Civil contractor and turbine-generator installation is done by the electromechanical contractor. Without proper collaboration, both parties can not meet their targets and deadlines. Collaboration with the local public will earn social acceptance for the project and avoid any disagreement or dispute.

Collaboration among the stakeholders is a prerequisite for resolving any disagreement or conflict in an amicable, cost-effective and timely manner. Various dispute resolution approaches such as negotiation, mediation, open dialogue, and dispute resolution committees employ collaborative methods to resolve disputesand foster trust and goodwill among the parties.

Solutions and Best Practices

Timely completion of hydropower projects in Nepal is crucial for meeting the country's growing energy demands and driving economic growth and sustainable development. In order to overcome the challenges and grab opportunities presented following solutions or best practices can be adopted

Integrated Approach for Contract Management

The complexity and the nature of the works within a hydropower project demand different types of FIDIC contracts to be employed. In such conditions, an integrated approach or mechanism is required to encompass all types of FIDIC documents and the interface between different types of standard documents. This mechanism further involves collaboration and communication among diverse stakeholders including governmental agencies, clients, consultants, contractors and local communities. This will ensure all aspects of the project from planning, design, and construction to operations are aligned with the project objectives, regulatory requirements and legal compliance. This will help streamline the decision-making process and optimize resource allocation. One of the key elements of an integrated approach is a robust dispute resolution mechanism.

Stakeholder Engagement and communication

For the timely completion of any hydropower project communication and consultation with stakeholders play a crucial role. A proper stakeholder communication and consultation plan is a must for a project. This plan will identify the stakeholders through stakeholder mapping and prepare communication and consultation plans accordingly. Timely, effective and appropriate engagement with stakeholders creates a sense of ownership of the project among stakeholders. This in turn helps the project to identify potential challenges, opportunities and concerns that may impact the project development and implementation. Active involvement of stakeholders in the decision-making process creates an environment of trust, consensus and a conducive environment for addressing and mitigating any conflict or grievance before they escalate. This avoids any delay or disruption in project implementation and operation. Therefore, timely and appropriate stakeholder engagement, communication and consultation a key for hydropower project development.

Dispute Resolution Mechanism

Disputes and conflicts are inevitable in large and complex projects like hydropower. Therefore, it should be treated in an appropriate method. For this, a robust and effective Dispute Resolution Method is a must. In Nepal, where complex projects involve multiple stakeholders with diverse interestsdisputes can impede project progress if not resolved in a prompt and amicable manner. Adopting Alternative Dispute Resolution (ADR) methods such as mediation, arbitration, dispute resolution board or adjudication will provide disputing parties a fair and efficient system for resolving disputes among them as well as maintaining good relationships. This mechanism should be incorporated into project contracts and integrated intothe overall contract management framework.

Monitoring and Evaluation

Monitoring and Evaluation (M&E) is one of the sectors where special care should be given. One of the reasons for cost and time overrun in the project is the lack of a proper monitoring and evaluation mechanism. With proper monitoring and evaluation process in place will help in assessing performance, identifying emerging risks that may impact the timely completion of the project and tracking the overall project progress. A robust and project-specific M&E system should be established incorporating key performance indicators (KPIs), benchmarks, milestones and targets to measure the progress against the project schedule and objectives. Regular monitoring of construction activities, expenditures, quality assurance system, operational health and safety (OHS), environmental safeguards and legal and regulatory compliances will give a clear picture of the current status of the project and trajectory of the project and flag any potential risks. Thus M&E gives the project management the opportunity to take any prompt actions required to complete the project within budget and timeframe. Additionally, periodic evaluation of a project's progress and lessons learned makes stakeholdersmake informed decisions, adapt strategies and improve the project performance.

Conclusion

In Nepal, the completion of a complex hydropower project within the estimated budget and timeframe is a great challenge. This cost and time overrun in hydropower projects poses potential risks to energy security, economic growth and sustainable development. Therefore, adopting solutions and best practices that encompass an integrated approach, proper stakeholder communication and consultation, robust dispute resolution mechanism and effective monitoring and evaluation methodologies is essential to ensure timely completion of a project. By adopting and effective implementation of these practices, stakeholders can overcome challenges, mitigate risks and achieve the project's objectives and success, thereby contributing to the country's energy security, economic development, and environmental sustainability.

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Examining the Inherent Biases in ICSID's Dispute Settlement Mechanism

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Abstract

This paper examines the inherent biases in the International Centre for Settlement of Investment Disputes (ICSID) dispute settlement mechanism. Despite its mandate to promote economic development and provide an independent forum for resolving investment disputes, ICSID has faced criticism for favoring investors over host states, particularly those from developing countries. The paper identifies several systematic factors contributing to this bias, including ICSID's organizational structure within the World Bank, bias in arbitrator selection, lack of transparency, high costs, and finality of awards without appeal. The paper encircles around the issues which have led to a perception that ICSID's processes and outcomes disproportionately benefit investors, undermining the institution's legitimacy and effectiveness. Ultimately, the paper concludes by calling for structural reforms to address these biases and ensure a fair and impartial dispute settlement system that respects the interests of all parties, particularly developing countries.

Key Words: ICSID, World Bank, Investor, Investment Dispute, Developing Countries, Arbitration, Conciliation

Breaking the Ice: ICSID Explained

Under traditional international law, investor did not have direct access to international remedies to pursue claims against foreign states for violation of their right. They depended on diplomatic protection by their home states.[1] But with the widening horizon of the international dispute settlement mechanism, the international relations is increasingly becoming judicialized. States are increasing their reliance on formal and semi-formal methods for resolving disputes. This trend towards judicialization has been particularly pronounced in the area of investor-state dispute resolution[2].In this backdrop, Investor- State

1 Rudolf Dolzer & Chrisstoph Schreuer, 'Principles of International Investment Law', Oxford University Press, UK, First Edition, 2008, p. 211.

2 Anton Strezhnev, 'Detecting Bias in International Arbitration Investment', Harvard Law Review,Volume 12:2, 2016, p.2.

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dispute settlement (ISDS) is one of most controversial and debated topics in international investment law in recent times.[3]

ICSID, one of the five organizations of the World Bank[4] and the specialized agency of the United Nations is working with the mandate of promoting development of member states by facilitating the investment related disputes. The ICSID was formed as per the provision of the Convention. The ICSID Convention was formulated under the aegis of the International Bank for Reconstruction and Development (IBRD or the World Bank) and was opened for signature and ratification on March 18, 1965. The ICSID entered into force on October 14, 1966. As of October, 2017, 153 countries have signed and ratified the Convention.

The ICSID Convention is a multilateral treaty formulated by the Executive Directors of the World Bank to further the Bank's objective of promoting international investment. This stands as one of the most common forums for investor-state dispute resolution. ICSID disputes usually take the form of claims by private firms brought against states, alleging a breach of contract or treaty. As such, they represent a new trend in international dispute resolution - the growth of disputes between private and public entities.

The jurisdiction of ICSID requires an investment dispute of a legal nature between a state party to the convention and a national of another state that is also party to the convention.[5]By becoming a party to the Convention, states instill the confidence of private foreign investors and provide assurance to potential investors that they would have recourse to an independent dispute settlement mechanism in a scenario where they lose their investment through expropriation, nationalization or other government actions. In addition, the two parties to the dispute (the host state and the investor) must have consented to the ICSID's jurisdiction.

The ICSID concerns mixed type of arbitration which combines features of both public and private international arbitration as it involves both states and juridical/natural persons.

Purpose of ICSID: Expectation v. Reality?

Theoretically, the ICSID Convention has the purpose to provide an "institutional and procedural framework for independent conciliation commissions and arbitral tribunals constituted, in each case, to resolve the dispute. The aim of ICSID Convention, as expressed in its preamble, is to promote economic development through the creation of a favorable investment climate.[6] It contributes to the improvement of investment climate by offering a procedural framework for the settlement of disputes.

ICSID provides for settlement of disputes by conciliation, mediation, arbitration or fact-finding. The

3 James J. Nedumpara& Aditya Laddha, 'India Joining the ICSID: Is it a Valid Debate?' Center for Trade and Investment Law Conference, New Delhi India, 2017, p.1.

4 The five organizations of the World Bank ("W1B") group are: International Finance Corporation ("IFC"), Multilateral Investment Guarantee Agency ("MIGA"), International Bank for Reconstruction and Development ("IBRD"), International Development Association (IDA"), and International Centre for Settlement of Investment Disputes ("ICSID").

5 International Convention on Settlement of Investment Disputes, October 14, 1966, March 18, 1965, art.25.

6 International Convention on Settlement of Investment Disputes, October 14, 1966, March 18, 1965, preamble.

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.[7] ICSID also promotes greater awareness of international law on foreign investment and the ICSID process.

In addition, on 27 September 1978, the ICSID Additional Faculty was created in order to offer arbitration, conciliation and fact-finding for certain disputes that fall outside the Scope of ICSID Convention. [8]

Unfortunately, the ICSID has failed to attain its objective due to multifold reasons giving rise of biasness and prejudice of different gravities. This paper will try to explore the various systematic factor causing trouble in the smooth operation of ICSID, based on its prejudice of not favoring the developing countries. Therefore, there exists a wide gap between the expectation of the drafters of the convention and the sad realities.

Dissecting the ICSID as a Biased Institution

In international investment avenues, with the opening up of global markets and emergence of newer mechanisms to facilitate flow of investment,the signing of the ICSID Convention and the creation of the Centre is accepted as the important milestones in thedevelopment of international law. However, legal scholarship has been evaluating the organization as an international adjudicatory body ignoring the complexity of its mandate and domain.[9] Many prominent and developing countries have refrained from being the member of ICSID. There are certain criticisms, which ultimately results in many developing statesto abstain from the said convention.

a. The ICSID does not have independent status as it is an integral organ of the World Bank.

ICSID's complicated relationship with the World Bank endangers its judicial functions.[10]It is argued that the ICSID's intricate relationship with the World Bank jeopardizes the judicial function of ICSID due to its problematic organizational structure. The close administrative ties of ICSID has been a matter of dispute from the very beginning of the adoption of the convention. [11]

The ICSID has a Secretariat [12]and an Administrative Council. [13]The Secretariat consists of a Secretary-General, one or more Deputy General and other professional and administrative staff. The Secretary-General and Deputy Secretary General are elected by the Administrative Council. The Secretary General of ICSID has the authority to appoint arbitrators to resolve investment disputes

7 'About ICSID' World Bank Group, available at https://icsid.worldbank.org/About/ICSID, assessed on 10 July 2023.
8 Yoshifumi Tanaka, ' The Peaceful Settlement of International Disputes', Cambridge University Press, UK, First Edition, 2018, P. 347
9 Sergio Puig, 'Recasting ICSID's Legitimacy DebateTowards a Goal-Based Empirical Agenda', Fordham International Law Journal, Volume 36: 2, 2013, p. 467-469
10 Jason Hickel, ' Apartheid in the World Bank and the IMF',Aljazeera, 26 November 2020, available at https://www.aljazeera.com/opinions/2020/11/26/it-is-time-to-decolonise-the-world-bank-and-the-imf, assessed on 10 July 2023
11 Christoph H. Schreuer, 'The ICSID Convention: A Commentary', Cambridge University Press, Second Edition, 2009, p.7.
12 International Convention on Settlement of Investment Disputes, October 14, 1966, March 18, 1965, s.3.
13 International Convention on Settlement of Investment Disputes, October 14, 1966, March 18, 1965,s.2.

The Governor of the World Bank is also an ex officio Chairman of ICSID's governing body, the Administrative Council. The annual meeting of the World Bank and its Fund coincides with the annual meeting of the Administrative Council of ICSID. Moreover, the World Bank funds the ICSID Secretariat.[14]In this way, the World Bank administration becomes able to actively control the arbitration mechanism of ICSID.

b. There is biasness in selection of Arbitrators which disturbs the integrity of adjudicating authority

Investor-state disputes are usually resolved by a three-member arbitral tribunal, with one arbitrator appointed by each party, and a third presiding arbitrator appointed by mutual agreement between the parties. It is often argued that arbitrators, as ad hoc appointees, may be incentivized to vote in biased ways that enhance their career and financial prospects[15]Due to the ad hoc nature of appointments, it has been suggested that arbitrators may strategically render decisions in biased ways with the goal of encouraging reappointments.[16]

The pool of arbitrators used in ICSID cases is relatively small, and some individuals have served as arbitrators in multiple cases. The presence of repeat arbitrators lead to the development of certain patterns or biases in decision-making, potentially favoring investors or host countries in a consistent manner. The composition of ICSID tribunals is generally biased towards the interests of investors, particularly multinational corporations the panelists who arbitrate disputes are typically lawyers specializing in investment law, and they may have professional backgrounds that lean towards investor protection.[17]

The majority of arbitrators come from an investment background and create investors favoring biases. The Convention's rules for arbitration are leaned towards the developed countries only. According to the ICSID Caseload Statistics 2017, 47% of Arbitrators, Conciliators and ad-hoc Committee Members appointed in the ICSID cases are from Western Europe.

In 2017, the United Nations Commission on International Trade Law (UNCITRAL) gave one of its working groups the mandate to identify concerns about ISDS and investigate possible reform of the ISDS system. Among the working group's top priorities are issues of arbitrator bias and the effects of an ad hoc appointment process. Many countries registered concerns over perceptions of the existence of pro-investor and pro-state arbitrators, which they tied to the ad hoc nature of ISDS.

14 In fact, on a positive side, greater technical and financial resources are available to ICSID's Contracting States at greater ease and at lower cost when compared to other investment arbitration institutions. Although there are unmistakable ties between ICSID and the World Bank, it is to be noted that this criticism sounds more polemic rather than evidence based. More evidence is required to conclusively establish that ICSID's judicial autonomy is being compromised because of its affiliation with the World Bank.

15

16 Sergio Puig and Anton Strezhnev, ' Affiliation Bias in Arbitration', The Journal of Legal Studies, The University of Chicago, Volume 16, p. 378, Press, available at https://www.jstor.org/stable/26457132 , assessed on 10 July 2023.

17 Weijio Rao, 'Are Arbitrators Biased in ICSID Arbitration? A Dynamic Perspective', SSRN, available atfile:///D:/SSRN-id3203019.pdf , assessed on 16th July 2023.

c. There is lack of transparency and openness in the arbitral proceedings.

While the parties involved have access to the proceedings, the public may not have access to key documents or information. It is often alleged that the ICSID has shown a lack of transparency in proceedings. Prior to 2006, the ICSID Arbitration rules did not contain provisions to ensure transparency in the proceedings. The mutual consent of the parties is necessary for the release of key documents such as the final decisions.[18]

Though According to the new rules adopted on April 10, 2006, parties are allowed to attend or observe all or part of the hearings. However, hearings are conducted in camera unless the parties otherwise agree.

d. The dispute settlement cost is comparatively expensive and costly which is unsupportive of developing countries.

The ICSID proceedings are perceived to be particularly complex, complicated and costly.[19] According to the United National Conference on Trade and Development (UNCTAD), costs in investor-State arbitrations in general have "skyrocketed" in recent years.[20]The cost of litigation in an ISDS case have averaged over USD 8 million with costs exceeding USD 30 million in some cases. This is why, the dispute settlement system of ICSID does not favor the states who are economically not sound enough to pay to participate in the litigation.

e. The award of the arbitration is final as there isno option of review/appeal.

The awards rendered by ICSID are binding and not subject to any appeal or to any other remedy except those provided for in the ICSID. [21]Though there is an appellate tribunal and ad hoc committee, it cannot review an award for errors of fact

Similarly, Parties are not permitted to seek annulment of an ICSID award before a national court i.e., there is no scope for a review of the award by the domestic court even if it violates the public policy of the country.

Arbitration panels include many international law professors whose teaching jobs are part time. Some of them tend to apply their pet theories on customary international law. They do not fear appeals, even on errors of law, because the grounds for appeal under arbitration laws

18 Toby Mclntosh, 'Lack of Transaprancy for Arbitrations at ICSID May Persist Despite New Rules', Eye on Global Transparency, 28 November 2022, available at https://eyeonglobaltransparency.net/2022/11/28/lack-of-transparency-for-arbitrations-at-icsid-may-persist-despite-new-rules/ , assessed on 16th July 2023.

19 Matthew Hodgsan&YarikKryvoi, 2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration', British Institute of International and Comparative Law, p.47.

20 Lorenzo Cotula, 'Rethinking Investment Treaties and Dispute Settlement in the light of Sustainable Development', Internatioanl Institute for Environment and Development, available at https://www.iied.org/rethinking-investment-treaties-dispute-settlement-light-sustainable-development, assessed on 16th July 2023.

21 Aditya Rathore& Amit Chawla, 'Appeal Mechanism in Investment Arbitration: Time to Revisit ICSID Convention', 21 September 2021, The Arbitration Workshop, available at https://www.thearbitrationworkshop.com/post/conceptualizing-appeals-mechanism-in-icsid-through-the-lens-of-multilateral-investment-court , assessed on 15 July 2023.

f. The increasing trend of Inconsistent Arbitral Awards is against the Principle of Stare Decisis

Arbitral awards are criticized for their lack of consistency and for being contradictory. The number of economic characteristics essential for an asset to satisfy the definition of investment has fluctuated from time to time. This violates the integrity of the principle of stare-decisis, which means the former decisions should be followed in the subsequent disputes involving the similar kind of facts.

For instance,

In the case of Salini vs. Morocco[22], an asset was held to be an investment, only if it satisfies the investment criteria, namely, (a) certain duration of investment; (b) assumption of risk; (c) a substantial commitment; and (d) contribution to the host state's development. On the contrary, in Phoenix vs. Czech Republic,[23] the Tribunal did not strictly adhere to the Salini test, and diverging from the same, provided its own rendition of the characteristics, i.e., a contribution in money or other assets; a certain duration; an element of risk; an operation made in order to develop an economic activity in the host State; as well as assets invested in accordance with the laws of the host State; and assets invested bona fide. This trend of divergence from the Salini's test has been followed in various other cases, thereby creating uncertainty which often harms the states before the ICSID Tribunals.[24]

g. ICSID disfavors the Developing Countries in the arbitration dispute as it decides in favor of the established Investors

The underlying framework of investor-state dispute settlement (ISDS), of which ICSID is a part, inherently favors investors over the interests of host countries. They argue that this bias arises from various provisions in international investment agreements, such as the principle of national treatment or most-favored-nation treatment, which can restrict the regulatory autonomy of host countries.

The relationship between developing countries and the International Centre for Settlement of Investment Disputes (ICSID) has not been smooth, to say the least. Critics have argued that developing countries lack the resources to bear the legal fees and related costs of defending against established investors. These costs not only include the fees and expenses paid to ICSID and arbitrators during the pendency of the dispute but also the fee paid to the law firms, experts and witness required in the proceedings which becomes a tough task for the poor countries.[25]

Due to this systematic biasness in the composition of the arbitrators, several developing countries such as Bolivia, Venezuela and Ecuador have pulled out from the ICSID Convention. On May 2, 2007

22 Salini Construction S.P.A. and Italstrade S.P.A v. Kingdom of Morocco, ICSID Case No. ARB/00/4,2001

23 Phoenix Action Ltd. V. The Czech Republic, ICSID CaseNo. ARB/06/05, 2007.

24 Yagya Sharma &ParidhiRastogi, 'India's Position Regarding ICAIS: An Analysis", The Competition and Commercial Law Review,Vol 3:1, 2021, available at https://www.tcclr.com/post/india-s-position-regarding-icsid-an-analysis , assessed on 14 July 2023.

25 Sam Luttrell, 'Bias Challenges in Investor–State Arbitration: Lessons from International Commercial Arbitration', Cambridge University Press, 5 December 2011, p. 234.

Bolivia pulled out from the ICSID Convention by submitting the notice of denunciation. [26]Ecuador on the other hand, first restricted ICSID's jurisdiction in disputes arising from natural resources investments, including oil, gas, mineral and others by resorting to Article 25(4) of the ICSID Convention. Subsequently, on July 6, 2009, Ecuador also submitted a notice of denunciation with effect from January 7, 2010

India, our closest neighbor, is one of the prominent developing countries that has refrained from joining the ICSID Convention, since its inception. The Indian Council for Arbitration has recommended to the Indian Ministry of Finance that India should refrain from becoming a signatory to the ICSID Convention on the following grounds:[27]

- *The Convention's rules for arbitration is leaned towards the developed countries; and*

- *There is no scope for a review of the award by an Indian court even if it violates India's public policy.*

Beside the aforementioned issues, other problems creating systematic biasness includes the rising length of arbitral proceedings, the possibilities for third parties to participate in proceedings.

Concluding Words

It can be hereby, concluded that ICSID is imparting its functions against the legitimate expectation of the global investment academia. The objective of the institution as expressed in its preamble doesn't resonance with its actions. Thus, ICSID should employ all the necessary strategies to overcome all the potential challenges faced by it and work out to create a sound and impartial atmosphere of investment dispute settlement. The dispute settlement horizon of ICSID should be as per the interest of developing countries. It should avoid supporting the powerful investors' exploiting the resources of the developing and undeveloped countries in an unjust way. The ICSID requires a massive structural reforms to avoid supporting the brutal hegemony of developed nations in the present global investment avenues.

26 In a statement, the President of Bolivia claimed that developing countries in Latin America "never win the cases. The transnationals always win."

27 James J. Nedumpara& Aditya Laddha, 'India Joining the ICSID: Is it a Valid Debate?' Center for Trade and Investment Law Conference, New Delhi India, 2017, p. 8.

Country of Origin of Goods

Satya Narayan Shah
Mechanical Engineer

"All goods and related services to be supplied under the contract are eligible, unless their origin is from a country specified in the BDS"- generally, this contractual statement is included in the bid document for the procurement of Goods. In this context the term "Origin" must be fully understood for the smooth execution of the contract. For the purpose of this clause, "origin" means the place where the goods are mined, grown, or produced, or the place from where the related services are supplied. It must be clear that the origin of goods and services is distinct from the nationality of the Bidder. Another fact is that the Country of origin (CO) represents the country or countries of manufacture, production, design, or brand origin where an article or product comes from. For multinational brands, CO may include multiple countries within the value-creation process.

Regarding the Country of Origin the **World Bank** states as: - The term "origin" means the country where the Goods have been mined, grown, cultivated, produced, manufactured or processed; or, through manufacture, processing, or assembly, another commercially recognized article results that differs substantially in its basic characteristics from its components. Similarly, **Wikipedia** explains the "Country of origin (CO) represents the country or countries of manufacture, production, design, or brand origin where an article or product comes from". For multinational brands, CO may include multiple countries within the value-creation process. It can refer to;

i. the place from where the merchandise is directly received; that is the last border crossed or port entered before reaching its final destination;

ii. the country of consignment (i.e., from where the goods are sold); or,

iii. the country of original growth or extraction.

According to the **International Chamber of Commerce (ICC),** A Certificate of Origin (CO) is an international trade document that certifies a declaration made by an exporter concerning the origin of goods being exported. ICC also states that it declares the 'nationality' of the product. A Certificate of Origin is a certified document that states what the country of origin is of a specific product. Certificates of Origin are one-time documents that accompany the shipments. When a second shipment of the same product is done, new certificate of origin is furnished or required.

Historical background of Country of Origin:

The inclusion of place of origin on manufactured goods has an ancient history. Informal branding, which included details such as the name of manufacturer and place of origin were used by consumers as important clues as to product quality. **David Wengrow** has found archaeological evidence of brands, which often included origin of manufacture, dating to around 4,000 years ago. Producers began by attaching simple **stone seals** to products which, over time, were transformed into **clay seals** bearing impressed images, often associated with the producer's personal identity thus providing information about the product and its quality.

The consumers used to choose the goods based on the origin as it relates to the quality of goods. Those days various seals or labels and pictorial markings functioned as a brand, conveying information about the contents, region of origin and even the identity of the producer which were understood to function as signs of product quality. By the 19th century, formal labels featuring manufacturer name and place of manufacture became relatively common. In the 20th century, as markets became more global and trade barriers removed, consumers have access to a broader range of goods from almost anywhere in the world. Country of origin is an important consideration in purchase decision-making. The country-of-origin effect is also known as the «made-in image» and the «nationality bias". Sometimes, it may be used to reject any product of a particular country which is barred due to political or any other reason.

Types of Certificates of Origin:

There are two types of COs in practice.

1. **Non-Preferential COs**

Non-preferential CO, also known as "ordinary CO," indicates that the goods do not qualify for reduced tariffs or tariff-free treatment under trade arrangements between countries. If an exporting country does not have in place a treaty or trade agreement with the importing country, an ordinary CO will be needed. Or, if a particular product being shipped has been excluded from tariff relief it must also be declared using an ordinary CO. Non-preferential Certify that the goods are subject to no preferential treatment. These are the main type of CO that chambers can issue and are also known as "normal CO".

The country of origin is determined by what parts or ingredients are in the product and where they came from, but also by the production process and where that takes place. In their guidance on non-preferential rules of origin the ICC describes it as follows:

Non-preferential origin is obtained where goods are "wholly obtained" in one country or, when two or more countries are involved in the manufacture of a product, origin is obtained where goods underwent their last, substantial, economically-justified processing or working, in an undertaking equipped for that purpose, resulting in the manufacture of a new product or representing an important stage of manufacture.

Local Chamber of Commerce will determine it based on the required information provided.

2. **Preferential COs**

Preferential COs indicate the presence of **a free trade agreement** or reduced tariffs between countries. These CO tend to be closely associated with **Free Trade Agreements (FTAs)**. Both preferential and non-preferential CO may also be required by an importer under the terms of a documentary letter of credit.

Preferential Origin has everything to do with import duties. Countries all over the world give highest priority to the trade deals with each other. In these trade deals, they may agree on preferential rates for certain goods. These preferential rates mean paying a lower amount of import duties or even exemption of import duties.

Components of Certificate of Origin:

The rules of origin have three essential components:

a) Origin criteria: To avoid high rate of customs duty, a product may be routed through a low tariff jurisdiction. To discourage misuse of certificate of origin, the custom authorities set rules for sourcing, manufacturing, and value addition.

b) Transport conditions: Generally, trade agreements contain a condition that goods claiming benefits under the certificate of origin rules should be directly transported to the importing country.

c) Documentary evidence: Original invoice, certificate from customs or chamber of commerce, and description of goods are required to fulfil the rules of origin.

Contents of Certificate of Origin:

A CO has at least the basic details about the product being shipped, a tariff code, the exporter and importer, and the country of origin. The exporter, with knowledge of the specific requirements of border control at the importing country, will document these details. Detail requirements depend on the type of goods being exported and where they are going.

Certificate of origin typically contains the following information;

- The name and contact information of the producer of the product, including the country of origin
- The name and contact information of the exporting agent
- The name and contact information of the receiver/importing agent
- A description of the good(s), including the appropriate product codes (known as HS codes)
- The item's quantity, size, and weight
- Airwaybill or bill of lading number
- The item's means of transportation and route information
- A dated commercial invoice of payment
- Any additional notes or remarks

The Objectives of the Country of origin (CO):

The main purpose of the Certificate of Origin is for clearing customs. If the goods, exported/imported do not come with a Certificate of Origin, the Custom Office will not allow the goods to leave the warehouse for checking. The Customs authorities, exporters, and importers have the following benefits of having CO.

a) Customs authorities gain access to information about the security and traceability of goods entering for consumption. In addition, they can determine taxes and duties payable on import.

b) Exporters and importers get quick and easy customs clearance when they have a legitimate certificate of origin along with other necessary documents. As a result, all the parties involved in the transaction become more productive.

c) Political objectives: The "country of origin" is taken as a rule with the intention of facilitating the free movement of goods or service providers so as to encourage cross-border competition or, possibly, to encourage individuals or companies to test other markets without having to establish in the target market. It is also sometimes intended to free providers of goods and service from the obligation to accommodate multiple regulatory regimes when trading across borders from a single location.

d) International trade: The products may have to be marked with country of origin when shipping products from one country to another and the country of origin will generally be required to be indicated in the export/import documents and governmental submissions. Country of origin will affect its admissibility, the rate of duty, its entitlement to special duty or trade preference programs, antidumping, and government procurement. The country of origin is a vital element in the import process as it is used for determining and regulating duty rates, preferential trade agreements, trade sanctions, and import quotas. Today, many products are an outcome of a large number of parts and pieces that come from many different countries, and that may then be assembled together in a third country.

Essential Terms used in CO certification:

There are few essential terms related to the CO, which should be known to exporter/importer before issuing or receiving CO. They are,

a) **Goods Wholly Obtained (WO):** Goods produced or obtained without any non-originating input material. If the Purchaser wishes to have goods on "Goods Wholly Obtained or Produced", in that case the manufacturer has to use the raw materials grown in its own country. For this, the Contract should explicitly speak this provision. Practically, this provision is used in case of Agro-products, Mines, Livestock, other natural products grown, harvested etc.

b) **Value Content Method:** For goods to considered as originating under this method, a certain percentage of the products value must originate in a particular country. The formula for calculating such value addition varies from agreement to agreement.

c) **Change in Tariff Classification (CTC) Method**: The non-originating component used in the manufacturing process must not have the same Harmonized System (HS) classification as the final goods. Manufacturers and/or exporters must know the HS classification of the final product and the non-originating raw materials.

d) **Process Rule Method**: Under this method, the goods should be produced through specific chemical process in the originating country.

e) **Cumulation/ Accumulation**: As part of trade agreement, countries share production of certain products and comply with the rules of origin jointly. The extent and nature of such cumulation is defined in the trade agreement and varies from agreement to agreement.

f) **Grown in:** 'Grown in' generally means that all the main components of the product were both grown in that country and almost all processing occurred in that country.

This is often used for food products. However, it is also relevant to non-food items, such as flowers and clothing items made from wool or natural fibers.

g) **Produced in:** 'Produced in' or 'product of' generally means that all the main ingredients or components for the product come from the stated country and almost all processing occurred in that country.

The overlap in the definitions of 'grown in' and 'produced in' means that origin claims are largely interchangeable. For example, a product that is 'grown in Nepal' can also claim to have been 'produced in Nepal' in most instances. This claim is often used for processed and fresh food products as well as other products such as clothing and makeup items.

h) **Made in**: 'Made in' generally means the last substantial step in the making of the product happened in that country. That step must have made a significant change to the ingredients or components so that the final product is fundamentally different in identity, nature or essential character from its imported ingredients or components. This claim is different from 'grown in' or 'produced in' claims, as most ingredients or components for the product can come from other countries. 'Made in' is generally used for manufactured products.

i) **Packed in:** Depending on the circumstances, a 'packed in' claim is generally used for food. The rules for 'packed in' claims are set out in the Country of Origin on Food Labelling Information Standard. The food will be able to claim to have been 'packed in' that country which cannot claim to have been grown, produced or made in a country.

Who needs a proof of origin?

First and foremost, the Customs in the importing country may require a proof of origin in order to determine whether or not to apply certain trade measures at the border. If there are any trade measures applicable for export, then the Customs in the exporting country would need it as well. The origin of the goods is essential for

determining the import duties that need to be paid, potential anti-dumping levies that need to be paid, or even whether the products are allowed to be imported or exported.

Customs officials expect the CO to be a separate document from the commercial invoice or packing list. Customs in these countries also expect it to be signed by the exporter, the signature notarized, and the document subsequently signed and stamped by a chamber of commerce. In some cases, the destination customs authority may request proof of review from a specific chamber of commerce. Some countries are accepting electronically issued certificates of origin that have been electronically signed by a chamber of commerce.

