NLIU LAW REVIEW

VOLUME – V **ISSUE – I**

DECEMBER 2015

NATIONAL LAW INSTITUTE UNIVERSITY

KERWA DAM ROAD, BHOPAL - 462 044 (M.P.)

The NLIU Law Review is published by the students of National Law Institute University, Bhopal, India.

The NLIU Law Review publishes material on subjects of interest to the legal profession. It invites unsolicited manuscripts for publication. Such manuscripts should be sent in MS Word (.docs format) to *lawreview@nliu.ac.in*. All citations and text generally conform to *The Bluebook: A Uniform System of Citation (19th ed. 2010).*

Recommended form of citation:

(2015) 2 NLIU Law. Rev. <page no.>

ADVISORY PANEL

PEER REVIEW PANEL

General Student Body Of NLIU Law Review (2015-16)

EDITORIAL AND CONTENT BOARD

Fifth Year Members
Devyani Gupta, Amoolya Khurana, Tara M. Hari, Shreyasi Srivastava, Srideepa Bhattacharya, Sakshi Soreng

Fourth Year Members
Sakshi Upadhyay, Ananya Singh, Anubhav Rajshekhar

Third Year Members
Praharsh Johorey, Raghavi Viswanath, Sanjana Aravamudhan, Addway Bandyopadhyay, Vaibhavi Tadwalkar, Varsha Sriram, Aneesh Upadhyay, Alisha Mehra, Rajeswari Mukherjee

Second Year Members
Vamika Taya, Aishwarya Nair, Tweisha Mishra

First Year Members
Utsav Mitra, Farah Naeem, Prabal De, Nidhi Kulkarni, Sahil Matthew Mishra

MANAGERIAL REVIEW BOARD

Fifth Year Members
Arindam Bhattacharjee, Aakanksha Badkur

Fourth Year Member
Vatsal Joshi, Richa Arya

Third Year Members
Meher Tandon, Anand Sharma, Sawan Srivastava

Second Year Members
Avani Mishra, Aishwarya Srivastava, Shivika Dixit, Robin Singh Rathore

First Year Members
Divyam Sharma, Dhruv Khurana, Nirjhar Sharma, Sukriti Jha

PUBLISHING AND DESIGN BOARD

Fifth Year Members
Aryan Kung Joseph, Pulkit Rahangdale

Fourth Year Members
Ayush Samaddar, Manisha Regalla

CONTENTS

FOREWORD

ARTICLES

MESSAGE FROM THE PATRON-IN-CHIEF

Justice A. M. Khanwilkar
CHIEF JUSTICE

191, South Civil Lines,
JABALPUR - 482 001
Tel. (O) 2626443
(R) 2678855
2626746 (Net)
Fax 0761-2678833

Dated : 17.03.2016

MESSAGE

I am delighted to know that the National Law Institute University, Bhopal is publishing its up-coming edition of the NLIU Law Review (Volume V No.I).

NLIU Law Review is recognized as the medium of expression and also useful tool for legal research. No law school is complete without an active law review board which serves as a platform not only for the dissemination of knowledge but also for the expression of ideas and solutions to the legal issues we face today and it engages in publication on a regular basis.

I am convinced that the NLIU Law Review will serve as a vital tool in a law student's pursuit for legal knowledge and act as a catalyst for future legal research.

I extend my best wishes for the launch of the next issue of the NLIU Law Review and hope that it will serve as a vast resource of information to law students, teachers, lawyers, judicial officers, jurists and all others associated with the field of law.

(A.M. KHANWILKAR)

MESSAGE FROM THE PATRON

With immense pleasure, I present Volume V Issue 1 of the NLIU Law Review to our readers. This Issue encapsulates varied aspects of national and international laws, and forays into relatively unchartered domains of legal literature, providing a worthy reflection of the prowess of the legal fraternity. I sincerely hope that this edition helps the readers gain valuable insight into integral legal concepts and enhances their research so as to facilitate intellectual discourse and stimulate legal innovation.

The NLIU Law Review is an endeavor to increase awareness among law students and academicians and provide a platform for them to contribute to the existing legal literature through well researched articles, case analysis and book reviews. The submissions that are received are evaluated by various Boards of the Law Review that assess the manuscript on the quality of content and eliminate plagiarized submissions. These contributions are then evaluated by the Peer Review Mechanism that operates under the guidance of the advisory board of legal luminaries.

I would like to thank the Patron-in-Chief of the Law Review, Hon'ble Shri Justice Ajay Manik Rao Khanwilkar, Chief Justice, High Court of Madhya Pradesh for his valuable guidance in this endeavor. I am grateful to Prof. Ghayur Alam for his unstinted support to the students, assisting them throughout the production of this edition. Lastly, I would like to thank the students for their contributions to this

edition. I hope that they will continue to contribute to the upcoming editions of the Law Review with equal enthusiasm and intellectual fervor.

Prof. (Dr.) S. S. Singh

Director,

National Law Institute University, Bhopal

MESSAGE FROM THE FACULTY ADVISOR

It is a matter of great satisfaction that we have been successful in publishing Volume V Issue I of the NLIU Law Review. I am thankful to the students involved who have worked with dedication and commitment in this endeavour. Through this Law Review we are working towards the aim of encouraging and inculcating the spirit of legal research and scholarship in the student and teaching community.

The articles included in this Issue deal with contemporary legal issues. We hope that these articles will contribute to the ongoing debates relating to issues covered in this Issue. The issues covered in these articles have a wide range. An article titled 'A Critical Appraisal of Selected AAR Rulings' discusses the scope of judicial powers vested in the Authority for Advance Ruling (AAR) with respect to determination of questions of tax liability while tracing its impact on the development of income tax law. The article, 'Parallel Imports and Trademark Infringement: An Indian Outlook' discusses parallel imports and trademark infringement in cross border trade whereas in 'Intellectual Property Rights and Competition Law: An EU and India Analysis', the authors seek to identify the areas of interplay between competition law and intellectual property rights in the innovation industry in the EU vis-à-vis India.

The article 'Umbrella Clauses: A jurisprudential Analysis under the Modern Day Bilateral Investment Treaties' traces the development of umbrella clauses in bilateral investment treaties with reference to host

states, sub-states and subsidiaries. Whereas the Indian experience with investment treaty arbitration has been elaborately scrutinized in the article 'Bilateral Investment Treaties and Investment Arbitration: Renunciation or Re-Invention?'.

In 'Pre-incorporation contracts: A legal puzzle in India', the authors have questioned the enforceability of pre-incorporation contracts in common law and have attempted to rationale the aspect of promoter's personal liability.

This issue also hosts a case analysis of the landmark Delhi High Court decision ABC v. The State (NCT of Delhi) in which the author has analysed the implications of the decision to permit an unwed mother to act as the sole guardian of her child without the consent of the father.

The article 'Protection of Right to Adequate Housing in Post-Disaster situations in India: An Assessment in the light of International Law and Practice' provides an overview of the state housing policies for disaster victims as compared to the best practices internationally.

The issues of aviation security and the enhanced policy measures incorporated in the 2014 Montreal Protocol have been discussed in 'The Preventive Mechanism on Board an Aircraft in Light of Montreal Protocol 2014'. In another interesting piece titled 'Rebuilding Tunisia: An Analysis of the Transitional Justice Model', the author has analysed the means of achieving transitional justice in

the backdrop of the Tunisian Revolution, focusing, inter alia, on the failures and successes of the Truth Commission.

We take this opportunity to thank and express our heartfelt gratitude to the Patron-in-Chief, Hon'ble Justice Ajay Manik Rao Khanwilkar, the Chief Justice of Madhya Pradesh High Court for his support and good wishes for our endeavour. We are extremely thankful to Prof. (Dr.) S.S. Singh, the Director of National Law Institute University, Bhopal for his encouragement, guidance and continuous support. The contributors whose articles are included in this Issue deserve special mention and thanks for making this endeavour a success.

We also invite comments and criticism on the articles published in this Issue. Kindly feel free to make suggestions and comments for improving the quality and stimulating intellectual discourse.

Prof. (Dr.) Ghayur Alam

Faculty Advisor,

NLIU Law Review

EDITORIAL NOTE

This issue of the Law Review is an attempt to engage the reader with narratives in a host of contemporary legal subjects ranging from those of national to international importance. All of these articles have gone through stringent reviewing and provide clear, simple and comprehensive deliberations on the urgent questions under each subject.

In the realm of Indian law, this issue hosts articles on diverse subjects. On taxation law, the reader will find an article discussing the instrumental nature of the Authority for Advance Rulings (AAR) in resolving questions on tax liability. This paper highlights the inconsistencies in recent judgments and exploring the development of income-tax law under the aegis of the AAR.

In the field of intellectual property rights, a consideration of parallel imports and trademark infringement in the backdrop of the burgeoning cross-border trade as well as a comparative analysis of the nexus between IPR and competition law in the innovation industry under the Indian legal structure. On the subject of bilateral investment treaties (BITs), there are, once again, two parallel discussions: one characterizing the development of umbrella clauses in BITs and discussing these clauses with reference to the host state, sub-state, and subsidiaries of the investing party and the other discussing roadblocks that host-states usually face with BITs with an elaboration on India's tryst with Investment Treaty Arbitration.

With regard to investment agreements, this issue provides a comparative analysis on the validity of pre-incorporation contracts, a relatively unscrutinized field of Indian legal literature, against common law raising pertinent questions on the enforceability of such contracts and the promoter's personal liability.

The reader will also find a case analysis of the landmark ABC v. The State (NCT of Delhi). This article analyses the judgment which upheld the right of an unwed mother to become the sole guardian of her child without the consent of the father and questions the impact of this decision on the realm of guardianship and custody matters.

An article also explores the conditions of state disaster management efforts, providing a skeletal overview of a right based housing policy for disaster victims drawing inferences from the international law and practice.

On the international front, this issue boasts two major articles. The first is a comparison of the Montreal Protocol of 2014 to the 1963 Tokyo convention to draw out enhanced policy measures in the field of aviation security. The other provides a contextualization of the Tunisian Revolution in reference to mechanisms of achieving the goals of transitional justice. Particular attention has been provided to studying the metamorphosis of women's rights in the region and the successes and failures of the Truth Commission.

The Law Review Team wishes that the present issue is successful for all the readers and hopes that the collection of articles on various

contemporary issues proves to be both useful and appreciable. We welcome any suggestions to improve the same.

Editorial Board

A CRITICAL APPRAISAL OF SELECTED AAR RULINGS

Akhil Deo[*]

Abstract

The Authority for Advance Rulings has gained significance in recent years because of its ability to quickly and efficiently resolve complex questions on income tax, particularly as a forum for non-resident investors to determine their tax liabilities in advance and avoid litigation, In recent years however several of the AAR's decisions have brought about confusion and have been inconsistent with established principles of law and commercial expediency. This short article seeks to highlight these inconsistencies and explore these recent developments in income-tax law.

I. INTRODUCTION

The Authority for Advance Rulings (AAR) came into being vide the Finance Act 1993, which introduced chapter XIXB to the Income Tax Act 1961(I-T Act). An 'advance ruling' under the Act is broadly a determination of the tax liability of an applicant either as to transactions undertaken or to be undertaken.[1] The Supreme Court has

[*]Akhil Deo is a fourth-year student at Hidayatullah National Law University, Raipur. The author may be reached out at akhildeo94@gmail.com.

[1]See generally, Income Tax Act, 1961, §245N.

recently noted that the AAR is a body exercising judicial function and that it would qualify as a tribunal for the purpose of determining its character.[2]

In the last five years, the AAR has adjudicated upon several cases relating to the maintainability of applications before it and also regarding capital gains tax, buyback of shares and tax avoidance in the context of various Double Taxation Avoidance Agreements (DTAA's). This short note seeks to highlight and address three debatable issues and the varying stand of the AAR: First with respect to the maintainability of an application before the AAR once a return of income (ROI) under Section 139 of the I-T Act is filed. Second, with respect to the re-characterisation of various transactions deemed to be colourable by the AAR and third, with respect to the exemption of buy-back of shares from capital gains tax.

The recent controversy regarding Minimum Alternate Tax (MAT)[3] can be traced back to the decision of the AAR in the *Castleton Investment*[4] case, revealing how important it is for the AAR to ensure consistency and predictability in its decision making. Along the same vein, this note seeks to highlight the several important decisions the AAR has made over the past few years and examine them with a critical approach.

[2]Columbia Sportswear Company v. Director of Income Tax, Bangalore, (2012) 8 TMI 105 (SC).

[3]Deepshikha Sikarwar, *Government, Castleton Investments agree to expedite Supreme Court hearings on tax row*, ECONOMIC TIMES, https://economictimes.indiatimes.com/news/politics-and-nation/government-castleton-investments-agree-to-expedite-supreme-court-hearings-on-tax-row/articleshow/47102653.cms.

[4]In Re: Castleton Investment Limited, AAR No. 999 of 2010.

II. JURISDICTIONAL ISSUES

Many questions have been raised regarding the maintainability of an application before the AAR once a ROI has been field by the applicant. Section 245R(2)(i) of the I-T Act provides that the AAR may reject an application where the question raised in the application is already pending before any income tax authority of Appellate Tribunal.

Initially, the AAR was of the view that once an ROI had been filled by an applicant under Section 139 of the I-T Act it becomes 'pending' so as to bar an application before the AAR.[5] This position was affirmed again by the AAR in the cases of *SEPCO Electric*[6] and *NetApp BV*,[7] where it was held that once a ROI is filed by the applicant, the jurisdiction of the I-T authorities is assumed and that the AAR can no longer entertain such an application. This position in fact saw support from the Delhi High Court on appeal as well.[8]

However this position saw a dramatic shift in the case of *Hyosung Corporation*,[9] were the AAR ruled that the mere filing of a ROI will not be sufficient to claim that the matter is pending before any income tax authority. This decision was further elaborated and clarified in the case of Mitsubishi Corporation,[10] where the AAR held that a matter can be pending before an authority *only* when a notice under Section 142 or 143 of the I-T Act is issued. The Supreme Court after having taken cognisance of the above two rulings in fact remanded the case of *NetAapp BV* back to the AAR for reconsideration after setting

[5]In Re: Rotem Company, (1999) 238 ITR 189; In Re: Mustaq Ahmed, (2007) 293 ITR 530.
[6]In Re: SEPCO III Electric Power Corporation, (2012) 342 ITR 213 (AAR).
[7]In Re: NetApp B.V, (2012) 347 ITR 461 (AAR).
[8]NetApp B.V. v. Authority for Advance Rulings, (2012) 253 CTR 164.
[9]In Re: Hyosung Corporation, (2013) 261 CTR 230 (AAR).
[10]In Re: Mitsubishi Corporation, A.A.R. No.1309 of 2012.

aside the ruling of the Delhi High Court.[11] Therefore it can be inferred that this position has received the approval of the Supreme Court as well.

This position is correct and should be upheld, support for this can be found in the *Vodafone international*[12] case, where the Supreme Court noted that several forms of notice under the I-T Act only create a liability to deduct tax, the court went on to distinguish this from a procedure for "assessment" under the Act.[13] In another instance, the AAR has previously ruled that an order determining the liability of the payer to deduct tax at a particular rate will not make the matter pending before the income tax authorities.[14]

Therefore, If a notice under Section 142 after filing a ROI is issued, it is processed according to Section 143(1) which contains detailed procedure for assessment of the same and therefore would make the matter pending. For the sake of clarity, such an "assessment" can be distinguished from other Sections, for example, Section 201 *inter-alia* states that a person is an assessee in default if he fails to file his ROI, a notice under this Section should not make the matter pending for the purpose of Section 245R because it is not in the nature of an assessment.

III. ISSUES RELATING TO RE-CHARACTERISATION OF TRANSACTIONS

Two recent cases before AAR have raised important issues as to the re-characterisation of transactions for the purposes of determining the true nature of the transactions:

[11]Sin Oceanic Shipping ASA v. AAR,(2014)269 CTR 15(SC).
[12]Vodafone International Holdings B.V. v. Union of India, (2012) 6 SCC 613.
[13]*Id.*
[14]In Re: Burmah Castrol Plc., (2008) 305 ITR 375 (AAR).

A. Re-characterisation Of Buyback Of Shares As Dividend

The first of these cases is *Otis Ltd*.[15] where the AAR held that a proposed scheme for buyback of shares under Section 77A of the Companies Act 1956 (Act of 1956) as a colourable device for the purpose of avoiding tax and in fact re-characterised the transaction as a dividend payment. The AAR made this ruling based on the following findings: First, that the scheme for buyback of shares was undertaken only to avoid the Dividend Distribution Tax (DDT) under Section 115-O of the I-T Act which was introduced in 2003, and if the company had continued to declare dividends then they would have been liable to pay tax in India. Second, among the various shareholders of *Otis Ltd.*, only the Mauritian shareholder accepted the proposal and not the remaining shareholders, leading the court to believe that the transaction was undertaken only to avail the benefit of the DTAA.

This ruling, however, is not free of criticism and incorrect on the following grounds; Firstly, regarding the re-characterisation of shares as dividend, Section 2(22)(4) of the I-T Act specifically excludes consideration paid on buyback of shares from the definition of dividend. Secondly, Section 46A of the I-T Act also clearly states that consideration paid on buyback of shares is capital gains, the speech of the then Finance Minister also clarifies this position stating that, "*I propose to amend the law to put it beyond doubt that on buyback of shares the shareholders will not be subject to dividend tax.*" [16] Third, The AAR itself has previously ruled that taking advantage of the India-Mauritius DTAA is not objectionable treaty shopping.[17] Finally, regarding the ruling of the AAR that the purpose of the buyback

[15]In Re: Otis Ltd., AAR No. 957 of 2010.
[16]Shri Yashwant Sinha, Finance Minister, Government of India, 27th February 1999, Speech at Union Budget 1999-2000, https://www.indiabudget.gov.in/doc/bspeech/bs19992000.pdf.
[17]In Re:Ardex Investment Mauritius Ltd., (2012) 340 ITR 272 (AAR).

scheme was to avoid the DDT it is pertinent to highlight the observations of the Expert Committee on General Anti Avoidance Rules (GAAR)[18] where it was clarified that "*Whether to pay dividend to its shareholder or buyback its shares is the strategic business choice of the company.. Further at what point of time it makes these decisions cannot be questioned under the GAAR.*"[19] Admittedly, the GAAR are scheduled to be effected from 2016,[20] however this interpretation should clarify that the actions of the I-T Authorities in presuming that the transaction was for tax avoidance was incorrect.

B. Re-characterisation of compulsorily convertible debentures (CCD's) as interest

The second of these cases is that of *Z ltd.*[21] where the AAR re-characterised payments made on redemption of CCDs as interest income and not capital gains. The AAR made this ruling based on the following facts: First, relying on its prior ruling[22] the AAR found that debentures are in the nature of debt instruments and therefore any consideration made on their redemption amounts to interest taxable as per Article 11 of the India-Mauritius DTAA and under Section 2(28) of the I-T Act. Second, after lifting the corporate veil the AAR found that the relevant parties were in-fact a single economic entity and that the transactions were intended to avoid tax.

Subsequently, however, this case was reversed on appeal by the Delhi High Court in the case of *Zaheer Mauritius,*[23]where the court held

[18]Expert Committee, Final Report on General Anti Avoidance Rules in Income Tax Act 1961, Ministry of Finance (2012), www.itatonline.org/info/?dl_id=1013.
[19]*Id.* at p.71-72.
[20]Girish Vanvari&Arinjay Jain, *Tax Conundrums on buybacks*, HINDU BUSINESS LINE, http://www.thehindubusinessline.com/features/taxation-and-accounts/tax-conundrums-on-buybacks/article5079584.ece.
[21]In Re: Z Ltd., (2012) 345 ITR 11 (AAR). [This case was eventually overruled by an appeal to the Delhi High Court.]
[22]LMN India Ltd. v. CIT, (2008) 307 ITR 40 (AAR).
[23]Zaheer Mauritius v. DIT, (2014) 47 TMN 247 (Delhi).

that the gains arising from the transfer of a CCD would in fact be capital gains and not interest. The court arrived at this conclusion on the basis of the following facts: First, the existence of call and exit options meant that the returns were not fixed. Second, the relevant parties were separate entities not exercising singular management and third that CCD's were recognized instruments for the purpose of India's Foreign Direct Investment (FDI) policy and so sufficient commercial rationale exists in effecting the transaction therefore precluding the I-T authorities from deeming it a scheme for tax avoidance.

The position of the Delhi High Court is correct on the following grounds: Firstly, the AAR was incorrect in holding that CCD's can be re-characterised as interest. The definition of 'interest' under both Article 11 of the India-Mauritius DTAA and Section 2(28) of the I-T Act requires the existence of a debt. However the Reserve Bank of India (RBI) its guidelines for foreign investment in debentures has stated that "*instruments which are fully and mandatorily convertible into equity, within a specified time would be reckoned as part of equity and not as part of a company's debt."*[24] Therefore CCD's, unlike traditional debentures, are not debt instruments. Secondly, CCD's cannot in every case be fixed return instruments, in fact the RBI in its foreign investment guidelines with respect to CCD's has stated that "*The guiding principle would be that the non-resident investor is not guaranteed any assured exit price at the time of making such investment/agreement and shall exit at the price prevailing at the time of exit, subject to lock-in period requirement, as applicable.*.[25] Finally, It is consistent business purpose test as elaborated by the Supreme Court in *Vodafone International* were the

[24]Foreign Investment in Debentures-Revised Guidelines, RBI/2006-2007/435 A.P. (DIR Series) Circular No. 74 of 2007 (Issued on June 8, 2007).

[25]Foreign Direct Investment-Pricing Guidelines for FDI instruments with optionality clauses, RBI/2-13-2014/436 A.P. (DIR Series) Circular No. 86 of 2014 (Issued on January 9, 2014).

Supreme Court has observed that mitigating tax liability by arranging commercial affairs is not impermissible and that the existence of a commercial rationale behind a transaction prevents the I-T authorities from deeming it as colourable.[26]

C. Permissibility of re-characterisation?

It should be noted that the Supreme Court in the *Vodafone international* case had held that in the absence of any specific anti-avoidance legislation, the I-T authorities are prohibited from looking through the transaction.[27] Admittedly Section 115QA of the I-T Act or the Buyback Distribution Tax (BBDT) was introduced in 2013 with the intent to tax buy-back of shares, a transaction several persons resorted to in order to avoid the DDT,[28] however it does not permit the I-T authorities from looking through the transaction and, as long as the buy-back transactions had taken place prior to the BBDT coming into effect it is not liable to tax as only the legal position at the time of withholding taxes needs to be considered.[29]

Again, re-characterising consideration paid on buy-back of shares as interest after reaching the conclusion that the CCD's are in fact debt instruments should not only be impermissible before the GAAR comes into effect, [30] it also created uncertainty and ambiguity in India's FDI policy evidenced by the recent dispute between the I-T authorities and Shell India Pvt. Ltd.[31] The reason for this is that debt instruments are beyond the scope of the FDI policy and instead fall

[26]See generally, Vodafone, *Supra* note 10.
[27]*Id.*
[28]Vodafone, *Supra* note 20.
[29]Channel Guide v. DCIT, (2013) TaxCorp (INTL) 6702; New Bombay Park Hotel Pvt. Ltd v. ITO, (2014) 61 SOT 105 (Mumbai).
[30]See generally, Income Tax Act 1961, Chapter X-A, as amended by Finance Act 2013, w.e.f 1-4-2016.
[31]Remya Nair & Utpal Bhaskar, *Shell India to challenge tax evasion order*, LIVEMINT, http://www.livemint.com/Companies/3cXN4BVXIDJdaoFY7LbUfL/Tax-evasion-reports-baseless-Shell-India.html.

within the purview of external commercial borrowings (EBC's) both of which require different regulatory qualifications.[32]

IV. THE DEBATE OVER EXEMPTING CAPITAL GAINS TAX FOR BUYBACK OF SHARES.

The AAR has also adopted a controversial approach in determining the application Section 47(iv) of the I-T Act. In the case of *RST Ltd*[33] and in *Armstrong World Industries*[34] the AAR refused to grant the benefit of capital gains tax exemption under Section 47(iv) on the buyback of shares by a subsidiary company from its holding company. Section 47(iv) provides for exemption of the transfer from a holding company to its 100 percent owned Indian subsidiary from capital gains tax. At this stage it is relevant to note that the Companies Act 1956 vide Section 49(3) enables a company to hold shares in the name of its nominees to ensure that the number of shareholders does not fall below the statutory mandate.[35] Therefore, it is legally impossible for a company to hold 100 percent shares in its subsidiary.

The AAR had based its ruling on the following findings: First, that both companies did not own their subsidiaries 100 percent by reason of appointing nominee shareholders to satisfy the mandate of the Companies Act and therefore do not qualify for the benefit under Section 47(iv), which uses the phrase 'the parent company or its nominees.' Second, the AAR ruled that Section 46A is special

[32]See generally, Consolidated FDI Policy, D/o IPP F.No. 5(1)/2013-FC.I (Issued on April 17, 2014).
[33]In Re: RST Ltd., AAR No. 1067 of 2010.
[34]In Re: Armstrong World Industries Mauritius Multiconsult Ltd., AAR No. 1044 of 2011.
[35]Section 12(1) of the Companies Act 1956 requires at-least two persons for the formation of a private company.

charging provision and that Section 47 only pertains to Section 45 of the I-T Act which is the charging provision for capital gains. Therefore, there are two important issues to consider:

A. Interpretation Of Section 47(iv)

There are naturally adverse commercial implications of the above decisions. First, it would mean that the subsidiary company either has to be held entirely by the parent company, which is impossible considering the mandate of the Companies Act 1956 or it has to be held entirely by the *nominees* of a holding company to avail the benefit of Section 47(iv) of the I-T Act. Moreover, the position of the AAR in *RST* and *Armstrong World Industries* contradicts the AAR's own prior understanding on the matter; in the case of *Praxair Pacific*[36] the AAR ruled that the provisions of Section 47(iv) will apply to a transaction where a Mauritius applicant proposed to transfer its shares in an Indian Company to its 'wholly' owned Indian subsidiary, despite the existence on nominee shareholders holding a small portion of the shares.

In light of these anomalies it is submitted that that this position of the AAR incorrect with respect to the interpretation of Section 47(iv), on the following grounds: The effect of a strict and literal interpretation by the AAR of Section 47(iv) is to nullify the working of the statute itself, which is inconsistent with the established principle that no statue should be read so as to render its working redundant.[37] Moreover, being a beneficial provision, Section 47(iv) must be read liberally so as to give it full effect,[38] and therefore the AAR should read the words 'the parent company or its nominees' as 'the parent company *and* its nominees'. Such an interpretation will be consistent

[36]In Re Praxiar Pacific Ltd., (2010) 326 ITR 276 (AAR).
[37]CIT v. Hindustan Bulk Carriers, (2003) 259 ITR 449 (SC).
[38]CIT v. J Palemar Krishna, (2012) 342 ITR 366.

with the Supreme Courts view that words can be added or read into a statue to avoid making it meaningless.[39]

B. Relationship Between Sections 46A And 47(iv)

Regarding the relationship between Section 45, 46A and 47, there is some support for the AAR's view. For example the benefit of Section 47(iv) does not apply to the provisions of Section or 46(2), which creates a separate charge as opposed to Section 45.[40] However this position should not hold true for Section 46A because, arguable, Section 46A creates no separate charge, support for this can be found in the difference in the language between Sections 46(2) which uses *"shall be chargeable to income tax under the head 'capital gains'",* and Section 46A which says *"shall be deemed to be capital gains."*

Therefore, it is arguable that Section 46A still draws its chargeability from Section 45 and that together they should be treated as an integral code,[41] a view made possible by the fact that Section 2 (24)(vi) of the I-T Act recognises only Section 45 for the purpose of capital gains.

V. CONCLUSION

Another interesting development is the question of the binding authority of an advance ruling; according to Section 245S if the I-T Act, a ruling by the AAR is only binding upon the applicant, the transaction in question and the relevant I-T authority. However, Section 245S (2) states that a ruling will be binding unless there is a change in law or facts on the basis of which it has been pronounced. However, the Bombay High Court in the case of Prudential Assurance

[39]ParshottamNagindas v. Adwalpalkar, (1996) 218 ITR 392 (Guj).
[40]CIT v. Brahmi Investments P. Ltd., (2006) 204 CTR 319 (Guj).
[41]CWT v. Karan Singh, (1993) 1 SCR 560.

Company,[42] on a perusal of Section 245S (2), has ruled that a subsequent ruling of the AAR on a third party will not override the advance ruling obtained by an applicant.

The Delhi High Court has observed that there should be consistency and uniformity in interpretation of provisions as uncertainties can disable and harm governance of tax laws.[43] This especially stands true for the AAR which aims to be an authoritative forum to sort out complex issues of income tax.[44]

To summarize the key takeaways from the AAR's recent rulings discussed above: It is noted that the AAR's verdict in *Mitsubishi* is good in law considering the analysis of Section 142 and 143 with respect to Section 245R of the Act. Further, the *Otis Ltd.* case is incorrect in law after the Expert Committee Report clarifying that making a *prima-facie* assumption that a company's choice of transaction is designed to avoid tax should not be allowed. Moreover, the AAR must not attempt to re-characterize transaction until either the Direct Tax Code (DTC) is enacted or the GAAR comes into effect and specific provisions enable it to do so. The *Zaheer Mauritius* ruling is important as it adopt the commercial rationale test as set out in *Vodafone International* in determining the true intent of the transaction. Both the cases of *RST* and *Armstrong* deserve re-consideration in light of the AAR's own ruling in *Praxair* and the true nature of Section 46A.

[42]The Prudential Assurance Company Ltd. v. DIT, (2010) 324 ITR 381.
[43]Cairn U.K. Holdings Ltd. v. DIT, (2013) 359 ITR 268 (Del).
[44]HANDBOOK ON ADVANCE RULINGS,at 4, http://aarrulings.in/book.pdf.

PARALLEL IMPORTS AND TRADEMARK INFRINGEMENT: AN INDIAN OUTLOOK

*Satish Kumar Rai & Gurtejpal Singh**

Abstract

The burgeoning cross-border trade brings with it complex novelty concern with respect to the trademarked goods and further leading to bewilderment among the consumers of those goods. Trademark of the goods since its inception, is being employed as an indicator of the origin of the goods and has also helped the trademark owners or proprietors to protect their goods and develop a brand image in turn. The increase in the global trade lately and price disparity of the same goods in different States, made economic, trade and IP organisations consider and re-define the extent of rights enjoyed by the trademark proprietor with respect to the goods re-sold by the third party, once legitimately procured by the proprietor himself. One such formal platform on an international echelon was TRIPS negotiations where the exhaustion of trademark rights were extensively discussed and debated only to end with no consensus leading to keeping it open for the States' domestic legislations to adopt either to allow imports of trademarked goods by a third party or to follow the contrary. India in its domestic legislation despite of not providing the principle of exhaustion explicitly have inherently and intrinsically endowed with the same. The interpreters of law, the judiciary of India,

bestowed with the chore of social engineering has been precarious in construing the system of exhaustion followed by the Indian law, the latest ruling being in favour of International Exhaustion allowing imports by the third party known as Parallel Imports, only to be challenged in the Apex Court. The principle of trademark exhaustion raises considerable political economic issues and it is in constant evolution and improvement.

I. INTRODUCTION

The term "*Commercial Cannibalism*" was coined by Herbert Spencer for piracy which goes hand in hand with the growth of commerce and is directly proportional to the same. Trade mark law, in turn, was a concept developed in 19th Century as a consumer protection directive so as to avoid any confusion with respect to the origin of a particular good or product. Trademarks serve in particular as an indicator of source and as an important bearer of "goodwill" for the producers of the products concerned. Trademarks can be maintained for an unlimited period of time unlike most other IP rights.[1] In India before any statutory enactment, common law was the guiding principle on the subject. Even after the enactment of statue till its latest one in 1999 i.e. "The Trade Marks Act", India has to a great extent followed UK law, like in many other cases. In this era of rapid growing cross-border and global trade and movement of goods, the protection of IP rights including the rights of Trade Mark proprietor becomes more significant and important. A trade mark owner or proprietor can protect his right to a certain extent but may not use the

*Satish Kumar Rai and Gurtejpal Singh are fourth-year students at ILS Law College, Pune. The authors may be reached at satishrai.ils@gmail.com and gurtejthegps@gmail.com respectively.

[1]Exhaustion of Trademark Rights, Working Document From The Commission Services, INTERNAL MARKET COUNCIL, http://ec.europa.eu/internal_market/indprop/docs/tm/exhaust_en.pdf.

Trade Marks right to prevent the sale of goods. Since the whole legislation and trademark law aims for the benefit of the consumer, the benefit of restricting the rights of the proprietor over of sold trademark goods is that consumers can re-sell the goods on day-to-day basis. Exhaustion refers to one of the limits of intellectual property rights. Once a product protected by an IP right has been marketed either by an enterprise or by others with the proprietor's consent, the IP rights of commercial exploitation over this given product can no longer be exercised by the proprietor or such enterprise, as they are exhausted. Sometimes this limitation is also called the first sale doctrine, as the rights of commercial exploitation for a given product end with the product's first sale. Unless otherwise specified by law, subsequent acts of resale, rental, lending or other forms of commercial use by third parties can no longer be controlled or opposed by the proprietor or their licensed enterprise. There is a fairly broad consensus that this applies at least within the context of the domestic market.[2] This austerely means that the owner of the trademarked goods exhausts his rights over those goods one he sells or puts those goods in a particular market place, generally defined in geographical terms and this doctrine is more often known as "doctrine of exhaustion of rights". More formally, Exhaustion of rights doctrine is the principle that once the owner of an intellectual property has placed a product covered by that right into the marketplace, the right to control how the product is resold within that internal market is lost.[3] From a legal standpoint, the definition of an exhaustion regime depends upon the recognition of this principle by national trademark laws and upon the determination of the geographical area over which the principle is to apply.[4] As the determining factor where the proprietor loses his rights over the trademarked goods is- the market in geographical terms, the extent in terms of area or market to which this doctrine of exhaustion shall be applied on a given trademark owner gives rise to three precise

[2]*International Exhaustion and Parallel Importation*, WIPO, http://www.wipo.int/sme/en/ip_business/export/international_exhaustion.htm.
[3]BRAYAN A. GARNER, BLACK'S LAW DICTIONARY 636 (8th ed., West Publishing 2004).
[4]S. K. Verma, *Exhaustion of Intellectual Property Rights and Free Trade—Article 6 of the TRIPS Agreement,* 29 IIC 534, 539 (1998) [hereinafter Verma].

pigeonhole to this doctrine, namely- National Exhaustion, Regional Exhaustion and Global or International Exhaustion, while taking only national approach, traditionally, it has been characterized by two approaches: National exhaustion and International Exhaustion.[5]

A. Doctrine of National Exhaustion

The concept of National Exhaustion does not allow the IP owner to control the commercial exploitation of goods put on the domestic market by the IP owner or with his consent. However, the IP owner (or his authorized licensee) could still oppose the importation of original goods marketed abroad based on the right of importation.[6] Under National Exhaustion, once the trademarked products are placed on the market by the owner, or with his consent, the owner's rights are considered exhausted only in the domestic territory. The owner will still be free to oppose the importation of genuine goods bearing his trademark that have been put on the market outside the domestic territory.[7] For illustration: if goods bearing a trademark which is registered in the land of Strombolia are put on sale in Strombolia by the trademark owner or with his consent, the trademark owner cannot use his trademark rights in order to prevent subsequent sale of those particular goods in Strombolia. But if goods are put on sale in the neighbouring state of Vesuvia, the trademark owner can sue anyone who imports them into Strombolia and subsequently sells them for trademark infringement.[8]

B. Doctrine of International Exhaustion

Under International Exhaustion, if a trademark owner, or someone with his consent, places the trademarked goods on the market in any of the national jurisdictions where the trademark owner enjoys protection, the owner's rights are exhausted in other national jurisdictions where he

[5]Herman Cohen Jehoram, *International Exhaustion versus Importation Right: A Murky Area of Intellectual Property Law*, 4 GRUR INT'L 280 (1996).
[6]*Supra* note 2.
[7]Verma, *supra* note 4, at 539.
[8]JEREMY PHILIPS, THE TRADEMARK LAW-A PRACTICAL ANATOMY 274 (Oxford University Press 2003) [hereinafter Philips].

enjoys similar rights and consequently, the trademark owner will not be free to prevent international importation of genuine products bearing his trademark. Where a country applies the concept of International Exhaustion, the IP rights are exhausted once the product has been sold by the IP owner or with his consent in any part of the world.[9] In its simplest terms, International Exhaustion means that, if goods bearing a trademark are put on sale in a specific country by the trademark owner or with his consent, the trademark owner cannot stop subsequent sales of that product in that country or in any other country. The policy of global (international) exhaustion followed, practiced and envisaged under the laws of the United States, Canada and Switzerland.[10]

C. Doctrine of Regional Exhaustion

In the case of regional exhaustion, the first sale of the IP protected product by the IP owner or with his consent exhausts any IP rights over these given products not only domestically, but within the whole region, and parallel imports within the region can no longer be opposed based on the IP right. The appropriate example of the region following this principle is European Union (EU), where there is a constant tussle and resentment to this principle and many scholars want this principle to be extended to International regime. India, being member of many regional organisations including SAARC, does not follow this principle of exhaustion because none of the blocs do not feel any need of regional exhaustion being built in their respective domestic regime.

II. DOCTRINE: HISTORY AND EVOLUTION

The history of the doctrine of exhaustion can be traced out to be appeared as a creature judicial practice in the courts of Germany. Since IP laws go hand in hand with economic development, with the development of international trade this doctrine was started to be used gradually all across

[9] *Supra* note 2.
[10] Philips, *supra* note 8, at 275.

the world with the hike in the global trade. Earlier it was manoeuvred under the prescript of "doctrine of implied contractual consent". This principle entailed that when the proprietor or any other person authorised on behalf of the proprietor or someone who has been assigned the trademark by the proprietor sells his trademarked goods to another person or and enterprise in bulk and volume, it shall be presumed that the person buying such goods will be dealing further in those goods including re-sale of the same. But, this doctrine soon became obsolete owing to its limitations as the fundamental principles of a contract restricted its operation. For illustration or instance, even after an existence of an implied contract between the proprietor of the trademarked goods and the person buying in bulk, a similar contract could not be contemplated and implied between the buyer in bulk and the further buyer who buys it from such person due to the privity of contract which is a common law principle also applicable in Indian jurisprudence. Other limitation is on the principle that a term can only be implied only if it is obligatory to its performance. Apart from all the aforementioned limitations, in reality, insinuation of this implied contractual consent would more likely be considered as false and contrived. In view of this, a more favorable principle which evolved was the doctrine of exhaustion which is independent of all contractual impediments which were there in the theory of implied contractual consent.

Although a lot of effort and conferences occurred, a major breakthrough in the field of IP at an international forum was the TRIPS agreement initiated by developed countries under US. During the TRIPS negotiations, there was fairly extensive discussion of the exhaustion issue, but governments did not come close to agreeing upon a single set of exhaustion rules for the new WTO. They instead agreed that each WTO Member would be entitled to adopt its own exhaustion policy and rules and Article 6 of the TRIPS was included to address the exhaustion of intellectual property rights. As a result, many jurisdictions around the world adopted one or the other principles of exhaustion. Pursuant to its obligations under the TRIPS Agreement, the Indian government has amended its intellectual property laws to meet the substantive minimum standards of the agreement.

III. PARALLEL IMPORTS: MEANING AND EXHAUSTION PRINCIPLE

A brand is wide term; it may be narrowly defined as a mark that an owner uses to differentiate its product in the market and makes it easy for the product to be spotted and remembered by the consumer. While on a broader scale a brand may also include all the components that make up a business enterprise. Brand owners often resort to licensing their goods for sale in foreign markets. This licensing brings two fold benefits for both the owner and the licensee. Often the owners benefit from the reach of their products in a foreign market owing to the expertise of licensee. The licensee usually gains from the exclusive rights to trade such products in the said market or region. Since, The Indian Trademarks Act, 1999 protects the rights of a registered as well as a non-registered trademark owner, using the term brand is more appropriate. Parallel imports are premised on one simple fact, price disparity. Products are often priced differently in different markets; this is due to important factors like tax regimes, promotional and marketing costs, royalties and legal protection etc. Due to this price differential, products from other economies, where they cost less are imported to markets where they are sold at a higher price or are not sold at all. These imported goods are then sold in the market often for lesser prices but in cases where the products are restricted or hard to find, at higher prices than usual.

These goods, though legally imported are sold through unauthorized and unintended channels. Such sale gives rise to a term called the 'Gray market'. Such sales let consumers take advantage of price differentials and induce a price reducing effect due to parallel competition, but at the same time the trade mark owners are restricted from controlling the quality and distribution process of the product. This inability of the owner results from the principle of exhaustion, which makes this sale of goods in gray market a re-sale. The owner has already exhausted his rights in respect to that product and has been rewarded after the 'first sale' took place. The rationale behind this is the fact that the owner must not be repeatedly allowed to control the products' subsequent use, resale,

distribution or pricing. The only distinction between gray and regular goods is the distribution channel through which they travel to reach the consumer. Gray channel operators acquire and resell branded goods without the sanction of the trademark owner. Regular goods travel through intermediaries designated by the trademark owner as the authorized purveyors of the product. Gray channels acquire merchandise from Members of the authorized channel, including even the manufacturer… The term gray is applied only because the diversion is against the professed policies of the brand owner.[11]

The principle of Parallel Imports in its core is a corollary to the Doctrine of Exhaustion and is operated in the same sense. Conceptually, Parallel Import of any trademarked good is legal and within the ambit of law if the Domestic regime of law is of International Exhaustion and the same shall be considered to be illegal if the IP law of the country, specifically Trademarks Law, follows the Doctrine of National Exhaustion. Regional Exhaustion can be best understood vis-à-vis Parallel Imports in terms of EU regime. From an EU perspective, parallel trade (sometimes referred to as the "**gray market**") consists of trade in genuine trade mark protected products, which have been firstly commercialized (by the trade mark holder) outside the EU/EEA, and which are subsequently imported into the EU/EEA area.[12]

IV. THE Indian Exhaustion Regime: From National to International

The Trade Marks Act, 1999, came into operation only in the year 2003. The Act embodied the recommendations made by the Raghavan Committee Report on Trademarks Law and explicitly didn't lay down the concept of exhaustion in it. But, the same can be implicitly read into the terminology provided to Section 30(3) of the Act, which has been the

[11]Louis P. Bucklin, *Modelling the international gray market for public policy decisions*, 10 INTL. J. RESEARCH IN MKTG. 387, 388 (1993).
[12]*Supra* note 1.

bone of dispute within the judiciary as to which principle of exhaustion does India follow. Since the principle of exhaustion entailed in the Indian Trademarks Act, 1999 is ambiguous; the major stress has been on interpreting the market laid down in the provision itself, in geographical terms so as to determine the regime of exhaustion in Indian law. The Indian Judiciary has been, since inception of the Trademarks Act, on two sides with conflicting opinions and ruling with respect to the principle of exhaustion in India, with an inclination towards providing the market a broader meaning in view of the recent ruling on this matter.

"*30. Limits on effect of registered trade mark-*[13]

(1)….

(3) Where the goods bearing a registered trade mark are lawfully acquired by a person, the sale of the goods in the market or otherwise dealing in those goods by that person or by a person claiming under or through him is not infringement of a trade by reason only of----

(a) the registered trade mark having been assigned by the registered proprietor to some other person, after the acquisition of those goods: or

(b) the goods having been put on the market under the registered trade mark by the proprietor or with his consent."

"*The issue of exhaustion was not expressly addressed in the 1958 Act, but the New Act statutorily introduces this concept. Section 30 of the New Act provides that where the goods bearing a registered trade mark are lawfully acquired, the further sale or other dealings in such goods by the purchaser or by a person claiming to represent him is not considered an infringement if the goods have been put on the market under such mark by the proprietor or*

[13]Trade Marks Act 1999, §30.

> *with his consent....A cause of action for trademark infringement may be available to the proprietor against an importer where the genuine goods have been materially altered without the proprietor's consent after they were put on the market. The burden of proving such consent is on the importer. A cause of action on the grounds of passing off is available if the trademark proprietor can show that the importer is passing off the goods in a misleading or improper way causing confusion in the minds of the public."*

The issue of parallel imports remained uncertain as the principle of exhaustion was not defined or formulated by the Hon'ble Delhi High Court in the aforementioned judgment. Till the judgment in the matter of *Xerox Corporation v. Puneet Suri*,[14] wherein the Hon'ble Delhi High Court interpreted this provision in favour of the principle International Exhaustion. The bone of dispute in the case was that the defendants being a third party imported second-hand copiers into India and the Plaintiff contended that the defendant's act of importing and selling second hand Xerox machines constituted trademark infringement as the trademark 'Xerox' was owned by the Plaintiff, to which the defense taken by the Defendants was that their acts were protected under Section 30(3) of the Trademarks Act, which follows the principle of International Exhaustion. The Court held that the "*import of [used] Xerox machines that have proper documentation*" is not trademark infringement provided that "*there is no change or impairment in the machine*."[15] Justice Sanjay K. Kaul of the Hon'ble Delhi High Court agreed with the defendants, holding that the "*import of [second hand] Xerox machines that have proper documentation*" is permissible under the Trademarks Act, provided that "*there is no change or impairment in the machine*."[16]

[14]Xerox Corporation v. Puneet Suri, CS (OS) No. 2285/2006 dated 20th February 2007.
[15]Shamnad Basheer, S. Khettry, D Nandy & Mitra, *Exhausting Copyrights and Promoting Access to Education: An Empirical Take*, 69 JIPR 17 (2012).
[16]Shamnad Basheer, *Exhausting' Patent Rights in India: Parallel Imports and TRIPs Compliance*, 13 JIPR 486-497 (2008).

