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Editorial Notes

CONFLICTING OVERRIDING CLAUSES AND THE IBC

Neha Koshy*

The status of non-performing assets ('NPAs'), i.e. bad loans in the hands of banks is rather bleak in our country. As of December 2017, the estimated gross of all the NPAs held by the banks stands at Rs. 8,40,958.[1] *The availability of credit is an important ingredient of economic growth and the lack of credit could lead to economic contraction. The Insolvency and Bankruptcy Code, 2016 ('IBC') was passed to address this issue, in the hope of tackling the burgeoning NPAs at the hands of creditors and financial institutions in India.*

Since the code came into being, at least 2,434 fresh cases have been filed before the National Company Law Tribunal ('NCLT') as of November 30, 2017 and at least 2,304 cases seeking the winding-up of companies have been transferred from various High Courts.[2]

While the Code has been successful in improving the perception of India as an investment destination (as evinced in India's 30 point jump in the ease of doing business statistic),[3] *there have been instances where the operation of the Code and other recovery enactments have been delayed due to, inter alia, an overriding clause in the Code. One such instance where the conflict between overriding clauses was observed is the decision of the Supreme Court in the case of Innoventive Industries Ltd v ICICI Bank and Ors*,[4] *where the Code conflicted with the Maharashtra Relief Undertakings (Special Provisions Act), 1958.*

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1 Press Trust of India 'Banks' gross NPAs at Rs 8.41 trn in Dec 2017; SBI highest at Rs 2 trn' *The Economic Times*, (9 March 2018) <https://www.business-standard.com/article/finance/banks-gross-npas-at-rs-8-41-trn-in-dec-2017-sbi-highest-at-rs-2-trn-118030900982_1.html> accessed 6 July 2018.

2 Jayshree P Upadhyay and Alekh Archana, 'A Year Later, the Insolvency and Bankruptcy Code is still evolving' Livemint (26 January 2018) <https://www.livemint.com/Industry/X3wAbf9I3Um8xTDUdbeHaL/A-year-later-the-Insolvency-and-Bankruptcy-Code-is-still-ev.html> accessed 6 July 2018.

3 Press Trust of India (n 1).

4 (2018) 1 SCC 407.

The NCLT has over the last two years seen similar conflicts in connection with the overriding clause. This article will look into this overriding clause in the IBC, judgments of the Supreme Court and the National Company Law Tribunal involving conflicting legislations, and the impact of the overriding clause under the IBC in cases of conflict. My note will subsequently suggest how an amendment may be carried out in the IBC to avoid conflict with any legislation.

I. Introduction

The IBC was passed on May 11, 2016 to provide a route for creditors to seek relief against defaulting borrowers.[5] Section 238 of the IBC specifies that the legislation shall be in addition to, and not in derogation of the provisions of any other law for the time being in force. Due to possible conflicts of the IBC with other legislations, litigation could be anticipated for the provisions of:[6]

1. Any law dealing with matters of insolvency and bankruptcy of natural persons and legal entities;
2. Any law dealing with recovery of dues from natural persons and legal entities and disputes associated with the same;
3. Any law whose provisions can impact the procedures and the creditors waterfall as per the IBC; and
4. Any subordinate legislation, rules or regulations, in each of the above.

To understand the consequence of the overriding clause in IBC, it is imperative to understand the rationale behind the provision. The IBC was drafted as a result of the deliberations amongst the Bankruptcy Laws Reforms Committee ('Committee').[7] The Committee in its report dated November 4, 2015 ('Report'), specified the following with regard to the conflict of the IBC and other laws:[8]

> From a constitutional perspective, a parliamentary law on insolvency and bankruptcy can override other laws on this subject matter. However, there are two points of specific concern. First, certain categories of secured creditors and the tax authorities have special powers granted to them under extant laws. Second, the number of adjudicating authorities (specialised tribunals) under the various laws is large and appears to be growing. The adjudicating authority under the Code needs to have the

5 Recitals to the Insolvency and Bankruptcy Code, 2016.

6 'Lok Sabha, Report of the Joint Parliamentary Committee on the Insolvency and Bankruptcy Code, 2015, Sixteenth Lok Sabha', (*Insolvency and Bankruptcy Board of India*, April 2016) <http://ibbi.gov.in/16_Joint_Committee_on_Insolvency_and_Bankruptcy_Code_2015_1.pdf> accessed 6 July 2018 ('Report of the Joint Committee').

7 Insolvency and Bankruptcy Board of India, *The Report of the Bankruptcy Laws Reforms Committee Volume I: Rationale and Design* (IBBI, November 2015).

8 Report of the Joint Committee (n 6).

> requisite jurisdiction to deal with conflicts that may arise due to this.
>
> …In practice, however, defining all possible interfaces with an exhaustive list of relevant laws is impossible. These will be the subject matter of case law and will evolve over time.

The drafters of the IBC intended to allow the legislation to evolve over time through judicial decisions. As a result, the drafters inserted a *non obstante* clause that has an overriding effect on any legislation that conflicts with the provisions of the IBC.[9]

Consequently, the NCLT and the Supreme Court were required to decide on the standing of the IBC when it conflicted with other enactments. One instance where this conflict came to the fore was the case of *Innoventive Industries Ltd v ICICI Bank and Ors*.[10] This case questioned the validity of the overriding clause of the Insolvency and Bankruptcy Code, 2016 over the overriding clause of the Maharashtra Relief Undertakings (Special Provisions Act), 1958.

II. The Judgements

In the case of *Innoventive Industries Ltd v ICICI Bank and Ors*,[11] the question of the commencement of the insolvency resolution process against the appellant under the IBC was brought up. To this, a reply was filed by means of an interim application, under which the appellant claimed that there was no debt legally due in accordance with the Maharashtra Relief Undertakings (Special Provisions Act), 1958 ('Maharashtra Act'), and all liabilities of the appellant were temporarily suspended for a period of one year.[12]

Here, the Supreme Court held that that the later *non obstante* clause of the IBC would prevail over the limited *non obstante* clause contained in Section 4 of the Maharashtra Act and consequently, the Maharashtra Act would not stand in the way of the corporate insolvency resolution process under the IBC. Therefore, the Supreme Court did not accede to the contention that a notification under the Maharashtra Act kept the debt in temporary abeyance only, and it would become due the moment the notification ceased to have effect.

Similarly, situations of the validity of the *non obstante* clause in the event of conflict have come up in 12 other cases[13] before the National Company Law Tribunal, various High

9 Report of Joint Committee (n 6) 144.
10 (2018) 1 SCC 407.
11 ibid.
12 ibid [4].
13 *Ashok C Babu v Parekh Aluminex Ltd* 2017 SCC OnLine Bom 42; *Psl Limited v Jotun India Pvt Ltd* 2018 SCC OnLine Bom 36; *Kanak Projects Limited v Stewarts & Lloyds Of India Limited* CS 247/2010, GA 2791/2017; *Gmc Engineers & Contractor Pvt Ltd v State (Finance Dept) Ors* Civil WP 6872/2017; *Bhagwanti Bai v State Of Madhya Pradesh* WP No 6563/2016; *M/S Anandram Developers Private Limited v The National Company Law Tribunal* WP Nos 29084 and 29085 of 2017; *Sunil Gandhi & Anr v AN Buildwell Private Limited* 2017 SCC OnLine Del 7476; *Sel Manufacturing Company Ltd v Union Of India And Ors* 2018 SCC OnLine P&H

Courts across the country, and the Supreme Court. The validity of one enactment over the other has been decided in the manner specified below.

III. Conflicting Overriding Clauses

When two legislations purport to effect the same field, each containing an overriding clause stating that its provisions will have effect 'notwithstanding anything inconsistent therewith contained in any other law for the time being in force', the conflict between their respective overriding clauses is roughly addressed through three principles:

A. Time of Passing the Enactment:

This principle was mentioned by the Supreme Court in the case of *KSL and Industries Limited v Arihant Threads Limited*[14] where it was held that if a *non obstante* clause in a later enactment is subject to and supplemental to an earlier enactment, also containing a *non obstante* clause, the later enactment may be interpreted to prevail over the earlier. In this case, the Recovery of Debts Due to Banks and Financial Institutions ('RDDB') Act, 1993, which was a later Act, prevailed over the Sick Industrial Companies (Special Provisions) Act, 1985 ('SICA'). Justice Kabir, in his opinion, held that the *non obstante* clause in the RDDB Act would make it subject to SICA and was to be read to be in addition to, and not in derogation of SICA, and therefore, SICA would prevail over the RDDB Act.

If we were to apply this principle to the much reported[15] conflict between the IBC and the Real Estate (Regulation and Development) Act, 2013 ('RERA'), both of which contain overriding clauses, the IBC which was passed on May 11, 2016 would prevail over RERA, which was passed on March 10, 2016. However, courts have sought to give weight to the purpose and nature of the legislation instead of merely deciding the effect of the overriding clause on the basis of the time of passing the legislation, which is where the second and third principles come into play.

B. Purpose and Policy Underlying the Enactment:

One of the cases where purpose behind a legislation was given importance was the case of *Swaran Singh v Kasturilal*,[16] where the conflicting operations of Slum Areas

463; *Falcon Tyres Limited v Geodis Overseas Private Limited* (CS No 65 of 2011); *State Bank Of India v Commissioner Of Sales Tax MP* WP No4909/17 & WP No 6297/17; *Macquarie Bank Limited v Shilpi Cable Technologies* 2018 2 SCC 674; *Bank of India Limited v State of Maharashtra* 2016 SCC OnLine Bom 9099, 2017 Comp Cas 468.

14 (2008) 9 SCC 763 [70], [92].

15 'IBC, RERA pitted against each other; need reconciliation: ASSOCHAM' (*Assocham India*, 22 April 2018) <http://www.assocham.org/newsdetail.php?id=6803> accessed 6 July 2018; RERA as Growth Impetus – Does the promise hold out on the ground?' (March, 2018) <https://goo.gl/3sZPDE> accessed 6 July 2018; Press Trust of India 'IBC, RERA conflict seen in insolvency' *The Hindu* (23 April 2018) <https://www.thehindu.com/todays-paper/tp-business/ibc-rera-conflict-seen-in-insolvency/article23640505.ece> accessed 6 July 2018.

16 AIR 1977 SC 265.

(Improvement and Clearance) Act, 1956 and the Delhi Rent Control Act, 1958 were brought into question. Here, the Supreme Court held that the right to immediate possession conferred on the land owners by the Delhi Rent Control Act, 1958 trumped, in its purpose, the provisions of the Slum Areas Act, 1956 which was passed to give the government the right to evict settlers over land.

The application of this principle to the current assessment produces an interesting outcome. The purpose and intent of RERA is to protect the interest of consumers acquiring real estate,[17] whereas the IBC was legislated to consolidate and amend the laws relating to insolvency resolution and to promote entrepreneurship through recovery of funds for credit.[18] In such a conflicting situation, the provisions of RERA will override the provisions of IBC, since it is specific to the situation of protecting the interests of homeowners in connection with construction projects.

C. Nature of the Enactment:

If an enactment was special and is conflicting with a general enactment, the special enactment will prevail. This was held in *Jain Ink Manufacturing Company v Life Insurance Corporation.*[19] In this case, the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 ('Premises Act') was a special and later law which was held to prevail over the general Delhi Rent Control Act, 1958 even though both the enactments contained *non obstante* clauses.

Here, the rule of harmonious construction should be considered. When two conflicting legislations with *non obstante* clauses covering 'any other law for the time being in force' operate in different fields, then a harmonious construction of both legislations should be applied. In case the application of an earlier act is required, the question of it superseding the later legislation will not arise.[20]

Applying this principle, it can be argued that as RERA is a special enactment passed to protect the interests of homeowners across the country aggrieved by the constant project delays faced at the hands of developers it would prevail over the IBC, even though it is the earlier enactment. As the purpose of RERA is to protect the interests of these homeowners, who were otherwise rendered helpless as result of delays in delivery at the hands of builders, it can be argued that RERA is a special enactment which should override the IBC.