A certificate of origin may also be required by the buyer in the documentary requirements stated within a letter of credit. The letter of credit may specify additional certifications or language which should comply with the stated requirements.

Secondly, the importer may need a proof of origin. In relation with the Customs in the importing country, the importer bears the responsibility to provide what the Customs requires for the appropriate processing of imports.

Thirdly, the exporter may need a proof of origin to provide it to the importer who will submit it to the Customs authority of the importing country, when requested by that authority. The exporter may also need a proof of origin if the Customs authority in the exporting country requires it.

Process to obtain Certificates of Origin in Nepal:

A company wishing to export goods manufactured in Nepal to abroad for the first time, has to register the company/enterprises/industry online application for issuance for Certificate of Origin at Nepal National Single Window (www.nnsw.gov.np) and then approach at one of the following organizations:

1) Trade and Export Promotion Centre, TEPC (www.tepc.gov.np)

2) Federation of Nepalese Chamber of Commerce and Industries, FNCCI (www.fncci.org)

3) Confederation of Nepalese Industries, CNI (https://cni.org.np)

4) Nepal Chamber of Commerce, NCC (www.ncc.org.np)

Procedure to receive Certification of Origin (CO) for Third Country

A company wishing to receive Certificate of Origin can apply online application form in one of the organizations mentioned above.

The application form is to be submitted with the following documents:

i. Company or Firm Registration Certificate

ii. Tax Registration Certificate

iii. VAT/PAN Registration Certificate

iv. License and permits (if required) for export of specific goods

v. Mode of Payment

vi. Commercial Invoice

The application is reviewed by Technical Committee in Department of Industry, Tripureshwor, Kathmandu and decides on the issuance of the Certificate of Origin if the application and the supporting documents are in order.

The applicant is required to pay 0.09 percent of total amount in the Commercial Invoice. The payment should be made in Nepalese currency.

Upon receiving the payment, a Certificate of Origin is issued.

Procedure to receive Certification of Origin (CO) for India

The following documents are to be submitted with the application

i. Cost Sheet

ii. Company or Firm Registration Certificate

iii. Tax Registration Certificate

iv. VAT/PAN Registration Certificate

v. License and permits (if required) for export of specific goods

The technical committee at Department of Industry, Tripushwor, Kathmandu reviews the application and make field visits factories to learn about the applicants' factory's production capacity, labour capacity, etc.

The technical committee reviews the application with a report developed after the field visits. If the information provided by the company seems matches the production capacity, the technical committee approves the application and provide recommendation for a Certification of Origin.

The firm is then required to fill an application form and apply for Certificate of Origin with the following documents

i. Company or Firm Registration Certificate

ii. Tax Registration Certificate

iii. VAT/PAN Registration Certificate

iv. License and permits (if required) for export of specific goods

v. Commercial Invoice

The Form-A will be accepted if the information entered is correct.

If the application is approved then the exporter is requested to pay a service charge of 0.09 percent of total amount in the Commercial Invoice. The payment should be made in Nepalese currency.

TEPC issues Certificates of Origin in One Spot Export Clearing House, Babarmahal, Kathmandu

Conclusion

A certificate of origin (CO) is a document used in international trade to identify a product's country of origin. The CO may also detail the product's specifications and the identities of the exporter and importer. The CO is used for customs purposes, especially when a tariff or other import duty is required. A preferential CO may be used in cases where a regional free trade agreement is in place, in which case less information and scrutiny are needed.

The requirements for requesting a certificate of origin depend on whether there is the producer of the goods, a trader re-selling the goods, or a logistics service provider.

The producer of the goods needs to submit description of the production process and in case of trader or a logistics service provider, a declaration from the supplier is needed stating the origin of the goods.

A Certificate of Origin can be preferential or non-preferential. Preferential certificates are needed in case of preferential duties, reduced duties or even no duties at all. Most certificates of origin are non-preferential. The country of origin is required for purposes of calculating the duties. It can also be used in case of policy measures, like trade embargoes, anti-dumping measures, or safety measures.

Source of Information:

i. *Agreement on Rules of Origin WTO*

ii. *The ICC Guide to Authentic Certificates of Origin for Chambers of Commerce*

iii. *Wikipedia*

iv. *Guidelines on Certificate of Origin – World Customs Organization*

v. *Trade and Export Promotion Centre, TEPC (www.tepc.gov.np)*

vi. *Federation of Nepalese Chamber of Commerce and Industries, FNCCI (www.fncci.org)*

vii. *Confederation of Nepalese Industries, CNI (https://cni.org.np)*

viii. *Nepal Chamber of Commerce, NCC (www.ncc.org.np)*

ix. *Source: Guidelines on Certificate of Origin – World Customs Organization*

x. *World Bank procurement Documents*

xi. *Nepal Government Procurement Documents*

A Comprehensive Study on the Enforcement of Foreign Arbitral Awards in Nepal

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1. INTRODUCTION TO ARBITRATION LAW IN NEPAL

Arbitration as a means of dispute resolution is on the rise due to its effectiveness and autonomy from judicial intervention. The essence of 'Arbitration' is to resolve a dispute without recourse to the court (Lawson, 1997). The development of international relations, the involvement of foreign construction companies in development activities in Nepal, the expansion in trade, commerce, and investment cumulatively ushered the evolution of new legal regimes on the subject (Suvedi, 2007). A statutory provision regarding arbitration first appeared in the Development Board Act, 1956, and it applied to the resolution of the dispute under the contract to which the board is a party, in the context of the need for foreign capital and technology to attain the economic development plans and the policy of intensive and extensive industrialization process (Mnookin, 1998).

The history and development of arbitration law in Nepal reflects the gradual acceptance of alternative dispute resolution methods in the country's legal landscape, with the aim of promoting fair and speedy resolution of commercial disputes. The acceptance of arbitration as a dispute resolution mechanism in Nepal is evidenced by the increasing attention of parties and the increasing number of arbitrations being conducted in the country. Parties typically seek arbitration clauses that provide for mandatory outcomes without court intervention, thereby ensuring a speedy dispute resolution process and enforcement.

However, defective arbitration clauses can create uncertainty, prolong proceedings, increase costs, and potentially render the arbitration clause unenforceable. The most common problems with arbitration clauses include ambiguous language, unilateral appointment of an arbitrator, and lack of specification of a dispute resolution mechanism such as a Dispute Adjudication Board (DAB). Such erroneous or vague arbitration clauses may require judicial intervention and also undermine the effectiveness of arbitration process. In practice, problems also arise from conflicting provisions in contracts, such as the simultaneous use of courts and arbitration procedures.

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Generally, Judiciary of Nepal has adopted a pro-arbitration approach, refraining from unnecessary interference with arbitration proceedings, that are conducted in accordance with the arbitration clauses. Nevertheless, there are challenges in enforcing arbitral awards, specifically foreign arbitral awards. Despite enforcement provisions, practical hurdles often impede prompt resolution of disputes. In this regard, judiciary has made efforts to clarify procedural issues while adhering to legal limits. However, challenges remain in improving the efficiency and effectiveness of arbitration process to ensure timely enforcement of arbitral awards.

2. INTERNATIONAL OBLIGATION TO ENFORCE FOREIGN ARBITRAL AWARDS

Nepal is a party to the **United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, 1994, (hereinafter "UNCITRAL Model Law")** as well as the **Convention on the Recognition & Enforcement of Foreign Arbitral Awards or the New York Convention, 1958, (hereinafter "New York Convention")**, (KC, 2019). These international instruments have established principles and procedures regarding recognition and enforcement of foreign arbitral awards within the territory of its signatory states, including Nepal. The Secretariate in an explanatory note recommended that all States give due consideration to the UNCITRAL Model Law, "in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice".

Article 35(1) of the UNCITRAL Model Law provides that, an arbitral award must be recognized as binding and enforceable regardless of its country of origin. However, such recognition is subject to the conditions set out in Articles 34, 35(2) and 36, which provide grounds for refusal of recognition or enforcement. The UNCITRAL Model Law departs from 'reciprocity' as a condition for recognition and enforcement; mirroring a move away from traditionally paramount 'seat of arbitration' and a move towards overcoming territorial limitations to enforcement of arbitral awards, regardless of its origin.

Article III of the New York Convention provides that each State Party shall recognize and enforce arbitral awards in accordance with the procedural rules of the territory in which the award is enforced, subject to the conditions set out in that article. It also prohibits imposing conditions or higher fees for recognition or enforcement of foreign arbitral awards than for domestic arbitral awards. Furthermore, the Recommendation on the interpretation of Articles II, paragraph 2 and VII, paragraph 1 of the Convention and the suggestions concerning the understanding of Article II, paragraph 2, and Article VII, paragraph 1, of the Convention, emphasizes the need for a uniform interpretation and application of international agreements in the field of international trade.

3. MUNICIPAL LAW APPLICABLE TO ENFORCE FOREIGN ARBITRAL AWARDS

The Nepalese laws constitute laws, regulations, rules and principles that comply with international arbitration standards, principles, practices and aforementioned international instruments to which Nepal is a party. An award maybe recognized, without being enforced but, if it is enforced, then it is necessarily recognized by the court which orders its enforcement (Redfern & Hunter, 1999). Recognition,

followed by Enforcement of a foreign arbitral award in Nepal, proceeds in a manner as provided in section 34 of the **Arbitration Act, 2055 (1999).** The enforcement of a judgment pronounced abroad involves certain formalities: If a party wishes to enforce the award, it must submit an application accompanied by the original or certified copy of the arbitration award, the agreement between the parties constituting arbitration clause and if the award is in a foreign language, an official Nepali translation. These provisions are in line with the New York Convention, which lists two items that the applicant should supply to the enforcing court in order to have the award recognized and enforced: the duly authenticated original award (or a duly certified copy) and the original agreement referred to in article II (or a duly certified copy).

Further, arbitral awards may be recognized and enforced subject to certain conditions, including compliance laws and procedures of the agreement, prompt notification to the parties and compliance with the agreed arrangements or other conditions decided according to the foreign law. Also, an application for implementation must be submitted within 90 days from the issuance of arbitral award. If the Court of Appeal finds that these conditions are met, it will send the award and order the district court for enforcement.

The payment of 'award enforcement fee' is given in Article 41 of the Arbitration Act, 2055 (1999) which is as follows; A fee equivalent to 0.5 percent of the amount received for enforcement of the arbitral award must be paid to the competent authority. If the judgment does not involve a monetary payment, the fee will be 0.5 percent of the current market value or the value of the action taken pursuant to the judgment. If these values cannot be determined, the party requesting performance has to pay a fixed fee of Rs.500/- If a party pays the costs per given above and wishes to recover them from the other party, the district court shall facilitate the recovery of the costs by the other party, by a process similar to that of court fees under the Nepalese laws.

4. EXCEPTIONS TO ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article 34 of the UNCITRAL Model Law provides limited grounds on which an arbitral award may be set aside. Those grounds are similar to and supplemented by Article V of the New York Convention (New York, 1958). The grounds include: lack of capacity to enter into an arbitration agreement, lack of a valid arbitration agreement, failure to fulfill notification requirements, lack of capacity to bring the case, non-arbitrable nature of the subject matter of the dispute, deviation from the agreed structure or agreed Arbitration Procedures or 'due process' and violation of public policy.

An arbitral award may be set aside by the court if it finds that: (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or (ii) the award is in conflict with the public policy of this State (United Nations Commission on International Trade Law, 2010). Based on this, Section 34(4) of the Arbitration Act, 2055 (1999), specifically provides for situations in which an award rendered by an arbitrator in a foreign country cannot be enforced: (a) In case the awarded settled dispute cannot be settled through arbitration under the laws of Nepal (b) In case the implementation of the award is detrimental to the public policy (Government of Nepal, 1999).

To clarify, the foreign arbitral award cannot be enforced: first, if the subject matter of the dispute is not subject to arbitration under Nepali law, for example certain types of disputes must be resolved through specific legal procedures or are deemed impossible and second, if the implementation of the award could prove contrary to public policy, which denotes situations where enforcement of the award would go against the dominant values or interests and principles of justice, morality or public welfare within the territory of Nepal. 'Public policy' serves as a 'safety valve' and operates as a 'shield' to the enforcement of foreign awards, which may bear unwanted and unwarranted consequences. International arbitration being a substitute for national courts, arbitrators should not be allowed to disregard public interests that would otherwise be protected by the judges (Prasad, 2020).

Ergo, the domestication of international legal provisions relating to the Law of Arbitration, ensures consistency in international recognition and enforcement of arbitral awards. The exceptions in course of implementation of foreign arbitral awards exist to ensure that foreign arbitral awards are enforced in Nepal if they are in accordance with the Nepalese laws and the public policy. Conversely, in lack of fulfillment of required conditions, non- enforcement of such foreign arbitral award in Nepal is inevitable.

5. DOSSIER ON JUDICIAL PRONOUNCEMENTS

In the legal dispute between Hanil Engineering and Construction Co. (Korean company) and KONECO Pvt. Limited (Nepali Company), following Hanil's appeal to enforce the foreign arbitral award issued, the Supreme Court of Nepal gave a landmark decision in this historic- first, unprecedented case; **Adv. Devendra Pradhan on behalf of Hanil Engineering & Construction Co. Ltd. v. Appellate Court, Patan (NKP 2075, Decision No. 10138, p. 2086)**, The court emphasized on the autonomy of arbitration clauses, parties' freedom to choose the applicable law, and compliance with contractual dispute resolution procedures before resorting to arbitration, and ruled that, "The arbitral award shall lose its validity if the notice requirements have not been adequately fulfilled" (para. 3-5, 10-17).

In another case; **Bikram Pandey v Ministry of Physical Planning and Construction (NKP 2067, Decision No. 8437, p. 1346)**, the Supreme Court of Nepal noted that, "Internationally recognized rules like the UNCITRAL Arbitration Rules may govern arbitration, but when such rules come into conflict with domestic laws the provisions of domestic law will apply."

In another case; **Anil Kumar Pokharel v. Kathmandu District Court et al (NKP 2064, Decision No.7836, p. 460)**, the Supreme Court of Nepal explained that, in case either party files an application request correction, the award will become final and binding once the Court of Appeal ratifies it. This means that the entire enforcement process must wait for the Court of Appeal to rule on the challenge, if any. If the award is not contested, it is final and binding on the parties.

Regarding appeal against an arbitral award, the Supreme Court of Nepal has ruled that, "there is no right to appeal against an arbitral award, that the jurisdiction of the appellate court is of a correctional nature, not on the merits of the case, but on limited grounds, such as the validity and legality of the contract, the right to be heard, the issue of jurisdiction, the arbitrability of the dispute under Nepalese law and awards that are against public policy or the public interest" (Sinha, 2015).

6. CLOSURE

The article begins by tracing the development of domestic arbitration law and its integration with international standards and practices. It examines the obligations arising from relevant Nepalese laws and international instruments. It then proceeds to sincerely acknowledge the challenges of enforcement of foreign arbitral awards in the course of resolving legal disputes that involve a 'foreign element'. It does so, by referring to court's pronouncements in circumstances wherein, foreign arbitral awards may not be enforced: particularly when their enforcement could potentially contravene the Nepalese laws or the public policy considerations. Overall, 'A Comprehensive Study on the Enforcement of Foreign Arbitral Awards in Nepal' constitutes an attempt to delve deep into the intricacies of enforcement of foreign arbitral awards, specifically in the context of Nepal.

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Conceptual framework of Alternative Dispute Resolution (ADR)

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Meaning and definition of Alternative Dispute Resolution (ADR)

A legal arbitrator is an impartial third party selected by the parties involved in a dispute to mediate, arbitrate, and render a decision (typically at their request). Here is another way of looking at an arbiter. Arbitration is a good substitute for conventional dispute resolution procedures. An arbitrator is an impartial third person appointed by the parties or the appropriate authorities to resolve a disagreement and render a decision that is final and enforceable by law. If parties comply with the filing and make the necessary bond payments, the arbitrators' rulings are final and unchallengeable due to their arbitrary authority. For this reason, arbitrators are referred to as such. An arbitrator is a private, special judge selected to mediate disputes between parties in a private setting[1].

Many strategies and procedures collectively referred to as "If parties comply with the filing and make the necessary bond payments, the arbitrators' rulings are final and unchallengeable due to their arbitrary authority. For this reason, arbitrators are referred to as such. An arbitrator is a private, special judge selected to mediate disputes between parties in a private setting. Alternative dispute resolution" are used to assist in resolving legal disputes outside of the judicial system. Most agree that it includes "hybrid" methods like arbitration, mediation, and other processes where a neutral third party helps resolve legal problems without issuing a formal verdict. For a number of reasons, using several adjudication options is recommended.

In addition to improving ex post compliance with the resolution's provisions and potentially lowering transaction costs. Since ADR procedures are likely less expensive and time consuming than traditional court proceedings—other potential benefits of alternative dispute resolution include crafting resolutions that more accurately reflect the parties' underlying needs and interests.

Alternative dispute resolution (ADR) becomes a synonym for different techniques as alternative to

1 B. Totterdill, An Introduction to Construction Adjudication: Comparison of Dispute Resolution Techniques. (Sweet & Maxwell, London, 2003) p. 21.

the long and costly court procedure. Alternative dispute resolution became popular in the middle of 1990's. At first, it was seen as a tool for the reduction of court's backlogs. With the diminishing role of national chambers of commerce — as promoters of arbitrage courts — also the arbitrage became less and less popular among small and medium size enterprises. These processes were even more radical in ex-Socialist/Communist countries with no small and medium enterprises developed1. So, the new millennium with the developed IT infrastructure has brought out also new ideas about the society development. The Alternative dispute resolution is now presented as a procedure that is faster and cheaper than the court procedure. To avoid the negative sides of arbitrage more elements of court procedure were introduced (like role of experts, provisional measures…). To make Alternative dispute resolution more popular it was promoted as a procedure in which the parties can choose their own judge, produce their own law and even sell the risk of the possible decision. But the latest judgement of EU court in investment arbitrage2 could be the end of such approach. The main question is whether the arbitrage could be still an effective method of dispute resolution also for small and medium size enterprises. For the adequate answer the analysis of historical development of ADR should be seen. Through the historical development the essence of ADR could be explained. Submission is divided in three parts. Introduction presents the historical developments and logic behind ADR. Second part deals with goals and interests in ADR. Understanding the goals and interests helps in understanding the nature of disputes. The last part presents cases in which ADR could be still effectively used. The solutions presented is a synthesis of first- and second-part findings.[2]

ADR has the ability to guarantee Kenyans' access to justice. Utilizing this potential is a good idea. ADR techniques like mediation, conciliation, and negotiation have particular qualities that, when used, can promote justice and equity. These characteristics include minimal cost, non-complex procedures, party autonomy, and process flexibility.[3]Over time, it has become clear that using alternative dispute resolution procedures is essential to managing a variety of challenges on a worldwide scale.[4]

Evolution of Alternative Dispute Resolution (ADR)

The modern growth of arbitration, mediation, and other ADR processes can be attributed to at least two different animating concerns. On the one hand, scholars, practitioners, consumers, and

2 Stražišar, B. (2018). Alternative dispute resolution. *Право. ЖурналВысшейШколыЭкономики*, (3), 214-233.

3 What is Alternative Dispute Resolution (ADR)? - African Mediation And Community Service, Available at http://www.metros.ca/amcs/international.htm Accessed on 27th April, 2013; See also Kariuki Muigua, Reflections on ADR and Environmental Justice in Kenya, page 1, Available at http://www.chuitech.com/kmco/attachments/article/97/Reflections.pdf

4 Kariuki Muigua, Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010, page 2. Available at http://www.chuitech.com/kmco/attachments/article/111/Paper%FINAL.pdf; See also Sunday E. N. Ebaye, the relevance of arbitration in international relations, Basic Research Journal of Social and Political Sciences Vol. 1(3) pp. 51-56,November 2012 Available at http//www.basicresearchjournals.org Accessed on 15th April, 2013

advocates for justice in the 1960s and 1970s noted the lack of responsiveness of the formal judicial system and sought better 'quality' processes and outcomes for members of society seeking to resolve disputes with each other, with the government, or with private organizations. This strand of concern with the quality of dispute resolution processes sought De-professionalization of judicial processes (a reduction of the lawyer monopoly over dispute representation), with greater access to more locally based institutions, such as neighborhood justice centers, which utilized community members, as well as those with expertise in particular problems, with the hope of generating greater party participation in dispute resolution processes[5]. Others sought better outcomes than those commonly provided by the formal justice system, which tend toward the binary, polarized results of litigation in which one party is declared a loser, while the other is, at least nominally, a winner. More flexible and party controlled processes were believed to deliver the possibility of more creative, Pareto-optimal solutions which were geared to joint outcomes, reduction of harm or waste to as many parties as possible, improvement of long term relationships, and greater responsiveness to the underlying needs and interests of the parties, rather than to the stylized arguments and 'limited remedial imaginations' of courts and the formal justice system[6, 7] (Menkel-Meadow 1984, Fisher et al. 1991).

In the twenty-first century, alternative dispute resolution, or ADR, aims to replace costly and time-consuming litigation as a quicker, less expensive, and more effective method of settling issues both domestically and internationally. Foreign investors typically prefer arbitration or mediation because they frequently worry about how well their own judicial system would handle cross-border conflicts. In the context of cross-border transactions, alternative dispute resolution (ADR) is becoming more and more well-liked on a national and international level.[8]

Alternative Dispute Resolution (ADR) in Nepalese perspectives

Alternative Dispute Resolution (ADR) in Civil (Code) Actand Constitution of Nepal

Future of Alternative Dispute resolution (ADR)

Arbitration is a dispute settlement mechanism. Arbitration arises where a third party neutral (known as an arbitrator) is appointed by the parties or an appointing authority to determine the dispute and give a final and binding award.

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5 Merry, S., & Milner, N. (1993). The Possibility of Popular Justice: A Case Study of American Community Justice. Ann Arbor, MI: University of Michigan Press

6 Menkel-Meadow, C. (1984). Toward another view of legal negotiation: The structure of problem solving. UCLA Law Review, 31, 754–842.

7 Fisher, R., Ury, W., & Patton, B. (1991). Getting to Yes: Negotiating Agreement Without Giving In. (2nd edn.). New York: Viking Penguin.

8 Surridge&Beecheno, Arbitration/ADR Versus Litigation, September 4, 2006, Available at http://www.hg.org/articles/article_1530.html Accessed on 23rd April, 2013

There is no question that the use of a variety of different processes to resolve individual, organizational, governmental, political, and international problems is continuing to expand. New hybrid forms of ADR (as in mediation on the Internet, Katsh and Rifkin 2001, and public policy mediation and consensus building) are developing to help resolve new problems, with greater participation by more parties. [9]

Large organizations are creating their own internal dispute resolution systems. There are clear trends in favor of mediation and arbitration in the international arena, where globalization of enterprises and governmental interests require creative and simple processes that are not overly attached to any one jurisdiction's substantive law, to promote goals of efficiency, fairness, clarity, and legitimacy, particularly in regimes with underdeveloped formal legal systems. It is also clear that there is competition over who will control such processes, and which processes will dominate in which spheres of human disputing and deal-making. The likely result is that the creative pluralism and flexibility of ADR will be subject increasingly to its own forms of formality and regulation in an effort to keep its promises of efficiency, participatio Arbitration and court processes are not necessary in the Alternative Dispute Resolution (ADR) process of resolving disputes. If the parties are unable to reach a settlement, mediation is an inexpensive, informal, discrete, and readily adaptable solution that they may readily embrace. Furthermore, it puts interests ahead of (legal) rights. In informal dispute settlement, pastoralist villages in northern Kenya use peace committees, better quality outcomes, and justice[10].

Application of Alternative Dispute resolution (ADR)

Arbitration has, thus far, been the mode of choice for resolving international commercial, investment, and trade disputes, such as in the public law settings of the World Trade Organization (WTO), the General Agreement on Tariffs and Trade (GATT) and the International Centre for the Settlement of Investment Disputes (ICSID), and the more private international law settings of the International Chamber of Commerce or the London Court of Arbitration. Arbitration has also been deployed in new forms of disputes developing under both domestic and international intellectual property regimes. Various forms of mediation and arbitration are also being used increasingly to resolve transnational disputes of various kinds (political, economic, natural resource allocation, and ethnic violence) and are employed by international organizations such as the United Nations and the Organization of American States, as well as multinational trade and treaty groups (NAFTA, the European Union, and Mercosur) and nongovernmental organizations in human rights and other issue related disputes.[11] Two more non-violent methods of problem solving, in addition to the traditional techniques of questioning, conciliation,

9 Katsh, E. & Rifkin, J. (2001).Online Dispute Resolution: Resolving Conflicts in Cyberspace. San Francisco: Jossey Bass Publishers.

10 Kariuki Muigua, Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010, Opcit. page 7; The use of Mediation is envisaged by statute, s. 59A & B of the Civil Procedure Act, Cap 21, Laws of Kenya.

11 Greenberg, M. C., Barton, J., & McGuinness, M. E. (2000). Words Over War: Mediation and Arbitration to Prevent Deadly Conflict. Lanham, MD: Rowman & Littlefield.

arbitration, and mediation, are organizing conferences and utilizing social media.[12]

In contrast to costly and time-consuming litigation, alternative dispute resolution, or ADR, aims to develop a quicker, less expensive, and more effective process for settling disputes both locally and internationally in the twenty-first century. Foreign investors typically prefer arbitration or mediation because they are frequently concerned about how successfully the legal system in their own country would manage cross-border problems. In the context of cross-border transactions, alternative dispute resolution (ADR) is becoming more and more well-liked on a national and international level[13].

Conclusion

Rather than being called "alternatives," which implies that they are less successful than litigation, ADR techniques are better described as "appropriate dispute resolution mechanisms". As a matter of fact, these processes should be considered to be on par with litigation. They have a wealth of applications in a variety of contexts where disputes may occur; their potential is only waiting to be exploited. It is crucial to realize that adjudicatory procedures and alternative conflict resolution procedures operate independently of one another.[14]

12 United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

13 Surridge&Beecheno, Arbitration/ADR Versus Litigation, September 4, 2006, Available at http://www.hg.org/articles/article_1530.html Accessed on 23rd April, 2013

14 Laxmi Kant Gaur, Why I Hate 'Alternative' in "Alternative Dispute Resolution", page 4, Available at http://delhicourts.nic.in/Why_I_Hat1.pdf Accessed on 22 April, 2013

Exploring Global Connectivity in Climate Action: Bridging the Gap Across COPs

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Abstract:

Climate change poses an unprecedented challenge requiring coordinated global action. The annual Conferences of Parties (COPs) under the United Nations Framework Convention on Climate Change (UNFCCC) provide a key multilateral platform for climate negotiations amongst nation states. This presentation provides a comprehensive overview of over 25 years of global climate summits since COP1 in 1995 to the upcoming COP28 in 2023.It outlines the history and birth of UNFCCC itself in 1995 before detailing the origins of the seminal Kyoto Protocol negotiated during COP3 in 1997 which assigned mandatory emissions reduction targets to developed countries. The presentation traces key milestones in subsequent COPs including the Bali Action Plan, tumultuous Copenhagen and Cancun summits and ultimately the landmark Paris Agreement of COP21 in 2015 which brought all countries into a common cause.The Paris Agreement contains accelerating provisions designed to limit global warming through binding nationally determined targets, transparency in reporting and periodic ratcheting of collective ambitions. Progress and gaps in actual implementations vis-à-vis scientific imperatives are examined through latest available data and COP26 outcomes. The analysis also assesses linkage with Sustainable Development Goals and explores COP outcomes specific for India and Nepal.Finally it surveys forthcoming policy priorities and negotiation dynamics headed into COP27 and COP28 while providing summary perspective on the efficacy of UN climate change conference evolution spanning over two decades. Recommendations center on equity and differentiated responsibilities for climate justice to ensure the promise of Paris is fulfilled through urgent, ambitious action.

I. **Introductions**:

An unprecedented challenge calls for unprecedented cooperation amongst the community of nations. Climate change refers to long-term shifts in temperatures and weather patterns[1]. Climate change poses

1 United Nations, 'What is Climate Change?' (UN Climate Change) https://www.un.org/en/climatechange/what-is-climate-change/ accessed 15 February 2024

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one such existential threat to human civilization, with impacts already being felt across the globe through rising temperatures, extreme weather events, disrupted ecosystems and endangered species. The fundamental cause lies in heat-trapping greenhouse gases building up in the Earth's atmosphere as a direct result of more than a century of massive fossil fuel exploitation since the industrial revolution to meet the ever-growing energy needs of a modern world.The impacts of climate change pose profound risks to communities and ecosystems across the world. Effects include increases in extreme weather events like heatwaves, floods and tropical cyclones leading to deaths, displaced populations and massive economic costs. Other threats range from rising sea levels submerging coastal lands to droughts devastating agriculture food production to outbreak of infectious diseases. No country is immune with developed and developing nations alike facing existential challenges. Climate change knows no borders. This urgent planetary crisis can only be tackled through unprecedented international cooperation and collective global action. From transitioning rapidly away from polluting fossil fuels to providing finance and technological support enabling emissions reductions globally, multilateral collaboration is imperative. It holds the key to climate change mitigation and adaptation to avoid catastrophic irreversible planetary heating.The annual United Nations climate change conferences, referred to as the **Conferences of Parties or COPs**, have provided a pivotal multilateral platform to coordinate a unified response amongst nations to counter climate change for over two and a half decades now. It all started with the first "**COP1**" **summit held in Berlin, Germany in 1995**[2] which led to creation of the seminal United Nations Framework Convention on Climate Change (UNFCCC) itself of which almost all countries are signatories. The early COPs focused on voluntary emissions reductions given reluctance and debates over binding caps or commitments.It took until COP3 two years later in **1997 at Kyoto, Japan** for concrete mandated caps to be imposed on developed nation's only, not emerging economies, through the pioneering Kyoto Protocol. Although flawed by exclusions and later withdrawals, Kyoto was still a milestone first step on a long climate negotiation pathway. Tumult followed during subsequent COPs when attempts to bring major developing world carbon emitters like China and India into a broader successor's regime to Kyoto post-2012 faced stiff resistance, ultimately resulting in failure at Copenhagen during COP15 in 2009. But slowly clarity, cooperation and willingness to find common ground and acceptable compromises started taking shape, culminating eventually in the breakthrough Paris Agreement universal accord between almost all countries inked at **COP21 in Paris in December 2015**[3].The Paris pact contains far-reaching and accelerating provisions designed to substantially limit average global temperature rise caused by climate change to ideally no more than 1.5 degrees Celsius in the coming decades. This paper examines in closer detail this landmark global consensus platform in the form of the Paris Agreement, tracing the 25+ year negotiation journey since Berlin 1995 that made it possible. Progress and gaps since Paris

2 United Nations Framework Convention on Climate Change (UNFCCC), 'Berlin Climate Change Conference - March 1995' https://unfccc.int/conference/berlin-climate-change-conference-march-1995/accessed 15 February 2024

3 United Nations Framework Convention on Climate Change (UNFCCC), 'COP 21' [https://unfccc.int/event/cop-21/] accessed 15 February 2024

are analyzed, linkage with Sustainable Development Goals explored, and country-specific perspectives provided including for vulnerable developing nations like India and Nepal. Recommendations center on equity and differentiated but shared responsibilities through urgent climate justice and solidarity between the Global North and South to fulfill temperature goals that climate science proves is imperative for planetary health. The aim is predicting whether the promise of Paris can indeed be achieved via implementation developments headed into the forthcoming COP27 in Egypt and COP28 in the UAE.