Hence, for the first time after the introduction of the Trademarks Act, the principle of exhaustion was settled to be the International Exhaustion and consequently the parallel imports were legalized owing to this ruling of the judiciary only till the next notable ruling of the Hon'ble Madras High Court in the case *Wipro Cyprus Private Limited v. Zeetel Electronics*[17] where the Court refused to read Section 30(3) in isolation and read it with Section 29 of the Act which lays down that import of the goods bearing trademark by a third party is an unauthorized use of trademark and therefore a trademark infringement. The Court laid down that a harmonious construction has to be applied between Section 29 which provides for trademark infringement in cases of import of trademarked goods and Section 30(3) which provides for circumstances where the proprietor exhausts its rights on the trademark. The court laid down that Section 30 provides for the exceptions to Section 29 and shall be construed in the same manner as the construction of Section 30 in isolation devoid of its harmonious meaning shall render the provision otiose. Applying the aforementioned principle The Hon'ble Madras High Court held that the assignee of the trademark i.e. the Plaintiff had an exclusive right of use of the same as the Defendants violated Section 29(6)(c) of the Act as the imports of trademarked goods without permission of the proprietor amounts to infringement of trademark. The judgment once again, made the position vis-à-vis the exhaustion regime followed by India uncertain and ambiguous as it settled the case without even touching the aspect of exhaustion envisaged under the Trademarks Act, 1999.

The most important and latest ruling came in the matter of *Samsung Electronics Company Limited & Anr. v. Kapil Wadhwa & Ors*.[18]. Out of the three major issues which came up before the Hon'ble Delhi High Court, two pertained to the doctrine of exhaustion and trademark infringement, namely, Does sale of imported, genuine products without consent of the right holder in India, constitute infringement under Section

[17]Wipro Cyprus Private Limited v. Zeetel Electronics, (2010) 44 PTC 307 (Mad).
[18]Samsung Electronics Company Limited & Anr. v. Kapil Wadhwa & Ors., C.S. (OS). No.1155/2011 dated 17th February 2012.

29(1) read with 29(6) and does Section 30(3) recognise National Exhaustion or International Exhaustion. The first question was answered in affirmative and J. Manmohan Singh in single bench judgment held that any importer who is not a registered proprietor or permissive right holder, even if importing genuine products, is culpable of infringement. Moving further, the second question was answered with India following National Exhaustion principle. J. Manmohan Singh laid down that the only "market" for the purpose of Section 30(3) is deemed to be the Indian market. The Court unequivocally held that Section 30(3) does not recognize any concept of International Exhaustion, and the Section operates only within the market where the registration of the mark extends. This judgment of Single Bench was appealed by the Defendants before the Division Bench in the matter of *Kapil Wadhwa & Ors. v. Samsung Electronics Company Limited & Anr*.[19] And again the question of the exhaustion regime was put up before the Division Bench which included J. Pradeep Nandrajog. The Bench reversed the single bench judgment to recognize that the Indian Trademarks Act follow the principle of International Exhaustion and held that the term 'market' used in Section 29 and 30 of the Act, five times in frequency, in all aspect refer to global market and shall be construed in the same manner only to uphold the principle of International Exhaustion. The Court referred to the similar provisions of other seven jurisdictions, literal interpretation, intent of the legislature, Copyright Amendment Bill 2010 and other reasons to lay down that Section 30(3) is not a proviso of Section 29 and the principle of International Exhaustion allowing parallel imports is embodied under Section 30(3), qualified only by Section 30(4), which says that if the proprietor has legitimate reasons to oppose such import including material alteration then such import shall be rendered illegal and the same has been dealt later under a separate rubric of this paper.

Although the Division Bench judgment is still pending in the Supreme Court which finally will settle the question of exhaustion, the status quo

[19]Kapil Wadhwa & Ors. v. Samsung Electronics Company Limited & Anr., (2012) 194 DLT 23 (DB) ["**Kapil Wadhwa & Ors**"].

on the same is that the Indian Trademarks Act, 1999 follows the principle of International Exhaustion.

V. INTERNATIONAL EXHAUSTION IN INDIA: RATIONALE

The Division Bench with all its judicial unassailability relied on all possible aspects of the principle entailed within Section 30(3) of the Indian Trademarks Act, 1999 and gave manifold rationale supporting the ruling of International Exhaustion.

A. Literal Interpretation of Section 30(3)

The principle of literal interpretation was approached to by the Division Bench as it is the cardinal rule of interpretation. The word "market" occurs five times in Section 29 and 30. Interpreting the word "any market" occurring in Section 30(2)(b) it can be concluded that the market is the global one and not a domestic one. The word "any" can be a pronoun and determiner or an adverb, but since it has been used with the word "market", which is a noun, "any" shall be a pronoun in this case and a determiner. Also, "*any market"* occurs as *"or in relation to goods exported to any market*". Hence, the word "*any market*" find a mention in the phrase *"in relation to goods exported to any market*", prima facie giving it the meaning of a global market. Therefore, it can easily be concluded that the Trademarks Act follows the principle of International Exhaustion. Section 29(6)(c) says that import of goods is a use of trademark for the purposes of the Section. However, Section 30(3) provides for an exception to Section 29 and states that when the goods are lawfully acquired by a third party, reselling or further dealing with respect to such good is not an infringement. Section 30(3) remains an exception even if the goods are imported after acquiring somewhere else outside India. This is because, the word "market" used in Section 30 shall be construed to be a global market and not a domestic market based on the literal interpretation, and hence, the proprietor, the authorized dealer

and the third party can be anywhere in the global market and not necessarily be situated in India i.e. the domestic market.

Apart from the aforementioned provisions, Section 30(2)(b), Section 29(6)(b), 30(3)(b) and 30(4) uses the word "the market". Notwithstanding 'the' being a definite article, is not used to specify a particular market but is used only to demarcate an economic area or space as distinguished from other spaces, whether public or private. Therefore, it cannot be concluded that merely because 'any market' in Section 30(2)(b) means the global market, it must logically be inferred that reference to 'the market' refers to the domestic market and to make it more clear, external aid of interpretation shall be applied.

B. Trade Mark Bill 1999: Object and Reasons

While introducing the Trade Mark Bill 1999, clause-30, which ultimately found itself as Section 30, was explained in the Statement of Objects and Reasons, inter-alia in the following words:-

> "*Sub-clauses (3) and (4) recognize the principle of 'exhaustion of rights' by preventing the trade mark owner from prohibiting on ground of trade mark rights, the marketing of goods in any geographical area, once the goods under the registered trade mark are lawfully acquired by a person. However, when the conditions of goods are changed or impaired after they have been put on market, the provision will not apply*."

The expression 'in any geographical area', in the Statement of Objects and Reasons to the Trade Mark Bill 1999 clearly envisage that the legislative intent was to recognize the principle of International Exhaustion of rights to control further sale of goods once they were put on the market by the registered proprietor of the trade mark. Hence, it is abundantly clear that the word "the market" used in context of the aforementioned Section(s) is global market following the principle of International Exhaustion.

C. Copyright Amendment Bill 2010: 227th Report

The 227th Report on Copyright Amendment Bill, 2010 supports the interpretation in favor of International Exhaustion. The report laid down that -

> "*Indian Law is quite liberal in permitting Parallel Imports of genuine goods bearing the registered trademarks provided such goods have not been materially altered after they have been put in the market….The general rule is that once trademarked goods are released anywhere in the market by or with the consent of the trademark proprietor, the proprietor cannot assert its trademark rights to prevent imports of such goods into India, provided that such goods are not materially altered*."

Therefore, even the said report supports the fact that Indian law follows the principle of International Exhaustion and is more inclined towards the same, affirming the view taken on the basis of all aforementioned rationale.

D. Section 30(4): Construction and Inference

Section 30(4) supports the interpretation in favour of International Exhaustion. With reference to Sub-Section 4 of Section 30 of the Trade Marks Act 1999 further dealing in the goods placed in the market under a trade mark can be opposed where legitimate reasons exist to oppose further dealing and in particular where the condition of the goods has been changed or impaired. With respect to physical condition being changed or impaired, even in the absence of a statutory provision, the registered proprietor of a trade mark would have the right to oppose further dealing in those goods inasmuch as they would be the same goods improperly so called, or to put it differently, if a physical condition of goods is changed, it would no longer be the same goods. But, Sub-Section 4 of Section 30 is not restricted to only when the conditions of the goods has been changed or impaired after they have been put on the market. The Section embraces all legitimate reasons to oppose further

dealings in the goods. Thus, changing condition or impairment is only a specie of the genus legitimate reasons, which genus embraces other species as well. This can only happen in case where goods have to be imported from a country of manufacture or a country where they are put on the market thereof, and then imported into India. Only then would there be a difference in the language of the literature provided with the product; difference in services and warranties in the country from where the goods are imported by the seller and the country of import i.e. the manufacturer's warranties not being available in the country of import; difference in quality control, pricing and presentation as also differences in advertising and promotional efforts. Hence it would be erroneous to say that 'market' used in relevant provisions is a domestic market and with the same rationale it shall be held that the market is a global market.[20]

E. Similar Provisions: Foreign Jurisprudence

Comparing the similar provisions of various jurisdictions around the world it can be concluded that India follows the principle of International Exhaustion. Brazil and Turkey, which have incorporated the Principle of National Exhaustion, have used the clear expressions: 'products placed on the internal market' and 'the product has been put on the market in Turkey' respectively. The European Union and United Kingdom have used the clear expression 'market in the community' and 'market in the European Economic Area' respectively to define the market as neither domestic nor international but expanded/confined to the entire European community. Similarly the legislation in Singapore and Hong Kong uses well defined expressions 'goods which have been put on the market, whether in Singapore or outside Singapore' and 'put on the market anywhere in the world'.

Therefore, the other jurisdictions have clearly defined the market clearly so as to follow either of the two principles. In India, the market has been used neutrally; hence, prima facie no meaning can be given in a rush. The only option is to see to the intent of the legislature by referring to the

[20] *Id.*

external aids of interpretation namely the Statement of Object and Reasons, which has already been laid down specifies the market to be a global market and hence uphold the doctrine of International Exhaustion.

F. Customs Department Circular: Implications

The circular of Customs Office, published by the Department of revenue, Ministry of Finance, Government of India declares parallel imports to be legal in India. The circular clears the decks for the free movement of parallel imported goods in India, stating that they are genuine goods that are allowed under the Trademarks Act, 1999 and laid down:

> *"....In this regard, the Department of Industrial Policy and Promotion which is nodal authority for all matters relating to (i) Trade Marks Act, 1999 (ii) Patents Act, 1970 and (iii) Designs Act, 2000 has, inter alia, stated that:*
>
> *(i) Section 107A (b) of the Patents Act, 1970 provides that importation of patented products by any person from a person who is duly authorised under the law to produce and sell or distribute the product shall not be considered as an infringement of patent rights. Hence, in so far as Patents are concerned, Section 107A (b) provides for parallel imports.*
>
> *(ii) Section 30(3)(b) of the Trade Marks Act, 1999 provides that where the goods bearing a registered Trade Mark are lawfully acquired, further sale or other dealing in such goods by purchaser or by a person claiming to represent him is not considered an infringement by reason only of the goods having been put on the market under the registered Trade Mark by the proprietor or with his consent. However, such goods should not have been*

> *materially altered or impaired after they were put in the market.....*"[21]

The Customs Department sought clarification from the Department of Industrial Policy and Promotion ("**DIPP**") which comes under the ministry of commerce and is the office handling the issues relating to trademark and other IP laws and DIPP itself has interpreted the relevant Section i.e. Section 30(3) to follow the principle of International Exhaustion by laying down that parallel imports are allowed.

G. Uruguay Rounds: India's Position

It was acknowledged during the Uruguay Round debates of the TRIPS agreement that parallel importation was a concept which fitted perfectly within the goal of international free trade advocated by the General Agreement on Tariffs and Trade ("**GATT**") and that it should be comprehensively dealt in the treaty covering all aspects of IP rights.[22] Although an agreement could not be reached among the Member States over this contentious issue, Indian position was to permit parallel imports. This is also an indicator as to India's stand with regards to International Exhaustion. This confirms India's intent to follow the regime of International Exhaustion and confirms all the aforementioned observations with regards to the same.

H. EU and Indian Law: Distinction

Indian Trademarks Law is not pari materia to that of EU directives as the words used in both the laws in the relevant provisions are different. Two of the major differences in both the provisions are that Article 7 of the EU uses "further commercialization" while Indian Law uses "further dealings" and EU's Article 7 again uses the phrase "goods especially where" while Indian Law uses "goods in particular, where". Hence there

[21]Enforcement of Intellectual Property Rights on Imported Goods - Clarification on the Issue of Parallel Imports, F. No. 528/21039/08-Cus/ICD, CENTRAL BOARD OF EXCISE & CUSTOMS - DEPARTMENT OF REVENUE, http://www.cbec.gov.in/customs/cs-circulars/cs-circ12/circ13-2012-cs.htm.

[22]Florian Albert & Christopher Heath, *Parallel Imports and Trade Marks in Germany*, 28 INTL. REV. INDUS. PROP. & COPY. L. 32 (1997).

is a substantial difference between the provisions entailed in Indian law and that of EU directives and cannot be given the same meaning and Indian laws has to be interpreted in the manner aforementioned.

All of the above rationale indicates towards Indian Law following the principle of International Exhaustion inherently and implicitly although not clearly manifested in the Act itself.

VI. SECTION 30(4): RESTRICTIONS ON PARALLEL IMPORTS

The right to parallel import envisaged by the Division Bench judgment of the Hon'ble Delhi High Court under Section 30(3) is qualified and subject to an exception entailed under the provision Section 30(4) which subscribe that Sub-Section (3) shall not apply where there exists legitimate reasons for the proprietor to oppose further dealings in the goods in particular, where the condition of the goods, has been changed or impaired after they have been put on the market.[23] This principle has been followed and taken from the UK and EU law which already talked of the same provision. After the adoption of the Trademark Directive, while acknowledging that the matter poses a peculiarly provocative constraint on the free movement of goods, the ECJ held that repackaging and relabelling are two of the "legitimate reasons" trademark owners may invoke to prevent parallel trade within the EEA.[24] According to the ECJ, to trade non-genuine or repackaged products constitutes trademark infringement when it may lead to confusion on the part of the public or provoke unfair detriment to the trademark itself.[25] A few instances or acts which have been held to give a legitimate reason to the proprietor of the registered trademark to oppose the further dealings in the goods are and as was contend and relied upon by the Respondents-Plaintiffs in the Delhi

[23]Trade Marks Act 1999, §30(4).
[24]Ansgar Ohly, *Trade Marks and Parallel Importation – Recent Developments in European Law*, 30 I.I.C. 512 (1999).
[25]F. Loendersloot Internationale Expeditie v. George Ballantine & Son Ltd., (1997) ECR I-6227.

High Court case are[26] differences in language of the literature provided with the product[27], difference in services and warranties[28], difference in advertising and promotional efforts[29], differences in quality control, pricing and presentation[30], differences in packaging[31] etc. The Division Bench laid down that merely the fact that the physical features of the goods sold abroad are different from the features of the same goods sold in India is irrelevant as long as the goods placed in the International market are not impaired or condition changed.[32]

VII. INTERNATIONAL EXHAUSTION: CRITICAL ANALYSIS

Generally, without Indian prospect, the exhaustion doctrine shall be different for different industries and more so based on the benefits accrued by the consumers by following a certain principle of exhaustion. Illustratively, the principle adopted for medicines and pharmaceuticals should be different than that of cinematic field. Also, because US has adopted the principle of International Exhaustion principle, it is highly probable that the industrialists in the developing and emergent nations to craft gray markets. The developing nations have to be strategic towards the policy of the US with respect to imposition of treaty-based impediments on its partners in trade. The principle of International Exhaustion has manifold benefits and even backlashes.

A. Benefits: International Exhaustion Principle

The consumer ultimately is the beneficiary of an International Exhaustion regime. The prime benefit of unrestricted parallel imports is availability

[26]Kapil Wadhwa & Ors., *supra* note 20.
[27]SKF USA v. International Trade Commission & Ors., (2005) 423 F.3d 1037; PepsiCo Inc v. Reyes, (1999) 70F.Supp 2d 1057; Original Appalachian Artworks Inc. v. Granada Electronics Inc., (1987) 816 F.2d 68, 76.
[28]Fender Musical Instruments Corp. v. Unlimited Music Center Inc., (1995) 35 USPQ 2d 1053; Osawa & Co. v. B&H Photo., (1984) 589 F. Supp. 1163.
[29]Osawa & Co. v. B&H Photo., (1984) 589 F. Supp. 1163.
[30]Societe Des Produits Nestle v. Casa Helvetia, (1992) 982 F.2d 633.
[31]Ferrerro USA v. Ozak Trading, (1991) 753 F. Supp. 1240.
[32]Kapil Wadhwa & Ors., *supra* note 20.

of goods to consumers at the lowest price. Parallel imports allow the same goods to be present in the market at different costs, inducing a competition that results in consumer welfare. International Exhaustion and open parallel importation are consistent with the fundamental premise underlying liberalization of trade: that is, to encourage the efficient production of goods and services for the benefit of consumers.[33] The practice of parallel importing represents an uneasy balance between the protection of intellectual property rights such as trademark and patent rights and the liberalization of trade in goods and services promoted by organizations such as the World Trade Organization.[34]

Owners often artificially curate the product prices in different countries to maximize profits. Considering the purchasing power of an average consumer, same product is usually marketed in developed countries at higher prices and at lower prices in developing countries. This selective pricing approach often helps consumers in developing countries as products can be purchased at cheaper prices.

B. Backlashes: International Exhaustion Principle

Although there is a prima facie benefit to the consumers because of theoretical chance for them to get the same product at a cheaper price, not always that happens as principally the third party importing the goods does that for making profit, so there is a high probability that there might not be a detrimental difference between the prices of the parallel imported goods and those out in the market by the proprietor. This means that the practical aspect of the same benefit might not reach the consumer as it is not the consumer who gets the same good at a cheaper price but the third party who later on imports it to maximise profit.

[33]Frederick M. Abbott, *Parallel Importation: Economic and social welfare dimensions*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, https://www.iisd.org/pdf/2007/parallel_importation.pdf.
[34]Philip Kitchen, *The Impact of Gray Marketing and Parallel Importing on Brand Equity and Brand Value*, UNIVERSITY OF HULL, http://www2.hull.ac.uk/hubs/pdf/memorandum38.pdf.

a) After Sale Services

Since the products that are parallel imported are in an unaltered state, there is no way via which a consumer can differentiate between the gray market products and the same product reaching to the consumer through an authorized channel. This is detrimental to the interest and benefit of the consumers as the consumer does not receive the warranty if the warranty is regional in nature and also the after sale services attached to the product, which in turn damages the goodwill of the proprietor's brand value and image.

b) Regional and Climatic Limitations

Products which are specific to certain climatic conditions, specifically eatables and beauty products can have an adverse experience for a consumer because of the change in their composition, taste and quality owing to the change in the climatic conditions of the product. For illustration: If X being a brand of a tooth paste having manufacturing units at Brazil and UK, for the markets in the respective domestic territory and uses the locally procured limestone for the product having different qualities and compositions, UK one being higher. Later, if a third party imports the Brazilian version of the toothpaste into the market of the UK, the consumers buying such toothpaste will be dissatisfied owing to the inferior quality than before, believing it to be one they used to use earlier as the brand remains the same. This leads to loss to and of consumers for a particular brand, say X.

c) Loss to authorized channels

With the increase in the goods in the gray market there is a rapid decline in the profit margin of the authorised channels for goods distribution as the parties of parallel imports reap on the advertisement costs incurred by those channels and the proprietor. Since the cost of the grey marketed products are generally lower than that of those of the authorised distributors, the consumers prefer the former one leading to economic

loss to such channels which further results in unpleasant relations between the proprietor and the authorized channels.

VIII. CONCLUSION

Parallel imports continue to be on crossroad between a liberalized consumer centric global economy and hindered innovation and revenue due as a result. An international issue left at national discretion was always bound to create chaos on global scale. With the rise of the internet market, parallel imports have become more commonplace than they were ever before. Countries are required to make clear legislations on this issue so as to balance the impact of such imports on owners and consumers.

The Indian perspective, though in favor of International Exhaustion as far as precedents go, is still under Hon'ble Supreme Court of India's consideration. From National Exhaustion to International exhaustion, India's stance has changed through landmark judgments in recent past. The question remains important for owners and consumers alike. Brand owners are understandably vying for National Exhaustion to be accepted while International Exhaustion seems beneficial for consumers as it will increase competition, reduce monopolistic pricing regimes and allow for an open market on the lines of free global trade as envisioned by WTO and other Regional Trade Organizations.

Though on the outset, International Exhaustion seems to be the better option as far as consumer welfare goes, the negative effects of parallel imports mentioned hereinabove like, absence of warranties and post-sale services to legitimate products, dysfunctional or sub-par regional and climatic changes and loss of brand image should also be taken into consideration. With the rise of governmental and executive policies inviting and alluring foreign investors in the country, international exhaustion is an impediment and hindrance as the MNCs are skeptical about the profits they will make in a developing country as the consumers therein make their choices with economic aspect as a parameter resulting

in more success of gray market. But, since IP laws have always been for the benefit of the consumers, International Exhaustion provides a better pathway to achieve the same, more specifically in the Trademark Law, as the objective of bringing in the concept of the trademark protection was never to restrict the movement but to confine the source or origin of the goods.

PRE-INCORPORATION CONTRACTS: A LEGAL PUZZLE IN INDIA

*Lakshmi Dwivedi & Varun Byreddy**

Abstract

This paper attempts to examine the validity of a pre-incorporation contract i.e. of a contract entered into by a company before its incorporation. The problem arises because at the time of contracting, the company is non- existent and hence the contract has been entered into with an incapable party. It is surprising that such a contemporary aspect hasn't received much scrutiny in Indian legal literature. Even though Specific Relief Act lays down the procedure for a contract to be enforceable against the company, how must a lawyer advise the promoters of the company, liability on whom can be cast by law, especially if the company refuses to accept the contract? Proper drafting of the contract can eliminate the need for law to resolve the dispute. However, due to inadequate drafting, when law does come into picture, how is to one clarify the position of all the parties to the contract. The paper begins with probing who can be considered as a promoter. By a comparative analysis, the paper tries to trace the common law and provide answers. This paper attempts to examine the law regarding the enforceability of the contract, against the company by interpreting the section of the specific relief act. On the basis of common law, it attempts the answer on the question of promoter's personal liability on a pre-

incorporation contract. It answers the question, if the promoter can recover any reincorporation expenses from the company and from the co-promoters, if any. Drawing a distinction between a pre-incorporation contract and a contract by a company defectively incorporated, it concludes with some drafting suggestions for a pre-incorporation contract.

I. INTRODUCTION

For any contract to be a valid one, it needs to be executed between two competent persons.[1] Birth of a company's competency is marked by its incorporation[2]. This gives it a separate legal existence[3] and the rights and obligations of the contract lie squarely with the company and not personally with the director or the promoter or the promoter group.[4]

Thus, as seen, there is always a group of people or persons who are working on behalf of the corporation. However, what happens when someone purports to be working on behalf of a company, which is technically not a company (due to the absence of incorporation)? Can anyone contract for a non-existent person, and in this case, an artificial person in the process of formation but which has not yet been brought

*Lakshmi Dwivedi and Varun Byreddy are fourth-year students at the NALSAR University of Law, Hyderabad. The author can be reached at lakshmidwi22@gmail.com.

[1]Indian Contract Act 1872, §10.

[2]The Companies Act 2013, §9 states that once the company is registered, the body incorporated has the "power to acquire, hold and dispose of property, both movable and immovable, tangible and intangible, to contract and to sue and be sued, by the said name."

[3]The Companies Act 2013, §21 provides that a person authorized by the Board or a key Managerial Person can enter into the contract on behalf of the company. Key Managerial person is further defined in Section 2(51) of the said act as: Chief Executive Officer or Managing Director or Manager, Company Secretary, the whole time director, Chief Financial Officer, or any such officer as may be prescribed.

[4]Solomon v. Solomon, (1896) UKHL 1.

into existence? This is precisely termed as a pre-incorporation contract i.e. a contract entered on behalf of a company prior to its incorporation.[5]

Usually, there are three stakeholders to this contract i.e. the promoter,[6] the party with which the promoter contracts with and the company (the company will be considered as a party only after the incorporation is completed) on whose behalf the promoter has entered into a contract. The legal status of this contract is extremely questionable. After all, how can anyone contract on behalf of a person who has not yet come into existence?[7] This leads us to the primary question 'What is the legal status of such a contract?

Along with the above question, another important question relating to the rights and obligations of the stakeholders can also be raised in this context. It is pertinent to mention that such a contract, especially in India stand on shaky grounds and might not enjoy 'the security of transaction".[8] Is the promoter to be held personally liable (also entitled to rights) on the contract? Will he have any defenses? When can a company be held liable and be entitled to the benefits from such a contract? Will making the company liable relieve the promoter of all liabilities (subsequently, even disentitling him from the rights under the contract)? Can the promoter recover his pre-incorporation expenses, especially

[5] M. J. Whincop, *Of Dragons and Horses: Filling Gaps in Pre-incorporation Contracts*, (1998) 12 JCL 22, 225.

[6] The Companies Act 2013, §269 has introduced the definition of the term 'Promoter' under the Indian Law for the first time. Promoter is a person (a) who has been named as such in a prospectus or is identified by the company in the annual return referred to in section 92; or (b) who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or (c) in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act: Provided that nothing in sub-clause (c) shall apply to a person who is acting merely in a professional capacity. It is to be noted that this definition only refers to a promoter after the incorporation of the company. Much has to be debated about who can act as a promoter for a company before incorporation. This will be seen in the next section.

[7] STEWART KYD, TREATISE ON THE LAW OF CORPORATIONS 13 (1st ed., J. Butterworth, 1794).

[8] This term was introduced in the EEC Directive (EEC 68/151), which in a bid to secure a pre-incorporation contract, by statutory provision held the promoter personally liable for a pre-incorporation contract. This 'security' might not be available under the Indian law due to the absence of a statutory provision to the effect.

those arising under a pre-incorporation contract from other promoters or even the company after it is incorporated?

If one attempts to search answers for these questions solely within the four corners of the Indian legal framework, then they will notice that the picture regarding pre-incorporation contracts in the Indian legal framework is, to an extent, blurry.[9] There are different permutations of situations that can exist and the validity and enforcement of a pre-incorporation transaction in such different scenarios is equivocal.[10] The only guiding light is provided by the Specific Relief Act, which lays down when can companies sue and be sued for a pre-incorporation contract.[11] However, the rights and obligations of the company comprise only one aspect of the transaction. There is more to it, as we have seen. Also, the Specific Relief Act can be enforced only in certain circumstances.[12] Dearth of case laws expounding on this concept has been a major hindrance in getting answers to the numerous questions. The enforcement of contracts in India is considered to be a cumbersome process,[13] resulting in fewer case laws and limited evolution of law.[14] The paper will try to answer these questions by a critical and comparative analysis of various jurisprudences, like English Law, American Law, and South African Law.

One can avoid this mess by simply entering into contracts after incorporation.[15] Incorporation under the Indian Law might take around

[9]Prasidh Raj Singh, *Promoter and Pre-incorporation Contract*, 6 ASIAN JOURNAL OF INTERNATIONAL LAW, 1-2 (2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1938065 ("**Singh**").

[10]To name a few, different situations that can arise include no ratification by the company, ignorance of the status of the company, status of the company as a third party to the contract etc. More on this will be elucidated later.

[11]Specific Relief Act 1963, §15 (h) & 19(e).

[12]Specific Relief Act 1963, §10.

[13]Somasekhar Sudareshan, *India cuts a sorry figure with Contracts*, BUSINESS STANDARD, 9th May 2011, http://www.business-standard.com/article/economy-policy/india-cuts-a-sorry-figure-with-contracts-111050900030_1.html.

[14]Ponzetto & Fernandez, *Case Law versus Statute Law: An Evolutionary Comparison*, 37 JOURNAL OF LEGAL STUDIES (2008) [hereinafter Ponzetto & Fernandez].

[15]William J. Rand, *High Pressure Sales Tactics and Dead Trees: What to do with Promoters' Pre-Incorporation Contracts*, 4 RUTGDER'S BUSINESS LAW JOURNAL 1 (2007) [hereinafter Rand].

15 days to one month[16] and for a foreign company, this might take around 1.5 months.[17] It is always advised to wait for incorporation and get the benefit of a secure transaction rather than enter into legal conundrums of a pre-incorporation contract in India. However, as noticed in England, companies hardly issue prospectus before entering into arrangements for business and property[18]and sometimes the promoters deem it necessary to enter into legally binding arrangements[19] to make sure that company reaps the benefits for which it was formed.[20] Apart from contracts for constructing the office, hiring lawyers for the company etc. (few illustrations), they might enter into contracts related to the specific business of the company to 'lock-in' the other party.[21] However, there is a possibility that technicalities might render such attempts infructuous since it is a pre-incorporation contract[22] or there might be a scenario that the promoter has to personally pay the fees of the lawyer or might have to pay the builders out of his own pockets. As noted, the answer is blurry and equivocal.[23]

This paper will first address the theoretical framework of the pre-incorporation contract, specifically the nexus between the promoter and

[16]*Time Frame for Incorporation*, AVA PROFESSIONAL CONSULTANTS, http://www.avaprofessionals.com/knowledge-center/company-registration-india/time-frame-for-incorporation/.
[17]*Incorporating a company in India,* MADAN & CO, http://madaan.com/incorporate.htm.
[18]Thomas Reith, *The Effect of Pre-incorporation Contracts in German and English Law*, 37 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 109 (1988) [hereinafter Reith].
[19]These arrangements, at least in India might not be legally binding.
[20]Maleka Femida Cassim, *Difficult Aspects of Pre -Incorporation Contracts in South African Law and Other Jurisdictions*, 13 BUS. L. INT'L (2012) [hereinafter Cassim].
[21]EDWARD FRY, A TREATISE ON THE SPECIFIC PERFORMANCE OF CONTRACTS 200 (BiblioLife, 2009) [hereinafter Fry].
[22]Dr. Joseph H. Gross, *Liability of Pre-incorporation contracts: A Comparative Review*, 18 MCGILL LAW JOURNAL (1972), http://www.lawjournal.mcgill.ca/userfiles/other/1732404-gross.pdf [hereinafter Gross]. The present state of the law is considered in most common law countries as "unsatisfactory and replete with serious difficulties for promoters, companies and the public at large" and the rules on this subject are "highly technical and inconvenient and it is clearly desirable that they should be abrogated.
[23]A. RAMAIYA, GUIDE TO COMPANIES ACT (17th ed., 2010) [Hereinafter Ramaiya].

the company. Out of such impossible theoretical framework, some answers might be sought which will also try to examine the contractual relationship between the three stakeholders, especially its enforceability and if any defenses will be available to the parties. This will also address relation between the promoter and co-promoters. Then, the paper will look into the difference in the effect between defective incorporation and pre-incorporation contracts. The paper will conclude with the examination of some legal and non-legal solutions for securing the transaction.

II. PROMOTER AND THE ROLE OF PROMOTER

Common Law propounds that *"the term promoter is a short and convenient way of designating those who set in motion the machinery by which the Act enables them to create an incorporated company"*[24] and promoter is one who "*undertakes to form a company with reference to a given project and to set it going, and who takes the necessary steps to accomplish that purpose*."[25]

Promoter plays a very important role in a company. Formation of a company starts with the promotion of a company. Usually the idea of the company will be of the promoters, they have the idea of the business and its feasibility. After considering many things and doing a basic research or assessment only promoters will decide to form a body to do business. The decision to create what kind of body will also be decided by the promoters i.e. whether to form a sole proprietorship or partnership or limited liability partnership or a company will be also decided by the promoter.[26] Promoters have various duties before the company is formed and they take care of incorporation and they enter into pre-incorporation contracts.

[24]Erlanger v New Sombrero Phosphate Co, (1878) 3 App Cas 1218.
[25]Twycross v. Grant, (1877) 2 CPD 469 (CA).
[26]*Role of Promoter in Company establishment*, LAW TEACHER (June 24, 2019), http://www.lawteacher.net/free-law-essays/business-law/role-of-promoters-in-company-establishment-business-law-essay.php.

To understand the liability of the promoter regarding the pre-incorporation contracts we have to understand the definition of the promoter and also have to see statutory definitions of the this word. In India the definition of the word promoter is not clearly defined. The Companies act, 1956 defined the word promoter with respect to prospectus. Section 62 of the 1956 act defines promoter as *"a promoter who was a party to the preparation of the prospectus or of the portion thereof containing the untrue statement, but does not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company*". The relevance of this provision is only with respect to claims for compensation made by shareholders in case if any misstatement or misrepresentation made in the prospectus issued to raise capital. This definition is to be applied only under those circumstances where compensation is claimed by a person who has purchased shares and debentures on the faith of the content given in the prospectus. This definition expressly prohibits professionals who act for the company.

The word 'promoter' has also been defined in the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 1997[27] and also in the SEBI (Issue of Capital and Disclosure Requirements) Regulations 2011.[28] But none of these definitions help us to understand the liability of the promoters for the pre-incorporation contracts. So there was a hope that the 2013 act will define this word in a proper manner and gives clarity but it also disappointed by giving an inclusive definition[29] and not giving a descriptive definition. This definition only deals with the situations after incorporation but not pre-incorporation. So even the definition of the word promoter is not clear in India.

[27]SEBI (Substantial Acquisition of Shares and Takeovers Regulations) 1997, Regulation 3.
[28]SEBI Issue of Capital and Disclosure Regulations 2011, Regulation 2(ZA).
[29]Companies Act 2013, §2(69).

III. ENFORCEMENT OF THE CONTRACT

The peculiarity of a pre-incorporation contract revolves around the fact that a contract is entered on behalf of a non-existent company.[30] The third party has been left on shaky grounds in a number of jurisdictions with the contract being declared null and void due to lack of competent persons entering into the contract. [31] However, there are various interesting ways in which these situations were dealt under the common law where some protection to the third party was given.

The first question that needs to be dealt with is the relation between the promoter and the company, prior to its incorporation. A number of positions have been espoused in different jurisdictions to define this relation, which range from making them the agents of the company, to the trustees of the unincorporated company.[32]

The usual argument that has been made and often selectively applied is to treat the promoter as an agent of the unincorporated company.[33] However, the promoter can't bind the company as its agent since the principal is non-existent.[34] Another implication of this is manifested in the post-incorporation stage and ratification is still not permitted.[35] English Law bars ratification of a pre-incorporation contract by the company on the basis that even for ratification, the company needs to have legal capacity at the time the contract was completed, which is absent for a pre-incorporation contract.[36] The doctrine of persona ficta is so strictly followed in England that unless novation of the contract takes place to replace the company as a party to the contract, no unilateral

[30]Kelner v. Baxter, (1866) LR 2 CP 174.
[31]Gross, *supra* note 22.
[32]*Outmoded Concept Dominates Law of Promoters' Pre-Incorporation Contracts*, 2 STANFORD INTRAMURAL LAW REVIEW (1948).
[33]*Id.*
[34]*Id.*
[35]*Id.*
[36]Joseph Savirimuthu, *Pre- incorporation contracts and the problem of corporate fundamentalism: are promoters proverbially profuse?* 24 COMPANY LAWYER 196, 196-209 (2003).

ratification is permitted.[37] Any act of ratification or adoption by the company is treated to be that of an offer to third party, and not acceptance of the offer of the third party.[38] This is in spite of the recommendations of Jenkins Committee to allow for ratification for commercial expediency reasons.[39] One strand of theory suggests and which has been adopted with some flexibility in certain jurisdictions is to allow the company to ratify pre-incorporation contract.[40] Analogy is drawn to ratification of unauthorized acts of agent by the principle.[41]

South African Law confers the power on the board to ratify and in fact, has a provision for deemed ratification, i.e. if within 3 months the corporation doesn't act on the contract, it will be deemed to be ratified by the company.[42] This provision though is a step ahead of other common law jurisdictions might prove harmful for the company especially because no specific knowledge of the contract is required and the time period might be arbitrary, without giving consideration to the kind of contract. Some contracts might take longer than 3 months to be examined and be ratified.[43]

American jurisprudence tries to skirt the theoretical difficulty of ratification by introducing another concept of 'adoption' instead of ratification.[44] Though the legal effect for both of them is the same, the difference lies in being technically correct.[45] The company by adopting the benefits of the contract automatically becomes a party to the contract.[46] The liability, which is to be impinged on the company, is not justified on the basis of abstract principal-agent relationship but the power can be located within its inherent powers of forming contracts as

[37] *Id.*
[38] Reith, *supra* note 18.
[39] *Id.*
[40] *Supra* note 32.
[41] *Supra* note 32.
[42] Cassim, *supra* note 20.
[43] *Id.*
[44] Fry, *supra* note 21.
[45] Ponzetto & Fernandez, *supra* note 14.
[46] *Id.*

body corporate.[47] Thus, the company though might not be free to 'ratify' in the strictest legal sense, but is definitely free to adopt the contract with the equitable reason to protect third parties, especially if the company has taken use of the benefits of the contract.[48] But it also becomes necessary to protect the shareholders of the company from any undesired liability that the company may attract because of the promoter. Certain safeguards have been put in place to protect them which include that merely benefitting from an unsolicited act doesn't amount to acceptance and some affirmative act would be needed along with the requirement of having full knowledge of the contract, with the knowledge to the promoter not amounting as knowledge to the company.[49]

It has been noted that Indian Law along with South African law has been very liberal in this aspect and gives companies the power to 'ratify' pre-incorporation contracts entered on its behalf.[50] Under Indian Law, the same power can be located within the framework of Specific Relief Act under Section 15(h) and Section 19(e).

It is respectfully submitted that in the case of *Seth Sobhag Mal Lodha v. Edward Mills Co. Ltd*.[51], the court erroneously denied any scope for enforcement of a pre-incorporation contract. However, it has been noted that the judgment failed to take provisions of Specific Relief Act into account for consideration of the matter.[52]

A breakdown of Section 19(e)[53] & 15(h)[54] of the Specific Relief Act points that for a pre-incorporation contract to gain validity in the eyes of the law, it must have been entered into for the purposes of the future company and must have been warranted by the terms of the incorporation. Further, the acceptance of the contract must be

[47]*Supra* note 32.
[48]Wall v. Niagara Mining & Smelting Co. of Idaho, (1899) 20 Utah 474.
[49]Gross, *supra* note 22.
[50]ANDREW GRIFFITHS, CONTRACTING WITH COMPANIES (Hart Publishing, 2005) ("**Griffiths**").
[51]Seth Sobhag Mal Lodha v. Edward Mills Co. Ltd., (1972) 42 Com Cases (Raj).
[52]Ramaiya, *supra* note 23.
[53]To be enforced by the third party.
[54]To be enforced by the company.

communicated to the third party.[55] The questions raised in this regard would involve how one is to interpret "warranted by the terms of incorporation" and how one is to interpret 'acceptance of the contract'. Does warranted by the terms necessarily imply that it must be expressly included in the articles of association or it means that such contract can be ratified as long as it is not against the objects of the company? Further can implied acceptance be considered valid i.e. by utilizing the benefits of the contracts?

Express ratification and acceptance are not the only ways to enforce a contract. If a company has accepted benefits of a pre-incorporation contract,[56] the contract won't be a complete nullity and claims can be adjudicated based on such a contract. The Apex court in India has held that the term "warranted by the terms of incorporation" must be construed to mean that it must not be ultra vires of the object of the company and dismissed the submission that an express condition needs to be articulated in the articles for the acceptance of a pre-incorporation contract.[57] Even a company's declaration of ownership to the property conveyed under the contract would suffice for the purpose of acceptance under Specific Relief Act. Thus, acceptance of benefits of the contract by the company should then essentially entail it to accept the burden of the contract too.[58]

However, a blanket rule under Specific Relief Act can't be formulated for all pre-incorporation contracts, at least in India. It must be read in conjunction with other statutes and relevant framework. Thus, in *Jai Narain Parasurampuria (Dead) and others v Pushpa Devi Saraf and others*,[59] the Supreme Court upheld the validity of the land transfer agreement, after concluding that it doesn't conflict any provision of

[55]Specific Relief Act 1963, §15 (h) and 19(e).
[56]Weaver Mills v. Balkis Ammal, (1969) AIR Mad 462; The Company took possession of the land transferred in a pre-incorporation contract with promoter acting on behalf of the company and the company improved on the land. Held, title vests in the company.
[57]Jai Narain Parasurampuria (Dead) and others v. Pushpa Devi Saraf and others, (2006) 7 SCC 756.
[58]*Id.*
[59]Griffiths, *supra* note 50.

Transfer of Property Act. However, another case held that a pre-incorporation share transfer agreement couldn't be enforced because a company not in existence can't be registered as a transferee in the register.[60] The case can also be interpreted harmoniously with Apex court ruling and with the Act by regarding that such a share transfer certificate is strictly speaking not "for the purposes of the company"[61] and hence, while interpreting the given term, care must be taken to evaluate that the contract should not only be ultra vires the objects but also must in some way contribute beneficially to the principal business for which the company is purported to be formed.[62] This makes the line very blurred and obfuscated and renders the interpretation highly subjective. Hence, it is submitted that the position formulated by the Supreme Court should be upheld, which states that as long as it is not ultra vires the objects clause of the company, it must be left to the company to ratify it.

The difference between English, Indian and American Law lies in allowing the company to have the requisite flexibility to continue with a contract that was made on its behalf before its existence. English Law, however, has been unable to grant the same power to the contracts. American law on the other hand has struck down the English Law approach in favor of the commercial benefits of the parties involved and has come up with its own techniques to enforce the contract, which is much more flexible compared to Indian law. The theories that have emerged from judicial re-thinking under American jurisprudence are ratification, adoption, acceptance of continuing offer and novation.[63] Continuing offer is synonymous to adoption wherein the pre-incorporation contract is considered to be an open-offer for[64] the corporation, which it may choose to accept by receiving or rejecting the benefits. This can be treated to be the position under Specific Relief Act, since only on the company accepting the contract, can it have some legal

[60]Inclec Investment Pvt Ltd v. Dynamatic Hydraulics Ltd, (1989) 3 Comp LJ 221, 225 (CLB).
[61]KM GHOSH AND KR CHANDRATRE, K.M. GHOSH & DR. K.R. CHANDRATRE'S COMPANY LAW: WITH SECRETARIAL PRACTICE (13th ed., Bharat Law House, 2007).
[62]*Id.*
[63]*Id.*
[64]*Id.*

effect. However, the next section will go beyond the Specific Relief and look into the common law to further examine the contract.

IV. PERSONAL LIABILITY OF THE PROMOTER

Though Specific Relief Act has spoken on conditions of enforcement between the company and the third party, there is a legal vacuum in India when it comes to the enforcement of the contract without such ratification.[65] Can the promoter be held liable personally for this contract as is followed in a number of jurisdictions e.g. UK, EU, and USA? There is another important question i.e. whether the promoter can be relieved of liability when the company ratifies the pre-incorporation contract. The judiciary in India is silent on this aspect of the law.

A. Non-Ratification

An inroad to the Common Law position would be helpful in this regard. The common Law in this context gave prime importance to the intention of the parties in adjudicating the contract.[66] If the promoter purported to act for the corporation, then he was held personally liable for the contract. However, if the contract is entered in name of the proposed company and the promoter merely authenticated the signature, the promoter was absolved from all liability.[67] The justification for the same was based on the intention of the parties i.e. who they look to when contracting. The illustration for the same could be found in the two English cases, which rendered the distinction highly technical.[68] The most often cited authority for enabling enforcement against the promoter has been *Kelner v. Baxter*[69] in which, the promoter signed "on behalf of

[65]Ramaiya, *supra* note 23.
[66]Rand, *supra* note 15.
[67]ARDEN & PRENTICE ED., BUCKLEY ON COMPANIES ACT (17th ed., LexisNexis, 2009) [hereinafter Arden & Prentice].
[68]N. N. Green, *Security of transaction after Phonogram*, 47 THE MODERN LAW REVIEW 671-691 (1984).
[69]The Companies Act 2013, §2(69).

the proposed company". The company wasn't formed and the enforcement of the contract was bought before the court. Here the court held that since it was evident to both the parties that the company was 'proposed' to be formed, hence the intention of both the parties could be to hold promoter personally liable in case, the company is not formed. [70]

However, a different approach was taken in the case of *Newborne v. Sensolid*[71] In this case, a contract was entered into at a time when the company was not properly formed. From the signature, the court concluded that since the director authenticated the signature of the company and didn't purport to sign as an agent of the company. Hence, in this case the contract was rendered void.[72]

This distinctive approach has often been criticized as too technical with intention being reduced to focus on the form of signature.[73] Lord Denning also propounded that the real intent is to be discerned by the knowledge of the parties and the contract itself rather than the technical distinctions of signature and he criticized this approach.[74] However, Newborne doesn't stand as an authority to deny enforcement of the contract vis-à-vis the promoter.[75] In this case, the parties wrongfully assumed that the company was in existence when the contract was entered into. The company pleaded its unconstitutionality to get away with the contract[76]. Thus, the principle that can be filtered from these two cases is that when both the parties were aware that company was non-existent, then the question that must be asked to determine the intention of the parties is whether promoters had wished to assume liability in case

[70]*Id.*
[71]Newborne v. Sensolid, (1953) 1 All ER 708.
[72]*Id.*
[73]Arden & Prentice, *supra* note 67.
[74]Phonogram Ltd v. Lane, (1982) QB 938.
[75]SIR FRANCIS BEAUFORT PALMER, PALMER'S COMPANY LAW (25th ed., Sweet and Maxwell, 2013).
[76]*Supra* note 32.

the contract was not novated.[77] Further, in Newborne the court failed to account the promoters for breach of warranty or authority. [78]

The common law distinction between the signatures was obliterated by Section 9(c) of the EEC directive and further Section 36 of the Companies Act which laid down that any person who purports to contract for a company, will be held liable for it personally, unless expressly agreed otherwise by the parties.[79] Thus, to prevent the contract from being declared a nullity, and leaving behind a dead tree where no one is held liable, the statutory enactment reinforced the security of transactions. In India, in the absence of such statutory enactment, the question of liability is left open.[80]

Section 36C of the Companies Act, which crystallized common law and obliterated technical inconveniences, also took within its fold cases where no formal contract was entered into but services were rendered under some arrangement.[81] In the case of *Braymist Ltd v. Wise Financial Co Ltd*.[82], it was held that not only can the agents be sued under the contract but can also sue on the contract.