While the rules regarding the validity of an enactment do provide guidance in view of a conflict, ambiguity in the rules of statutory interpretation still exist in the face of conflict. This brings about a need to clarify the applicability of the IBC in the face of conflict which can be done by way of an amendment to the IBC.

17 Preamble to the Real Estate (Regulation and Development) Act, 2013.
18 Preamble to the Insolvency and Bankruptcy Code, 2013.
19 AIR 1981 SC 670.
20 *Jay Engineering Works Ltd. v Industry Facilitation Council* (2006) 8 SCC 677.

IV. Possible Amendment To The IBC

In the case *Brij Rai Krishna v S K Shaw and Brothers*[21] it was said that the phrase 'notwithstanding anything contained in any other law' prevents reliance on any other law to the contrary. Thus, a *non obstante* or validation clause bears a negative impact upon the adoption of a legislation, considering its feasibility along with the other relevant pieces of legislations during the implementation stage of the particular law. The case established that it becomes difficult for the judges to determine the applicability of any particular provision of the legislation having a *non obstante* clause or to give harmonious interpretations of a particular provision along with the concurrent legislations in the case of any challenge.

This view was resonated by the Supreme Court in the case *ITO v Gwalior Rayon Silk Manufacturing Co Ltd*,[22] where it was held that while interpreting a *non obstante* clause the court is required to find out the extent to which the legislature intended to give it an overriding effect. So, it is not wise to insert a *non obstante* clause in any legislation without a realisation of the suitability of such a harsh provision. It will be justifiable and beneficial for the effective enforcement of law if the legislations are made after undertaking deep and critical research, taking an integrated scheme and using proper and perceivable wordings instead of using the *non obstante* clause.

Drafting all encompassing overriding clauses throws light on the lack of care deployed in drafting legislations. To aid the already overworked and understaffed courts, it would have helped if makers of the IBC had avoided drafting blanket overriding clauses. It is, therefore, advisable to remove such a clause and to specify a broad class of rules, regulations, and legislations the IBC is likely to conflict with. In addition, the amended clause should also provide clarity on the route to be taken in the event of conflict for each broad class of rule, regulation, or legislation. Providing this categorisation will not only help reduce litigation in relation to conflict, but also provide clarity on to the application of the IBC.

Alternatively, lawmakers could consider employing a 'without prejudice' clause, instead of the *non obstante* clause, which ensures that the provision enacted would not have the effect of affecting the operation of any other legislation, with the exception of any legislation that was passed with a purpose similar to the IBC.

The Supreme Court has previously held[23] that it is important to ensure that the wide ambit of any overriding enactment be kept limited to the legislative policy and that it only be given effect to the extent Parliament intended and not beyond. Keeping in mind the aforementioned suggestions, I look forward to such an effort by the lawmakers when they review the IBC and suggest amendments.

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21 AIR 1951 SC 115.

22 AIR 1976 SC 43.

23 *ICICI Bank Limited v SIDCO* (2006) 8 SCC 726; *Ramdev Food Products Private Limited v Aravindbhai Rambhai Patel* (2006) 8 SCC 726.

Articles

INDIA'S CONTRIBUTION TO INTERNET GOVERNANCE DEBATES

Sunil Abraham*, Mukta Batra[Ψ], Geetha Hariharan[γ], Swaraj Barooah[δ] and Akriti Bopanna[μ]

India is the leader that championed 'access to knowledge' and 'access to medicine'. However, India holds seemingly conflicting views on the future of the Internet, and how it will be governed. India's stance is evolving and is distinct from that of authoritarian states who do not care for equal footing and multi-stakeholderism.

I. Introduction

Despite John Perry Barlow's defiant and idealistic Declaration of Independence of Cyberspace[1] in 1996, debates about governing the Internet have been alive since the late 1990s. The tug-of-war over its governance continues to bubble among states, businesses, techies, civil society and users. These stakeholders have wondered who should govern the Internet or parts of it: Should it be the Internet Corporation for Assigned Names and Numbers (ICANN)? The International Telecommunications Union (ITU)? The offspring of the World Summit on Information Society (WSIS) - the Internet Governance Forum (IGF) or Enhanced Cooperation (EC) under the UN? Underlying this debate has been the role and power of each stakeholder at the decision-making table.

States in both the global North and South have taken various positions on this issue.

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μ Akriti Bopanna is a Programme Officer in the Internet Governance team at the Centre for Internet and Society.

1 John Perry Barlow, 'A Declaration of the Independence of Cyberspace' (*Electric Frontier Foundation,* 8 February 1996) <https://projects.eff.org/~barlow/Declaration-Final.html> accessed 11 June 2018.

Whether all stakeholders ought to have an equal say in governing the unique structure of the Internet or do states have sovereign public policy authority?[2] India has, in the past, subscribed to the latter view. For instance, at WSIS in 2003, through Arun Shourie, then India's Minister for Information Technology, India supported the move 'requesting the Secretary General to set up a Working Group to think through issues concerning Internet Governance,' offering him 'considerable experience in this regard... [and] contribute in whatever way the Secretary General deems appropriate'.[3] The United States (US), United Kingdom (UK) and New Zealand have expressed their support for 'equal footing multi-stakeholderism' and Australia subscribes to the status quo.[4]

India's position has been much followed, discussed and criticised. In this article, we trace and summarise India's participation in the IGF, UN General Assembly ('UNGA'), ITU and the NETmundial conference (April 2014) as a representative sample of Internet governance fora. In these fora, India has been represented by one of three arms of its government: the Department of Electronics and Information Technology (DeitY), the Department of Telecommunications (DoT) and the Ministry of External Affairs (MEA). The DeitY was converted to a full-fledged ministry in 2016 known as the Ministry of Electronics and Information Technology (MeitY). DeitY and DoT were part of the Ministry of Communications and Information Technology (MCIT) until 2016 when it was bifurcated into the Ministry of Communications and MeitY.

DeitY used to be and DoT still is, within the Ministry of Communications and Information Technology (MCIT) in India. Though India has been acknowledged globally for championing 'access to knowledge' and 'access to medicine' at the World Intellectual Property Organization (WIPO) and World Trade Organization (WTO), global civil society and other stakeholders have criticised India's behaviour in Internet governance for reasons such as lack of continuity and coherence and for holding policy positions overlapping with those of authoritarian states.

We argue that even though confusion about the Indian position arises from a multiplicity of views held within the Indian government, India's position, in totality, is distinct from those of authoritarian states. Since criticism of the Indian government became more strident in 2011, after India introduced a proposal at the UNGA for a UN Committee on Internet-related Policies (CIRP) comprising states as members, we will begin to trace

2 Throughout this article, we will use the terms 'multi-stakeholder' or 'multi-stakeholderism' as umbrella terms. We would urge readers to remember the various iterations of multi-stakeholder models for Internet governance as context to this article. See Laura DeNardis and Mark Raymond, 'Thinking Clearly about Multistakeholder Internet Governance' (*SSRN*, 17 July 2016) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2354377> accessed 5 June 2018.

3 'India's Submission at 'World Summit on Information Society: From Geneva to Tunis', Geneva' (11 December 2003) <www.itu.int/wsis/geneva/coverage/statements/india/in.doc> accessed 11 June 2017.

4 Statements of representatives of these States at the Ad-hoc Working Group on Internet-related Resolutions, the ITU Plenipotentiary Conference, 2014 (Busan, South Korea).

India's positions chronologically from that point onwards.

II. The Genesis of CIRP and the 6th Internet Governance Forum (Nairobi), 2011

India proposed the constitution of the CIRP at the 68th UN General Assembly meeting (October 2011). The CIRP sought only state membership with consultative/advisory roles for the private sector and civil society. Due to its multilateral nature, CIRP was criticised and believed to be authoritarian.[5]

A. India Brazil South Africa (IBSA) Forum (Brasilia), 2006

The origins of the CIRP can be traced back to the first collaboration on Internet governance at the India Brazil South Africa (IBSA) Forum, i.e., the MoU on Information Society published in Brasilia on 13 September 2006 where India was represented by MEA. Article 2 of the MoU, 'Fields of Cooperation',[6] envisaged trilateral cooperation and capacity building in a list of project areas, which included the WSIS.[7] Although there was a lack of substantive agreement, the MoU signalled the beginning of policy cooperation among the IBSA countries on Internet governance. Interestingly, Article 4 of the IBSA MoU promoted 'multi-stakeholder partnerships… with the participation of the private sector and civil society'. When IBSA met again in 2011, it included businesses and civil society participants.

B. India Brazil South Africa (IBSA) Forum (Rio de Janeiro), 2011

Despite giving support to the two phases of WSIS, India had been increasingly frustrated with the lack of progress at IGFs. On 14 December 2010, Ambassador Manjeev Singh Puri spoke for India at the UN Secretary General's Consultation on Enhanced Cooperation on Internet Public Policy Issues pertaining to the Internet,[8] identifying enhanced cooperation as a process 'to fill the institutional vacuum in the decision-making process on international public policy issues pertaining to the Internet'.[9] In this regard, he called for an 'inter-governmental working group to be established under the UN CSTD'.[10]

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5 Milton Mueller, 'A United Nations Committee for Internet-Related Policies? A fair assessment' (*Internet Governance Project*, 2011) <http://www.internetgovernance.org/2011/10/29/a-united-nations-committee-for-internet-related-policies-a-fair-assessment/> accessed 27 August 2017.

6 Framework for Cooperation on the Information Society between the governments of the Republic of India, the Federative Republic of Brazil and the Republic of South Africa (adopted 13 September 2006), art 2 (Framework for Cooperation).

7 ibid.

8 Statement by Ambassador Manjeev Singh Puri, Deputy Permananent Representative During The UN Secretary General's Consultations on 'Enhanced Cooperations on International Public Policy Issues Pertaining to the Internet', Permanent Mission of India to the United Nations, (14 December 2010) <http://unpan1.un.org/intradoc/groups/public/documents/un-dpadm/unpan043561.pdf> accessed 13 June 2018.

9 ibid.

10 ibid.

At the IBSA Forum in Rio (2011) too, India voiced the need for a UN body for global Internet policy. Nandini K. of the MEA, then Counsellor (Economic) at the Permanent Mission to the UN in Geneva, led Indian participation at the IBSA Multi-stakeholder Meeting on Global Internet Governance in Rio de Janeiro, Brazil (September 2011). The recommendations emerging from the meeting in question said, 'an appropriate body is urgently required in the UN system to co-ordinate and evolve coherent and integrated global public policies pertaining to the Internet.'[11] The CIRP was born out of this understanding among states at the Rio Forum, and at the time, support for a UN body came from Brazil, South Africa, India, Honduras, Saudi Arabia, Venezuela, Iran and Cuba. The MEA was, thus, in favour of a UN multilateral body for Internet-related global public policy with states as the exclusive or primary members.

C. 2nd Meeting of Working Group on Improvements to the Internet Governance Forum (Geneva), 24-25 March, 2011

Meanwhile, the MEA represented India at the second meeting of the Working Group on Improvements to the Internet Governance Forum ('WG-IGF'). Some of India's proposed improvements to the IGF pertain to the Multi-stakeholder Advisory Group (MAG), which has members from governments, industries and the civil society. They were as follows:

a) The MAG should identify key policy questions;
b) MAG should establish Working Groups around the key questions;
c) The Working Groups should develop background material on the theme;
d) Feeder Workshops should be followed by 'Round Table' discussions;
e) Inter-Sessional Thematic meetings and
f) IGF Plenary.

These recommendations were aimed at making the IGF a more outcome-oriented forum. India's suggested modalities would help the IGF produce two types of outputs:[12]

a) IGF Reports on key policy questions which provide a concrete set of policy options;
b) Vast amount of information and the wide array of views that may have been generated around the yearlong process of focusing on a specific policy question can be captured in a background paper or a set of background documents.