II. Paris Agreement - Fulfilling Climate Justice through Multilateral Ambition:

The existential threat of climate change demanded a unified global response. Culminating 25+ years of multilateral negotiations under the annual United Nations Climate Change Conferences (COPs), this manifested in the landmark Paris Agreement adopted at the COP21 summit in Paris in December 2015. Signed by almost all nations, the Paris Agreement marked unprecedented consensus on collective action to limit the grave impacts of runaway climate change.

Key Elements and Provisions:

Mitigation for Emission Cuts:

The Paris Agreement sets out binding commitments from nations worldwide to substantially reduce national net **carbon emissions**[4]**,** through both policies and technological shifts aimed at **decarbonization**[5] of energy, transport, infrastructure and food production sectors.Centered on voluntary pledges or Nationally Determined Contributions (NDCs) submitted every five years with increasing levels of ambition, the Agreement relies on bottom-up national plans rather than globally legislated cuts. This flexible, pragmatic model helped overcome previous roadblocks during past COPs to mandatory top-down emissions targets that emerging economies like China and India had resisted. Current NDCs however are still inadequate to meet temperature goals. As of 2022, combined pledged cuts limit warming to 2.4 degree Celsius by 2100[6]as compared to pre-industrial levels whereas Paris Agreement's central aim is keeping it under 1.5 degree Celsius, and at the most 2 degree Celsius. This NDC ambition gap remains the Agreement's foremost flaw and area needing urgent enhancement.

Adaptation for Resilience

The Agreement also includes strong provisions on adaptation even while mitigation remains its principal long-term focus given the root driver. Adaptation refers assistance needed by developing countries already

4 Carbon emissions refer to the release of carbon compounds, primarily carbon dioxide (CO2), into the atmosphere. These emissions can occur naturally, such as through volcanic eruptions or respiration, but human activities are the leading source of carbon emissions today.

5 Decarbonization refers to the process of significantly reducing or eliminating carbon dioxide (CO2) and other greenhouse gas (GHG) emissions from the atmosphere.

6 Climate Action Tracker, 'Temperatures' (climateactiontracker.org) https://climateactiontracker.org/global/temperatures/ accessed 15 February 2024

facing climate change effects for disaster risk reduction and building resilience.Historically adaptation financing had lagged mitigation in climate summits. Paris attempted reversing this through mandates like global adaptation goals, placing adaptation on equal footing via inclusion together with mitigation in NDCs which had previously only covered latter, and significantly increasing flows earmarked as adaptation finance for communities battling climate damage.Still adaptation support continues lagging behind mitigation flows due to structural deficiencies within climate financing architectures and lack of credible data. Adaptation provisions hence require ongoing strengthening for climate justice.

Climate Finance Transfers

Flow of climate finance from developed to developing nations is pivotal given lower income countries have done least to cause the climate crisis but face maximally risks. Under Paris the target by 2020 was mobilizing $100 billion annually from public and private sources globally[7] but remains unmet so far.The Glasgow Pact at COP26 in late 2021 urged developed countries to fully deliver on the $100 billion goal urgently by 2023[8]. Climate financing received however is still often not transparent nor credible when accounting for repackaged existing aid. Truly new, accessible and trackable climate finance transfers remain crucial for equity under Paris.

Paris Goals and Guiding Principles

The chief long-term temperature goal contained in Paris is restricting global warming rise to well below 2 degree Celsius above pre-industrial era levels, aiming further for only 1.5 degree Celsius rise given grave threats posed by 2 degree heating. The 1.5 degree ceiling on planetary warming was core demand by vulnerable Small Island Developing States facing literal extinction from sea-level rise triggered as polar ice caps melt[9].The **Paris pact**[10]also enshrined equity as central guiding tenet in both implementing and continuously assessing the accord. Historical responsibility must be honored given developed nations have overwhelmingly caused climate change from over a century of unabated carbon emissions since industrialization but developing countries now face the devastating results. Both responsibility and respective capacity are anchored as key equity principles within implementation.

Expected Outcomes

Scientific projections show current Paris pledges limiting temperature rise to 2.4 degrees only whereas 1.5 degrees is planetary red line[11]. Urgently enhancing NDC ambitions and accelerated emissions cuts

7 Organisation for Economic Co-operation and Development (OECD) 'Climate Finance and the USD 100 Billion Goal' (OECD, Climate Change) https://www.oecd.org/climate-change/finance-usd-100-billion-goal/accessed 15 February 2024

8 World Resources Institute (WRI), 'COP26: Key Outcomes From the UN Climate Talks in Glasgow' (World Resources Institute, 19 November 2021) https://www.wri.org/insights/cop26-key-outcomes-un-climate-talks-glasgow accessed 15 February 2024

9 The New York Times, 'Have We Crossed a Dangerous Warming Threshold? Here's What to Know' (The New York Times, 2024-02-08) https://www.nytimes.com/2024/02/08/climate/global-warming-dangerous-threshold.html accessed 15 February 2024

10 Paris Pact" can refer to the international climate change agreement aiming to limit global warming

11 IPCC, 'Summary for Policymakers' (IPCC, 2024-02-18) https://www.ipcc.ch/sr15/ accessed 15 February 2024

this decade is vital to come closer to Paris goals and avert irreversible, catastrophic climate disruptions. Economic impacts show transition risks from phasing out fossil fuels and impacts on workers must be handled justly but clean energy shift also offers enormous opportunities with renewable energy jobs booming. Managing this energy transition in socially inclusive ways is imperative.Societal outcomes when done properly can foster greater climate justice through public mobilization, bringing marginalized voices to decision-making tables. Treaties alone rarely succeed so ongoing mass civic pressures globally which sparked Paris deal itself remain integral to hopes of achieving its promises.

India and Nepal: Climate Vulnerabilities and Equity Implications

Climate Exposure for India and Nepal:

India and Nepal face acute climate change threats. The Hindu Kush Himalaya (HHK) region containing the Himalayan mountain range and transboundary Indo-Gangetic plains spanning the two South Asian neighbors is ecologically fragile, densely populated, socioeconomically underdeveloped and exceptionally vulnerable.Impacts projected in coming decades encompass alarming glacier and snow cover losses, increased variability of monsoons and extreme precipitation, frequent destructive floods and droughts, changes in soil moisture and runoff vital for agriculture. These will gravely jeopardize water access for hundreds of millions in the region while also increasing disasters, fragility and migration.

Equity and Responsibility Elements:

Crucially India and Nepal have among lowest per capita carbon emissions globally, including just one-third the world average in India's case. Historical culpability of climate crisis therefore does not lie here. That onus sits squarely on industrialized high-emitters in the Global North.Yet these vulnerable developing countries are at highest risk levels to devastating fallouts. Equity under principles enshrined within Paris demands significant transfers both in mitigation finance to shift energy trajectories and adaptation support to secure communities as climate chaos intensifies in the South Asian region in coming years. Without such cooperation, marking sharp increase in flows compared to the $34 billion received in South Asia combined 2019-2020 levels per OECD data[12], hopes for climate justice under Paris will fail leaving countries India and Nepal to fend for themselves even while Northern nations primarily responsible for the unfolding crisis do too little to curb their own emissions, let alone assist victims.The promise behind Paris was transforming a looming climate catastrophe into opportunity for greater equity, development justice and environmental cooperation benefiting humanity as a whole. But its lifetime will be defined by action, or inaction. From enhancing mitigation ambitions and adaptation investments to ensuring credible finance transfers, accelerated efforts this decade led by developed countries which grew rich while polluting the atmosphere are imperative ethical obligations without which 1.5 degree goal under Paris cannot be fulfilled.Timing is everything too in the climate equation. The 2020s are decisive in shaping climate trajectory given locked-in impacts due already from historical emissions. Action delayed

12 OECD, 'Finance USD 100 billion goal' (OECD) https://www.oecd.org/climate-change/finance-usd-100-billion-goal/ accessed 15 February 2024

will melt away Paris hopes like glaciers receding higher each year, presenting grave intergenerational injustice for today's children especially across vulnerable global south communities from India to Small Islands who contributed least for the climate mess but face highest damages.At its core, Paris is about this very climate justice. Its litmus test remains fulfilling promises through equitable responsibility sharing and adequate support transfers that respect different national realities so developing nations also prosper in a zero-carbon future instead of becoming its first victims. Only cooperative, urgent worldwide ambition this decade infused with ethical obligations across the classic development divide can secure legitimate Paris aims centered on securing future generations their right to dignified survival on a common planet dangerously warming. The world's choices in the 2020s and this year's COP27 summit will judge if Paris was real hope or mere rhetoric unable to bend global emissions curves in time enough to halt climate unraveling[13]. What is decided holds lasting consequences for billions vulnerable across India, Nepal and beyond awaiting true climate solidarity matching the scale of the emergency at hand.

III. Tracing the History of climate Negotiations- From Berlin Mandates to Fulfilling Paris Promises:

The annual United Nations climate change summits known as Conference of Parties (COP) provide pivotal global forums for collective action against an unfolding climate crisis. Initiating with COP1 in Berlin back in 1995 which gave birth to UNFCCC itself, these conferences have traced a 25+ year journey aimed at driving multilateral cooperation to curb emissions and assist vulnerable nations already facing climate impacts even while global political dynamics surrounding differential responsibilities and levels of action remain complex and often vexing.

a. COP1 - The Berlin Mandate (1995)

Historical Origins:

Prior to initiation of the Conference of Parties (COP) process, growing scientific consensus had started coalescing in late 1980s over concerning data on observed atmosphere and ocean warming tied to humanity's profligate greenhouse emissions release since the industrial revolution. Calls amplified for coordinated global action.This resulted eventually in negotiations for an overarching climate treaty. Adopted in 1992, the UN Framework Convention for Climate Change (UNFCCC) laid down initial principles like equity and common but differentiated responsibility. Its core aim was voluntary stabilization of emissions but without any mandated caps or reduction targets.But by then advanced modeling already indicated voluntary measures were inadequate given the magnitude of the problem. Data showed business-as-usual trajectories could catalyze over 2 degrees Celsius planetary heating by 2050 spurring dangerous climate disruptions.

13 'COP26 ends with agreement but falls short on climate action' (UN Environment Programme) https://www.unep.org/news-and-stories/story/cop26-ends-agreement-falls-short-climate-action accessed 15 February 2024

First COP in Berlin & Achievements

Hence the first annual COP summit held in 1995 in Berlin, Germany was always destined as inflexion point from where accelerated efforts were vital.The Berlin discussions ultimately produced a decision called the "Berlin Mandate". It signaled acceptance amongst nations that binding quantified emissions limitation objectives within specified timeframes were required for developed nations who had overwhelmingly caused the climate problem from over a century of industrial greenhouse releases since 1850s.The Berlin Mandate thus set stage for negotiating stronger provisions during subsequent conference outcomes.

b. **Why COP2 was Necessary?**

But concrete steps on legally mandated emission cuts for nations only materialized two years later during COP3 in 1997 in Kyoto through the pioneering but flawed Kyoto Protocol. The intermediary COP2 summit in Geneva in 1996 could not resolve intricate issues like developing countries not wanting historic emitters alone deciding future consumption space given implications for their own growth. These unsettled equity debates necessitated further talks. COP2 however kept momentum through Geneva Ministerial Declaration asserting will for legally binding targets and sustaining global climate response urgency in the interim year before Kyoto.

COP2 Outcomes:

Held again in Geneva, Switzerland after Berlin kickstarter, COP2 achievements included:

- Affirming political will for legally binding emissions reduction agreements to be finalized next year at COP3
- Requesting the IPCC to produce comprehensive report assessing scientific understanding of climate change ahead of COP3
- Calling on all countries to prepare initial communications about their domestic circumstances, greenhouse gas inventories, mitigation steps and constraints which became basis for differentiation principles
- Urging countries who had not already joined UNFCCC itself to now become Parties via ratification
- Geneva Ministerial Declaration issued outside formal COP process recognizing need for precautionary measures and different national capabilities

COP2 Reflections:

In retrospect while COP2 lacked flagship outcomes of Berlin's urgency or Kyoto's targets that followed, its role keeping negotiations ongoing by sustaining momentum and information flows should not be understated. This was vital bridging period.

c. **COP3 - The Kyoto Protocol (1997):**

Birth of a Breakthrough Treaty - Key Elements

Held in Kyoto, Japan in late 1997, COP3 represented seminal moment when conceptual climate change acknowledgment culminated into concrete legally binding emission reductions for developed nations.

The path breaking Kyoto Protocol's key pillars binding developed signatories included:

- Mandatory cuts - Average 5% against 1990 levels over 5 years from 2008-2012
- Differentiated cuts equating "common but differentiated responsibilities" enshrined in UNFCCC earlier
- Innovative market mechanisms for flexibility & efficiency - Carbon Trading, CDM, Joint Implementation
- Reporting & Review compliance mechanisms

Divisive Debates Resolved:

Contentious issues like the United States demanding developing nations also adopt some binding targets almost derailed the talks.But skillful diplomacy by conference chair Raul Estrada leading the Argentine delegation brokered compromises allowing differentiated responsibilities between North and South. Per capita fairness and historic emissions arguments justified relaxed provisions for poorer nations. China and India's influence as emerging forces however secured headroom allowing future unchecked emissions, sowing seeds for later discord once both started rising fast up carbon charts from early 2000s as manufacturing and construction powerhouses.

Why Kyoto Protocol Mattered?

For all its flaws and exclusions, Kyoto still represented epochal breakthrough after years of debates over responsibilities, capabilities and policy consequences.It transformed abstract climate risks into acknowledged fact-based reality demanding serious mitigation. Codifying targeted emission cuts in international treaty signaled arrival of climate change as definitive intergovernmental priority. Even watered down 5% developed world reduction from base year levels was start acknowledging the stakes involved.

Post-Kyoto Problems Emerge:

Kyoto's clean development mechanism (CDM) designed for joint collaborative emissions mitigation projects between North and South saw huge demand as carbon trading blossomed into a booming global market within few years facilitating cost-effective cleaner industrial growth in emerging economies despite worries by activists over accounting loopholes on actual additional mitigation.But troubles surfaced as Canada withdrew from the Protocol in 2011 while large swathes of the US Congress refused

ratifying citing exclusion of Chinese and Indian emissions.When in 2001 President George W Bush confirmed the US was withdrawing cooperation citing unfair economic burdens, it initiated fateful cascade ultimately leading to 2015 when Canada, Russia, Japan and New Zealand too exited Kyoto ignominiously.A global climate policy rift had erupted requiring fresh ideas under a successor pact - setting stage for over 15 torturous years of inconclusive wrangling till Paris salvation.

d. **COP4 (Buenos Aires, 1998)**

The 1998 Buenos Aires meet put meat on bones of previous milestones via the Buenos Aires Plan of Action centered on aiding Kyoto Protocol ratification through enhanced reporting systems, building capacity in vulnerable developing nations and attempting progress on tricky topics like reducing emissions from deforestation not addressed earlier. Rules for compliance procedures and flexibility mechanisms saw elaboration while adaptation funding mechanisms were initiated even if lacking detail. But Buenos Aires built bridges for next year's finalization.

e. **COP5 (Bonn, 1999)**

By the time COP5 arrived at German city of Bonn in late 1999, the Kyoto Protocol stood tantalizingly close to implementation if pending technical complexities could get untangled across multiple workstreams. Intensive negotiations over two weeks achieved breakthrough on quantitative emission targets for states, flexibility via carbon trading options, forest conservation accounting and compliance enforceability. The heavy lifting completed the Bonn Agreements, laying foundation for entry into force within few years.

f. **COP6 (The Hague, 2000)**

If Buenos Aires and Bonn progressed technicalities, The Hague meet in 2000 was envisioned as possible crowning moment for operationalizing Kyoto itself. But unresolved wrangles over developing nations taking on binding targets, extent of forest and land use carbon credits allowed and penalties for non-compliance saw talks dramatically collapse in disarray - delaying Protocol ratification by years.

g. **COP6 Phase II (Bonn, 2001)**

When COP6 resumed next year back in Bonn, intensive diplomacy stitched back together the complex architecture across disputed issues like carbon sinks, compliance penalties, funding channels etc. This political deal unlocked gridlock allowing countries confidence now to proceed ratifying Kyoto itself. The rescues Act at Bonn laid basis for Marrakesh Accords.

h. **COP7 (Marrakesh, 2001)**

As countries lined up to ratify the Protocol after US withdrawal, the Marrakesh summit in late 2001 completed essential rulebook frameworks needed for practical implementation focusing on accounting procedures that would underpin credible market mechanisms enabling global carbon trading regimes. Adaptation funding saw headway by formalizing the Adaptation Fund.

i. **COP8 (New Delhi, 2002)**

India hosted next COP summit in 2002 at New Delhi which via the Delhi Declaration stressed cooperation between developing and industrialized states highlighting technology innovation and transfer for sustainable development as win-win for mitigation and poverty reduction. Calls amplified for countries yet to ratify Kyoto to now proceed urgently.

j. **COP9 (Milan, 2003)**

The 2003 Milan talks delivered key accord on thorny issue of accounting methods for land use changes and forestry emissions which had derailed past talks while providing vital exemptions for certain unavoidable agricultural emission activities especially crucial for developing country farms. Reporting and review guidelines also got enshrined building trust.

k. **COP10 (Buenos Aires, 2004)**

When COP returned to Argentina, efforts on driving actual projects under Kyoto flexibility mechanisms dominated agenda alongside debuting idea of emissions credit exchanges between states to incentivize quicker reductions. Demonstrating multipronged pragmatism, Buenos Aires also initiated Dialogue on long-term action inviting inputs.

l. **COP11 (Montreal, 2005)**

Coming soon after Kyoto enforcement in early 2005 with Russia's decision tipping ratification threshold, Montreal discussions focused on implementation via the Montreal Action Plan ranging from boosting compliance, reporting standards and capping excess country credit withdrawals that could undermine real emissions progress. The stage was now set for full-fledged climate cooperation.

m. **COP12 (Nairobi, 2006)**

Two Nairobi outcomes - 5 year program to compile scientific adaptation research for policy decisions and concrete steps initiating operations of the pivotal Adaptation Fund supporting climate vulnerable communities marked hopes operationalizing support structures. But post-2012 ambition divides remained unsettled. Bali Roadmap next year then charted course for post-Kyoto future.

n. **COP13-16: Bali to Copenhagen Crash (2007-09):**

Bali Roadmap

With the Kyoto Protocol's first commitment phase ending in 2012, COP13 held in the Indonesian island of Bali in 2007 became venue for debate on post-Kyoto architecture for climate mitigation until 2020 and beyond.After extensive negotiations, Bali culminated in adoption of "Bali Road Map" - a key blueprint for establishing successor to Kyoto Protocol via a novel "Ad Hoc Working Group" which was tasked to deliver an ambitious climate protection treaty by 2009.Momentum seemed high as world leaders also initiated

13 fresh multilateral funds and partnerships fostering technology cooperation on clean energy, reducing deforestation and helping vulnerable countries adapt to climate impacts aside from the core Bali Action Plan focused on mitigation via binding future emission pathways.

Towards a Global Deal – Copenhagen COP15:

As epic climate summit in Copenhagen approached under great expectations in 2009 which aimed sealing the long-awaited post-Kyoto vision as outlined in Bali, unprecedented political energy got injected by newly elected US President Barack Obama supporting legislation for the first time to cap American emissions which were left out by Kyoto.The stage seemed set for a historic worldwide climate accord hailed as perhaps most significant diplomatic event since the UN formation itself post World War 2. Desperate small island states demanded delivery of a 1.5-degree firm ceiling on global warming which they already faced existential risk from rising seas.

Copenhagen Drama & Breakdown:

But as Copenhagen talks progressed, it turned into diplomatic train wreck eroding goodwill. Sudden issuance of a backdoor draft prompted angry allegations by poorer nations of exclusion who protested along with youth and civil society observers kept out of guarded halls.Inside the complex forums, major disagreements flared often along classic North-South fissures on legal nature of emission pledges, how strict to peg temperature rise caps, binding verification needs and critically on fast-growing giants China and India resisting taking on reduction mandates like OECD countries.US legislation was also stalled back home over domestic political wrangles on social and economic costs further weakening its negotiating levers.

Flawed Copenhagen Accord

When talks collapsed painfully in rancour and chaos without major agreement barring a hastily improvised "Accord" orchestrated via backchannels directly between Obama and BASIC country leaders, it left the multilateral consensus gambit in tatters.The weak Accord despite proclaiming temperature caps and financing figures utterly failed matching urgency or ambition needed. It crucially proved a non-starter legally owing to opposition led by Venezuela and Sudan over process violations.

Cancun Agreements Salvage Some Ground

Next year in 2010, COP16 at Cancun, Mexico produced another watered down stopgap package named Cancun Agreements which mostly assembled pieces from the controversial Accord while deferring legally binding cuts for a later day. But progress on novel concepts like loss and damage recognition and anchoring equity via core review principles helped rebuild some multilateral traction.The stage was now set for another 5 years of tremulous negotiations until Paris finally delivered a workable framework acceptable enough to all fractious parties.

o. **COP21 Paris Agreement (2015):**

Paris Pact Breakthrough

Culminating 24 long and fractious years since UNFCCC itself first entered into force, the landmark Paris Agreement in 2015 succeeding the expired Kyoto Protocol was enshrined with elation and applauds by world leaders as a new dawn for climate ambition and cooperation.The Paris Agreement's unprecedented diplomatic accomplishment lay in getting practically every country into a common cause based on voluntary emission pledges through anchored transparency without the earlier model of top-down mandated targets for select advanced economies. This flexible pragmatic framework manufactured consensus by sacrificing legal bindingness.

Salient Architectural Features:

Its main instruments and signatories' obligations include:

- Submitting voluntary vows called Nationally Determined Contributions (NDCs) every 5 years with progressively higher ambition - Almost 190 NDCs representing 96% global emissions are submitted already with new iterations due again in 2025 focusing on 2030 outcomes
- Binding all parties to reporting and accountability systems tracking progress on NDCs which gets independently verified with technical expert reviews
- Requiring successive NDCs consistent with individual capacities and equity while reflecting highest possible ambition towards a common temperature goal
- Reaffirming USD 100 billion annual climate finance support from developed nations for developing countries from 2020 targeting adaptation necessities like disaster funds which saw new pledges
- Loss and Damage recognition as a separate pillar for assisting most vulnerable nations incurring irreparable climate harms

Evolving Ratcheting Mechanism

Central to Paris weaving a pragmatic balance between voluntary yet progressive emission cut vows and monitoring systems forcing enhancement is its hybrid "ratcheting mechanism" demanding continual updation of ambitions on a 5-year stocktake cycle known as global stocktakes.These periodic peer reviews of collective progress made towards the overarching temperature goals would apply pressure on countries to match rhetoric with real deeds.The stocktake innovation rewarded transparency over punitive policing given prior regimes faltered confronting defiance. It signaled philosophical embrace that climate battles would be won slowly but surely through cooperation not coercion.

Remaining Gaps - Insufficient Ambitions, Inadequate Finance:

Yet while the Paris Agreement won acclaim for flexible unity, its inherent limitations were visible from

Day One when even full implementation of the initial round of NDCs submitted only limited global warming to 2.5-3 Degree Celsius instead of ideal 1.5 or maximum 2 degree target set.Most NDCs fell critically short matching science-recommended emission cuts for 2 degree pathway necessitating immediate strengthening. Developed nations also failed supplying $100 billion yearly support from 2020 triggering equity disputes. Clear means for boosting adaptation finance remained absent.So while Paris saved multilateralism from climate abyss through unanimous diplomatic consent, its lifetime success still lies with nations actually enhancing mitigation efforts and financial help each cycle till warming curves biologically flatten. Without which Paris would remain more triumph of optimistic rhetoric and less substantive salvation.

p. **COP26 Glasgow Pact (2021):**

Six Years from Paris:

By the time UK hosted the COP26 summit at Scottish port city of Glasgow in late 2021 delayed by a pandemic year, global emissions had kept rising worryingly since Paris adding further risks of overshooting low warming targets. G20 alone almost utterly failed enhancing NDCs.But pressure also mounted to finally deliver concrete targets and plans bridging gaps on finance and adaptation adding teeth to barebone Paris architecture as the pact entered critical implementation phase in its 6-year lifecycle prompted by impact worseningeight of the warmest years recorded occurred in the last decade.

Uneven Pledges & Outcomes:

Uneven achievements at Glasgow included new pledges towards stronger 2030 NDCs albeit still not enough for 1.5 degree goal keeping vulnerable nations unsatisfied.Rich countries continued delaying financial disbursements owing developing peers over $75 billion just for the interim 2020-2025 period in flagrant breach of agreements stoking bitterness while delivery systems for channelizing newly launched adaptation funding itself remained unclear or weak[14].Some headway on complex issues like finalizing rulebooks for new carbon market systems under Article 6 which promotes international cooperation did bring partial relief though critics highlighted troubling accounting loopholes and offramping risks over claimed mitigation outcomes.

Verdicts Remain Split

Reviews remained split on COP26 outcomes with optimists cheering expanded climate coalition reaching 90% global emissions coverage finally while critics slammed egregious gap remaining between urgent mitigation needs and actual response failing those already facing climate firestorms after 25 talks starting from Berlin 1995 having achieved little emission bend so far while global 2030 trajectory still remained daunting if Paris goals were to be fulfilled at all.

14 The Guardian, 'Rich nations failing to meet climate aid pledges' (The Guardian, 20 February 2009) https://www.theguardian.com/environment/2009/feb/20/climate-funds-developing-nationsaccessed 15 February 2024

q. **COP27 Sharm El Sheikh 2022**

Eyes on Global South

As climate justice calls gain momentum from developing countries, next summit at Egyptian coastal city of Sharm El Sheikh is already billed to test Northern nations willingness for transferring funds and technologies enabling low carbon growth across still industrializing Global South where per capita emissions often remain far lower but size of populations imply aggregate volumes are rising.Real progress on long-delayed demands like measurable tracking of $100 billion 12 year old support commitments and funneling new adaptation monies to Africa and Asia-Pacific will determine if Glasgow was genuine turning point or further betrayal.Egypt's diplomatic heft would be leveraged for the South but a shifting climate risk reality might compel even recalcitrant polluting economies to offer some concessions to protect planetary futures.Now over quarter century since Berlin kickstarted global climate journey, COP27 carries burden of proving pledges match consequences for the vulnerable watching global emissions continuing rising year on year while struggling already to cope with a disrupting climate.

r. **COP28 (2023):**

Final Summit of Critical Decade:

By 2023 when UAE welcomes near 200 delegations to slick futuristic Masdar City aiming to showcase oil-exporting nations too can champion green causes, the Paris Agreement would be entering final triennial review cycle of its first decade since 2015 before the next NDC enhancement.As current NDCs fail limiting warming over 1.5-2 Degree target, updated 2025 commitments and implementation plans would define if Paris' lofty vision can be fulfilled.COP28 as the last summit of the critical 2020s amidst worsening global heating and catastrophes represents possibly final realistic chance for unlocking sufficient climate mitigation and financial assistance ambition essential to save Paris pact and planet it was created for through extraordinary world cooperation starting from Berlin 1995.What was started then reaches fruition or failure by end of this decade. World's coastal, forest, mountain communities await if glacial melt and associated disasters can be halted before land, livelihoods and lives disappear in societies already at maximal risk. They watch and wait hoping COP28 will determine more than just their future but also that of coming generations.

IV. **Conclusion - Climate Justice Now for Just Futures:**

The year journey from Berlin's common concern to Paris' consensus architecture has been marked by courageous pacts and cowardly acts as climate change realities and negotiations proceeded in tandem from 1995 to present times.There has been success in form of treaties and peaks like Kyoto and Paris but also troughs when agreements came undone over legally binding targets, finance and verification wrangles. However temperature rise itself maintained an upward march all along imperiling vulnerable communities already battling disruptions with minimal culpability thanks to paltry emissions histories. Urgent ambition enhancements are mandated this decade across mitigation capacities, adaptation inadequacies and inequitable climate financings if temperature increases are to be contained sustainably under 1.5 degree pathway by mid-century as 135 developing nations desperately demand after

struggling to shoulder collateral damages from northern industries that grew rich while polluting the global atmospheric commons.

Recommendations for Climate Justice

If climate negotiations spanning over 25 years are to salvage viability of durable multilateralism centered on cooperation not coercion, equity must lie at heart of urgent recommendations as critical 2020 decade unfolds with its decisive implications on warming trajectories ahead.

- The principle of Common But Differentiated Responsibilities (CBDR) needs to be translated from theoretical discussions to concrete actions to operational centerpiece guiding elevated assistance flows, climate financing and technology transfers from wealthy carbon culprits to victim countries via tools like directed Special Drawing Rights reallocations at IMF that account for lost development space caused by global emissions centuries denying South opportunity for growth seen by North.
- **Right to development** for global South anchored as core progress pillar at par with emission cuts tracked for developed North which owes ethical obligation not just reducing own footprint but also powering cleaner trajectories of poorer nations through patient capital, concessional loans and grant aid helping bypass the fossil fuel growth path historically taken by current prosperous emitters when climate risks were unknown.
- Vulnerable communities rights specifically mainstreamed across UNFCCC work streams via dedicated mechanisms giving decisive voice for representation, participation and rights championing for indigenous groups, women inheriting subsistence farm challenges and youth facing generational burdens from climate disruption.

When it comes to vulnerable developing countries like India and Nepal, linkage between climate negotiations and broader Sustainable Development Goals (SDGs) is unmistakable. These South Asian neighbors with minimal historic emissions face maximal climate risks to developmental aspirations and poverty reduction priorities. Success of COP mechanisms in facilitating sustainable technology transfer and adaptation finance hence bears directly on safeguarding communities as well as ensuring irrigation, agriculture, clean water and sanitation related SDGs vital to uplift hundreds of millions out of income insecurities. India has emerged progressive voice championing solar transitions while supporting other Global South voices, often with assistance from Nepal delegations under principles of South Asian solidarity. Fulfilling climate justice for the Indian subcontinent implying patient capital inflows for low carbon leapfrogging and climate proofing Himalayan ecosystems and downstream densely populated plains hence ties directly into the wider SDG agenda. If sustainability and equity preferentially applies anywhere, then it must begin in South Asia where vulnerability converges with poverty still denying dignified living for the marginalized. Climate futures and development destinies remain inseparable for India and Nepal which hopefully newer instruments like SDG framework can help reconcile.In final analysis, “common but differentiated” responsibilities must give way to “equitable development” opportunities for hitherto marginalized South facing maximal climate consequences created by unchecked industrial Emit activities of wealthy Global North over past 150 years.Climate justice entails patient partnerships not impatient blame games. Just futures for all demand climate equity now.