A look at the American jurisprudence suggests a strict liability for the promoter in case the corporation is not formed or doesn't adopt the contract. Thus, in the case of *RKO-Stanley Warner Theatres, Inc. v. Graziano,*[83] the promoter was held personally liable in spite of explicitly denying the liability for such contract and placing it on the corporation to be formed. Even after the corporation was formed, it never adopted the contract, hence the court turned down to the plea to limit the personal liability to the pre-incorporation stage.[84]

[77]*Id.*
[78]*Id.*
[79]Arden & Prentice, *supra* note 67.
[80]Ramaiya, *supra* note 23.
[81]Hellmuth, Obata & Kassabaum Inc. v. Geoffrey King (unreported, Sept. 29 2000, QBD, Technology & Construction Court).
[82]Braymist Ltd v. Wise Financial Co Ltd., (2002) EWCA Civ 127.
[83]RKO Stanley Warner Theatres, Inc. v. Graziano, (1975) 355 A.2d 830.
[84]*Id.*

Restatement of Agency suggests three routes available in case of a pre-incorporation contract: make the corporation liable on the contract; liability of the promoter to ensure that the corporation adopts the contract or; termination of promoter's liability on the corporation adopting the contract. [85] The default rule however, is to make the promoter personally liable on all such contracts.[86] Out of these alternatives, the first one would not be allowed in India since Specific Relief Act requires acceptance by the company and such acceptance can't be pre-imposed on the company without its will. The third case in India is ambiguous.

South African Law not only makes the promoter personally liable but also holds him in breach of dual warranty of statutory authority. One is that promoter will incorporate the company within reasonable period of time and also that the company would ratify the contract. This provides the third party with much needed security of transaction but "the statutory warranty approach begets uncertainty by leaving lacunae and gaps during the interim period between the execution of the pre-incorporation contract by the agent and its ratification by the company. This gives rise to a number of practical problems and challenges, such as the issues of unilateral withdrawal of the third party and mutual cancellation of the agreement during the interim period."[87]

The question of promoter's liability on the contract is an unsettled issue in Indian law due to the absence of any statutory enactment to the effect and lack of any judicial pronouncements to define the contours of the issue.[88] Ramaiyya's commentary suggests that under Section 230 of the Indian Contract Act, a promoter can't be held liable under a pre-incorporation contract since under Section 230 of the Indian Contract Act, an agent is not personally bound by the contract entered for his principal.[89] Thus, once the company is incorporated, the promoter can't sue or can be sued in case the company refuses to ratify the contract[90]

[85]Rand, *supra* note 15.
[86]*Id.*
[87]Fry, *supra* note 20.
[88]Ramaiya, *supra* note 23.
[89]*Id.*
[90]*Id.*

except on the principle of quantum merit or breach of warranty of authority.[91] Quantum merit would imply that if the promoter has rendered services to other party and it has been accepted by the other part, then he can sue under the contract.[92] However, it is submitted that such position is incorrect because it assumes an agent principal relation. The move to make promoter personally liable would depend on the intention of the parties and no such rule to make the contract void can be deduced from even Indian jurisprudence.

The promoter's personal liability can be avoided by construing a pre-incorporation agreement as a revocable offer or "gentle-man's agreement" under which, if the offer is not revoked, the corporation can on adoption accept the contract.[93] The advantage for the promoter under this interpretation of the contract is that he has no rights or liabilities regarding the contract provided there was no fraudulent intent or breach of warranty of authority.[94] A look at the Specific Relief Act also suggests that one can interpret the Company's ratification as acceptance of an offer by the third party. The promoter merely locks in the third party for the company.[95]However, this doctrine is not very popular with American Courts since it can be nugatory defeating the very intention of the parties to give some legal effect to the contract.[96]

An issue however arises because of the note put in the Name Approval Certificate. The Certificate, issued by the Registrar under its statutory power clearly says that no contract can be entered on behalf of the proposed company till it is registered i.e. it is incorporated.[97] It is not clear if it is a condition subsequent to issuance of certificate and to

[91]Royal Bank of Canada v. Starr, (1985) 31 BLR 124 (Canada).
[92]Cotronic (UK) Ltd v. Dezonie, (1991) BCLC 721 (CA).
[93]HARRY G. HENN & JOHN R. ALEXANDER, LAW OF CORPORATIONS (3rd ed., West Publishing Co. 2007).
[94]*Id*; RAC Realty v. WOUF Atlanta Realty Corp, (1949) 205 Ga. 154, 52 SE 2d 617; Strause v. Richmond Woodworking Co., (1909) 109 Va. 724, 65 SE 659.
[95]Cotronic (UK) Ltd v. Dezonie, (1991) BCLC 721 (CA).
[96]*Id.*
[97]Sample available at: http://coconutboard.in/kadathanad/pdfs/Certificate%20of%20Approval%20of%20Name.pdf.

harmoniously construct this note with the Specific Relief Act, one might come to conclusion that until and unless the Company ratifies the contract, any such contract can never bind the company. Thus, one strand of interpretation suggests that the contract can't be enforceable and hence would be void. Other strand would still hold the promoter liable personally and would only bar burdening the company with any such contract.

B. On Ratification by Company

Another problem with ratification/adoption is the uncertainty that underlies the continuance of the promoter's liability after the corporation ratifies or adopts the contract.

As mentioned before, the English Law denies ratification of a pre-incorporation contract. Under the English Law, novation is permitted which requires the corporation to take promoter's place. Such substitution of parties is termed novation.[98] This theory of novation has been propounded by Williston[99] and has been accepted by the courts too.[100] Novation undoubtedly releases promoter from all liability under the contract.[101]

With Specific Relief Act in place and unilateral ratification being permitted, the position resembles the American position more. The Specific Relief Act only requires the company to convey the acceptance to the other party and doesn't necessitate express assent by the third party. Thus, the position resembles American position in that respect. For this precise reason, American jurisprudence will be looked into to ascertain the position and Goodman v. Darden[102] clarified that merely because the corporation adopted the contract, doesn't dissolve the promoter of his personal liability. In this case, both the parties were aware that corporation is non-existent at the time of making of contract and further

[98]Arden & Prentice, *supra* note 67.
[99]Gross, *supra* note 22.
[100]*Id.*
[101]Rand, *supra* note 15.
[102]Goodman v. Darden, (1983) 670 P.2d 648.

that, the corporation did accept the contract and the promoter directed all the payments received under the contract to the company. Still, the court went ahead to hold that the intention of the third party was never to release the promoter from the liability. The very knowledge of it being a pre-incorporation contract would indicate that to reduce the uncertainty, the third party would have intended to make the promoter liable too which didn't end on corporation adopting the contract.[103] This might be to ask for warranty that the corporation would perform its obligations, which is analogous to the South African statutory law.[104] Thus, what the court examines is the third parties' intention as to whether the third party intended to limit the liability of the promoter on the corporation adopting the contract.[105]

In the Indian context what might be suggested is either to amend the provision for ratification or ask for novation, otherwise mere adoption by corporation won't be a guarantee for the promoter to be relieved of all its liabilities.[106] However, a case for abolishing promoter liability once the company adopts the contract can also be rooted on the principles of fairness and equity.[107] This would reduce the burden on one party and would even distribute the benefits and liabilities between the parties. Further, it would fetter the third party's choice of holding anyone of his choice liable under the contract. [108] It is also submitted that the case of Goodman has been fallaciously interpreted the intent of the parties since it failed to give due acknowledgment to the intent of the promoter, who on adoption by the company would naturally not intend to be bound personally since incorporation's primary feature is that it ensures limited liability. [109]Another argument in support of abolishing personal liability of promoter would be by the principle of contractual mutuality. On incorporation, the promoter has no personal interest in the contract and it

[103]*Id.*
[104]Cotronic (UK) Ltd v. Dezonie, (1991) BCLC 721 (CA).
[105]Wolfe v. Warfield, (1972) 296 A.2d 158.
[106]Gross, *supra* note 22.
[107]Eddie R. Flores, *The Case For Eliminating Promoter Liability On Pre-incorporation Agreements*, 32 ARIZ. L. REV. 405 (1990).
[108]*Id.*
[109]*Id.*

is solely by the virtue of the company. Hence, it is unfair to make the promoter liable. An interesting case would arise when it involves a One Person Company. Thus, the following test has been suggested:

First, has the promoter entered into a contract on behalf of a non-existent corporation? Second, has the corporation adopted or ratified the contract? Third, have the corporation and the third party contractor entered into a novation to release the promoter from liability, or, has the third party agreed to look solely to the corporation for liability? Finally, is the corporation genuine or has it been established to defeat promoter liability in connection with a fraudulent scheme?[110]

Further, the practices from other jurisdictions can be of greater help for solving the issue of the pre-incorporation contracts. In jurisdictions like Germany, Australia and South Africa, innovative solutions have been introduced by the legislature to deal with the problem of liability of Promoters for the pre-incorporation contracts. In USA the ratification of the pre-incorporation contract need not be done expressly. Ratification of this contract will happen automatically after the company is formed if that contract has been made for the benefit of the company. Germany, which is a civil law country, the promoter can make the other promoters liable along with him and the pre-incorporation association can be treated similar to that of a partnership.[111] Another important aspect of the German Law is that there is a theory called theory of Identity, which states that the company formed after the incorporation will be treated similarly as the pre-incorporation association and after the incorporation that body will get the same rights and obligations as enjoyed by the pre-incorporation association prior to the incorporation of the company.[112] This theory was later named as the theory of Continuity and under these theories the company after its formation need not adopt or ratify the contract and the obligations and rights will be accrued to the company as if under the succession.[113]

[110] *Id.*
[111] *Id.* at 11.
[112] *Id.* at 12.
[113] *Id.*

It is submitted that this theory as adopted in Germany can be considered as the best solution to avoid the liability for the promoter. In India, as stated earlier, it will be usually the promoters who will have a major control in the company so if the contracts are accrued to the company as if under succession then the promoters will be saved from liabilities and even the third parties will also have a better debtor as the company will get obligations towards them and they will have a better security against the dues that have to be paid to them or any service if any, has to be rendered to them. In the Indian context, this will be apt as the most of the companies are family based and the pre-incorporation contracts entered also will be beneficial to the company in most of the instances. Legislature should also consider this option as the issue of pre-incorporation contracts is a special case and it's not a simple one as it appears. Under the Australian laws, where Section 131 of the Australian Corporation Act, 2001 states that the Court can interfere into this matter of the pre-incorporation contract if the Companies won't ratify the contracts. Under this law the court can order for the payment of damages to the promoter if it thinks that it's appropriate to grant such an order. It is submitted that this law is a radical step as the courts can interfere to protect the promoters whose contracts haven't been ratified by the company. In the Indian context also this may hold well because there may be a promoter who also may be a minority shareholders and the majority might not ratify the contract after the incorporation of the company. This might suit for our country as even the available remedies are not targeted to protect the promoters but only for the protection of the third party and this also depends upon the discretion of the company.

V. RELATIONSHIP BETWEEN THE PROMOTER AND THE COMPANY

Though the case laws and the academic discourse on this issue has been multifaceted and inconclusive, but the Indian Supreme Court has affirmed a previous high court ruling which defined the relation between

the two as that of a fiduciary relation.[114] It rejected the position of the promoter with respect to that of the unincorporated company as that of agency or trustees.[115] In the case of *Weavers Mills v. Balkis Ammal*[116], it was held that even without express conveyance of property by the promoter to the unincorporated company, since the promoter stands in fiduciary duty to the company, all the benefits of the pre-incorporation contract would pass on to the company.

> "*While we accept the position that a promoter is neither an agent nor a trustee of the company under incorporation, we are inclined to think that in respect of transactions on behalf of it, he stands in a fiduciary position. … The legal position of a promoter in relation to his acts, particularly purchase of Immovable properties on behalf of the company under incorporation, is a peculiar one not capable of being brought into any established or recognized norms of the law as to its character as an agent or a trustee. But, at the same time, it is impossible, to our minds, to deny that he does stand in a certain fiduciary position in relation to the company under incorporation. When he does certain things for the benefit of it, as for instance, purchase of Immovable properties, he is not at liberty to deny that benefit to the company when incorporated. We are prepared to hold that in such a case the benefit of the purchase will pass on to the company when incorporated*."[117]

Being in a position of fiduciary duty, can the promoter force the company to compensate it for the pre-incorporation expenses that the promoter incurs on behalf of the company? One position can be that if the company accepts the benefits of the contract, then it must accept the burden too and hence must compensate the promoter for all his expenses under the said

[114]Gross, *supra* note 22.
[115]*Id.*
[116]Weavers Mills v. Balkis Ammal, (1969) AIR Mad 462.
[117]Gross, *supra* note 22.

contract. However, if the company doesn't ratify the contract, then the promoter can't claim for reimbursement.[118]

The reimbursement can be in the form of increased payup during the allotment of shares.[119] However, allotment of shares in lieu of pre-incorporation services is not treated as a good consideration in a number of American jurisprudences.[120] Under the Indian Contract Act however, since consideration for past services is considered to be good consideration,[121] allotment of shares in lieu of pre-incorporation services can be permissible.

A. Liability Of A Co-Promoter

Here the issue of non-existence of a principle doesn't arise. This especially becomes pertinent when the promoter acts to incorporate a subsidiary of a foreign company. One can claim that the promoter is acting as agent of an already existing holding company, and hence could ask for his remuneration and re-imbursement from this company.

English Law however, restricts the liability of co-promoters only to cases where an express authority to act as agent is conferred. The courts have been slow to read implied authority[122] and have explicitly rejected conferring such liability.[123] English law suggests, albeit weakly, that pre-incorporation association to be that of partnership. However, what it is pertinent to prove is that the association is with the common objective of earning profit.[124] This becomes difficult to show when the object is merely administrative in nature i.e. to get the company organized. However, when it was shown that the object was more than administrative, i.e. for acquiring a business and operating it before incorporation (pre-ordering goods for restaurant), then it can be

[118]Cotronic (UK) Ltd v. Dezonie, (1991) BCLC 721 (CA).
[119]Arden & Prentice, *supra* note 67.
[120]Cotronic (UK) Ltd v. Dezonie, (1991) BCLC 721 (CA).
[121]A R Mohammed Jalaludeen v. V. S. Dhakshinamoorthy, Second Appeal No. 980 of 2009 (Mad HC).
[122]Reith, *supra* note 18.
[123]Ramaiya, *supra* note 23.
[124]Indian Partnership Act 1932, §1(1).

considered to be a partnership and expenses were recovered from all promoters.[125] It is difficult to hold them liable as an association sui generis but if the association was a partnership that was later incorporated then one can say that the acts of the promoter can bind the partnership as a whole.[126]

In India, partnership act lays down that partnership must be the result of an agreement[127], which need not be formal or written,[128] but the requirement to carry out business is indispensable under the Indian Partnership Act.[129]

South African law has again taken a leap forward by holding all promoters jointly and severally liable for a pre-incorporation contract entered into by any of the promoter.[130] Care must be taken to not focus merely on the signatory but also on any implied authority by other promoters.[131]

VI. PRE-INCORPORATION OR DEFECTIVE CORPORATION?

Often Newborne case and Kelner case is commented upon by mentioning how the intention of holding promoter liable hinged on technical distinction of how the contract was signed. However, it must be noted that Newborne dealt with a contract with a defective corporation. The confusion is not new and people often tend to put both of them under the same umbrella. [132] It has been suggested that the doctrines of corporation

[125]Keith Spicer Ltd v. Mansell, (1970) 1 WLR 333.
[126]Reith, *supra* note 18.
[127]Indian Partnership Act, 1932, §4.
[128]Abdul v. Century Wood Industries, (1954) AIR Mys 33.
[129]The Indian Partnership Act 1932, §4; AVATAR SINGH, INTRODUCTION TO LAW OF PARTNERSHIP (10th ed., Eastern Book Company, 2010).
[130]*Supra* note 20.
[131]In the case of Bay v. Illawarra Stationery Supplies Pty Ltd *(*1986) 4 ACLC 429*;* even when four promoters were acting together, only one of the signatory promoter was held liable.
[132]Norwood P. Beveridge, *Corporate Puzzles: Being a True and Complete Explanation De Facto Corporations and Corporations by Estoppel, Their Historical Development,*

by estoppel and de facto corporation can be used to deal with the problem of pre-incorporation contracts.[133] These doctrines protect the promoters or directors from being personally liable on contracts that were entered into with a company, that both parties, in good faith, believed to have been incorporated, when it was not.[134]

What most commentators can miss is that the distinction lies in the knowledge of the parties. In a pre-incorporation, no effort is undertaken to incorporate. Merely having good faith intent to incorporate is not a sufficient requirement for the doctrine of corporation by estoppel to operate. Some attempt must be undertaken to bring it into operation. Further, another difference that lies is in the knowledge of the parties. Whereas in pre-incorporation contract, both parties know that the company is yet to be incorporated, in a defective incorporation both have a bona fide but fallacious belief in the existence of the company. If the promoter lies about the same to the other party, then he can clearly be held liable for fraud or breach of warranty of authority.[135]

In the Indian scenario, on account of the name approval certificate, it is quite clear that the doctrine of corporation by estoppel or de facto corporation would come into play only when attempts are made to file certificate of registration.

VII. CONCLUSION

This paper would conclude with some drafting suggestions for a pre-incorporation contract and might look at some favorable alternatives that can be made a part of the law itself. Half of the problems of pre-

Attempted Abolition, and Eventual Rehabilitation, 22 OKLA. CITY U. L. REV. 935, 938 (1997).
[133]Singh, *supra* note 9.
[134]Rand, *supra* note 15.
[135]*Id.*

incorporation contract can be resolved by apt drafting which clearly sets out the intention of the parties.[136]

Regarding the drafting suggestion, the promoter must limit his risk by explicitly bargaining for no personal liability in case of failure of non-ratification and that in case of ratification, his liability would end. A further rider must be put indicating the status of the corporation and the promoter can also disown liability for making the corporation compulsorily ratify the contract. This is because the contract per se can't include a clause for compulsorily burdening the company with any liability it didn't consent too and the shareholders can't be forced with such contract.[137] It is further consistent with principle of preserving the share capital of the company.[138] Though sometimes the promoter, who might become the majority share- holder can enforce the ratification as an incident of his power but legally such enforcement is not voluntary.[139] Rights and obligation of the promoter, of the contemplated corporation along with consequences (which follows if the contemplated corporation repudiates the agreement or does nothing regarding the agreement, with or without accepting the benefits) with respect to ratification/non-ratification must be followed. [140] The promoter can also put in a clause of indemnification of all pre-incorporation expenses.[141]

Under the Indian law, one can conclude that the corporation can adopt the contract. However such adoption/ratification is no guarantee that the contract will release the promoter from the liability and hence the promoter must undertake appropriate safeguards to protect himself and press for novation of the contract. In case of non-ratification by the promoter, it is quite possible that Indian courts might take the common law road to make the promoter personally liable on the contract. However, interpretation to deny this personal liability also exists especially if one construes the pre-incorporation contract to be that of a

[136]Cotronic (UK) Ltd v. Dezonie, (1991) BCLC 721 (CA).
[137]Reith, *supra* note 18.
[138]*Id.*
[139]Arden & Prentice, *supra* note 67.
[140]Cotronic (UK) Ltd v. Dezonie, (1991) BCLC 721 (CA).
[141]*Id.*

continuing offer for the corporation. Though South African law might hold other co-promoters jointly or severally liable, Indian Courts might take the English path and would be slow to read in liability for all co-promoters. A strong case can be made by the promoter to be indemnified for all the pre-incorporation contracts especially if the Corporation adopts the same and reimbursement for services can commonly be sought by increased allotment of shares. Finally, care must be taken to not club all pre-incorporation contracts as one that being made by defective corporations.

THE PREVENTIVE MECHANISM ON BOARD AN AIRCRAFT, IN THE LIGHT OF THE MONTREAL PROTOCOL OF 2014

*Pranay Bali & Mihika Gupta**

Abstract

The increasing frequency of air traffic brings with it fresh challenges which need to be analysed with the existing laws. Keeping this in mind the Montreal Protocol 2014 was developed as an amendment to the Tokyo convention of 1963, on offences and certain other acts on-board an aircraft. This paper analyses the introduction of the new provisions in the protocol and the need for the same. Specifically, it first identifies the various jurisdictional limits of the convention, and what bearing the new protocol will have on the exercise of jurisdiction by affected nations. Second, it discusses the increasing importance of In-Flight Security Officers with respect to the problems related to unruly passengers, and how the amended convention provides for the same, throwing new light in this regard. In this context, the loopholes in the original convention of 1963 are identified, and the improvements made by the amendment to the preventive mechanism of aviation security are analysed.

I. INTRODUCTION

In light of the increasing incidents of terrorism and crime, the Convention on Offences and Certain other acts committed on Board Aircraft (hereinafter, the Tokyo Convention) was formulated over 50 years ago in 1963. Due to an increase in the incidence of crimes other than that of hijacking and terrorism, the need to develop a new set of legislation emerged. In the light of this, the Montreal Protocol of 2014, came out as an amendment to the existing provisions of the Tokyo Convention. The Protocol is required to be ratified by a total of 22 states before it comes into force. This paper analyses the main areas that the new provisions of this Protocol deal with.

II. JURISDICTION

Article 3 and 4 of the Tokyo Convention[1] contain the provisions regarding jurisdiction. Briefly, Article 3 grants the state of registration of the aircraft the power to exercise jurisdiction. It does not exclude the criminal jurisdiction, which may be exercised in accordance with the country's domestic penal laws. Article 4 on the other hand grants jurisdiction to any contracting State, which is not the State of registration, in the light of few exceptional circumstances.[2] However, in order to fully understand the scope of the Tokyo Convention, the various forms of jurisdiction present in international law must also be considered. This is because in order to successfully prosecute a crime, the State's first step must be to acquire jurisdiction.[3]

*Pranay Bali and Mihika Gupta are students at the National Law University, Jodhpur. The author may be reached at pranay94@gmail.com.

[1]Convention On Offences And Certain Other Acts Committed On Board Aircraft, Tokyo, 14th September 1963, ICAO Doc. 8364 ["**Tokyo Convention**"].

[2]Tokyo Convention, Art 4.

[3]Robert F. Klimek, *International Law-Convention On Offenses And Certain Other Acts Committed On Board Aircraft-The Tokyo Convention,* 20 DEPAUL L. REV. 485 (1971).

A. The Principle Of Nationality

A person's nationality enables the State to which he belongs, to assert their jurisdiction.[4]An extension of this rule can be extended to the nationality of an aircraft. The aircraft can be said to have the nationality of the State in which it has been registered.[5] The idea that aircrafts have nationality goes back to the earliest days of commercial aviation,[6] and this concept is derived from maritime law. Any vessel flying the flag of a particular nation, is its jurisdictional extension, and therefore any act committed against the vessel has an effect on the territory of that state, thereby giving it jurisdiction.[7]

B. The Principle Of Territoriality

This principle implies that a State enjoys sovereignty over its territory, which includes the airspace in its domain. The Paris Convention and the Chicago Convention have also recognized this principle.[8] The territoriality principle gives the nation state jurisdiction when an event, which has an effect on the State itself, takes place. This principle is used to prove, under maritime law that any vessel flying the flag of a particular nation is an extension of that nation, therefore any act against that vessel is deemed to have an effect on that State.[9]

The Tokyo Convention does not provide for mandatory jurisdiction in any provision. Rather, it allows the coexistence of other recognized bases for jurisdiction, as have been recognized above. In addition to this, the Convention does not contain any system, which gives priority of jurisdiction to any particular nation. It grants jurisdiction equally to the

[4]Mendelsohn, *In-Flight Crime: The International and Domestic Picture under the Tokyo Convention,* 53 VA. L. REV. 509, 511 (1967).
[5]Juan J. Lopez Gutierrez, *Should the Tokyo Convention of 1963 Be Ratified?* 31 J. AIRL. & COM. 3, 7 (1965).
[6]Convention Relating to the Regulation of Aerial Navigation), Paris, 13th October 1919, 11 LNTS 173, Art 6-8.
[7]Mendelsohn,*Supra* note 4, at 511.
[8]Convention Relating to the Regulation of Aerial Navigation), Paris, 13th October 1919, 11 LNTS 173; Convention on International Civil Aviation, Chicago, 7th December 1944, 15 UNTS 295.
[9]Mendelsohn,*Supra* note 4,at 511.

State of registration of the aircraft and to any other contracting State to the Convention. This can very often create conflict as to where the jurisdiction truly rests. There is no system to delimit this jurisdiction among the various nations who may assert it.[10] The contracting states are free to decide which among them shall assert jurisdiction, and the manner in which it will be asserted.[11]However, this is also one of the strengths of the Convention, as it ensures that at least one State will eventually prosecute the offender.

C. Weakness In The Jurisdiction Provisions Of The Convention

The French jurist Fauchille in 1902 recommended that the law of the flag, or the nationality of the airplane should govern the jurisdiction of the offences committed on board regardless of the nationality of the offender or the victim.[12] The Tokyo Convention has also recognized this principle.

The State of Registration of the aircraft is competent to exercise jurisdiction over offences and acts committed on board, as has been established by the Convention.[13] It then requires each contracting State to take all necessary measures in its laws to establish its jurisdiction as the State of Registration over offences committed on board its aircraft.[14] The Convention does define what qualifies as a jeopardizing act in Article 1, however it is also left up to the individual State to determine what are or are not criminal acts on board its aircraft.[15]

Although jurisdiction is primarily vested in the State of registry, the Tokyo Convention does not exclude any criminal jurisdiction exercised in accordance with national laws.[16] Consequently, due to such provisions,

[10]Boyle &Pulsifer, *The Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft,* 30 J. AIR L. & COM. 329 (1964).
[11]*Id*. at 353.
[12]E. Nys,*Régimejuridique des aerostats, 2. Rapport de M. Nys, second rapporteur sur lerégimejuridique des aérostats",* 19, Institut de Droit International Annuaire 97 (1902).
[13]Tokyo Convention, Art 3(1).
[14]Tokyo Convention, Art 3(2).
[15]Captain Russell Kane,*Time to put Teeth into Tokyo?*43 ZLW 187 (1994).
[16]Tokyo Convention, Art 3(3).

exclusive jurisdiction has not been established by the Convention. Rather a system of concurrent jurisdiction emerges. As the State of registry, a State Party bears a "best efforts" obligation to assert its jurisdiction over criminal offences committed on board aircraft registered by it. [17]

Commentators have often contended that the State of Registry does not have any obligation to exercise jurisdiction.[18] The Tokyo Convention does not provide for mandatory jurisdiction.[19] In fact, the State of registry is only obliged to "take measures as may be necessary to establish its jurisdiction as the State of registration over offences committed on board aircraft registered in such State."[20] The use of the word offences narrows the scope of jurisdiction of the State of registry. Therefore the existence of a legal basis for the State of registry to exercise jurisdiction over acts that are not criminal offences, but nonetheless jeopardize the safety of the aircraft or the good order and discipline on board, can be questioned.[21] Under the Convention of 1963, this would seem to be optional for States Parties.[22]

There are also a few weaknesses in the nationality theory. As Fauchille himself acknowledges that, the theory fails to account for the interests of the State, which might be affected by the criminal incidents on board. In addition to this, passengers in today's day and age, select airlines on a random basis depending upon the offer they receive on the airline fares. Yet by accepting such a ticket the passenger would be agreeing to the laws and procedures of that country with the exclusion of all others, and the passengers would have no idea that they have done so. For instance a passenger living in country C may want to fly to country A and may book

[17]NANCY DOUGLAS JOYNER, AERIAL HIJACKING AS AN INTERNATIONAL CRIME (Brill Archive, 1974).
[18]ICAO, Report of the Rapporteur Mr. Alejandro Piera '*Report Of The Rapporteur Of The Special Sub-Committee On The Preparation Of An Instrument To Modernize The Convention On Offences And Certain Other Acts Committed On Board Aircraft Of 1963'* LC/SC-MOT-WP/1 7th May 2012 at p.147.
[19]JOYNER, *Supra* note 17, at 13.
[20]Tokyo Convention, Art 3(2).
[21]Christian Giesecke, *Unruly Passengers: The Existing Legal System and Proposed Improvements*,53ANNALS OF AIR & SPACE LAW 26 (2001).
[22]Kane, *Supra* note 15, at 190.

B-airlines which is registered in country B. Thereby any offence which might be committed on board will give country B jurisdiction according to the nationality theory, even though the interests of country A and C are at stake. Therefore this skews the concept of jurisdiction.

The jurisdictional gap that exists due to the above-discussed provisions can be addressed by introducing the jurisdiction of the State of landing. This provides a number of advantages. Very evidently, as has also been noted by Mendelsohn, "When the aircraft lands, all the passengers, ergo, all potential witnesses to the offence, are present."[23] In addition to closing the jurisdictional gap, it also discourages the occurrence of criminal acts on board aircraft.[24] The provision to grant the State of landing jurisdiction was added in the amendment to the Tokyo Convention, that is, the Montreal Protocol, 2014.[25] Article IV of the Protocol[26] states that the State of landing shall be competent to exercise jurisdiction when the aircraft on board which the offence or act is committed lands in its territory with the alleged offender still on board.

To address the jurisdictional gap identified above as one of the flaws of the Tokyo Convention, the new Protocol combines options contained in The Hague and Montreal Conventions, and in the Beijing instruments.[27] Most notably, the Montreal Protocol 2014 recognizes the following jurisdictions: (i) State of registry; (ii) State of the operator; (iii) State over whose territory the offence is committed; (iv) State of the nationality of the offender; and (v) State of landing. Just as for the Tokyo Convention, the new instrument does not exclude any criminal jurisdiction exercised in accordance with national law.[28]

[23]Mendelsohn,*Supra* note 4,at509.
[24]Gutierrez, *Supra* note 5.
[25]Protocol to amend the Convention on Offences and Certain Other Acts Committed On Board Aircraft, Montreal, 4th April 2014, DCTC Doc No. 33 [hereinafter "Montreal Protocol"].
[26]Montreal Protocol, Art 4.
[27]ICAO, *Supra* note 18.
[28]*Id.*

III. UNRULY PASSENGERS

As reported by the International Air Transport Association there have been over 28,000 cases of unruly behaviour on board aircrafts between the years 2007-2013. These cases include violence against crewmembers and other passengers, sexual harassment, failure to follow safety instructions, etc.

The loopholes in the Tokyo Convention allow unruly behaviour to go unpunished. Which is why, one of the main concerns the Montreal Protocol addresses is the problem related with unruly behaviour. It provides a proper definition for the term unruly passengers as, passengers who fail to respect the rules of conduct on board aircraft or to follow the instructions of crewmembers and thereby disturb the good order and discipline on board aircraft.[29]

The agreed changes give greater clarity to the definition of unruly behaviour (such as including the threat of or actual physical assault, or refusal to follow safety-related instructions). There are also new provisions to deal with the recovery of significant costs arising from unruly behaviour.

The new Protocol provides the aircraft commander with greater deference. In doing so, the commander does not need to have reasonable grounds to believe that a passenger is committing a serious offence according to the penal law of the State of registration of the aircraft. The Protocol only requires him to have reasonable grounds to believe that a serious offence has been committed.[30] Such offences could range from terroristic threats, to violent or threatening behaviour against other passengers or crew, to tampering with a smoke detector.[31]

[29]Guidance Material on Legal Aspects of Unruly/Disruptive Passengers, ICAO, Circular 288 (2002) at p.1.
[30]Montreal Protocol, Art 8.
[31]William V. O'Connor et al., *Unruly Passengers Beware: ICAO Delivers Montreal Protocol 2014 To Enhance Enforcement Measures Against Unruly Passengers*, MOFO, http://www.mofo.com/~/media/Files/ClientAlert/140429ICAODeliversMontrealProtocol2014.pdf.

The Protocol also encourages contracting states to take appropriate criminal, administrative, or other measures against any person who commits an in-flight offence, including "physical assault or threat to commit such assault against a crew member" or "refusal to follow a lawful instruction given by or on behalf of the aircraft commander".[32]

IV. IN-FLIGHT SECURITY OFFICERS: THE NATURE AND IMPORTANCE

The events of September 11, 2001, albeit extremely unfortunate, acted as a catalyst for the surge in legislation and regulation in the field of aviation security. Even though the United States had been deploying air marshals on domestic and international flights since the 70s,[33]in the aftermath of the attack it took active steps to pass the legislation that created the Transportation Security Administration and heavily augmented the numbers of air marshals.[34] This example was followed internationally as various countries began to deploy air marshals on-board their flights: In Australia, they are appointed under the Air Security Officer program under the Australian Federal Police;[35] In Canada, under the Canadian Air Carrier Protection Program, provided by the Royal Canadian Mounted Police, and in India, such officers are provided by the National Security Guard,[36] which is one of the eight Central Armed Police Forces of India.[37]

[32]Montreal Protocol, Art 10.
[33]JOSEPH M. SIRACUSA, DAVID G. COLEMAN, DEPRESSION TO COLD WAR: A HISTORY OF AMERICA FROM HERBERT HOOVER TO RONALD REAGAN (PERSPECTIVES ON THE TWENTIETH CENTURY)(215, Prager, 2002).
[34]*Federal Air Marshals*, TRANSPORTATION SECURITY ADMINISTRATION, http://www.tsa.gov/lawenforcement/programs/fams.shtm.
[35]*Air Security Officers: Making Our Skies Safe*, 99 AUSTRALIAN FEDERAL POLICE PLATYPUS MAGAZINE, July 2008.
[36]*Private airlines brace to meet hijack threats*, TIMES OF INDIA, 21st February 2015.
[37]The National Security Guard Act 1986.

At the most essential level, these nations derive the ability to appoint In-Flight Security Officers from Article 17 of the Chicago Convention, which states that "aircraft have the nationality of the State in which they are registered."[38] This statement is augmented by Article 18 of the same convention, which provides that an aircraft can only be registered in one state at a time.[39] Therefore, an aircraft can be said to have the nationality of the state in which it is registered.

It is a well-established principle of commercial aviation that aircrafts have a nationality and in effect, are the national territory of the state of registration.[40] As a result of this principle of aircraft nationality, the laws of the state of registry apply to every aspect of the functioning of commercial airlines.[41] This includes personnel licensing as well.[42]

Further, In-Flight Security Officers are officials appointed by the Government of the state of registration by their very definition, as provided by the International Civil Aviation Organization.The ICAO defines an "in-flight security officer" as a "person who is authorized by the government of the State of the Operator and the government of the State of Registration to be deployed on an aircraft with the purpose of protecting that aircraft and its occupants against acts of unlawful interference". This definition was the first international instance of defining an In-Flight Security Officer, and of the movement towards providing for the same in the Tokyo Convention[43]. This can be illustrated by the 35thSession of the ICAO Legal Committee, which was held from 6 to 15 May 2013 in Montreal, with the main purpose of furthering the proposal of amendment to the Tokyo Convention.[44]

[38]Convention on International Civil Aviation, Chicago, 7th December 1944, 15 UNTS 295.
[39]*Id.*at art 18.
[40]SAMI SHUBBER, JURISDICTION OVER CRIMES ONBOARD AIRCRAFT, The Netherlands, MartinusNIjhoff,109 (1973).
[41]*Supra* note 38, Art 32 & 32(a).
[42]*Supra* note 38, Personnel Licensing, Annex 1.
[43]*Supra* note 1.
[44]Legal Committee-35th Session, Appendix to working paper LC/35- WP/2-1 and Appendix F to the Draft Report (LC_35_YCR_WP 7-13).

One of the more extensively discussed issues was the possibility of including in the amendment a reference to in-flight security officers. However, due to the status of In-Flight Security Officers as Government officials of the state of registration, most of the delegates of the Latin American countries at the meeting were against the inclusion of any reference to the IFSOs in the draft protocol to amend.[45] The apprehensions and oppositions were gradually overcome to include In-Flight Security Officers in the Tokyo Convention, as amended by the Montreal Protocol of 2014.It shall now be analysed how the amendment serves to improve the aviation security framework by filling up certain gaping holes in the Tokyo Convention, with respect to In-Flight Security Officers. The deficiencies of the Tokyo Convention of 1963 shall be looked into in this regard.

V. THE NEED FOR INCLUSION OF IFSOS IN THE TOKYO CONVENTION OF 1963

The 1963 Tokyo Convention on Offences and Certain Other Acts Committed On Board Aircraft[46] was drafted and enacted by the representatives of sixty-one Governments at the International Conference on Air Law convened at Tokyo in August-September 1963under the auspices of the International Civil Aviation Organization (ICAO), a specialized agency of the United Nations.[47] It applies in respect of: "a) offences against penal law; and b) acts which, whether or not they are offences, may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board."[48] Therefore, the primary purpose of the Convention is to ensure the safety of everyone and everything on-board the aircraft. While the

[45]Third Meeting of The Aviation Security And Facilitation Regional Group (Avsec/Fal/Rg/3) Lima, Peru, 19th to 21stJune 2013.
[46]*Supra* note 1.
[47]*Supra* note 10, at 349.
[48]Tokyo Convention, art 1.

aircraft is still in flight, the occurrence of any jeopardising incident is a possibility which has been provided for inadequately by the Convention.

This is so, because in Chapter III of the Convention, titled "Powers of the Aircraft Commander", the Convention provides the aircraft commander the power to impose measures including restraint against a person who, in his opinion, has committed any act envisaged under Article 1, paragraph 1.[49] The provision further provides the aircraft commander the power to: "a) require or authorize the assistance of the other crew members; and b) request or authorize the assistance of passengers to restrain any person who he is entitled to restrain."[50] This provision is inadequate and incomplete because it leaves out the power of the aircraft commander to require or authorize an In-Flight Security Officer to assist him. The provision goes on to confer upon any crew member or passenger the power to take "reasonable preventive action" even without authorization by the aircraft commander, when such person has reasonable grounds to do so.[51]

The fact that this provision of the convention did not include any mention of an IFSO was a serious deficiency when it is taken into consideration that even prior to 1970, four countries-the United States[52], Russia[53], Ethiopia[54] and Israel[55], were known to have used armed personnel on board aircrafts to deter hijackers and ensure flight safety. In light of this, the scope of the actions that could be taken by IFSOs was left ambiguous, especially in terms of acts of the nature defined in the Tokyo Convention. The effect this had, was that an IFSO, who should have been in the primary position to take preventive action under the convention, could

[49] *Id.* art 6(1).
[50] *Id.* art 6(2).
[51] *Id.*
[52] JEFFREY C. PRICE & JEFFREY S. FORREST, PRACTICAL AVIATION SECURITY: PREDICTING AND PREVENTING FUTURE THREATS 67 (Butterworth-Heinemann, 2nd edition 2009).
[53] *Soviet Union: A Dreaded First for Aeroflot*, TIME, 26th October 1970 at p.46.
[54] Aircraft Hijackings and Other Criminal Acts Against Civil Aviation: Statistics and Narrative Reports, Office of Civil Aviation Security at p.60 (1986).
[55] AMI PEDAHZUR, THE ISRAELI SECRET SERVICES AND THE STRUGGLE AGAINST TERRORISM 36(Columbia University Press, 2009).

not restrain a wrongdoer under a literal interpretation of Article 6(2), as he could not be considered to be a member of the crew, nor a passenger.

A. Improvements Brought Forth By The Montreal Protocol Of 2014

The deficiencies in the Tokyo Convention of 1963 with respect to IFSOs, took their toll on civil aviation, as there were over 28,000 reported cases of unruly passenger incidents on board aircraft in flight from 2007-2013.The persistent efforts by the ICAO to bring about an amendment to the Tokyo Convention of 1963 culminated in the Montreal Protocol of 2014[56], which closes the loopholes in the original convention.

With regard to the inclusion of IFSOs, which was one of the most extensively discussed issues in the drafting process,[57] the protocol has amended Article 6 of the convention. Paragraph 2 of the Article has been amended and it now reads: "*the aircraft commander may require or authorize the assistance of other crew members, and may request or authorize, but not require, the assistance of in-flight security officers or passengers to restrain any person who he is entitled to restrain*."[58]

Paragraph 3 has been inserted into the Article, which confers upon an in-flight security officer the power to take a reasonable preventive measure even without the authorization of the aircraft commander, only when he has reasonable grounds to believe that such action is immediately necessary to ensure the safety of the persons and property on board the flight. The provision confers this right upon "*an in-flight security officer deployed pursuant to a bilateral or multilateral agreement between the relevant contracting states*."[59] The reason for the same has been elaborated upon in the comments and observations on the draft proposed text of the Tokyo Protocol of 1963, presented by Qatar:

[56]*Supra* note 25.
[57]Boyle &Pulsifer,*Supra* note 10.
[58]*Supra* note 25.
[59]*Id.*

"*The issue (of insertion of in-flight security officers in the draft protocol) is not merely limited to endorsing the provision concerning in-flight security officers for implementation. The consequences go well beyond that. The implementation of such a provision requires many arrangements and total coordination among States for the training of in-flight security officers, arming them, deciding on the number and the type of these weapons, on the procedures for their entry into the country, whether they should keep their weapons once they leave the plane and their interaction with the State authorities*."[60]

The Montreal Protocol, thus, provides for in-flight security officers in clear and unambiguous terms, giving them the powers to take the requisite measures to deal with unruly persons on board aircraft.

B. Unlawful Interference

Another hiccup in ensuring the effectiveness of IFSOs stemmed from the definition of the term itself. According to the ICAO definition, an in-flight security officer is "to be deployed on an aircraft with the purpose of protecting that aircraft and its occupants against acts of unlawful interference".[61] This raised the question of whether the scope of an IFSO's power was limited only to acts of unlawful interference, or did it also extend to acts of unruly passengers.

An "unlawful interference" has been defined in the Hague Convention as "an act committed unlawfully, by force or threat, or by any other form of intimidation, to seize, or exercise control of, that aircraft, or attempt to perform any such act."[62] Thus, according to this definition of "unlawful interference", an IFSO will only have the power to act against an attempt to seize control of the aircraft by any person, or in simpler terms, a hijacking.

The Montreal Protocol thus, serves to end all confusion in this regard by expressly providing for IFSOs in Article 6 of the convention. The

[60]Comments and Observations on the Draft Proposed Text of the Tokyo Protocol of 1963, Montreal (26th March to 4th April 2014) DCTC Doc No. 12.
[61]*Supra* note 45.
[62]Hague Convention, art 1.

situation was further clarified by the ICAO, when it provided that themain mandate of the IFSO is to prevent acts of unlawful interference with civil aviation, but the Government may also include in the mandate the duty to assist the crew, if necessary, in dealing with act of unruly passengers in particular those, which endanger the safety of flight.[63]

Therefore, the position of In-Flight Security Officers has been clarified and cemented by the commendable efforts of the ICAO and the delegates of all the concerned nations by legislating an essential amendment to the Tokyo Convention and adding teeth to its preventive procedure.

VI. CONCLUSION

The new instrument does in various ways fill the void that was evident in the Tokyo Convention in terms of jurisdiction. It provides a wider ambit and expands the scope of prosecution, ensuring that the wrong doers do not go unpunished. However, this could also lead to conflict among various countries if more than one country tries to assert jurisdiction in a given matter. This could lead to unnecessary complications and delay, which could have been avoided, had mandatory jurisdiction been provided for in the Convention.

The clarification of the term unruly passengers, ensures that a certain level of discipline is maintained on board the aircraft. Giving the commander additional powers of deference will also enforce the same. However, restricting the use of the word unruly only to the passengers has been criticised as on many occasions it has been seen that crewmembers at times also indulge in disruptive and hazardous behaviour. Therefore their behaviour should not go unpunished as well. Moreover, additional deference to the commander may at times result in innocent people getting punished. This could be because of faulty judgment on part of the commander in determining what constitutes a

[63]Montreal Convention, art 6.

"serious offence" without having any guidelines to rely on, in order to identify the same.

In-Flight Security Officers have been an integral part of aviation security for more than fifty years. The need to appoint them to serve on-board international, as well as domestic flights is of paramount importance in the present day, when air travel has reached a peak in terms of the quantum of travellers. With increasing acts of unruly behaviour occurring on-board aircrafts, the Tokyo Convention fell short of providing an effective preventive mechanism, as it ignored the inclusion of IFSOs in dealing with unruly passengers, thereby causing confusion as to the extent of their power to act in such situations.

The Montreal Protocol of 2014 has served to clarify the role of IFSOs in clear and express terms and has paved the way for more effective implementation of the preventive mechanism as envisaged by the Tokyo convention. As a result, the future of commercial air travel looks safer than before.

UMBRELLA CLAUSES: A JURISPRUDENTIAL ANALYSIS UNDER THE MODERN DAY BILATERAL INVESTMENT TREATIES

*Tanay Khanna & Milind Rai**

Abstract

With the sudden proliferation of BITs in the last decade the problem of umbrella clauses which has far now been the most controversial area in the domain of international investment arbitration has bloomed with majority of BITs featuring umbrella clauses. We have gone into a brief history of the clause and traced its working from its origin to the modern day system of BITs. Through these clauses, investors have elevated contract breaches into international obligations, and have received the protection for their investments against the host states. The tribunals all around the globe seem to be divided on the issue of interpretation of the clause, and there is yet no predictability over the matter. The paper also talks about the role of sub-state entities in the investment agreements. This paper analyses the role of host state in bestowing authority to its instrumentalities to execute investment contracts with the investors. The municipal law on this issue is regarded of high relevance and is considered to be the last resort in dispute settlement. This paper also deals with the principle of privity of contract in the light of the investment arbitration since arbitration is

deemed to be a creature of consent. It also delves into the rights and obligations of the subsidiaries of the investing parties and their stakes into domestic companies of host State. This paper clearly depicts umbrella clauses as a modern day tool for investors against the host State, which is a party to a bilateral investment treaty.

I. INTRODUCTION TO UMBRELLA CLAUSES

There has been a growing uncertainty to the term 'Umbrella clauses' which have been found in multiple Bilateral Investment Treaties (BIT). To put it succinctly, umbrella clauses create mutual international obligations to be indebted by the contracting states that compel them, as host states, to respect the obligations they have entered into, with the investors from other contracting state or their investments. However there has been an array of disputes over the proper construction of umbrella clauses and has become a bone of contention in a number of recent International Centre for Settlement of Investment Disputes (ICSID) cases. But before we move on to the meaning, structure and implications of umbrella clauses, it is imperative to understand what exactly Bilateral Investment Treaties (BIT) are and how they have changed the face of international investment law over the past few decades.

