SESSION I:

5TH APRIL, 2012 (2.30 – 4.30 PM)

INVESTOR STATE ARBITRATION AND DISPUTE RESOLUTION CLAUSES IN BILATERAL INVESTMENT TREATIES

India has entered into Comprehensive Economic Partnership Agreements (CEPAs) with several states, and is currently negotiating similar agreements with the European Union, among others, to promote trade. These CEPAs, more often than not, contain within their investment chapters Bilateral Investment Promotion and Protection Agreements (BIPAs). Crucially, BIPAs contain dispute settlement mechanisms (ISDSs).

However, the Indian Department of Industrial Policy and Promotion has recently decided against the inclusion of such ISDs that permit an investor to pursue legal action before independent arbitral tribunals. This principled stand comes close on the heels of Australia being taken to arbitration by Hong Kong based Phillip Morris Asia Ltd. last year, on the basis of a Australian law disincentivizing tobacco consumption. In fact, the outcome of a BIT dispute between India and mining company White Australia Ltd. is currently before the Supreme Court after arbitration commenced in 2002 under a BIT dispute of the company with Coal India Pvt. Ltd.

The reason for the DIPP decision is the prevention of Government involvement in what would otherwise be private disputes, as is the case in both the above instances. In fact, a similar rationale led to Australia's decision to eliminate such clauses from future BITs.

Alternatives to pursuing such action before independent tribunals such as the ICSID, should such a clause be eliminated, would include the WTO's Dispute Settlement Body or action in domestic courts.

Whether or not these are viable alternatives remain points of contention, with history showing a compelling favour toward investor-state arbitration. This debate is made more interesting

when the opportunity, or rather lack thereof, to appeal from decisions such as those of the ICSID, is taken into consideration, particularly in light of recent controversy over enforcement of foreign arbitral awards in the Indian context and review of the existing position of law.

It is often also expressed, however, that the benefit of such clauses to Indian companies cannot be undermined in light of increasing investment by these companies not only in traditionally strong economies and sectors such as IT in the Unites States but also smaller, lesser developed economies. Further, often disputes remain tainted by the nature of the subject matter of trade, the reputation of the company initiating proceedings and the responding government and its political clout, which often pushes for settlement outside the arbitration and BIT framework. Modification of such clauses to incorporate safeguards to prevent the privileging of foreign investor rights over domestic investors, as well as other suggestions have been tentatively proposed though the issue thus far has largely come into focus post the 2011 Phillip Morris decision and the Gillard Government Policy in Australia. Many states such as Brazil and South Africa are increasingly leaning away from the older BIT model with investor state arbitration.

Indian interests are engaged as well, amidst talk of potential BITs with the United States and the European Union, as also vulnerability vis-à-vis existing regional BITs.

Within this background, this Session proposes to discuss the significance of such clauses, the consequences of their elimination especially in a developed-developing country BIT, and the viability of alternatives.

SESSION II:

8TH APRIL (11.30 AM – 1.30 PM)

UMBRELLA CLAUSES

The expansion of international trade has led to a concomitant increase in contractual relations between States and private actors. Accordingly, an increase in contractual disputes has reinvigorated the debate on forums for dispute settlement. Are such contractual disputes to be litigated in an investor-state arbitral tribunal, or as any other routine matter in the domestic courts? With investors preferring the stability of the former course of action, states have

displayed a reluctance to elevate contractual matters to international disputes. The question, then, is: Is 'international' arbitration qualifying the law or the parties involved?

The answer to this question has posed considerable problems, with much debate surrounding the so-called '*umbrella clauses*'. These broadly worded clauses remove disputes from domestic courts and place them within the jurisdiction of investor-state arbitral tribunals. In addition to substantive legal assurances under the BIT, these umbrella clauses assure investors of an effective forum. A vast majority of the network of 2500 BITs that exist today include such umbrella clauses, in one variation or the other.

Under such BITs, states and investor enter into an array of contracts – for a host of goods and services. In the routine course, disputes arising out of such contracts would be referred to domestic courts in line with the law of the state. Within the backdrop of umbrella clauses, however, the question arises: Do such clauses elevate contractual claims to breaches of the Bilateral Investment Treaty, or does there remain a conceptual distinction between treaty and contractual claims?

To add to the debate, states – seized of this concern – are reconsidering these garden-variety umbrella clauses. The redefinition of umbrella clauses raises not only legal concerns (with often conflicting jurisprudence), but travels beyond, as legal assurances of arbitral settlement inspire investor confidence.

At the crossroads of legal and policy concerns, this Session debates the interpretation of umbrella clauses in light of recent arbitral decisions; traversing various kinds of contractual obligations. Combined with recent policy concerns highlighted by states, this Session attempts to reconcile legal interpretations and policy effects of umbrella clauses – building upon the first session of the Conference.