Nepal Council of Arbitration (NEPCA) Committees

NEPCA's 12th Executive Committee: 31st Annual General Meeting of NEPCA was held on 2079/09/30 at NEPCA Conference Hall, Kupondol, Lalitpur. The AGM has elected the 12th Executive Committee members as follows:

1.	Dr. Rajendra Prasad Adhikari	- Chairperson
2.	Mr. Dhurva Raj Bhattari	- Immediate Past Chairperson
3.	Mr. Lal Krishna KC	- Vice – Chairperson
4.	Mr. Baburam Dahal	- General Secretary
5.	Mr. Thaneshwar Kafle	- Secretary
6.	Mr. Hari Kumar Silwal	- Treasurer
7.	Prof. Dr. Gandhi Pandit	- Member
8.	Mr. Manoj Kumar Sharma	- Member
9.	Mr. Mahendra Bahadur Gurung	- Member
10.	Mr. Madhab Prasad Paudel	- Member
11.	Mr. Som Bahadur Thapa	- Member

Various committees were formed in order to achieve the objective of NEPCA. The committees are as follows:

a. Membership Scrutiny Committee

i.	Mr. Baburam Dahal	- Coordinator
ii.	Mr. Hari Kumar Silwal	- Member
iii.	Mr. Mahendra Bahadur Gurung	- Member

b. Arbitrator/Adjudicator/DB Appointment Committee

i.	Dr. Rajendra Prasad Adhikari	- Coordinator
ii.	Mr. Thaneshwar Kafle (Rajesh)	- Member
iii.	Mr. Som Bahadur Thapa	- Member

c. Statute, Discipline and Panelist Scrutiny Committee

i.	Mr. Dhruva Raj Bhattarai	- Coordinator
ii.	Dr. Rajendra Prasad Adhikari	- Member
iii.	Mr. Madhab Prasad Paudel	- Member

d. Training Committee

i. Prof. Dr. Gandhi Pandit - Coordinator
ii. Mr. Thaneshwar Kafle - Member
iii. Mr. Manoj Kumar Sharma - Member

e. Institutional Development and International Relations Committee

i. Mr. Mahendra Bahadur Gurung - Coordinator
ii. Mr. Hari Kumar Silwal - Member
iii. Mr. Naveen Mangal Joshi - Member

f. Research and Publication Committee

i. Mr. Manoj Kumar Sharma - Coordinator
ii. Mr. Gyanendra Prasad Kayastha - Member
iii. Dr. Bal Bahadur Parajuli - Member

g. Finance and Physical Infrastructure Development Committee

i. Mr. Hari Kumar Silwal -Coordinator
ii. Mr. Mahendra Bahadur Gurung -Member
iii. Mr. Janak Raj Kalakheti -Member

Activities of NEPCA/Seminars & Trainings

1. On 2nd to 6th April, 2024

Nepal Council of Arbitration (NEPCA) in collaboration with Advocate Society Nepal (ASN)conducted a 5-day training on Contract Management and Dispute Settlement at Carnival Restro and Meeting, Anamnagar, Kathmandu. All together 42 participants of Law practitioners, Engineers and Individual


Professionals were physically participated on the training program. Chief Guest Honorable Justice Mr. Bal Krishna Dhaka, NEPCA's Chairperson Dr. Rajendra Prasad Adhikari and ASN's Chairperson Advocate Arjun Prasad Paudel distributed the certificate to the participants. Finally, the training was closed with a group photo.

2. On 4th to 8th April, 2024,

Nepal Council of Arbitration (NEPCA) in collaboration with Socialist Professional Lawyers Association (SPLA) conducted a 5-day training on Contract Management and Dispute Settlement at Union House, Anamnagar, Kathmandu. All together 48 participants of Law practitioners, Engineers and Individual


Professionals were physically participated on the training program. Chief GuestFormer Chief Justice Mr. Hari Krishna Karki, NEPCA's Chairperson Dr. Rajendra Prasad Adhikari and SPLA's Chairperson Advocate Dekendra Prasad Subedi distributed the certificate to the participants. Finally, the training was closed witha group photo.

3. On 5th to 9th June, 2024

Nepal Council of Arbitration (NEPCA) in collaboration with Nepal Engineers' Association (NEA) conducted a 5-day training on Construction Management and Dispute Settlement at Engineers' Bhawan, Pulchowk,

Lalitpur. Altogether, 30 participants of Engineers, Law practitioners and Individual Professionals were participated in the training program. NEPCA's Chairperson Dr. Rajendra Prasad Adhikari and NEA's General Secretary Er. Ravi Bhushan Jha distributed the certificate to the participants. Finally, the training was closed with a group photo.

4. २०८१ जेष्ठ २८

नेपाल मध्यस्थता परिषद (नेप्का) र न्यायाधीश समाज, नेपालको सयुक्त आयोजनामा "कारारीया दायित्व, मध्यस्थता र सार्वजनिक खरिद प्रक्रिया" विषयक अन्तरक्रिया कार्यक्रम काठमाडौँ मेरियत होटलमा सम्पन्नभयो । सो कार्यक्रमको सभापतित्व न्यायाधीश समाज, नेपालका अध्यक्ष तथा सर्बोच्च अदालतका माननीय न्यायाधीश श्री सपना प्रधान मल्लज्यूले गर्नुभयो र सर्बोच्च अदालतका माननीय न्यायाधीश प्रकास मान सिंह राउत ज्यूको प्रमुख अतित्यता सम्पन्न भयो ।

सो कार्यक्रममा सर्बोच्च अदालतका माननीय न्यायाधीशहरु, माननीय महान्यायाधिवक्ता, उच्च अदालतका माननीय न्यायाधीशहरु, विभिन्न जिल्लाअदालतका माननीय न्यायाधीशहरु, विभिन्न अदालतका मुख्य रजिष्ट्रार तथा रजिष्ट्रारहरु, नेपाल मध्यस्थता परिषदका पदाधीकारी एवम् सदस्यहरु, विभिन्न बार एशोसियसनका अध्यक्ष र न्यायाधीश समाज, ने पालका प्रबन्ध समितिका पदाधिकारीहरुको सहभागिता थियो । कार्यक्रम संचालन काठमाडौं जिल्ला अदालतका माननीय न्यायाधीश शिशिर राज ढकाल ज्यूले गर्नु भयो। नेप्काका महासचिब अधिवक्ता श्री बाबुराम दहाल ज्यूले कार्यक्रममा उपस्थित महानुभावहरुलाई स्वागत गर्दै आफ्नो स्वागत मन्तव्य राख्नु भयो र न्यायाधीश समाज, नेपालका महासचिब बिशे ष अदालतका माननीय न्यायाधीश टेक नारायण कुवर ज्यूले कार्यक्रम उपर प्रकाश पर्दै आफ्नो मन्तब्य राख्नुभयो ।

नेप्काका सभापति डा. राजेन्द्रप्रसाद अधिकारी ज्यूले "सार्वजनिक खरिद र मध्यस्थता कार्यान्वयनका चुनौतिहरु" सम्बन्धीकार्यपत्र पेश गर्नुभयो त्यस्तै सर्बोच्च अदालतका माननीय पूर्व न्यायाधीश श्री अनिलकुमार सिन्हाज्युले "मध्यस्थतामा अदालतको भूमीका" सम्बन्धी कार्यपत्र पेश गर्नुभयो । दुवै कार्यपत्र उपर सहभागीहरुबाट आ-आफ्नो भनाई सहित बृहद छलफल भयो । नेप्काका सभापति डा. राजेन्द्रप्रसाद अधिकारीज्यूले अन्तरक्रिया तथा सहभागीहरुको भनाई उपर टिप्पणी सहित उठेका बिषयहरुमा विचार बिमर्स गर्दा आगामी दिनहरुमा थप छलफलको आवश्यकता रहेको भन्दै आफ्नो मन्तब्य राख्नुभयो र माननीयपूर्व न्यायाधीश श्री अनिलकुमार सिन्हाज्युले सहभागीहरुबाट उठेका प्रश्नहरु सम्बो धन गर्दै आफ्नो मन्तब्य राख्नु भयो । सर्बोच्च अदालतका माननीय न्यायाधीश प्रकास मान सिंह राउतज्यूले अदालत र मध्यस्थताको क्षेत्र अधिकारको बिषयमा स्पष्ट हुनु जरुरी छ भन्दै आफ्नो मन्तब्य राख्नु भयो ।

अन्त्यमा न्यायाधीश समाज नेपालका अध्यक्ष तथा सर्बोच्च अदालतका माननीय न्यायाधीश श्री सपना प्रधानमल्ल ज्यूले कानुनमा रहेर कार्य गरेमा सबै चुनौतिको समाधान हुन्छ र विवाद समाधानको लागि जुन निकाय छानेकाछौ त्यही निकायबाटै विवाद समाधान गर्नुपर्ने भन्दै आफ्नो मन्तब्य सहित सभा बिसर्जन गर्नुभयो ।

5. On 24th to 26th June, 2024

Commercial Law Development Program (CLDP), USA in collaboration with Nepal Council of Arbitration (NEPCA) conducted a 3-dayworkshop on South Asia Regional International Commercial Arbitration Information Exchange Programat Hotel Yak & Yeti, Kathmandu. Alltogether, 30 participants of Law practitioners from Nepal, India, Maldives, Bangladesh, Sri Lanka and Pakistan. Grishma Pradhan,

Attorney-Advisor, CLDP conducted the program followed by Introductory Remarks from Dr. Rajendra Prasad Adhikari, Chairperson, NEPCA. There were 4 sessions each day and in total 12 sessions of topics related to “International Commercial Arbitration”.The program was concluded with distribution of the certificate and a group photo.

6. On 16th to 20th February, 2024

Commercial Law Development Program (CLDP), USA in collaboration with Nepal Council of Arbitration (NEPCA) conducted one day Arbitration Institution Workshop at Hotel Yak & Yeti, Kathmandu. All together, 30 participants of Engineers, Law practitioners and Arbitrators from NEPCA and CLDP. Grishma

Pradhan, Attorney-Advisor, CLDP conducted the program followed by Introductory Remarks from Dr. Rajendra Prasad Adhikari, Chairperson, NEPCA. There was each session from NEPCA and CLDP followed by group discussion. The program was concluded with distribution of the certificate and a group photo.

7. On 27th July to 03 August, 2024

Nepal Council of Arbitration (NEPCA) in collaboration with Gyanpunj School of Leadership conducted a 5-days training on Contract Management and Dispute Settlement at Union House, Anamnagar, Kathmandu. Altogether,73 participants of Engineers, Law practitioners and Individual Professionals

were participated physically on in the training program. Attorney General of Nepal, Senior Advocate Ramesh Badal was the chief guest in the opeing cermony. In the closing cermony Chief Guest Justice of Supreme Court Honorable Mr. Tek Prasad Dhungana, NEPCA's Chairperson Dr. Rajendra Prasad Adhikari and GSL's Chairman Advocate Hari Prasad Dumre distributed the certificate to the participants. Finally, the training was closed with by a group photo.

NEPCA Panelist

S.N	Name	Profession	Address
1	Mr. Ajaya Kumar Pokharel	Engineer	Baneshwor, Kathmandu
2	Mr. Ashish Adhikari	Advocate	Naxal, Kathmandu
3	Mr. Babu Ram Dahal	Advocate	Anamnagar, Kathmandu
4	Mr. Bhoj Raj Regmi	Engineer	Baluwatar, Kathmandu
5	Mr. Bhola Chhatkuli	Engineer	Kritipur, Kathmandu
6	Mr. Bhoop Dhoj Adhikari	Former Judge	Baneshwor, Kathmandu
7	Mr. Bindeshwar Yadav	Engineer	Baneshwor, Kathmandu
8	Mr. Bipulendra Chakraworty	Senior Advocate	Biratnagar, Morang
9	Mr. Birendra Bahadur Deoja	Engineer	Baneshwor, Kathmandu
10	Mr. Birendra Mahaseth	Engineer	Chakupat, Lalitpur
11	Mr. Dev Narayan Yadav	Engineer	Baneshwor, Kathmandu
12	Mr. Dhruva Raj Bhattarai	Engineer	Gyaneswor, Kathmandu
13	Mr. Dinker Sharma	Engineer	Mandikatar, Kathmandu
14	Mr. Dipak Nath Chalise	Engineer	Maligaun, Kathmandu
15	Mr. Durga Prasad Osti	Engineer	Baneshwor, Kathmandu
16	Mr. Dwarika Nath Dhungel	Social Sciences Researcher	Baneshwor, Kathmandu
17	Dr. Gokul Prasad Burlakoti	Advacate	Babarmahal, Kathmandu
18	Mr. Govinda Kumar Shrestha	Former Judge High Court	Samakhusi, Kathmandu
19	Mr. Gyanendra P. Kayastha	Engineer	Sanepa, Lalitpur
20	Mr. Hari Prasad Sharma	Engineer	Anamnagar, Kathmandu
21	Mr. Hari Ram Koirala	Engineer	Kalanki, Kathmandu
22	Mr. Indu Sharma Dhakal	Engineer	Mahankal, Kathmandu
23	Mr. Keshav Bahadur Thapa	Engineer/ Advocate	Babarmahal, Kathmandu
24	Mr. Keshav Prasad Pokharel	Engineer	Koteshwor, Kathmandu
25	Prof. Khem Nath Dallakoti	Engineer	Battisputali, Kathmandu
26	Dr. Kul Ratna Bhurtel	Advocate	Dhobighat, Lalitpur
27	Mr. Lekh Man Singh Bhandhari	Engineer	Sainbhu, Lalitpur
28	Mr. Madhab Prasad Paudel	Rt. Civil Servent/ Lawyer	Jagritinagar, Kathmandu
29	Mr. Madhav Prasad Khakurel	Engineer	Maijubahal, Kathmandu
30	Mr. Mahanedra Bahadur Gurung	Engineer	Hadigaun, Kathmandu
31	Mr. Mahendra Nath Sharma	Engineer	Battisputali, Kathmandu
32	Mr. Manoj Kumar Sharma	Engineer	Nagarjun, Kathmandu
33	Mr. Matrika Prasad Niraula	Senior Advocate	Anamnagar, Kathmandu
34	Mr. Mohan Man Gurung	Engineer/ Advocate	Bagbazar, Kathmandu
35	Mr. Murali Prasad Sharma	Advocate	Baneswor, Kathmandu
36	Mr. Narayan Datt Sharma	Advocate/ Engineer	Gyaneshwor, Kathmandu
37	Mr. Narayan Prasad Koirala	Advocate	Baneshwor, Kathmandu
38	Mr. Narendra Kumar Shrestha	Fromer Deputy AG/ Advocate	Baneshwor, Kathmandu
39	Mr. Naveen Mangal Joshi	Engineer	Kobahal Tole, Lalitpur
40	Mr. Niranjan Prasad Poudel	Engineer	Baluwatar, Kathmandu
41	Mr. Poorna Das Shrestha	Engineer	Balkot, Bhaktapur
42	Mr. Raghab Lal Vaidya	Advocate	Nagarjun, Kathmandu

S.N	Name	Profession	Address
43	Mr. Rajendra Kishore Kshatri	Lawyer	Lainchour, Kathmandu
44	Mr. Rajendra Niraula	Engineer	Balkhu kathmandu
45	Mr. Rajendra P. Kayastha	Engineer	Maharajgunj, Kathmandu
46	Dr. Rajendra Prasad Adhikari	Project Mgmt, Advocate	Bishalnagar, Kathmandu
47	Mr. Ram Kumar Lamsal	Engineer	Bhimsengola, Kathmandu
48	Mr. Rameshwar Prasad Kalwar	Engineer/ Advocate	Balkhu, Kathmandu
49	Mr. Resham Raj Regmi	Advocate	Anamnagar, Kathmandu
50	Dr. Rishi Kesh Wagle	Advocate	Tokha, Kathmandu
51	Mr. Rupak Rajbhandari	Engineer	Kathmandu, Nepal
52	Mr. Sanjeev Koirala	Engineer	Balkumari, Lalitpur
53	Mr. Satya Narayan Shah	Engineer	Mahalaxmi, Lalitpur
54	Mr. Shambhu Thapa	Senior Advocate	Tinkune, Kathmandu
55	Mr. Sharada Prasad Sharma	Engineer	Baneshwor, Kathmandu
56	Mr. Shree Prasad Pandit	Lawyer	Dillibazar, Kathmandu
57	Mr. Shreedhar Sapkota	Advocate	Baneshwor, Kathmandu
58	Mr. Som Bahadur Thapa	Engineer	Madhyapur, Thimi, Bhaktapur
59	Mr. Som Nath Paudel	Engineer	Teku, Kathmandu
60	Mr. Subash Chandra Verma	Engineer	Gothatar, Bhaktapur
61	Ms. Sujan Lopchan	Senior Advocate	Kapan, Kathmandu
62	Mr. Suman Kumar Rai	Advocate	Belbari, Morang
63	Mr. Sunil Kumar Dhungel	Engineer	Baneshwor, Kathmandu
64	Mr. Suresh Kumar Regmi	Engineer	Maligaun, Kathmandu
65	Mr. Surya Nath Upadhyay	Advocate, Former CIAA Chief	Budhanilkanta, Kathmandu
66	Mr. Surya Raj Kadel	Engineer/ Advocate	Palungtar, Gorkha
67	Mr. Thaneshwar Kafle(Rajesh)	Advocate	Samakhushi, Kathmandu
68	Mr. Tul Bahadur Shrestha	Advocate	Anamnagar, Kathmandu
69	Mr. Tulasi Bhatta	Senior Advocate	Anamnagar, Kathmandu
70	Mr. Udaya Nepali Shrestha	Former VC, Law Commission	Satdobato, Lalitpur
71	Mr. Varun P. Shrestha	Engineer	Baneshwor, Kathmandu

NEPCA Life Member

S.N	Name	Profession
1	Mr. Ajaya Kumar Pokharel	Engineer
2	Ms. Alpana Bhandari	Advocate
3	Mr. Amar Jibi Ghimire	Advocate
4	Mr. Amber Prasad Pant	Senior Advocate
5	Mr. Amod Kumar Adhikari	Engineer
6	Mr. Amog Ratna Tuladhar	Advocate
7	Mr. Ananta Raj Dumre	Rt. Judge
8	Mr. Anil Kumar Sinha	Senior Advocate
9	Mr. Anup Kumar Upadhyay	Engineer
10	Mr. Ashish Adhikari	Advocate
11	Mr. Awatar Neupane	Advocate
12	Mr. Babu Ram Dahal	Advocate
13	Mr. Babu Ram Pandey	Advocate
14	Mr. Badan Lal Nyachhyon	Engineer
15	Dr. Bal Bahadur Parajuli	Engineer
16	Mr. Bala Krishna Niraula	Engineer
17	Mr. Bala Ram K.C.	Former Justice, Supreme Court
18	Mr. Balaram Shrestha	Engineer
19	Mr. Bedh Kantha Yogal	Engineer
20	Mr. Bhagawan Shrestha	Engineer
21	Ms. Bhagwati Sharma Bhandari	Advocate
22	Mr. Bharat Bahadur Karki	Senior Advocate
23	Mr. Bharat Kumar Lakai	Advocate
24	Mr. Bharat Lal Shrestha	Engineer
25	Mr. Bharat Mandal	Engineer
26	Mr. Bharat Prasad Adhikari	Lawyer
27	Mr. Bhava Nath Dahal	Auditor

S.N	Name	Profession
28	Mr. Bhesh Raj Neupane	Advocate
29	Mr. Bhim Pd. Upadhyaya	Engineer
30	Mr. Bhoj Raj Regmi	Engineer
31	Mr. Bhola Chatkuli	Engineer
32	Mr. Bhoop Dhoj Adhikari	Former Chief Judge, High Court
33	Mr. Bhupendra Chandra Bhatta	Engineer
34	Mr. Bhupendra Gauchan	Engineer
35	Mr. Bikash Man Singh Dangol	Engineer
36	Mr. Bimal Prasad Dhungel	Advocate
37	Mr. Bimal Subedi	Advocate
38	Mr. Bindeshwar Yadav	Engineer
39	Mr. Binod Mohan Acharya	Rt. Judge
40	Mr. Binod Shrestha	Engineer/Advocate
41	Mr. Bipulendra Chakravartty	Senior Advocate
42	Mr. Birendra Bahadur Deoja	Engineer
43	Mr. Birendra Mahaset	Engineer
44	Mr. Birendra Siwakoti	Advocate
45	Mr. Bishnu Om Baade	Engineer
46	Dr. Bishwadeep Adhikari	Senior Advocate
47	Mr. Bodhari Raj Pandey	Former Justice, Supreme Court
48	Mr. Bolaram Pandey	Advocate
49	Mr. Buddha Kaji Shrestha	Insurance Professional
50	Mr. Chabbi Lal Ghimire	Advocate
51	Mr. Chandeshwor Shrestha	Senior Advocate
52	Mr. Chandra Bahadur KC	Engineer

S.N	Name	Profession
53	Mr. Daya Kant Jha	Engineer
54	Mr. Deepak Kunwar	Engineer
55	Mr. Deo Narayan Yadav	Engineer
56	Mr. Deukaji Gurung	Engineer
57	Mr. Devendra Karki	Engineer
58	Mr. Dhanaraj Gnyawali	Former Secretary, Law
59	Mr. Dhruba Prasad Paudyal	Engineer
60	Mr. Dhruva Raj Bhattarai	Engineer
61	Mr. Dhundi Raj Dahal	Engineer
62	Mr. Digamber Jha	Engineer
63	Mr. Dilip Bahadur Karki	Engineer
64	Mr. Dilli Raman Dahal	Advocate
65	Mr. Dilli Raman Niraula	Engineer
66	Mr. Dinesh Kumar Karky	Advocate
67	Mr. Dinesh Raj Manandhar	Engineer
68	Mr. Dinker Sharma	Engineer
69	Mr. Dipak Nath Chalise	Engineer
70	Mr. Dipendra Malla	Advocate
71	Mr. Dipendra Shrestha	Engineer
72	Mr. Durga Prasad Osti	Engineer
73	Mr. Dwarika Nath Dhungel	Social Sciences Researcher
74	Mr. Fanendra Raj Joshi	Engineer
75	Mr. Gajendra Kumar Thakur	Engineer
76	Dr. Prof. Gandhi Pandit	Senior Advocate
77	Ms. Gauri Dhakal	Former Justice, Supreme Court
78	Mr. Gaya Prasad Ulak	Engineer / Consultant

S.N	Name	Profession
79	Mr. Ghan Shyam Gautam	Engineer
80	Mr. Girish Chand	Engineer
81	Mr. Gokarna Khanal	Engineer
82	Dr. Gokul Prasad Burlakoti	Advocate
83	Dr. Gopal Siwakoti	Advocate
84	Mr. Govinda Kumar Shrestha	Former Judge, High Court
85	Mr. Govinda Prasad Parajuli	Former Chief Judge, High Court
86	Mr. Govinda Raj Kharel	Advocate
87	Mr. Gunanidhi Nyaupane	Senior Advocate
88	Mr. Gyanendra Prasad Kayastha	Engineer
89	Mr. Hari Bahadur Basnet	Former Judge, High Court
90	Mr. Hari Bhakta Shrestha	Engineer
91	Mr. Hari Kumar Silwal	CA / Lawyer
92	Mr. Hari Narayan Yadav	Enginer
93	Mr. Hari Prasad Dhakal	Engineer
94	Mr. Hari Prasad Sharma	Engineer
95	Mr. Hari Ram Koirala	Engineer
96	Mr. Hari Ram Koirala (2)	Former Chief Judge
97	Mr. Hari Ram Shrestha	Engineer
98	Mr. Harihar Dahal	Senior Advocate
99	Mr. Hariom Prasad Shrivastav	Engineer
100	Mr. Hum Nath Koirala	Construction Entrepreneur
101	Mr. I.P. Pradhan	Engineer
102	Mr. Indra Lal Pradhan	Engineer
103	Mr. Indu Sharma Dhakal	Engineer
104	Mr. Ishwar Bhatta	Engineer

S.N	Name	Profession
105	Mr. Ishwar Prasad Tiwari	Engineer
106	Mr. Ishwori Prasad Paudyal	Engineer
107	Mr. Jagadish Dahal	Advocate
108	Mr. Janak Lal Kalakheti	CA
109	Mr. Jaya Mangal Prasad	Advocate
110	Mr. Jayandra Shrestha	Adviser/Finance
111	Mr. Jayaram Shrestha	Advocate
112	Mr. Jivendra Jha	Engineer
113	Mr. Kamal Karki	Engineer
114	Mr. Kamal Kumar Shrestha	Joint Secretary, PMO
115	Mr. Kamal Raj Pande	Engineer
116	Mr. Kameshwar Yadav	Engineer
117	Mr. Kedar Man Shrestha	Engineer
118	Mr. Kedar Nath Acharya	Former Justice, Supreme Court
119	Mr. Kedar Neupane	Advocate
120	Mr. Kedar Prasad Koirala	Advocate
121	Mr. Keshari Raj Pandit	Former judge, High Court
122	Mr. Keshav Bahadur Thapa	Engineer/Advocate
123	Mr. Keshav Prasad Mainali	Advocate
124	Mr. Keshav Prasad Ghimire	Engineer
125	Mr. Keshav Prasad Pokharel	Engineer
126	Mr. Keshav Prasad Pulami	Engineer
127	Prof. Khem Dallakoti	Engineer
128	Mr. Khem Prasad Dahal	Accountant
129	Mr. Kishor Babu Aryal	Engineer
130	Mr. Komal Natha Atreya	Engineer

S.N	Name	Profession
131	Mr. Krishna Prasad Nepal	Engineer
132	Mr. Krishna Sharan Chakhun	Engineer,
133	Mr. Kul Ratna Bhurtyal	Former Chief Justice
134	Dr. Kumar Sharma Acharya	Senior Advocate
135	Mr. Lal Krishna K.C.	Engineer
136	Mr. Lava Raj Bhattarai	Engineer
137	Mr. Laxman Krishna Malla	Engineer,
138	Mr. Laxman Prasad Mainali	Advocate
139	Mr. Laxmi Sundar Hakuduwal	Engineer
140	Mr. Lekh Man Singh Bhandhari	Engineer
141	Mr. Lok Bahadur Karki	Advocate
142	Mr. Madan Gopal Maleku	Engineer
143	Mr. Madan Shankar Shrestha	Engineer
144	Mr. Madan Timsina	Engineer
145	Mr. Madhab Prasad Paudel	Rt. Civil Servent/ Lawyer
146	Mr. Madhav Belbase	Engineer
147	Mr. Madhav Das Shrestha	Advocate
148	Mr. Madhav Prasad Khakurel	Engineer
149	Mr. Madhusudan Pratap Malla	Engineer
150	Mr. Mahendra Bahadur Gurung	Engineer
151	Mr. Mahendra Kumar Yadav	Engineer
152	Mr. Mahendra Narayan Yadav	Engineer
153	Mr. Mahendra Nath Sharma	Engineer
154	Mr. Mahesh Bahadur Pradhan	Engineer
155	Mr. Mahesh Kumar Agrawal	Entrepreneur
156	Mr. Mahesh Kumar Thapa	Senior Advocate
157	Mr. Manoj Kumar Sharma	Engineer

S.N	Name	Profession
158	Mr. Manoj Kumar Yadav	Engineer/Advocate
159	Mr. Matrika Prasad Niraula	Senior Advocate
160	Mr. Meen Raj Gyawali	Engineer
161	Mr. Min Bahadur Rayamajhee	Former Chief Justice, Supreme Court
162	Mr. Mitra Baral	Civil Service
163	Mr. Mohan Man Gurung	Engineer/Advocate
164	Mr. Mohan Raj Panta	Engineer
165	Mr. Mukesh Raj Kafle	Engineer
166	Mr. Mukunda Sharma Paudel	Senior Advocate
167	Mr. Murali Prasad Sharma	Advocate
168	Mr. Nagendra Nath Gnawali	Engineer
169	Mr. Nagendra Raj Sitoula	Consultant
170	Mr. Narayan Datt Sharma	Advocate/Engineer
171	Mr. Narayan Prasad Koirala	Engineer/Advocate
172	Mr. Narendra Bahadur Chand	Engineer
173	Mr. Narendra Kumar Baral	Engineer
174	Mr. Narendra Kumar K.C	Advocate
175	Mr. Narendra Kumar Shrestha	Former DAG, Advocate
176	Mr. Narendra Pratap Singh Budhathoki	Advocate
177	Mr. Naveen Mangal Joshi	Engineer
178	Mr. Niranjan Prasad Chalise	Engineer
179	Mr. Niranjan Prasad Poudel	Engineer
180	Mr. Om Naraya Sharma	Engineer
181	Mr. Om Narayan Shrestha	Advocate
182	Mr. Panch Dev Prasad Gupta	Advocate
183	Mr. Pawan Karki	Engineer

S.N	Name	Profession
184	Mr. Poorna Das Shrestha	Engineer
185	Mr. Prabhu Krishna Koirala	Advocate
186	Mr. Pradip Chandra Poudel	Advocate
187	Mr. Prajesh Bikram Thapa	Engineer
188	Mr. Prakash Jung Shah	Engineer
189	Mr. Prakash Poudel	Engineer
190	Mr. Pramod Krishna Adhikari	Engineer
191	Ms. Prativa Neupane	Advocate
192	Mr. Prithivi Raj Poudel	Engineer
193	Prof. Purna Man Shakya	Senior Advocate
194	Mr. Purnendu Narayan Singh	Engineer
195	Mr. Purusottam Kumar Shahi	Engineer
196	Mr. Puspa Raj Pandey	Advocate
197	Mr. Radheshyam Adhikari	Senior Advocate
198	Mr. Raghab Lal Vaidya	Senior Advocate
199	Mr. Raghabendra Yadav	Engineer
200	Mr. Rajan Adhikari	Advocate
201	Mr. Rajan Raj Pandey	Engineer
202	Mr. Rajendra Kishore Kshatri	Advocate
203	Mr. Rajendra Kumar Bhandhari	Former Justice, Supreme Court
204	Mr. Rajendra Niraula	Engineer
205	Mr. Rajendra Paudel	Engineer
206	Dr. Rajendra Prasad Adhikari	Project Mgmt, Advocate
207	Mr. Rajendra Prasad Kayastha	Engineer
208	Mr. Rajendra Prasad Yadav	Engineer
209	Mr. Raju Man Singh Malla	Advocate
210	Mr. Ram Krishna Sapkota	Engineer

S.N	Name	Profession
211	Mr. Ram Krishna Sapkota	Engineer
212	Mr. Ram Kumar Lamsal	Engineer
213	Dr. Ram Lal Sutihar	Advocate
214	Mr. Ram Prasad Acharya	Advocate
215	Mr. Ram Prasad Gautam	Advocate
216	Mr. Ram Prasad Shrestha	Senior Advocate
217	Mr. Ram Prasad Silwal	Engineer
218	Mr. Ram Shanker Khadka	Lawyer
219	Mr. Ramesh Kumar Ghimrie	Advocate
220	Mr. Ramesh Prasad Rijal	Engineer
221	Mr. Ramesh Raj Satyal	Auditor
222	Mr. Rameshwar Lamichhane	Engineer
223	Mr. Rameshwar Prasad Kalwar	Engineer/Advocate
224	Mr. Ravi Sharma Aryal	Former Justice, Supreme Court
225	Mr. Resham Raj Regmi	Advocate
226	Mr. Rishi Kesh Sharma	Engineer
227	Dr. Rishi Kesh Wagle	Dean KU, Law
228	Mr. Rishi Ram Sharma Neupane	Engineer (Water Mgmt)
229	Mr. Rishiram Koirala	Engineer
230	Mr. Roshan Soti	Engineer
231	Dr. Rudra Prasad Sitaula	Advocate
232	Mr. Rupak Rajbhandari	Engineer
233	Mr. Sahadev Prasad Bastola	Former Judge, District Court
234	Mr. Sajan Ram Bhandary	Advocate
235	Mr. Sanjeev Koirala	Engineer
236	Mr. Santosh Kumar Pokharel	Engineer