BITs have proliferated over the past decade and have gradually changed the way of international investment disputes from diplomatic interventions and domestic law suits to international arbitration. The BIT aims to magnetize foreign investment by giving broad rights to potential investors and creating pliancy in the intention to solve investment disputes. BITs are one of the most commonly used international agreement for protecting and swaying foreign investment. In the past decade there have been over 1500 BITs being concluded by various countries bringing the number of total BITs to 2400. It comes as no

surprise that the emotion-charged increase in number of BITs has led to a surge of arbitration involving investment treaties.[1]

Generally the contents of a BIT differ from each other and even if a country would like to impose its own idea of a model BIT the fluctuating negotiation strength of the other contracting party has the culminating effect of rendering most countries' model BIT heterogeneous. It is so to say that reach and fibre of third party ingress to international arbitration through the BIT apparatus is so varied from one BIT to the other one that it is very onerous to speak of a dominant custom, hence every BIT must be examined on its own merit.

Under a model BIT the most prevalent customary protections of international investment laws are generally marshalled and further strengthened. This gives freedom to investors to make claims directly against the host state. The disputes arising out of the BIT are governed by the mechanism provided in the BIT. Nonetheless the status quo is more complicated. This is so, because of the existence of 'umbrella clauses' which have become widespread in the recent BITs that have come into existence.2 The stretch of subject matter jurisdiction has not been constant under Bilateral Investment Treaties (BITs).

A few BITs engage only disputes in relation with "obligation under this agreement", i.e., only claims for violation under the BIT. Others enlarge the jurisdiction to "all dispute relating to investments". While some have created an international law responsibility towards the host state, they shall, to simplify, "observe all obligation it may have entered to"; "constantly guarantee the observance of the commitments it has entered

*Tanay Khanna and Milind Rai are students at the National Law University, Odisha. The authors may be reached at tanay.nlu@gmail.com and milindrai24@gmail.com respectively.

[1]Stanimir A. Alexandrov, *Breaches of Contract and Breaches of Treaty – The Jurisdiction of Treaty-based Arbitration Tribunals to Decide Breach of Contract Claims in SGS v. Pakistan and SGS v. Philippines*, 5 J. WORLD INVESTMENT & TRADE 555 (2004).

[2]RUDOLF DOLZER &MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES (Martinus Nijhoff Publishers, 1995).

into"; "observe any obligation it has assumed", and other formation, in respect to investments.[3]

These set of principles are commonly called "umbrella clauses", although other formulations have also been used: "elevator", "mirror effect", "parallel effect", "sanctity of contract", "respect clause" and "*pacta sunt servanda*". Clauses of this kind have been added to provide additional protection to investors and are directed at covering investment agreements that host countries frequently conclude with foreign investors.

II. ROOTS IN HISTORY AND THE CONTEMPORARY USE OF THE CLAUSE

Umbrella clauses have become a rather efficient feature of international investment agreements and have been incorporated to provide extra protection to investors by including all contractual duties in investment agreements between foreign investors and host countries. Umbrella clauses over the past have become very controversial and a subject of debate, with international arbitral tribunals.

The scheme behind the figure of speech, that is, the umbrella clause is that an umbrella clause protects in other respect independent investment arrangements between a Contracting State and private investors from the other Contracting State under the treaty's "umbrella of protection."[4] Inter-state obligations between contracting parties to observe investment agreements is the purpose of umbrella clauses which may be invoked by the investors when the BIT provides a direct recourse to arbitration.

It is unclear under general international law whether it will qualify as a beach of international law when a state breaches a contract with the

[3]Thomas W. Walde, *The Umbrella Clause in Investment Arbitration – A Comment on Original Intentions and Recent Cases*, 6 THE JOURNAL OF WORLD INVESTMENT AND TRADE (2005).

[4]ElihuLauterpacht, *International Law and Private Foreign Investment*, 4 IND. J. GLOBAL LEGAL STUD. 259, 271-72 (1997).

investor.[5] As such a breach may be construed as a normal domestic commercial case. This is precisely the reason why umbrella clauses first arose, when investors had no choice but to resolve their disputes over their contracts in the municipal courts of the host state under its own domestic laws, which were susceptible to unilateral variation by the state.

Origins of umbrella clauses have been traced by scholars to a 1954 draft settlement agreement involving the Anglo-Iranian Oil Company's (AIOC) claims regarding Iran's oil nationalization program[6] The Abs-Shawcross Draft Convention of Investments Abroad (Abs-Shawcross Draft)[7] is a private effort to make a blueprint of rules for the protection of foreign investments. The Abs-Shawcross Draft was created by European lawyers to address the kinds of disputes that confronted AIOC.

Article II of the Abs-Shawcross Draft, umbrella clause states: "*Each party shall at all times ensure the observance of any undertakings which it may have given in relation to investments made by nationals of any other Party*."[8] This clause in particular is applicable not just to one single agreement but to all investment commitments undertaken by each state party towards investors from any other state party. This made way for umbrella clauses to evolve and to resemble the umbrella clauses that we find today in the modern BITs.

A. The evolution of the clause in early stages

The umbrella clauses first appeared[9] as a unique protection clause in 1956-59 Abs Draft International Convention for the Mutual Protection of Private Property Rights in Foreign Countries:[10]

[5]LASSO OPPENHEIM, SIR ROBERT JENNINGS & SIR ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW 927 (9th ed. Longman, 1992).
[6]Anglo-Iranian Oil Co. Ltd. (U.K. v. Iran), (1952) ICJ 2.
[7]The text of the Abs-Shawcross Draft Convention/Draft Convention on Investments Abroad is reprinted in The Proposed Convention to Protect Private Foreign Investment: A Round Table, 9 J. PUB. L. 115, 116-18 (1960).
[8]Abs-Shawcross Draft Convention on Investments Abroad, art. 2.
[9]A.C. Sinclair, *The Origins of the Umbrella Clause in the International Law of Investment Protection*, 20 ARBITRATION INTERNATIONAL 411, 411-434 (2004).

> "*In so far as better treatment is promised to non-nationals than to nationals either under inter-governmental or other agreements or by administrative decrees of one of the High contracting Parties, including most-favoured nation clauses, such promises shall prevail*."[11]

Moreover the Abs-Shawcross Draft included all contractual investment obligations within its ambit including such obligation, between a foreign private investor and a state, since an 'undertaking' is construed to be broader than a contract and thus covers obligations arising out of a contract. Legal scholars like Fatouros, commented on Article II that, it was "*meant to cover the cases of contractual commitments of states to aliens*,"[12] and Schwarzenberger noted that it "*covers undertakings by contracting parties both to subjects and objects of international law*."[13]

This outlook went through an overhaul in the 1959 Abs-Shawcross Draft Convention on Foreign Investment, Article II:

> "*Each Party shall at all times ensure the observance of any undertakings which it may have given in relation to investments made by nationals of any other party*."[14]

The clause made an appearance again in the first ever BIT between Pakistan and Germany in 1959, Article 7:

> "*Either Party shall observe any other obligation it may have entered into with regard toinvestments by nationals or companies of the other party*."[15]

---

[10]*See* H.J. Abs, *Proposals for Improving the Protection of Private Foreign Investments*, IN INSTITUT INTERNATIONALD'ÉTUDESBANCAIRES (1958).
[11]Abs Draft International Convention for the Mutual Protection of Private Property Rights in Foreign Countries, 1956-59, art 4.
[12]Arghyrios A. Fatouros, *An International Code to Protect Private Investment—Proposals and Perspectives*, 14 U. TORONTO L.J. 77, 88 (1961).
[13]Georg Schwarzenberger, *The Abs-Shawcross Draft Convention on Investments Abroad: A Critical Commentary*, 9 J. PUB. L. 147, 154 (1960).
[14]Abs-Shawcross Draft Convention on Investments Abroad, art. 2.
[15] Treaty for the Promotion and Protection of Investments, F.R.G.-Pak., Nov. 25, 1959, 457 U.N.T.S. 23, 28-29 (1963).

It also appeared in the core substantive rules of the OECD Draft Convention on the Protection of Foreign Property, 1967, Article 2 which stated that:

> "*Each Party shall at all times ensure the observance of undertakings given by it in relation to property of nationals of any other Party*."[16]

Even though the OECD Draft pen ultimately did not get a majority, the OECD Council resolved at its 150th Meeting in 1967 to suggest the draft convention to member states as a prototype for their own BITs and as a general pronouncement of international law rules pertinent to foreign investment.[17]

III. SIGNIFICANCE OF THE CLAUSE IN INVESTMENT ARBITRATION

Now that we have a general understanding of how umbrella clauses emerged and worked their way through the functioning of the modern day BITs and have become a seminal feature of today's international investment law, let us try to understand, what they exactly are and how they work.

To put it simply the umbrella clause is an international law obligation created by treaty, that a host State shall 'observe any obligation it may have entered into', 'constantly guarantee the observance of the commitments it has entered into', 'observe any obligation it has assumed', and other variants.

The first umbrella clause which found its way in the a BIT was the Pakistan-Germany BIT of 1959.[18] Article 7 of the Pakistan-Germany BIT

[16] Draft Convention On The Protection Of Foreign Property And Resolution Of The Council Of The OECD On the Draft Convention, OECD Publication No. 23081 (1967).
[17] *Id.*
[18] Treaty for the Promotion and Protection of Investments, F.R.G.-Pak., Nov. 25, 1959, 457 U.N.T.S. 23, 28-29 (1963).

contained the umbrella clause which was worded as: "*Either party shall observe any other obligation it may have entered into with regard to investments by nationals or companies of the other Party*."[19] It was noted by a German scholar in the survey of the Pakistan-Germany BIT that such an umbrella clause "*relates particularly to investment contracts between the investor and the host country*" and "*transforms responsibility incurred towards a private investor under a contract into international responsibility*."[20]

The 1959 Germany-Pakistan BIT went on to lay the foundation for the 1991 German Model BIT which contains an umbrella clause in article 8(2) and has a similar language "Each Contracting Party shall observe any other obligation it has assumed with regard to investments in its territory by nationals or companies of the other Contracting Party."[21] Similarly the US Model BIT of 1983 contains an umbrella clause which was designed with keeping the OECD draft in mind[22] which states that "*each Party shall observe any obligation it may have entered into with regard to investors or nationals or companies of the other Party.*"[23] The US Model BIT was published in 1984 and 1987, subsequently including similarly worded umbrella clauses.[24]

The tribunal on breaking down these umbrella clauses believes that these clauses agree on their effects, namely that such a clause "*raises to a treaty issue any attempt by a BIT partner to invalidate a contract by changes in domestic law or otherwise such that a breach of contract constitutes a breach of treaty*."[25] Sweeping analyses of BITs assert that umbrella clauses permit the breaches of investor-state contracts to be characterized as BIT violations so as to trigger dispute resolution

[19]*Id.*
[20] Joachim Karl, *The Promotion and Protection of German Foreign Investment Abroad*, 11 ICSID REV.-FOREIGN INVESTMENT L.J. 1, 23 (1996).
[21]*Id.*
[22]K. Scott Gudgeon, *United States Bilateral Investment Treaties: Comments on their Origin, Purposes and General Treatment Standards*, 4 INT'L TAX AND BUS. L. 105, 111 (1986).
[23]U.S. Model BIT, 1983, art. II(4).
[24]*Id.*
[25]*Id.*at 23.

procedures provided under the BIT. In a precedent the United Nations Centre on Transnational Corporations noted that an umbrella clause "makes the respect of investor State contracts an obligation under the treaty.

Thus, a breach of such a contract by the host State would engage its responsibility under the [BIT] and—unless direct dispute settlement procedures come into play— entitle the home State to exercise diplomatic protection of the investor."[26] Likewise the United Nations Conference on Trade and Development (UNCTAD) found in its survey of BITs conducted in the mid-1990s that "*as a result of [an umbrella clause in a BIT], violations of commitments regarding investment by the host country would be redressible through a BIT*."[27]

Thus the aggregate of the history of umbrella clauses and the virtual body of opinions regarding its interpretation points explicitly to one conclusion: The whole scheme of umbrella clauses applies to responsibilities and obligations arising under investor-state contracts so as to allow for their breach to be resolved as BIT violations.

However to understand umbrella clauses more closely two landmark judgements need to be considered, namely *SGS v. Pakistan*[28] and *SGS v. Philippines*.[29] Both the cases have interpretation of umbrella clauses inconsistent with each other but have the same effect of overturning that conclusion.

[26]United Nations Centre on Transnational Corporations (UNCTC), *Bilateral Investment Treaties* (New York, United Nations, 1988), Doc No. ST/CTC/65.
[27]*Id.*
[28]SociétéGénéral de Surveillance S. A. v. Islamic Republic of Pakistan, ICSID (W. Bank) Case No. ARB/01/13 (2003),Objections to Jurisdiction.
[29]Société Général de Surveillance S. A. v. Philippines, ICSID (W. Bank) Case No. ARB/02/6 (2004), Objections to Jurisdiction.

IV. SCRUTINY OF SUCH CLAUSES IN THE LIGHT OF RIGHTS OF THE STAKEHOLDERS

The enduring consistency of commentators concerning the clause's effect disappeared eventually after the first exhaustive analysis of the clause by the ICSID tribunal in the *SGS v. Pakistan* case.

A. Elevation of Contractual Breaches to International Obligations

Since the inception of the clause's existence, legal scholars have acknowledged a broader approach in interpretation of the umbrella clauses and the same follows for the majority of tribunals faced with the interpretation of umbrella clauses. Subsequent to the decision in *SGS v. Pakistan* several other tribunals which dealt with the interpretation of the umbrella clause directly addressed the award to contradict its result. Prosper Weil argued in favour of the transformation of mere contractual obligations in his famous Hague lecture in 1969. He stated that:

> "*It is so often, that there is no difficulty whatsoever when there is an "umbrella treaty" between the contracting State and the State obligations of the contracting state vis-à-vis the State of the other contracting party. The mere existence of the umbrella treaty turns contractual obligations into international obligations and by the virtue of which ensures, the intangibility of contract under the threat of violating the treaty; any performance of the contract under the threat of violating the treaty, any performance of the contract, even if it is legal under the national law of the contracting of the other contracting party, which turns the obligation to perform the contract into an international State, gives rise to the international liability of the latter vis-à-vis the national State of the other contracting party*."

In the view of Emmanuel Gaillard in the case of an umbrella clause, the engaged State is internationally responsible for the violation of a contract as a violation of the treaty. He calls this a "mirror effect"[30] of the clause:

> "*You have a violation of the contract, and the treaty says as if you had a mirror, that this violation will also be susceptible to being characterized as a violation of the Treaty*."[31]

Shreuer contends that "*under the operation of an umbrella clause, the claim need not fail if the investor is unable to demonstrate a violation of one of the BIT's substantive provisions. The often difficult proof that there has been a violation of the 'fair and equitable treatment' or 'full protection and security' standards or that there has been an 'indirect expropriation' is no longer decisive, provided a breach of an investment contract can be shown*".[32] Hence, "*under the regime of such an umbrella clause, any violation of a contract thus covered becomes a violation of the BIT*."[33]

B. The narrow interpretation or rejection of an elevating effect

The significance of a narrow interpretation approach guides to an undemonstrative function of the umbrella clause. The Tribunals in order to dodge the State's international responsibility for every single breach of contract adopted this approach. These decisions however cannot be rejecting the wide function of the clause in an undivided manner, but these are to be judged in the light of their specific circumstances.

The case of *SGS v. Pakistan* among the decisions of tribunals that adopt a restrictive approach, stands a very important one. This case on the other end of the spectrum, envisages the clearest negation of the clause's broad

[30]E. Gaillard, *Investment Treaty Arbitration and Jurisdiction over Contract Claims- The SGS Case considered*, in T. WEILER, INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 325, 344 (2005).
[31]SGS's response to the objections of Pakistan in *SGS v. Pakistan, Supra* note 28.
[32]DOLZER & STEVENS,*Supra* note 2.
[33]SGS's response to the objections of Pakistan in *SGS v. Pakistan, Supra* note 28.

interpretation. It was the first time that an international arbitral tribunal was examining the effects of an umbrella clause exhaustively.[34] Therefore, the tribunal's decision became the bone of contention of the actual debate.

It is important to note here that with the subsequent decision in this case the tribunal placed itself opposite the majority doctrine. With its "outright rejection."[35] it stands aloof from the overwhelming part of traditional interpretations that have been given to the clauses. It is however important to note that the tribunals that seem to follow this approach do so in regard to very specific situations and not in a generally fashioned way.

Commentators in the past have though criticised the far-reaching impact on a state's sovereignty because of the broad interpretation of the clause. After its first appearance, there were doubts whether states that may be most affected by the clause would agree to such a provision. The contention that is made that the mere hope that investors would invoke umbrella clauses with appropriate restraint and not for "trivial disputes"[36] is insufficient to serious jeopardy tot eh whole system of investment protection through BITs. The narrow approach was followed by two other tribunals.

The case between Joy Mining Machinery Limited and Egypt arose out of contract concerning the provision of specialized long-wall mining equipment for a phosphate mining project.[37] As the abovementioned case was more in form of a commercial dispute rather than an investment within the treaty's notion of investment but a purely commercial dispute, the tribunal concluded that it lacked jurisdiction.

[34]Prior to the *SGS v. Pakistan* decision, the clause was applied only once in Fedax N.V v. Venezuela, ICSID Case No. ARB/96/3 (1998).
[35]T. Walde, *The "Umbrella" Clause in Investment Arbitration- A Comment on Original Intentions and Recent Cases*, 6 JWIT 183 (2005).
[36] C. Schereuer, *Travelling the BIT Route- of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 JWIT 231 (2004).
[37]Joy Mining Machinery Limited v. The Arab Republic of Egypt, ICSID Case No. ARB/03/11 (2004).

Despite the fact that the problem at hand did not entail an investment dispute the tribunal went ahead and addressed the meaning of the alleged umbrella clause in article 2(2) of the UK-Egypt BIT.[38]

In this context, the tribunal said that every breach of contract cannot be transformed into a violation of the Treaty, unless there is a direct correlation between the violation of the Treaty rights and the breach of the contract, to trigger the treaty protection.[39]

In sum, the case does not represent an approach as narrow as the one applied in SGS v. Pakistan, and do not sustain such an approach in a general manner. The view taken in SGS v. Pakistan is that the tribunal has an advantage with regard to the effectiveness of dispute resolution. The non-qualification of many international arbitrators to deal adequately with the domestic law of foreign States argues in favour of the local court's jurisdiction.[40]

V. INVOCATION OF UMBRELLA CLAUSES AND THE PRINCIPLE OF PRIVITY OF CONTRACT

Now, even if an individual contract is considered to be under the ambit of the umbrella clause, then the tribunal encounters a different issue: whether the clause can be invoked only by the parties to the contract, or whether the ambit of such clauses is wide enough to cover sub-state entities, holding and subsidiary companies or shareholders of the parties to the BIT?

[38]UK-Egypt BIT, Art 2(2) of the BIT provides that "each contracting party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other contracting parties."
[39]Joy Mining Machinery Limited v. The Arab Republic of Egypt, ICSID Case No. ARB/03/11 (2004).
[40] J. Gill et al., *Contractual Claims and Bilateral Investment Treaties- A comparative Review of the SGS Cases*, 21J. INT'L ARB. 31 (2004).

Arbitration is considered to be a creation of existence, i.e., the arbitral decree is binding only on the consenting parties. Nevertheless, investment arbitration has been demarcated as 'arbitration without privity,[41] as BITs, though they are executed between States but they frequently deliver a 'standing offer' to arbitrate to the investors.[42]

The literature on this matter is limited and so the case laws are also inconsistent on this subject. And, the reason for this inconsistency is the fact that the drafting of such clauses is different in each case.

A. Ensconcing the investors under the shade of umbrella clauses

The first concern on umbrella clauses and privity of contract rests on the investor's side. Recent MITs and BITs permit investors to mark their investments through various ways. Investment is frequently explained as every kind of asset,[43] containing, inter alia, shares in a corporation, contractual rights and intellectual property rights. Most of the investments are made through the acquisition of shares in companies of the host State or by incorporating subsidiaries (e.g. – Special Purpose Vehicle) solely to facilitate the investment. Hence, raising the issue as to whether such clauses can cover the subsidiary or the investor itself, when its investment is basically a share in the domestic company which signed the contract. On this subject-matter, a lucid demarcation in trends can be observed, subject to whether the investor is entitled to claim rights owed to its subsidiary, or to the company wherein it holds shares interest.

a) Safeguards Provided To Subsidiaries Against The Host State

In case of subsidiaries, tribunals have not deemed the umbrella clause to cover them. In *Azurix v. Argentina*,[44] the tribunal rejected the claim on merely two grounds: firstly, that thecontract was executed with the Province of Buenos Aires, instead of Argentina and lastly, that the second party to the contract was not the claimant (Azurix) itself, but its

[41]Jan Paulsson, *Arbitration without Privity*, 10 ICSID REV. – FOREIGN INVEST. L.J. 232 (1995).
[42]*Id.*
[43]Ecuador-Netherlands BIT, art. 1(a).
[44]Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12 (2006).

subsidiary ABA. Likewise, the Siemens tribunal solely rejected the claim on the rationale that the claimant did not execute the contract and SITS, Siemens' subsidiary, was not a party to the arbitral proceedings.[45]

In *Burlington v. Ecuador*, the tribunal made an exhaustive analysis to determine whether the claimants could depend on the umbrella clause to impose its wholly owned subsidiary's rights under a contract executed with Ecuador. The tribunal regarded that the word obligation was the 'operative' phrase of the umbrella clause, and for the purposes of defining it, two fundamentals had to be kept in mind; the fact that someone's obligation involves the rights of another and that obligations occurs under the ambit of a legal framework, usually the domestic law. In pursuance of these legal fundamentals, the majority held that Ecuador's obligations under the contract were allied to the subsidiary of Burlington, and that Ecuadorian law does not affirm the fact that the non-signatory holding company could claim the rights of its subsidiary.[46]

Notably, in the *CMS v. Argentina* nullification verdict,[47] the ad hoc committee nullified the portion of the arbitral award with regard to the Tribunal's verdicts on the umbrella clauses. The committee observed five significant issues with the tribunal's construal of the umbrella clause, which may be difficult for further tribunals to neglect.[48]

The committee was of the opinion that a rational interpretation of the clause should address the forthcoming issues: (i) the phrase any obligations it may have entered into with regard to investments, of the clause, was evidently concerned with consensual obligations ascending out of the BIT; (ii) consensual obligations are generally entered into with respect to specific individuals; and (iii) if the applicable law and content

[45]Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8 (2007).
[46]Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5 (2012).
[47]CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8 (2007).
[48]El Paso Energy International Company v. Argentine Republic,ICSID Case No. ARB/03/15 (2011), 190-198, 533.

of the liability are not altered by the umbrella clause, then the parties to the obligation should not alter either.[49]

The other grounds stated by the ad hoc committee were: (i) the wide interpretation endows the claimant to administer the contractual rights of its subsidiary despite of the fact that the claimant is not bound to administer its subsidiary's contractual liabilities; and (ii) the construal will render the mechanism in Article 25(2) (b) of the ICSID Convention[50] futile.

The Burlington tribunal and CMS annulment committee undoubtedly established a convention to examine: whether the investor can enforce the breach of a contract executed with the subsidiary company. It established that the domestic law that administers the contract, which generally necessitates privity for the purposes of ascertaining which parties are liable to each other.

b) Safeguards Provided To Shareholders Against The Host State

On the contrary, a plethora of tribunals has observed that when the investment is made by virtue of purchasing shares in the host state's country, the investor, as a shareholder may have a right to enforce the breach of obligation with regard to the company in which they have shares, in the case when the value of shares, i.e. investment by the investor, is affected by such breach.

In the matter of CMS and Argentina, the tribunal established that the umbrella clause of the US-Argentina BIT has been breached by Argentina as they had failed to satisfy the contractual obligation executed

[49]CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8 (2007).

[50]Article 25(2) (b), Convention on The Settlement of Disputes Between States And National of Other States, 1965: This provision states that "any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention."

with the Argentine company- TGN, in which CMS held minority stakes. Albeit its observations were later nullified for not stating proper reasons, it is comprehensible that the tribunal observed grounds to safeguard the rights of an investor that held a minority stakes in a national company, similarly as CMS. The tribunal's rationale was that, in order to find the jurisdiction, it was not necessary for the investor to be a party to the concession agreement with the State as there was an uninterrupted right of action of the shareholders.[51]

In the dispute between EDF and Argentina, the tribunal encountered a similar situation that of Azurix. In this case the investor, who held majority stakes in EDEMSA, a company that executed a contract with the Province of Mendoza. Regrettably, the tribunal was not explicit in enforcing the rights of the investor by virtue of being a shareholder and to claim obligations because of EDEMSA. Nevertheless, it did state that the breach was a governmental act, and that the concession agreement made 'explicit mention of shareholder.'[52]

In *Enron v. Argentina*, similar issues arose, the claimant held minority stakes in TGS, an Argentine company for the distribution and shipping of gas. As a matter of fact, Enron was invited by the Argentine Government to partake in the investment concerning the privatization of TGS.[53] The tribunal also laid emphasis on the fact that Enron's 'technical expertise… was one of the key elements needed to materialize partake in the process' and that, it had assured decision-making power in the management of TGS. Pursuant to these observations, the tribunal held that '*the participation of the Claimants was specifically sought [by the Government] and […] they are thus included within the consent to arbitration given by the Argentine Republic. . . [Claimants] are beyond*

[51]CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Objections to Jurisdiction (2003).
[52]EDF International S.A., SAUR International S.A., and León ParticipacionesArgentinas S.A. v. Argentine Republic, ICSID Case No. ARB/03/23 (2012).
[53]Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic, ICSID Case No. ARB/01/3, Objections to Jurisdiction (2004).

any doubt the owners of the investment made and their rights are protected under the Treaty.'[54]

According to the tribunal, the invitation by the Argentine Government was conclusive to avow its resolve to have Enron as a foreign investor, and hence, they have the protection under BIT and thus they can resort to the umbrella clause as well as ICSID arbitration. This view is certainly beneficial, as it addresses the rational contemplations of the investor under the principle of fair and equitable treatment. According to this norm, the State parties to a BIT are expected to render international investments such treatment that does not adverse the fundamental expectations, that were taken into consideration by the investor while making the investment.'[55]

c) *Rights Of Investors Against Sub-State Entities Under The Operation Of Such Clauses*

In the recent times, investment contracts are entered into with Sub-State entities, when such entities have been delegated by the Government to carry out certain state functions or to deliver any specific service.

The most important case on this issue is *Impregilo v. Pakistan*[56] wherein the claimant executed a contract with the Pakistan Water and Power Development Authority (WAPDA). Though the Italy-Pakistan BIT did not contain an umbrella clause, nonetheless, Impregilo contended that Pakistan had extended such safeguard to other investor under other BITs, and hence, by virtue of Most Favored Nation (MFN) clause embodied in the Italy-Pakistan BIT, Pakistan was obligated to offer protection under the umbrella clause.

However, the tribunal ruled in the favour of Pakistan and held that even if the jurisdiction of umbrella clause is extended to Impregilo by virtue of MFN, then also the clause would not provide any safeguard as the

[54]*Id.*
[55]TécnicasMedioambientales TECMED S.A. v. México, ICSID Case No. AF/00/2 (2003).
[56]Impregilo SPA v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/3, Objections to Jurisdiction (2005).

investment contracts were executed with WAPDA and not with Pakistan. It further added that 'in arguendo that Pakistan… has assured the contractual obligations executed with Italian investors (i.e. umbrella clause), but such assurances would not extend to current agreements as Pakistan has not executed them.'[57]

The tribunal also laid emphasis on the status of WAPDA under the domestic law of Pakistan and observed that the 'status and authority of WAPDA for the purposes of the Agreements, WAPDA is a separate legal entity from the State of Pakistan.'[58]

In the dispute between *Azurix v. Argentina*, the matter was regarding the breach of an investment agreement with the Province of Buenos Aires instead of an Argentine instrumentality. Furthermore, the other party to the contract was not the claimant but its subsidiary, ABA. The tribunal ruled in the favor of Argentina and refused the claim because, 'Azurix can only claim for breaches, under the BIT, by Argentina, and it owes not obligation to Azurix that has to be honored other than that of BIT.'[59] Thus, Azurix can claim only those rights that are mentioned in the US-Argentina BIT, and not in the contract, which was executed with Province of Buenos Aires.

d) Progressive interpretation of the clause attributing actions of the sub-state entities to the State

On the contrary, some tribunals have rendered protection to investors under umbrella clause against sub-state entities. In the matter *Eureko v. Poland*,[60] the claimant had executed an agreement with the State Treasury, who failed fulfil its obligations under the contract. The tribunal deemed the State Treasury as the wing of the Government of Poland, and ruled that every 'Government of Poland, through its actions and

[57] *Id.*
[58] *Id.*
[59] Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12 (2006).
[60] Eureko B.V. v. Republic of Poland, IIC 98 (2005).

inactions, has failed to breached its obligations under the Treaty and they have also failed to fulfil its commitment under umbrella clause of the Treaty.'[61]

The leading case on this issue is *SGS v. Pakistan*, wherein the tribunal ruled that according to the principles of State responsibility under the international law, '*the "commitments", which are in dispute, mentioned in umbrella clause may be interpreted as commitments of the State itself as a legal person, or of any office, entity or subdivision (local government units) or legal representative thereof whose acts are . . . attributable to the State itself.*'[62]

In furtherance of this the International Law Commission (ILC)[63] has codified the International Law Rules on State Responsibility, which contains three articles pertinent to State liability for the conduct of other entities: (i) Article 4 prescribes that the entities which are satisfactorily connected to the State, thus it will be liable for their actions;[64] (ii) Article 5 elucidates those entities which are not satisfactorily connected to the State in order to qualify under Article 4, however, such entities are bestowed with certain governmental authority and State will be held liable for such entities and their actions while exercising that authority;[65] and (iii) Article 8 prescribes entities not satisfactorily connected to the State in order to qualify under Article 4 or 5, but whose certain conducts are attributable to the State to the scope that they are administrated, directed or instructed by the State.[66]

---

[61] *Id.*

[62] SociétéGénéral de Surveillance S. A. v. Islamic Republic of Pakistan, ICSID (W. Bank) Case No. ARB/01/13 (2003),Objections to Jurisdiction.

[63] The ILC is the organ of United Nations which is charged with codifying international law.

[64] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, art 4.

[65] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, art 5.

[66] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, art 8.

In furtherance of these principles the tribunal in *Noble Ventures v. Romania* observed that the obligations assumed by two sub-state entities were also the obligations of the State. The tribunal reached this conclusion by emphasising the fact that both entities were bestowed with the responsibility of representing the State in the privatization process and to enter into the agreements for that purpose. Hence, the tribunal held that the respective privatization agreements were entered on behalf of the State and thus are attributable to the State for the purposes of umbrella clause.[67]

e) Decisive factors for the obligations of the sub-state entities attributable to the state

Now, we will have to address the issue whether the obligations assumed by sub-state entities are in fact attributable to State. The ILC rules on State responsibility are supportive but not binding while addressing this issue. Furthermore, the domestic law of the host nation governing the sub-state entity is crucial as it will help in outlining the ambit of the entity's authority. This rationale was used by the tribunals in *Azurix* and *Impregilo*.

On the contrary, the tribunals in *Noble Ventures*, *SGS* and *Eureko* took the help of the principles of public international law, specifically the ILC rules on state responsibility. This approach raises another question: whether the State renounced its sovereign immunity in a way that the tribunal can adjudicate, without referring to the municipal law, if the entity had the authority to enter into an agreement with the investor? Since, this waiver of the sovereign immunity by the State under the BIT will lead to let the arbitrators decide whether the treaty obligations have been breached by the State or not.

Hence, whenever the issue arises as to whether the breach committed by the sub-state entity, under the umbrella clause, is attributable to the State, then the arbitrators will have to resort to the municipal law, including the

[67]Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award (2005).

Constitution, of the host State. The tribunal can rely on the ILC rules only when the status and power of the instrumentality is either ambiguous or absent in the municipal law.

This issue has been addressed in the ICSID Convention, wherein Article 25(1) and 25(3) provide the contracting states the option to assign which of its instrumentalities or entities have also agreed to the jurisdiction of ICSID[68] without State's prior approval. This means that the investor can initiate arbitration proceedings against the host State's instrumentality if such designation has been made.[69]

VI. CONCLUSION

It is well established that umbrella clauses, if interpreted correctly, can be a powerful tool for investors. The clause is multifaceted and allows investor states to bring not only investor-state arbitration proceedings, but also parties alien to their claim against the State, given that party being a shareholder, State instrumentalities or their subsidiaries.

As it can be seen from the reasoning of case laws that it is still immature a time in this area for tribunals to come to a common understanding over the interpretation and application of the umbrella clause, this is, howsoever, because States are at liberty to define the scope of their Treaty and the terms therein. Still, contradictory decisions can be seen with identical umbrella clauses. This unpredictability is probably the current reason for this still being a grey area in the domain of International Investment Arbitration.

[68]Art 25(3), Convention on The Settlement of Disputes Between States and National of Other States, 1965: This provision states that "Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required."

[69]NIKO Resources (Bangladesh) Ltd. v. People's Republic of Bangladesh, BAPEX and PETROBANGLA, ICISD Case No. ARB/10/11 & ARB/10/18, Objections to Jurisdiction (2013), in which the Tribunal held that the designation provided in Article 25(3) of the ICSID Convention could even be done implicitly.

It doesn't escape the eye in matters of investment arbitration carrying excessive importance for establishing a jurisdiction of an arbitral tribunal that there is no homogenous stand either in jurisprudence or in doctrine. Especially the divergence in ICSID jurisprudence, is matter of great concern.

It should be a thing of general consciousness, however, the paucity of formal stare decisis doctrine in ICSID arbitration seems to be an impediment to ever achieving a complete unified approach. Breaches of a Bilateral Investment Treaty and breaches of a contract should firstly, be kept distinct to a level as to prevent uncertainty and to prevent an overflow of litigation. The Tribunal should be quick enough to resolve a distinction between these two, in an attempt to obtain BIT Jurisdiction.

Secondly, an attempt should be made from states to widen their consent to investment arbitration in all situations they want, but it should be mentioned in the BIT as unambiguously as possible. Thirdly, as it can be seen it is difficult rather impossible to have a uniform interpretation of umbrella clauses, as the wording differs from one BIT to another and each umbrella clause necessarily deserves its own interpretation. The tribunal should decline in seemingly irresolvable cases where there is a doubt as to whether the clause grants jurisdiction to deal with contractual breaches as it is important for keeping the balance of the investment law system.

It is realized that it is rather difficult to achieve the observance of these guidelines in practice but it is something which is desirable and should be aimed for. In conclusion it is in our opinion that the abovementioned guidelines if nothing, would promote more predictability in various issues coming in front of different investment arbitration tribunals. And such predictability would help in facilitating in the protection of both economic and legal interests of host states and investors.

BILATERAL INVESTMENT TREATIES AND INVESTMENT ARBITRATION: RENUNCIATION OR RE-INVENTION?

*Tania Singla**

Abstract

Little more than two decades ago, investment treaties and investment treaty arbitration were virtually unknown to anyone beyond the circles of those who were involved in treaty negotiations. But in the last few years, Bilateral Investment Treaties have been creating ripples across international arbitration landscapes and are considered conducive to a perception of domestic regime as supportive of foreign investments. Investment Treaty Arbitration has risen along with the spike in BITs and has spawned a new body of jurisprudence almost entirely on its own. The swift pace of growth in the two has also resulted in a gradually growing disillusionment with the framework on part of States. This paper will commence with a discussion regarding the nature of BITs and proceed to analyze the issues that make BITs a thorny path for States. The paper will then conduct an analysis of the challenges inherent in the ITA framework juxtaposed with the model of international commercial arbitration. The experience of India in the realm of investment treaty arbitration has been explored followed by the conclusion and recommendations of the author.

I. INTRODUCTION

Once upon a time, it was a basic principle of customary international law that only a State has the legal capacity to assert a claim against another State for a breach of its obligations owed to the citizens of the Claimant State. This principle was even endorsed by the International Court of Justice in *Barcelona Traction*:

"*The Court would here observe that, within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law… emphasis added.*"[1]

But the times have changed; States are witnessing the rise of foreign investors as actors in public international law. These investors, as beneficiaries of Bilateral Investment Treaties ("**BITs**") concluded between States, can now institute a claim against a State where their investments are located and more importantly, in a forum of equal standing: Arbitration.[2] The once dormant[3] area of International

*Tania Singhla is a fifth-year student at the National Law University, Delhi. The author may be reached at taniasingla@gmail.com.

[1]Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain), 1970 I.C.J. Reports 3, 78.

[2]A.P. NEWCOMBE & L. PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 18-39, (Kluwer Law International, 2009);W.S. Dodge, *Investor-State Dispute Settlement between Developed Countries: Reflections on the Australia-United States Free Trade Agreement*, 39 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 1 (2006); C Schreuer, *Course on Dispute Settlement ICSID 2.1 Overview*,UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT(2003), http://www.unctad.org/en/docs/edmmisc232overview_en.pdf.

[3]The ICJ made the following remarks in 1970 about the state of development of the law of foreign investment in the Barcelona traction case: 'Considering the important developments of the last-half century, the growth of foreign investments and the expansion of international activities of corporations, in particular of holding companies, which are often multinational, and considering the way in which the economic interests of states have proliferated, it may at first sight appear surprising that the evolution of the

investment arbitration has been transformed into "one of the liveliest fields of international dispute resolution",[4] especially since 1995.[5]

The focal point of this transformation has been the explosion in the number of bilateral Investment Treaties, mainly due to the desire of the developing countries to attract capital and the interest of capital-exporting countries to safeguard their citizens' investment.[6] Since Germany and Pakistan concluded their 'Friendship, Commerce and Navigation' (FCN) Treaty in 1959, more than 2,500 similar treaties have been entered into, over 2,000 of which have been signed since 1990 alone.[7] BITs are *"[a]greements that establish the terms and conditions for investments by nationals and companies of one country in the jurisdiction of another*."[8] These treaties provide legal protection to investments made by foreign investors — individuals and corporations alike — within the territory of a State ("**host State**").

law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane.'

[4]Gabrielle Kaufmann-Kohler, *Overview of Investor-State Arbitration Articles,in*CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION (Arthur Rovine ed., Brill, 2009).

[5]*Investor-state Dispute Settlement And Impact On Investment Rulemaking: The Asia-pacific Perspective*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT(2006); *Latest Developments In Investor-state Dispute Settlement, IIA Monitor No. 4*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT(2006), https://unctad.org/system/files/official-document/webiteiit20052_en.pdf; Alexandre de Gramont & Maria Gritsenko, *Key Issues And Recent Developments In International Investment Treaty Arbitration*, ABA SECTION OF INTERNATIONAL LAW SPRING MEETING WASHINGTON, D.C., http://www.crowell.com/documents/Key-Issues-and-Recent-Developments-in-International-Investment-Treaty-Arbitration.pdf [hereinafter Gramont & Gritsenko]; Barton Legum, *The "New" Regime of Foreign Direct Investment - Investment Arbitration: A Big Bang*, 99TH ANNUAL AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS (2005).

[6]Asoka de. Z. Gunawardena, *Inception and Growth of Bilateral Investment Promotion and Protection Treaties*, 86TH ANNUAL AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS (1992).

[7]John Beechey & Anthony Crockett, *New Generation of Bilateral Investment Treaties: Consensus or Divergence,in* CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION(Arthur Rovine ed., Brill, 2009).

[8]Zachary Elkins et al., *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000*, U. ILL. L. REV. 265 (2008).

BITs generally provide for investment treaty arbitration ("**ITA**") that can be initiated either by the investor or the host state in the event that a dispute arises in relation to the investment. These treaties sometimes allow for arbitration only under the aegis of International Centre for Settlement of Investment disputes ("**ICSID**"), an institution established by the World Bank in 1965 under the ICSID Convention to provide rules and procedural facilities to investor-State disputes.[9] It may even be possible that BITs enlist a choice of fora where arbitration proceedings may take place such as the ICSID, the International Chamber of Commerce ("**ICC**"), the Stockholm Chamber of Commerce ("**SCC**"), or an ad-hoc tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law ("**UNCITRAL**").

It remains disputed whether the significant rise in the conclusion of BITs alone has stimulated additional foreign investments[10] but it certainly has contributed to the steep and dramatic rise in investment treaty arbitration.[11] Claims in ITA are usually substantial, ranging from US$120 billion to "billions and billions" of dollars.[12] Recent arbitral awards have made States wary of BITs and some States such as Venezuela, Bolivia and Ecuador have withdrawn from the ICSID Convention and even

[9]*Background Information on the International Centre for Settlement of Investment Disputes (ICSID)*,WORLD BANK, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&icsidOverview=true&language=English.

[10]Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a bit…and They could Bite*, WORLD BANK GROUP, 1-21 (2003); Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*3(1) WORLD DEVELOPMENT(2004);Jennifer Tobin & Susan Rose-Ackerman, *When BITs Have Some Bite: The Political-Economic Environment forBilateral Investment Treaties*, 6(1)THE REVIEW OF INTERNATIONAL ORGANIZATIONS(2011).

[11]Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73(4) FORDHAM LAW REVIEW,1527 (2005) [hereinafter D. Franck]; Michael D. Goldhaber, *Big Arbitrations*, AMERICAN LAWYER, 22 (2003),http://www.americanlawyer.com/focuseurope/bigarbitrations.html.

[12]*Id.*

terminated a number of their BITs.[13] In the background of this mounting averseness to the BIT framework, this paper will analyze the ambiguities of investment treaties and uncertainties of ITA, followed by the Indian experience in this field.

II. BILATERAL INVESTMENT TREATIES

A. What Makes Investment Treaties So Special?

In order to avoid the historical difficulties associated with "gunboat diplomacy", States promulgated investment treaties as a device to attract foreign investment and instil confidence in the stability of the investment climate. The success of these treaties is owed largely to the rights in the treaties themselves. First, under these treaties, investors are guaranteed a series of specific substantive rights,[14] which help contribute to the stability of the investment climate of an investment. Second, investors are offered direct remedies[15] to address violations of those substantive rights. Though the substance of specific rights and obligations in individual treaties may differ, it is chiefly due to treaty-specific negotiations.[16]

There is a general trend in the rights that States guarantee under BITs, gravitated towards laying down "*specific substantive standards that govern the host state's treatment of an investment*".[17] A typical investment treaty will usually guarantee different permutations of the following protections:

---

[13]*UNCTAD, IIA Issues Note*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (2010),http://unctad.org/en/docs/webdiaeia20106_en.pdf[hereinafter UNCTAD, IIA Issues Note].

[14]Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*,19(2)PACIFIC MCGEORGE GLOBAL BUSINESS & DEVELOPMENT LAW JOURNAL,337-374 (2007).

[15]Alejandro Escobar, *An Overview of the International Legal Framework Governing Investment, American Society of International Law Proceedings*, 91ST AM. SOC'Y INT'L L. PROC., 489-491 (1997).

[16]D. Franck, *supra* note 11.

[17]Patricia M. Robin, *The BIT Won't Bite: The American Bilateral Investment Treaty Program*, 33 AM. U. L. REV. p.942-43 (1984).

Fair and Equitable treatment, including a policy of non-discrimination on the basis of nationality of the investor;[18]

a. Protection from expropriation and adequate compensation in the event of violation;

b. Prohibition on States from enforcing any barriers on free flow of capital;[19]

c. Full protection and security for an investment.

Most treaties define, albeit broadly,[20] the kind of investors and investments entitled to these substantive protections and the entitlement arises only if there is a qualifying person or entity (the *ratione personae* requirement),[21] a subject matter within the scope of the treaty (the *ratione materiae* requirement)[22] and a dispute within a qualifying time frame (the *ratione temporis* requirement). The Investment Arbitral Tribunal is the chief body that determines the satisfaction of the three-fold threshold, which gradually has been becoming increasingly complicated due to the structuring[23] of investments by investors through other countries. For instance, an Indian citizen making an investment in Kuwait through a British company may be able to claim substantive rights under both the

[18]See Hungary-Netherlands BIT Art 3(1), 1987; United States-Azerbaijan BIT Art II(3), 1997; Lithuania-Kuwait BIT Art 2(1), 2001.

[19]See US-Romania BIT Art 4, 1992; India-Kazakhstan BIT Art. 7(1), 1996; Germany-Nigeria BIT Art. 6, 2000.

[20]J.R. Weeramantry, *Treaty Interpretation in Investment Arbitration, in*OXFORD INTERNATIONAL ARBITRATION SERIES168-170 (Oxford University Press, 2012); Todd Weiler, *The Ethyl Arbitration: First of Its Kind and a Harbinger of Things to Come,* 11 AM. REV. INT'L ARB. 187, 188 (2000).

[21]THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 6 (Peter Muchlinski, Federico Ortino & Christoph Schreuer (eds.), Oxford University Press, 2008).

[22]*Dispute Settlement, 2.5 Requirements of Ratione Materiae*, UNCTAD, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES(2003),http://www.unctad.org/en/docs/edmmisc232add4-en.pdf.

[23]Matthew Saunders, *Bilateral Investment Treaties Oil the Wheels of Commerce: An Increase in BITs in Recent Years Is Helping to Encourage and Protect International Business,* LEXIS NEXIS,http://www.lexisnexis.com/publisher/EndUser?Action=UserDisplayFullDocument&orgld=1746&topicld=26635&docId=l:214719388&start=24.html.

India-Kuwait BIT and the Kuwait-UK BIT. In the event that an investor is able to take advantage of two BITs simultaneously, this accentuates the possibility of inconsistency[24] in arbitral decisions on the same set of facts.