Clearly, India was keen that the IGF do more than focus on 'learning' outputs and outcomes. India wanted the IGF to contribute more directly to the development of international law and norms, as well as the harmonisation of substantive and procedural laws pertaining to the Internet. At the WG-IGF (March 2011), the MEA proposed that IGF Reports be 'sent to the CSTD, ECOSOC, and the UN General Assembly', which

11 Framework for Cooperation (n 6).
12 Indian Proposal to IGF Outcomes, India's Permanent Mission to the United Nations <http://igfwatch.org/2011/04/02/> accessed 10 July 2018.

could forward them, 'to the concerned global/international and other institutions'.[13] In the interests of time and efficiency, India also proposed that the IGF or ECOSOC bypass the UNGA, fast forward reports directly to the concerned institutions. Towards greater accountability, it also proposed that institutions receiving the IGF Reports report back at the next IGF on the relevant Internet governance issues.[14]

India's WG-IGF proposal was discussed at the workshop 'Reflection on the Indian Proposal Towards an IGF 2.0'[15] during the 6th IGF (Nairobi, 2011) with inputs from India's DoT. In his introduction, Jeremy Malcolm, then coordinator of the Internet Governance Civil Society Caucus (IG-Caucus), characterised the proposal as incorporating many suggestions proposed by other stakeholders over the past five years.[16] It would thus seem that by seeking to make the IGF more outcome-oriented, the MEA in India was not pushing an unpopular agenda. Mr. N. Ravi Shanker confirmed that India 'would like the IGF to have an outcome orientation'.[17]

III. The 68th United Nations General Assembly (New York), 2011

At the 6th IGF in Nairobi (2011), India, Brazil, and South Africa came under serious attack by proponents of an equal-footing multi-stakeholder model for the 2011 IBSA proposal.[18] The proposal itself, however, was not discussed during the formal agenda. As the IBSA proposal was demonised as an anti-multistakeholder move, Brazil and South Africa were forced to reconsider their support for it.[19] *Ad hominem* attacks from supporters of 'equal footing' multi-stakeholder models, such as those against the MEA officers and civil society members involved in the negotiations for the IBSA proposal and forum, were abrasive and many.

So, India was without allies when the MEA introduced, through Mr. Dushyant Singh (Member of Parliament), the proposal for a UN Committee on Internet-related Policies

13 ibid.

14 ibid.

15 'TS Workshop 10: Reflection on the Indian Proposal Towards an IGF 2.0' (*The Internet Governance Forum*, 29 September 2011) <http://www.intgovforum.org/multilingual/content/ts-workshop-10-reflection-on-the-indian-proposal-towards-an-igf-20> accessed 3 May 2018.

16 ibid.

17 ibid.

18 For summaries and commentaries of the proposal see Monica Emert, 'Proposal For New Internet Governance Body Meets Resistance' (*Intellectual Property Watch*, 2011) <http://www.ip-watch.org/2011/10/03/proposal-for-new-un-internet-governance-body-meets-resistance/> accessed 5 September 2014; Milton Mueller, 'India, Brazil and South Africa call for creation of new global body to control Internet' (*Internet Governance Project*, 2011) <http://www.internetgovernance.org/2011/09/17/india-brazil-and-south-africa-call-for-creation-of-new-global-body-to-control-the-internet/> accessed 29 May 2017.

19 For an analysis see Milton Mueller, 'A UN Committee on Internet-related Policies? A Fair Assessment' (*Internet Governance Project*, 2011) <http://www.internetgovernance.org/2011/10/29/a-united-nations-committee-for-internet-related-policies-a-fair-assessment/> accessed 27 August 2017.

(CIRP)[20] on the floor of the UNGA on 26 October 2011. Calling it 'urgent and imperative that a multilateral, democratic, participative and transparent global policy making mechanism be urgently instituted', India relied on the language of 'enhanced cooperation' in the Tunis Agenda[21] (§ 69) to state the need to enable governments, on an equal footing, to carry out their roles and responsibilities in international public policy issues pertaining to the Internet. Specifically, India, at the UNGA, stated that the intent behind proposing 'a multilateral and multi-stakeholder mechanism' was not to 'control the Internet' or to permit governments to have the last word in regulating the Internet.[22] However, the CIRP's tasks were, *inter alia*, to develop and establish international public policies, coordinate and oversee the bodies responsible for technical and operational functioning, negotiation of treaties, conventions and agreements on Internet-related public policies, promotion and protection of all human rights and arbitration and dispute resolution functions.[23]

Even though the CIRP proposal is both multilateral and multi-stakeholder in letter, it is not multilateral in spirit. Membership to the CIRP is open only to member states of the UN (see Annexure to the CIRP proposal), though private sector and civil society have participative roles in policy-making. Although the CIRP does not eschew multi-stakeholder participation, the choice of the UN as a forum automatically limits other stakeholders from being freely involved. This may be considered to reflect §35 of the Tunis Agenda, which sets out delineated roles and responsibilities for governments, the private sector and civil society.

Interestingly, in the CIRP proposal, India uses the phrase 'equal footing' to mean equal roles for *governments* in Internet governance, possibly indicating a discomfort with disproportionate control exercised by some states in Internet governance. This is a far cry from the most-used meaning of 'equal footing' by which multi-stakeholderism advocates mean that governments will have no special role or responsibility in comparison with other stakeholders.[24]

IV. The 7th Internet Governance Forum (Baku), 2012

At the 7th IGF, Mr. Kapil Sibal, then Minister for Communications and Information Technology, supported multi-stakeholderism expressly. This stance was an apparent turnaround from the MEA's advocacy for CIRP at the UNGA in 2011. Mr. Sibal acknowledged that the Internet, due to its very nature, cannot co-exist with the concept of

20 'India's Statement Proposing UN Committee for Internet-Related Policy' (*The Centre for Internet Society*, 26 October 2011) <https://cis-india.org/internet-governance/blog/india-statement-un-cirp> accessed 25 March 2018 (India's Statement Proposing UN Committee).

21 World Summit on the Information Society, 'Tunis Agenda for the Information Society' (18 November 2005) WSIS-05/TUNIS/DOC/6 (Rev. 1)-E.

22 India's Statement Proposing UN Committee (n 20).

23 ibid.

24 Avri Doria, 'Use [and Abuse] of Multistakeholderism in the Internet' (PSG 2013) <https://psg.com/~avri/papers/Use%20and%20Abuse%20of%20MSism-130902.pdf> accessed 19 April 2015.

'governance', which relates to a system designed for dealing with the issues of the physical world. Rather radically, he stated that the 'term 'governance', immediately invokes concepts of those who govern and those who are governed, which have no relevance in cyberspace',[25] echoing strains of John Perry Barlow's call for the independence of cyberspace.[26] Being the Minister for both DoT and DeitY, it is unclear which department's views Mr. Sibal expressed.

It is clear, then, that the MEA and MCIT hold distinct positions on Internet governance. In 2010-2011, the MEA leaned towards multilateralism, spearheading the IBSA and CIRP proposals, expressing frustration with the outcome non-orientation of the IGF through its WG-IGF proposals. The MCIT, on the other hand, is more accepting of multi-stakeholderism, but also inconsistent. At Nairobi, the DoT supported the MEA's WG-IGF proposals, while at Baku, the Minister for CIT spoke out in favour of 'adopting a multi-stakeholder, democratic and transparent approach',[27] in the spirit of the vision outlined in the Tunis agenda.

Dr. Anja Kovacs of the Internet Democracy Project, Delhi, offers an explanation. She observes that MCIT leans in favour of multi-stakeholderism perhaps because it 'interacts with a wide group of stakeholders on a regular basis' and the MEA towards multilateralism because it is 'informed by a far more narrow range of domestic concerns, broader geopolitical interests are an important influence on the positions it takes as well'.[28]

V. World Conference on International Telecommunications (Dubai), 2012

ITU's World Conference on International Telecommunications, 2012 (WCIT) was organised to amend the outdated 1988 International Telecommunications Regulations (ITRs). Mr. R.N. Jha of the DoT led the Indian delegation for WCIT. Certain proposals for amendment such as the controversial Resolution 3 proposed by Russia, led to conclusions among multi-stakeholderism advocates that this was a UN takeover of the Internet, since theoretically, the ITU could expand its regulatory scope from telecommunications to include the Internet. But this threat was, in many eyes, a hyperbole.[29]

In continuity with Mr. Sibal's statements in Baku, the DoT's submissions to WCIT appeared to support the Tunis paradigm. In particular, the DoT recognised the 'multi-

25 Aditi Phadnis, 'The term internet governance is an oxymoron: Kapil Sibal', *Business Standard* (21 January 2013) <https://www.business-standard.com/article/opinion/the-term-internet-governance-is-an-oxymoron-kapil-sibal-112111100032_1.html> accessed 10 July 2018.

26 John Perry Barlow (n 1).

27 ibid.

28 Email interview with Anja Kovacs by authors.

29 Pranesh Prakash, 'The Worldwide Web of Concerns' (*The Centre for Internet Society*, 2012) <http://cis-india.org/internet-governance/blog/asian-age-column-december-10-2012-pranesh-prakash-the-worldwide-web-of-concerns> accessed 21 October 2017.

stakeholder nature of the Internet'[30] and made statements supporting the view that governments have no regulatory monopoly over the Internet. For instance, it did not allow national security to become an excuse to deploy an Internet kill switch, and in its proposal, specifically said that member states should 'endeavour to take the necessary measures to prevent interruptions of services'.[31]

But DoT's submission also appeared to advocate for greater regulation of telecom companies ('Operating Agencies' in ITU parlance). It advocated the inclusion of Article 5A on 'Confidence and security of telecommunications/ICTs', with the following language:

> Member-States should endeavour to oversee that Operating Agencies in their territory do not engage in activities that impinge on the security and integrity of ICT network such as denial of service attack, unsolicited electronic communication (spam), unsolicited access to network elements and devices etc., to enable effective functioning of ICTs in secure and trustworthy conditions.[32]

The DoT also called for harmonisation of substantive law to increase the likelihood that a foreign law enforcement agency would implement orders from Indian courts claiming extraterritorial jurisdiction for laws like the Information Technology Act, 2000. This follows from complaints of law enforcement agencies in India that requests under Mutual Legal Assistance Treaties often take two years to process, by which time it is far too late to deliver justice. So DoT called on member states to 'endeavour to cooperate to harmonise national laws, jurisdictions, and practices in the relevant areas.'[33] These amendments were based on the Draft of the Future ITRs[34] prepared by the ITU Working Group to prepare for the WCIT 2012.

However, in contrast to MEA's multilateral approach and despite DoT's call for greater regulation of telecom companies, India opposed the ITRs at the final voting at WCIT. While India's stated reason was that it needed time to consider implications of the amended ITRs, it must surely be seen in light of the underlying tension at WCIT. This concerned the proposal introduced by Russia and its allies, which sought to make the ITU a forum for discussions on Internet governance. Hysterically called an 'ITU takeover of the Internet',[35]

30 'India's Submission to the WCIT, Department of Telecom' (*Press Information Bureau*, 14 December 2012) <http://pib.nic.in/newsite/erelease.aspx?relid=90748> accessed 6 September 2017.

31 'Indian Government's Submission to the International Telecommunications Union', (*The Centre for Internet Society*, 2012) <http://cis-india.org/internet-governance/blog/indian-govts-submission-to-itu> accessed 21 October 2017.

32 ibid.

33 ibid.

34 World Conference on International Telecommunications (WCIT-12), Draft of the Future ITRs (*International Telecommunications Union*, December 2012) <https://www.itu.int/en/wcit-12/Documents/draft-future-itrs-public.pdf> accessed 24 May 2018.