S.N	Name	Profession
237	Ms. Sarala Moktan	Advocate
238	Mr. Sarb Dev Prasad	Engineer
239	Mr. Saroj Chandra Pandit	Engineer
240	Mr. Satya Narayan Shah	Engineer
241	Mr. Shailendra Kumar Dahal	Senior Advocate
242	Mr. Shaligram Parajuli	Engineer/Advocate
243	Mr. Shambhu Thapa	Senior Advocate
244	Mr. Shankar Prasad Pandey	Former Secretary
245	Mr. Shant Raj Sharma Neupane	Financial Analyst
246	Mr. Sharada Prasad Sharma	Engineer
247	Ms. Sharda Shrestha	Former Justice, Supreme Court
248	Mr. Sher Bahadur Karki	Advocate
249	Mr. Shishir Koirala	Engineer
250	Mr. Shital Babu Regmee	Engineer
251	Mr. Shiva Hari Sapkota	Engineer
252	Mr. Shiva Kumar Basnet	Engineer
253	Mr. Shiva Prasad Sharma Paudel	Engineer
254	Mr. Shiva Prasad Uprety	Engineer
255	Mr. Shiva Raj Adhikari	Advocate
256	Mr. Shiva Ram K.C	Engineer
257	Mr. Shree Prasad Agrahari	Engineer
258	Mr. Shree Prasad Pandit	Senior Advocate
259	Mr. Shreedhar Sapkota	Advocate
260	Mr. Shyam Bahadur Karki	Engineer
261	Mr. Shyam Bahadur Pradhan	Former Justice, Supreme Court
262	Mr. Shyam Prasad Kharel	Engineer
263	Mr. Shyam Shrestha	Advocate

S.N	Name	Profession
264	Mr. Som Bahadur Thapa	Engineer
265	Mr. Som Nath Poudel	Engineer
266	Mr. Subash Kumar Mishra	Engineer
267	Mr. Subhash Chandra Verrma	Engineer
268	Ms. Sujan Lopchan	Senior Advocate
269	Mr. Suman Kumar Rai	Advocate
270	Mr. Suman Prasad Sharma	Engineer
271	Mr. Suman Rayamajhi	Chartered Accountant
272	Mr. Sunil Bahadur Malla	Engineer
273	Mr. Sunil Ghaju	Engineer
274	Mr. Sunil Kumar Dhungel	Electrical Engineer
275	Mr. Sunil Man Shakya	Advocate
276	Mr. Suresh Chitrakar	Engineer
277	Mr. Suresh Kumar Regmi	Engineer
278	Mr. Suresh Kumar Sharma	Engineer
279	Mr. Suresh Man Shrestha	Advocate
280	Mr. Surya Dev Thapa	Engineer
281	Mr. Surya Nath Upadhyay	Former CIAA Chief/ Advocate
282	Mr. Surya Prasad Koirala	Advocate
283	Mr. Surya Raj Kadel	Senior Advocate
284	Mr. Sushil Bhatta	Engineer
285	Mr. Suvod Kumar Karna	Chartered Accountant
286	Mr. Tanuk Lal Yadav	Engineer
287	Mr. Tara Bahadur Sitaula	Senior Advocate
288	Mr. Tara Dev Joshi	Advocate
289	Mr. Tara Man Gurung	Engineer
290	Mr. Tara Nath Sapkota	Engineer
291	Mr. Tej Raj Bhatta	Advocate
292	Mr. Tek Nath Achraya	Chartered Accountant
293	Mr. Thaneshwar Kafle(Rajesh)	Advocate
294	Mr. Tika Ram Bhattarai	Advocate
295	Mr. Tika Ram Regmi	Advocate
296	Mr. Tilak Prasad Rijal	Advocate
297	Mr. Trilochan Gauchan	Senior Advocate
298	Mr. Tul Bahadur Shrestha	Advocate
299	Mr. Tulasi Bhatta	Senior Advocate
300	Mr. Udaya Nepali Shrestha	Former VC, Law Commission
301	Mr. Uddhav Prasad Kadariya	Tax Counselor
302	Mr. Uma Kanta Jha	Engineer
303	Mr. Umesh Jha	Engineer
304	Mr. Upendra Dev Bhatta	Engineer
305	Mr. Upendra Rja Upreti	Advocate/Engineer
306	Mr. Varun Prasad Shrestha	Engineer
307	Mr. Vinod Prasad Dhungel	Former Judge
308	Mr. Vishnu Bahadur Singh	Engineer
309	Mr. Vishwa Nath Khanal	Engineer
310	Mr. Yadav Adhikari	Nepal Police
311	Mr. Yagya Deo Bhatt	Engineer
312	Mr. Yajna Man Tamrakar	Engineer
313	Mr. Yaksha Dhoj Karki	Construction Entrepreneur
314	Mr. Yoganand Yadav	Engineer
315	Mr. Yubaraj Snagroula	Senior Advocate

NEPCA Ordinary Member

S.N.	Name	Profession
1	Mr. Abhi Man das Mulmi	Engineer
2	Mr. Ajay Adhikari	Engineer
3	Mr. Ambika Prasad Upadhay	Engineer
4	Mr. Ananta Acharya	Engineer
5	Mr. Anil Kumar Shrestha	Advocate
6	Mr. Ashish Upadhyay	Engineer
7	Mr. Babu Lal Agrawal	Engineer
8	Mr. Bharati Prasad Sharma	Engineer
9	Mr. Bhawesh Mandal	Engineer
10	Mr. Bipin Paudel	Engineer
11	Mr. Chet Nath Ghimire	Advocate
12	Mr. Deepak Man Singh Shrestha	Engineer
13	Mr. Devendra Shrestha	Architect
14	Federation of Contractors' Association of Nepal	
15	Mr. Gouri Shankar Agrawal	Engineer
16	Mr. Guru Bhakta Niroula Sharma	Advocate
17	Mr. Kalyan Gyawali	Engineer
18	Mr. Kamala Upreti -Chhetri	Advocate
19	Mr. Kashi Raj Dahal	Chief, Administrative Court
20	Mr. Krishna Bahadur Kunal	Engineer/Advocate
21	Mr. Laxman Prasad Adhikari	Engineer
22	Mr. Mahendra Kanta Mainali,	Advocate
23	Mr. Manaj Jyakhwo	Advocate
24	Mr. Nanda Krishna Shrestha	Advocate
25	Mr. Narendra Kumar Dahal	Advocate
26	Mr. Prabhu Krishna Koirala	Advocate
27	Mr. Prajwal Shrestha	Engineer

S.N.	Name	Profession
28	Mr. Pramesh Tripathi	Engineer
29	Mr. Puskar Pokhrel	Advocate
30	Mr. Rabin Nepal	Engineer
31	Ms. Rabina KC	Advocate
32	Dr. Rabindra Nath Shrestha	Engineer
33	Mr. Rabindra Shah	Engineer
34	Mr. Raj Narayan Yadav	Engineer
35	Mr. Rajeev Pradhan	Engineer
36	Dr. Ram Chandra Bhattarai	Lecturer, T.U
37	Mr. Sadhu Ram Sapkota	Lawyer
38	Mr. Santosh K.Pokharel	Engineer
39	Ms. Saraswati Shah	Advocate
40	Mr. Satyendra Sakya	Engineer
41	Mr. Semanta Dahal	Advocate
42	Mr. Shailendra Upareti	Advocate
43	Mr. Shankar Prasad Agrawal	Advocate
44	Mr. Shankar Prasad Yadav	Engineer
45	Mr. Shishir Dhakal	Engineer
46	Mr. Sita Prasad Pokharel	Advocate
47	Mr. Sital Kumar Karki	Advocate
48	Mr. Suraj Regmi	Engineer
49	Mr. Surendra Pradhan	Advocate
50	Mr. Tarun Ranjan Datta	Engineer/Lawyer
51	Mr. Temba Lama Sherpa	Engineer
52	Mr. Tilak Prasad Rijal	Advocate
53	Mr. Tribhuvan Dev Bhatta	Advocate
54	Mr. Ujjwal Karki	Engineer

नेपाल मध्यस्थता परिषद (NEPCA) ले करार बमोजिम प्रक्रिया पुऱ्याई मध्यस्थ नियुक्ति गरिएको कार्य सदर हुने।

श्री उच्च अदालत पाटन
संयुक्त इजलास
इजलास नंः-१४
माननीय न्यायाधीश श्री श्यामकुमार भट्टराई
माननीय न्यायाधीश श्री दुर्गाप्रसाद ढुङ्गेल
आदेश
मुद्दा नंः-०८०-WO-०७४७
मुद्दाः- उत्प्रेषण परमादेश।
निर्णय नंः-२८
आदेश मिति २०८०।१०।२९

नेपाल सरकार, भौतिक पूर्वाधार तथा यातायात मन्त्रालय, सडक विभागको तर्फबाट ऐ.का महानिर्देशक ई. सुशील बाबु ढकाल.....१ — निवेदक

बिरुद्ध

कालिका हुलास जे. भि. सुन्धारा काठमाडौं,.....१
ललितपुर जिल्ला ललितपुर महानगरपालिका, कुपण्डोल, ललितपुर स्थित कार्यालय भएको फोन नं. ५४३०८९४, नेपाल मध्यस्थता परिषद् (नेप्का).....१ — विपक्षी
श्री गोविन्द प्रसाद पराजुली (मुख्य मध्यस्थ), श्री दिपकनाथ चालिसे (मध्यस्थ), श्री सिताराम तिव्रारीसमेत तीन जना रहेको भनिएको मध्यस्थ न्यायाधिकरण ललितपुर, कुपण्डोल.....१

न्याय प्रशासन ऐन, २०७३ को दफा ८(१) बमोजिम यस अदालतको क्षेत्राधिकार भित्र पर्ने प्रस्तुत रिटको संक्षिप्त तथ्य एवं ठहर यस प्रकार छ :-

तथ्य खण्डः

१) सडक विभाग र विपक्षी कालिका हुलास जे.भी. का बीच ओखलढुङ्गा र खोटाङ जिल्लाको सिमानामा रहेको जयराम घाटमा दुधकोशीमा पुल निर्माण गर्ने सम्बन्धमा मिति २०६६।०३।२२ मा भएको सम्झौतामा मध्यस्थ नियुक्ति पुर्व एडजुडिकेटर समक्ष विवाद

पेश गर्नु पर्नेमा सो प्रकृयालाइ व्येवास्ता गरी सम्झौता विपरित मध्यस्थ नियुक्त गर्ने कार्य आफैमा त्रुटिपूर्ण रहेको व्यहोरा निवेदन गर्दछु। करारको कार्यान्वयन तथा विवाद समाधान पनि करारकै शर्त बन्देजभित्र रही गर्नु अपरिहार्य हुने भनी नेपाल सरकार, भौतिक पूर्वाधार तथा यातायात मन्त्रालय, सडक विभाग, बबरमहल विरूद्ध पुनरावेदन अदालत पाटन, ललितपुरसमेत भएको सम्वत् ०७२-WO-१०८० को मुद्दामा (ने.क.प. २०७७, अंक ३, नि.नं. १०४६१) तथा निर्णय कर्ताको भूमिका निर्वाह गर्ने कामको लागि नियुक्त व्यक्तिको नियुक्ति अनियमित भयो वा क्षेत्राधिकार नभएको व्यक्तिबाट नियुक्ति भयो वा हदम्यादभित्र नियुक्त भएन भन्ने किसिमको विवाद निरोपण नगर्ने सम्बन्धमा अन्य वैकल्पिक उपचारको व्यवस्था नभएको अवस्थामा अदालतको असाधारण क्षेत्राधिकार आकर्षित हुने भनि सर्वोच्च अदालतले नेकाप २०६७ फागुन, नि.नं ८५१४ रहेको सडक विभाग वि. नेप्का भएको मुद्दामा सिद्धान्त प्रतिपादन भईरहेको समेतबाट नेपाल मध्यस्थता परिषद् (नेप्का) बाट भए गरेका मध्यस्थ नियुक्ति, सो सम्बन्धी निर्णय, काम कार्वाही एवं पत्राचार र मध्यस्थ टाइबुनलले गरेको काम कारवाही समेत उत्प्रेषणको आदेशले बदर पाउँ । साथै, विपक्षी नेप्काबाट गलत तरिकाले तोकिएका मध्यस्थलाई यस सम्वन्धी काम कारवाही अगाडी नवढाउनु भनी परमादेश लगायत जो चाहिने आदेश समेत जारी गरी पाउँ भन्ने निवेदन पत्र।

२) यसमा विपक्षीहरु बाट लिखित जवाफ माग गर्ने र अन्तरिम आदेश छलफलको लागि उपस्थित हुनका लागि विपक्षीहरुलाई जानकारी गराइ नियमानुसार पेश गर्नू भन्ने मिति २०८०/०७/२१ गतेको आदेश।

३) यसमा निवेदन माग बमोजिम अन्तरिम आदेश जारी हुनुपर्ने देखिएन भन्नेसमेत मिति २०८०/०८/०५ गतेको आदेश।

४) करारीय पक्षहरुको विचमा भएको करारको दफा २९ मा विवाद समाधानको प्रकृया र ऐ दफा २६(१) मा Arbitration Rules as set forth by NEPCA, Appointing Authority, NEPCA, Place of Arbitration; Nepal भन्ने व्यवस्था रहेको छ। नेप्कामा करारको दफा २६(१) बमोजिम निवेदन परेको र मध्यस्थ नियुक्त गर्नुभन्दा अगाडि विपक्षी सडक विभागलाई १५ दिनभित्र मध्यस्थ नियुक्त गर्नुहुन भनी विपक्षी उपर पत्राचार गरिएको, मध्यस्थको लागि तीन जना व्यक्तिको नामसहित पत्राचार गरेको र जवाफ नलगाएको अवस्थामा करारको शर्त २६(१) र नेप्काको मध्यस्थता कार्यविधि सम्बन्धी नियमावली, २०७२ को नियम १८ बमोजिम दिपकनाथ चालिसेलाई नेप्काको तर्फबाट मध्यस्थ नियुक्त गरी दुवै पक्षलाई जानकारी गराएको हो। सो पश्चात मध्यस्थबाट प्रारम्भिक वैठक वसी दावी तथा प्रतिवाद गर्ने समय एव फि, भेन्यु निर्धारण गरेको हो। मध्यस्थता ट्राईबुनलले मध्यस्थता ऐन, २०५५ तथा पक्षहरु बिच भएको सम्झौताको आधारमा मध्यस्थको प्रकृया अगाडी बढ्ने हो त्यसमा विवाद गर्नुपर्ने अवस्था छैन। नेप्काले विशुद्ध तवरबाट असल नियतका साथ गरेको कामकारवाहीलाई अतिरन्जित गरी नभएको व्यहोरा सृजना गरी विपक्षी बनाई दायर गरेको

सडक विभाग **विरुद्ध**: कालिका हुलास जे.भि.सुन्धारा **समेत**, **मुद्दाः-उत्प्रेषण परमादेश मुद्दा नं.:- ०८०-Wo-०७४७,नि.नं. ,पृष्ठ ६ मध्येको पृष्ठ २**

निवेदनमा कुनै कानुनी तथा सम्बैधानिक प्रश्न निहित रहेको छैन। हचुवाको भरमा कानुन बमोजिम काम गर्ने निकायलाई विपक्षी बनाई दायर गरेको निवेदन खारेज गरी न्याय इन्साफ गरीपाउँ भन्ने व्यहोराको विपक्षी मध्यस्थता ट्राईबुनल र नेपाल मध्यस्थता परिषद (नेप्का)को तर्फबाट परेको लिखित जवाफ।

५) निवेदकलाई संविधान कानूनले प्रदान गरेका कुनै पनि हक अधिकारमा आघात पुगेको/पुग्नसक्ने विद्यमानता नभए नरहेको हुंदा रिट निवेदन खारेज गरी न्यायिक इन्साफ पाउँ भन्ने व्यहोराको विपक्षी कालिका-हुलास जे.भी.का आधिकारिक प्रतिनिधि रणबहादुर भुजेलको तर्फबाट परेको लिखित जवाफ।

<u>आदेश खण्डः-</u>

६) नियमबमोजिम साप्ताहिक तथा दैनिक पेशी सूचीमा समावेश भई निर्णयार्थ यस इजलाससमक्ष पेश भएको प्रस्तुत रिट निवेदन तथा लिखित जवाफसहितका सम्बन्धित कागजातको अध्ययन गरियो।

७) निवेदकको तर्फबाट उच्च सरकारी वकिल कार्यालयका, पाटनका उपन्यायाधिवक्ता श्री अशोराज रेग्मीले र विपक्षीको तर्फबाट उपस्थित विद्धान श्री कुमारमणि कोइरालाले गर्नु भएको बहस सुनियो।

८) उल्लिखित व्यहोरा निवेदन मागदावी एवं लिखित जवाफ जिकिर रहेको प्रस्तुत रिट निवेदनमा निवेदन मागदावी बमोजिमको आदेश जारी हुनुपर्ने हो, होइन? भन्ने सम्बन्धमा निर्णय दिनुपर्ने देखियो ।

९) निर्णयतर्फ विचार गर्दा नेपाल मध्यस्थता परिषद्बारा गरिएको नियुक्ति र मध्यस्थाबाट भएको काम कारवाही समेत उत्प्रेषणको आदेशले बदर गरी गलत तरिकाले तोकिएका मधस्थलाई काम कारवाही अगाडि नबढाउनु भनी परमादेशको आदेश माग गरी प्रस्तुत निवेदन दर्ता भएको देखिन्छ भने निवेदक र प्रत्यर्थी कालिका हुलास जे भी का बीच भएका सम्झौता बमोजिम मध्यस्थ न्यायाधिकरण गठन भएको हुँदा निवेदन दावी खारेज गरी पाउँ भन्ने लिखित जवाफ रहेको देखिन्छ।

१०) नेपालको संविधानको धारा १४४ को उपधारा (१) मा यस संविधानद्वारा प्रदत्त मौलिक हकको प्रचलनका लागि वा अर्को उपचारको व्यवस्था नभएको वा अर्को उपचारको व्यवस्था भए पनि सो उपचार अपर्याप्त वा प्रभावहीन देखिएको अन्य कुनै कानूनी हकको प्रचलनका लागि वा सार्वजनिक हक वा सरोकारको कुनै विवादमा समावेश भएको कुनै पनि कानूनी प्रश्नको निरूपणका लागि आवश्यक र उपयुक्त आदेश जारी गर्ने अधिकार उच्च अदालतलाई हुने छ "भनी उल्लेख छ। उपधारा (२) मा उपधारा (१) को प्रयोजनका लागि उच्च अदालतले बन्दीप्रत्यक्षीकरण परमादेश, उत्प्रेषण, प्रतिषेध, अधिकारप्रेक्षालगायत जुनसुकै आदेश जारी गर्न सक्ने छ भन्ने व्यवस्था छ। उक्त संवैधानिक व्यवस्था अनुसार रिट क्षेत्रबाट

उपचार खोज्ने पक्षले माथि उल्लिखित अवस्था स्थापित गर्न सक्नु पर्दछ र रिटका आधारभूत मान्यतासँग मेल खाँने अवस्था दर्शाउन सक्नु पर्दछ।

११) निवेदकले उत्प्रेषण एवम् परमादेशको माग गरी निवेदन दावी लिएको सन्दर्भमा हेर्दा सिद्धान्ततः उत्प्रेषणको आदेश कुनै प्रशासनिक, अर्धन्यायिक वा तल्लो न्यायिक निकायले निर्णय गर्दा कानुनमा तोकिएको अधिकार र कार्यविधिको पालना भएको छ छैन भन्ने अथवा निर्णय गर्ने अधिकारीले बदनियत राखी निर्णय गरेमा उक्त निर्णय त्रुटिपूर्ण छ भन्ने कुरा सम्बन्धित मिसिलबाट देखिएको अवस्थामा उत्प्रेषणको रिट जारी हुन्छ। त्यसैगरी कुनै पनि संवैधानिक वा कानूनी निकाय वा अधिकारीले संविधान र कानूनद्वारा तोकिएको सार्वजनिक कर्तव्य पूरा गर्न नगरेमा त्यस्तो कर्तव्य पूरा गराउन परमादेशको आदेश जारी गरिने हो। राज्यका कुनै पनि निकाय वा अधिकारीको कार्य वा अकार्यबाट (Commission or Omission) न्याय प्राप्त गर्ने मार्ग अवरूद्ध हुन्छ भने त्यस्तो अवरूद्ध मार्ग प्रशस्त गर्नु अदालतको दायित्व हुन्छ। यसको लागि त्यस्तो अवस्था तथ्य एवं प्रमाणले पुष्टि भएको हुनु पर्दछ। परमादेशको निवेदनबाट उपचार खोज्ने पक्षले कानूनद्वारा प्रदत्त हक हनन् हुन सक्ने अवस्थाको विद्यमानता रहेको कुरामा अदालतलाई विश्वस्त पार्न सक्नु पर्दछ। अब सो अवस्था प्रस्तुत निवेदनमा रहेको छ छैन भनी हेर्नु पर्ने देखियो।

१२) प्रस्तुत निवेदन नेपाल सरकारको निकायको तर्फबाट दायर भएको देखिन्छ। सामान्यतया रिट क्षेत्राधिकारको उपयोग सरकारी वा सार्वजनिक निकायको विरुद्धमा उपचार खोज्ने पक्षले बैकल्पिक उपचारको व्यवस्था नभएको वा भए पनि प्रभावकारी नभएको अवस्थामा दायर हुने गर्दछ। सरकारी निकाय स्वयम् रिट निवेदकको रुपमा आउँदा रिट निवेदनमा आउनु पर्ने विशिष्ट अवस्था र औचित्य स्थापित गरेर मात्र आउँनु पर्दछ। यो अपवादात्मक अवस्थामा मात्र अभ्यास गरिने विषय हो।

१३) प्रस्तुत निवेदनसहितको मिसिल कागजात अध्ययन गर्दा निवेदक सडक विभाग र विपक्षी कालिका हुलास जे.भी. का बीच ओखलढुङ्गा र खोटाङ जिल्लाको सिमानामा रहेको जयराम घाटमा दुधकोशीमा पुल निर्माण गर्ने सम्बन्धमा मिति २०६६।०३।२२ मा भएको सम्झौताको GCC २४.१ मा Any dispute or difference,unless settled amicably,that arises between the contractor and the Employer out of or in connection with the contract,including any valuation or other decision of the employer,shall be referred by either party to adjudication in accordance with the Nepal council or Arbitration (NEPCA) rules. The adjudicator shall be any person agreed by the parties.In the event of disagreement the adjudicator shall be appointed in accordance with the rules. भनी उल्लेख भएको देखिन्छ। सो व्यवस्था अनुसार सम्झौता कार्यान्वयनको सिलसिलामा उठेको विवाद समाधान गर्न एडजुडिकेटर नियुक्त हुनुपर्नेमा हाल सार्वजनिक खरिद सम्बन्धी कानूनले एडजुडिकेटर सम्बन्धी व्यवस्था हटाइसकेको अवस्थामा दुवै पक्षले सहमतिि गरी मध्यस्थको प्रक्रियामा जान उपयुक्त हुने भनी निवेदक विभागले

मिति २०७९/१०/१० मा नेपाल मध्यस्थता परिषद् नेप्का तथा विपक्षी निर्माण व्यवसायीलाईसमेत जानकारी गराएको भन्ने देखिन्छ।

१४) निवेदक र विपक्षी बीच भएको सम्झौताका सम्बन्धमा विवाद उत्पन्न भएको अवस्थामा सम्झौताको Special Condition of Contract को SCC 27.1 मा Arbitration Rules; as set forth by NEPCA Appointing Authority; NEPCA भन्ने उल्लेख भएको समेतका आधारमा विपक्षी निर्माण व्यवसायीको अनुरोधमा नेप्काबाट मध्यस्थता (अदालतले कार्यविधि) सम्बन्धी नियमावली, २०७२ को नियम १६ अनुसारको कार्यविधि पूरा गरी मध्यस्थ नियुक्ति गरिएको देखिन्छ। सो विषयमा चित्त नबुझ्ने पक्षले मध्यस्थता (अदालतले कार्यविधि) नियमावली, २०५९ को नियम ७ अनुसार मध्यस्थ समक्ष नै उजुरी गर्न सक्ने र त्यस सम्बन्धमा भएको आदेशमा चित्त नबुझे सोही नियमावलीको नियम ९ बमोजिम यस अदालतमा निवेदन गर्न सक्नेसमेत देखिएको अवस्थामा निवेदक निकायले सो उपाय अवलम्बन गरेको देखिएको छैन। उपचारको वैकल्पिक बाटो उपयोग नगरी रिट क्षेत्रमा आएको विषय आफैंमा विचारणीय रहेको छ।

१५) निवेदनमा नेपाल मध्यस्थता परिषद् नेप्काको निर्णय र काम कारवाही उपर उत्प्रेषण र परमादेशको आदेश माग गरिएको देखिएको छ। नेप्काले करारमा भएको व्यवस्था अनुसार मध्यस्थ नियुक्त गरी आवश्यकता अनुसार स्थान र सचिवालयको सेवा सुविधा उपलब्ध गराएको अवस्था छ भने विवादका विषयमा प्रवेश गरी कुनै निर्णय तथा गरेको अवस्था देखिँदैन। नेप्काले करार सम्झौता बमोजिम मध्यस्थ नियुक्ति गर्नुभन्दा पहिला निवेदक सडक विभागलाई १५ दिनभित्र मध्यस्थ नियुक्तिका लागि सिफारिस गर्नका लागि गरेको पत्राचारमा समयमा निवेदकले जवाफ दिएको वा सो पत्रलाई चुनौती दिएको अवस्था मिसिलबाट देखिँदैन। करार सम्झौता बमोजिम पक्षका आग्रहमा निवेदकलाई समेत जानकारी दिई मध्यस्थता (अदालतले कार्यविधि) सम्बन्धी नियमावली, २०७२ मा भएको व्यवस्था अनुसार प्रक्रिया पूरा गरी मध्यस्थको नियुक्ति भएको र सो विषयमा निवेदकले समयमा प्रतिवाद गरेको वा चुनौती नदिएको अवस्थामा मध्यस्थ नियुक्ति उत्प्रेषणको आदेशद्वारा बदर गरी पाउँ भन्ने र मध्यस्थको काम कारवाही रोकी पाउँन परमादेश जारी गरी पाउँ भन्ने निवेदन माग स्वाभाविक देखिन आएन। निवेदकले माग गरेको उत्प्रेषण र परमादेशको आदेश जारी हुने आधार र अवस्था निवेदकको तर्फबाट स्थापित हुन सकेको अवस्था देखिएन।

१६) तसर्थः माथि उल्लेखित विश्लेषणका आधारमा निवेदकसँग भएका सम्झौताको स्पेशल कन्डिसन अफ कन्ट्रयाक्ट scc को २६.१ एवम् मध्यस्थता ऐन, २०५५को दफा ३(१) र दफा ६(३) समेतका आधारमा मध्यस्थको नियुक्ति भई विवाद समाधानका लागि कारवाही प्रक्रिया अगाडि बढाएको देखिएको र निवेदकले चित्त नबुझेको विषयमा मध्यस्थ ट्रिबुनल समक्ष सो ऐनको दफा १६ को प्रक्रिया अवलम्बन गर्न सक्ने एवम् मध्यस्थ ट्रिबुनलले गरेको

सडक विभाग **विरुद्धः** कालिका हुलास जे.भि.सुन्धारा **समेत, मुद्दाः-उत्प्रेषण परमादेश मुद्दा नं.:- ०८०-Wo-०७४७,नि.नं. ,पृष्ठ ६ मध्येको पृष्ठ ५**

निर्णय उपर चित्त नबुझ्ने पक्षले सो ऐनको दफा ३० बमोजिम उपचारका लागि निवेदन गर्न सक्नेनै हुँदा प्रस्तुत रिट निवेदन खारेज हुने ठहर्छ।

तपसिल

१) उच्च सरकारी वकील कार्यालय, पाटन मार्फत निवेदकलाई प्रस्तुत आदेशको प्रमाणित प्रतिलिपिसहितको जानकारी दिनू।
२) सरोकारवालाले प्रस्तुत फैसलाको प्रतिलिपि माग गरे उच्च अदालत नियमावली,२०७३ को परिच्छेद १२ को प्रकृया पूरा गरी प्रमाणित प्रतिलिपि दिनू।
३) प्रस्तुत निवेदनको दायरीको लगत कट्टा गरी मिसिल नियमानुसार गरी अभिलेख शाखामा बुझाई दिनू।

(श्यामकुमार भट्टराई)
न्यायाधीश

उक्त रायमा म सहमत छु।

(दुर्गा प्रसाद ढुङ्गेल)
न्यायाधीश

फैसला तयार गर्न सहयोग गर्ने:
इजलास अधिकृत :- रबि प्रसाद पान्डे
कम्प्यूटर अपरेटर :- स्मित श्रेष्ठ
ईति सम्वत २०८० साल माघ महिना २९ गते रोज शुभम्.....।

प्रमाणिकरण मिति : न्यायाधीश अदालतको छाप

नेपाल मध्यस्थता परिषद (NEPCA) को मध्यस्थता कार्यबिधी सम्बन्धी नियमावली २०७२ बमोजिम प्रक्रिया पुऱ्याई मध्यस्थ नियुक्ति गरिएको कार्य बदर हुननसक्ने।

श्री
उच्च अदालत पाटन
संयुक्त इजलास
इजलास नं. १०
माननीय न्यायाधीश श्री हरिप्रसाद पौडेल
माननीय न्यायाधीश श्री सुदर्शनराज पाण्डे

आदेश

रिट नं. ०८०-WO-०३६५
निर्णय नं. २६४

विषयः- उत्प्रेषण समेत।

बारा जिल्ला, सिम्रौनगढ नगरपालिका वडा नं.३ स्थित अमन मत्स्य फार्म लि.को अख्तियार प्राप्त गरी आफ्नो हकमा समेत ऐ.का अध्यक्ष ऐ.ऐ. बस्ने शकुन्तला कुमारी यादव ----------१ **निवेदक**

विरुद्ध

ललितपुर जिल्ला, ललितपुर महानगरपालिका वडा नं.१ स्थित नेपाल मध्यस्थता परिषद (Nepal Council of Arbitration) ----------१
ऐ.ऐ. स्थित डा. ऋषीकेश वाग्ले मूख्य मध्यस्थ र भोला छत्कुली र आशिष अधिकारी मध्यस्थ भएको मध्यस्थता न्यायाधिकरण ----------१
ललितपुर जिल्ला, ललितपुर महानगरपालिका वडा नं.१ सातदोवाटो स्थित आशिष-ओम साइराम जे.भी. ----------१ **विपक्षी**

नेपालको संविधान, २०७२ को धारा ४६/१४४ तथा न्याय प्रशासन ऐन, २०७३ को दफा ८(१) बमोजिम यस अदालतको क्षेत्राधिकारभित्र दायर हुन आएको प्रस्तुत रिट निवेदनको संक्षिप्त तथ्य एवं यस अदालतको आदेश र तपसिल यस प्रकार छः-