B. Ambiguities and Uncertainties in BITs

The massive proliferation of treaties in the last two decades was significant especially for developing countries who viewed them as opportunities to attract greater foreign investment from the Western capital-exporting countries. But in recent times, States are growing increasingly disillusioned with the bilateral investment regime[25] and seeking alternatives, largely due to the risks inherent in the structure of these treaties that do not bode well for States in the event that investors file a claim under the treaty.

a) Overbroad definition of 'investment'

Investment treaties usually adopt a very broad definition of investment. The majority of the agreements have a non-exhaustive list of various types of investment which typically include stocks, credits, securities, real estate and personal property, in rem assets, intellectual property rights, prospecting, extraction or development of natural resources, including public law concessions, etc.[26] For example, the Model Indian BIT defines investment as:

> "*[E]very kind of asset established or acquired including changes in the form of such investment, in accordance with the national laws of the Contracting Party in whose territory the investment is made and in particular, though not exclusively, includes:*
>
> *(i) movable and immovable property as well as other rights such as mortgages, liens or pledges;*

[24]D. Franck, *supra* note 11.
[25]loan Micula v. Romania (Jurisdiction), ICSID Case No ARB/05/20 (2008) p.28-32; UNCTAD, IIA Issues Note, *supra* note 13.
[26]Jose Luis Sequiros, *Bilateral Treaties on the Reciprocal Protection of Foreign Investment*, 24 CAL. W. INT'L L.J. 259 (1994).

(ii) shares in and stock and debentures of a company and any other similar forms of participation in a company;

(iii) rights to money or to any performance under contract having a financial value;

(iv) intellectual property rights, in accordance with the relevant laws of the respective Contracting Party;

(v) *business concessions conferred by law or under contract, including concessions to search for and extract oil and other minerals*."[27]

With such a sweeping definition finding place in several BITs, few respondent states have challenged the claimant on *ratione materiae* grounds. During the course of the research, there was only one ITA case found where the tribunal held the definition of "investment" was not satisfied.[28] In *CMS Gas Transmission Company v. Argentina*[29], the tribunal held that the claimant, a U.S. Company who was a minority shareholder in a local Argentine company could institute a claim under the U.S.-Argentina BIT because the definition of "investment" even included "a company or shares of stock or other interests in a company or interests in the assets thereof". Noting that the arbitral awards in ITA cases run into several million dollars, it is not surprising that States have started renegotiating their earlier BITs in a bid to narrow the scope of the definitions incorporated in BITs.

b) Ambiguous legal standards

Investment treaties usually confer protection on the basis of ambiguous legal standards such as 'fair and equitable treatment' ("**FET**") and

[27]*Ministry of Finance, Model Indian BIT, Art I (b)*,FINANCE MINISTRY OF INDIA, http://finmin.nic.in/the_ministry/dept_eco_affairs/icsection/Indian%20Model%20Text%20BIPA.asp.

[28]Joy Mining Machinery Limited v. Egypt (Jurisdiction) ICSID Case No. ARB/03/11 (2004).

[29]CMS Gas Transmission Company v. Argentina (Decision on Objections to Jurisdiction), ICSID Case No.ARB/01/8 (2003).

'indirect expropriation'.[30] These standards are not distinctly defined either in the treaties or in international law,[31] and consequently tribunals interpret them on a case-to-case basis[32] using their broad discretion. Several variations exist of the FET standard in BITs, where it has been combined with general international law,[33] international custom[34] or even standards in domestic law.[35] These treaties also generally fail to make a distinction between 'indirect expropriation' and creeping expropriation, "where the state gradually encroaches upon a foreign investment so as to confiscate or destroy it",[36] and between legitimate government regulations for the domestic economy. Foreign investors naturally argue for a broad interpretation of these standards which States fear may jeopardize their legitimate domestic measures. Arbitral tribunals have adopted diverging approaches[37] to determine where the line must be drawn between the two, creating greater uncertainty among investors and States.

[30]Carlos M. Correa, *Hazards in Bilateral Investment Treaties (BITs): Investors' Rights v. Public Health*, 47 SOUTHVIEWS,6 (2012).

[31]M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT217-218 (Cambridge University Press, 2nd ed. 2004); A.F. LOWENFIELD, INTERNATIONAL ECONOMIC LAW 555 (Oxford University Press, 2nd ed. 2008); R. DOLZER & M. STEVENS, BILATERAL INVESTMENT TREATIES 58 (Kluwer Law International, 1995).

[32]David A. Gantz, *Investor-State Arbitration Under ICSID, the ICSID Additional Facility and the UNCTAD Arbitral Rules*,US-VIETNAM TRADE COUNCIL, http://www.usvtc.org/trade/other/Gantz/Gantz_ICSID.pdf[hereinafter Gantz].

[33]Switzerland-Uganda BIT Art 4(1), 1971; Canada-Costa Rica BIT Art II(1), 1998; France-Mexico BIT Art 4(1), 1998; US Model BIT Art II(2)(a), 1992.

[34]US Model BIT Art 5, 2004; Canada Model BIT Art 5, 2004.

[35]CARICOM-Cuba BIT Art. 4, 1997.

[36]Luke Eric Peterson, *Bilateral Investment Treaties – Implications for Sustainable Development and Options for Regulation*, FES CONFERENCE REPORT,http://www.fes-globalization.org/publications/ConferenceReports/FES%20CR%20Berlin_Peterson.pdf [hereinafter Peterson].

[37]CME Czech Republic v. The Czech Republic (Partial Award) IIC 62 (2003), ¶ 591; Tecnias Medioambientales Tecmed, SA v. United Mexican States (Merits), 19 ICSID Rev 158 (2003);Peterson, *supra* note 36.

c) The 'Most-Favored-Nation' (MFN) Clause

The MFN Clause has become another minefield for States; it requires the host state to accord treatment that is no less favourable[38] than the treatment extended by the State to its citizens or to the investors of any other State. The MFN clause has been interpreted to refer not only to the material economic treatment meted out by the host state but also procedural rights.[39] In *White Industries Australia Limited v. the Republic of India*, the claimant Australian company successfully invoked the clause "effective means of asserting claims and enforcing rights" — an obligation present in the India-Kuwait BIT — taking advantage of the MFN clause in the India-Australia BIT. This renders treaty-specific negotiations futile because an investor can claim the highest standard agreed by the host State in any BIT, who are entitled to a lower protection in the BITs with their home countries and encourages "treaty-shopping" among investors.

In *Maffezini v. Kingdom of Spain*, the tribunal did suggest:

> "*[a]s a matter of principle, the beneficiary of the clause should not be able to override public policy considerations that the contracting parties might not have envisaged as fundamental conditions for their acceptance of the agreement in question, particularly if the beneficiary is a private investor, as will often be the case...emphasis added*"[40]

Laudable as it may be, uncertainty persists regarding the future identification of exactly what those fundamental public policy considerations might be.[41] This increases the potential discretion that

[38]Rep. of the Int'l Law Comm'n, 13th Sess., *Draft Articles on the Most Favored Nation Clauses of the UN International Law Commission*, 2 Y.B. Int'l Law Commission11, U.N. Doc A./CN-4/Ser. A. 1978/Add. 1 (1978).
[39]Emilio Agustin Maffezini v. Kingdom of Spain (Decision on Objections to Jurisdiction), ICSID Case No. ARB/97/7 (2001).
[40]*Id.*
[41]JURGEN KURTZ, *The Delicate Extension of Most-Favoured-Nation Treatment to Foreign Investors: Maffezini v Kingdom of Spain, in*INTERNATIONAL INVESTMENT LAW

tribunals may exercise while interpreting MFN clauses, which has proven to be very expensive for several States, much to their chagrin.

C. An Evaluation

In contrast to the earlier State-State dispute resolution mechanisms, BITs certainly are a 'normative breakthrough'[42] because foreign investors now have direct access to international investment tribunals. But the host States' discontent with the bilateral regime is due in part to the readiness of tribunals to adopt expansive interpretations of 'vague' standards, which has major implications for the governments. The issues with regard to Investment treaty arbitration are discussed in the next section.

III. INVESTMENT TREATY ARBITRATION

A. Issues and Challenges in ITA

Ever since the first investor-State arbitration under a BIT materialized in 1984,[43] arbitration as a neutral forum for investor-State dispute settlement has found favour with almost all foreign investors for two main reasons. First, since BITs grant investors the right to take recourse to arbitration against the host State, the investors are no longer at the mercy of international politics and governmental bureaucracy and can pursue their litigation independent of any foreign relations considerations that often characterize State-to-State dispute settlement.[44] Second, the investors do

AND ARBITRATION: LEADING CASES FROM ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 546-547 (Todd Weiler ed., Cameron May, 2008).

[42]Tarcisio Gazzini, *Bilateral Investment Treaties, in*INTERNATIONAL INVESTMENT LAW: THE SOURCES OF RIGHTS AND OBLIGATIONS (T. Gazzini, E. De Brabandere (eds.), The Hague: Martinus Nijhoff)(2012).

[43]Asian Agricultural Products Ltd v Sri Lanka, ICSID Case No ARB/87/3 (1987).

[44]Daniel M. Price, *Some Observations on Chapter Eleven of NAFTA*, 23 HASTINGS INT'L & COMP. L. REV, 427 (2000).

not need a separate contract with the Host State to initiate arbitration as the consent of the State is often deemed to be present in the BIT itself.[45]

Once the investor has initiated the arbitration process, the procedures followed are relatively standard including: (1) submitting a notice of dispute to the host State, (2) complying with the applicable waiting period if any, (3) electing where to resolve the dispute, and (4) taking the chosen procedure forward in accordance with the chosen mechanisms articulated in the investment treaty. The next step is the appointment of the arbitral tribunal which typically provides for an arbitrator to be appointed by each party and the third arbitrator is chosen by the party-appointees.[46] The proceedings ensue according to the rules of the arbitration mechanism that the investor elected and the tribunal renders its award. In recent years, the arbitral awards have been rising in value, being anywhere between $8-10 million to "billions and billions of dollars". Noting the enormous claims made on public treasuries of States, a variety of critiques has questioned the lack of transparency in the arbitral proceedings,[47] among several other issues.

a) Lack of Transparency in Arbitral Proceedings and Confidentiality of Awards

Since ITA is based upon the model of commercial arbitration, a strong emphasis is placed on confidentiality of the process and award even though a State is involved as a party. Most arbitral rules contain specific provisions about the confidentiality or the publication of awards, providing that awards may be made by both parties, unlike court

[45]Giorgio Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, 269 RECUEIL DES COURS, 299 (1997); Gramont & Gritsenko, supra note 5; Gantz, *supra* note 32.
[46]*Id.*
[47]Julie A. Maupinn,*Transparency in International Investment Law: The Good, the Bad, and the Murky,in*TRANSPARENCY IN INTERNATIONAL LAW (Andrea Bianchi & Anne Peters (eds.), Cambridge University Press, 2013);Alessandra Asteriti & Christian J. Tams, *Transparency and Representation of the Public Interest in Investment Treaty Arbitration,in*INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW (Stephen W Schill (ed.), Oxford University Press, 2010).

decisions which are in the public domain.[48] Consequently, the evidence, the documents prepared for and exchanged in the arbitration and arbitral awards are not easily accessible. In addition, the hearings are private and no "third party" can participate in these proceedings without the parties' consent or even submit opinions or briefs to the tribunals as *amicus curiae*.

This undermines the public interest involved: "the very presence of a State as a party to the arbitration raises a public interest because the nationals and residents of that State have an interest in how the government acts during the arbitration and in the outcome of the arbitration".[49] To be fair, in exceptional circumstances, when the public interest is compelling, *amicus* briefs have been admitted by some arbitral tribunals.[50] But it remains subject to their discretion and is limited to certain cases, which is unfair to legitimate public expectations.[51]

b) Inconsistent Decisions and Insulation from Judicial Control

Due to the ambiguous standards incorporated in BITs, different tribunals can come to different conclusions about the same standard in the same treaty. In the event that a foreign investor can claim rights under two treaties, different tribunals organized under different treaties can come to different conclusions about disputes involving the same facts, related parties, and similar investment rights.[52] The options for addressing inconsistency of decisions in the ITA framework are limited: an unsatisfied party may request a modification of the award under the

[48]UNCITRAL Rules, Art. 32(5); AAA ICDR, Art. 34; CRCICA, Art. 37 bis; LCIA Arbitration Rules, Art. 30; LMAA, Rule 26; WIPO Rules, Art. 73-76; IBA Rules of Ethics, Rule 9; 2004 AAA/ABA Rule of Ethics for Arbitrators in Commercial Disputes.
[49]Ruth Teitelbaum, *A Look At The Public Interest In Investment Arbitration: Is It Unique? What Should We Do About It?*, 5 BERKELEY J INT'L L 54 (2010).
[50]Methanex Corporation v. United States of America, UNCITRAL,http://www.naftaclaims.com/disputes_us_6.htm; United Parcel Service of America Inc. v. Government of Canada, ICSID Case No. UNCT/02/1.
[51]Loukas A. Mistelis, *Confidentiality and Third Party Participation: UPS v. Canada and Methanex Corp. v. United States, in*INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW, (Todd Weiler ed., Cameron May, 2008).
[52]D. Franck, *supra* note 11.

applicable rules or institute a suit in the national courts on limited grounds.[53]

Provisions for modification of an award under most applicable rules allow only for correction of minor clerical errors and do not usually permit a review of the merits of the claim.[54]

The more popular option in ITA to remedy inconsistent decisions is to challenge the award after the tribunal renders it either (1) at the seat of arbitration or (2) contest enforcement at the place where enforcement is sought.

But it has been observed that arbitration tribunals are often insulated from the review of judicial authorities as "*investment treaties provide that investor-state disputes are to be treated as commercial disputes for the purposes of the New York Convention. This restricts the degree to which domestic courts can refuse to enforce an investor-state award on the grounds that it goes beyond the bounds of commercial arbitration*".[55] In a bid to promote their domestic arbitration environment, many States have revised their national laws such that they now provide for a less vigorous standard of judicial review for foreign arbitral awards.[56]

For instance, Belgium has removed any kind of judicial oversight that Belgian Courts had over international arbitration awards.[57] The Indian Supreme Court, in its 2012 judgment in *Bharat Aluminium Co. (BALCO) v. Kaiser Aluminium Technical Service* has ruled that Indian courts will

[53]Mark B. Feldman, *TheAnnulment Proceedings and the Finality of ICSID Arbitral Awards*, 2 ICSID REV.-FILJ85 (1987).
[54]ICSID,*Art. 49, ICSID Convention, Regulations and Rules: Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings*, WORLD BANK, http://www.worldbank.org/icsid/basicdoc/partD.htm.
[55]Biswajit Dhar et al., *India's Bilateral Investment Agreements: Time to Review*, 47(52)ECONOMIC AND POLITICAL WEEKLY119 (2012).
[56]Thomas W. Walsh, *Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality, Berkeley Journal of International Law,* 24 BERKELEY J. INT'L L., 445 (2006): http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1310&context=bjil.
[57]Georges R. Delaurne, *The Finality of Arbitration Involving States: Recent Developments*, 5 ARB. INT'L.29 (1989).

not entertain any application to set aside a foreign arbitral award under Section 34 of the Indian Arbitration Act,[58] giving a further boost to investors locked in disputes with Indian companies or Government of India. Thus, since there are no appeals processes provided for in the ITA framework, the diminishing number of effective options to review arbitral awards certainly gives cause for disillusionment.

c) A Private Tribunal for Questions of Public Law

Due to overbroad definitions of 'investment' in BITs and inclusion of terms like 'indirect expropriation', investors have been able to sue Host states even for to government actions taken to protect the public welfare, environment or national security.[59] Subject-matter of investor- State claims often include functioning of and decisions by domestic court systems, denial of regulatory permits, national resource policies, health and safety measures, environmental protections and emergency regulatory measures taken during financial crises.[60]

The arbitral tribunals have awarded egregious damages in such cases, disregarding the duty of the State to act in public interest and restricting their judgment to an assessment of whether the government action reduces the value of an investment.[61] In *Philip Morris Brands Sárl & Ors. v. Uruguay*, the claimants had instituted a challenge to the cigarette packaging and labelling requirements that adopted by Uruguay to reduce the domestic consumption of tobacco.[62] They claimed damages under the Uruguay-Switzerland BIT, arguing that the measures taken had frustrated their "legitimate expectations" regarding the stability of their investment

[58]Bharat Aluminium Co. (BALCO) v. Kaiser Aluminium Technical Service, (2012) 9 SCC 552 (India).
[59]Jane Kelsey, *Investor-State Disputes in Trade Pacts Threaten Fundamental Principles of National Judicial Systems*, CITIZEN.ORG, http://www.citizen.org/documents/isds-domestic-legal-process-background-brief.pdf [hereinafter Kelsey].
[60]Middle East Cement v. Egypt (Award),ICSID Case No. ARB/99/6 (2002);Goetz v. Republic of Burundi, ICSID Case No. ARB/95/3 (1998);Loewen v. United States, ICSID Case No. ARB(AF)/98/3 (2003).
[61]Middle East Cement v. Egypt (Award), ICSID Case No. ARB/99/6, 107 (2002).
[62]Philip Morris Brands Sárl & Ors. v. Uruguay, *ICSID Case No. ARB/10/7 (2013).*

in Uruguay. This is not the first time such a challenge has arisen[63]and while the decision of the tribunal is still awaited, it demonstrates how ITA can be used as a strategy to stifle policy-making and to reduce regulations by States that are detrimental to the *profits* of investors.[64]

Arbitral tribunals no longer consider their authority restricted to pecuniary relief of damages; in several instances, they have even allowed injunctive relief that has created severe conflicts of law.[65] In a claim brought by Chevron against Ecuador under the U.S.-Ecuador BIT, the tribunal ordered the Executive branch of the Egypt Government to intervene and halt the enforcement of an appellate court ruling, unmindful of the fact that this order violates the principle of separation of powers.[66]

B. An Evaluation

These issues underscore the fact that ITA framework has been unable to accommodate several concerns regarding implications of an Investor-State dispute that usually do not figure in international commercial arbitration. We must not forget that these Arbitral tribunals are constituted of privately contracted lawyers and arbitrators who lack public accountability, do not operate under any standard judicial ethics rules and rule on significant questions of public law according to arbitration rules that are in many respects alien to public law.[67] Therefore, continuing transplantation of that model for regulatory adjudication between Investor-State may not be the best way forward.

IV. THE INDIAN MICROCOSM

[63]Emilio Agustin Maffezini v Kingdom of Spain, ICSID Case No. ARB/97/7 (2000).
[64]Gramont & Gritsenko, supra note 5.
[65]Enron & Ponderosa v. Argentina (Award on Jurisdiction), ICSID Case No. ARB/1/03 (2004).
[66]Kelsey, *supra* note 59.
[67]GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW70-71 (1st ed., Oxford University Press 2007).

Eager to tap into the mobility of foreign investment post-liberalization, India commenced its BIT programme in 1994 and since then, BITs have been concluded with 86 countries out of which 73 have entered into force. Conspicuously, India is neither a signatory to the ICSID Convention nor a member of ICSID and therefore, any arbitration under Indian BITs would be either under the Additional Facility Rules or modeled as an ad-hoc non ICSID arbitration under the UNCITRAL Rules.[68]

India's Model BIT has standard clauses for Fair and Equitable Treatment, Most-Favoured Nation, post-establishment national treatment and UNCITRAL model arbitration. It is worth noting that Model BIT does not grant a '*right to make investments in India'*; an investor can exercise the rights under any BIT to which is a party only after making investments in its territory. Also, it covers only those investments which are made in accordance with the laws and regulations of the contracting State.[69] The rosy picture that BITs painted for the Indian government regarding FDI inflows faded away in 2011 when the first ITA claim in the *White Industries* case was decided against India.

A. The Dabhol power settlement case

Earlier, proceedings had been instituted against India by two U.S. investors which had invested in India through their Dutch and Mauritian subsidiaries to build, own and operate a power plant in Maharashtra. The Maharashtra State Government attempted to terminate it thereafter, on the ground that no competitive bidding procedure had been followed in the allocation process.[70] Enron invoked investor-State arbitration under the India-Netherlands BIT. An award was never made as the Indian

[68]S. Bhushan, *Bit Arbitration in India: Exploring Applicability of the 1996 Act and Enforcement of Resultant Arbitral Awards*,4 CONTEMPORARY ASIA ARBITRATION JOURNAL 273-304 (2011).

[69]*Ministry of Finance, Model Indian BIT, Art 2*,FINANCE MINISTRY OF INDIA,http://finmin.nic.in/the_ministry/dept_eco_affairs/icsection/Indian%20Model%20Text%20BIPA.asp.

[70]Kenneth Hansen et al., *The Dabhol Power Project Settlement - What Happened? And How*?, 12 INFRASTRUCTURE JOURNAL (2005).

government settled the dispute for a significant sum.[71] But in *Capital India Power Mauritius I and Energy Enterprises (Mauritius) Company v. India,*[72] the other investor persisted and successfully received damages under the BIT arbitration clause.

B. White Industries Australia Ltd. v. India

The *White Industries* award, the first of its magnitude and the first ever published investment treaty arbitration award against India, was a startling twist for the Indian investment arbitration landscape. The claimant was an Australian investor, who had concluded a long-term contract with Coal India Limited (CIL), a State enterprise, to supply equipment and develop the Pipawar Mine located in Bihar, for CIL. In 1999, disputes arose between them regarding payments under the contract and subsequently, the claimant initiated arbitration proceedings against CIL under the ICC Arbitral Rules. In a majority decision, the ICC Arbitral Tribunal awarded damages to the claimant. In 2002, both CIL and the claimant instituted proceedings in Indian courts: the former, in the Calcutta High Court to set aside the Award under the Indian Arbitration and Conciliation Act of 1996 and the latter, in the Delhi High Court to enforce the ICC award.

Both proceedings experienced significant delays and even after almost 10 years, they were pending before the Indian Supreme Court with no date of hearing fixed. Seeing no other alternative to enforce the award, finally in December 2009, White Industries invoked investor-State Arbitration under the Australia-India BIT. The claimant argued that it had been denied "effective means of asserting claims and enforcing rights", an obligation present in the Kuwait- India BIT, which it asserted that it was entitled to under the MFN Clause in the Australia-India BIT[73]. The Tribunal found that the ICC Award was an "investment" within the

[71] *Id.*

[72] Capital India Power Mauritius I and Energy Enterprises (Mauritius) Company v. India (Award), ICC Case No 12913/MS (2005).

[73] White Industries Australia Limited v. The Republic of India, UNCITRAL (2011) [hereinafter White Industries Australia Limited].

definition in the BIT and such long delays constituted a denial of "effective means" which translated into the denial of justice/fair and equitable treatment under the BIT. Thus, finding in favour of the claimant, the Tribunal ordered India to pay $98,12,077 (Aus.) as damages.[74]

The 'effective means' standard has opened its own can of worms; it seems to have lowered the threshold from the 'denial of justice' standard usually used in investment arbitrations. The denial of justice standard was articulated in the *Mondev* case:

"In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment."[75]

The test for FET standard has a "high threshold", and as an objective standard, it required a "*particularly serious shortcoming and an egregious conduct, that shocks or at least surprises, a sense of judicial propriety*."[76]

In the *White Industries* case, the Tribunal acknowledged that the "effective means" standard was a forward-looking, "distinct and potentially less demanding test, in comparison to denial of justice."[77] The tribunal also noted that the "effective means" standard was "measured against an objective, international standard," which focuses on "whether the system of laws and institutions work effectively at the time the promisee seeks to enforce its rights/make its claim".[78] It is baffling that India was found guilty not for a specific commission or omission on its

[74]*Bilateral Investment Treaties*, MINISTRY OF COMMERCE AND INDUSTRY, http://pib.nic.in/newsite/erelease.aspx?relid=95593.
[75]Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2.
[76]Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador, UNCITRAL, PCA Case No. 34877.
[77]White Industries Australia Limited,*supra* note 73, at 11.3.2 and 11.3.3.
[78]*Id.*at 11.3.2 (f).

part but singularly on the basis of the ordinary delays in its judicial system. This precedent has worrisome implications for India as it enormously increases the potential State liability under other similar BITs as well.

C. The Post-White Industries Scenario

White Industries has led to a ripple effect among other foreign investors: for instance, on 17 April 2012, Vodafone through its Dutch subsidiary Vodafone International Holdings BV initiated the dispute settlement process under the India-Netherlands BIT.[79] It declared that it was challenging the retrospective amendments for the tax code proposed by the Indian Government.[80] In its press release, Vodafone has argued that these proposals "amount to a denial of justice and a breach of the Indian Government's obligations under the BIT to accord fair and equitable treatment to investors."[81] This is one among many; companies such as the Russian conglomerate Sistema, Norwegian company Telenor, and the British hedge fund Children's Investment Fund, have initiated arbitration proceedings against India for various regulatory actions,[82] including the recent 2G Judgment by the Indian Supreme Court.[83]

To curb the onslaught of investment arbitrations, the Indian government recently froze all BITs negotiations till a "review of the model text of

[79]Sandeep Joshi, *Vodafone serves notice to Centre on tax dispute*,THE HINDU,http://www.thehindu.com/todays-paper/tp-business/vodafone-serves-notice-to-centre-on-tax-dispute/article3325893.ece.
[80]*Id.*
[81]*Id.*
[82]S. Bhushan and Puneeth Nagaraj, *Need to Align Bilateral Investment Treaty Regime with Global Reality*, THE HINDU, https://www.thehindu.com/business/companies/need-to-align-bilateral-investment-treaty-regime-with-global-reality/article4276916.ece.
[83]Centre for Public Interest Litigation v. Union of India, (2012) 3 SCC 1 (India); *2G Case: Russia's Sistema seeks protection of $3 bn investment from Indian Govt*, THE ECONOMIC TIMES, https://economictimes.indiatimes.com/industry/telecom/2g-case-russias-sistema-seeks-protection-of-3-bn-investment-from-indian-govt/articleshow/12070509.cms?from=mdr.

BIPA is carried out and completed".[84] The Indian Department of Industrial Promotion and Policy (DIPP) is contemplating the exclusion of investor-state arbitration clauses from the country's future BITs.[85]

V. THE WAY AHEAD: RENUNCIATION OR REINVENTION?

BITs have played a crucial role in the international investment regime by facilitating a stable regulatory framework for foreign investors to host their investments and flourish. But over the last few years, a gradual renunciation of the BIT & ITA framework is setting in, and spreading among States, especially the developing nations. This fundamental shift in due to the increasing risks and enormous costs involved that States now perceives under these treaties. The fact remains that the *status quo* is unsatisfactory and diminishing in its appeal and it is due in part to the transplantation of the international commercial arbitration model without accounting for extra-legal considerations that accompany the acts of States.

But the horizon is not as bleak as it appears; the BIT & ITA framework has slowly begun to respond to its perils and re-invent itself. States have begun renegotiations of their existing BITs[86] in order to address the issues and challenges that have been outlined in the previous sections of this paper. These new-generation treaties are a step forward in trying to correct the balance that is currently skewed completely in the favour of investors.

[84]Sanjay Mehudia, *BIPA talks on a hold*, THE HINDU,https://www.thehindu.com/business/Economy/bipa-talks-put-on-hold/article4329332.ece#!.

[85]Asit Ranjan Mishra, *Indiamay exclude clause on lawsuits from Trade Pacts*, THE MINT,https://www.livemint.com/Home-Page/dTXmHa0mYUyRrFko4HbiLP/India-may-exclude-clause-on-lawsuits-from-trade-pacts.html.

[86]UNCTAD, *Recent Developments in International Investment Agreements, IIA Monitor No.3 (2007)*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (2007), https://unctad.org/system/files/official-document/webiteiia20076_en.pdf.

UNCTAD has identified five distinguishing characteristics of these treaties:[87]

1. Greater precision in the scope of the definition of "investment";
2. Clarification of the meaning of key obligations;
3. Clarification that investment protection should not be pursued at the expense of other public policy objectives;
4. Promotion of greater transparency between the contracting parties and in the process of domestic rule-making; and
5. Innovation in relation to dispute settlement mechanisms.

A. Recommendations

The new generation treaties are certainly a laudable step forward but if investment arbitration mechanisms are to fulfil their promise, they will have to demonstrate greater sensitivity to crucial concerns such as public interest, transparency and minimize the risk of inconsistent decisions. States need to undertake an exhaustive review of their existing BITs and modify treaty provisions and procedures so that they are able to assume greater control over the arbitration process.

In addition, there is a need for an international body to provide appellate review and provide clarifications on the meaning of rights contained in investment treaties. States can utilize a variety of preventive mechanisms such as UNCTAD's concept of Dispute Prevention Policies (DPPs): it usually constitutes the establishment of institutional mechanisms within the government of the host State that focus on preventing the emergence and escalation of conflicts between the State and investors.[88]

[87]UNCTAD, *Investor-state Dispute Settlement and Impact on Investment Rulemaking*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (2007),http://unctad.org/en/docs/iteiia20073_en.pdf.
[88]UNCTAD, *Investor–State Disputes: Prevention and Alternatives to Arbitration*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (2010),http://unctad.org/en/docs/diaeia200911_en.pdf.

Reinvention is the key and now is the time; either BITs and ITA must rise to the occasion or forever miss the boat.

INTELLECTUAL PROPERTY RIGHTS AND COMPETITION LAW: AN EU AND INDIA ANAYLSIS

Reeti Agarwal & Rishi Raju[*]

Abstract

Intellectual Property Rights (IPR) and Competition Law are two regimes of law that are bound together by the economics of innovation and market by intricate legal rules that seek to provide balance between protecting and fostering innovation and preventing distortions in the market structure. Historically, these two regimes have developed as two separate fields of law, however, recently in India, the conflict between the two has overplayed. It is argued that these two regimes are not at loggerheads as their goals are to craft consumer welfare and encourage innovation through variant means. Further, it is argued that the interference of competition laws is not with the existence of patents, trademark or copyright but the exercise of it.

The present paper addresses the nexus between IPR and competition law in the innovation industry focusing on the Indian legal structure. This article argues that India is at a nascent stage towards the administration of Competition Laws. There is no sufficient jurisprudence to guide the Indian authorities to deal with the interface of IPR and competition in matters relating to abuse

[*]Reeti Agarwal and Rishi Raju are fourth-year students at the Jindal Global Law School, Sonipat. The author may be reached at 12jgls-rraju@jgu.edu.in.

of dominant position, refusal to deal, tying agreements, exclusive licensing, patent pooling and mergers, predatory pricing and compulsory licensing. It is necessary to analyse and inculcate the jurisprudence developed in the EU, regarding the inherent tension between IPR and competition.

In conclusion,it is stated that the aims and objectives of IPR and competition laws may seem, at first instant wholly at odds with each other; however, it is argued that these two regimes are complementary to each other, since both are aimed towards encouraging innovation and a fair competitive market structure.

I. INTRODUCTION

The application of competition laws to intellectual property rights ("**IPR**") has been an area of complication and topic for debates for a long time, both at the USA and the European Union. Competition laws intend to prevent market distortions and anti-competitive behaviour, whereas, IPR at instances allows the creation of monopoly status or monopolistic behaviour among IP holders. However, this article argues that though both these legal regimes have developed as separate regimes, their goals are intrinsically intertwined towards consumer welfare, protect and foster innovation and prevent market distortion.

First, the article provides a detailed analysis of the inherent tension between Competition laws and IPR. Further, it argues that the functioning of each of the two legal regimes might be separate, however, at the backdrop of each of their respective objectives, the main aim of both such regimes is to create consumer welfare and foster innovation. Second, the article focuses at the TRIPS Agreement, and provides a detailed analysis of the extent at which the Agreement has provided

guidance in order to address the friction between these two regimes. Third, the paper focuses on a few judgements provided by the European Union (EU), and extract various principles and judicial language used to smoothen the tension between the two regimes. Fourth, the paper addresses the lack of jurisprudence with regard to the application Competition laws to IPR in Indian Courts. In addition, it analyses the scanty number of cases present before the Indian Courts and the lack of judicial language with regard to clear demarcation between IP rights and Competition law intervention. Lastly, it is argued that due to the lack of precedent set before the Indian Courts, it is necessary that Indian Courts inculcate the jurisprudence laid down in the EU, in order to judge cases that require a segregation between IP holder's rights and interference of Competition laws.

II. INTERFACE BETWEEN INTELLECTUAL PROPERTY RIGHTS AND COMPETITION LAWS

Intellectual Property Rights are a set of statutory rights protected under the Indian Copyrights Act,[1] Patents Act,[2] and Trademarks Act.[3] These rights are provided to the inventor or creator of the property in order to protect their work and create a sense of exclusivity. In common parlance, IPR's designate boundaries which create a monopolistic or quasi-monopolistic rights over their innovation;[4] thus, limiting the scope of the market and the influx of new competitors.[5] Whereas Competition laws are a set of principles and rules that promote efficient functioning of the

[1]Indian Copyright Act, 1957.
[2]Patents Act, 1970.
[3]Trade Marks Act, 1999.
[4]THE INTELLECTUAL PROPERTY DEBATE-PERSPECTIVES FROM LAW, ECONOMICS, AND POLITICAL ECONOMY (Meir Perez Pugatch ed., Edward Elgar, 2007).
[5]Thomas Cottier & Ingo Meitinger, *The TRIPs Agreement without a Competition Agreement,* FONDAZIONE ENI ENRICO MATTEI WORKING PAPER NO., 65-99, http://www.feem.it/userfiles/attach/Publication/NDL1999/NDL1999-065.pdf.

market.[6] Their objective is to stop participants in a particular market to engage in anti-competitive practices that have a detrimental effect on the market.[7]

As Sir Meir Perez Pugatch, a renowned author, described in his book, "*The Intellectual Property Debate-Perspectives from Law, Economics, and Political Economy*", that if a Martian (any kind of extra-terrestrial body) were to visit Earth for the first time, and it were exposed to the knowledge of IPR and Competition law, it would undoubtedly think that there exist a certain sense of friction between these two systems.[8] However, it is argued that they are merely complementary to each other, which promote innovation and consumer welfare.[9]

It is noticed that in the short-run it may appear that IPR protection creates a monopoly, however, in the long run it promotes innovators and artists an incentive a new form of innovation or artistic expression, respectively.[10] It allows the participants in a market to create better quality and diverse products which allow growth and efficiency in the market.[11] Competition laws, on the other side, does not specifically estop participants in a particular market to possess market dominance or a monopoly. All the Indian Competition Act prohibits is the abuse of such

[6]K. Maskus, *Competition Policy and Intellectual Property Rights in Developing Countries: Interest in Unilateral Initiatives and a WTO Agreement*, WORLD BANK CONFERENCE ON DEVELOPING COUNTRIES AND THE MILLENNIUM ROUND, GENEVA 1999, http://siteresources.worldbank.org/DEC/Resources/84797-1251813753820/6415739-1251814020192/maskus.pdf.

[7]Eshan Ghosh, *Competition Law and Intellectual Property Rights with Special Reference to the TRIPS Agreement*, RESEARCH PAPER FOR THE COMPETITION COMMISSION OF INDIA,http://cci.gov.in/images/media/ResearchReports/EshanGhosh.pdf.

[8]The tension between competition laws and IPR is not a new phenomenon, it has been a bone of contention since a long time. See *supra* note 4.

[9]*Consumer Protection and Competition Policy*, PLANNING COMMISSION OF INDIA,http://planningcommission.nic.in/plans/planrel/fiveyr/11th/11_v1/11v1_ch11.pdf.

[10]Alice Pham, *Competition Law and Intellectual Property Rights: Controlling Abuse or Abusing Control?* CUTS INTERNATIONAL, INDIA (2008), http://www.cuts-international.org/pdf/CompetitionLaw_IPR.pdf ("**Pham**").

[11]S.F. Anthony, *Antitrust and Intellectual Property Law: Adversaries to Partners*, 20 AIPLA Q.J. 1 (2000) ("**Anthony**").

dominant position[12] which would create an adverse effect on the specific market.

In the light of the objectives of each system, i.e. IPR and Competition law, it is seen that competition is not the end goal of Competition laws; and protection of expression of ideas is not the end goal of IPR.[13] They are the mere means of achieving the goals set out in each of these systems. Though the two systems have emerged as widely different and distinct systems, their goals are complementary to each other, in order to pursue dynamic innovation and consumer welfare.[14] Where Competition laws provide a static efficiency in the market of the IP holder, IPR itself promotes a long-term system that allows incentive for innovation and growth.[15]

III. TRIPS AGREEMENT: PERMITTING CONTROL OF IPR

Trade-Related Aspects of Intellectual Property Rights ("**TRIPS**") Agreement is an international arrangement that sets down minimum standards for various forms of IP regulations that should be adopted by the nation states which are members of WTO.[16] TRIPS recognizes the application of Competition laws on IP holders and the market power it creates. It allows members to maintain laws that are necessary for prohibiting anti-competitive arrangements and practices.[17]

[12]Competition Act, 2002, §4.
[13]Pham, *supra* note 10.
[14]Atari Games Corp. v. Nintendo of Am Inc., (1990) 897 F.2d 1572, 1576.
[15]MARTIN KHOR, INTELLECTUAL PROPERTY, COMPETITION AND DEVELOPMENT (TWN, 2005).
[16]*Overview: The TRIPS Agreement*, WORLD TRADE ORGANISATION, https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm.
[17]Final Act embodying the Results of Uruguay Round of the Multilateral Negotiations, Marrakesh Agreement Establishing the World Trade Organization, April 15, 1994, Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights, Arts 8(2), 30, 31, 40. ("**TRIPS**").

The TRIPS agreement provides a regulatory measure on the use of IPRs, and Competition policy is a supplementary set of rules that are mentioned in the TRIPS Agreement.[18] Article 7 of the Agreement states that the enforcement of IPR should be construed to balance the rights and obligation and in pursuance of social and economic goals.[19] This does not specifically narrate the use of Competition laws where IP holders have abused their position, but it acts as an interpretative section that permits the members to control the use of IPR where it acts inconsistent with its objectives.[20]

The TRIPS agreement foresees and acknowledges that there may be a friction between the use of IPR and Competition laws.[21] Article 8(2) of the agreement clearly permits nation states to adopt any appropriate measures that prevent the abuse of IPR.[22] The text of the said article does not directly state that Competition policy should be adopted to control the abuse of IP holders, however, it provides enough room for nation states to adopt any such measures or policies that restrict such practices.

Article 40 of the TRIPS agreement is the "epicentre"[23] of the debate regarding IPR and Competition laws. Article 40(2) clearly states that nation could adopt or use competition laws to prevent the IP holders from abuse their dominant position or create an adverse effect on the market.[24] It acts as a conclusive manifestation of restriction mentioned in Article 8(2) of the Agreement. Further, the issuance of compulsory licensing is validated under Article 31 of the Agreement, it acts as a strong counterbalance between the patent holder and creation of an adverse effect in the market.[25]The article lays down eleven conditions which

[18]JAYASHREE WATAL, INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES (3rd ed, Oxford University Press, 2001) ("**Watal**").
[19]TRIPS Agreement, Art. 7.
[20]D. Shankar, *The Vienna Convention of Law of Treaties, the Dispute Settlement System of the WTO and the Doha Declaration on the TRIPS Agreement*, 36 JOURNAL OF WORLD TRADE 721 (2002).
[21]Eleanor M. Fox, *Trade, Competition and Intellectual Property- TRIPS and its Antitrust Counterparts*, 29 VAND. J. TRANSNATIONAL L. 481, 486 (1996).
[22]TRIPS Agreement, Art. 8.2.
[23]*Supra* note 16.
[24]TRIPS Agreement, Art. 40.
[25]Watal, *supra* note 18, at 380-381.

requires to be observed before granting a compulsory license, it is an exhaustive list containing strict safeguards.

The TRIPS Agreement is largely focused on the functioning of IPR and creating an international standard of regulating the use of IPR. It has strictly mentioned the manner in which IPR can be obtained and used, however, it has to be in pursuance with the objective of granting and protection IP. The use of Competition policy in the TRIPS agreement is supplementary, however, it acts as a regulatory rule in order to control the conduct of the IP holder.

IV. ANALYSIS OF EU CASE LAWS DEALING WITH COMPETITION LAW

The Rome Treaty, which was responsible for the creation of European Union, was formulated in 1957. The treaty has been renamed in 2009 by the Lisbon Treaty as Treaty on the Functioning of European Union ("**TFEU**").[26] The primary objective of the European Union has to provide a market for goods and services and maintain the free and fair arrangement of the market. This policy has been re-affirmed when it is entwined with the Competition laws of EU. The rules of competition have been essentially based on two doctrines: firstly, competition rules apply to the exercise of the intellectual property rights rather than the mere existence of them; secondly, restraints over competition is justified when it is 'reasonably necessary' for protecting the intellectual property right in a certain subject matter.[27]

The Rome Treaty of 1957 has enumerated various kinds of anti-competitive practices through specific treaty provisions, which have

[26]JEAN-CLAUDE PIRIS, THE LISBON TREATY: A LEGAL AND POLITICAL ANALYSIS (Cambridge University Press, 2010).
[27]*Revised report by UNCTAD secretariat on Competition policy and the exercise of Intellectual property rights*, UNCTAD, www.unctad.org/en/docs//c2clp22r1.en.pdf.

further been developed by judicial precedents. The interface between IPR and each such division is analysed below.

A. European Union Laws On Competition Law

The reinforcement of free and fair market for the purposes of market integration is well-supported by the competition rules stated in the Rome Treaty of 1957. Article 81 and 82 of the Treaty have substantially discussed which list out various actions that could be deemed to have a destructive impact on the competition. The European Court of Justice ("**ECJ**") however has made a prominent remark that such a list contained in Article 82 does not provide an entire "exhaustive enumeration"[28]of the possible kinds of abuse by a dominant position. Article 81 (presently Article 102 of the Treaty on the Functioning of the European Union: TFEU)[29] prohibits and bars agreements that may fix purchases or selling price, limit production, restrict the source of supply, or basically cause a competitive disadvantage, and thus automatically declares such an agreement void under Article 81(2).[30]

Article 82 (presently Article 102 of the TFEU)[31] on the other hand, regulates the undertakings and prohibits the abuse in relation to those who already possess a dominant position,[32] or even near that position within a common market, which has the potential to affect the trade between its Member States. Thus, in addition to exorbitant pricing and limitation of output, the Article considers driving out existing market and

[28]Europemballage Corp. and Continental Can Co. Inc. v. Commission, (1973) E.C.R. 215.

[29]*Consolidated Reader-Friendly Edition of the Treaty on Functioning of European Union*, EU DEMOCRATS, http://www.eudemocrats.org/fileadmin/user_upload/Documents/D-Reader_friendly_latest%20version.pdf

[30]However, the agreement is not void where the agreements are innocuous and promote technical or economic progress or foster consumer welfare and enable consumers to reap a fair share of benefit under Article 81(3).

[31]*Supra* note 29.

[32]A firm holds a dominant position if it possesses enough market power to behave to an appreciable extent independently of the competitors, customers and ultimately consumers. SeeUnited Brands Co. v. Commission, (1978) E.C.R. at 207, ¶65.

"placing ... [others at a] competitive disadvantage"[33] a form of abuse. The Article is substantially responsible for issuing licenses of intellectual property rights. The European Commission has clearly stated on several occasions that "an important part of its policy for encouraging innovation in the EU is a harmonized system of IPRs that can be used effectively to protect new products and technology".[34] Thus, mere dominance does not equate to abuse of such dominance. Therefore, the Commission must scrutinize the conduct and behaviour of such a company concerning the impact the actions have on the relevant market in question.

a) Abuse of Dominant Position

Intellectual Property Rights or exclusive rights[35] are granted to an inventor or a creator with the rationale of rewarding them for their invention and encouraging for further new research and development or innovations. Owing to the nature of IPRs, they create a "degree of economic exclusivity".[36] Therefore, an established dominant position in the market does not by default violate Competition Laws,[37] if such a case was however a violation, the concept of granting exclusive rights would be redundant. It also does not obligate exclusive right holders' to license such a property to others in all cases. Thus, it is safe to state that such an abuse of dominant position is largely dependent upon facts involved in a particular case.[38]

Dominance has been defined as a situation where in a certain market the

[33]The Rome Treaty 1957, Art. 82.
[34]DUNCAN CURLEY, INNOVATION, INTELLECTUAL PROPERTY AND COMPETITION – A LEGAL AND POLICY PERSPECTIVE,(Stockholm Network, 2006).
[35]Abhishek Adlakha, I*ntellectual Property and Competition Law: The Innovation Nexus*, 4 CIRC (2013).
[36]Pham, *supra* note 10.
[37]Emanuela Arezzo, *Intellectual property rights at the crossroad between monopolization and abuse of dominant position: American and European approaches compared*, 24JOHN MARSHALL JOURNAL OF COMPUTER & INFORMATION LAW (2007) [hereinafter Arezzo].
[38]Pham, *supra* note 10.

normal competitive forces are weakened in a sensible manner.[39] Therefore, the European authorities and courts have emphasized that existence of dominance in such a market does not simply exclude a certain degree of competition, unlike in cases of monopoly.[40] In Hoffmann-La Roche[41]case the ECJ, held that the "abuse is an objective concept relating to the behaviour of an undertaking in a dominant position… has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition." In other words, the "abuse further"[42] destroys the market, which was already weakened by the presence of the dominance.