35 Elise Ackerman, 'The UN Fought The Internet -- And The Internet Won; WCIT Summit In Dubai

this led many states to vote against the amended ITRs,[36] and has resulted in the sense that certain states may 'swing' the Internet governance debate by their unpredictable voting, India being one such 'swing state'.[37]

VI. The 8th Internet Governance Forum (Bali), 2013

Unsurprisingly, the MCIT again represented India at Bali. It is, by now, possible to discern a pattern in India's participation at Internet governance forums. The MCIT attends the IGFs and ITU forums, primarily through DeitY at the IGF, and DoT at the ITU. The MEA represents India at the UN forums, such as the UNGA and consultations on Enhanced Cooperation, as well as the IBSA forums and raises calls for a more multilateral approach to Internet governance. The MCIT is more amenable to multi-stakeholderism, though it is unclear at this point in time whether DoT or DeitY is the prime advocate.

At the 8th IGF, Mr. Rakesh M. Agarwal, then Deputy Director General of Networks and Technologies at the DoT, sought to establish India's claims to multi-stakeholderism at the Indian Ministry of Communication and Information Technology Open Forum.[38] He gave examples of domestic policy making such as the National Telecom Policy 2012, which held '12 meetings with the multi-stakeholders (sic) group' and sought queries from the public for over 6 months,[39] to show India's commitment to multi-stakeholderism at the national level. He also expressed, surprisingly openly, a desire to 'work with society, with the companies and countries who want to cooperate with India'.[40]

VII. Phase I - 2nd Meeting of Working Group on Enhanced Cooperation (Geneva), 2013

In 2012, the UNGA passed a resolution inviting the Chairman of the ECOSOC Committee on Science, Technology and Development (CSTD) to create a working group

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Ends' (*Forbes*, 14 December 2012) <https://www.forbes.com/sites/eliseackerman/2012/12/14/the-u-n-fought-the-internet-and-the-internet-won-wcit-summit-in-dubai-ends/#562a8d8237c> accessed 10 September 2017.

36 For a more balanced analysis see Milton Mueller, 'ITU Phobia: Why WCIT Was Derailed' (*Internet Governance Project*, 2012) <http://www.internetgovernance.org/2012/12/18/itu-phobia-why-wcit-was-derailed/> accessed 2 March 2018.

37 Tim Maurer and Robert Morgus 'Tipping the Scale: An Analysis of Global Swing States in the Internet Governance Debate' (*Centre for International Governance Innovation*, 5 May 2014) <https://www.cigionline.org/publications/tipping-scale-analysis-global-swing-states-internet-governance-debate> accessed 27 January 2018.

38 Indian Ministry of Communication Open Forum Connecting a Billion Online- Learning's and Opportunities for the World's Largest Democracy (*Internet Governance Forum*, 24 October 2013) <http://www.intgovforum.org/cms/2013-bali/igf-2013-transcripts/121-igf-2013/preparatory-process-42721/1485-indian-ministry-of-communication-open-forum-connecting-a-billion-online-learnings-and-opportunities-for-the-worlds-largest-democracy> accessed 13 April 2016.

39 ibid.

40 ibid.

in relation to enhanced cooperation and to examine the mandate of WSIS under the Tunis Agenda.[41] The MEA has represented India at all WGEC meetings. It may be argued that the MEA has held to its favour of multilateralism in global Internet governance.

For instance, at the 2nd WGEC meeting, Mr. B.N. Reddy, then Deputy Permanent Representative of Permanent Mission of India to Geneva, echoed the CIRP proposal stating that it was a recognition for the governments to act on an equal footing with each other. This may indicate that the MEA's primary concern for India at inter-governmental forums is the United States government's dominance in the Internet governance ecosystem.[42] But at this meeting, the MEA also supported the IGF and multi-stakeholderism as a way to enhance 'dialogue among the various stakeholders',[43] at the same time emphasising assigned relative roles for stakeholders as far as decision-making was concerned. In other words, while the MEA saw IGF as a valuable forum for discussion and dialogue, it considered global Internet public policy and decision-making to be a governmental task.

Responding to a questionnaire circulated after the 1st WGEC meeting in May 2013, the MEA had continued to define Enhanced Cooperation as a multilateral mechanism. It considered the WGEC mandate to include

> International public policy issues pertaining to the Internet, as well as the development of globally applicable principles on public policy issues pertaining to the coordination and management of critical internet resources, *but not the day-to-day technical and operational matters, that do not impact on international public policy issues*.[44] (emphasis supplied)

The MEA further elucidated its multilateral stance by delineating certain Internet-related issues and public policy areas as the 'sovereign right of States',[45] but excluding operational matters from exclusive governmental authority. In its response, the MEA also advocated the creation of a 'suitable multilateral, transparent and democratic mechanism' where, in consultation with all other stakeholders, 'governments, on an equal footing, may carry out their roles and responsibilities' in areas within their authority.[46] You may notice that this repeats the MEA's concern of disproportionate governmental control, earlier

41 UNGA Information and Communication Technologies for Development, A/RES/67/195 (2013).

42 Samir Saran, 'The ITU and Unbundling Internet Governance - The Indian Perspective' (*Council on Foreign Relations,* 2014) <http://www.cfr.org/internet-policy/itu-unbundling-internet-governance/p33656> accessed 15 February 2017.

43 'Transcript Second Meeting Working Group on Enhanced Cooperation', India's Submissions at the Working Group on Enhanced Cooperation, Geneva (*UNCTAD*, 2013), <http://unctad.org/meetings/en/SessionalDocuments/WGEC_2013-11-06_Transcript_en.pdf> accessed 3 March 2015.

44 'Government of India's response to WGEC Questionnaire', Permanent Mission of India to the United Nations Office (*UNCTAD*, 2013) <http://unctad.org/Sections/un_cstd/docs/WGEC_IndiaMission.pdf> accessed 10 November 2016.

45 ibid.

46 ibid.

expressed in the CIRP proposal.

Though India acknowledged the relevance of multi-stakeholder approaches, it insisted that Enhanced Cooperation and IGF were distinct but complementary processes. While the IGF enhanced stakeholder dialogues, Enhanced Cooperation was seen as addressing the 'need to have active role of governments, of course with the involvement through various processes of all other stakeholders'.[47] For the first time, the MEA identified nuances for primary government involvement in Internet governance, setting out, for example, issues such as cyber-security, consumer rights, child online protection as requiring international and cross-border enforcement cooperation.[48]

India's interventions at the WGEC continued to be peppered with the word 'international', indicating a preference for multilateralism over multi-stakeholderism, and this aligned them with positions of Saudi Arabia and Iran. The authoritarian nature of these regimes placed India on the blacklist of multi-stakeholderism advocates, and international civil society also continued to demonise India by tweeting pictures of Indian government representatives lunching with representatives of authoritarian states.[49]

VIII. Phase I - 3rd Meeting of Working Group on Enhanced Cooperation (Geneva), 2014

For the MEA at the WGEC, the central question was the role of governments and how EC could 'enable the governments to carry out their responsibilities on an equal footing in international public policy issues pertaining to the Internet'.[50] In its evaluation of the progress of Enhanced Cooperation through a 'series of attempts… in 2006, 2008, 2010, and 2012', the MEA considered this to be an 'unfinished task'.

The MEA attempted to clarify governmental roles in Internet-related public policy and its co-existence with multi-stakeholder models. Reflecting India's views at the 2nd WGEC meeting, Mr. B.N. Reddy argued that 'equal footing' ought to be considered at various levels of policy preparation, but finally, policy-making was the realm of governments. In India's eyes, it was important that other stakeholders be accountable. "Will all of the sectors be accountable for their decisions? I'm afraid not", said Mr. Reddy.[51]

Thus, the MEA clarified two things: *first*, that multi-stakeholder models were useful in public policy formulation but not in their implementation and enforcement, and *secondly*, that governments have sovereign public policy function over Internet-related public policy

47 ibid.
48 ibid.
49 <https://twitter.com/search?q=%40patrikhson%20%23wgec&src=typd>.
50 'Transcript Third Meeting Working Group on Enhance Cooperation', India's Submissions at the Working Group on Enhanced Cooperation, Geneva (*UNCTAD*, February 2014) <http://unctad.org/meetings/en/SessionalDocuments/cstd2014_WGECd13_en.pdf> accessed 18 October 2016.
51 ibid.

issues relating to coordination and management of critical Internet resources as well as specific issues such as cyber-security and child online protection.

IX. NETmundial (Sao Paulo), 2014

India was represented at NETmundial by the MEA, where the Indian delegation was led by Mr. Vinay Kwatra, then Joint Secretary (Americas). India's initial written contribution to NETmundial echoed Mr. Sibal's speech at Baku, calling for a 'transformational shift from the Internet of today to the 'Equinet' of tomorrow'.[52] Unfortunately, 'Equinet' has remained a vague and undefined concept from Baku to Sao Paulo and beyond. While acknowledging that governments do not have untrammelled policy monopoly, India's contribution nevertheless echoed the Tunis Agenda in that 'policy authority for Internet-related public policy issues is the sovereign right of states'.[53]

While India's contribution did not use the word 'multi-stakeholder' except while describing the IGF, it said that Internet governance should be 'multilateral, transparent, democratic, and representative, with the participation of governments, private sector, civil society, and international organizations, in their respective roles'.[54] It is interesting to note that the language is very similar to that of the CIRP proposal.

Moreover, the MEA called for internationalisation of structures that manage and regulate core Internet resources and the need for them to be made 'representative and democratic'.[55] It also clarified that existing international law and norms relevant to the use of ICTs by states is an essential measure to reduce risks to international peace, security and stability,[56] clearly calling for an extension of current international law to handle Internet-related public policy challenges. But India accepted that 'the same rights that people have offline must also be protected online, in particular the freedom of expression which is applicable regardless of frontiers and through any media of one's choice'.[57]

India's stance is thought provoking, given its insistence on multilateralism for implementation and acceptance, in principle, of human rights online. Throughout Internet governance debates, multi-stakeholder dogmatists insist that proponents of multilateralism want to dilute human rights online. But perhaps the opposite is true. For instance, NETmundial has been lauded by civil society and governments alike (especially the US, the UK and other European governments, Australia and New Zealand) as an exemplar of

52 'Government of India's initial submission to Global Multistakeholder Meeting on the Future of the Internet Governance, Sau Paulo, Brazil, April 23-24, 2014' (*NETmundial*, 24 April 2014*)* <http://content.netmundial.br/contribution/government-of-india-s-initial-submission-to-global- multistakeholder-meeting-on-the-future-of-internet-governance-sau-paulo-brazil-april-23-24-2014/138> accessed 21 October 2016.

53 ibid.

54 ibid.

55 ibid.

56 ibid.

57 ibid.

multi-stakeholderism. But leading privacy and access to knowledge activists were deeply disappointed with the NETmundial Outcome Document[58] as it was a serious dilution of the right to privacy and access to knowledge.[59]

X. Phase I- 4th Meeting of Working Group on Enhanced Cooperation (Geneva), 2014

At the 4th WGEC meeting in May 2014, Mr. B.N. Reddy of the MEA expressed India's support for Internet governance discussions at the national and the regional level.[60] However, regarding multi-stakeholderism, he repeated his earlier concern about the lack of stakeholder accountability for decisions, adding that creating or eliciting parameters 'enhances the overall global approach towards multi-stakeholderism'.[61] Importantly, he stated that India was not opposed to multi-stakeholderism, but needed greater clarity. Until, Mr. Reddy stated, 'we reach that particular level of confidence to use this particular phrase with greater appreciation and greater acceptance',[62] more work was needed. Particularly, the MEA felt that there needed to be 'critical discussion' in UN fora.[63]

Again, the MEA made clear its support for the delineation of roles and responsibilities in §35 of the Tunis Agenda. The term 'multi-stakeholder' brought with it a sense of stakeholder roles so that, 'whichever stakeholder is engaged in a certain process, certain practice, certain activity, then they have certain laws that have been at least defined in the Tunis Agenda'.[64] Most interestingly, Mr. Reddy accepted that the Tunis enumeration of roles and responsibilities was not cast in stone but could be altered by a summit akin to WSIS. While this may seem a concession, it may be remembered that a UN summit is, by definition, multilateral. So, the MEA's statement may be interpreted as accepting changes in stakeholder roles *only if and when* governments are willing to permit such change; this is in opposition to the view of multi-stakeholder advocates.