तथ्य खण्ड

१. निवेदक कम्पनीले मत्स्य पालन र कृषिजन्य व्यवसाय गर्ने र राज्यको समेत कृषि एवम् पशुपालनजन्य व्यवसायमा प्राथमिकता रहेकोले स्वपूजी र प्रदेश नं. २ सरकारको सहयोगमा बारा जिल्लाको हरिहरपुर गा.वि.स. वडा नं. ९ हाल परिवर्तित सिम्रौनगढ न.पा. वडा नं. ३ मा

अमन मत्स्य फार्म लि.को अख्तियार प्राप्त भई आफ्नो हकमा समेत शकुन्तला कुमारी यादव **विरुद्ध** ललितपुर महानगरपालिका वडा नं. स्थित नेपाल मध्यसथता परिषद समेत, **विषयः-** उत्प्रेषण समेत, **मुद्दा नं.** ०८०-WO-०३६५, पृष्ठ १२ मध्येको पृष्ठ १

शीतगृह निर्माण (Construction and Installation of 3000 MT cold storage plant for fruits and vegetables) कार्यको लागि मिति २०७६।२।२० (2019 Oct. 14 मा बोलपत्र आह्वान गरिएकोमा विपक्षी नं. ३ द्वारा पेस भएको बोलपत्र स्वीकृत भई मिति २०७६।१०/१० मा सम्झौतापत्र Contract ID No. AMF1076-07711 सम्पन्न भएको थियो । उपरोक्त कार्य मिति २०७६।१०।२५ बाट सुरु भई सो मितिबाट ५४७ दिनभित्र (मिति २०७८।४।४) सम्पन्न गर्नुपर्नेमा कोभिड-१९ को सक्रमणको कारण मिति २०७९।३।२४ सम्म म्याद थप भएको थियो । राष्ट्रव्यापी महामारी, स्थानीय तह र सरकारको निषेधाज्ञाजन्य आदेशको कारण एकातर्फ सम्झौतानुसारको कार्य प्रभावित भयो भने अर्कोतर्फ प्रदेश सरकारको प्राथमिकता स्थास्थ्य उपचारमा पथान्तरण (Divert) भएको कारणले सरकारी अनुदान प्राप्त हुन नसकेकोले निवेदकले पेस गरेको कार्य प्रगतिे वीलको प्राविधिक नाँपजाँच मू.अ.क. सहित रु. २,९४,३२,२४७।१४ भुक्तानी हुन बाँकी रहेको छ । काम गर्दै जानुहोस भुक्तानीको प्रवन्ध गर्ने विश्वास दिलाउँदै अनुरोध गर्दासमेत प्रत्यर्थी ठेकेदारको मिति २०७८।११।१ देखि निर्माणस्थलमा उपस्थितिे छैन । विपक्षीले पेस गरेको कार्यप्रगतिको भुक्तानीको प्रमाणित कार्य सम्झौतानुसार भुक्तानी दिने विषयमा सम्झौतापत्र प्रष्ट हुँदाहुँदै विपक्षी ठेकदारले सम्झौतापत्रको प्रकरण नं. २९.१ वमोजिम वार्ताद्वारा विवाद समाधान नभएको भनी सन् 2022 Oct. 12 (मिति २०७९।६।२६) मा निवेदकलाई अनुरोध गर्दा मध्यस्थ नियुक्त नगरेको भनी विवाद समाधानको निम्तिे GCC को प्रकरण नं. २९.१ र ३०.१ को आधारमा सन् 2022 Nov. 25 (मिति २०७९।०८।९) मा प्रत्यर्थी नेपाल मध्यस्थता परिषदमा निवेदन गर्नु भएको रहेछ । सोही आधारमा परिषदले सन् 2022 Nov. 27 (मिति २०७९।०८।११), सन् 2023 Jan. 8 (मिति २०७९।०९।२४) निवेदकलाई मध्यस्थ नियुक्त गर्न पत्राचार गरेको र सन् 2023 Feb. 1 (मिति २०७९।१०।१८) मा ३ जनाको नाम सिफारिस गरी सन् 2023 Feb. 14 (मिति २०७९।११।२) मा निवेदक कम्पनीको तर्फबाट भोला छत्कुलीलाई मध्यस्थ नियुक्त गरिएको रहेछ । विपक्षी ठेकदारको तर्फबाट आशिष अधिकारी निवेदकको तर्फबाट परिषदबाट नियुक्त भोला छत्कुलीले डा. ऋषिकेश वाग्लेलाई मूख्य मध्यस्थ नियुक्त गरी मिति २०७९।१२।५ मा प्रारम्भिक वैठक सम्पन्न गरी सोही आधारमा निवेदकलाई प्रतिवाद (Defense) पेस गर्नु भनी कान्तिपुर र गोरखापत्र राष्ट्रिय दैनिकमा मिति २०८०।४।३० मा सूचना प्रकाशित भएकोले परिषद समक्ष मिति २०८०।५।०९ मा उपस्थित भई केही कागजातको फोटो खिचीे लिँदा मात्रै उक्त बेहोरा अवगत हुन आयो । यसप्रकार विपक्षीहरुले सम्झौताको व्यवस्था प्रतिकुल हुने गरी निवेदकको तर्फबाट मध्यस्थ नियुक्त गर्ने निर्णय एवम् कार्य र त्यसरी नियुक्त भएको मध्यस्थको सहमतिे एवम् छनौटको आधारमा मूख्य मध्यस्थ नियुक्त गरी गठन गरिएको मध्यस्थ (मध्यस्थता न्यायाधिकरण) गैरकानूनी रहेको, कानून प्रतिकुल गठन भएको मध्यस्थता न्यायाधिकरणबाट विवाद सुनुवाई गर्ने सम्बन्धमा भएका काम कारवाई क्षेत्राधिकार र प्रारम्भदेखि नै वदरभागी रहेकोे, वैध विधि र प्रकृयाबमोजिम गठित मध्यस्थता न्यायाधिकरणलाई मात्रै विवाद सुनुवाई र

अमन मत्स्य फार्म लि.को अख्तियार प्राप्त भई आफ्नो हकमा समेत शकुन्तला कुमारी यादव **विरुद्ध** ललितपुर महानगरपालिका वडा नं. स्थित नेपाल मध्यसथता परिषद समेत, **विषयः**- उत्प्रेषण समेत, **मुद्दा नं.** ०८०-WO-०३६५, पृष्ठ १२ मध्येको पृष्ठ २

निरोपण गर्ने अधिकार हुने भएकोले गैरकानूनी रुपमा मध्यस्थता न्यायाधिकरण गठन र सोबाट मिति २०७९।१२।१६ मा भएको सुनुवाईको प्रारम्भिक बैठक एवम् ततसम्वन्धमा भए गरेका कारवाई र उक्त मध्यस्थता समक्ष निर्माण व्यवसायीबाट पेस भएको दायित्व सम्बन्धमा प्रतिवाद पेस गर्न भएको निर्णय एवम् मिति २०८०।४।३० मा कान्तिपुर र गोरखापत्रमा प्रकाशित सूचनाबाट निवेदकको मध्यस्थता ऐन, २०५५ को दफा ६, ७ र १६ एवम् नेपालको संविधानको धारा १८(१), २०(८) र मुलुकी देवानी कार्यविधी संहिता, २०७४ को दफा ५०७ द्वारा प्रदत्त अधिकार अतिक्रमण भएकोले प्रत्यर्थी आशिष ओम साइराम जे.भी. को अनुरोधमा नेपाल मध्यस्थता परिषदबाट मिति २०७९।११।२ मा निवेदकको तर्फबाट मध्यस्थत नियुक्त गरेको पत्र र निर्णय एवम् सोको आधारमा मुख्य मध्यस्थ नियुक्ति गरिएको निर्णय एवम् त्यस अनुसार गठीत मध्यस्थबाट मिति २०७९।१२।०५ र २०७९।१२।२६ मा भएको प्रारम्भिक बैठकको निर्णय मिति २०८०।१४।१ मा प्रकाशित सूचना र सोको आधारमा भए गरेका सम्पूर्ण काम कारवाई गैरकानूनी भएकोले उत्प्रेषणको आदेशद्वारा वदर गरी मध्यस्थता न्यायाधिकरणबाट प्रस्तुत विवाद सुनुवाई र निरोपणको कुनैपनि कार्य नगर्नु नगराउनु भनी नेपालको संविधानको धारा ४६, १४४ (१) (२) वमोजिम प्रतिषेध लगायतको उपयुक्त आदेश जारी गरी पाऊँ साथै प्रस्तुत निवेदनपत्रको अन्तिम किनारा नभएसम्म गैरकानूनी रुपमा गठित मध्यस्थता न्यायाधिकरणबाट विवाद सुनुवाई सम्बन्धमा थप काम कारवाई नगरी यथास्थितिमा राख्नु भनी उच्च अदालत नियमावली, २०७३ को नियम ४२ वमोजिम अन्तरिम आदेश जारी गरी पाऊँ भन्ने समेत बेहोराको निवेदन पत्र ।

२. यसमा के कसो भएको हो ? निवेदकको निवेदन मागबमोजिम आदेश किन जारी हुनु नपर्ने हो ? आदेश जारी हुनु नपर्ने कुनै आधार, कारण र प्रमाण भए सो समेत खुलाई आफैं वा आफ्नो कानूनबमोजिमको प्रतिनिधिमार्फत लिखित जवाफ पेस गर्नू र निवेदकले माग गरेको अन्तरिम आदेश सम्बन्धमा विचार गर्दा, विभिन्न पत्रमा उल्लेख गरेको मध्यस्थता नियुक्ति सम्बन्धी प्रश्न अधिकारक्षेत्रसँग गाँसिएको र मध्यस्थता ऐन, २०५५ को दफा ७ को कानूनी व्यवस्थासँग सम्बन्धितसमेत रहेको देखिँदा हाल मध्यस्थता परिषदबाट मिति २०७९/११/२ मा मध्यस्थ नियुक्ति गरेको पत्र, निर्णय एवम् सो बमोजिम गठित मध्यस्थबाट मिति २०७९/१२/५ र मिति २०७९/१२/२६ को बैठकको निर्णय र मिति २०८०।४।१ मा प्रकाशित सूचना हाल कार्यान्वयन नगर्नु नगराउनु, सो सूचनासमेत जे जुन अवस्थामा छ सोही अवस्थामा राख्नु भनी विपक्षीहरुको नाममा अल्पकालीन अन्तरिम आदेश जारी गरिदिएको छ । सो अल्पकालीन अन्तरिम आदेशलाई निरन्तरता दिने नदिने सम्बन्धमा छलफल गर्न २०८०/०५/२४ को पेसी तारिख तोकी सो को जानकारी विपक्षीहरुलाई दिई नियमानुसार गरी पेस गर्नू भन्ने यस अदालतबाट मिति २०८०/५/१७ मा भएको आदेश।

३. यसमा निवेदकले मध्यस्थ नियुक्ति सम्बन्धी प्रश्न उठाएको देखिएको, नेपाल मध्यस्थता परिषदमा विपक्षी आशिष ओम साइराम जे.भी.ले मध्यस्थको प्रक्रिया अघि बढाउन निवेदन दिएको र सो

अमन मत्स्य फार्म लि.को अख्तियार प्राप्त भई आफ्नो हकमा समेत शकुन्तला कुमारी यादव **विरुद्ध** ललितपुर महानगरपालिका वडा नं. स्थित नेपाल मध्यसथता परिषद समेत, **विषयः-** उत्प्रेषण समेत, **मुद्दा नं.** ०८०-WO-०३६५, पृष्ठ १२ मध्येको पृष्ठ ३

को प्रयोजनको लागि यी निवेदकलाई सूचना र जानकारी दिएको भन्ने देखिन्छ । यी निवेदकले सो सूचनाहरु र जानकारी प्राप्त भए पश्चात सो सम्बन्धमा विपक्षी परिषदमा कुनै कारवाही चलाएको स्थिति नभएको, मध्यस्थताको लागि अवलम्वन गर्ने कार्यविधि नेपाल मध्यस्थ परिषदबाट जारी भएको मध्यस्थता कार्यविधि सम्बन्धी नियमावली, २०७२ बमोजिमको हुने सम्झौताले स्वीकार गरेको देखिएको, यी निवेदक र विपक्षी जे.भी. बिच भएको सम्झौताको GCC ३१.१ र SCC ३०.१ र मध्यस्थता कार्यविधि सम्बन्धी नियमावलीको नियम १८ र २३ को प्रावधानसमेतको आधारमा हेर्दा निवेदनमा उल्लिखित विषय र प्रश्नहरुको सम्बन्धमा अन्तिम निरुपण हुँदाका वखत विवेचना हुने नै हुँदा हाल निवेदन मागबमोजिमको अन्तरिम आदेश जारी गर्नु पर्ने अवस्थाको विद्यमानता नदेखिँदा मिति २०८०।५।१७ मा यस अदालतबाट जारी भएको अल्पकालीन अन्तरिम आदेशलाई निरन्तरता प्रदान गरिरहनु पर्ने देखिएन तर प्रस्तुत रिट निवेदनको विषयवस्तु र सन्दर्भलाई विचार गर्दा प्रस्तुत रिटको निरुपण छिटो हुनु उपयुक्त देखिँदा अग्राधिकार प्रदान गरिदिएको छ । सो जनाई नियमानुसार पेस गर्नू भन्ने यस अदालतबाट मिति २०८०/५/२४ मा भएको आदेश।

४. रिट निवेदनमा उठाइएको विषय नितान्त व्यक्ति केन्द्रित, मनोगत, तथ्य भन्दा बाहिर र करार सम्झौता तथा मध्यस्थता ऐन, २०५५ को दफा ६, ७ तथा नेपाल मध्यस्थता परिषदको मध्यस्थता कार्यविधि सम्बन्धी नियमावली, २०७२ को नियम १८ प्रतिकुल रहेको छ । उक्त कानूनी व्यवस्थाको आधारमा मध्यस्थ नियुक्त भई मध्यस्थ ट्राइबुनलले पूर्णता पाई प्रारम्भिक बैठक बस्नको लागि विड कागजातमा उल्लिखित ठेगानामा इमेल तथा पत्राचार गरिएकोमा समेत कुनै जानकारी प्रतिकृया नजनाई बसेको अवस्थामा गोरखापत्र तथा कान्तिपुर दैनिकमा मिति २०७८।०३।३० मा सूचना जारी गरिएको हो । सो सूचनाको आधारमा उपस्थित नभई प्रकृया नै अवरोध गर्ने गरी दायर निवेदन स्वतः खारेजभागी रहेको छ । मध्यस्थता ट्राइबुनलले मध्यस्थता ऐन, २०५५ तथा पक्षहरु बिच भएको सम्झौताको आधारमा मध्यस्थको प्रकृया अगाडि बढ्ने हो, त्यसमा विवाद गर्नुपर्ने अवस्था छैन । करारले अवलम्वन गरेको विधि र प्रकृयाबाट नै विवादको समाधान हुनुपर्ने हुन्छ । करारीय पक्षको करारको विवादमा के कति कस्को दावी तथा प्रतिदावी रहन्छ सो विषय नितान्त पक्षहरुको हो, त्यसमा नेप्काको कुनै चासो सरोकार र स्वार्थ रहेको हुन्न। सम्झौताबमोजिम विवाद समाधान होस् भन्ने चाहाना रहेको हुन्छ । विपक्षीको कुन हक अधिकारमा नेप्काले आघात पुऱ्याएको वा पुऱ्याउने आशंका गरेको हो खुलाउन नसकी हचुवाको भरमा विवाद लम्बाउने दुषित नियतका साथ दायर भएको निवेदनमा कुनै कानूनी तथा संवैधानिक प्रश्न रहेको छैन । नेप्काले विशुद्ध तवरबाट असल नियतकासाथ गरेको कामकारवाहीलाई अतिरञ्जित गरी नभएको बेहोरा सृजना गरी हचुवाको भरमा दायर गरेको निवेदन खारेज गरी पाऊँ भन्ने समेत बेहोराको विपक्षी मुख्य मध्यस्थ ऋषिकेश वाग्ले, मध्यस्थ भोला छत्कुली र आशिष अधिकारी मध्यस्थ भएको मध्यस्थता परिषद (नेप्का) कुपण्डोलको तर्फबाट ऐ.को अख्तियार प्राप्त पूर्ण ध्वज कार्कीको लिखितजवाफ।

अमन मत्स्य फार्म लि.को अख्तियार प्राप्त भई आफ्नो हकमा समेत शकुन्तला कुमारी यादव **विरुद्ध** ललितपुर महानगरपालिका वडा नं. स्थित नेपाल मध्यसथता परिषद समेत, **विषयः-** उत्प्रेषण समेत, **मुद्दा नं.** ०८०-WO-०३६५, पृष्ठ १२ मध्येको पृष्ठ ४

५. निवेदकले मिति २०७६/०५/२३ (०९ सेप्टेम्बर २०१९) मा प्रकाशन गरेको बोलपत्र सूचना अनुसारको खरिद प्रक्रियामा सहभागी भई मिति २०७६/१०/१० (२४ जनवरी २०२०) मा सम्झौता गरेको थियो । सो सम्झौताको GCC 30.1 मा विवाद समाधान मध्यस्थतामार्फत हुने र मध्यस्थतामा NEPCA को कार्यविधि लागु हुने भन्ने उल्लेख थियो । उक्त सम्झौतामै विपक्षीको ईमेल ठेगाना aman.matshya.farm@gmail.com उल्लेख थियो । सम्झौताबमोजिम कार्य थालनी भए पश्चात Intermin Payment Statement- 01 पौष २०७८ मा पेस भएकोमा त्यसको भोलिपल्ट प्रमाणित भई Interim Payment Certificate-०१ बनेको थियो । IPC- 01 भुक्तानीमा ढिलाई भए पश्चात यस जे.भी. ले पत्राचार गरेकोमा भुक्तानि प्राप्त नभए पनि आफ्नो काम जारी राखेको हुँदा थप काम बापत ३ फाल्गुन २०७८ मा Interim Payment Statement- 02 पेस गरी ०९ चैत्र २०७८ मा Interim Payment Certificate- 01 भुक्तानी गर्न पुनः पत्रचार गरिएको थियो भने Interim Payment Statement- 02 १६ चैत्र २०७८ मा प्रमाणित भई Interim Payment Certificate- 02 बनेको थियो । दुईवटा IPC को भुक्तानी लामो समय देखि बाँकी रहेकोले ९ जेष्ठ २०७९ मा IPC-01 तथा IPC-02 को समयमा नै भुक्तानी नदिई नियोक्ताद्वारा करारको आधारभूत उल्लङ्घन भएको भनी पत्राचार गरेको थियो । सो पत्रको पनि विपक्षीले कुनै जवाफ नदिएको हुँदा जे.भी.ले नियोक्ताले समयमा भुक्तानी नदिएको कारणले निर्माण कार्य रोकिएको र सम्झौता रद्द भएको सूचना २२ असार २०७९ मा दिएको थियो । सो पश्चात सम्झौताका प्रावधान, सम्झौतामा नै उल्लेख गरिएको NEPCA को मध्यस्थता कार्यविधि तथा मध्यस्थता ऐन, २०५५ बमोजिम मध्यस्थ नियुक्ति तथा गठनको प्रक्रिया अघि बढाएको र NEPCA ले विभिन्न चरणमा विपक्षीलाई आफ्नो तर्फबाट मध्यस्थ नियुक्त गर्ने मौका प्रदान गर्दा विपक्षीले कुनै प्रतिक्रिया नै नदिएको हुँदा अन्ततः NEPCA कार्यविधि बमोजिम NEPCA ले मध्यस्थ नियुक्त गरी दियो । मध्यस्थले मध्यस्थता ऐन, २०५५ को दफा २० बमोजिम पठाएको सूचना पनि वेवास्ता गरेको, विपक्षीले यस जे.भी. को दावी उपर कुनै प्रतिवाद पेस नगरेको र रजिस्टर्ड पोस्ट मार्फत पठाएको पत्र बुझ्न नमानेको प्रमाण NEPCA तथा ट्राइब्युनललाई प्राप्त भए पश्चात मध्यस्थ ट्राइब्युनलले NEPCA मार्फत विपक्षीको नाममा सार्वजनिक सूचना कान्तिपुर राष्ट्रिय दैनिकमा ३० श्रावन २०८० मा प्रकाशित गरेको हो । मध्यस्थता ऐन, २०५५ को दफा ३(१) ले **"कुनै सम्झौतामा मध्यस्थताद्वारा विवाद समाधान गरिने व्यवस्था भएकोमा त्यस्तो सम्झौता वा सो अन्तरगतका विषयसँग सम्बन्धित विवाद सम्झौतामा नै कार्यविधि उल्लेख भएकोमा सोही बमोजिम र नभएकोमा यस ऐन बमोजिम मध्यस्थताद्वारा समाधान गराउनु पर्नेछ"** भन्ने व्यवस्था गरेको, GCC 30.1 मा NEPCA को मध्यस्थता सम्बन्धी कार्यविधि लाग्ने व्यवस्था भएकोमा ऐन उपर उक्त कार्यविधिले प्राथमिकता पाउने प्रष्ट छ । उक्त कार्यविधिको नियम १६ ले मध्यस्थको नियुक्तिको व्यवस्था गरेको छ भने नियम १८ ले परिषद्द्वारा मध्यस्थ नियुक्त गर्ने कार्यविधिको व्यवस्था गरेको छ । यसरी GCC 30.1 मा NEPCA कार्यविधि मान्ने भनी विपक्षीले सम्झौता गरेको, मध्यस्थता ऐन, २०५५ को दफा ३(१) ले विवाद सम्झौतामा नै

अमन मत्स्य फार्म लि.को अख्तियार प्राप्त भई आफ्नो हकमा समेत शकुन्तला कुमारी यादव **विरुद्ध** ललितपुर महानगरपालिका वडा नं. स्थित नेपाल मध्यसथता परिषद समेत, **विषयः**- उत्प्रेषण समेत, **मुद्दा नं.** ०८०-WO-०३६५, पृष्ठ १२ मध्येको पृष्ठ ५

कार्यविधि उल्लेख भएकोमा सोही बमोजिम मध्यस्थताद्वारा विवाद समाधान गराउनु पर्ने व्यवस्था गरिएको र NEPCA कार्यविधिमा मध्यस्थ नियुक्तिको व्यवस्था गरिएको हुँदा नेपाल मध्यस्थता परिषद् (नेप्का) को मध्यस्थता कार्यविधि सम्बन्धी नियमावली, २०७२ बमोजिम मध्यस्थ नियुक्ति भएकोलाई अन्यथा भन्न मिल्दैन । मध्यस्थ ट्राइब्युनलले मिति २०८० असोज १७ मा राखेको Hearing Meeting मा विपक्षी आफ्ना प्रतिनिधिमार्फत उपस्थित भई सकेको र सो मा "In consultation with the parties, it was agreed that the request of the Respondent for the dismissal for the formation of the Arbitration shall be decided at the final hearing of the case." भन्ने आदेश समेत भएको हुँदा विपक्षी वैकल्पिक उपचारको बाटोमा लागिसकेको स्थापित भएको हुँदा यो मुद्दा औचित्यहीन छ, विपक्षीको मुद्दा खारेज गरी पाऊँ भन्ने समेत बेहोराको विपक्षी आशिष-ओमसाई राम जे.भी.को लिखितजवाफ।

आदेश खण्ड

६. नियमबमोजिम साप्ताहिक तथा दैनिक पेसी सूचीमा समावेश भई पेस हुन आएको प्रस्तुत रिट निवेदनमा निवेदकको तर्फबाट उपस्थित विद्वान् वरिष्ठ अधिवक्ता श्री शरद प्रसाद कोइराला र विद्वान् अधिवक्ता श्री किरण पौडेलले करारका पक्षहरु विच विवाद उत्पन्न भएपछि त्यस्तो विवादको समाधान पक्षहरुद्वारा नियुक्त मध्यस्थहरुद्वारा हुनु पर्ने हुन्छ, निवेदक र निर्माण व्यवसायी विच उत्पन्न विवाद समाधान गर्न निवेदकको तर्फबाटै मध्यस्थ नियुक्त हुनु पर्नेमा निवेदक तर्फको मध्यस्थ समेत विपक्षी मध्यस्थता परिषदबाट भएको निर्णय तथा कामकारवाही पक्षहरु विच भएको सम्झौता तथा मध्यस्थता ऐन, २०५५ समेतको प्रतिकूल भएको हुंदा विपक्षी नेपाल मध्यस्थता परिषदबाट निवेदकको तर्फबाट मध्यस्थ नियुक्त गरेको पत्र र निर्णय एवम् सोको आधारमा मुख्य मध्यस्थ नियुक्ति गरिएको निर्णय एवम् त्यस अनुसार गठित मध्यस्थ ट्रिवुनलबाट भएको प्रारम्भिक बैठकको निर्णय, मिति २०८०।१४।०१ मा प्रकाशित सूचना र सोको आधारमा भए गरेका सम्पूर्ण काम कारवाई उत्प्रेषणको आदेशद्वारा वदर गरी विपक्षी मध्यस्थ ट्रिवुनलबाट प्रस्तुत विवाद सुनुवाई र निरोपणको कुनै पनि कार्य नगर्नु नगराउनु भनी प्रतिषेधको आदेश जारी हुनु पर्दछ भन्ने समेत व्यहोराको बहस प्रस्तुत गर्नुभयो ।

७. विपक्षी नेपाल मध्यस्थता परिषदका तर्फबाट उपस्थित विद्वान् अधिवक्ता श्री राजन अधिकारीले निवेदक र ठेकदार कम्पनीका विच भएको सम्झौताका सम्बन्धमा विवाद उत्पन्न भएकोले विवाद समाधानको लागि सम्झौताको व्यवस्था अनुसार ठेकदार कम्पनीले आफ्नो तर्फबाट मध्यस्थ नियुक्त गरेकोमा निवेदकका तर्फबाट मध्यस्थ नियुक्त नगरिएको र परिषदले निवेदकका तर्फबाट मध्यस्थ नियुक्त गर्न पत्राचार गर्दा समेत मध्यस्थ नियुक्त नगरिएकोले परिषदले नियममा भएको व्यवस्था अनुसार मध्यस्थ नियुक्त गरेको हुँदा निवेदन माग बमोजिमको आदेश जारी हुनु पर्ने होइन भन्ने समेत व्यहोराको र विपक्षी आशिष-ओम साईराम जे.भी.को तर्फबाट विद्वान् अधिवक्ता श्री हिमेशकृष्ण खरेल तथा विपक्षी मध्यस्थहरुका तर्फबाट विद्वान् अधिवक्ता श्री अपुर्व खतिवडाले निवेदक र विपक्षी निर्माण व्यवसायी विच भएको सम्झौतामा विवादको समाधान मध्यस्थबाट हुने

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र त्यस सम्बन्धमा **NEPCA** को नियम लागू हुने भनिएकोले निवेदकलाई मध्यस्थ नियुक्त गर्न जानकारी गराइएकोमा निजका तर्फबाट मध्यस्थ नियुक्त नगरिएकोले **NEPCA** को नियमानुसार निवेदकका तर्फबाट मध्यस्थ नियुक्ति गरिएको हुँदा निवेदन माग बमोजिमको आदेश जारी हुनु पर्ने होइन, रिट निवेदन खारेज हुनु पर्दछ भनी गर्नु भएको बहस जिकिर समेत सुनियो ।

८. प्रस्तुत निवेदनमा निवेदक कम्पनी र विपक्षी निर्माण व्यवसायी ठेकदार कम्पनीका विच शीतगृह निर्माण **(Construction and Installation of 3000 MT cold storage plant for fruits and vegetables)** गर्नको लागि मिति २०७६।१०/१० मा **Contract ID No. AMF1076-07711** सम्झौता भएकोमा उक्त सम्झौता अनुसारको निर्माण कार्य समयमा सम्पन्न हुन नसकी विवाद उत्पन्न भएको र सम्झौतापत्रको प्रकरण नं. २९.१ बमोजिम वार्ताद्वारा विवाद समाधान हुन नसकेकोले सम्झौताको प्रकरण ३०.१ को आधारमा मध्यस्थद्वारा विवाद समाधान गर्न आफ्नो तर्फबाट आशिष अधिकारीलाई मध्यस्थ नियुक्ति गरी विपक्षी नेपाल मध्यस्थता परिषदमा निवेदन गरेको र सोही आधारमा विपक्षी परिषदले निवेदक कम्पनीको तर्फबाट भोला छत्कुलीलाई मध्यस्थ नियुक्त गरी निजहरुले डा. ऋषिकेश वाग्लेलाई मूख्य मध्यस्थ नियुक्त गरी मिति २०७९।१२।५ मा प्रारम्भिक बैठक सम्पन्न गरी सोही आधारमा निवेदकलाई प्रतिवाद **(Defense)** पेस गर्नु भनी कान्तिपुर र गोरखापत्र राष्ट्रिय दैनिकमा मिति २०८०।४।३० मा सूचना प्रकाशित भएपछि त्यस सम्बन्धमा जानकारी पाएकोले विपक्षीहरुले सम्झौताको व्यवस्था प्रतिकुल हुने गरी निवेदकको तर्फबाट मध्यस्थ नियुक्त गर्ने निर्णय एवम् कार्य र त्यसरी नियुक्त भएको मध्यस्थले मूख्य मध्यस्थ नियुक्त गरी गठन गरिएको मध्यस्थ न्यायाधिकरणबाट विवाद सुनुवाई गर्ने सम्बन्धमा भएका काम कारवाई क्षेत्राधिकार र प्रारम्भदेखि नै वदरभागी रहेकोले गैरकानूनी रुपमा मध्यस्थता न्यायाधिकरण गठन र सोबाट मिति २०७९।१२।१६ मा भएको सुनुवाईको प्रारम्भिक बैठक एवम् ततसम्वन्धमा भए गरेका कारवाई र उक्त मध्यस्थता समक्ष निर्माण व्यवसायीबाट पेस भएको दायित्व सम्बन्धमा प्रतिवाद पेस गर्न भएको निर्णय एवम् मिति २०८०।४।३० मा कान्तिपुर र गोरखापत्रमा प्रकाशित सूचनाबाट निवेदकको मध्यस्थता ऐन, २०५५ को दफा ६, ७ र १६ एवम् नेपालको संविधानको धारा १८(१), २०(८) र मुलुकी देवानी कार्यविधी संहिता, २०७४ को दफा ५०७ द्वारा प्रदत्त अधिकार अतिक्रमण भएकोले प्रत्यर्थी आशिष ओम साइराम जे.भी. को अनुरोधमा नेपाल मध्यस्थता परिषदबाट मिति २०७९।११।२ मा निवेदकको तर्फबाट मध्यस्थत नियुक्त गरेको पत्र र निर्णय एवम् सोको आधारमा मुख्य मध्यस्थ नियुक्ति गरिएको निर्णय एवम् त्यस अनुसार गठीत मध्यस्थबाट मिति २०७९।१२।०५ र २०७९।१२।२६ मा भएको प्रारम्भिक बैठकको निर्णय मिति २०८०।४।३० मा प्रकाशित सूचना र सोको आधारमा भए गरेका सम्पूर्ण काम कारवाई उत्प्रेषणको आदेशद्वारा वदर गरी मध्यस्थता न्यायाधिकरणबाट प्रस्तुत विवाद सुनुवाई र निरोपणको कुनैपनि कार्य नगर्नु नगराउनु भनी नेपालको संविधानको धारा ४६, १४४ (१) (२) बमोजिम प्रतिषेध लगायतको उपयुक्त आदेश जारी गरी पाऊँ भन्ने निवेदन मागदावी रहेकोमा