The ECJ in two cases[43] has held that enforcement of design rights or a refusal in granting the license did not amount to an abuse within the meaning of Article 82 of the Rome Treaty.[44] For instance in *AB Volvo v. Erik Veng*,[45] Veng was importing the manufactured parts without authorization, and had made serious attempts of obtaining a license. However, Veng opposed this importation. The ECJ on this ruled that a Veng's refusal to grant the license to Veng did not amount to abuse. The rationale given by the court was the right to excluding third parties from the sphere of "manufacturing and selling or importing products… constituted the very subject of [the Company's] exclusive right."[46]

The jurisprudence and approach of the ECJ has however developed in the more recent cases. The court has established a general criterion[47] as compared to Veng or CIRCA. In the Magill Case,[48] it involved refusal to license the copyright on the TV listings to a relatively small broadcasting company. This company was inclined in providing a comprehensive

[39]Hoffmann-La Roche v. Commission, (1979) ECR I-461 at 39 [hereinafter Hoffmann-La Roche].
[40]BritishAirways v. Commission, Case C-95/04P (2007).
[41]Hoffmann-La Roche, *supra* note 39.
[42]Arezzo, *supra* note 37.
[43]Volvo v. Erik Veng, (1988) E.C.R. 6211; CIRCA v. Renault, (1988) E.C.R. 6039.
[44]RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND COMPETITION, (Joseph Drexl (ed.), Edward Elgam Publishing, 2008) (hereinafter "**Drexl**").
[45]AB Volvo v. Erik Veng, (1988) E.C.R. 6211 ("***AB Volvo***").
[46]*Id.*
[47]Drexl, *supra* note 44.
[48]RTE and ITP v. Commission (Magill), (1995) E.C.R. 1153 ("***RTE and ITP***").

weekly TV guide comprising of the three broadcasters' programming details, [49] which were the copyright holders. The ECJ based on these facts, issued a test, commonly known as the Magill test,[50] for actions that are abusive under Article 82. Namely, a) exclusive holder of input or raw material for running a business, where such product is not duplicable; b) when potential consumer demand exists for a product, but there is a limitation on the entry in the market itself c) there exists no legitimate business justification for such refusal to license d) where the goal is for reserving a downstream market by barring competition.[51] Thus, the ECJ held that the three television companies had abused their own individual dominant position in the market; as a result they were obligated to disclose the information for the TV weekly guide to be published by Magill.

In the landmark case of Microsoft,[52]intellectual property rights and competitions laws were faced at loggerhead. The case was initiated by Sun Microsystems, which claimed that Microsoft's refusal to supply the interoperability information that is essential, was illegal. The allegation stemmed from the fact that the licenses were being granted by Microsoft to Sun Microsystems' competitors, which they were claiming as an abuse of dominant position. After a process of investigation, the EC ruled that it was an abuse under Article 82 of the Treaty. For detecting abuse, the Commission first established that Microsoft possessed monopoly. On the basis of this, it re-iterated earlier decisions of the ECJ stating that a firm in possession of dominant position carries "*a special responsibility, irrespective of the causes of that position, not to allow its conduct to impair genuine undistorted competition on the common market*."[53]

Further, applying the above principle the Commission held cumulatively that firstly, information of interoperability was indispensable for other

[49]Anthony, *supra* note 11.
[50]Arezzo, *supra* note 37.
[51]RTE and ITP, *supra* note 48.
[52]Microsoft v. Comm'n, (2007) ECR II-1491.
[53]Michelin v. Commission, (1983) E.C.R. 3461.

work groups of operating systems. Secondly, there was a risk of eradication of all possibilities of competition with respect to the server operating system market. Lastly, there was a restriction on development of new products due to the rejection of licensing. Hence, such a refusal contributed to developing anti-competitive practices, amounting an abuse being a dominant position.

b) Excessive Pricing and Competition Law

An overall view of the European Commission(EC) practice has been inclined towards curtailing the abuse of dominance in terms of excessive pricing, where exorbitant prices are prevailing in market. It has taken several approaches and tests to determine the issue of excessive pricing peculiarly in most cases. The EC has not only constructed its decisions on economic arguments, but also inculcated arguments of "fairness", as the language of the law suggests by itself "unfair practices".[54] The primary objective for curbing the practice is that the monopolists use their position to "reap trading benefits that [probably] would not have reaped if there had been normal and sufficiently effective competition."[55] In addition, it is presumed that there exists a "fair" price that could be derived from the Commission/Courts, which is derived externally in that specific trade. [56]

The difficulty is in demarcating the line between what is unfair and what is not in a monopoly pricing system. As there is no definitive law on the standards of determining the fairness, the decision is largely dependent upon judicial interpretation.[57] In General Motors v. Commission,[58] the ECJ gauged whether a price is reasonable to its economic value, if not the price is known to be abusive in nature. General Motors (GM), possessed the power to inspect and issue certificates of conformity to all the vehicles for their respective trademarks that entered the country. The

[54]Michal S. Gal, *Monopoly pricing as an antitrust offense in the U.S. and the EC: Two systems of belief about monopoly?* 49 ANTITRUST BULLETIN 384 (2004) ("**Gal**").
[55]United Brands Co. v. Commission, (1978) 1 C.M.L.R. 429.
[56]Gal, *supra* note 54.
[57]*Id.*
[58] General Motors v. Commission, (1976) 1 C.M.L.R. 95.

Belgian authorities conferred this power. However, GM charged a high fee for such a service. The Commission found that GM was in a dominant position. The Court extending the ambit of abuse held, "the imposition of a price which is excessive in relation to the economic value of the service provided" would amount to abuse.

Similarly, in *United Brands Co. v. Commission*,[59] the Court applying the General Motors principle further stated that "*the question to be further determined is whether the difference between the costs actually incurred and the price actually charged is excessive*".[60] Therefore, the Court restating the principle of General Motors held that charging a price that is exorbitant, which has no "reasonable relation" to the economic value of the product that is being supplied, would be an abuse. In other words, this decision initiated a test that necessitated the Commission to conduct a cost analysis in terms of comparing the selling price of a product and the cost of its production, for the determination of excessive pricing.[61]

Another approach adapted by the courts is the "comparative market test".[62] The test was initially applied in the Societe des Auteurs, Compositeurs at Editeurs de Musique ("SACEM") decisions.[63] The issue in this case was whether the rate was higher than the rates in other Member States and thus was it subject to unfair trading conditions. The court held that the on the comparison of the fee levels, it can be determined whether the difference is inclined towards abuse of a dominant position. Therefore, the suggestive method posed to be an alternate to the cost-analysis, where it required instead to objectively weighing the price levels among comparable markets while detecting

[59]United Brands Co. v. Commission, (1978) 1 C.M.L.R. 429.
[60]*Id.*
[61]Production costs are especially difficult to determine when long-term investments are made, when risk- factors should be assessed, when production costs of complex corporate structures with a wide product range or multinational production facilities must be apportioned, or when intellectual property is involved. See CICCE v. Commission, (1986) 1 C.M.L.R. 486.
[62]Gal, *supra* note 54.
[63]Ministere Public v. Tournier, (1991) 4 C.M.L.R. 248 ("**SACEM II**"); Lucazeau v. SACEM, (1989) E.C.R. 281 ("**SACEM III**").

excessive pricing.

The ECJ as a common practice has intervened in cases where the margins are beyond or about one hundred percent.[64] It has permitted a significant line of margin that can be rightfully be exercised by a monopolist.[65] However, the ECJ in a number of cases, observed excessive pricing as an "abuse of market power" that leads to distribution of inequitable benefits or even accepting distribution of wealth[66] which prevail in a market regulated by monopolists.

c) Refusal to Deal/License

The general principle that is followed in European Union Laws is that the parties, even including dominant firms, are free to contract.[67] It is thus pertinent to note that the refusal to deal doctrine has been termed as a series of "exceptional circumstances", where the refusal by the monopolists or even near monopolist is detrimental or harmful[68] to a competition-based market. The provision flows from Article 102 of the Treaty, which states that "…since the refusal to sell would limit markets to the prejudice of consumers and would amount to discrimination which might in the end eliminate a trading party from the relevant market".[69]Thus, balancing the prevalence of Intellectual Property Rights and Competition Law, the courts have developed the jurisprudence through several case laws while dealing with exceptional circumstances.

In *AB Volvo v. Erik Veng*,[70] the ECJ held that Article 82 of the Treaty could be attracted and as a result constitute "abuse of dominance", if a dominant position engages in abusive conduct for example "arbitrary

[64]Gal, *supra* note 54.
[65]*Id.*
[66]Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV., 561 (1983).
[67]Maggiolino M., *Monopolists' Refusal to Deal in IP: US Courts and EU Institutions line up along some Cultural and Jurisdictional Cleavages*,3RD ANNUAL CONFERENCE OF THE EPIP (EUROPEAN POLICY FOR INTELLECTUAL PROPERTY) ASSOCIATION (2011).
[68]*Id.*
[69]The Rome Treaty, 1957.
[70]AB Volvo, *supra* note 45.

refusal to supply spare parts to the independent repairers."[71] Therefore, it is important to note a clear difference that merely refusal to grant license may not per se be anti-competitive, however, such a refusal must be arbitrary for constituting as an abusive conduct. In the *Magill Case*,[72] the ECJ, in addition to the other violations, it held that refusal was also abusive in nature because "*it prevented the appearance of a new product [that the dominant firm] did not offer and for where there was a potential consumer demand*". Therefore, it held that refusal to such licenses of copyright resulted in abusive conduct on the part of dominant firms.

In *Oscar Bronner*,[73] a landmark case on refusal to deal, the ECJ laid down a definitive test for resolving the issue of when refusal to deal is "illegal". It stated three instances for the same: a) it may be likely to eliminate competition in secondary market; b) that cannot be objectively justified; and c) when the claimed input of the same is indispensable for the rivals to even carry on their own business, where basically there are no actual or substantial substitutes in existence for that input. Therefore, even though the undertaking of such a dominant position may not amount to abuse, however, "the exercise of an exclusive right by the proprietor may, in exceptional circumstances may involve abusive character.

In a more recent case, *IMS Health v. NDC Health*,[74] the ECJ validated identical stance as Magill. It stated that the refusal to grant access to, in this case copyrighted input, was abusive as: a) it was such as to exclude any competition in the secondary market; b) it was unjustified; and c) it concerned an indispensable input. Further, it said that such a refusal resulted in blocking the beginning of a new product, which possessed a potential consumer demand, which in effect affected the overall development of a new market.

[71] *Id.*
[72] ITP v. Commission, (1995) E.C.R. I-743.
[73] Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, (1998) ECR I-7791.
[74] IMS Health v. NDC Health, (2004) E.C.R. 1-5039 ("**IMS Health**")].

V. ANALYSIS OF INDIAN CASE LAWS DEALING WITH COMPETITION LAW

The Indian Competition Act was enacted in the year 2002, which traces back to the Monopolies and Restrictive Trade Practices Act, 1969. Due to the liberalization of the Indian economy, many of the sections in the previous Act became redundant. The Competition Act is a fairly new piece of legislation that intends to prevent trade practices that create an adverse effect to the market and protect the welfare of consumers.[75]

It is argued that the recent Competition Act is not directly resolve the conflict between Competition Laws and IPR. Further, it is argued Section 3(5) of the Act does not restrict or prohibit aggrieved parties to bring a matter relating to anti-competitive practices of IP holder to the Competition Commission. A close perusal of Manupatra regarding the interface between Competition Law and IPR would show the lack of Indian jurisprudence that is available regarding the conflict. However, the few that are available, lack enough judicial thought and language that could clearly dissect the conflict.

The Competition Act is divided into various kinds of anti-competitive practices, the interface between IPR and each such division is analysed below.

A. The non-obstante clause of Section 3(5)

Section 3(5) of the Competition Act states that any reasonable conditions imposed by the IP holder during the exercise of his IPR, would not amount to an anti-competitive practice under the Act.[76] However, any unreasonable conditions on an agreement imposed by an IP holder will not fall within the protection laid down in Section 3(5) of the Act. In other words, while exercising an IPR, if the party performs a prohibited

[75]Competition Act 2002, Preamble.
[76]Competition Act 2002, § 3(5).

trade practice,[77] in detriment of the market or consumer welfare,[78] the non-obstante clause under Section 3(5) would not be applicable.[79]

B. Where should such matters be heard- Issue on Jurisdiction

The dispute between IPR and Competition Act is one of the most complex and disputed areas of law.[80] Thus, the issue regarding where such matters shall be instituted is of importance. The provisions of neither Competition Law nor IPR, does not provide any remedy to such situations. However, in *Aamir Khan Production v Union of India*[81], the Court held that Competition Commission of India (CCI) has the jurisdiction here matters relating to IPR when it is directly in contravention of the provisions of the Competition Act. In cases of providing licenses, it would be the duty of the Copyright Board to hear such matter, since the Act specifically provides it to do so.[82] This principle of law has been further reiterated in subsequent judgements where such dispute was an issue.[83]

C. Abuse of Dominant Position

Dominant position is a position of economic strength, where it can operate independently with respect to the other competitive market

[77]Manju Bharadwaj v. Zee Telefilms Ltd., (1996) 20 CLA 229. See also Dr Valla Peruman v. Godfrey Phillips (India) Ltd., (1995) 16 C.L.A. 201.
[78]Jefferson Parish Hospital District No. 2 v. Hyde, (1984) 466 US 2.
[79]ABIT ROY &JAYANT KUMAR, COMPETITION LAW IN INDIA202-203 (Eastern Law House, 2008).
[80]Drexl, *supra* note 44. See also Regibeau &Rockett Katharine, *The relationship between intellectual property law and competition law,*UNIVERSITY OF ESSEX, DEPARTMENT OF ECONOMICS, ECONOMICS DISCUSSION PAPERS 581,https://www.essex.ac.uk/economics/discussion-papers/papers-text/dp581.pdf.
[81]Aamir Khan Productions Pvt. Ltd. and Aamir Hussain Khan v. Union of India through Ministry of Affairs, The Competition Commission of India through its Secretary Mr. S.L. Bunker and the Director General Competition Commission of India, (2010) 102 SCL 457 (Bom).
[82]*Id.*
[83]Kingfisher v. Competition Commission of India, Writ Petition No. 1785 of 2012.

participants.[84]A position of dominance itself does not conclude that it is anti-competitive,[85] it is only in contravention with the Act when it abuses this position.[86] It enables dominant market participants to prevent operative competition in the relative or a geographical market.[87]

The rigidity among IPR and Competition Law is mainly due to the understanding that where the former creates and protects monopoly, the latter seeks to prevent or restrict it.[88] However, such an understanding of IPR is far too simplistic. Indian Courts have not effectively facilitated to resolve this issue. It is argued that IPR itself does not grant monopoly rights. They provide an opportunity to IP holders to regulate prices of their products.[89] However, that should not be considered as granting an economic stronghold in a particular market as understood in competition laws.[90]

[84]It has been established that dominant position in a market can be abused when the market participant intends to control the prices of the commodities sold in the market and sell them at discriminatory prices and when such participants prevent other firms from entering the market; Belaire Owner's Association v. DLF Limited Haryana Urban Development Authority Department of Town and Country Planning, State of Haryana, (2011) 104 CLA 398 (CCI);United States v. E.L. du Pont de Nemours & Co., (1956)351 U.S. 377.

[85]Hoffmann-la Roche & Co. AG v. Commission of the European Communities, (1979) 3 C.M.L.R. 211.

[86]Competition Act 2002, § 4.

[87]M/s. Maharashtra State Power Generation Company Ltd. v. M/s. Mahanadi Coalfields Ltd. and M/s. Coal India Ltd., Case No. 11 of 2012; M/s. Gujarat State Electricity Corporation Limited v. M/s. South Eastern Coalfields Ltd. and M/s. Coal India Ltd., (2013) CompLR 910.

[88]US v. Westinghouse, (1981) 648 F.2d 642.

[89]GUSTAVO GHIDINI, INNOVATION, COMPETITION AND CONSUMER WELFARE IN INTELLECTUAL PROPERTY LAW, (Edward Elgar Publishing Ltd., 2010).

[90]Mark D. Janis, Herbert J. Hovenkamp, Mark A. Lemley, *Virtually all mystery novels are copyrighted, yet no one could seriously claim that any one mystery novel held a monopoly in a relevant economic market,* ANTICOMPETITIVE SETTLEMENT OF INTELLECTUAL PROPERTY DISPUTES, MAURER SCHOOL OF LAW: INDIANA UNIVERSITY DIGITAL REPOSITORY (2003),http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1407&context=facpub.

FICCI Multiplex Association of India[91] Case is a leading authority that dissevers the dispute between IPR and competition law. In the present case UPDF formed cartels and refused to deal with multiplex owners in order to raise their revenue. In order the defend themselves, UPDF raised an argument that under section 14 of the Indian Copyright Act, they have the authority to sell or communicate their film to the public.[92] The Court held that such a right is recognized by the Court, however, it would not permit producers to form cartels and act in contravention to section 3(3) of the Competition Act.[93] The rights guaranteed under section 14 of the Copyright Act does not take allow IP holders to act arbitrarily and inconsistent with the provisions of the competition laws.

The Delhi High Court in *Hawkins Case*[94]observed the case regarding an allegation by the plaintiff that the defendant company was using the plaintiff's trademark "Hawkins" on their products, which were pressure cooker gaskets. The Court held that a well-known mark cannot create a market monopoly due to its reputation. If it does create a monopoly it cannot use this economic strength in order to control the ancillary markets, then, it would be considered as an abuse of dominant position.[95]

Indian Courts lack thorough jurisprudence in the field of abuse of dominant position with regard to IP holders. The above two judgements are the only clear judicial decisions which have been able to clarify the position of IPR and competition law. Courts have not specifically stated that the main aim or objective of IPR is to promote innovation and economic interest is only secondary.[96] Therefore, any act that is done in pursuance of economic interests which would disrupt the market, would be in contravention to the provisions of competition law. In the light of

[91]FICCI Multiplex Association of India v. United Producers Distribution Forum(UPDF), (2011) CompLR 79 (CCI).
[92]*Id.*
[93]*Id*
[94]Hawkins Coolers Ltd. v. Murugan Enterprises, (2008) 36 PTC 290(Del).
[95]*Id.*
[96]Twentieth Century Music Corp. v. Aiken, (1976) 422 US 151.

the above argument it could be stated both IPR and competition laws have similar interests, to create freedom of trade and consumer welfare.[97]

D. Refusal to License

A widely accepted notion of IPR is that the holder is not under any obligation to license its products. It is consistent even when an IP holder has monopoly over the market of a particular material.[98] However, at instances where an IP holder refuses to licence its product it may constitute an abuse under competition laws.[99] Refusal to licence at instances may be misused by dominant IP holders to take unjustified anti-competitive advantages,[100] at such instances the refusal acts in contravention to competition laws.

In order to cope with such practices foreign courts have developed the "essential facility doctrine".[101] It requires a firm possessing monopolistic character to grant access it has protection over in order to facilitate effective competition.[102] In India there is a lack of jurisprudence regarding refusal to license and its impacts on market competition.

E. Excessive Pricing or Price Discrimination

Excessive pricing of a commodity is not exactly a violation of Indian Competition Laws.[103] There has been an ambiguity with this regard, as to what extent could an IP holder use its exclusive rights to charge a

[97]United Brands Co. & United Brands Cont'l BV v. Comm'n, Case, (1978) ECR 207, 63-66;Hoffmann-la Roche & Co. AG v. Commission of the European Communities, (1979) 3 C.M.L.R. 211.
[98]Anthony, *supra* note 11.
[99]Radio Telefis Eireann v. Commission, (1995) 1 CEC 400.
[100]K.D. Raju, *The Inevitable Connection between Intellectual Property and Competition Law: Emerging Jurisprudence and Lessons for India,* 18 J. INTELL PROP RIGHTS, 117 (2013) [hereinafter Raju].
[101]Rita Coco, *Antitrust Liability For Refusal To License Intellectual Property: A Comparative Analysis and the International Setting,* 12(1) MARQ. INTELL. PROP. L. REV., 4-15 (2008) [hereinafter Coco].
[102]Jaiveer Singh, *Is there a Case for Essential Facilities Doctrine in India?*, CIRC WORKING PAPER NO. 04, CUTS: INSTITUTION FOR REGULATION AND COMPETITION(2013),http://circ.in/pdf/Essential_Facilities_Doctrine_India.pdf.
[103]Union of India v. Cyanamide India Ltd. and Anr., (1987) AIR 1802 (SC).

particular price for its commodity. Predatory Pricing is prohibited under the Indian Competition Act,[104] however, there is no strict jurisprudence in India that prohibits an IP holder to charge an excessive amount for its product.

A recent case before the Competition Appellate Tribunal, the CCI considered the nature of anti-competitive behaviour and abuse of dominant position with regard to Microsoft's charges for various licences.[105] In the *Microsoft Case*,[106] it was alleged that the respondents were abusing their dominant position in pricing similar products, differently, and compelling the consumer to purchase the costly products, and refusing to sell the same product at a lower price. The Court held that the ultimate product which was to be sold were not a software of Microsoft Office or Microsoft Word, but three distinct and separate licenses.[107] The Court held that since the products were different, IP bearers had the right to charge differential prices for its products. Since, the appellants could not produce any evidence to show that the three products were similar in nature or that Microsoft was abusing its dominant position, the matter was dismissed.

The Tribunal failed to consider that there were no competitors in the market, apart from Microsoft, with respect to Windows Operating System.[108] It is argued that they failed to obtain further evidence regarding the matter, and dismissed the matter prematurely. Microsoft owned 90% of the market share[109] and it coerced consumers to buy volume licenses for a higher price, where the product was being sold at a lower price with respect to personal computers. The judgement by the Tribunal lacked analysis of the manner in which Microsoft was pricing its commodity and the manner in which it effected the market.

[104]Indian Competition Act 2002, §4.
[105]Singhania & Partners LLP v. Microsoft Corporation (I) Pvt Ltd and Anr., (2012) CompLR 1107 [hereinafter Singhania & Partners LLP].
[106]*Id.*
[107]*Id.*
[108]Raju, *supra* note 100.
[109]Singhania & Partners LLP, *supra* note 105.

VI. LESSONS FOR INDIA

A. Incorporation of Essential Facilities Doctrine

Essential facilities doctrine, as mentioned before, requires a dominant firm to allow access to an essential facility that it provides in order to create effective competition in the market.[110] Under this principle, a dominant IP holder is required to grant access to competitors with regard to its commodity, in order to permit competitors to reasonable provide goods and services to its consumers.[111] It is essential to note that this doctrine is required to be used cautiously and not to arbitrarily intrude an IP holder's right to its innovation. In order to incorporate the set standard in Indian Competition Law it is required to consider the precedent set by the European Court of Justice.

In establishing dominance, it is required to show that the firm has economic stronghold in the market, as opposed to monopoly power.[112] It is necessary to establish that the firm has a "special responsibility" no to refuse its license in order to prevent a distortion or create an adverse effect on Competition.[113] Further, there has been to strict term defined to explain the nature and width of "essential facilities".[114] However, it is necessary for Indian Courts to establish the extent at which certain commodities should be included under the said doctrine.

---

[110]Chiripa, Anca Daniela, *Access to Essential Facilities- A Comparative Competition Law Perspective of Share Use and Recent Margin Squeeze Cases*, 1 COMPETITION SURVEY: STUDIES, RESEARCH AND ANALYSIS,32-41 (2011).

[111]Daniel Glasl, *Essential Facilities* Doctrine *in EC Anti-Trust Law: A Contribution to the Current Debate*, 4 ECLR, 305-312 (1994).

[112]It is not required to show that the firm has a certain percentage of market share to inculcate a dominant position in the relevant market. In accordance with Indian Competition Laws, it is required to prove that conditions are met under Section 19, other factors are required to take into concern while establishing a dominant position in the market. See Brain A. Facet and Dany H. Assaf, *Monopolization and abuse of Dominance in Canada, The United States and The European Union: A Survey*, 70 ANTITRUST L. J. 513 (2003).

[113]Nederlandsche Baden-Industrie Michelin v. Commission (Michelin 1), (1983) E.C.R. 3461.

[114]Cyril Ritter, *Refuse to Deal and "Essential Facilities": Does intellectual property require special deference compared to tangible property?*, 28(3), MARQ. L. REV.,1117-1118 (2005).

The test that should allow Courts to use this doctrine, has been firmly been established in the IMS Health Case.[115] The three conditions that require to be followed to order to apply "essential facilities doctrine" are:

i. The refusal to license is preventing the emergence of a new product for which there is a potential demand by the consumers;

ii. The refusal is arbitrary and not justified by an objective standard;

iii. The refusal will exclude any or all competition or will eliminate any or all competition in the secondary market.[116]

Indian Courts could read the doctrine with Section 4 of the Competition Act, which deals with abuse of dominant position. Indian Competition Law defines dominance with respect to "economic strength" as opposed to market monopoly, which is similar to European Union's understanding of dominant position.[117] It could read in the principle within Section 4, Explanation (a), which states that the abuse of dominance that effects its competitors or consumers or the relevant market in its favour, is prohibited.[118] However, the close has to keep a close scrutiny while determining the essential facility that is required to be licensed and the extent to which it could restrict or harm the IP holder's rights. It has to provide a strict balance between the rights of the IP holder and a proper functioning competition in the market.[119]

B. Integration of European Union Experience

The Competition Commission of India, being a recently formed body, could rely on the European Authority standards of regulating the tension between IPR and Competition laws. The laws in such major jurisdictions has developed over the years through judicial precedents which has

[115]IMS Health, *supra* note 74.
[116]*Id.*
[117]United Brands Company and United Brands Continental v. Commission, (1978) E.C.R. 207.
[118]Competition Act 2002, § 4 Explanation (a),
[119]Coco, *supra* note 101.

accommodated and protected both innovation and competition rights of small companies. The CCI could take guidance from the arguments that are framed by the European Commission while gauging the abuse of IPRs that have been granted to inventors/creators.

The language of the Competition Act of 2002, specifically Section 3, is broadly shaped on Article 82 of the Rome Treaty (presently Article 102 of the TFEU).[120] Even the definition of dominant position in the Competition Act has been imbibed as stated in the case *United Brand v. Commission* by the European Commission. Therefore, there is no substantial scope of development possible as far as legislation is concerned in relation to abuse of dominance.

The dominant position of an enterprise can be determined under Section 19(4) of the Competition Act in India. Once such a position is determined as per the criterion laid down, the CCI is required to determine the abuse in the exercise of IPRs. A few reports and analysis have indicated that CCI has been inconsistent while applying the economic principles for determining the abuse and analysing the market for such practice. It has been suggested that if a consistent approach is practiced by the CCI during their economic analysis, it will promote and encourage industries and companies for adapting a "pro-competitive business strategy"[121] that falls within the ambit of the Competition Laws of India.

Excessive pricing has been in conflict inherently since the development of IPR and Competition Law. Where a market faces a downfall in competition, there is a direct effect on the consumers as the price paid by them is not based upon the true economic value of the service/product. However, it has been difficult for assessing the practice irrespective of jurisdiction, thus India's competition authorities will therefore face a similar difficulty. Thus, the Competition bodies could apply the tests, discussed in the paper, that have been used in excessive pricing under the

[120]Shalaka Patil et al., *Competition Law in India – Jurisprudential Trends and the Way Forward*, NISHITH DESAI ASSOCIATES (Apr. 2013), https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Competition%20Law%20in%20India.pdf.
[121]*Id.*

jurisdiction of European Commission. However, it is important to avoid a disparity where a very low margin is maintained always, as this would only dissuade investment. Thus, a "sustainable"[122] level of margin would serve the purpose.

VII. CONCLUSION

The growing importance of nexus between IPR and Competition laws are indisputable. The dispute between both the regimes has to be resolved in backdrop of furtherance and promotion of innovation and market stability. The protection provided by IPR is necessary to foster innovation among market player, however, it has to be within the boundaries provided by Competition policy. Neither of the two regimes should undermine the prominence of the other. The applicability of Competition laws towards exclusive right holders should be used cautiously in order to prevent erroneous precedent and proper competition in the market.

Indian Courts are at a nascent stage towards resolving issues regarding IPR and Competition law disputes. The Courts lack strict judicial precedents and appropriate judicial language in order settle disputes between both such regimes. In light of the normative stage in India, it is opined that it should adhere to the TRIPS Agreement in order to create an edifice to resolve disputes regarding both such regimes. Further, the Agreement is not comprehensive to create a strict set of tools to provide a resolute guidance towards each case of anti-competitive practice with respect to IPR. However, it should allow Courts to create a structure of balancing IPR and Competition laws in the backdrop of achieving social and economic goals.

In order to create an opposite balance between both such regimes, it opined that Indian Courts should inculcate the precedent laid down in EU. Further, the judicial decisions should provide a definite applicability

[122]Amitabh Kumar, *Excessive Pricing – An abuse of Dominance*, 88 COMPETITION LAW REPORTS (2011).

of Competition laws with respect to IP holders. The judicial texts should suggest that the intervention of Competition laws with respect to IP holder's rights are with respect to the exercise of such rights and not its existence. Lastly, the Courts should provide a clear demarcation between the two regimes and provide decisions in the framework of achieving consumer welfare, promotion of innovation and economic growth.

CASE NOTE ON ABC v. THE STATE (NCT OF DELHI)

Nooreen Haider & Rishima Rawat[*]

Abstract

The Guardians and Wards Act is a secular legislation regulating issues of guardianship and custody of children. The primary objective of the act is the welfare of the child. All the provisions in the act are guided by this principle. However, the laws regarding guardianship of the child, if not custody, give primacy to the father over the mother. In the case of ABC v. The State (NCT of Delhi), the Supreme Court while addressing a single, unwed mothers' petition upheld the right of an unwed mother to become the sole guardian of her child under section 11 without the consent of the father. The court noted the predicament of the mother who did not want to disclose the name of the father but was forced to do so under the present law. The paper is an analysis of this case. It discusses the reasoning of the court and its reading of various other legislations and case laws to uphold the welfare of the child and give effect to the legislative intent. It argues that even though the judgment is a progressive reading of the law, its impact is limited to the procedure laid down by the act and not a conclusive reading of the rights of an unwed mother.

[*]Nooreen Haider and Rishima Rawat are fourth-year students at the West Bengal National University of Juridical Sciences. The authors may be reached at nooreenhaider@nujs.edu and rishimarawat@nujs.edu.

I. INTRODUCTION

The primary objective of the guardianship laws is to ensure the welfare of the minor. However, these laws do not create a level playing field for both parents. Earlier, the father was considered to be the natural guardian of a minor child and after him, it was the mother. It required a judicial pronouncement by the Supreme Court of India to give mothers an equal right of being the natural guardian of their children.[1] Thus, the guardianship laws in our country have inadvertently endorsed a patriarchal social structure. This is reflected by the many procedural requirements that insist on father's name on forms for various important documents, thereby creating problems for single or unwed mothers. As a result, there have been many long, legal battles for equal guardianship rights by women. The judgment by the Supreme Court in the present case *ABC v. The State* (NCT of Delhi),[2] which upheld the right of an unwed mother to become the sole legal guardian without seeking prior consent of the father has been heralded as a milestone judgment for the cause of single or unwed mothers in India. However, reading the judgment to mean that unwed mothers were given sole guardianship of their child is in all probability a wrong conclusion. Despite the efforts of the judiciary since the Githa Hariharan case, single, unwed or divorced women still suffer at the hands of laws that make custody and guardianship of their child a torturous legal battle.

II. PROCEDURAL HISTORY OF THE CASE

This Special Leave Petition arose from a judgment of the Delhi High Court. The appellant was an educated, financially secure unwed mother who had been taking care of her minor son since his birth, without the involvement of his father. In order to make the son her nominee in all her

[1]Githa Hariharan v. Reserve Bank of India, (1999) AIR 1149 (SC) (India) ("***Githa Hariharan***").

[2]ABC v. The State (NCT of Delhi), Arising out of S.L.P. (Civil) No. 28367 of 2011 (India) ("***ABC v. The State***").

savings, she filed an application for guardianship with the local authority. She was asked to either disclose the name of the child's father or get a guardianship certificate from the court.

She filed an application before the Guardianship Court under section 7 of the Guardianship and Wards Act, 1890 ('the Act') to declare her the sole guardian of the minor. Since the appellant refused to reveal the name of the father, the Guardianship Court dismissed her application in April, 2011. She appealed to the High Court which again dismissed her appeal in August, 2011 stating that the natural father of the child could have an interest in the child's welfare and therefore he had to be notified. Thus, the High Court refused to decide the case in the absence of a necessary party, that is, the father.

Aggrieved by the High Court's decision, the appellant approached the Supreme Court with this Special Leave Petition.

III. COURT'S INTERPRETATION OF OTHER LEGISLATIONS AND CONVENTIONS

While delivering the judgment, the apex court looked closely at various legislations and personal laws pertaining to guardianship. It meticulously read sections 7,11 and 19 of the Act. While section 7 empowers the court to appoint a guardian for the welfare of the minor, section 11 elucidates the procedure to be followed when an application for guardianship of a minor is received. The court emphasized on clause (i) of Section 11(1)(a) which requires a notice to be served in accordance with the Civil Procedure Code on the parents of the minor if they reside in any state to which the Act applies. Section 19 prevents the court from appointing a guardian if the father of the minor is living and is, in the court's opinion, fit to become the guardian of the minor. The State argued that under the above provisions, a notice had to be given to the 'parents' of the minor and the court could not appoint a guardian while the father of the minor was still living. Thus according to the State, the judgment of the High

Court was in accordance with the Act. The court rejected this argument of the State stating that such an interpretation of the provisions would defeat the essence of the statute, which was to protect the welfare of the minor. Section 11, which is a procedural safeguard, requires sending notice to the parents of the child, would have to be read accordingly keeping in mind the intention of the legislation. It observed that there was a significant difference between 'parents' as used in section 11 and 'father' as used in section 19. "The dominant factor to be considered by the court is the welfare of the minor and not of any procedural lapse and that too a procedure which does not contravene the law."[3] The court stated that section 11 of the Act ideally applies when a third party is seeking guardianship, which is not the situation in this case. A literal reading of the provision would make it mandatory to notify and hear the father before proceeding with the guardianship application, which was the position taken by the Delhi High Court.[4] But the peculiar circumstances of the case demanded a different interpretation of this provision. The Act makes the "welfare of the minor" the sole consideration to appoint a guardian. The Supreme Court by invoking section 7 of the Act, which states that the child's welfare should be the fundamental and deciding factor in awarding guardianship, took a more liberal approach, in keeping with the intention of the legislation.[5] Thus, the court took a holistic view of the act as well as attempted to incorporate the reasoning of legislations from other jurisdictions.

A. Foreign/Domestic Legislations

A notable feature of this judgment is the reference made by the court to the provisions of various domestic and foreign legislations which ensure the welfare of the minor. The court looked at legislations from various

[3]Society of Sisters of Charity St.Gerosa Convent v. Karnataka State Council for Child Welfare, (1992) AIR Kant 263 (India).

[4]Saurav Datta, *Why The Elation Around The SC Ruling On Unwed Mothers Was Overblown,* CATCH NEWS,http://www.catchnews.com/pov/false-elation-why-the-sc-ruling-on-custody-and-unwed-mothers-was-overblown-1436356616.html ("**Saurav Datta**").

[5]*Id.*

jurisdictions in order to "arrive at a holistic understanding"[6] of how they ensured the best interests of the child and not to understand the tenets of Christian law. The court emphasized the secular character of our nation and the need to keep religion away from the interpretation of law. The Hindu Minority and Guardianship Act, 1956 and Mohammedan law both give primacy to the mother of the illegitimate child over the father. Even the Indian Succession Act, 1925 in section 8 further establishes this primacy by stating that the domicile of origin of the illegitimate child is in the country in which his mother is domiciled at the time of his birth.

The court referred to the legislations in the United Kingdom, the United States of America, Ireland, Philippines, New Zealand and South Africa. All these jurisdictions give the biological mother of the child, regardless of whether she is married or unmarried, the sole custodial and guardianship rights over the child. The court used this predominant position in various countries to interpret Indian legislation as bestowing similar rights on the mother of the child.[7]

The Supreme Court therefore concluded that the guardianship laws in India give priority and preference to the mother over the father of the concerned child. It observed that in today's society where women are increasingly choosing to raise children alone, it is often in the best interest of the child to not impose on him a father who is unwilling to remain a part of the child's life and is not concerned with the child's well-being.[8]

IV. INTERPRETATION OF PRECEDENTS

The Act makes the father the natural guardian of a child. But the landmark case of *Githa Hariharan v. Reserve Bank of India*[9] affirmed the position of the mother as a natural guardian. In this case, the Supreme Court held that a mother can be appointed as the guardian of the child instead of the father for the child's best interest. The court, while taking

[6]ABC v. The State, *supra* note 2 at 10.
[7]*Id.*
[8] *Id.*
[9]Githa Hariharan, *supra* note 1.

into account the mother's right to privacy as well as the child's best interest, referred to section 6 of the Hindu Minority and Guardianship Act, 1956 which names the father as the natural guardian of a minor and after him, the mother. The case recognized both mother and father as natural guardians of a minor child. The court interpreted that 'after' can also mean temporary absence of the father because of any reason. This case was cited in order to point out that when the mother is the exclusive caregiver of the child and the child is under her custody, for any reason, she can act as the natural guardian of the minor and all her actions would be valid even during the lifetime of the father.[10]

The court, while exercising its *parens patrae* jurisdiction to secure the welfare of the child, noted that even though the case involves determining the rights of the mother, father and child, it is the third that is the most relevant in this case. It referred to *Laxmi Kant Pandey v. Union of India*[11], to reiterate that the welfare of the child should be given priority over anything else, including the rights of the parents. The court, even in the face of express terms in the statute, directed that notice should not be sent to the biological parents, as that could jeopardize the future and interest of the child who was being adopted.

The Supreme Court, while taking a progressive stance indicated that in today's society, where single women are increasingly choosing to raise their children alone, views of an uninvolved father are not essential, to protect the interests of a child born out of wedlock and being raised by the mother.[12]It drew a fine balance between the rights of a child and the procedural norms. It waived the requirement to name the father while keeping with the requirement of notice of guardianship through publication in a daily newspaper.[13] Even while doing so, the court secured the right of the child to know about his father. This is in

[10]*In the Name of the Mother*, ECONOMIC AND POLITICAL WEEKLY, http://www.epw.in/editorials/name-mother.html.
[11]Laxmi Kant Pandey v. Union of India, (1985) SCC 701 (Supp) (India).
[12]ABC v. The State, *supra* note 2 at 10.
[13]Sidharth Luthra &Viraj Gandhi, *Single Mothers, Absent Fathers and the Best Interests of the Child: Drawing a Fine Balance in the ABC Case,*OXFORD HUMAN RIGHTS HUB, http://ohrh.law.ox.ac.uk/single-mothers-absent-fathers-and-the-best-interests-of-the-child-drawing-a-fine-balance-in-the-abc-case/.

consonance with the Convention on the Rights of the Child, which India adopted on 11 December, 1992.[14] In fact this was not the first time the Supreme Court has stressed on the right of the child to know about his father. Previously, the court has clarified that the right of a child to know about his father or origin is a part of the (fundamental) right to life under Article 21 of our Constitution.[15] Thus, the court did not find it mandatory to disclose the identity of the father in the child's interest. But acting as the *parens patriae* of the child, it did stress on the child's right to know his father, which shouldn't be compromised with. It observed that the Universal Declaration of Human Rights, to which India is a party, has recognized the right of a child to know the identity of his or her parents. Therefore, the judges impressed upon the woman to disclose his father's name to her son, and submit all details in a sealed envelope, the contents of which would be revealed pursuant to specific and appropriate directions given by the court.[16]

In the present case, the woman claimed that naming the father in the guardianship application would breach her privacy, making her child vulnerable to future paternity suits. The privacy of the mother and the rights of the child as well as the father were an issue here. In *Dipanwita Roy v. Ronobroto Roy*[17]the court was faced with similar issues about the privacy concerns of an unwed mother and the rights of a child and father. The court, in that case, protected the privacy of the mother while at the same time acted in the interest of the child. Similarly, the court in the present case held that if the woman is forced to disclose the name and particulars of the father of her child, her fundamental right of privacy would be violated.

V. ANALYSIS

This judgment has been hailed by the media as progressive and landmark. However, on a closer scrutiny, it can be noticed that the Supreme Court

[14]Convention of the Rights of the Child, G.A. Res. 44/25 (1989).
[15]Narayan Dutt Tiwari v. Rohit Shekhar, (2011) IAD 404 (Delhi) (India).
[16]Saurav Datta,*supra* note 4.
[17]Dipanwita Roy v. Ronobroto Roy, (2015) AIR 418 (SC) (India).

failed to address certain issues.

A. Not On Any Substantive Issue

In paragraph 18, the court states that the present dispute was not a custodial battle so it was unnecessary to go into the competence of the appellant as the guardian of the welfare of the child. Therefore, the judgment was not about whether an unwed mother could be appointed as the guardian of the minor child. It was merely about the requirement of notifying the putative father of the minor about the unwed mothers' guardianship application. This is made clear in the second line of the judgment itself where the court says, ''the conundrum is whether it is imperative for an unwed mother to specifically notify the putative father of the child whom she has given birth to of her petition for appointment as the guardian of her child.''[18]The appellant had submitted an affidavit agreeing for an alteration or revocation of the status of guardianship, if required, in future upon challenge to the same by the father of the child. In the last paragraph, the court orders the Guardian Court to recall its order of dismissal and consider the appellant's application without giving a notice to the putative father of the minor. This further underpins the argument that the judgment did not decide any substantial right. Rather it did away with a procedural requirement of disclosing the name of the putative father in order to ensure the welfare of the minor.

The court merely upheld the right of an unwed mother to not disclose the father's name, for important documents like passports, school forms etc. and directed authorities to issue a birth certificate that lists only the mother's name as long as she furnishes an affidavit to this effect. This would help in making it easier for single mothers to apply for such official documents for their child. Though the court did away with the procedural aspect of the law, it did not give a ruling on the substantive rights of the unwed mother regarding guardianship of her child. A woman's right to custody and guardianship of her child is still subject to too much litigation .The court also did not go into the merits of the case. Though they did observe that the father in this case did not bother or

[18]ABC v. The State, *supra* note 2 at1.

show any concern regarding his child, the court did not intend to rule on the issue of custody of the child. Thus, the case is not applicable to cases where one of the spouses approaches the court to unilaterally seek custody of a child behind the back of their spouse.[19]

B. Judgment Does Not Cover All Cases

The judgment offers protection to unwed mothers of minor children. This can be seen as a limited protection given only to unwed mothers. This protection should have been extended to all mothers who do not wish to reveal the identity of the father for reasons that would affect the welfare of the minor.[20] As argued by activist Githa Hariharan, the law should categorically state that women of all communities, whether wed, unwed or widowed are the natural guardians of their minor children as much as the men.[21] Had this issue been addressed by the court, there could have been some response by the law-making agencies to look into the matter and amend the law to place all mothers at par with the fathers as natural guardians of the minor children.

C. Policy Implications

Even though the judgment does not decide any substantive right, it certainly seeks to give some procedural respite. It is a progressive step in ensuring relief to unwed mothers who do not wish to disclose the identity of the father of the minor child. The court reiterates the recent trend where the requirement of furnishing the name of the father in case of applications for a child's admission in school or obtaining a passport has been done away with.[22] However, under both these circumstances, a Birth Certificate is required. The court, in this regard, issues a directive that if a single parent or unwed mother applies for a Birth Certificate for a child born from her womb, then the she only needs to submit an affidavit to

[19] *Id* at 14.
[20] *Unwed Mother Can Be Made Guardian Of Child Without Father's Consent: SC,* THE MINT, http://www.livemint.com/Politics/BFVJbdzcYznrNBixjlzVjK/Unwed-mother-can-be-made-guardian-of-child-without-fathers.html.
[21] *Id*.
[22] ABC v. The State, *supra* note 2 at 19.

that effect,after which the concerned authorities must issue her the Birth Certificate unless there is a direction from the court to the contrary. Thus, it removes another procedural requirement which would have created problems for unwed/single mothers in case they chose not to reveal the identity of the father of their minor child. The court places the duty of recording the birth of every citizen by issuing a Birth Certificate upon the State.

Such a directive by the court is a welcome step in efforts to reduce the agony faced by single/unwed mothers. While the passport authority has framed new guidelines which deleted the requirement of mentioning the father's name in the application,[23] it is yet to be seen how well the authorities issuing birth certificates implement this directive. This can be a step forward in ensuring that a mother's name is sufficient in procuring various documents for the child if she does not wish to disclose the name of the father for any reason whatsoever that may jeopardize the welfare of the minor.

VI. CONCLUSION

The Guardian and Wards Act is guided by the best interests if the child. The welfare of the child takes precedence over the statutory provisions. However, the laws regarding guardianship are very often riddled with instances where inequality between both the parents is apparent. The 257th Law Commission Report attempts to address this problem and stresses on the equality between parents as a goal that needs to be pursued.[24] It recommends looking beyond the gender stereotypes and bringing the law in line with the present times. Though the 2010

[23]*Passport Rules on Including Father's Name Being Revised: Centre*, THE ECONOMIC TIMES, http://articles.economictimes.indiatimes.com/2015-02-23/news/59423282_1_passport-authorities-regional-passport-officer-passport-application-form.

[24]Report No 257: Reforms in Guardianship and Custody Laws in India, LAW COMMISSION OF INDIA(2015), http://lawcommissionofindia.nic.in/reports/Report%20No.257%20Custody%20Laws.pdf.

amendment to the Act did attempt to abolish the preferential position given to the father, the judgment at hand shows that the laws are still lagging behind when it comes to the problems faced by single, unwed or divorced mothers fighting for the their child' s custody or guardianship.

The present case presented with itself a very common predicament faced by single mothers while naming their child's father in various forms. For a number of reasons, a mother may not want to disclose the identity of the father, but the procedural requirements make it almost impossible to do so. This results in the mother as well as the child facing hardships in acquiring even the most basic documents. The court while delivering this judgment took note of the difficulty faced by many such mothers and held that 'parents' under section 11 could mean the parent who is raising the child alone and is the primary caregiver, and not both the parents. By doing so, it achieved the dual objective of not imposing an unconcerned or absent parent on the child, while at the same time protecting the privacy of the mother.

However, the court while giving a favorable ruling for the mother, did not conclusively settle the substantive rights of mothers fighting for the custody of their children. It merely read a procedure in the act to reflect the growing change in the society regarding child rearing where both the parents are not involved. It must be noted that the Act lays down the procedure for guardianship and custody but the substantive rights are still governed by the personal laws. Despite the present ruling, unwed mothers can still get a raw deal at the hands of such laws by the very same court.

In fact, this problem may be more adeptly handled by the legislature. A private member's bill to be introduced in the Monsoon session of the Parliament, in order to bring about an amendment to the constitution to provide mothers the right of sole guardianship of a child, is a step in the right direction. This will finally acknowledge the realities of unwed motherhood and help in addressing the problems faced by such mothers while raising their children singlehandedly.