XI. 9th Internet Governance Forum (Istanbul), 2014

As before, the MCIT led India's delegation to the IGF. Mr. R.S. Sharma, Secretary of DeitY, spoke at one of the main sessions, Evolution of the Internet Governance Ecosystem

58 'NETmundial Multistakeholder Statement' (*NETmundial*, 24 April 2014) <http://netmundial.br/wp-content/uploads/2014/04/NETmundial-Multistakeholder-Document.pdf> accessed 21 June 2018.

59 Sunil Abraham, 'Net Freedom Campaign Loses its Way' (*Business Line*, 10 May 2014) <https://www.thehindubusinessline.com/todays-paper/tp-opinion/Net-freedom-campaign-loses-its-way/article20768939.ece> accessed 22 May 2018.

60 'India's Submission to the WGEC' (30 April, 2014) <http://unctad.org/meetings/en/SessionalDocuments/cstd2014_WGEC4th_Transcript_Day_1_en.pdf> accessed 5 June 2018.

61 ibid.

62 ibid.

63 ibid.

64 ibid.

and the Future of the IGF,[65] recognising the inherent policy implications of technology and the need for understanding technical issues of underlying infrastructure to frame Internet policies.[66] This may be considered an unequivocal acknowledgement of the plurality of governance regimes required for the Internet.

At the same time, Mr. Sharma referred to the MEA's WG-IGF proposal, identifying the IGF as a 'clearinghouse for public policy issues related to the Internet'.[67] While this harks back to Mr. N. Ravi Shanker's defence of the WG-IGF proposal at Nairobi, this may be seen as a shift in DeitY's stance. Previously, representatives of DeitY at Bali and Baku had openly spoken in favour of multi-stakeholderism. At Istanbul, however, DeitY's stance moves in favour of a more nuanced and narrowed support for multi-stakeholderism. For instance, on the issue of 'equal footing', Mr. Sharma identified cyber-security as an 'arena where every stakeholder will certainly need to be consulted', but ultimately, action and implementation lies with governments.[68] This is reminiscent of the MEA's enumeration of areas where governments have sovereign public policy authority at the WGEC meetings.

So is DeitY becoming more accepting of the MEA's tiered, issue-enumerated support for multi-stakeholderism? At the same time, is the MEA softening its hardline stance on multilateralism by narrowing governmental authority to enumerated public policy areas? The latter should, in our view, be a more cautious conclusion. For the MEA has consistently stated, since 2011, that in global Internet-related public policy, the implementation, enforcement and final authority in decision-making lies with governments, though other stakeholders may be consulted.

XII. The ITU Plenipotentiary Conference (Busan), 2014

At the Plenipotentiary Conference, 2014 (PP-14), India's delegation, led by Mr. Ram Narain of the DoT, tabled a new resolution titled 'ITU's Role in Realising Secure Information Society'. The resolution raised security concerns about the flow of Internet traffic and equity concerns about the allocation of names and numbers. It proposed that the ITU undertake studies, in collaboration with relevant organisations, to explore the development of a 'systematic, equitable, fair, just, democratic and transparent' naming and numbering system, which would also permit the identification and geo-location of all IP addresses at all times. DoT also openly expressed a desire to pursue studies at the ITU for localisation of Internet traffic originating and terminating within the country.

65 'Evolution of the Internet Governance Ecosystem and the Role of the IGF' (*Internet Governance Forum*, 4 September 2014) <https://www.intgovforum.org/multilingual/content/evolution-of-the-internet-governance-ecosystem-and-the-role-of-the-igf> accessed 1 April 2016.

66 'Finished – 2014 09 04 – Main Session – Evolution of the Internet Governance Ecosystem and the Future of the IGF – Main Room', India's Submission at the 9th Internet Governance Forum Istanbul (*Internet Governance Forum*, 4 September 2014) <http://www.intgovforum.org/cms/174-igf-2014/transcripts/1977-2014-09-04-ms-evolution-of-the-ig-main-room> accessed 14 May 2016.

67 ibid.

68 ibid.

In short, DoT wants the ITU to have a more active and effective role in Internet governance. What is interesting is that this is a turnaround from DoT's opposition of the ITRs at WCIT. While a conclusion on DoT's change of heart would be precipitate (for DoT's reasons for opposing the ITRs are murky), there is a definite vocalisation of its support for multilateralism. The DoT had, of course, previously defended the MEA's WG-IGF proposals at Nairobi (IGF 2011), but it also expressed support for multi-stakeholderism at Baku (IGF 2012) and Bali (IGF 2013). By opposing the ITRs at WCIT, DoT also effectively voted *against* enhancing ITU's role in Internet governance. Seen from this lens, its proposal at PP-14 (Busan 2014) indicates increasing solidarity with MEA's position.

XIII. Working Group on International Internet-Related Public Policy

Under the aegis of the ITU, a council Working Group on International Internet-Related Public Policy issues was constituted based on resolutions taken in the 2010 Plenipotentiary Conference. The mandate of the body is to 'identify study and develop matters related to international Internet-related public policy issues'.[69] The membership of the group is limited to Member States, India being one of them while an open consultation exists for all stakeholders.[70] Access to the documents detailing the workings of the group is restricted. However, we were able to find India's only two written contributions to the group.

In 2014, the Government, through the DoT, provided their inputs on Internet-related Public Policy in response to a questionnaire circulated in the group.[71] Their belief consistently expressed the idea that governments need to be at the forefront of policy making when it comes to Internet Governance. They should do so by engaging their respective stakeholders such as the technical community, academia and civil society through a consultation process while, at the global level, nations should do the same - create a policy framework through mutual negotiation and consultation. The role of governments is highlighted keeping in mind the current state of many developing and least developed countries that do not have the sophisticated institutions to lead the process. India reiterated that the management of the Internet should be 'multilateral, transparent, and democratic' with the key institutions regulating the Internet needing to be internationalised, again a reference to the US control over ICANN.

Four years later, Kishore Babu from the DoT made India's second written contribution during the 11th meeting of the group in the second last week of January 2018. They were clear in their support for the multi-stakeholder form of internet governance stating that India was in favor of governments having 'equal footing in IG with involvement of stakeholders'

69 'Council Working Group on International Internet-related Public Policy Issues' (*International Telecommunications Union*, 18 January 2-18) <https://www.itu.int/en/council/cwg-internet/Pages/default.aspx> accessed 4 February 2018.

70 ibid.

71 'Response from India ITU-SG RCLINTPOL4 Document 37' (*International Telecommunications Union*, 18 February 2014) <https://www.itu.int/md/S14-RCLINTPOL4-INF-0037/en> accessed 4 February 2018.

in their natural role as laid down in the Tunis Agenda.[72] This is in order to ensure that public interests are sufficiently represented and protected in the administration of the Internet. Further, they acknowledged the difference in opinions among member states on the same and supported the significance attached to this divergence. They called for avoidance of duplication of work on IG matters since there are different activities relating to such being conducted on various platforms. Creating a mechanism within the UN structure to assimilate all the work conducted so far would aid in the above and progress in enhanced cooperation.

They referred to the suggestions made by the Working Group on Enhanced Cooperation, some of which were underway at ITU and asked for the ITU to clarify for the Member States and public the gamut of work and activities that fall within their domain so as to clearly identify their responsibilities. This would flow from the basic legislation of the ITU and the range of activities in the WSIS outcome documents in which the ITU has a part to play.

XIV. 10TH INTERNET GOVERNANCE FORUM (JOÃO PESSOA), 2015

At the 10th IGF held at João Pessoa in Brazil, India was once again represented by the MCIT through the DeitY. Rahul Gosain, Director of E-Governance and Data, DeitY, addressed one of the main sessions, Enhancing Cybersecurity and Building Digital Trust,[73] where he re-emphasised the importance of multi-stakeholder cooperation in the area of cybersecurity.[74] However, he went on to underscore the central role of the Government in the area of cybersecurity while stating that 'governments are ultimately held responsible by the public and are indeed accountable to the public for all security related issues'. This appears to reflect the MCIT's changing approach towards tailoring nuanced areas where multi-stakeholderism can take place while ensuring that the central importance in decision-making lies with the Government. The same was also underlined in Mr. Gosain's statement when he said that '…one cannot but help underscore the central role of governments in this area (of cybersecurity). That is the constituency from which I come from, I come from the Government of India. That is why I speak from that perspective'.

This seems to carry forward the shifting stance of the MCIT towards multi-stakeholderism from the previous IGF in Istanbul. One of the reasons for its position seems to be the legal challenges to cybersecurity like territorial jurisdiction, where only the Government can exercise a claim. In the WSIS+10 Consultations at the IGF, Mr. Gosain, while citing the success of the Tunis Agenda in increasing access of the Internet to developing countries, encouraged developing countries to begin engaging in policy-development

72 'Council Working Group on International Internet-related Public Policy Issues' (n 69).

73 '2015 11 12 Enhancing Cybersecurity and Building Digital Trust Main Meeting Hall Finished' (*Internet Governance Forum*, 12 November 2015) <http://www.intgovforum.org/cms/187-igf-2015/transcripts-igf-2015/2884-2015-11-12-enhancing-cybersecurity-and-building-digital-trust-main-meeting-hall-finished> accessed 5 December 2016.

74 ibid.

processes regarding Internet Governance.[75] He argued for the substantive inclusion of developing countries in Internet Governance processes. The reference made here gives an impression that the MCIT wants to reinforce governmental participation in Internet Governance. Although this alone cannot be taken to mean that multi-stakeholderism is not encouraged, the position of the Government in the previously mentioned session regarding cyber-security seems to indicate otherwise. Seen together, this is an underpinning of the changing position of the MCIT to a point where its position has, to a significant extent, limited multi-stakeholder involvement to areas of reference and discussion.

XV. 11TH AND 12TH INTERNET GOVERNANCE FORUM (2016, 2017)

In 2016, the Department of Electronics and Information Technology was made into the Ministry of Electronics and Information Technology headed by Ravi Shankar Prasad.[76] Rahul Gosain who became a Director at the new Ministry represented India at the IGF in 2016 held in Mexico along with Aruna Sundararajan, India's Telecom Secretary. Mr. Gosain was the sole representative of the country at the 12th IGF in Geneva, 2017. In both these years, the Indian government gradually reduced the significance of their participation in the IGF with the delegates taking a passive role. They attended the event but did not make any statements. This is in contrast to their vocal contributions in the past where positions were expressly stated and advocated. In fact, the only acknowledgment of the IGF by the Government in their statements was by the Ministry of External Affairs in 2016 with regard to the United States- India partnership. In it, they committed to continue their 'dialogue and engagement' in various internet governance fora such as the IGF.[77] This should not be surprising given their continuous frustration with the perceived lack of progress at various IGFs.

XVI. 1ST MEETING OF WORKING GROUP ON ENHANCED COOPERATION 2.0, 2016

The second phase of the WGEC had a two year mandate commencing from 2016 and its first meeting took place on the 30th September of 2016. India was at the forefront of the formation of the first phase of the WGEC and consequently, in the first meeting of the second phase, they were keen on the work of the previous WGEC being the ground for further work by this working group. The group upheld the mode it used in the previous phase, the multi-stakeholder model approach with 5 representatives from each of the non-

75 'Response from India ITU-SG RCLINTPOL4 Document 37' (n 71).

76 Aman Sharma, 'DeITY becomes a new ministry, leg-up for Ravi Shankar Prasad' (The Economic Times, 2016) <https://economictimes.indiatimes.com/news/economy/policy/deity-becomes-a-new-ministry-leg-up-for-ravi-shankar-prasad/articleshow/53285683.cms> accessed 26 February 2018.