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विपक्षीहरुको लिखित जबाफमा मध्यस्थता ऐन, २०५५ मा भएको कानूनी व्यवस्था र पक्षहरु विच भएको सम्झौताको दफा २९.१ र ३०.१ को आधारमा मध्यस्थद्वारा विवाद समाधान गर्नको लागि निर्माण व्यवसायीको तर्फबाट आशिष अधिकारीलाई मध्यस्थ नियुक्ति गरिएको र निवेदक कम्पनीका तर्फबाट मध्यस्थ नियुक्त गर्न पटक पटक पत्रचार गर्दा समेत मध्यस्थ नियुक्त नगरिएकोले नेपाल मध्यस्थता परिषदको मध्यस्थता सम्बन्धी कार्यविधि नियमावली, २०७२ मा भएको व्यवस्था अनुसार निवेदक कम्पनीका तर्फबाट भोला छत्कुलीलाई मध्यस्थ नियुक्ति गरी निजहरुले डा. ऋषिकेश वाग्लेलाई मूख्य मध्यस्थ नियुक्त गरी मध्यस्थ ट्रिवुनलबाट विवाद समाधानको प्रक्रिया सुरु गरिएको र उक्त प्रक्रियामा निवेदक कम्पनी समेत सहभागी भइसकेकोले प्रस्तुत रिट निवेदन खारेज हुनु पर्ने जिकिर लिइएको पाइयो ।

९. उल्लिखित व्यहोराको निवेदन मागदावी, लिखित जवाफ जिकिर तथा विद्वान् कानून व्यवसायीहरुको बहस जिकिर रहेको प्रस्तुत रिट निवेदनमा निवेदकको माग बमोजिमको आदेश जारी हुनु पर्ने हो, होइन ? भन्ने विषयमा निर्णय दिनुपर्ने देखियो ।

१०. निर्णयतर्फ विचार गर्दा, निवेदक अमन मत्स्य फार्म लिमिटेडले शीत गृह निर्माणका लागि वोलपत्र आव्हान गरेकोमा उक्त निर्माण कार्यको लागि विपक्षी आशिष-ओम साईराम जे.भी. छनौट भई मिति २०७६/१०/१० मा सम्झौता भएकोमा ठेक्का सम्झौता अनुसारको निर्माण कार्य कोभिड-१९ को महामारीका कारण निर्धारित समयमा सम्पन्न हुन नसकेकोले मिति २०७९/०३/२४ सम्मको म्याद थप भई निर्माण कार्य गरी निर्माण व्यवसायीले विभिन्न चरणहरुमा कार्य प्रगति वील पेश गरेकोमा समयमा नै रकम भुक्तानी नभएकोले निवेदक र विपक्षी निर्माण व्यवसायी विच विवाद उत्पन्न भएको भन्ने विषयमा विवाद देखिंदैन । उक्त सम्झौता बमोजिमको कार्य गरी विपक्षी निर्माण व्यवसायीले मिति २०७८।९।२४ मा **Interim Payment Statement 1** पेस गरी **Interim Payment Certificate-1** प्रमाणित भएकोमा त्यसको भुक्तानी प्राप्त गर्न नसकेको र थप निर्माण कार्य गरी मिति २०७८।११।३ मा **Interim Payment Statement -2** पेस गरी मिति २०७८।१२।१६ मा **Interim Payment Certificate-2** समेत प्रमाणित भएकोमा उक्त विल अनुसारको रकम समेत भुक्तानी नपाएकोले नियोक्ताद्वारा करारको आधारभूत उल्लङ्घन भएको भनी विपक्षी निर्माण व्यवसायीले मिति २०७९।२।९ मा पत्राचार गरेको देखिन्छ । उक्त पत्र अनुसार पनि निज विपक्षीले विल भुक्तानी पाएको भन्ने देखिंदैन । त्यसपछि निज विपक्षीले निवेदक कम्पनीलाई मिति २०७९।३।२२ मा नियोक्ताले समयमा भुक्तानी नदिएको कारणले निर्माण कार्य रोकिएको र सम्झौता रद्द भएको सूचना निवेदक कम्पनीलाई दिएको र मिति २०७९।५।५ मा आपसी समझदारीमा विवाद समाधान गर्न पत्राचार गरेको मिसिल संलग्न कागजातबाट देखिन्छ । उक्त पत्र अनुसार निवेदक कम्पनीले विपक्षी निर्माण व्यवसायीले माग गरे अनुसार आपसी समझदारीमा विवाद समाधान गर्न कुनै पहल गरेको भन्ने देखिंदैन ।

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११. सम्झौताका पक्षहरु विच विवाद उत्पन्न भएको अवस्थामा त्यस्तो विवाद मध्यस्थको माध्यमबाट समाधान गर्ने कार्यविधिका सम्बन्धी विद्यमान कानूनी व्यवस्था तर्फ दृष्टिगत गर्दा, मध्यस्थता ऐन, २०५५ को दफा ३ को उपदफा (१) मा कुनै सम्झौतामा मध्यस्थताद्वारा विवाद समाधान गरिने व्यवस्था भएकोमा त्यस्तो सम्झौता वा सो अन्तरगतका विषयसँग सम्बन्धित विवाद सम्झौतामा नै कार्यविधि उल्लेख भएकोमा सोही बमोजिम र नभएकोमा यस ऐन बमोजिम मध्यस्थताद्वारा समाधान गराउनु पर्नेछ भन्ने व्यवस्था गरिएको पाइन्छ । उक्त कानूनी व्यवस्था अनुसार सम्झौताका पक्षहरु विच विवाद उत्पन्न भएको अवस्थामा त्यस्तो विवाद समाधान गर्न सम्झौतामा मध्यस्थताद्वारा विवाद समाधान गरिने व्यवस्था गरिएको रहेछ भने त्यस्तो सम्झौता वा सो अन्तरगतका विषयसँग सम्बन्धित विवाद सम्झौतामा उल्लेख भएको कार्यविधि अनुसार विवाद समाधान गरिनु पर्दछ भन्ने स्पष्ट हुन्छ ।

१२. यस पृष्ठभूमिमा निवेदक कम्पनी र विपक्षी निर्माण व्यवसायीका विच भएको सम्झौतामा विवाद समाधान (**Dispute Settlement**) का सम्बन्धमा सम्झौताको दफा २९.१ मा गरिएको व्यवस्था हेर्दा नियोक्ता र निर्माण व्यवसायीका सम्झौतासंग सम्बन्धित कुनै विषयमा कुनै विवाद वा असहमति उत्पन्न भएमा वार्ताद्वारा उपयुक्त समाधानको प्रयास गर्ने (**The Employer and the Contractor shall attempt to settle amicably by direct negotiation any disagreement or dispute arising between them under or in connection with the Contract.**) र दफा २९.२ मा त्यसरी विवादको समाधान हुन नसकेमा त्यसको जानकारी दिइएको ३० दिन भित्र त्यस्तो विवाद मध्यस्थसमक्ष पठाइनु पर्ने (**Any dispute between the Parties as to matters arising pursuant to this Contract which cannot be settled amicably within thirty (30) days after receipt by one Party of the other Party's request for such amicable settlement may be referred to Arbitration within 30 days after the expiration of amicable settlement period.**) भन्ने उल्लेख गरिएको पाइन्छ । त्यस्तै सम्झौताको दफा ३०.१ मा मध्यस्थद्वारा विवाद समाधान गर्नु परेको अवस्थामा मध्यस्थ सम्बन्धी कारवाही नेपाल मध्यस्थता परिषदको नियम अनुसारको कार्यविधि अवलम्वन गरिने (**In case of arbitration, the arbitration shall be conducted in accordance with the arbitration procedures published by the Nepal Council of Arbitration (NEPCA) at the place given in the SCC.**) भन्ने उल्लेख गरेको पाइन्छ । मध्यस्थता ऐन, २०५५ को दफा ३ मा भएको कानूनी व्यवस्था र निवेदक कम्पनी र विपक्षी निर्माण व्यवसायीका विच भएको सम्झौतामा गरिएको उक्त व्यवस्था अनुसार निवेदक तथा विपक्षी निर्माण व्यवसायीका विच भएको सम्झौता अनुसारको निर्माण कार्य गर्ने सिलसिलामा उत्पन्न विवाद आपसी सहमतिमा उपयुक्त किसिमले समाधान गर्न नसकी मध्यस्थद्वारा विवाद समाधान गर्नु परेको अवस्थामा विपक्षी परिषदद्वारा निर्धारित प्रक्रिया अवलम्वन गरी मध्यस्थद्वारा विवाद समाधान गरिने भन्ने उल्लेख भएकोले सोही आधारमा नै विवाद समाधान गरिनु पर्नेमा विवाद गरिरहनु पर्ने देखिएन ।

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१३. निवेदक कम्पनी र विपक्षी निर्माण व्यवसायीका विच विवाद उत्पन्न भएपछि निजहरु विच भएको सम्झौताको **GCC** को दफा २९.१ र ३०.१ मा भएको व्यवस्था अनुसार विपक्षी निर्माण व्यवसायीले निवेदक कम्पनीलाई मिति २०७९।३।२२ मा समयमा भुक्तानी नपाएको कारण निर्माण कार्य रोकिएको र सम्झौता रद्द भएको सूचना दिई मिति २०७९।५।५ मा आपसी समझदारीमा विवाद समाधान गर्न पत्राचार गर्दासमेत निवेदक कम्पनीले आपसी समझदारीमा विवाद समाधान गर्न कुनै पहल नगरेकोले विवाद समाधानको लागि मध्यस्थ नियुक्ति गरी पाऊँ भनी विपक्षी नेपाल मध्यस्थता परिषदमा निवेदन गरेको देखिन्छ । विपक्षी परिषदको मध्यस्थता कार्यविधि सम्बन्धी नियमावली, २०७२ को नियम १८ मा यस नियमावली बमोजिम विवादको कुनै पक्ष वा पक्षहरुबाट मध्यस्थ नियुक्तिको अनुरोध प्राप्त भएमा परिषदले आफुले कायम गरेको स्वतन्त्र मध्यस्थहरुको सूची (प्यानल) मध्येबाट मध्यस्थ नियुक्ति गर्नुपर्नेछ भन्ने व्यवस्था भए अनुसार विपक्षी परिषदले निवेदक कम्पनीलाई मिति २०७९/०८/११ मा मध्यस्थ नियुक्ति गर्न जानकारी गराएको र मिति २०७९/०९/२४ मा मध्यस्थ नियुक्तिका लागि तीन जना मध्यस्थको नाम सहित पत्राचार गरेकोमा निवेदकबाट त्यसको कुनै जवाफ नआएकोले परिषदको मध्यस्थता कार्यविधि सम्बन्धी नियमावली, २०७२ को नियम १८ मा भएको व्यवस्था अनुसार निवेदक कम्पनीका तर्फबाट भोला छत्कुलीलाई मध्यस्थ नियुक्ति गरिएको देखिन्छ ।

१४. मध्यस्थता ऐन, २०५५ को दफा ३ को उपदफा (१) मा भएको कानूनी व्यवस्था, निवेदक कम्पनी र विपक्षी निर्माण व्यवसायी विच भएको सम्झौताको दफा ३०.१ मा भएको व्यवस्था र विपक्षी परिषदको मध्यस्थता कार्यविधि सम्बन्धी नियमावली, २०७२ को नियम १८ मा भएको व्यवस्था अनुसार निवेदक कम्पनीलाई मध्यस्थ नियुक्तिका लागि विभिन्न मितिमा जानकारी गराउँदा समेत मध्यस्थ नियुक्ति नगरेकोले विपक्षी नेपाल मध्यस्थता परिषदले निवेदकका तर्फबाट भोला छत्कुलीलाई मध्यस्थ नियुक्त गरी सो को जानकारी निवेदक कम्पनीलाई दिएको भन्ने देखिएकोले विपक्षी परिषद्को उल्लिखित काम कारवाही मध्यस्थता ऐन, २०५५ मा भएको कानूनी व्यवस्था, निवेदक कम्पनी र विपक्षी निर्माण व्यवसायी विच भएको सम्झौता तथा विपक्षी परिषद्को नियमावलीमा भएको व्यवस्थाको प्रतिकूल भएको भन्ने देखिएन ।

१५. यसका अतिरिक्त मध्यस्थता ऐन, २०५५ को दफा १० मा मध्यस्थ नियुक्त हुनको लागि योग्यता तोकिएको र सोही ऐनको दफा ११ को उपदफा (२) मा मध्यस्थले निष्पक्ष रुपले काम नगरी कुनै पक्षप्रति झुकाव राखेको वा पक्षपात गरेको समेतका आधारमा मध्यस्थबाट हटाउन सकिने व्यवस्था समेत गरिएको पाइन्छ । त्यस्तै विपक्षी परिषदको मध्यस्थता सम्बन्धी नियमावली, २०७२ को नियम २३ मा समेत मध्यस्थलाई हटाउन सकिने व्यवस्था गरिएकोमा उल्लिखित कानूनी व्यवस्थाको आधारमा विपक्षी परिषदद्वारा निवेदकका तर्फबाट नियुक्त मध्यस्थ अयोग्य भएको वा निजले निष्पक्ष रुपले काम नगरी कुनै पक्षप्रति झुकाव राखेको भन्ने समेत आधारमा निजलाई मध्यस्थबाट हटाउनु पर्ने कुने विश्वसनीय र मनासिव आधार निवेदकले निवेदन पत्रमा खुलाउन सकेको देखिंदैन भने उल्लेखित आधारमा मध्यस्थलाई हटाउनु पर्ने

अमन मत्स्य फार्म लि.को अख्तियार प्राप्त भई आफ्नो हकमा समेत शकुन्तला कुमारी यादव **विरुद्ध** ललितपुर महानगरपालिका वडा नं. स्थित नेपाल मध्यसथता परिषद समेत, **विषयः-** उत्प्रेषण समेत, **मुद्दा नं.** ०८०-WO-०३६५, पृष्ठ १२ मध्येको पृष्ठ १०

अवस्थामा सोही ऐनको दफा ११ अनुसार छुट्टै कारवाही चलाउनु पर्नेमा निवेदकले त्यसतर्फ कुनै कारवाही चलाएको भन्ने पनि देखिँदैन ।

१६. विपक्षी निर्माण व्यवसायीहरुबाट नियुक्त मध्यस्थ आशिष अधिकारी र निवेदकका तर्फबाट विपक्षी परिषदद्वारा नियुक्त मध्यस्थ भोला छत्कुलीले डा. ऋषिकेश वाग्लेलाई मूख्य मध्यस्थ नियुक्ति गरी मध्यस्थ ट्रिवुनलको प्रारम्भिक बैठक मिति २०७९/१२/२४ (७ अप्रिल २०२३) मा बस्ने तय गरी निवेदकलाई जानकारी गराएकोमा उक्त बैठकमा निवेदक कम्पनी उपस्थित नभएपछि पुनः मिति २०७९/१२/२६ (९ अप्रिल २०२३) मा प्रारम्भिक बैठक बस्ने जानकारी समेत पठाइएकोमा निवेदकले चासो नदेखाएकोले सुनुवाईको प्रकृया अगाडि बढाई निवेदकलाई **Satement of Defence and Counter Claim** पेश गर्न समय दिइएको र त्यसको जानकारी परिषदले हुलाक मार्फत रजिष्ट्री गरी सूचना पठाउंदा नबुझेको र इमेल मार्फत जानकारी गराउँदासमेत सम्पर्कमा नआएपछि मध्यस्थ परिषदले मिति २०८०/०४/३० मा राष्ट्रिय स्तरको दैनिक पत्रिकामा प्रतिवाद पेश गर्न सुचना प्रकाशन गरेको भन्ने देखिएकोले उल्लेखित काम कारवाही कानून प्रतिकूल रहेको भन्ने देखिएन ।

१७. यसैले मध्यस्थता ऐन, २०५५ को दफा ३ को उपदफा (१) मा भएको कानूनी व्यवस्था, निवेदक कम्पनी र विपक्षी निर्माण व्यवसायी विच भएको सम्झौताको दफा ३०.१ मा भएको व्यवस्था र विपक्षी परिषदको मध्यस्थता कार्यविधि सम्बन्धी नियमावली, २०७२ को नियम १८ मा भएको ब्यवस्था समेतको आधारमा विपक्षी परिषदले निवेदकको तर्फबाट भोला छत्कुलीलाई मध्यस्थ नियुक्त गरेको पत्र र निर्णय एवं निज समेतले डा. ऋषिकेश वाग्लेलाई मुख्य मध्यस्थ नियुक्ति गरेको निर्णय एवं त्यसरी गठित विपक्षी मध्यस्थ ट्रिवुनलको प्रारम्भिक बैठकको निर्णय तथा प्रकाशित सूचना र सो को आधारमा भएका भए गरेको काम कारवाही गैरकानूनी मान्न नमिल्ने हुँदा उल्लिखित काम कारवाही उत्प्रेषणको आदेशद्वारा बदर गरी र उक्त मध्यस्थ ट्रिवुनललाई विवाद सुनुवाई र निरोपणको कुनै कार्य नगर्नु नगराउनु भनी प्रतिषेधको आदेश जारी हुनु पर्ने अवस्था देखिएन ।

१८. अतः माथि विवेचित आधार र कारणबाट निवेदन माग बमोजिमको आदेश जारी गर्नुपर्ने अवस्थाको विद्यमानता रहेको नदेखिँदा प्रस्तुत रिट निवेदन खारेज हुने ठहर्छ । अरुमा तपसिल बमोजिम गर्नू।

<u>तपसिल खण्ड</u>

१. सरोकारवालाले प्रस्तुत फैसलाको प्रतिलिपि माग गरे उच्च अदालत नियमावली, २०७३ को नियम १२० बमोजिम प्रतिलिपि दिनू ।

२. फैसला प्रमाणीकरण भएको सूचना टाँस गरी यस अदालतको वेभसाइटमासमेत प्रकाशन गर्नू ।

अमन मत्स्य फार्म लि.को अख्तियार प्राप्त भई आफ्नो हकमा समेत शकुन्तला कुमारी यादव **विरुद्ध** ललितपुर महानगरपालिका वडा नं. स्थित नेपाल मध्यसथता परिषद समेत, **विषयः**- उत्प्रेषण समेत, **मुद्दा नं.** ०८०-WO-०३६५, पृष्ठ १२ मध्येको पृष्ठ ११

३. प्रस्तुत आदेश विद्युतीय प्रणालीमा अपलोड गरी प्रस्तुत रिट निवेदनको दायरीको लगत कट्टा गरी मिसिल नियमानुसार अभिलेख शाखामा बुझाई दिनू ।

सुदर्शनराज पाण्डे
न्यायाधीश

उक्त रायमा सहमत छु।

हरिप्रसाद पौडेल
न्यायाधीश

फैसला लेखनमा सहयोग गर्नेः

इजलास अधिकृतः शान्ता पौडेल
कम्प्युटर टाईप गर्नेः बसन्त दर्शनधारी
इति संवत् २०८० साल पुष ४ गते रोज ४ शुभम् .....।
फैसला प्रमाणीकरण मिति र दस्तखतः न्यायाधीश अदालतको छाप

अमन मत्स्य फार्म लि.को अख्तियार प्राप्त भई आफ्नो हकमा समेत शकुन्तला कुमारी यादव **विरुद्ध** ललितपुर महानगरपालिका वडा नं. स्थित नेपाल मध्यसथता परिषद समेत, **विषयः-** उत्प्रेषण समेत, **मुद्दा नं.** ०८०-WO-०३६५, पृष्ठ १२ मध्येको पृष्ठ १२

नेपाल मध्यस्थता परिषद (NEPCA) बाटै पुनःमध्यस्थता गर्ने गरि मध्यस्थको निर्णय बदर हुने। पक्षहरुलाई नेपाल मध्यस्थता परिषद (NEPCA) मा हाजिर हुन पठाउने।

श्री
उच्च अदालत पाटन
संयुक्त इजलास
इजलास नं. १०
माननीय न्यायाधीश श्री मुनेन्द्रप्रसाद अवस्थी
माननीय न्यायाधीश श्री हेमन्त रावल
फैसला
मुद्दा नं. ०८०-FJ-०००१
निर्णय नं. ४३४
मुद्दाः- मध्यस्थता।

श्री आशिष/सि.एम./जय बाबा जे.भी.को अख्तियार प्राप्त प्रतिनिधि धादिङ जिल्ला, निलकण्ठ गा.वि.स. वडा नं.५ घर भई हाल काठमाडौं जिल्ला, काठमाडौं महानगरपालिका वडा नं.४ बस्ने श्याम कुमार श्रेष्ठ ----------१ } निवेदक

<u>विरुद्ध</u>

नेपाल सरकार, भौतिक पूर्वाधार तथा यातायात मन्त्रालय, सडक विभाग, चाकुपाट, ललितपुर ----------१ } विपक्षी

मध्यस्थता भएको स्थान	:-	DRC, Nepal, Maharajgung, Kathmandu
निर्णय गर्ने मध्यस्थ	:-	राजु मान सिंह मल्ल (एकल मध्यस्थ)
निर्णय मिति	:-	२०८०/२/२९
पुनरावेदन दर्ता मिति	:-	२०८०/४/२

मध्यस्थता ऐन, २०५५ को दफा ७ बमोजिम यस अदालतको क्षेत्राधिकार भित्र निवेदनपत्र दायर हुन आएको प्रस्तुत मुद्दाको संक्षिप्त तथ्य एवं यस अदालतको आदेशर तपसिल यस प्रकार छः-

<u>तथ्य खण्ड</u>

१. विपक्षी र सयुक्त उपक्रम बिच भएको उक्त करार समझैता कार्यान्वयनको शिलशिलामा विवाद उत्पन्न भई सम्झैता GCC को प्रकरण नं. २३ बमोजिम आपसि समझदारीबाट विवादको समाधान हुन नसकी GCC को प्रकरण नं. २३ र SCC प्रकरण २३.२ बमोजिम Adjudication मा गई एकल मध्यस्थ श्री महेन्द्र बहादुर गुरुङबाट मिति २०७८/११/१३ मा नियोक्ताको सहभागिता र जिम्मेवारी भएकै देखिने हुँदा निवेदकले भुक्तानी पाउन मनासिब ठहर्छ भनी अवार्ड भएको थियो। सो अवार्ड चित्त नबुझाई नियोक्ता अनी निवेदक पुन GCC को प्रकरण नं. २५ र SCC प्रकरण २५.४ बमोजिम Arbitration गई नियोक्ताले भनेबमोजिम एकल मध्यस्थ श्री राजु मान सिंह

मल्लबाट मिति २०८०/०२/२९ मा त्रुटिपूर्ण अवार्ड हुन गएको थियो। सम्झैतामा मध्यस्थको संख्या उल्लेख नभएमा मध्यस्थता ऐन, २०५५ को दफा ५ र ६ बमोजिम तीन सदस्यीय मध्यस्थता न्यायधिकरण गठन हुन पर्ने भएतापनि प्रस्तुत विवाद समाधानको लागि एकल मध्यस्थ राजु मान सिंह मल्ल रहेको मध्यस्थता गठन भएको थियो। एकल सदस्य रहेको मध्यस्थता न्यायाधिकरण समक्ष निवेदक निर्माण व्यवसायी सयुक्त उपक्रम (दावी कर्ता) बाट निम्न अनुसारको बुँदाहरुमा दावी पेस गरिएको थियो। a) Claim for payment of Outstanding Quantity of IPC No. 15 (without VAT) ..... RS. 99,56,456.73, b) Claim of the interest on Late Payment of Outstanding Bill, IPC:15 (without VAT)..... Rs.15,77,211.86, c) Bank Commission for issurance and renewal of PBG..... Rs.24,28,191.25, d) Premium for issurance and renewal of Insurance Policy..... Rs.21,10,000.00 Total Claim amount Rs. 1,60,71,859. 84 (without VAT) । निवेदक निर्माण व्यवसायी सयुक्त उपक्रम (दावीकर्ता) बाट पेस गरेको दावीमा विपक्षी नियोक्ताबाट दावीलाई पूर्णताः अस्वीकार गरी प्रतिवाद पेस भएको थियो। उपरोक्त दावी एवम् प्रतिवाद भएको विवादमा मध्यस्थ न्यायधिकरणबाट मिति २०८०/०२/२९ (12 जुन 2023) मा निर्णय हुँदा मुलत निम्नलिखित निर्णय भएको छ। a) SOC-1: Payment of Outstanding Quantity (IPC-15). The contractor is not entitled to the Payment of the Outstanding Quantity (IPC-15) of NRs. 99,56,456.73 (Without VAT) b) SOC-2: Payment of Interest on Late Payment of Outstanding Quantity (IPC-15). The contractor is not entitled to the Payment of Interest on Late Payment of the Outstanding Quantity (IPC-15) of NRs. 1,577,211.86 (Without VAT), c) SOC-3: Reimbursement for Renewal of PBG as well as the Premium for Issuance and Renewal of Insurance Policy (IPC-15). The contractor is not entitled to the Payment of Reimbursement for the Renewal of PBG of NRs. 24,28,191.25 as well as the Premium for Issuance and Renewal of Insurance Policy of NRs. 21,10,000.00. उपरोक्त बमोजिमको भएको मध्यस्थको निर्णयमा मध्यस्थलाई सुम्पिएको शर्त प्रतिकूल र सार्वजनिक हित र नीति प्रतिकुल भई मध्यस्थता ऐन, २०५५ को दफा ३०(१) २(ग) ३(ख) को अवस्था भएकाले निवेदनकको मागबमोजिम आदेश जारी हुनुपर्ने बेहोरा निम्मनुसार प्रष्टयाउँदछु। (i) निवेदकको निवेदन मागबमोजिम आदेश हुने कानूनी, सैदान्तिक आधारहरु; (क) सार्वजनिक खरिद ऐन, २०६३, (ख) सार्वजनिक खरिद नियमावली, २०६४, (ग) मुलुकी देवानी संहिता, २०७४, (घ) मध्यस्थता ऐन, २०५५, (ङ) प्रमाण ऐन, २०३१, (च) नेपाल कानून व्याख्या सम्बन्धी ऐन, २०१०, (छ) The Principle of Good Faith, (ज) दायित्व अवलम्बन गर्ने सम्झौता (Agreement to Assume Obligation), (झ) अन्यायिक समृद्धिको फाइदाको सिद्धान्त (Doctrine of Unjust Enrichment) (ञ) वैध अपेक्षाको सिद्धान्त (Principle of Legitimate Expectation), (ट) Contra Proferentem Rule, (ठ) Principle of Illegality and Public Morality & justice. (ड) Unforeseeable Events (ढ) The Prevention Principle, (ii) निवेदक/दावीकर्ताले मध्यस्थ सामु पेस गरेको दावी पुष्टि हुने निम्नानुसारको आधारहरु रहेकोमा सम्झौता एवम् कानूनको अपव्याख्या गरी शुन्य आदेश वा मागदावी शुन्य हुनेगरी निर्णय भएको अवस्था छ। (iii) ठेक्काको सम्पूर्ण विवरण र घटनाक्रमहरु संक्षिप्त र बुँदागत रुपमा निम्नानुसारको तालिकामा मिसिल संलग्न रहेको छ। कामकार्य वापत प्राप्त गर्नुपर्ने रकमको सम्बन्धमाः अ) दावीकर्ताको (दावी नं.१) पहिलो दावीमा

श्री आशिष/सि.एम./जय बाबा जे.भी.को अख्तियार प्राप्त प्रतिनिधि श्याम कुमार श्रेष्ठ **विरुद्ध** भौतिक पूर्वाधार तथा यातायात मन्त्रालय, सडक विभाग, चाकुपाट ललितपुर समेत, **मुद्दाः-** मध्यस्थता, **मुद्दा नं.** ०८०-FJ-०००१, **पृष्ठ** ९ मध्येको **पृष्ठ** २

रहेको विषयमा सम्झौतानुसारको १५ औं रनिङ बिलको कार्य वापत रकम भुक्तानी प्राप्त गर्नुपर्ने विषय रहेको छ। उक्त दावीमा १५ औं रनिङ बिलको भुक्तानी GCC ४१ बमोजिम गर्नुहुन मिति २०७७/३/१ मा GCC ४० बमोजिम निवेदन पेस गरेको थियौं। हामीले "Bona Fide" Utmost Good Faith and Good Intention राखी निर्माणकार्यहरु सम्पन्न भई गरी नियोक्ताबाट सर्वेक्षण सँगै प्रमाणिकरण पुष्ट्याई हुने प्रमाण कागजातसहितको विजक पेस गरेकोमा सार्वजनिक खरिद ऐन, २०६३ को दफा ५७ मा सार्वजनिक निकायले बिल बिजकको भुक्तानी खरिद सम्झैताको अधिनमा रही तोकिएबमोजिम दिनु पर्ने भन्ने व्यवस्था गरेको छ भने सार्वजनिक खरिद नियमावली, २०६४ को नियम १२३ को उपनियम (३) मा पेस भएको विल बिजक र कागजात सम्बन्धित अधिकारीले ३० दिन भित्र स्वीकृत गरी खरिद सम्झैतानुसार अनुसार GCC ४१.१ बमोजिम सार्वजनिक निकायले त्यस्तो विल बिजकको सोही अवधिभित्र भुक्तानीसमेत गर्नु पर्नेछ भन्ने व्यवस्था रहेको अवस्थामा समेत लामोसमयसम्म निवेदकलाई नियोक्ताबाट प्राप्त गर्नुपर्ने जम्मा रकम रु. ३,८८,११,८३५.०४ (भ्याट बाहेक) मध्ये रु. २,८८,४८,१२५.४८ (भ्याट बाहेक) रकम मात्रको बिजक स्वीकृत गरी भराई दिने निर्णयमा हामी निवेदकले स्वीकार गरेका थियौं तर Adjudication मा IPC-15 र त्यसको व्याज, बैंक ग्यारेण्टी र बीमा नीतिको प्रिमियम सम्बन्धमा आंशिक अवार्ड प्रदान गरेको भुक्तानी गर्ने जिम्मेवारी निकायसमेत यकिनका साथ नतोकिएको हुँदा उक्त निर्णयमा चित्त नबुझी मध्यस्थता नियुक्ति गरिएको थियो भने मध्यस्थताबाट हामी निवेदकले दावी गरेको दावीमा कुनै पनि दावी अस्वीकार गरी गरेको निर्णय त्रुटिपूर्ण रहेको छ। आ) निवेदकबाट सम्पन्न भए गरेका कार्यहरुको भुक्तानी गर्नुपर्ने गरी निर्णय गर्नुपर्नेमा सम्झैताको बर्खिलाप गई करार बमोजिम दायित्वमा नपर्ने भनी भएको निर्णय सम्झैता एवम् प्रचलित कानून प्रतिकुल हुन, जबकी करार सम्झैताको दफा ३० ले मिति २०७७/०६/०६ को सम्झौता तथा सहमतिलाई करारको अभिन्न अङ्गकै रुपमा हुने हुँदा, नागार्जुन नगरपालिकाले सम्झौता बमोजिम दायित्व बहन नगरेको देखिएकाले सडक विभागलाई मिति २०७७/०६/०६ को सम्झौताबमोजिम दायित्व बहन गर्नु नपर्ने भनी सडक डिभिजन कार्यालय आफ्नो दायित्वबाट उम्किने छुट कानूनत हुदैन र मिति २०७७/०६/०६ को लिखित सहमति स्वतत्र प्रकृतिको समझौता मान्न नमिल्ने हुँदा, दायित्व अवलम्बन गर्ने सम्झौता (Agreement to Assume Obligation/Assumption of Obligation) आकर्षित हुने साथै मुलुकी देवानी संहिता, २०७४ दफा ६६४(२)(ख) अनुचित सम्वृद्धि (Doctrine of Unjust Enrichment) बमोजिम पनि मध्यस्थले करार समझौताको विवादमा, पक्षहरूले गरेको सम्झौताको शर्त र व्यवस्था भन्दा वाहिर गएर Award दिन नसक्ने, तर दिएको खण्डमा जसबाट कानूनी प्रश्नको उत्पन्न हुने हुँदा उक्त निर्णयको हदसम्म मध्यस्थको निर्णय बदर हुन पर्ने प्रष्ट छ। इ) हामी निर्माण व्यवसायीले असल नियतको सिद्धान्त (Principle of Good Faith) बमोजिम नियोक्ताको आग्रह, अनुरोध र संर्वेक्षण सँगै प्रमाणिकरण गरी सहभागी भै निर्माण कार्यको सम्पन्नतामा पुगेको हो। नियोक्ताको प्रत्यक्ष संलग्नता र आग्रह बमोजिम नै हामी निर्माण व्यवसायीले कामकार्य गर्ने गरेका थियौं। हामी निर्माण व्यसायीले असल नियत राखी कुनै पूर्वाग्रहहरु नराखी निर्माणकार्य गरेको थियौं भने मध्यस्थले करार सम्झैता, कानूनी प्रश्न र सार्वजनिक हित वा नीति प्रतिकुल (Award) निर्णय त्रुटिपूर्ण भएकाले