REBUILDING TUNISIA: AN ANALYSIS OF THE TRANSITIONAL JUSTICE MODEL

*Enakshi Jha**

I. INTRODUCTION

While it is rightly claimed that justice is the hallmark of a triumphant legal order, the road to justice is most often obstructed by a grave history of injustice and oppression. Justice also plays a crucial role in identifying the atrocities of an unjust legal order and attempts to heal the wounds of the past. Transitional Justice is an analogous school of this idea of justice, focusing upon a spectrum of mechanisms and structural changes, to not only account for abuses of social, economic and human rights, but to attain the goals of reconcilement. [1]

Unlike other formalist and positivist schools of law, transitional justice is malleable and can be moulded to meet the needs of a circumstantial context via judicial and non-judicial processes. It accounts for the past and eases the transition to a period of law enforcement and just social order. Transitional justice hence serves the goals of accountability of the past by giving the oppressed a platform to voice their grievances instead of muting any record of previous violations with the goal of establishing reforms in the legal, political and economic arena to enable social reconciliation. [2]

In light of this discourse, it is discernible that transitional justice has not only an active but contextual role to play. The Author attempts to analyze the tools, mechanisms and processes of reaching the goals of transitional justice in the context of the Tunisian Revolution in this paper.

*Enakshi Jha is a fourth-year student at NALSAR University of Law, Hyderabad. The author may be reached at jhaenakshi@gmail.com.

[1] PADRAIG MCAULLIFE, TRANSITIONAL JUSTICE AND RULE OF LAW RECONSTRUCTION: A CONTENTIOUS RELATIONSHIP108-109 (Routledge, 2013).

[2] Eric Posner & Adrien Vermeule, *Transitional Justice as Ordinary Justice*, 117 Harv. L. Rev. 762 (2003) [hereinafter Posner & Vermeule].

Tunisia saw itself lie in the center of the storm with the emergence of the Arab Spring and has hence vowed to embrace the rule of law. Its gory past, marked by brutal oppression and arbitrary trials and imprisonment only define the gruesome state of human rights of citizens in the country. The Jasmine Revolution united the people of Tunisia to challenge such oppression and embark on a journey towards democracy and the first baby step on the same was taken in December 2013 with the formation of a Transitional Justice law and the establishment of the Truth and Dignity Commission to study human rights violations.[3] What is noteworthy in the Tunisian context is the focus on women rights and corruption and the need to uphold the same as an objective for this law.

This paper traces the history of Tunisia and outlines the nature of violations primarily focusing upon the Rule of Law and Human Rights violations. In tracing this history of oppression, the Author seeks to pin point major challenges to the transitional justice journey in Tunisia. A focus on the status of women's' rights has been adopted to stay in consonance with not only the objective of Tunisia's goals of transitional justice but to study the metamorphosis of the rights of women in the region. The Author also seeks to analyze the success and obstacles faced in this context by the adoption of a Truth Commission while comparing it with instances of the past. This paper is divided into the following sections that the Author wishes to focus upon based on the analysis of the model of transitional justice adopted and its impacts.

The first section of the paper focuses on the history and oppression of Tunisian people and the success of the Jasmine Revolution in paving the way forward. The second section of this paper addresses the need for transitional justice while referring to the previous section. This section is further divided to address the issues of institutional reform, criminal justice (this sub section will include reparations) and gender reforms to keep the scope of research limited. The third section will analyze the

[3]Moataz Elfigiery, *Truth and Reconciliation?- Transitional Justice in Tunisia, Egypt and Libya*, FRIDE POLICY BRIEF (2014), http://fride.org/download/PB_177_Truth_and_reconciliation.pdf (hereinafter "**Elfigiery**").

tools of transitional justice adopted in Tunisia and assess their utility .The fourth section will address the challenges and will be followed by a conclusion that highlights the Author's recommendations.

II. UNDERSTANDING THE TUNISIAN CONTEXT: A GLIMPSE INTO THE HISTORY OF OPPRESSION IN TUNISIA

While it would be unfair to categorize Tunisia into an oppressive nation with low level of socio-economic development, it is essential to recognize the paradox of the Tunisian context of transitional justice. Tunisia has comparatively higher levels of social and economic development while compared to other countries in the Middle East region, but has encountered the absence of a civil society to challenge the injustice in the political system, which imposed socio-economic violations. Political liberalization suffered in an authoritative regime that was characterized by repression of political institutions and reforms.[4]

This paper limits the scope of research to Zine Abedine Ben Ali's authoritative governance and reiterates the relevance of him being termed the "Pinochet of the Mediterranean".[5] Firstly, the revolution to oust an illegitimate ruler was fueled by a peoples' movement beginning from the iconic self-blazing of a fruit seller, Mohamed Bouazizi as a result of the corruption in Tunisia and the lack of judicial grievance redressal mechanisms. The limited opportunities of socio-economic advancement plaguing Tunisia formed the pivotal link for the uprisings that followed.[6]

[4]Klaus Bachmann, *Paradoxes of Retribution: What Central European Experiences tell aboutTransitional Justice in Arab Countries*,CENTRE FOR INTERNATIONAL RELATIONS, REPORTS AND ANALYSES(2011), http://csm.org.pl/fileadmin/files/Biblioteka_CSM/Raporty_i_analizy/2011/CIR_Reports_and_Analyses_6.

[5]L. Chomiak, *The Making of a Revolution in Tunisia*, 3 MIDDLE EAST LAW AND GOVERNANCE JOURNAL68-83, (2011) [hereinafter Chomiak].

[6]Ivan Watson &JomanaKaradsheh, *The Tunisian Fruitseller who started the Arab Uprising*, CNN, http://edition.cnn.com/2011/WORLD/meast/03/22/tunisia.bouazizi.arab.unrest/index.html.

In a regime of limited political opportunities for the people to participate in and the absence of an alternative government regime, conversations of dissatisfaction with the social, economic and political state of affairs began taking a public voice. The alienation of people and the lack of a due process in the judiciary further strengthened this dissent. Unfortunately, Ben Ali's government always maintained that Tunisia had a healthy democracy characterized by free and fair elections and the right of people to criticize the government.[7]

The first wave of peaceful protests began the transition by openly criticizing the oppression of this double standard. This lead to non-elite political actors gaining relevance along with the emergence of potential to change the political demography of Tunisia.[8] Filling the abeyance of Ben Ali's government saw the emergence of two major other political factions, En-Nahda and the Democratic Progressive Party (PDP). Unfortunately, they have failed to attain a consensus and the fear of political instability continues to threaten the process of transitional justice.[9]

Secondly, the status of women in Tunisia has always been disappointing with religious ideas clashing with International Protective regimes like instruments of the United Nations. While the former remain mute on their discourse with religious rights, few nations have attempted to ratify instruments to meet religious obligations and provide women basic protective rights.[10] The Committee on the Elimination of Discrimination against Women endeavours to protect women both in the private and

[7]AmelBoubekeur, *The Tunisian Elections: International Community must insist on moving beyond façade democracy*, (2009), http://carnegieendowment.org/publications/index.cfm?fa=view&id=24065&zoom_highlight=ave.
[8]Chomiak, *supra* note 5.
[9]Mohammed Hachemaoui, *Tunisia at Crossroads: Which rule for which transition?*,SWP RESEARCH PAPER, http://www.swp-berlin.org/fileadmin/contents/products/research_papers/2013_RP06_hmu.pdf.
[10]Michele Brandt & Jeffrey A. Kaplan, *The Tension between Women's Rights and Religious Rights: Reservations to CEDAW by Egypt, Bangladesh and Tunisia*, 12 JOURNAL OF LAW AND RELIGION 105,142 (1996).

public sphere and Tunisia has taken the baby steps toward incorporating the same within its Sharia Law structure.

This is a commendable step which furthers the goals for transitional justice vis a vis women's rights as Tunisia has followed the "Takkhayur", which is an Islamic school of interpretative jurisprudence, enabling greater protection.[11] Regrettably, this has failed to attain its goals, as women in Tunisia remain uneducated or mute about securing their rights. This has been dealt with in greater detail in the latter chapters of this paper.

To summarize the Tunisian context, John Locke's theory of punishment, which states that men can only be punished for the breach of law in place at the time, gains significance. However, Locke's' theory of the law of nature and natural rights which must not be breached in any circumstance extends to regimes like Tunisia, as injuring or offending a person without a cause forms the very breach of this natural law attributing to punishment.[12] However, Transitional justice attempts to move beyond mere punishment or the prosecution model of transitional justice as seen in the Nuremberg Trials by adopting non-judicial processes like Truth Commissions that facilitate reconciliation in society. [13] Tunisia has rightly identified the need for the same and is in the right direction towards healing its troubled past.

III. THE PRESSING NEED FOR TRANSITIONAL JUSTICE

In light of the international pressure surrounding Tunisia, especially after the success of transitional justice in South Africa and Northern Ireland it becomes crucial to identify the pros and cons of adopting transitional

[11]Kevin Davis & Michael Trebilcock, *What role do legal institutions play in development?*,INTERNATIONAL MONETARY FUND'S CONFERENCE ON SECOND GENERATION REFORMS,https://www.imf.org/external/pubs/ft/seminar/1999/reforms/trebil.pdf.

[12]Simon Stacey, *A Lockean Approach to Transitional Justice*, 66 THE REVIEW OF POLITICS 55 (2004).

[13]Posner &Vermeule, *supra* note 2.

justice tools as the state continues to face volatility. In the face of political polarization, the fear of long-term justice goals remains threatened. This becomes crucial while analyzing the pressing need for adopting a transitional justice model in Tunisia.[14] After Ben Ali's exit the newly elected Ennahada movement formed the Ministry of Human Rights and Transitional Justice to identify and collaborate with the multiple stakeholders of the justice process. Victims of past abuses, political and military figures along with the sprouting political parties separated by the Islamists and Secularists ideas were identified as major stakeholders, whom the process would target.[15]

At this point, it is essential to note that unlike other countries in this region like Libya, that faced a military oppression, Tunisia did not see an armed conflict but saw decades of oppression by the governmental structure, most often through the channels of corruption and human rights abuses.[16] To address this from of violation, Tunisia adopted the Truth and Dignity Commission tool primarily, accompanied by a series of Reparation programs for collective and individual recognition of victims and accompanying compensation.[17] Justice reforms in line with constitutional and human rights safeguards have been introduced with a focus on increasing transparency in judicial appointment. Lastly, an essence of the prosecution method of transitional justice has also been adopted.

A. Modus Operandi of Transitional Justice in Tunisia

The Ministry of Human Rights and Transitional Justice and the new Constitution of Tunisia together enabled the enacting of a Transitional Justice law, which was ratified in December 2013. This clearly lays out

[14]Elfigiery, *supra* note 3.

[15]*As Tunisia finalizes Transitional Justice Law, ICTJ advocates for victims' rights and participation*, INTERNATIONAL CENTRE FOR TRANSITIONAL JUSTICE (Aug. 7, 2013), https://www.ictj.org/news/tunisia-finalizes-transitional-justice-law.

[16]K. Christopher, *Transitional Justice in Tunisia: Negotiating Justice during Transition*, 49 CROATIAN POLITICAL SCIENCE REVIEW,32-33 (2012) [hereinafter Christopher].

[17]Luca Urech, *Challenging History: The power of transitional justice in Tunisia*, AL NAKHLAH (Jun. 10, 2014), http://alnakhlah.org/2014/06/10/challenging-history-the-power-of-transitional-justice-in-tunisia-by-luca-urech/.

the structure of attaining the justice of transitional justice using reparations, rehabilitation, accountability for past crimes and criminal prosecutions for the same, Truth and Dignity Commissions, political and institutional structural reforms and other forms of social reconciliation to enable greater peace in Tunisia in the long run.[18] Islamic law also has the potential to compliment this positivist law, as national, international and Islamic legal principles place reliance on truth finding and compensation for victims of oppression. A post conflict society like Tunisia has a lot to gain from Islamic laws accentuation of both social and criminal justice, showing Tunisia a ray of light along the path of transitional justice.[19]

This relationship of transitional justice with Islamic law has proved to be a success in the past, as is evident by the post conflict situation in Aceh (Indonesia).[20] Following the Islamic principle of "Diyat" which mandates compensation for victims of murder enables a system of accountability that not only identifies the oppressors but also compensates the victims and their families. However, this practice has been criticized by Western literature for ignoring the greater goals of transitional justice, such as reconciliation and lack of respect for other tools of transitional justice.[21] The Author however argues that the similarities must be focused upon at this point of the transition, as it would grant greater acceptance and legitimacy from the Islamic influence and belief system in Tunisia.

Apart from gaining significance in the Islamic jurisprudence context, Tunisia has placed great reliance on Truth Commissions. Truth Commissions focus upon the abuses in the past (limited context in Tunisia as only pre revolution abuses are being studied) and the pattern

[18]Emily C. Perish et al., *Transitional Justice in the Wake of the Arab Spring*, PAPER PREPARED FOR PRESENTATION AT THE ANNUAL MEETING OF THE INTERNATIONAL STUDIES ASSOCIATION (2012).

[19]Robert Stewart, *Incorporating cultural and religious practices*, MIDDLE EAST INSTITUTE (Aug. 16, 2014),http://www.mei.edu/content/map/incorporating-cultural-and-religious-practices-transitional-justice-lessons-related-islam- tunisia.

[20]Ross Clarke &GaluhWandita, *Considering Victims: The Aceh Peace Process from a Transitional Justice Perspective*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, https://www.ictj.org/sites/default/files/ICTJ-Indonesia-Aceh-Process-2008-English.pdf.

[21]TRANSITIONAL JUSTICE IN THE ASIA-PACIFIC 87-89 (Renee Jeffery and Hun Joo Kim (eds.), Cambridge University Press, 2013).

of the same for gathering information to draft a report that is recognized by the State.[22] Truth Commissions work at grass root levels enabling direct participation and recognizing the grievances of the victims. However, the success of such Truth Commissions is directly proportional to political stability, which has posed a problem in the Tunisian context. Changing governments and clashes between the Secularists and Islamists leaves Truth Commissions precarious.

Further, security concerns like the loss of evidence and confidence in people to speak about their grievances have proved a problem in Tunisia. [23] Tunisia has attempted to strengthen security reforms via greater transparency and accountability, yet a lot more is left to desire. [24] The vicious cycle of economic injustice, namely corruption and its causal nexus with social injustice extends even too Truth Commissions that often find themselves understaffed or underfunded. This cycles also extends to a great mistrust between the victims, who see the Truth Commission as yet another oppressive organ of the State and refuse to cooperate with this powerful tool of transitional justice.[25]

B. Tools Of Transitional Justice

The previous section of this paper has thrown light upon the goals and processes adopted by the process of enabling justice. This section elaborates upon the methods undertaken to implement the same. The fundamental tool of compensation gains the limelight in situations of mass oppression. Financial compensations of 20,000 Dinars were given

[22]JOHN LANNON, HUMAN RIGHTS AND INFORMATION COMMUNICATION TECHNOLOGIES 74-75 (IGI Global, 2012).
[23]Gilles Bertrand, *Can the Tunisian Revolution be reversed?*, EUROPEAN INSTITUTE OF SECURITY STUDIES, http://www.iss.europa.eu/uploads/media/Alert_Tunisia.pdf.
[24]*Addressing the Past, Building the Future: Justice in Times of Transition*, INTERNATIONAL CENTER FOR TRANSNATIONAL JUSTICE(May 17, 2011), https://www.ictj.org/sites/default/files/ICTJ-Tunis-Conference-Report-2011-English.pdf.
[25]Eric Weibelhau, *All Retributive Justice, no Restorative Justice post-Arab Spring*, MIDDLE EAST INSTITUTE (Mar. 14, 2014), http://www.mei.edu/content/all-retributive-justice-no-restorative-justice-post-arab-spring-middle-east.

to victims of the deceased and those injured. This however has been taken with a pinch of salt as families often moot that no form of financial aid can heal their loss and there have been questions regarding the parameters on which such compensation has been calculated. [26]

Compensation has also been viewed as an alternative to judicial remedies and while it is a crucial aid factor it could dampen the spirit of transitional justice, which centers on account finding and reconciliation via judicial and non-judicial methods.[27] However, in the present context compensation to Tunisian victims has been a mere initial grant and a higher compensation amount along with judicial accountability is expected. This is in accordance with Article 20 of the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation and accounts for not only physical harm but also lost opportunities in employment, social benefits and education. Further transitional justice has a lot to gain from this Principle as compensation can be accorded for moral damage, which has emerged as a common violation in Tunisia. [28]

Article 21 of the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation supplements the above by providing for medical treatment and psychological care to enable rehabilitation of people. Further it mandates legal and social services to ensure justice prevails and the society is equipped to deal with the ghosts of the past. This however does not account for long-term medical treatment and specialized care in complicated medical illnesses as primary medical care in Tunisia is unequipped to handle both the quantum and complications of medical cases.[29]

C. The Right to a Remedy

[26]*One Step Forward, Two Steps Back? One Year since Tunisia's Landmark Elections*, AMNESTY INTERNATIONAL (Oct. 23, 2012),https://www.amnesty.org/download/Documents/.../mde300102012en.pdf.
[27]Marek M. Kaminski et al., *Normative and Strategic Aspects of Transitional Justice*, 50 THE JOURNAL OF CONFLICT RESOLUTION, 295-302 (2006).
[28]M. Cheriff Bassiouni, *Editorial*, 8 THE INTERNATIONAL JOURNAL OF TRANSITIONAL JUSTICE, 325-338 (2014).
[29]*Supra* note 26.

With the manifest need for transitional justice to play an active role in Tunisia, comes the International law obligation of states in upholding the right of victims who have faced human rights violations with a remedy. This consists of the three elements, Truth, Justice and Reparations.[30] Transitional Justice seeks to unravel the same by discovering the nature of violations that took place and enabling justice by prosecuting the perpetrators on the basis of available evidence. Lastly, reparations ensure compensation for the victims and their families and are viewed as the first step towards social reconciliation as they enable victims to rehabilitation and guarantees of protection to prevent such violations in the future.

Principle VII of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law further manoeuvre the transitional justice process by stating the available remedies, ranging from reparation to access to justice along with information about the mechanism and structures that imposed such violence. This enables victims to overcome their trauma and does away with oppression being a subject of taboo.[31]

D. Establishment And Role Of Specialized Chambers

Adopting a comprehensive approach to Transitional Justice, the Truth and Dignity Commission was formed to unravel the truth of violence in Tunisia. This is coupled with a system to enable criminal accountability for the same. Institutional reform, vetting of the judiciary and civil servants gain prominence in this process of national reintegration that

[30] *Id.*

[31] Theo Van Boven, *The United Nations Basic Principles and Guidelines on the right to a remedy and reparation for victims of gross violations of International Human Rights Law and serious violations of International Humanitarian Law*, UNITED NATIONS AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW (Dec. 16, 2005), http://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_e.pdf.

transitional justice seeks to enable.[32] Under Article 8 of the Constitution, Specialized Chambers have been formed and only such judges may be appointed who have not been involved in any prior trials that are political in nature. This is to ensure the Chambers are not biased towards a political ideology and follow due process.[33]

These Chambers have been given the duty of hearing cases of human rights violations ranging from sexual abuse to enforced disappearances and other cases that are forwarded by the Truth commission. This allows cases of political exile, corruption, electoral fraud and misuse of power to be within the Chambers jurisdiction, making it the most powerful judicial tool in the process of transitional Justice. Unfortunately, Tunisia's laws do not criminalize forced political exile and electoral fraud and could be challenged for being retrospective in nature as neither domestic law nor international law provides regulations for the same.[34]

The fear of double jeopardy (restricted by Article 14 (7) of the ICCPR) follows as the Chambers can try a person again for the same crime, thereby disrespecting due process. Article 14 of the ICCPR endorses a fair and impartial hearing and the Commentary of the section specifies that the creation of specific jurisdictions such as the Special Chambers in Tunisia is allowed only upon the satisfaction of certain standards and conditions under International law.[35] The status of the same and its interaction with domestic courts hence remains ambiguous.

[32]*Tunisia: Hope for justice past abuses*, HUMAN RIGHTS WATCH (May 24, 2014), http://www.hrw.org/news/2014/05/22/tunisia-hope-justice-past-abuses.
[33]Ministry of Human Rights and Transitional Justice: Republic of Tunisia, *Organic Law on Establishing and Organizing Transitional Justice*, available at: http://www.ohchr.org/Documents/Countries/TN/TransitionalJusticeTunisia.pdf.
[34]*Supra* note 32.
[35]*The Independence and Accountability of the Tunisian Judicial System*, INTERNATIONAL COMMISSION OF JURISTS(May 10, 2014), http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/05/Tunisia-Strengthen-Judicial-Independence-Report-2014-ENG.pdf.

IV. FACES OF INJUSTICE

A. Corruption as a Catalyzing Factor of the Jasmine Revolution and Primary Target of Transitional Justice

Corruption played a central role in embarking on this journey, as Tunisia is speculated to have lost almost a billion US Dollars to corruption annually. This form of corruption is often analogous to the infamous Papa Doc Duvalier in Haiti.[36] Corruption not only prevented a wholesome economic development of the Tunisian economy, but also prevented deserving market players from entering the economic structure as permits and licenses were only granted to those trusted and often related to personnel in the government, leaving the populous of the country hopeless. This in turn led to the vicious cycle of unemployment and poverty for the rest, causing dissatisfaction amongst the common man.[37]

Corruption not only erodes the structural makings of the society but also enables the consolidation of power in the hands of a few, leaving the others at their mercy and this power enables further violations of human rights such as lack of shelter or food, forced displacement without adequate compensation and unfair use of natural resources.[38]

Unfortunately, the authoritarian government dealt harshly with any form of criticism regarding the same, often torturing or imprisoning people without a trial. This cycle of corruption hence lead to an unfortunate chain of human rights violations.[39] It is in this context that it becomes

[36]Christopher, *supra* note 16.
[37]Maria Cristina Paciello, *Tunisia: Changes and Challenges of Political Transition*, CEPS, 7-8 (2011), http://aei.pitt.edu/59195/1/MEDPRO_TR_No_3_Paciello_on_Tunisia_(1).pdf.
[38]C. Albin-Lackey, *Corruption, Human Rights and Activism: Useful Connections and Their Limits*, *in*JUSTICE AND ECONOMIC VIOLENCE IN TRANSITION, 143-144 (D. Sharp (ed.), Springer: New York, 2014).
[39]Robinson Isabel, *Truth Commissions and Corruption: Towards a Complementary Framework*, GENEVA TRANSITIONAL JUSTICE WORKING PAPER NO. 1 (2014), http://www.geneva-

important for transitional justice to not only address mere human rights violations but also nurse the causal linkages beyond a mere recognition of the existence of economic, social and cultural rights. The International Council on Human Rights Policy (ICHRP) states corruption can cause a "*direct, indirect or remote*" violence and it is essential to fight this in order to enable victims to access basic human rights. This also extends to broader mandates such as the right to economic self-determination, which is often a cause for concern amongst the youth in Tunisia and the right to development in the long term.[40] Societies like Tunisia, where public trust hits ground zero find an optimum panacea in curbing corruption in order to encourage the rule of law.

When institutional violence fueled by corruption reduces, the faith of the people in the same civic society exponentially increases. This further augments to the judiciary and ensures a system of checks and balance. The ICHRP attacks " *indirect violations*" and "*remote violations*" to cover indirect and linking events within its ambit. This premise can be extended to corruption being an indirect violation of a basic right such as the right to food.[41]

To relieve this reality, three Truth and Dignity Commission set up by the Transitional Justice law in Tunisia mandates recognition of not only the multiple forms of corruption but also the roots of the same. [42]This process of recognizing and attacking corruption helps achieve a bottom up mechanism of transitional justice, as it identifies corruption to be the primary culprit of other injustices, while regaining public confidence.[43] The Truth and Dignity Commission has also established an Arbitration Committee for corruption cases, reflecting the seriousness of economic transformation and curing social injustice linked to corruption.

academy.ch/docs/Transitional%20Justice%20Working%20papers/TJWP_260814%20(2)(2).pdf [hereinafter Isabel].

[40]*Id.*

[41]J. T. Gathi, *Defining the Relationship between Human Rights and Corruption*, 31 JOURNAL OF INTERNATIONAL LAW (2010).

[42]Heather McRobie, *Will Tunisia's Truth and Dignity Commission Heal the Wounds of the Authoritarian Past?*,OXHRH BLOG (Feb. 20, 2015), http://ohrh.law.ox.ac.uk/will-tunisias-truth-and-dignity-commission-heal-the-wounds-of-the-authoritarian-past.

[43]Isabel, *supra* note 39.

B. Gender Dynamics of the Transition in Tunisia

Tunisia's Constitution grants equal protection of all citizens under Article 6. Unfortunately, the engrained structural violence enforced by the patriarchy coupled with gender stereotypes in an Islamic setting countervails Constitutional mandates.[44] Acts of sexual and gender violence, lack of socio-economic development and minimal representation in the political arena plague women's rights in Tunisia. The first wave of transition in this position was witnessed in the active participation of women in the Tunisian Revolution. Women took to the streets and protests along with running independent movements to overthrow the authoritative regime by means of online communication.[45] While this must be caroused for being a baby step towards treating the fairer gender in par, it is shadowed by the lurking threat of the rise of the Ennahda party. Ennahda is an Islamic political party and is symbolic for its antiquated views on women's rights. [46]

The focus on Islam not only threatens the status of women but does away with any possibilities of capability building to ensure that the goals of transitional justice with respect to women succeed. Capability building is the method of providing women with basic requirements such as education and awareness of their rights in order to give them the capacity to reform their lives and status.[47] Ennahda's Islamic centric approach threatens the same by limiting the role of women to the domestic sphere.

Further, despite having higher rates of education women in Tunisia remain under represented in all spheres of life and their grievances remain unaccounted for. This in turn ensures women's rights always take the backstage in this period of transformation. Transitional justice holds

[44]Rosa Ana Alija Fernández &Olga Martin Ortega, *Women's Rights in the Arab Spring: a Chance to Flourish, a Risk of Hibernation*, 11 REVISTA DE ESTUDIOSJURÍDICOS(2011).
[45]Borovsky, G. &Ben Yahia, A*., Women's Political Participation in Tunisia After theRevolution* (2012),https://www.ndi.org/files/womens-political-participation-Tunisia-FG- 2012-ENG.pdf.
[46] Doris Gray &Terry Coonan, *Silence Kills! Women and the Transitional Justice Process in Post-Revolutionary Tunisia*, 7INTERNATIONAL JOURNAL OF TRANSNATIONAL JUSTICE, 348-349 (2013) [hereinafter Gray & Coonan].
[47]*Id.*

the key to reforming this cloak of gender violence as investigation committees, the Truth and Dignity Commission are equipped to analyze sexual and gender violence and enable women to voice their opinions and grievances. The fruits of the same have been seen in 2011, when Tunisia withdrew its reservations to the CEDAW and adopted parity principles in electoral regulations. [48]

Regrettably, this joy was dampened when Tunisia declared that it would not make any legislate changes to national statutes if the violate Chapter 1 of the Constitution. This Chapter refers to conflicts with the Constitution and has the provision for Islam being Tunisia's national religion.[49] Hence, what can be clearly deciphered is that the mere end of a regime does not do away with embedded gender inequalities. Instead, this period often leaves women more vulnerable.[50] Inscribing this difficulty, transitional justice processes in Tunisia lead to "gender parity "elections in 2011, giving women a higher position in public life and reconciling societal norms. The transitional government also mandates an equal number of men and women to be on electoral lists along with endeavoring to reach the goal of 50 percent seats in the Parliament being held by women.[51] In conclusion, the law and policies have been amended for the better, yet the implementation holds the key to transforming women's rights in Tunisia. The political future of Tunisia will continue to impact this metamorphosing status of Tunisian women and the need to stress upon International norms of protection prevail.

[48]Saida Fatiha, *Women's rights and prospects for Euro-Mediterranean co-operation*, REPORT OF COMMITTEE ON EQUALITY AND NON-DISCRIMINATION, COUNCIL OF EUROPE,11-12(2014),http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=21133&Language=EN.

[49]Bridget C. McCullough, *Designing Democracy: Women's constitutional rights after the Arab Spring*, 4 IMPUNITY WATCH LAW JOURNAL (2014).

[50]*Supra* note 24.

[51]*Women in democratic transitions in the MENA Region*, WILSON CENTER (Mar. 2013),http://www.wilsoncenter.org/sites/default/files/Women_in_democratic_transitions_in_the_MENA_region_compilation.pdf.

V. OBSTACLES IN THE PATH TO JUSTICE

A. Tunisia's Judiciary in Rambles

The most critical tool for opening a new book in the Tunisian context lies in the accountability of the oppression, spearheaded by Ben Ali. Firstly, slow and inefficient criminal investigations coupled with the absence of trial for offences committed before 2011 have allowed authoritative rulers like Ben Ali to abscond. This not only slows down the legal process but also is also descriptive of the lack of political will in Tunisia to identify perpetrators of oppression. [52] Secondly, the judicial system in Tunisia remains in rambles in account of decades of encroachment by Ben Ali. The judiciary in unequipped to deal with the quantum of cases and lacks the technical ability to deal with questions of human rights violations, which are the primary distress of the Tunisian populace. [53] Most important, is the question regarding the independence of the judiciary and its ability to allow justice to prevail and earn public trust. The lack of vetting reforms has not been addressed as yet as this transitional justice process is presently addressing political and institutional reforms. [54]

B. Jurisdiction of Military Courts

Tunisian law allows Military Courts to hear cases concerning security forces. In the aftermath of the Revolution, such Military Courts found their gates flooded with cases. Unfortunately, due to their previous link with the authoritative government and the non-transparent appointment of the judiciary, accountability of such Courts was challenged. Procedural delays such as evidence gathering and witness hearings were delayed by Civil Courts before transferring cases to the military Court on establishment of security personnel being involved in the crime,

[52]Elfigiery, *supra* note 3.
[53]*Human Rights and Transitional Justice in Asia*, AMNESTY INTERNATIONAL (2013),https://www.amnesty.nl/sites/default/files/public/geuzenpaper_def.pdf.
[54]*Supra* note 35.

aggravating to a growing mistrust.[55] Further Military Courts only heard cases transferred to it by the civil Prosecutor. This process was long, leading to a loss of time in which forensic evidence was either lost or tapered with weakening evidence gathering. The Legal reasoning of judgments passed by military Courts also poses another problem as the responsibility for crimes committed by such authorities is most often under the command of superiors. Tunisian law is not endowed to anticipate such scenarios associated with command responsibility and merely states criminal liability is imposed on those directly linked to the commission of crimes under Article 32 of the Penal Code.[56] These contentions lead to another wave of outcries leading to a new law being formulated in June 2014, to address human rights abuses during the uprising by classifying them as "gross violation of human rights" under the framework of transitional justice. This in turn enabled civil courts to transfer such cases to Specialized Tribunals under the direction of the Truth Commission. To strengthen the position of the specialized Tribunals, the law specified that Res Judicata would not be applicable in such cases.[57]

C. Problems of Unemployment

In a country encumbered by high rates of unemployment, economic reforms remain in jeopardy. Protests and violent conflicts between the government and workers unions are catalyzed the dwindling investment in Tunisia and fall in tourism due to security threats. Such unemployed members of society do not have faith in the process of transitional justice and believe economic issues must be dealt with on a priority basis, leaving transitional justice goals to take the back seat. This also poses a threat to transitional justice as factions are forced to compete for limited natural resources in times of an account deficit, magnifying differences

[55]*Flawed Accountability*, HUMAN RIGHTS WATCH (Jan. 12, 2015), http://www.hrw.org/sites/default/files/reports/tunisia0115_ForUpload.pdf.
[56]*Tunisia reform legal framework- try crimes of the past*, HUMAN RIGHTS WATCH (May 3, 2012),http://www.hrw.org/news/2012/05/03/tunisia-reform-legal-framework-try-crimes-past.
[57]*Supra* note 32.

instead of unifying them towards the goals of reconciliation of society.[58]

D. Political Division

The number of political groups that sprouted after the fall of Ben Ali are impetuous to establish a new political order after an era of repression. Political groups and ideologies have seized the moment to push forth their agendas and gain acceptance further dividing Tunisian society. Islamists, Secularists and Salafists in Tunisia therefore take away from the goals of transitions and polarize the population making policy reform accepted by a majority an onerous task. This is especially in the context of women's' rights.[59]

E. Impact of International Attention

Tunisia's transitional justice path holds the key to a transformation in society in the Middle East and this potential faces the peril of drawing international attention that could threaten the security and sovereignty of Tunisia as it seeks donations and aid from many Western nations. The power dynamics between the State, its people and international players such as countries and banks, including the World Bank could impose further instability towards transitional justice goals.[60]

VI. RECOMMENDATIONS AND CONCLUSION

Tunisia lies at the crossroads of change today. The transition from an authoritative regime with no deference for Economic, Social and Cultural rights to the hopeful state where the Rule of law is paramount comes with

[58]Shelley Deane, *Transforming Tunisia: The Role of civil society in Tunisia's transition*, INTERNATIONAL ALERT (Feb. 2013), http://www.international-alert.org/sites/default/files/publications/Tunisia2013EN.pdf.
[59]Hardin Lang, *Tunisia's Struggle for Political Pluralism After Ennahda*, AMERICAN PROGRESS (Apr. 2014),https://www.americanprogress.org/wp-content/uploads/2014/04/Tunisia-report.pdf.
[60]Elfigiery, *supra* note 3.

challenges ranging from accountability, social and civic mistrust to a macabre past watermarked by human rights violation. In light of this era of violation, transitional justice attempts to metamorphose Tunisian society to enable protection of Human Rights, political obligations and reform institutions and structures.

While this process does not work wonders overnight, it ensures Tunisia channels its potential to enable a brighter tomorrow. The Author has laid out crucial and controversial aspects of the same and critically argues that the adoption of the recommendations below could catalyze this process and achieve the sacrosanct goals of transitional justice –

1. Acceptance of International Standards of Protection and their consequent ratification or withdrawals of reservations would initiate a stricter regime of human rights protection. The ratification of a spectrum of human rights treaties such as Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), the International Convention for the Protection of All Persons from Enforced Disappearance (CED), the Convention against Torture and the Rome Statute are evidence of the seriousness of the transitional justice goals in Tunisia and this must be encouraged by the International community. Despite this celebration, Tunisia is yet to sign Torture Conventions and must do away with its law of limitations regarding the same in the domestic sphere. [61]

2. Identifying institutions and violence imposing structures – Decades of oppression of the people have left different forms of violence entrench in Tunisian institutions and structures. This can be cured by focusing primarily on the watch dogs of the law. The Judiciary must be made a completely independent body, not dependent on the Government's appointment of judges to ensure a checks and balance system is maintained. Further, police violence must be controlled by stricter legislation. Any officials accused of undertaking acts of violence must be suspended or terminated, along with being slapped with a hefty fine to begin fragmenting institutionalized forms of

[61] *Supra* note 56.

imposing violence. Military Court's jurisdiction must be made limited only to cases of military professionals engaging in oppression. [62]

3. Proper and timely communication of details of investigations must be made public along with the criteria used in determining the compensation or reparation awarded. The pain and oppression of the people must retain center stage and the transitional justice process should focus primarily upon this principle in chalking out plans of implementation.[63]

4. Freedom of Speech and Expression must be guaranteed to ensure the voice of the people is heard and to provide for a platform of criticism towards the Government and its policies to ensure the rise of another Ben Ali is stalled. The criminalization on "attacks on religious sanctities" must be repealed to ensure circulation of ideas without the fear of penalties.[64]

5. Tunisia's transitional justice law must focus on the status of women's rights. This should move beyond purely positivistic formulation of statutes to a system of implementation to ensure the protection of women's rights. The Parliament must mandate a minimum number of women contesting seats and enable women to move beyond the domestic domain by implementing the Capability model. Specific legislations protecting women and giving them equal status are a priority. [65]

6. The Command Responsibility definition under International law must be replicated into domestic statutes to ensure that Specialized Tribunals can sieve cases accordingly.[66]

[62] *Supra* note 35.
[63] *Supra* note 26.
[64] *Supra* note 56.
[65] Gray & Coonan, *supra* note 46.
[66] *Supra* note 56.

Hence the Author concludes by congratulating Tunisia on its efforts in transformation via transitional justice and believes the implementation is key to the success of this process.

PROTECTION OF RIGHT TO ADEQUATE HOUSING IN POST-DISASTER SITUATIONS IN INDIA: AN ASSESSMENT IN THE LIGHT OF INTERNATIONAL LAW AND PRACTICE

Subhradipta Sarkar[*]

Abstract

Disasters render millions homeless and hence right to housing (or shelter) emerges extremely important in post disaster scenario. In fact, IDMC data reflects that the number of people displaced by natural disasters has multiplied in the recent years exceeding the number displaced by armed conflict. Yet the victims of disasters rendered homeless or forced to migrate have received lesser attention and protection under the international law compared to their conflict counterparts. The fulcrum for the right to adequate housing under international law is enshrined in the ICESCR. The criteria for right to adequate housing mentioned in CESCR General Comments have found their way in the IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters, Sphere Project and several UN Declarations. While the Supreme Court of India articulated the 'right to shelter', the judiciary has failed to pay any attention in safeguarding this right in the context of natural disasters. The role of the

[*]Subhradipta Sarkar is an Assistant Professor of Law at ITM University Law School, Gurgaon. The author may be reached at subhradipta.sarkar@gmail.com.

NDMA or NHRC has not been encouraging either. There are no disaster specific norms available, including the Disaster Management Act, 2005, ensuring right to adequate housing. As a result, the victims continue to live in vicious circle of misery, both in temporary shelters and permanent housing, as the right has ramification on their other rights. This paper demonstrates the poor state of affairs from Orissa Super Cyclone to Uttarakhand floods – the trend which has remained unchanged. Considering the void in our domestic legal regime, this paper attempts to lay down broad outlines of a right-based housing policy for disaster victims drawing inferences from the international law and practice.

I. INTRODUCTION

Adequate housing is universally viewed as one of the most basic human needs. While it is among the most recognized of all economic, social and cultural rights, it is also vital so far enjoyment of other such rights is concerned.[1] The Special Rapporteur on Adequate Housing proposed a working definition of right to housing as a 'right of every woman, man, youth and child to gain and sustain a secure home and community in which to live in peace and dignity'.[2]

The right to adequate housing can be severely compromised by disasters through damage and destruction, loss of records and the displacement. Hence, the right acquires greater importance in post-disaster situations. The plight of the victims of such disasters worsens when they are exposed to all forms of insecurity in the absence of any shelter. Added to

[1]Ina Zoon, *The right to adequate housing*, ROMA RIGHTS JOURNAL (2000), http://www.errc.org/article/the-right-to-adequate-housing/874.

[2]Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living 8, E/CN.4/2001/51 (2001).

this, anomalies on the part of various agencies engaged in post-disaster relief and rehabilitation process further aggravate the situation.

According to the data provided by the Norwegian Refugee Council's ("**NRC**"), International Displacement Monitoring Centre ("**IDMC**"), an estimated 32. 4 million people were displaced by disasters[3] compared to 6.5 million people due to armed conflict[4] in 2012. Despite its sheer numbers, it is unfortunate that the homeless victims of disasters have failed to grab enough attention when compared to their counterparts in armed conflicts. Unlike International Humanitarian Law ("**IHL**"), there is no specific set of laws which may be termed as 'international disaster management law'. Therefore, the protection of the disaster victims including their right to adequate housing has been derived through an amalgamation of provisions enshrined under various sources of international law.

Human rights are considered to be 'universal, indivisible and interdependent and interrelated'.[5] By implication, disregard of the right to adequate housing paves the way for further human rights violations in post-disaster situations. While wide range of international instruments – from treaties to UN resolutions to guidelines, which have recognized the right to adequate housing, the applicability of this right in the aftermath of natural disaster does not distinctively feature in the mainstream International Human Rights discourse.

It may be noticed that right to adequate housing is fundamentally different from other relief items such as food aid or medicine, as it is a significant, long-term and non-consumable asset. In all regions worldwide, the average cost in owning a house is significantly higher compared to the annual income of a particular household. In Latin

[3]IDMC, NRC, *Global Estimates 2012: People Displaced by Disasters*, INTERNAL DISPLACEMENT MONITORING CENTRE (May, 2013), https://www.internal-displacement.org/publications/global-estimates-2012-people-displaced-by-disasters.

[4]IDMC, NRC, *Global Overview 2012: People Internally Displaced by Conflict and Violence*, RELIEF WEB (Apr. 29, 2013), https://reliefweb.int/report/world/global-overview-2012-people-internally-displaced-conflict-and-violence.

[5]UN Gen. Assembly, *Vienna Declaration and Programme of Action*, ¶ 5, A/CONF.157/23 (1993).

America, while it is 5.4 times higher, it 12.5 times in case of Africa. Part of the issue lies in the fact that unlike other areas of relief, housing's status as property typically involves more obvious questions of ownership and legal entitlement.[6] Nevertheless, in post-disaster programming it attracts less far attention than it actually deserve. Housing reconstruction is mostly considered as a developmental activity rather than a humanitarian concern, and hence, tends to ignore the wholesome content of the right.[7]

In Section II, the author explains the concept with reference to the international law. In Section III, the author highlights some crucial issues relating to right to adequate housing that arose in the aftermath of certain mega disasters in the country, i.e. the Orissa Super Cyclone in 1999, the Gujarat Earthquake in 2001, the Indian Ocean Tsunami in 2004, the Uttarakhand Floods in 2013. Analogies from various countries are drawn to substantiate the arguments. While Section IV discusses the role of the courts and human rights institutions in safeguarding the right, Section V explores the disaster management law and policy regime. Eventually in the concluding Section V, the author proposes the broad outlines of in protecting the right to adequate housing of the natural disaster-affected victims.

II. RECOGNITION OF THE RIGHT IN INTERNATIONAL LAW IN THE CONTEXT OF NATURAL DISASTERS

Ronan McDermott points out that that the relationship between natural disasters and international regulation has been considered historically weak, especially when compared to the IHL applicable to armed conflict situations. It is encouraging to note that there is a growing interest in formulating international disaster management law primarily due to some mega disaster that the human race has encountered in the recent past

[6]Sultan Barakat, *Housing Reconstruction after Conflict and Disaster*, 43 NETWORK PAPER 1 (2013) [hereinafter Barakat].
[7]*Id.*

across the globe. Yet as it stands today, the normative standard for the protection of the disaster victims applicable to all phases of disaster management essentially derives its essence from the interpretation of International Human Rights Law ("**IHRL**") as it applicable to the peace time situations as opposed to the IHL applicable during conflict situation. Henceforth, the provisions of the IHRL may be extended to disaster situation as there is a vacuum with regard to legal safeguard. Besides such binding treaties, there exists several soft law or non-binding instruments which afford protection to the disaster victims.[8] These instruments have their origin in IHRL as well as IHL, International Refugee Law (IRL),[9] and International Environmental Law ("**IEL**").[10]

A. International Human Rights Treaties

The foundation of right to adequate housing at the international level was first laid down in Article 25(1) of the Universal Declaration of Human Rights ("**UDHR**") as a part of the "right to a standard living". Subsequently, the same was transformed into a binding treaty obligation of the States under Article 11(1) of the International Covenant on Economic, Social and Cultural Rights ("**ICESCR**"). Needless to say, the aforementioned provision reinforces ICESCR's principle enshrined under Article 2(1) which calls upon the State parties to "take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with

[8]Gregory C. Shaffer and Mark A. Pollack have repudiated the positivist legal scholars' effort of typically distinguishing hard and soft international law using a simple, binary binding/non-binding divide. Instead, they have preferred the wide spectrum of classifying international law through (1) obligation, (2) precision of rules, and (3) delegation to a third-party decision-maker. However, because of its inherent complexities in the second option and the fact that the importance of this article lies somewhere else, the author has adopted the binary division of international law for the purpose of this article. See, Gregory C. Shaffer and Mark A. Pollack, *Hard Versus Soft Law in International Security*, 52 BOSTON COLLEGE L. REV. 1159 (2011).

[9]This set of international law is significant for its reference to emergency situations.

[10]Ronan McDermott, *Compliance with Normative Frameworks in Disaster Management: A Comparative Study of Indonesia and Ireland*, HUMAN SECURITY: HUMANITARIAN PERSPECTIVES AND RESPONSES CONFERENCE, ISTANBUL (2013), http://humanitarianstudiesconference.org/wchs2013/fileadmin/user_upload/fe_users/ronanrua/wchs_paper315.pdf.

a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures". Other core human rights treaties have since then referred to some aspects of this right. E.g., Article 5(e)(iii) of the UN Convention on the Elimination of All Forms of Racial Discrimination ("**CERD**") prohibits racial discrimination in the enjoyment of the right to housing. Article 14(2)(g) and (h) and Article 16(1)(h) of the Convention on the Elimination of All Forms of Discrimination Against Women ("**CEDAW**") provides for the rights of rural women to adequate housing. Article 27(1), (2) and (3) of the Convention on the Rights of the Child ("**CRC**") establishes the positive obligation of States parties to provide material assistance, including housing to children in need.

While the concept of 'adequacy' of the right is neither elaborated in the UDHR nor the ICESCR, the Committee of Economic, Social and Cultural Rights ("**CESCR**") in its General Comment 4 has enumerated certain aspects which must be taken into account for this purpose in any particular context. It means more than mere shelter and includes the following:[11]

a) Security of tenure;

b) Availability of services, materials, facilities and infrastructure;

c) Affordability;

d) Habitability;

e) Accessibility;

f) Location; and

g) Cultural adequacy.