77 'India-US Joint Statement during the visit of Prime Minister to USA (The United States and India: Enduring Global Partners in the 21st Century)' (Ministry of External Affairs, 7 June 2016) <http://mea.gov.in/bilateral-documents.htm?dtl/26879/indiaus+joint+statement+during+the+visit+of+prime+minister+to+usa+the+united+states+and+india+enduring+global+partners+in+the+21st+century> accessed 17 February 2018.

governmental stakeholders; civil society, business, academia and technical community, and international organisations apart from 20 governmental representatives.[78]

The MEA stated they were open to including the new developments arising in the time between the last WGEC and the present one such as the Sustainable Developments Goals (SDGs) set by the United Nations. However it was insisted that the primary material driving the group's discussions should be those concepts already recognised in the previous phase, even if no consensus was reached on some of those. It was suggested that the recommendations could still be helpful in formulating the working methodology of the current working group. Essentially, India retained its opinion of being in favor of a multilateral approach, as the specifics of multi-stakeholderism starting with its definition have not yet been defined precisely.

Recognising that 'consensus building is a dynamic process', India was hopeful that this time the various countries will be able to come to a compromise and bridge their position gaps on the issues facing the group.[79]

XVII. 2ND MEETING OF WORKING GROUP ON ENHANCED COOPERATION 2.0

At the 2nd meeting on 26th and 27th January of 2017, India's submission endorsed the softer, nuanced multi-lateral model. It was rooted in the idea of developing a common perspective, which inculcated the 'roles of different stakeholders in various aspects of internet governance'[80] while acknowledging the supremacy of Governments in determining policies in tandem with their national laws and especially on issues of cyber security. Consequently, it was noted that stakeholders need to work with the Government on security matters. Increased cooperation between private sector and other multi-stakeholder communities was said to be essential and it was observed that the main barrier to this was the lack of an appropriate mechanism currently where stakeholders can exchange views and further homogeneity on cyber issues. In their opinion, this should be addressed by 'enhanced co-operation at a regional, national and international level.'[81] India would also like to see the process of selection of participants who represent these stakeholders to be conducted in a more transparent and inclusive manner.

The insistence for governments to have dominance in the decision making process was also repeated for 'international public policy issues particularly with regard to management of critical Internet resources.'[82] This is proposed by further empowerment of the Government Advisory Committee of ICANN and improving their accountability by having them report

78 'Unedited Transcript – First Meeting Working Group on Enhanced Cooperation 30 September 2016, 9:30, Geneva, Switzerland' <http://unctad.org meetings/en SessionalDocuments/WGEC_2016-09-30_Transcript_en.pdf> (UNCTAD, 2016) accessed 17 February 2018.

79 ibid.

80 'Unedited Transcript – First Meeting Working Group on Enhanced Cooperation 30 September 2016, 9:30, Geneva, Switzerland' (n 78).

81 ibid.

82 ibid.

to the ECOSOC through the CSTD working group annually. Stating that with regard to national security since states have a higher obligation, all policy formulations on the same should solely be within the power of Governments.[83]

It is relevant to note that India also talked of the need to support different stakeholders to have equal opportunities by emphasising that 'Cooperation is essential… so that the Internet remains open, accessible and affordable to all stakeholders who have played a role in its evolution'.[84] This once again points to potential concerns of unequal power dynamics diluting access to the internet and to human rights online, similar to the statement made at NetMundial 2014, which once again raises the issue of there not yet being a clearly recognising best practice model for ensuring access to knowledge, right to privacy, and other online human rights.[85]

XVIII. 3rd meeting of Working Group on Enhanced Cooperation 2.0

The Indian delegation at the third meeting of the WGEC from 3rd to 5th May 2017 included Mr. Pradeep Verma from MeitY. Members started their discussion on the recommendations that by and large have consensus but might need minor edits. One such recommendation by India was debated in the forum, which said, 'WGEC should encourage all stakeholders to come forward, participate, and make their voices be heard in the formulation of public policies pertaining to the Internet'.[86] This was found too general by a few states, however, received positive responses as to the spirit of the text which was agreed to be imbibed somewhere in the WGEC outcome document after modifying the language. India envisioned the WGEC as giving a signal to the world that there exists a group who 'wants all stakeholders to come forward, make their voice be heard'.[87] At the same time, calling stakeholders to make their voices be 'heard' is arguably still taking the position that governments will take the leading role with inputs from different stakeholders.

Support for the creation of a centralised body under the ambit of the UN was expressed by the delegation in order for stakeholders to exchange opinions on ICT strengthening the cause of enhanced cooperation. It was elaborated as a mechanism serving as a focal point for coordination of all the other UN organisations discussing these concepts. India is of the strong opinion that the level of coordination needed is plausible solely for a centralised body under the UN, which would again mean it would only be open to country representatives since other stakeholder groups are not represented in the UN.

The recommendation given by India on capacity building also ties into their view of

83 ibid.
84 'United Nations Commission on Science and Technology for Development – Working Group on Enhanced Cooperation' (UNCTAD) <http://unctad.org meetings/en/Contribution/WGEC2016_m2_c26_en.pdf> accessed 23 February 2018.
85 'India's submission to the WGEC' (n 60).
86 ibid.
87 ibid.

engaging all kinds of stakeholders because it was aimed at building and improving facilities such as remote participation in order for a wider pool of people to be involved in these internet policy matters. The importance of it as per them is that 'end users can ultimately participate in public policy discussion' if processes focusing on Internet Governance are implemented in educational institutions at the very beginning.[88]

XIX. 4TH MEETING OF WORKING GROUP ON ENHANCED COOPERATION 2.0, 2017

WGEC 2.0, held between the 25th and 27th September 2017 saw Ms. Bhavna Saxena who is the Director of Cyber Diplomacy attend the group on behalf of the MEA.

While debating a proposal regarding policy making at local and national levels, India made it clear that they did not support the same. They believe it is in the best interests of everyone to 'confine ourselves to the international platforms on Internet policy making'.[89] This would seem like they are reluctant to incorporate stakeholders from the grassroots levels in their policy making or would like them to have a limited role at the very least, contrary to the spirit of multi-stakeholderism.

Further, India was appreciative and showed further interest in Peru's recommendation of developing an international law of the Internet, which could potentially be the 'starting point or fundamental reference for Internet international-related policies.' Ad hoc workshops or the International Law Commission of the UN could execute these.[90]

XX. 5TH MEETING OF WORKING GROUP ON ENHANCED COOPERATION 2.0

The conclusion of the second phase of the WGEC in the meeting from 29th to 31st January resulted in inaction on new Internet policy recommendations as none could be agreed upon. Mr. Rahul Gosain from MeitY and Ms Bhavna Saxena from the MEA attended the meeting. There was no consensus on how to further enhance cooperation given the extreme contradiction in viewpoints. Commenting on the same, India called for a distilled report that laid down the options now available to the members. Reflecting on the work accomplished over the past two years, India thanked the group hoping for some guidelines or steps on how the United Nations General Assembly Members can proceed further. They were keen in putting forward that the work of the WGEC despite its eventual lack of progress should not go to waste with the deliberations fostering a discussion in some other forum such as the UNGA.[91]

88 'Third Meeting Working Group on Enhanced Cooperation' (*UNCTAD*, 2017) <http://unctad.org/meetings/en/SessionalDocuments/WGEC2016_m3_Transcript_d2_3-5May17.pdf> accessed 25 February 2018.

89 'Fourth Meeting Working Group on Enhanced Cooperation' (*UNCTAD*, 2017) <http://unctad.org/meetings/en/SessionalDocuments/WGEC2017_m4_Transcript_d3_25-27Sept17.pdf> accessed 28 February 2018.

90 ibid.

91 'Fifth Meeting Working Group on Enhanced Cooperation' (*UNCTAD*, 2017) <http://unctad.org/meetings/en/SessionalDocuments/WGEC2017_m5_Transcript_d3_29-31Jan2018.pdf>

XXI. Conclusion

India has been vocal in Internet governance debates at the international level, but its stances on multi-stakeholderism have been perplexing, to say the least. While there is a popular conception that India follows authoritarian regimes and their desire for control in supporting multilateralism, we have shown that the reality is far from simple.

At UN forums such as the General Assembly and WGEC, India has been represented by the MEA. Since 2011 and the IBSA Forums, the MEA has been a consistent advocate of multilateral modes of Internet governance. Echoing §35 of the Tunis Agenda, the MEA has considered implementation, enforcement and decision-making in global Internet-related public policy to be the 'sovereign right of states'. For them, a lack of accountability for decisions on the part of other stakeholders is a prime concern, as is a lack of definition of multi-stakeholderism, which it expressed at NETmundial. So while the MEA has supported a more outcome-oriented IGF through its WG-IGF proposals, its support for multi-stakeholderism and the IGF remains, till date, limited to the value of enhanced dialogue/discussion. A less spoken about aspect of multi-stakeholderism is the power differential existing within various stakeholders such as between large corporations and civil society. For example, even the ability to show up at the various fora is one that is often financially unviable for civil society to consistently undertake, where as it would be much easier for large corporations to continue finding a place at the table, while also gaining expertise over multiple fora events. This could potentially be a weakness in the system that more nuanced multilateralism does not suffer from. India's call for equal footing acknowledges and further, is a step towards negating the power differences that currently exist between countries.

The MCIT has represented India at the IGF and ITU, through the DeitY and DoT. The positions of these two arms of government are, in our view, more difficult to ascertain. At the IGF in Nairobi (2011), DoT expressed its support for MEA's WG-IGF proposal to make the IGF more outcome-oriented. However, at both Baku (IGF 2012) and Bali (IGF 2013), the MCIT openly expressed its support for multi-stakeholderism. The DoT's opposition of the amended ITRs may be seen, cautiously, as an extension of this.

However, in 2014, both DeitY and DoT seem to have adopted a subtler stance on multi-stakeholderism. At Istanbul (IGF 2014), DeitY recognised the importance of multi-stakeholderism, given the unique nature of the Internet, but at the same time, stated that in certain policy areas like cyber-security, the final call lay with governments. At ITU PP-14 (Busan 2014), DoT tabled a resolution that sought to increase ITU's role in Internet governance by undertaking collaborative studies and a recommendatory role in allocation of names and numbers and traffic localisation.

It would seem, then, that DeitY and DoT have shifted their open support for multi-

accessed 28 February 2018.

stakeholderism to more nuanced stances, where they enumerate certain policy areas for exclusive governmental authority, but at the same time, acknowledge the need for multi-stakeholder discussions and dialogue. Security seems to have been the underlying concern for both DoT and DeitY's public stances at IGF, Istanbul and PP-14, Busan. This trend continues in their stance at the Working Group on Enhanced Cooperation wherein they are in favor and suggest many ways to incorporate stakeholders but want cyber security and other critical policy making decisions within the power of Governments solely. Sources have claimed that India did not assume a strong role in the WGEC 2.0 proceedings because B.N. Reddy who had taken an active role in the previous phase had been transferred. More changes within the Government in terms of personnel at the MEA also contributed to a decline in continuity of the Indian vigour. Mr. Reddy who was a skilled negotiator and senior diplomat had been one to drive things and this was missing from the subsequent delegation.[92]

What we see, now, then is an approach that lies somewhere between multilateralism and multi-stakeholderism, what we term as nuanced multilateralism. India has supported this model where a multitude of stakeholders are consulted in policy formulation but not involved in its implementation and enforcement. Particular issues such as cyber-security, protection of children online and management of key Internet resources are looked after by the Governments. Thus, this hybrid form of Internet governance places a strong emphasis on involvement of stakeholders and their diversity, but retaining the core decision-making powers for the higher echelon.