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मध्यस्थको निर्णय बदर हुनुपर्ने प्रष्ट छ। समयमा भुक्तान नगरेकाले ब्याज र क्षतिपूर्ति भराई पाउन पर्ने सम्बन्धमाः अ) GCC को प्रकरण ४१.१ को व्यवस्था "The Employer shall pay the contractor the amount certified by project manager within 30 days from the date of the submission of each certificate by the Contractor..." भनी स्पष्ट उल्लेख गरेको छ। त्यस्तै सार्वजनिक खरिद ऐन, २०६३ को दफा ५७ मा सार्वजनिक निकायले बिल बिजकको भुक्तानी खरिद सम्झौताको अधीनमा रही तोकिएबमोजिम दिनु पर्ने भन्ने व्यवस्था गरेको छ भने सार्वजनिक खरिद नियमावली, २०६४ को नियम १२३ को उपनियम (३) मा पेस भएको बिल बिजक र कागजात सम्बन्धित अधिकारीले ३० दिनभित्र स्वीकृत गरी खरिद सम्झौतानुसार सार्वजनिक निकायले त्यस्तो बिल बिजकको सोही अवधिभित्र भुक्तानीसमेत गर्नु पर्नेछ भन्ने व्यवस्था समेतको अधीनमा रहँदा दावीकर्ताले प्राप्त गर्नु पर्ने भुक्तानी बिल बिजक पेस भएको ३० दिनभित्र स्वीकृत गरी भुक्तानीसमेत गरिसक्नु पर्ने हुन्छ, तर बाध्यात्मक समयावधि भित्र तिर्न बुझाउन पर्ने रकम भुक्तान नगरेको कारण दाविकर्तालाई पर्न गएको क्षति भराउन पर्ने दायित्वबाट विपक्षी उम्किन सक्ने अवस्था नभएको एवम् सम्झौता एवम् कानूनको अधीनमा रही ब्याज भराइदिने गरी निर्णय गर्नुपर्ने थियो। यस १५ औं रनिङ बिलमा उल्लिखित आइटमका सबै परिमाणहरु सार्वजनिक निकायका प्राविधिकहरुले नापी गरी प्रमाणित गरेर नै चढाइएको देखिएकाले हामी निवेदनको दावी तथ्यपरक नै देखिन्छ। त्यसैले मध्यस्थको उक्त निर्णय सम्झौता एवम् प्रचलित कानून प्रतिकुल हुन जान्छ। आ) "दावीकर्ताले प्रस्तुत गर्नु भएको दावीको वैधताको अभाव छ र सोही आधारमा खारेज गरिन्छ, ठेकदार करारबमोजिम दायित्व निर्वाहका लागि मात्र जिम्मेवार छ। विमा प्रमियम र कार्यसम्पादन जमानतको नविकरण (Refund of PBG and insurance Issuance and Renewable charge) को सन्दर्भमा दावीकर्ता हकदार छैन" गरी निर्णय भएको छ। हामीले APG, PBG and insurance Issuance and Renewable charge GCC को खण्ड ४९, ५० र १३ अनुसार नियोक्ताको निर्देशनबमोजिम पटक पटक नविकरण तिर्नु पर्ने भएकाले उक्त भार हामी निवेदकले नै व्यहोर्नु परेको थियो। सो रकम हामीलाई फिर्ता गर्नु पर्ने नै देखिन्छ। सार्वजनिक खरिद नियमावली, २०६४ को नियम १२३ को उपनियम (७) मा सार्वजनिक निकायले खरिद सम्झौतामा उल्लिखित अवधिभित्र भुक्तानी दिनु पर्नेछ र सो अवधिभित्र भुक्तानी नदिएमा खरिद सम्झौतानुसारको ब्याज भुक्तानी गर्नु पर्नेछ भन्ने व्यवस्थानुसार समयमा भुक्तान नगरेको समयावधिको ब्याज तिर्नुपर्ने दायित्वबाट विपक्षी मुक्त हुने अवस्था रहँदैन, एवम् मध्यस्थबाट निर्णय गर्दा सोलाई अनदेखा गर्नसमेत नमिल्ने प्रष्ट छ। ई) सम्झौतापत्रमा रकम भुक्तानी गर्ने अवधि तोकिएको छ। रकम भुक्तानी सम्बन्धमा समय सम्झौतापत्रको आधारभुत तत्त्व मानिन्छ। उक्त अवधिभित्र कुनै पक्षले दायित्व पूरा नगरेमा अर्को पक्षलाई हानी हुनसक्ने बेहोरा पक्षहरुले स्वीकार गरेको प्रकारान्तरले प्रष्ट हुने विषय हो। विपक्षीले रकम भुक्तानी गरेका भए त्यसबाट निवेदकले आय आर्जन गर्नसक्ने बेहोरालाई विपक्षीले इन्कार गर्नसक्नु हुँदैन। स्वआर्जनको प्रकृति भएको रकमको भुक्तानी नदिएकोले सम्मानित स.अ.बाट ने.का.प. २०७४ नि. नं. ९८४७ मा (अन्यायिक सवृद्धिको फाइदाको सिद्धान्त (Doctrine of Unjust Enrichment) प्रतिपादित सिद्धान्त र मुलुकी देवानी संहिता, २०७४ को दफा ५२५(३) बमोजिम दायित्व सृजना

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भएको मिति देखि भरीभराउ हुँदाको दिनसम्मको व्याज भराई दिने गरी निर्णय हुन पर्नेमा प्रचलित कानून एवम् सम्झौताको शर्त विपरित ब्याज नभराई दिने गरी भएको निर्णय विधिसम्मत हुन सक्दैन। **मध्यस्थको निर्णय बदर भई पुनः सुनुवाइको निम्ति पठाउँदा नयाँ नियुक्त गरी सुनुवाई गर्नु भनी आदेश गर्नुपर्ने सम्बन्धमाः** करार सम्झैता, कानूनी प्रश्न र सार्वजनिक हित वा नीतिमा प्रतिकुल मध्यस्थको (Award) निर्णय त्रुटी भएमा पुनरावलोकन हुनुपर्छ भन्ने मान्यताको आधारमा मध्यस्थबाट भएका त्रुटिहरु सम्बन्धमा अदालतले मध्यस्थको निर्णय हेर्न र बदर गर्न सक्ने कानूनी व्यवस्था मध्यस्थता ऐन, २०५५ दफा ३० उपदफा (१)(२)(३) बमोजिम अदालतलाई क्षेत्राधिकार हुने प्रष्ट छ। सम्बन्धित विवादहरुमा अदालतभन्दा मध्यस्थ नै बढी विज्ञ हुने र मध्यस्थ निर्णय गर्ने अन्तिम र सक्षम निर्णयकर्ता हो र मध्यस्थको निर्णयमा गम्भीर कानूनी त्रुटि वा सीमित आधारमा वा अवस्थामा मात्र अदालतमा निवेदन लाग्ने भनी प्रचलित मान्यता छ, तर यस मध्यस्थको (Award) निर्णय करार शर्त विपरित एवम् सार्वजनिक हित वा नीति प्रतिकूल र गैरकानूनी रहेको हुँदा बदरभागी छ। सार्वजनिक नीति व्यापक छः संविधानमा आधारित राज्यका नीतिहरु सार्वजनिक नीति हुन्। प्रस्तुत मुद्दा सार्वजनिक खरिद ऐन, २०६३ अन्तर्गतको रहेकोले सोही ऐनबमोजिमका सार्वजनिक नीति आकर्षित हुने हुँदा सार्वजनिक खरिद ऐन, २०६३ मा अन्तरनीहित सार्वजनिक नीतिहरु मध्ये सार्वजनिक खरिद प्रकृयामा स्वच्छ र सन्तुलित रुपमा करारीय दायित्वको परिपालना, सार्वजनिक निकाय र प्रदायकको जवाफदेहिता, मध्यस्थद्वारा विवादको समाधान, सुशासन जस्ता नीतिहरुलाई उदाहरण स्वरूप उल्लेख गर्न सकिन्छ। सार्वजनिक नीति बहुआयामिक अवधारणा हो, सार्वजनिक हित, सार्वजनिक नैतिकता र सार्वजनिक सुरक्षा यसका मुलभुत आधारशीला हुन्। सार्वजनिक नीति कानूनमा अन्तरनिहित कानूनका आधारभुत सिद्धान्तहरु हुन् र नजिरले यसलाई अझ स्पष्ट गरिदिएको हुन्छ। तथापि सार्वजनिक नीति कानून र नजीर भन्दा व्यापक हुन्छ जुन न्यायको रोहमा अन्वेषण हुन सक्ने हो, मुलत सार्वजनिक नीतिका श्रोतहरु न्याय र सार्वजनिक नैतिकता हुन। निष्कर्षमा, सार्वजनिक नीतिको आधारशिला कानून र नजीर नै हुन्। कानून एवम् सम्झैताको प्रतिकूल गई भएको निर्णयलाई क्षेत्राधिकार नाघेको (Excess of Jurisdiction) मानिन्छ। मध्यस्थलाई प्रस्तुत विवाद हेर्ने अधिकार सम्झैताले दिएको अवस्थामा सम्झौताकै विरुद्धमा गई निर्णय गर्ने अधिकार मध्यस्थले राख्दैन भनी सर्वोच्च अदालतबाट विभिन्न मुद्दाहरुमा सिद्धान्त प्रतिपादन भएको साथै उच्च अदालतबाट समेत व्याख्या गरिएको अवस्थामा मध्यस्थको निर्णय बदर गरी पुनः सुनुवाईको निम्ति पठाउनु पर्ने हुन्छ। मध्यस्थताबाट भएको निर्णय बदर गरी पुनः सुनवाईको लागि पठाउँदा साविककै मध्यस्थ वा नयाँ मध्यस्थ नियुक्त गरी पुनः सुनवाई गर्न आदेश हुन सक्दछ। मध्यस्थ स्वयम्मा पक्षहरुको निजी अदालत भएकोले पक्षहरुको इच्छाएको व्यक्तिद्वारा विवाद समाधान गर्ने स्थल (Platform) मध्यस्थता प्रणालीमा उपलब्ध हुने भएकोले नयाँ मध्यस्थद्वारा निरोपण गर्ने वातावरण अदालतको फैसलादावी हुन सक्ने सम्बन्धमा सिद्धान्तहरु प्रतिपादन भएको छ। पक्षले अविश्वास गरेको व्यक्तिद्वारा विवाद निरोपण गर्न वाध्य गरिदा मध्यस्थताको मुलसार समाप्त हुने मानिन्छ। प्रस्तुत विवादमा सम्झैताको प्रावधान प्रतिकुल भएको निर्णय बदरभागी भएको र साविकमा निर्णय गर्ने मध्यस्थ उपर विवादको एक पक्षको विश्वास

श्री आशिष/सि.एम./जय बाबा जे.भी.को अख्तियार प्राप्त प्रतिनिधि श्याम कुमार श्रेष्ठ **विरुद्ध** भौतिक पूर्वाधार तथा यातायात मन्त्रालय, सडक विभाग, चाकुपाट ललितपुर समेत, **मुद्दाः-** मध्यस्थता, **मुद्दा नं.** ०८०-FJ-०००१, **पृष्ठ** ९, मध्येको **पृष्ठ** ५

नभएकोले निवेदन दावीबमोजिम नयाँ मध्यस्थ नियुक्त गरी विवाद निरोपण गर्ने गरी आदेश हुनुपर्ने प्रष्ट छ। यसप्रकार कानून, सम्झौतापत्र एवम् संकलित प्रमाण, कानूनको मान्य सिद्धान्त, करारको मान्य सिद्धान्त प्रतिकुल सम्झौता र कानूनको अपव्याख्या गरी निर्णय गर्ने विद्यमान मध्यस्थहरु प्रति निवेदकको विश्वास नभएकोले नयाँ मध्यस्थ गठन गरी उक्त मध्यस्थता न्यायधिकरणबाट विवाद निरोपण गराउन ने.का.प. २०६६ नि.नं. ८१२८ र स.अ. बुलेटीन वर्ष १९ अंक ८ पुर्णाङ्क ४४३ (धनमाया महर्जन वि. मिठु ढकाल) मा प्रतिपादित सिद्धान्तबमोजिम अनुरोध गर्दछु। अतः मिति २०७८।११।१३ मा श्री महेन्द्र बहादुर गुरूङबाट भएको निर्णयमा आंशिक अवार्डमा चित्त नबुझी श्री राजु मान सिंह मल्ल ज्यूले हामीले गरेको दावीमा कुनै पनि दावीमा अवार्ड प्रदान नगर्ने गरी भएको मिति २०८०/०२/२९ को निर्णयमा मध्यस्थता ऐन, २०५५ को दफा ३०(२)ग(३)ख को अवस्था विद्यमान भएकोले उक्त निर्णय वदर गरी नयाँ मध्यस्थता न्यायधिकरण गठन गरी विवादको पुनः निर्णय गर्नु गराउनु भनी आदेश समेत जारी गरिपाऊँ भन्न समेत बेहोराको निवेदक दावीकर्ता श्री आशिष/सि.एम./जय बाबा जे.भी.को अख्तियार प्राप्त प्रतिनिधि श्याम कुमार श्रेष्ठको निवेदन पत्र।

२. यसमा निवेदन मागबमोजिम मध्यस्थको निर्णय किन बदर गर्नु नपर्ने हो ? सो सम्बन्धमा कुनै कारण भए लिखितजवाफ र प्रमाणसहित सूचना प्राप्त भएको मितिले बाटाका म्याद बाहेक ७ दिनभित्र उच्च सरकारी वकिल कार्यालय, पाटनमार्फत लिखितजवाफ पेस गर्नु भनी निवेदनको प्रतिलिपि संलग्न गरी मध्यस्थता (अदालती कार्यविधि) नियमावली, २०५९ को निमय ११(२) अनुसार विपक्षीलाई सूचना दिनू भन्ने यस अदालतबाट मिति २०८०/४/५ मा भएको आदेश।

३. Statement of Claim (soc)-1 Payment of Outstanding Quantity (IPC-15) मा Variation Order (Vo-2) स्वीकृत नै नभएको, मिति २०७७/६/६ मा भएको माइनुटबाट उक्त IPC-15 को भुक्तानीका लागि कार्यालय बाध्य नहुने गरी भएको फैसला करार एवम् प्रचिलित कानूनबमोजिमण नै रहेको छ। सो दावी स्वीकार्य नहुने भएपछि सो दावी सम्बन्धी भएको व्याजको दावी स्वतः खारेजभागी हुने गरी भएको निर्णय (Award) कानूनसम्मत नै रहेको छ। (SO4-3) Re-imbursement for Renewal of PBG as well as the premium for Issuance and Renewal of Insurance policy "सम्बन्धी दावीमा करारको दफा १३.१ मा "The Ccontractor shall provide insurance in the joint names of the employer and the contractor from the Start Date to the end of Defects liability period" प्रष्ट रहेको, दफा ५०.१ मा "... The Performance security shall be valid until a date 30 days from the date of issue of the Defect liability Certificate..." भन्ने करारीय प्रावधान अनुसार निर्माण व्यवसायीको दावी नं. ३ खारेज हुने भनी मध्यस्थ ट्राईबुनलबाट भएको फैसला करारीय प्रावधानबमोजिम नै रहेकोले मिति २०७९/४/५ को विभागीय निर्णयानुसार गठित मध्यस्थ ट्राइबुनलबाट मिति २०८०/०२/२९ मा भएको निर्णय (AWARD) कानूनसम्मत नै रहेकोले बदर हुनुपर्ने होइन, विपक्षी निर्वेदकको निवेदन खारेजभागी रहेकोले उक्त निवेदन खारेज गरी पाउँ भन्ने समेत बेहोराको विपक्षी नेपाल सरकार, भौतिक पूर्वाधार तथा यातायात मन्त्रालय, सडक विभागको तर्फबाट ऐ.का महानिर्देशक ई.सुशील बाबु ढकालको लिखितजावफ।

श्री आशिष/सि.एम./जय बाबा जे.भी.को अख्तियार प्राप्त प्रतिनिधि श्याम कुमार श्रेष्ठ **विरुद्ध** भौतिक पूर्वाधार तथा यातायात मन्त्रालय, सडक विभाग, चाकुपाट ललितपुर समेत,
मुद्दाः- मध्यस्थता, **मुद्दा नं.** ०८०-FJ-०००१, **पृष्ठ** ९, मध्येको **पृष्ठ** ६

ठहर खण्ड

१. नियमबमोजिम साप्ताहिक तथा दैनिक मुद्दा पेसी सूचीमा चढी निर्णयार्थ यस इजलास समक्ष पेस हुन आएको प्रस्तुत निवेदन पत्रसहितको मिसिल संलग्न कागजातहरूको अध्ययन गरी निवेदकको तर्फबाट उपस्थित विद्वान अधिवक्ताहरु श्री बाबुराम दाहाल, श्री मिलन अधिकारी, श्री मनोज कुमार यादव, श्री अमिन परियारले मिति २०८०/०२/२९मा भएको निर्णयमा मध्यस्थता ऐन, २०५५ को दफा ३०(२) ग (३)ख को अवस्था विद्यमान भएकोले उक्त निर्णय वदर गरी नयाँ मध्यस्थता न्यायधिकरण गठन गरी विवादको पुनः निर्णय गर्नु गराउनु भनी आदेश समेत जारी गरी पाउँ भनी तथा विपक्षी सडक विभागको तर्फबाट उपस्थित विद्वान् सहायक न्यायधिवक्ता श्री पूजा सिलवालले निवेदन माग बमोजिमको उक्त आदेश खारेज गरी पाउँ भनी गर्नु भएको बहस सुनियो।

२. यसमा मिति २०७८।११।१३ मा श्री महेन्द्र बहादुर गुरूङबाट भएको निर्णयमा आंशिक अवार्डमा चित्त नबुझी श्री राजु मान सिंह मल्ल ज्यूले हामीले गरेको दावीमा कुनै पनि दावीमा अवार्ड प्रदान नगर्ने गरी भएको मिति २०८०/०२/२९ को निर्णयमा मध्यस्थता ऐन, २०५५ को दफा ३०(२)ग(३)ख को अवस्था विद्यमान भएकोले उक्त निर्णय वदर गरी नयाँ मध्यस्थता न्यायधिकरण गठन गरी विवादको पुनः निर्णय गर्नु गराउनु भनी आदेश समेत जारी गरिपाऊँ भन्न समेत बेहोराको निवेदक दावीकर्ता श्री आशिष/सि.एम./जय बाबा जे.भी.को अख्तियार प्राप्त प्रतिनिधि श्याम कुमार श्रेष्ठको निवेदन पत्र रहेकोमा सम्झौतामा उल्लेख भएको करारीय प्रावधान अनुसार निर्माण व्यवसायीको दावी नं. ३ खारेज हुने भनी मध्यस्थ ट्राईबुनलबाट भएको फैसला करारीय प्रावधानबमोजिम नै रहेकोले मिति २०७९/४/५ को विभागीय निर्णयानुसार गठित मध्यस्थ ट्राइबुनलबाट मिति २०८०/०२/२९ मा भएको निर्णय (AWARD) कानूनसम्मत नै रहेकोले बदर हुनुपर्ने होइन, विपक्षी निर्वेदकको निवेदन खारेजभागी रहेकोले उक्त निवेदन खारेज गरी पाउँ भन्ने समेत बेहोराको विपक्षी नेपाल सरकार, भौतिक पूर्वाधार तथा यातायात मन्त्रालय, सडक विभागको तर्फबाट ई.सुशील बाबु ढकालको लिखितजावफ रहेको देखियो।

३. अब निवेदकको माग बमोजिमको आदेश जारी हुन सक्छ, सक्दैन? भन्ने सम्बन्धमा निर्णय गर्नुपर्ने देखियो।

४. निर्णय तर्फ विचार गर्दा, मिति २०७८/११/१३ मा श्री महेन्द्र बहादुर गुरुङबाट भएको निर्णयमा आशिंक अवार्डमा चित्त नबुझी श्री राजु मान सिंह मल्ल ज्यूले हामीले गरेको दावीमा कुनै पनि दावीमा अवार्ड प्रदान नगर्ने गरी भएको मिति २०८०/०२/२९ को निर्णयमा मध्यस्थता ऐन, २०५५को दफा ३०(२)ग(३)ख को अवस्था विद्यमान भएकोले उक्त निर्णय बदर गरी नयाँ मध्यस्थता न्यायधिकरण गठन गरी विवादको पुनः निर्णय गर्नु गराउनु भनी आदेश समेत जारी गरी पाउँ भन्ने समेत व्यहोराको निवेदन रहेकोमा statement of claim(SOC)-1 Payment of outstanding Quantity(IPC-15) मा Variation order (Vo-2)स्वीकृत नै नभएको, मिति २०७७/०६/०६ मा भएको माइनुटबाट उक्त IPC-15 को भुक्तानीको लागी कार्यालय बाध्य नहुने गरी भएको फैसला करार एवं प्रचलित कानून बमोजिम नै रहेको छ। सो दावी स्विकार्य नहुने भएपछि सो दावी सम्बन्धी भएको ब्याजको दावी स्वतः खारेज हुने गरी भएको निर्णय

श्री आशिष/सि.एम./जय बाबा जे.भी.को अख्तियार प्राप्त प्रतिनिधि श्याम कुमार श्रेष्ठ **विरुद्ध** भौतिक पूर्वाधार तथा यातायात मन्त्रालय, सडक विभाग, चाकुपाट ललितपुर समेत,
मुद्दाः- मध्यस्थता, **मुद्दा नं.** ०८०-FJ-०००१, **पृष्ठ** ९ मध्येको **पृष्ठ** ७

(Award) कानून सम्मत नै रहेको हुँदा निवेदन खारेज गरि पाउँ भन्ने समेत व्यहोराको प्रत्यर्थी सडक विभागको लिखित जवाफ रहेको देखियो। प्रस्तुत मुद्दामा निवेदक र विपक्षीका विचमा भएको सम्झौता बमोजिम विवाद उत्पन्न भई विवादको समाधान मध्यस्थद्वारा गर्ने सिलसिलामा एकल मध्यस्थ श्री महेन्द्र बहादुर गुरुङबाट मिति २०७८/११/१३ मा आंशिक दावी पुग्ने गरी निर्णय भएकोमा श्री राजुमान सिंह मल्लबाट मिति २०८०/०२/२९ मा निवेदकको कुनै पनि दावी नपुग्ने भनी निर्णय (award) भएको देखियो। निवेदकले मध्यस्थद्वारा विवाद समाधान गराउने सिलसिलामा देहायको चारवटा दावी देहायको मध्यस्थ समक्ष पेश गरेको देखिन्छ। 1. Claim for payment of outstanding Quantity of IPC No. 15 without VAT..... Rs.99,56456.73 2.Claim of Interest on late Payment of outstanding Bill IPC:15 (without VAT)... Rs.15,77,211. 3.Bank Commission for Insurance and renewal of PBG....RS.24,28,1912 4.Premium for Insurance and renewal of Insurance Policy.... Rs.21,10,000. उल्लिखित चारवटा दावीहरुमा एकल मध्यस्थ श्री महेन्द्र मान गुरुङबाट मिति २०७८/११/१३ मा भएको निर्णय (award) बाट अघिल्लो दुईवटा दावी पुग्ने र पछिल्लो दावी नपुग्ने भनी निर्णय भएको देखिन्छ। उल्लिखित चारवटा दावी रहेकोमा एकल मध्यस्थ । राजुमान सिंह मल्लबाट मिति २०८०/०२/२९ मा निर्णय (award) गर्दा कुनै पनि दावी नपुग्ने भनी निर्णय भएको देखिन्छ। निवेदकले सम्झौता बमोजिमको Variation Order (Vo)2 मिति २०७६/११/१२ मा पेश गरेको भन्ने तथ्य मिसिलबाट स्थापित भएको देखिन्छ। Variation order-2 का सम्बन्धमा विवाद रहेको अवस्थामा एकल मध्यस्थ श्री महेन्द्र बहादुर गुरुङबाट मिति २०७८/११/१३ मा ग्रहण भैसकेको विषयमा एकल मध्यस्थ श्री राजुमान सिंह मल्लबाट मिति २०८०/०२/२९ मा भएको निर्णयबाट अस्विकृत भएको अवस्था देखियो। एउटा मध्यस्थले सम्झौता बमोजिम Variation order-2 भएको मानी सो का सम्बन्धमा आंशिक दावी पुग्ने भनी निर्णय गरेको र अर्का मध्यस्थबाट उक्त Variation order-2 लाई सम्झौता बमोजिम नभएको मानी कुनै पनि दावी नपुग्ने भनी गरेको निर्णयमा मध्यस्थता ऐन, २०५५ को दफा ३० को उपदफा (२) र सो को खण्ड (ग) मा मध्यस्थलाई नसुम्पिएको विवादसँग सम्बन्धित विषयमा वा मध्यस्थलाई सुम्पिएको शर्त विपरीत वा मध्यस्थलाई सुम्पिएको क्षेत्र वाहिर गई निर्णय भएको देखिएमा आवश्यकतानुसार पुनः निर्णय गराउन उच्च अदालतको आदेश दिन सक्ने भन्ने कानूनी व्यवस्था रहेको देखिँदा प्रस्तुत विवादलाई पुनः इन्साफको लागि मध्यस्थ परिषदमा पठाइ दिनु उपयुक्त हुने देखियो। मध्यस्थहरुका वीचमा निवेदकले पेश गरेको Variation Order-2 पक्षहरुका वीचमा भएको सम्झौताको अंगको रुपमा ग्रहण गर्ने वा नगर्ने भन्ने विषय विवादित भएको देखिँदा सो सम्बन्धमा विवाद निरुपण हुने गरी मध्यस्थ परिषदबाट आवश्यक प्रकृया पूरा गरी मध्यस्थहरुको नियुक्ति गरी विवादको समाधान गर्ने गरी प्रस्तुत मुद्दाको मिसिल र तारिखमा रहेका पक्षहरुलाई नेपाल मध्यस्थ परिषदमा पठाई दिनु उपयुक्त हुने देखियो।

५. अतः उपरोक्त तथ्यगत अवस्था रहेको प्रस्तुत मुद्दाको मिसिल संलग्न प्रमाण कागजातलाई विश्लेषण गरी हेर्दा माथिका विभिन्न प्रकरणहरुमा विवेचित आधार र कारणसमेतबाट मिति २०८०/०२/२९ मा भएको मध्यस्थको निर्णयमा मध्यस्थता ऐन, २०५५ को दफा ३०(२)

(ग) को अवस्था विद्यमान रहेको देखिँदा उक्त निर्णय बदर गरिदिएको छ। अब यी निवेदक र विपक्षी विच भएको सम्झौतामा केन्द्रीत रही पुनः निर्णय गर्नू गराउनु भनी विपक्षी नेपाल सरकार, भौतिक पूर्वाधार तथा यातायात मन्त्रालय, सडक विभाग, चाकुपाट, ललितपुरमा सुरु सक्कल मिसिल फिर्ता पठाई दिने ठहर्छ। तारिखमा रहेका पक्षहरुलाई पेशी तोकि हाजिर हुन जानू भनी विपक्षी कार्यालयमा पठाई दिनू । अरुमा तपसिल बमोजिम गर्नू।

तपसिल खण्ड

१. माथि ठहर खण्डमा उल्लेख गरिए बमोजिम मिति २०८०/०२/२९ मा भएको निर्णय (award) बदर हुने ठहर भएको हुँदा आवश्यक प्रकृया पूरा गरी मध्यस्थ(हरु)को नियुक्ति गरी विवादको समाधान यी निवेदक र विपक्षी विच भएको सम्झौतामा केन्द्रित रही पुनः निर्णय गर्नु गराउनू भनी फैसलाको प्रमाणित प्रतिलिपि सहितको जानकारी नेपाल मध्यस्थ परिषदलाई दिनू।

२. प्रस्तुत फैसलाको प्रतिलिपि माग गरे उच्च अदालत नियमावली, २०७३ को नियम १२० बमोजिम लाग्ने दस्तुर लिई प्रतिलिपि दिनू ।

३. प्रस्तुत फैसला प्रमाणीकरण भएको विवरण यस अदालतको सूचना पाटीमा टाँस गरी वेभसाइटमा समेत प्रकाशन गर्नू ।

४. प्रस्तुत फैसलाको विद्युतीय प्रति अपलोड गरी दायरीको लगत कट्टा गरी मिसिल नियमानुसार अभिलेख शाखामा बुझाई दिनू ।

मुनेन्द्र प्रसाद अवस्थी
न्यायाधीश

उक्त रायमा सहमत छु।

हेमन्त रावल
न्यायाधीश

फैसला तयार गर्न सहयोग पुऱ्याउनेः
इजलास अधिकृत : समिक्षा भण्डारी
कम्प्यूटर अपरेटर : बसन्त दर्शनधारी
इति सं◌ंवत् २०८० साल माघ २२ गते रोज २ शुभम् .....।

फैसला प्रमाणीकरण मिति र दस्तखतः न्यायाधीश अदालतको छाप

श्री आशिष/सि.एम./जय बाबा जे.भी.को अख्तियार प्राप्त प्रतिनिधि श्याम कुमार श्रेष्ठ **विरुद्ध** भौतिक पूर्वाधार तथा यातायात मन्त्रालय, सडक विभाग, चाकुपाट ललितपुर समेत,
मुद्दाः- मध्यस्थता, **मुद्दा नं.** ०८०-FJ-०००१, **पृष्ठ** ९, मध्येको **पृष्ठ** ९

Note:

Note:

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Note:

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