The State shall take sufficient measure ensuring that every individual realizes this right 'in the shortest possible time in accordance with the

[11]CESCR, General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), ¶ 8, E/1992/23 (1991).

maximum of available resources'.[12] Besides, the CESCR emphasized that the principle of non-discrimination, enjoyment of other human rights,[13] special attention towards disadvantageous groups including 'victims of natural disasters' and 'people living in disaster-prone areas',[14] participation of all in the decision-making process,[15] protection against forced eviction[16] should not be compromised by the State while guaranteeing right to adequate housing to its people and provide appropriate legal remedies including payment of compensation are in place in case of illegal actions of any nature.[17]

The phenomenon of forced eviction deserves special mention in this context. It is considered to be gross human rights violation and may be only justified in extreme conditions with adequate protection.[18] The CESCR, in its General Comment 7 has defined 'forced eviction' as the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection' provided that such action is carried out 'in accordance with the law and in conformity with the provisions of the International Covenants on Human Rights'.[19] Additionally, the CESCR notes that forced eviction may also result in violations of civil and political rights, e.g. the right to life, security of the person, privacy, family, peaceful enjoyment of possessions. Such an approach is evident from Article 17(1) of the ICCPR which recognizes, *inter alia* right to be protected against 'arbitrary or unlawful interference' with one's home.[20]

In case eviction becomes imminent, the CESCR considers that the affected persons should enjoy certain procedural protections which

[12]*Id.* at 14.
[13]*Id.* at 9.
[14]*Id.* at 11.
[15]*Id.* at 12.
[16]*Id.* at 13.
[17]*Id.* at 17.
[18]UN Comm'n on Hum. Rts., Forced evictions, E/CN.4/RES/1993/77 (1993).
[19]CESCR, General Comment No. 7: The Right to Adequate Housing, Art.11(1) of the Covenant: Forced Evictions, E/1998/22 (1997).
[20]*Id.* at 8.

include: (a) an opportunity for genuine consultation; (b) adequate and reasonable notice prior to the eviction; (c) presence of government officials along with them during an eviction; (d) provision for legal remedies. Under no circumstances, eviction should render people homeless or vulnerable to other human rights violations.[21] In the light of the above observations of the CESCR, it may be concluded that in post-disaster scenario, if the victims have to relocated, they should be provided with all necessary information about resettlement or facilitated to return to their original place of residence at the earliest, in case of temporary or permanent displacement respectively.

B. International Soft Law

a) Habitat Declarations

Besides international treaties, the States have committed themselves towards the protection of adequate housing in various international declarations. E.g., the Vancouver Declaration 1976,[22] adopted by the UN Conference on Human Settlements (also known as Habitat I) advocated for a settlement policy which would eliminate social and racial segregation, ensure participation of all people and integration of the women folk, and give highest priority to the rehabilitation of the people rendered homeless due to natural disasters.

The objective of the Habitat Agenda – Istanbul Declaration on Human Settlements[23] – the outcome of Habitat – II in 1996, was to arrest the deterioration of the conditions of the human settlements by addressing various crisis situations including 'environmental degradation' and 'increased vulnerability to disasters' and integration of all sections of the population in implementing the Habitat Agenda. Inspired by the local programs as envisaged under Agenda 21 of the Earth Summit, local authorities were given prominence in action and also emphasized on cooperation among the government, private sector, NGOs, etc.

[21] *Id.* at 16.
[22] Vancouver Declaration 1976, UN G.A. Res. 114, A/RES/31/109, (1976).
[23] Report of the UN Conference on Human Settlements (Habitat II), Istanbul, UN Pub., Sales No. E.97.IV.6, chap. I, res.1, annex I (1996).

b) Rio Declarations

The UN Conference on Environment and Development (also known as Earth Summit) held at Rio de Janeiro in 1992 is an important milestone in the realm of IEL having ramification on the housing in disaster-prone areas.[24] The outcome of the summit – Agenda 21 has dealt with sustainable human settlement in 21st century with special reference to promoting planning and management in disaster-prone areas. Acknowledging the fact that disasters had disastrous impact on human lives and settlement, three areas of action were identified, namely, developing a culture of safety, pre-disaster planning and post-disaster reconstruction.[25] The first initiative involved undertaking impact studies of disasters, implementing awareness campaigns.[26] Pre-disaster planning was aimed to include tools to encourage disaster-sensitive settlements; training programs for builders, contractors as well as rural population on disaster-resilient methods; training programs for emergency site managers, NGOs, community groups which cover all aspects of disaster mitigation; developing action plans for the reconstruction of settlements.[27] Post-disaster reconstruction includes activities like adopting effective guidelines with particular focus on development-focused strategies; initiating contingency planning with participation of the affected communities for post-disaster reconstruction and rehabilitation.[28] The program desired for international cooperation in implementing the above proposals through financing, technology transfer, human resource development and capacity building.[29]

[24]UN Gen. Ass'mly, Report of the UN Conference on Environment and Development, Rio de Janeiro, A/CONF.151/26 (1992).
[25]United Nations Sustainable Development, *United Nations Conference on Environment & Development Rio de Janerio, Brazil, 3 to 14 June 1992 AGENDA 21*, SUSTAINABLE DEVELOPMENT 7.55 – 7.59, https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf.
[26]*Id.* at 7.60.
[27]*Id.* at 7.61.
[28]*Id.* at 7.62.
[29]*Id.* at 7.63-7.66.

In pursuance of General Assembly Resolution 64/236, and to order to mark the 20th anniversary of the Earth Summit of 1992, Rio+20 was organized at the same place in 2012.[30] The outcome document of Rio+20 – Future We Want, disaster risk reduction gets specific mention. The importance of inter-linkages among disaster risk reduction, recovery and long-term development planning was noted 'in order to reduce risk, increase resilience and provide a smoother transition between relief, recovery and development'. Eventually, it called for a coordinated action from all relevant stakeholders concerned from national to international level.[31]

c) UN Guiding Principles On Internally Displaced Persons

Furthermore, the UN Guiding Principles on Internally Displaced Persons (IDPs)[32] recall that every human being shall have the right to be protected against being arbitrarily displaced from his home or place of habitual residence.[33] They also emphasize that all the IDPs have the right to an adequate standard of living and that the competent authorities shall ensure IDPs with safe access to basic shelter and housing at a minimum, regardless of the circumstances and without discrimination.[34] The State shall take appropriate measures to take care of the property and possessions left behind by the IDPs against destruction and arbitrary and illegal appropriation, occupation or use.[35] The IDPs have a right to protection against forcible return or resettle where their life, liberty, safety and health would be under threat.[36] While facilitating voluntary return of the IDPs to their original home in safety and with dignity remains the primary duty and responsibility of the authorities, they shall

[30]Rio+20 – Future We Want, G.A. Res. A/RES/66/280 (2012).
[31]*Id.* at 189.
[32]UN Comm'n on Hum. Rts., *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39. Addendum: Guiding Principles on Internal Displacement*, E/CN.4/1998/53/Add.2, (1998).
[33]*Id.*, Principle 6.
[34]*Id.*, Principle 18.
[35]*Id.*, Principle 21.
[36]*Id.*, Principle 15(d).

also enable the reintegration of returned or resettled IDPs.[37] Inter-Agency Standing Committee (IASC) Framework on Durable Solutions for Internally Displaced Persons considers return or resettlement as a complex issue involving various challenges, namely, a human rights challenge (ensuring their right to security, property and housing), a humanitarian challenge (as they need temporary shelter until destroyed houses are rebuilt), a development challenge (in achieving durable solutions in providing access to livelihoods, education and health care identified by the Millennium Development Goals and helping to establish or re-establish local governance structures) and a reconstruction challenge (as durable solutions not possible without political, economic and social stabilization).[38]

d) Pinheiro Principles

Another key initiative specific to housing rights is the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons, commonly known as the 'Pinheiro Principles', endorsed by the UN in 2005. It recommends restitution of property from which they were arbitrarily displaced. States should establish appropriate administrative and judicial institutions and mechanisms to assess and enforce housing, land and property restitution claims. While the Principles were drafted primarily in the backdrop of post-conflict situations; the Official Handbook for their implementation makes explicit references to natural disasters because of wide range of common concerns.[39]

The concept of restitution provides offers the displaced with an aspiration to recover and repossess the dwelling, land or property which was their original home before the disaster happened. This is not only a theoretical discourse but the principles are designed to provide the States, UN and international community with practical guidance to address the complex

[37]*Id.*, Principle 28.
[38]Brookings-Bern Project on Internal Displacement, *IASC Framework on Durable Solutions for IDPs* (2010).
[39]Food and Agriculture Agency et. al., *Handbook on Housing and Property Restitution for Refugees and Displaced Persons Implementing the 'Pinheiro Principles'* (2007).

legal and technical issues surrounding housing rights. In fact, restitution rights have been recognised, and laws and procedures developed and enforced in post-conflict contexts such as Bosnia-Herzegovina, Kosovo and Tajikistan; in post-authoritarian countries like South Africa or Iraq; and in post-communist countries including East Germany, Latvia and Albania.[40]

The Principles proclaim that State shall consider right to restitution as the 'preferred remedy for displacement and a key element in restorative justice' ensuring 'right to voluntary return in safety and dignity'.[41] The principles emphasises that everyone has a right to adequate housing and protection against arbitrary displacement.[42] The State can interfere with the right to housing only in extreme circumstances in the 'interest of society' in its restrictive sense.[43] Hence, restitution shall be applied by the State in a non-discriminatory fashion reflecting the 'best interests of the child', through a just and timely manner.[44] States should ensure that restitution claims process is available to every displaced person with an option of special assistance including free legal aid for all, especially, the illiterate, children and disabled persons. The claim forms are required to be simplified and the process should be done in a language comprehendible for the victims.[45] The process should be facilitated through adequate and effective participation of the victims in the decision making process.[46] States should ensure the appropriate registration records are in place. In cases of disasters, when there is mass displacement and there is little documentary evidence, the determining authorities ought to adopt conclusive presumption that persons fleeing their homes during a given period marked by disaster, have done so

[40]*Id.* at 4.
[41]UN Sub- Comm'n on Promotion and Protection of Hum. Rts., *Principles on Housing and Property Restitution for Refugees and Displaced Persons*, Principle 2 & 10, E/CN.4/Sub.2/2005/17, (2005).
[42]*Id.*, Principle 8 & 5.
[43]*Id.*, Principle 7.
[44]*Id.*, Principle 12.
[45]*Id.*, Principle 13.
[46]I*d.*, Principle 14.

because of the disaster and are therefore entitled to right to restitution.[47] The principles also recognize the rights of the secondary occupants.[48] In exceptional cases where restitution is impossible, persons concerned shall be compensated as a form of restorative justice.[49] State should ensure that the decisions of the authorities determining the rights of the displaced people are implemented and respected by all concerned.[50]

e) Humanitarian Standards

Few standards have evolved as an amalgamation of IHRL, IHL and IRL. E.g. the IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters which promotes and facilitates a rights-based approach to humanitarian assistance activities, including building of temporary shelter and permanent housing for the affected communities.[51]

The Guidelines emphasize that the actors involved in the humanitarian services must ensure that the victims of disasters shall be allowed to live in security, peace and dignity in temporary camps and collective shelters as well as permanent relocation sites. They stress on adopting a community-based approach to strengthen the absorption capacities and resilience of host communities, e.g. through provision of additional water and sanitation facilities, enhancement of school and health services to the community, provision of building materials for host families to enlarge dwellings, etc. The shelters should preferably be culturally acceptable providing privacy for women and children; and also user-friendly for persons with disabilities or older persons. They must have adequate water and sanitation facilities, separate toilets and bathing facilities for men and women and for single-parent households. Moreover, the Guidelines make

[47] *Id.*, Principle 15.
[48] *Id.*, Principle 16 & 17.
[49] *Id.*, Principle 21.
[50] *Id.*, Principle 20.
[51] Brookings-Bern Project on Internal Displacement, *IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters* (2011).

it abundantly clear that such shelters are only transitional and the victims are required to be shifted to the permanent housing as soon as possible.[52]

Another important standard for humanitarian assistance is the Sphere Project launched in 1997 by a group of humanitarian NGOs and the Red Cross and Red Crescent movement. It consists of a Humanitarian Charter and Minimum Standards in Disaster Response. Sphere endorses the same criteria regarding right to adequate housing as enshrined in the General Comment 4 of the CESCR. The Minimum Standards regarding Shelter and Settlement are a practical expression of the principles and rights embodied in the Humanitarian Charter. The Standards underline that better shelter and settlement disaster response can be achieved through better preparedness. Such preparedness is possible through capacities, relationships and knowledge developed by the governments, humanitarian agencies, local civil society organisations and communities to anticipate and respond effectively to the impact of likely, imminent or current hazards. Preparedness is informed by an analysis of risks and the use of early warning systems. The Standards comprise of strategic planning, settlement planning, covered living space, construction and environmental impact. Each component of the standards spells out guidance notes, e.g. regarding strategic planning of the settlement sites, they recommend to undertake and regularly review a comprehensive risk and vulnerability assessment. In case of transitional shelters, the notes recommend that for non-displaced populations, such shelters can be erected *in situ* as a basic starter home, to be upgraded, expanded or replaced over time as resources permit. In case of, displaced populations, they can be disassembled and reused when the affected populations are able to return to their original homes or resettled elsewhere. The notes pay specific attention to the protection of housing and property rights of the vulnerable, especially, women, those widowed or orphaned by the disaster, persons with disabilities, tenants, social occupancy rights-holders and informal settlers. The settlements should include essential facilities, such as, water, sanitary facilities, communal cooking facilities, healthcare, solid waste disposal, schools, social facilities, places of

[52] *Id.* at 41.

worship, meeting points, space for livestock accommodation, access to roads, etc. The notes also lay down quantifiable standards to be conformed, e.g. fire safety provision shall have a 30-metre firebreak between every 300 metres of built-up area, and a minimum of 2 metres between individual buildings to prevent collapsing structures from touching adjacent ones. Similarly, with regard to covered living space, it has been prescribed that immediately after the disaster, particularly in extreme climatic conditions, a covered area of less than 3.5m² per person may be appropriate to save life and to provide adequate short-term shelter.[53]

C. Special Procedure: Report of the Special Rapporteur on Adequate Housing

In the recent past, the Special Rapporteur on Adequate Housing has also focussed on matters in the post-disaster context. Although the report circumscribed post-conflict situations; it broadly dealt with the commonalities, notwithstanding certain fundamental differences between the two situations. It urged the States to incorporate right to adequate housing as an integral part of any humanitarian, reconstruction and development responses. States, with the support of the NGOs should provide temporary shelter in reasonable adequate living conditions for the displaced population.[54]

Appreciably, it recognized that housing has an 'inherent social value' of vital importance for social stability, alleviation of poverty and development, and therefore, response to the impact of disasters on the right to adequate housing should not confine to the physical damage assessment shelter and infrastructure and should seek to address issues, e.g., disruption of social and economic relationships and networks; destruction of home-centred livelihoods; specific rights of the vulnerable

[53]*The Sphere Project: Humanitarian Charter and Minimum Standards in Disaster Response*, The Sphere Handbook (2004).
[54]Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, A/HRC/16/42 (2010).

groups; compromised access to facilities, amenities and livelihood opportunities. It vociferously argued in favour of involving the local communities in decision-making regarding location, design and infrastructure of housing while rebuilding lives in the aftermath of disasters. A rapid assessment and analysis of the pre-disaster land holding should be conducted in the immediate aftermath of a disaster was considered essential towards sustainable rehabilitation and reconstruction.[55]

In his report on women and adequate housing, the Special Rapporteur made specific mention for exploration regarding the impact of natural disasters on the right of women to adequate housing.[56] The report, published soon after the 2004 Tsunami, raised several issues concerning inadequate protection of the women's housing rights in post-disaster scenario in general and Tsunami in specific. The report expressed dismay over the fact that poor housing and living conditions in the centralized camps posed severe health risks to women and forced them to sleep in the places of worship in the neighbourhood. Assistance is too often distributed on a "head-of-family" basis and women, particularly single parents, fail to be recognized in the process. Women are excluded from camp governance or response planning. Additionally, loss of homes and livelihood after the tsunami exposed women not only to increased trafficking but also to incidents of violations of bodily integrity.[57]

[55]*Id.* at 62.
[56]Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living – Women and adequate housing, E/CN.4/2005/43 (2005).
[57]*Id.* at 5.

III. PROTECTION OF THE RIGHT IN THE AFTERMATH OF MEGA DISASTERS: A REALITY CHECK IN INDIA

Experiences across the globe reveal that in many disaster situations, there is very little or no need assessment of the affected communities, the houses are physically built without any reference to the right to adequate housing concept. As a result, the houses are either abandoned or remain unoccupied.[58] India is not alien to such problems. This section reflects and analyzes some of the common issues that have arisen in our country in the aftermath of some mega disasters that have haunted us in the recent past.

A. Anomaly & Discrimination in Receiving House Damage Compensation

In the aftermath of the Super Cyclone, there were reports of wide range malpractice. There was virtually no applicable rule for scrutiny of the beneficiary. It so happened that there were 4 to 5 claimants of the grant in one family. But surprisingly, people having houses on Government land since last 20 years or more were not eligible for getting house damage grant.[59] Housing loans, meant to help government employees and people serving in public sector units were given to fictitious PSUs and persons.[60] Except Gajapati district, from all other 13 affected districts of Orissa, a total of 15,43,672 petitions regarding non-payment and/or underpayment for the damaged houses were received by the end of June 2000, out of which 15,29,809 cases were enquired into and of this 1,18,125 cases were found eligible for house building assistance.[61]

[58]Barakat, *supra* note 6.
[59]Subhradipta Sarkar, *Compounding Disaster: Conformability Of Post-Natural Disaster Relief And Rehabilitation Process With Human Rights Standards* (2007).
[60]Soumyajit Pattnaik, *Orissa cyclone relief sinks without a trace*, THE HINDUSTAN TIMES (Sept. 29, 2006), http://el.doccentre.info/website/DOCPOST/sep-06-rdc/sep-06-rdc-formated/DB10-TS1-D-ht-y01-orissa-cyclone-relief-sinks-without-a-trace.pdf.
[61]GO Ms. No. 172, *infra* note 83.

The Government of Gujarat provided financial assistance to the earthquake victims in the form of a compensation package to build their own houses. However, it did not trickle down to poorer sections of the society. The more influential members of the communities took advantage of these packages and built their own houses. On many occasions the economically vulnerable communities were left out of the enumeration process conducted by the government. Consequently, without any financial assistance they continue to live in deplorable condition in temporary shelters.[62]

To bring about some uniformity in providing financial assistance to the affected populations, in 2015, the Government of India (GoI) has issued new norms of assistance from the State and National Disaster Response Fund established under the Disaster Management Act, 2005.[63] Accordingly, for fully or severely damaged houses the compensation be received is Rs. 95,100 and Rs. 1,01,900 with respect to each house in the plains and hilly areas respectively. In case of partial damage, it is Rs. 5,200 and Rs. 3,200 for pucca and kutcha house respectively, where the damage is at least 15%. It further note that the damaged houses should be an authorized one certified by a competent authority of the State Government. The norms are valid for period of 5 years, i.e. from 2015 to 2020.[64] Yet it is difficult to comprehend the manner in which the norms may be complied with in letter and spirit.

B. Temporary Shelter

Often the temporary shelters are built with just to provide shelter to affected communities with minimalist concern for their basic rights. The temporary shelters built in the tsunami-affected areas had limited sanitary conditions, particularly for women and young girls. Without any provision for kitchen inside the shelters, kerosene stoves were being used

[62]Rohit Jigyasu, *Post-Earthquake Rehabilitation in Gujarat 9 Months After: A Field Assessment*, RADIX – THE GUJARAT EARTHQUAKE (2001), http://www.radixonline.org/gujarat4.htm.
[63]Disaster Management Act, 2005, §46 & §48(1)(a).
[64]GoI, No. 32-7/2014-NDM-I, Ministry of Home Affairs (Disaster Management Division) (Apr. 8, 2015).

inside sleeping quarters and that posed a serious fire and health hazard. There was a terrible lack of hygiene with utensils being washed outside each shelter, leaving dirty puddles that have breeding grounds for mosquitoes and flies. The shelters turned into tinderboxes in the blistering summer heat and leaked during the rains.[65]

Recently R. Stephen Diyali, CEO of an NGO responsible for building temporary shelters in Uttarkashi district of the State of Uttarakhand after 2013 floods, in an interview with the author revealed that the shelters built by his NGO has no provision for toilets, though there is a small kitchen attached to the living area. There is no common toilet or bathroom facility either. He opined that it was not the primary concern of the desperate victims after the disaster and that there was no fund with his NGO for the same. Two years on, victim families continue to languish in those tin shelters.[66] All these examples are in clear violation of the humanitarian and human rights standards discussed in the previous section.

In 2001, following the earthquake a peculiar situation arose in Gujarat. Many people were allotted temporary shelter only after they had started to build permanent houses. Consequently, some families went on to have multiple houses – a temporary one, a semi-permanent one and a permanent one. While some used combined structures in order to retain them all, delays in process of building permanent housing encouraged families to convert their semi-permanent shelters into permanent housing by building stone walls. There was ample doubt of those hybrid structures to withstand future earthquakes.[67]

With pre-fabricated housing becoming increasingly popular in the western countries, perhaps, it's time for us to make a shift in the housing strategy. Although there is a concern regarding their durability, at times, pre-fabricated houses have shown long term endurance as in Croatia

[65]*Fire guts India tsunami shelters*, BBC NEWS (Nov. 1, 2015), http://news.bbc.co.uk/2/hi/south_asia/4396086.stm.
[66]Interview with R. Stephen Diyali, CEO, Mission for Ananth Development & Welfare Society, Uttarkashi, Uttarakhand (Jul. 28, 2015).
[67]Barakat, *supra* note 6, at 15.

where many such houses have survived over a decade. Political situation in those areas have compelled the agencies to retain such houses but over a period of time, such structures have gained the 'permanent' status.[68]

When hundreds are rendered homeless and the demand of housing is very high and rapid, there have been instances of providing durable transition homes which may be upgraded to permanent houses subsequently, as it happened in the Nyiragongo eruption in Goma in 2002 destroying 15,000 houses in two days. To come up with a rapid housing solution, more durable transitional shelters were built with a provision of upgrading them to permanent ones. In that case, plastic sheeting was provided for temporary roofing. However, the framework for the roof was constructed in such a way so that they could bear the weight of the tiles meant for permanent structures subsequently. While the first set of transitional housing was set up within six weeks of the disaster, during the lifetime of the program, 69 per cent of families had upgraded their homes.[69]

C. Community Participation In Permanent Housing

Habitat Declarations to Rio Declarations to Humanitarian Standards – every instrument has underlined the need of community approach in housing reconstruction in disaster context. In the Orissa cyclone reconstruction, the affected community was sparingly involved. The government had little faith in using low-cost technology in traditional housing. On the contrary, various expert guidelines have generally endorsed in favour of using indigenous technologies for better results.[70] The Gujarat earthquake reconstruction and rehabilitation policy promised a community-driven approach to reconstruction. Nonetheless in reality, it was mere consultation rather than actual decision-making. The ambiguity over community participation is evident in the construction debates.[71] There was gradual improvement in the process in the context of Tsunami.

[68]GESELLSCHAFT FÜR TECHNISCHE ZUSAMMENARBEIT (GTZ), GUIDELINES FOR BUILDING MEASURES AFTER DISASTERS AND CONFLICTS 64 (Eshborn, 2003).
[69]Barakat, *supra* note 6, at 16.
[70]*National Disaster Management Guidelines: Management of Earthquakes,* NDMA, GOVERNMENT OF INDIA (2007).
[71]GO Ms. No. 172, *infra* note 83, at 11.

An effort was made in involving the beneficiaries in actual building of their homes. Yet the mission remained far from being accomplished. As it was reported that only 2.22 per cent of the people employed in the post-Tsunami construction work were from the affected villages, even though they desperately needed the work.[72]

It is encouraging to note that after the Uttarakhand floods, to ensure community participation, the Government with funds from the World Bank proposed to the affected people whose houses got completely destroyed, to choose between prefabricated houses and 'owner-driven' constructed houses. To build their houses, the State of Uttarakhand issued a Government Order (GO) for providing Rs 5 lakh per unit in four installments after completion of certain phases of the work.[73] The names of all 2,497 beneficiaries along with the names of their respective villages, financial details, date of payment of the last installments and even their mobile numbers are uploaded on the website.[74] This practice augurs for transparent governance.

While the initiative is praiseworthy, it has not been devoid of pitfalls. First of all, it took a long time for the initiative to take off and the people were forced to stay in tents for months even in harsh winter.[75] In a recent interaction with the author, Gopal Thapliyal, Project Manager of an NGO working in Uttarkashi district of the State expressed his displeasure regarding the project. Besides pointing out the delay in the construction process, he does not find the process as participatory as the beneficiaries have been left to fend on their own and there is no proper supervision of the project. According to him, it should have been guided by professional contractors or engineers appointed by the government to approve the

[72]Nagaraj Srinivasan & Venkatesh, *The State and Civil Society in Disaster Response: An Analysis of the Tamil Nadu Experience*, J. SOC. WORK DISABIL. REHABIL (2005).
[73]G.O. No. 1024/F/XVIII-(2)/2013-16(5)/2013, Disaster Relief and Rehabilitation Department, Govt. of Uttarakhand (2013).
[74]*Housing: About ODCH*, UK DISASTER RECOVERY, http://ukdisasterrecovery.in/index.php/projects/udrp1/hpb.
[75]Kavita Upadhyay, *Housing in limbo in deluge-hit Uttarakhand*, THE HINDU (Jan. 2, 2014), http://www.thehindu.com/news/national/other-states/housing-in-limbo-in-delugehit-uttarakhand/article5527280.ece.

plans and modifications desired by individual families according to their need. There could have a provision of payment of their professional services and surprise checks to ensure that the construction is taking place according to the respective bye-laws of the local authorities.[76]

At times, if situation demands, community members may be inducted in informal manner which enhance confidence in the reconstruction program. E.g. in Mexico City following an earthquake in 1985, 'Renovation Councils' with elected representatives were formed for each reconstruction or rehabilitation site. Those councils did not have a legal status; yet, they provided an effective forum for community members to represent their needs to the authorities.[77] This is very much possible through meeting in the panchayats and municipal bodies in case of our country.

Community participation also helps in proper identification of the beneficiaries. This is crucial but it can prove expensive; as it happened in case of one NGO active in the Knin area of Croatia, which spent 22 per cent of its housing construction budget on identifying the target group.[78] Good local knowledge about the community assists in identifying the most vulnerable, and ensuring that the program actually reaches the target groups.

One of the finest examples of community participation was witnessed in the post-1993 earthquake in Maharashtra which damaged around 230,000 houses. The government of Maharashtra created the Maharashtra Emergency Earthquake Rehabilitation Program (MEERP) with assistance from the World Bank. For relocated communities, the MEERP ensured that the beneficiaries were engaged in every stages of the construction process from selection of the beneficiaries to the design of houses. To ensure fairness, final decisions were taken in plenary meetings of the

[76]Interview of Gopal Thapliyal, Project Manager, Shri Bhuvneshwari Mahila Ashram, Uttarkashi, Uttarakhand (Jul. 29, 2015).
[77]Barakat, *supra* note 6, at 6.
[78]Barakat, *supra* note 6, at 11.

whole village. Once the construction was completed, houses were allotted to beneficiaries in an open consultation with the entire village.[79]

For in situ reconstruction or repair, it was an owner driven process where the owners took charge of the construction with materials and financial and technical assistance provided by the government. The coupons for construction materials were transferred to the bank accounts, opened for this purpose, directly. Each village formed a beneficiary committee, even consisting of women self-help groups, to work with the project management unit. In the process the beneficiaries became well-aware of their entitlements and MEERP transformed into a people's project.[80]

D. Forced Relocation/Eviction

In the aftermath of a disaster, decisions whether to relocate and rebuild in a new area, or to rebuild on the same site become extremely sensitive. Settlements do not come into existence arbitrarily; various social, cultural and economic reasons dominate communities' preference of one place over the other. Hence, forcing them could prove destructive for the lives of the members in the settlement. Findings from UN shelter projects in 1970s and 1980s reveal that survivors generally prefer residing as close as possible to their original homes and means of livelihood, and strongly oppose to forced evacuation.[81]

Two years after the Latur earthquake in 1991, a report revealed that 97 per cent of people from 52 villages were happy with in situ homes, whereas only 48 per cent were happy with their relocated homes, which cost 3 to 10 times more. The Gujarat Earthquake Reconstruction and Rehabilitation Policy was an improvement in this regard as it offered the people with a choice to stay back or relocate to a new place. However, findings of study released ten months after the 2001 earthquake had a

[79]Barakat, *supra* note 6, at 34.
[80]Barakat, *supra* note 6, at 34.
[81]Barakat, *supra* note 6, at 27.

different story to tell. It revealed that people had abandoned their 'new' homes and relocated back to their old settlements.[82]

Despite the documentation of such negative impact of forcible relocation, disaster victims in India continue to suffer against the norms enshrined in the UN Guiding Principles on IDPs. To illustrate further, GO Ms. No. 172[83] was purportedly issued by the Government of Tamil Nadu inducing people to relocate outside the coast in lieu of a new house provided by the government. According to the GO, in case of partly damaged houses built before 1991[84] within 200 metre of the High Tide Line, the owners would get a new house worth Rs 1.5 lakh, constructed by the government; provided the owners are willing to move beyond 200 metre. However, the owners unwilling to move out would undertake all the repair work without any government assistance. In case of fully damaged houses there was no option but of moving out, as new construction in the same place was strictly prohibited according to this GO. This appeared to be a conscious policy of the government forcing the helpless people to relocate. Willing owners were asked to relinquish their old property to the government in favour of a new abode. The old property so relinquished by the owners would be used for 'public purposes'. Nothing is mentioned about the nature of these public purposes. In such circumstances, there would be no legal hindrance for the State Government to go ahead even with tourism projects at the expense of those poor people.[85]

Under the pretext of enforcing the Coastal Regulation Zone Notification, 1991,[86] while the Government apparently issued the distance limitation out of concern for the safety of the coastal communities, it did not do so

[82]GO Ms. No. 172, *infra* note 83, at 11.

[83]GO Ms. No. 172, Revenue (NC.III) Department, Government of Tamil Nadu (Mar. 30, 2005), http://www.tn.gov.in/gosdb/gorders/rev/rev-e-172-2005.htm [hereinafter GO Ms. No. 172].

[84]The year has reference to the enforcement of Costal Regulation Zone (CRZ) Notification.

[85]Subhradipta Sarkar & Archana Sarma, *Disaster Management, 2005 – A Disaster in Waiting?*, 41(35) THE ECO. & POL. WEEKLY, 3763 (2006).

[86]The Notification issued under the provisions of the Environment (Protection) Act, 1986 and the Environment (Protection) Rules, 1986.

in case of luxury resorts and hotels for exceeding the stipulated distance. Evicting fisher folk from the coast not only leads to their displacement, it has an enormous ramification on their livelihood as fishing activity demands the community to stay nearby the shore. Therefore, such forced evictions constitute gross violations of human rights such as the right to housing and thereby the right to an adequate standard of living.[87]

Some attempts of forced eviction were reported by NGO coordination, namely, the Tsunami Relief and Rehabilitation Coordination (TRRC) of Tamil Nadu and Pondicherry. In one village, Anna Nagar Kuppam, in Tamil Nadu, the TRRC alleged that the authorities had deterred coastal communities from replacing huts washed away by the waves, shut off electricity and water utilities to remaining houses, and removed their children from local schools. However, the forced location was stayed by the Madras High Court in an interim injunction after the TRRC had filed a writ petition in that matter.[88] All these instances demonstrate that we have to travel a long way to ensure right to restitution, as set out in Pinheiro Principles, for those displaced people.

IV. ROLE OF THE JUDICIAL & HUMAN RIGHTS INSTITUTIONS

A. Judgments Of Indian Courts

It is very regrettable that the natural disaster management, on a whole, has received a step-motherly behaviour from our judiciary.[89] Though not in the context of disaster, it is significant to mention that in Chameli

[87] *From Relief to Recovery*, SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE (Jul. 28, 2005), http://www.hrdc.net/sahrdc/hrfeatures/HRF123.htm.
[88] GO Ms. No. 172, *supra* note 83, at 16.
[89] Subhradipta Sarkar & Archana Sarma, *Disaster Management: A Black Hole in Indian Judicial System*, 26(6) LEGAL NEWS AND VIEWS, 20 (2012).

Singh v. State of Uttar Pradesh,[90] the Supreme Court of India has expounded its own concept of a shelter. The Court observed:

> *"Right to shelter . . . includes adequate living space, safe and decent structure, clean and decent surroundings, sufficient light, pure air and water, electricity, sanitation and other civic amenities like roads etc. so as to have easy access to his daily avocation. . . . Right to shelter when used as an essential requisite to the right to live should be deemed to have been guaranteed as a fundamental right."*

There are few instances where the constitutional courts have delivered judgments in protecting right to shelter in post-disaster situations. In *Kranti v. Union of India*,[91] the Supreme Court was forced to intervene in various problems faced by the by the inhabitants of the Andaman and Nicobar Islands in the aftermath of the Tsunami and issue directions including exploring the feasibility of constructing houses/huts in the traditional manner and design, and using climate-friendly material, such as timber.

In *Ambikapathi @ Vinayagam v. Union Territory of Pondicherry*,[92] writ petitions were filed before the Supreme Court against the Government for acquiring land from private individuals by invoking extraordinary powers under Section 17 of the Land Acquisition Act, 1894, for the purpose of providing house sites to Tsunami affected victims. The petitions argued that they were unfairly deprived of the opportunity to put forth their objections against the acquisition of their lands despite the fact that there was a procedural delay of around 14 months. Moreover, the land fell under 'No Development Zone', i.e. within 200 meters from High Tide Line (HTL), as per the CRZ Notification, and hence, no construction might be allowed and that no prior environmental clearance certificate was obtained. Moreover, there were alternative lands available for the purpose. The Court dismissed the petitions and held whether there was

[90]Chameli Singh v. State of Uttar Pradesh, (1996) AIR 1051 (SC).
[91]Kranti v. Union of India, (2007) 6 SCC 744.
[92]Ambikapathi @ Vinayagam v. Union Territory of Pondicherry, (2008) 2 M.L.J. 513 ("**Ambikapathi @ Vinayagam**").

urgency or which land is suitable – the administrative discretion lies solely with the Government and it is not amenable to judicial review. However, it shall not be formed arbitrarily or capriciously or with a *malafide* or oblique motive. With reference to the CRZ norms, some of the proposed lands were outside the CRZ and others fell under CRZ - II as per Pondicherry Coastal Zone Management Plan where construction of houses was a permissible activity. However, clearance should be obtained from the Town and Country Planning Department before starting any construction activity in such land. Nevertheless, the Court directed the Government to pay appropriate compensation for acquiring the land to the petitioners without much delay.

The case of *Bipin Chandra Diwan v. State of Gujarat*,[93] was regarding relief and rehabilitation in general, and hence, deserves mentioning here. As there was no statutory law at that time, the Court invoked Article 21 of the Constitution of India which guarantees to every citizen protection of his life and personal liberty, and is repository of all important human rights. Moreover, reference was made to the doctrine of '*Parens Patriae'* which refers to the obligation of the State to protect and take into custody the rights and privileges of its citizens for discharging its obligations. If necessary, the National Human Rights Commission (NHRC) may also act in accordance with the provisions of Section 12(b)[94] of the Protection of Human Rights Act, 1993, in redressing the complaints of violation of human rights. Right to adequate housing will naturally be encompassed under Article 21.

B. References to Foreign Court Judgments

Any discussion on the protection of the right to adequate housing will remain incomplete without reference to the notable judgment from the Constitutional Court of South Africa in the case of the *Government of the*

[93]Bipin Chandra Diwan v. State of Gujarat, (2002) AIR 99 (Guj).

[94]Protection of Human Rights Act, 1993, Sec. 12. Functions of the Commission. – The Commission shall perform all or any of the following functions, namely:- . . . (b) intervene in any proceeding involving any allegation of violation of human rights pending before a court with the approval of such court; . . .

Republic of South Africa and others v. Grootboom.[95] The respondents were evicted from private property and living in temporary shelter which became unsustainable for living because of the winter rains. They prayed for the enforcement of their right to basis shelter till they obtained permanent housing. The Court held that, although there was a comprehensive housing legislation and policy in place aimed at the progressive realization of the socio-economic right to adequate housing, they failed to take into account the situation of people in desperate need. The Court applied a test of reasonableness to the housing policy and concluded that it did not meet this test, as a reasonable part of the national housing budget was not devoted to such people. While the Court found that the State had no obligation to provide housing immediately upon demand, there is a negative obligation to ensure that the right is not impaired for those in desperate need. Additionally, the Court asked the State to devise and implement an appropriate program ensuring progressive realization of the right and devote reasonable resources towards the implementation of the same.

Failure of the State in protecting victims' right to adequate housing is not peculiar to India. It has been noted in the US that the failures of Federal Emergency Management Agency (FEMA) in managing various disasters in 1980s and 1990s were repeated in the wake of Hurricane Katrina.[96] In McWaters v. FEMA,[97] the first lawsuit against FEMA related to Hurricane Katrina, it was inter alia alleged that FEMA failed to provide adequate information and temporary housing assistance to the victims as mandated by the Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1988 – the principal disaster management legislation. Pursuant to the non-liability provision in the Act,[98] the federal government is not liable for any claim based on the exercise or performance of a discretionary function or duty in carrying out the provisions of the Act. Hence, FEMA argued that the alleged acts and/or

[95]The Government of the Republic of South Africa and others v. Grootboom, (2000) ZACC 19.
[96]John K. Pierre and Gail S. Stephenson, *After Katrina: A Critical Look at FEMA's Failure to Provide Housing for the Victims of Natural Disasters*, 68 LA. L. REV. (2008).
[97]McWaters v. FEMA, (2006) 408 F. Supp. 2d 221.
[98]42 U.S.C. § 5148 (2006).

omissions were all discretionary in nature and consequently immune from judicial review. The court held that non-liability provision does not expressly shield FEMA from constitutional violations or violations of mandatory duties. It further held that the victims of natural disasters have a property interest in temporary housing assistance created by the Stafford Act and that is protectable under the Due Process Clause. Therefore, such administrative action cannot preclude judicial review under the garb of sovereign immunity.

C. Role of the NHRC

The role of the National Human Rights Commission has not been consistent in the mega disasters. After the cyclone wreaked havoc in the coastal districts of Orissa in 1999, the NHRC considered it imperative to take *suo motu* cognizance of the situation. The Special Rapporteur, Chaman Lal, visited the affected areas for damage assessment, interacted with the officials at various levels and submitted a detailed report to the NHRC. Based on this report, the NHRC made specific directions/recommendations to the State Government in respect of housing[99] including construction of cyclone shelters, an action plan for each district to undertake the rehabilitation work and establishment of appropriate machinery for monitoring long-term rehabilitation measures.

In case of Gujarat earthquake, many of the directions were similar to that of Orissa. In particular, the Commission urged the State Government to hasten the work for the rehabilitation of the affected population and to ensure that temporary shelters were provided to all quake-affected people before the onset of the monsoon. In his report, the Special Rapporteur indicated various inadequacies in the rehabilitation process.[100] E.g. A number of houses constructed by outside agencies was lying un-occupied because the beneficiaries were not willing to accept relocation. It resulted in a colossal waste of scarce funds.

[99]National Human Rights Commission, Annual Report 1999 – 2000, 6.5.
[100]National Human Rights Commission, Annual Report 2004 – 2005, 152 – 54.

The victims, who had been tenants, were facing lot of difficulties since they had lost their documents, either due to passage of time or in the quake. They had no proof to establish their tenancy rights. There were 1,000 such families who were awaiting decision of the Government for allotment of land.

Regarding updating the building bye-laws, while some progress was made, a lot remained undone. There was no qualification required to become a builder. The structural engineers hardly verify whether the structures were properly put up. They did not have the time to check the quality and adequacy of the materials used.

Although the NHRC made a commendable beginning during the Orissa Super Cyclone but the task remained undone due to lack of sustained commitment. The NHRC should have appointed a Special Rapporteur on Adequate Housing whose mandate should also include housing rights of the disaster victims. Alternatively, there could be a Special Rapporteur on Rights of the Victims of Disasters who would report periodically to the Commission about the violation of human rights including housing rights of such victims.

V. DISASTER MANAGEMENT LAW AND POLICY REGIME

A. Disaster Management Act

The Disaster Management Act, 2005, provides for setting up a chain of disaster management authorities right from the central government to the district and local levels to draw, implement and execute a disaster management action plan. Unfortunately, rights perspective does not feature in the Act except Section 12 which obligates the National Disaster Management Authority (NDMA) to recommend guidelines for the minimum standards of relief to be provided to the affected communities. Interestingly, it includes relief camps in relation to shelter. Yet it there is no mention of the permanent housing. The Review of the Act does not add anything noteworthy in this matter.

B. National Policy On Disaster Management

The National Policy on Disaster Management requires the District Disaster Management Authorities (DDMAs) to set up the temporary relief camps and ensure basic facilities therein. The intermediate shelters with suitable sanitary facilities will be undertaken to ensure a reasonable quality of life to the affected people. It emphasizes that design of such shelters need to be eco-friendly and in consonance with local culture. The onus is on the State Disaster Management Authorities (SDMAs) to plan during periods of normalcy, the layout of intermediate shelters which is cost-effective and as per local needs with multi-use potential.[101]

For reconstruction, owner driven approach should be preferred. It is desirable that permanent housing must be completed within two to three years with dedicated project teams constituted by the State Governments. The entire process must be inclusive in nature incorporating various stakeholders. During periods of normalcy, the SDMAs should prepare the layout of intermediate shelters/permanent houses which are cost-effective and as per local needs with multi-use potential.[102]

C. National Disaster Management Guidelines

The NDMA has published an array of guidelines for different types of disasters. For consideration of the component of the housing, the author has referred to the Guidelines relating to the management of floods and earthquake.

a) National Guidelines on the Management of Floods

The National Guidelines on the Management of Floods acknowledged that absence of flood shelters as a major gap in flood management of the country.[103] As a measure of flood proofing, they suggest various techniques including providing raised platforms for flood shelter for

[101] *National Policy on Disaster Management,* NDMA, GOVERNMENT OF INDIA (2009).
[102] *Id.* at 31.
[103] *National Disaster Management Guidelines: Management of Floods*, NDMA, GOVERNMENT OF INDIA (2008).

human and cattle, raising the public utility installation especially the platforms for drinking water hand pumps and bore wells above flood level, promoting construction of double-storey buildings wherein the first floor can be used for taking shelter during floods. It would be the responsibility of the state governments/SDMAs to provide adequate number of raised platforms/flood shelters at suitable locations in the flood plains with basic amenities such as drinking water, sanitation, medical treatment, cooking, tents, lantern etc. for the people to take shelter during floods.[104] As a part of preparedness, the Guidelines emphasize on the construction of suitable shelters for the flood-affected people during the relief period. Such shelters should be designed, with minimum health and hygiene standards, in accordance with the appropriate climatic conditions. The responsibility for evolving such structure rests on the Ministry of Water Resources, in consultation with various expert bodies, e.g. Central Water Commission, Brahmaputra Board, Central Building Research Institute, etc., and the state governments. Nonetheless, the State Governments/SDMAs through the district and local authorities must ensure that schools, anganwadis or other similar facilities are maintained properly so that they are available in good condition during floods as and when required.[105]

b) National Guidelines on The Management of Earthquakes

The NDMA Guidelines on the Management of Earthquakes is primarily concerned with safe buildings. They call for adoption of earthquake-resistant structure for all new buildings including residential housing. The state governments/SDMAs were urged to organise capacity building programs among professionals and masons for the aforementioned purpose. It also prescribed a deadline of completing the project within one and half year ending in December 2008. In reality, it remained an ambitious project with no practical implication whatsoever. Additionally, it recommended BIS Codes to be simplified and easily available in the interest of the public. It also suggested mandatory licensing and certification of the professionals involved in building structures – both

[104] *Id.* at 32.
[105] *Id.* at 54.

private and public. Architects and engineers licenses would only be renewed only after certification of their proficiency in seismic safety standards and codes. Artisans should also be certified by the state governments by following a five year licencing cycle.[106]

VI. CONCLUSION

Right to adequate housing is pivotal in enjoying other associated rights and bringing the affected community back to normalcy. Progress has been made in India from the Super Cyclone days, yet certain problems continue to recuperate after every disaster. Local resources, needs, perception and constraints associated with the right pose humongous governance challenge to the State. If the State is committed to the cause of ensuring the right to the victims of disaster, it is imperative to prepare a policy for the same taking the following points into consideration:

1. India has ratified ICESCR. Hence, it is important that Government of India to ensure that the concept of adequate housing advocated by the CESCR is carried out in letter and spirit.

2. The State is under an obligation to provide access to right to shelter for the people rendered homeless after disasters. The Bipin Chandra Diwan judgment requires more publicity which emphatically pronounces the duty of state in a disaster situation. Our judiciary may also take note of the McWaters case from the US in this regard.

3. Every district authority must identify places for temporary as well as permanent shelters beforehand to avoid unnecessary litigation as the Ambikapathi case. It will help in accelerating the rebuilding of the lives of the disaster victims.

4. Forced eviction must be prohibited at all cost. Apart from abiding by the UN Guiding Principles on IDPs, the judgment of the South

[106] Ambikapathi @ Vinayagam, *supra* note 92, at 17, 18.

African court in the Grootboom case may be referral point.

5. Property restitution, according to the Pinheiro Principles, should be considered for people who had been displaced arbitrarily.

6. The NDMA Guidelines serve no purpose other than academic interest. They are more peripheral in nature rather than practical guidelines as the Sphere standards. The NDMA must invest energy and resources to formulate similar guidelines which can be used in the field.

7. Every district authority must identify agencies and professionals equipped in building disaster-resilient houses, in advance.

8. Without community participation in its true sense, right to adequate housing will always remain a distant dream. We have gradually progressed and it is evident from the owner-driven housing project in Uttarakhand; nevertheless there is still scope for improvement. Additionally, experiences learnt through MEERP need replication.

9. The NHRC require mainstreaming the human rights violations faced by the disaster-victims by giving more visibility to the issue. As a first step towards that matter could be by appointing a thematic Special Rapporteur as suggested above and take appropriate actions on the periodic reports prepared by such Rapporteur.

10. Incorporation of the best practices from other countries and efforts to put them into action with local adjustments will further strengthen our housing reconstruction strategies.

These suggestions are destined to go a long way in safeguarding the right of the victims of disaster to enjoy environmentally, socially and financially sustainable housing.