92 Interview with an anonymous source.

India's Position on Multi-stakeholderism vs Multilateralism

2011

6th Internet Governance Forum (IGF), Nairobi/ UN General Assembly Meeting (UNGA), New York City

ATTENDED BY Dushyant Singh, **Ministry of External Affairs (MEA)** - proposed Committee on Internet-related Policies (CIRP)

MULTILATERAL

2012

7th IGF, Baku

ATTENDED BY Kapil Sibal, **Minister for Communications and Information Technology (MCIT)***

- Department of Telecommunications (DoT)
- Department of Electronics and Information Technology (DeitY)

MULTI-STAKEHOLDER

*As Sibal was minister for both, DoT and DeitY, it cannot be confirmed which department within the Ministry he was speaking on behalf of

UNGA resolution creates a Working Group on Enhanced Cooperation (WGEC)

World Conference on International Telecommunications, Dubai

ATTENDED BY R.N. Jha, **DoT**

MULTI-STAKEHOLDER

They did not allow national security to become an excuse to deploy an Internet kill switch.

2013

8th IGF, Bali

ATTENDED BY Rakesh M. Agarwal, **DoT**

MULTI-STAKEHOLDER

WGEC PHASE I

2nd WGEC Meeting, Geneva

ATTENDED BY B.N. Reddy, **MEA**

NUANCED MULTILATERALISM

Stated that Enhanced Cooperation is a multilateral mechanism but called for a MS approach solely to enhance dialogue and discussion with policy making upto Governments only.

2014

3rd WGEC Meeting, Geneva

ATTENDED BY B.N. Reddy, **MEA**

NUANCED MULTILATERALISM

Multi-stakeholder models were useful in public policy formulation but not in their implementation and enforcement. Governments have sovereign public policy function over Internet-related public policy issues relating to coordination and management of critical Internet resources, as well as specific issues such as cyber-security and child online protection.

NETmundial, Sao Paulo

ATTENDED BY Vinay Kwatra, **MEA**

MULTILATERAL

Internet governance should be "*multilateral ..... with the participation of governments, private sector, civil society, and international organizations, in their* ***respective roles***". Language similar to the CIRP proposal.

Called for internationalisation of structures that manage and regulate core Internet resources

India's contribution did not use the word 'multi-stakeholder' in its approach apart from describing the IGF.

4th WGEC Meeting, Geneva

ATTENDED BY B.N. Reddy, **MEA**

MULTILATERAL

"India was not opposed to multi-stakeholderism, but needed greater clarity"

MEA's statements at the meeting may be interpreted as accepting changes in stakeholder roles *only if and when* governments are willing to permit such change; this is in opposition to the view of multi-stakeholder advocates.

9th IGF, Istanbul

ATTENDED BY R.S. Sharma, **DeitY**

NUANCED MULTILATERALISM

DeitY's stance moves in favour of a more nuanced and narrowed support for multi-stakeholderism.

International Telecommunication Union (ITU) Plenipotentiary Conference, Busan

ATTENDED BY Ram Narain, **DoT**

MULTILATERAL

Working Group on International Internet-Related Public Policy, Geneva

ATTENDED BY **DoT**

MULTILATERAL

India reiterated that the management of the Internet should be "*multilateral, transparent, and democratic*" with the key institutions regulating the Internet needing to be internationalized

2015

10th IGF, João Pessoa

ATTENDED BY Rahul Gosain, **DeitY**

NUANCED MULTILATERALISM

2016

DeitY and DoT were part of the Ministry of Communications and Information Technology (MCIT). In 2016, these both were subsumed within the newly created Ministry of Communications and Ministry of Electronics and Information Technology (MeitY).

11th IGF, Mexico

ATTENDED BY Aruna Sundararajan, **DoT**
Rahul Gosain, **MeitY**

No relevant comments were given

2017

12th IGF, Geneva

ATTENDED BY Rahul Gosain, **MeitY**

No relevant comments were given

This should not be surprising given their continuous frustration with the perceived lack of progress at various IGF's.

WGEC PHASE II

2nd WGEC 2.0 Meeting, Geneva

NUANCED MULTILATERALISM

2018

Working Group on International Internet-Related Public Policy, Geneva

ATTENDED BY Kishore Babu, **DoT**

MULTI-STAKEHOLDER

Clear in their support for the multi-stakeholder form of internet governance stating that India was in favor of governments having "*equal footing in IG with involvement of stakeholders*".

3rd WGEC 2.0 Meeting, Geneva

ATTENDED BY Pradeep Verma, **MeitY**

NUANCED MULTILATERALISM

"WGEC should encourage all stakeholders to come forward, participate, and make their voices be heard in the formulation of public policies pertaining to the Internet."

4th WGEC 2.0 Meeting, Geneva

ATTENDED BY Bhavna Saxena, **MEA**

NUANCED MULTILATERALISM

While debating a proposal regarding policy making at local and national levels, India made it clear that they do not support this. They believe it is in the best interests of everyone to "*confine ourselves to the international platforms on Internet policy making*".

5th WGEC 2.0 Meeting, Geneva

ATTENDED BY Rahul Gosain, **MeitY**
Bhavna Saxena, **MEA**

No relevant comments were given

by **Saumyaa Naidu**

THE EXTRAORDINARY EXONERATION OF RAVI SHANKARAN AND RAYMOND VARLEY: A COMMENT ON INDIA – UNITED KINGDOM EXTRADITION

Dayan Krishnan and Sanjeevi Seshadri*

This article describes India's experience with extradition and particularly looks at the Indian experience of extradition from the United Kingdom. The critique involves a case study of the Indian attempts for the extradition of Raymond Varley and Ravi Shankaran from the United Kingdom. A careful scrutiny of the decisions rendered in both these cases reveals startling inconsistencies in approach and fundamental errors in analysis that leave one with the impression that the denial of extradition was pre-decided, and the legal analysis to support this was created as an afterthought. In order to overcome this roadblock, this paper argues for a diplomatic offensive to highlight the unfair treatment of Indian requests for extradition, and also highlights the importance of reducing judicial oversight by India, negotiating its way into Category 1 of the Part II nations, which would mean that it would not have to establish a prima facie case for the purposes of Part II of the UK Extradition Act, 2003. This aside, the paper argues for the creation of a specialised committee united within the CBI and NIA which would be responsible for coordinating extradition efforts.

I. Introduction

The certainty of punishment when there is a violation of rules is essential to upholding the rule of law. However, the capacity of nation states to implement and prosecute individuals for the infraction of their laws is limited by their political territory. The law of extradition fills this lacuna. As Justice Kirby observed in *Foster v Minister of Customs and Justice*, 'In a world of increased mobility, interactive technology and new forms of criminality, extradition represents an essential response to the characteristics of contemporary crime.'[1]

* Mr. Dayan Krishnan, Senior Advocate and Mr. Sanjeevi Seshadri, Advocate.

Note: One of the authors has assisted the Crown Prosecution Service before the Westminster Magistrate Court, in both the, case of Ravi Shankaran as well as Raymond Varley. Readers are welcome to construe the author as a sore loser, however he believes that the issues discussed in this article have a substantial impact on the future of extraditions between India and the United Kingdom.

The high profile extradition requests for Vijay Mallya and Lalit Modi have resulted in extradition becoming a topic of much debate in the public domain.[2] Much ink has been spilt on the status of these extraditions and the likelihood of these accused being extradited to India.[3] An analysis of these cases is beyond the purview of this paper. Rather, through the course of this paper, it is argued that despite having in place an elaborate extradition framework, India has repeatedly failed at having accused persons extradited from the United Kingdom ('**UK**'), as courts in the UK have adopted an obstructionist attitude towards Indian attempts at extradition. Despite showering various encomiums upon India, courts in the UK have nevertheless denied extradition for reasons, which with the greatest of respect, might be characterised as specious.

To substantiate this hypothesis, this paper shall analyse the decisions rendered in two separate proceedings, that of Raymond Andrew Varley (a.k.a. Martin Ashley) ('**Varley**') and Ravi Shankaran. In the case of Varley, the extradition request was rejected by the Westminster Magistrates Court ('**Westminster Court**'),[4] which decision was subsequently approved by the High Court of Justice, Queen's Bench Division, Divisional Court ('**High Court**').[5] In the case of Ravi Shankaran, the extradition request was approved by the Westminster Court,[6] which decision was subsequently overturned by the High Court,[7] and the extradition rejected.

This paper is structured in the following manner: Section II describes and analyses the present legal framework that governs extradition between India and the United Kingdom. Section III describes the factual circumstances in the case of Ravi Shankaran and the findings rendered by the Westminster Court and the High Court thereon, while Section IV analyses the decisions rendered by the Westminster Court and the High Court in the

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1 (2000) CLR 442, 474 (Kirby J).

2 Ruhi Khan, 'Final Hearing in Vijay Mallya Extradition Case Pushed to April' *The Wire* (London, 19 March 2018) <https://thewire.in/business/final-hearing-in-vijay-mallya-extradition-case-pushed-to-april> accessed 28 March 2018; PTI, 'India seeks UK Cooperation in Vijay Mallya, Lalit Modi Extradition' *Indian Express* (New Delhi, 6 November 2017) <http://indianexpress.com/article/india/india-seeks-uk-cooperation-in-vijay-mallya-lalit-modi-extradition-4925526/> accessed 28 March 2018; Indiatimes, 'India Seeks Extradition of Vijay Mallya, Lalit Modi and Twelve Other Fugitives from the UK' *Indiatimes* (7 November 2017) <https://www.indiatimes.com/news/india/india-seeks-extradition-of-vijay-mallya-lalit-modi-and-twelve-other-fugitives-from-the-uk-333158.html> accessed 28 March 2018.

3 Jayant Sriram and Devesh K Pandey, 'Lalit Modi extradition a dicey issue' *The Hindu* (New Delhi, 8 August 2015) <http://www.thehindu.com/news/national/lalit-modi-extradition-a-dicey-issue/article7513794.ece> accessed 28 March 2018; V S Mani, 'Extraditing Lalit Modi Isn't Easy and Raje's Statement Makes It Harder Still' *The Wire* (Jaipur, 29 June 2015) <https://thewire.in/external-affairs/extraditing-lalit-modi-isnt-easy-and-rajes-statement-makes-it-harder-still> accessed 28 March 2018.

4 *Republic of India v Raymond Andrew Varley* (*aka Martin Ashley*) (District Judge Purdy).

5 *The Government of India v Martin Ashley (aka Raymond Andrew Varley)* [2014] EWHC 3505 (Admin) ('Raymond Andrew Varley').

6 *The Government of India v Ravi Shankaran* (District Judge Evans).

7 *Ravi Shankaran v The Government of the State of India* [2014] EWHC 957 (Admin).

case of Varley. Section V highlights the anomalies in these two decisions as well as the contradictory nature of the judgements, in order to substantiate the hypothesis of this paper. Section VI is the concluding section, with certain observations on the way forward and suggestions on how to mend this framework.

II. UK – India Extradition Framework

The extradition of fugitives between India and the United Kingdom is governed principally by 2 instruments. The first is the *Agreement Concerning The Investigation And Prosecution Of Crime And The Tracing, Restraint And Confiscation Of The Proceeds And Instruments Of Crime (Including Currency Transfers) & Terrorist Funds Between The Government Of The United Kingdom Of Great Britain & Northern Ireland And The Government Of The Republic Of India* (**'UK — India Extradition Treaty / Treaty')**. Aside from the UK-India Extradition Treaty, extradition requests to the United Kingdom are also governed by the Extradition Act, 2003 ('**UK Extradition Act**').

Extradition in India is normally coordinated by the Ministry of External Affairs. The extradition requests are sent through the Ministry of External Affairs by the respective investigating agency. For matters relating to Interpol, the efforts are coordinated by the National Crime Bureau ('**NCB**') of the Interpol, which in India is the Interpol branch of the CBI. In the United Kingdom, the Crown Prosecution Service presents the case for extradition before the UK Courts and usually engage Queen's Counsel or barristers for the same, with the assistance of the relevant Indian agencies and special prosecutors appointed by the Government of India.[8]

Peculiarly, Mutual Legal Assistance requests under Mutual Legal Assistance Treaties ('**MLAT**'), which are generally a precursor to an extradition request, are co ordinated by the Ministry of Home Affairs, with requests also being routed through the same ministry.[9] While this paper is concerned with the bleak rate of success of India in extraditions, it is nevertheless interesting to note that as far as requests under MLATs are concerned, which generally require no court interference, India's success rate is high. Particularly, in the experience of one of the authors, the assistance that has been provided by the United States, under MLAT's has been exemplary.

A. UK – India Extradition Treaty

As per its preamble, the UK – India Extradition Treaty was entered into for the purposes of making effective the co-operation between the two countries in the suppression

8 For a description of the role of various actors involved in the extradition process in the United Kingdom: see generally, Edward Grance and Rebecca Niblock, *Extradition Law: A Practitioners Guide* (2nd edn, Legal Action Group 2015) 6.

9 Ministry of Home Affairs: IS Division – II: Legal Cell: 'Comprehensive Guidelines regarding service of summons/ notices/Judicial Process on the persons residing abroad' (11 February 2009) <https://mha.gov.in/sites/default/files/Guid_service_pro250309.pdf>.

of crime by making further provisions for the reciprocal extradition of offenders.[10] The UK – India Extradition Treaty was a watershed moment, as it was the first general extradition treaty between the United Kingdom and another Commonwealth State. Prior to the treaty, the general extradition relations, between the United Kingdom and other Commonwealth states, had been carried out in line with the '*Scheme for the Rendition of Fugitive Offenders*' by means of domestic legislation.[11]

The retrospective application of the treaty is clarified in Article 1(1), which provides that extradition would be available regardless of whether such offence was committed before or after the entry into force of the Treaty.[12] Article 2 codifies the principle of dual criminality and defines extradition offences as those offences punishable with imprisonment in excess of 1 year, as per the laws of both the Contracting States.[13] Article 6 and Article 7 clarify the nature of jurisdiction that may be exercised in cases of inchoate offences or in circumstances where extra territorial jurisdiction is sought to be exercised.[14] The rule of speciality which is a fundamental principle of extradition law, and which requires that a person once extradited cannot be tried in respect of any other offence than one for which he was extradited, is codified in Article 13 of the Treaty.[15] The principle of *ne bis idem* is codified in Article 9(3) of the UK – India Extradition Treaty. Article 9(3) provides that extradition would not be available where the requested person would be entitled to be discharged under any rule of law of the Requested State on account of a previous acquittal or conviction.[16] Article 5 and Article 9 identify the circumstances or grounds under which extradition maybe denied,[17] with Article 5 clarifying that certain types of offences which are covered by multilateral conventions cannot fall under the political offence exception.[18] The procedure for extradition to be followed is extensively set out in the Treaty, with Article 11 requiring that extradition requests containing the material particulars of the extradition offence[19] and accompanied by such evidence as would enable the Requested State to take a decision on the request[20] must be submitted through diplomatic channels. Article 16 of the Treaty provides that extradition for an offence which is punishable by the

10 Agreement Concerning The Investigation And Prosecution Of Crime And The Tracing Restraint And Confiscation Of The Proceeds And Instruments Of Crime (Including Currency Transfers) & Terrorist Funds (United Kingdom and India) (adopted 22 September 1992, entered into force on 15 November 1993), Preamble (UK – India Extradition Treaty).

11 Geoff Gilbert, 'Extradition' (1993) 42 (2) International Comparative Law Quarterly 442. (Note: The Fugitive Offenders Act, 1881 which was the basic intra – commonwealth extradition act was held to have no force in India, after coming into force of the Constitution, by the Hon'ble Supreme Court in *State of Madras v C G Menon* AIR 1954 SC 517 [11])

12 UK – India Extradition Treaty art 1. See also Gilbert (n 11) 446.

13 ibid art 2.

14 ibid arts 6 -7.

15 ibid art 13.

16 ibid art 9(3).

17 ibid art 5, art 9.

18 ibid art 5(2).

19 ibid art 11.

20 ibid art 14.

death penalty shall not take place unless an undertaking is given to the effect that the death penalty shall not be carried out if extradited.[21] Since the United Kingdom has abolished the death penalty, this is only relevant *vis a vis* Indian extraditions from the UK.

Pursuant to this treaty, India has succeeded in the extradition of only one accused i.e. Samir Vinubhai Patel, who consented to such extradition,[22] while the United Kingdom has received three accused persons from India.[23]

In addition to this, there are some multi-lateral instruments that provide for extradition between the parties to the instrument.[24] For instance, the UN Convention against Transnational Organised Crime ('**UNCTOC**'), which has been ratified by both India and the United Kingdom, provides that State parties would consider the offences covered by the UNCTOC as extraditable offences for the purposes of their respective extradition treaties.[25] Further, the UNCTOC provides that States Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.[26]

B. UK Extradition Act

Requests for extradition in the United Kingdom are governed by the UK Extradition Act, 2003, which replaced the Extradition Act, 1989. The UK Extradition Act, 2003 was introduced as it was felt that extradition in the United Kingdom was a time consuming process, often abused by high profile fugitives.[27]

The UK Extradition Act, 2003 is divided into parts, with Part I giving effect in U.K. law to the European Union Framework Decision on the European Arrest Warrant ('**the**

21 ibid art 16.

22 Prasun Sonwalkar, 'Vijay Mallya arrest: Only 1 Indian extradited from UK since treaty signed in 1992' *Hindustan Times* (London, 18 May 2017) <https://www.hindustantimes.com/world-news/only-1-indian-extradited-from-uk-since-treaty-signed-in-1992/story-gWweei20KQP3Z9Hk2gJpzK.html> accessed 28 April 2018.

23 Ministry of External Affairs, Government of India, 'List of Fugitives Extradited to Foreign Countries' (*Ministry of External Affairs*, 5 March 2018) <http://www.mea.gov.in/byindia.htm> accessed 28 April 2018.

24 UN Convention against Corruption (adopted on 31 October 2003, entered into force on 14 December 2005) 2349 UNTS 41; UN Convention against Transnational Organised Crime (adopted on 8 January 2001, entered into force on 29 September 2003) 2225 UNTS 209 ('UNTOC'); Convention for the Suppression of Unlawful Seizure of Aircraft [Hijacking Convention] (adopted on 16 December 1970, entered into force on 14 October 1971) 860 UNTS 105 (Note: Security Council Resolution 1373 called upon States to ensure that claims of political motivation are not recognised as grounds for refusing requests for the extradition of alleged terrorists [3(g)] & Security Council Resolution 1566: called upon States to deny safe haven and bring to justice, on the basis of the principle to extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts [2]).

25 UNTOC (n 24) art 16(3).

26 ibid art 16(15).

27 Raj Joshi and Brian Gibbins, 'Reform of United Kingdom Extradition Law' (2003) 51 US Attorney's Bullettin, 51.

Framework Decision').[28] The European Arrest Warrant ('**EAW**') is a standardised extradition warrant enforceable throughout the EU. In cases involving EAWs there is no need to obtain a domestic arrest warrant in the requested country.[29]

Part II of the UK Extradition Act further divides countries into two groups. Group one is a group consisting of those nations which are required to provide admissible evidence to support the extradition request and make out a case to answer, while group two consists of those countries for whom this requirement is dispensed with.[30] As on date, India falls in the former category and is required to provide admissible evidence of a *prima facie* case in support of the extradition request. As of present 33, countries have been designated by the Order in Council as not having to establish a *prima facie* case for the purposes of Part II of the Extradition Act.[31] It is interesting to note that countries such as Canada, South Africa, Israel and the United States are a part of the category of nations that are not required to provide admissible evidence of a *prima facie case.* The ostensible basis of these nations being put in this category is '*close diplomatic relations and being trusted extradition partners*'.[32] However, India has to go through the rigors of the court process and establish a *prima facie* case. Readers, by the end of this paper would realise that if the Indian Government were serious about its extradition efforts, it would lobby diplomatically to have itself included as a part of the category which dispenses with the requirement of providing a *prima facie* case.

The scheme of extradition briefly put in the context of a Part II extradition is as follows: first, a valid extradition request complete in all particulars must be received by the Secretary of State for the Home Department ('**SSHD**') in terms of Section 70(4) of the UK Extradition Act. Once the SSHD satisfies himself of the completeness of the request, he will certify the same under Section 70(1).[33] Once certified, the request is forwarded to the Magistrate's Court,[34] who then issues a warrant for arrest.[35]

After being arrested, the accused has to be produced as expeditiously as possible before the Magistrate.[36] The initial hearings post the arrest are largely procedural with the Magistrate satisfying himself that the documents and the request conform to the

28 ibid 52. Colin Warbrick, 'Recent Developments In UK Extradition Law' (2007) 56(1) International & Comparative Law Quarterly, 199, 200.
29 Council Framework Decision 2002/584 on the European Arrest Warrant and Surrender Procedures between Member States (entered into force 13 June 2002) 2002/584/JHA.
30 Warbrick (n 28).
31 Grance and Niblock (n 8).
32 ibid.
33 ibid 133.
34 Extradition Act 2003, s 70 (9).
35 ibid s 71.
36 Grance and Niblock (n 8) 134. (Note: This creates considerable practical difficulties as the Westminster Magistrate Court is the only designated court for the whole of the UK. Regardless of where the arrest is effected, the accused has to be brought before this Court only as expeditiously as possible.)

requirements of Section 78 of the Extradition Act, 2003.[37] In addition to this, during the initial stages of hearing, the Magistrate must satisfy himself that the person appearing or brought before him is the person for whom the request has been made, that the offence specified in the request is an extradition offence and that all documents have been served upon the accused.[38]

Thereafter, the Magistrate proceeds to consider the extradition request, and analyses the requests from two standpoints (a) whether a case to answer has been established for the purposes of Section 84 (where the accused has not been already convicted in the requesting state) or Section 86 (where the accused has already been convicted in the requesting state)[39] and (b) whether there exist any bars to the extradition of the accused.[40] Once the Magistrate finds that there are no bars to extradition and that a case to answer has been established, the matter is referred to the SSHD. Ordinarily, the SSHD has two months to decide the application, and can receive representations from the accused as well.[41] If the SSHD deems fit, the extradition of the accused is ordered.

Having analysed the framework, it is now relevant to see how this was applied to actual requests for extradition in the cases of Ravi Shankaran and Varley.

III. Ravi Shankaran – Who Is Vic Branson?

Ravi Shankaran was formerly a naval officer, who upon retiring from service, set up companies which were involved in defence procurements, as well as in in advising other foreign companies seeking to supply defence equipment to the Indian military establishment.[42] It was the case of the prosecution that Ravi Shankaran entered into a criminal conspiracy with other officials who were then serving in the Indian Navy, and were working at the Directorate of Naval Operations in New Delhi (i.e. Naval War Room).[43] The purpose of the conspiracy was to secure certain classified documents.[44] so as to benefit Ravi Shankaran's commercial interests.[45] The other accused naval officers namely Commander Rana, Kashyap Kumar and V.K. Jha copied these classified documents which were available at the Directorate of Naval Operations,[46] and Commander Rana shared a copy of these classified documents (8 in number), to a person using the email ID. "vicbranson@aol.com",[47] which ID, it was alleged by the prosecution, was operated by Ravi Shankaran.[48] At

37 ibid 139.
38 ibid.
39 ibid 146.
40 ibid 141.
41 ibid 147.
42 *Ravi Shankaran* (n 7) [2].
43 ibid [3].
44 ibid [3].
45 *The Government of India v Ravi Shankaran* (n 6) [21] 9.
46 *Ravi Shankaran* (n 7) [6].
47 ibid [9] – [12].
48 ibid [31] – [32].

the time that the other accused were being arrested in the matter, including a co-director of Ravi Shankaran in the companies i.e. Kulbushan Parashar,[49] Ravi Shankaran himself was abroad.[50]

The Magistrate allowed the request for extradition and divided his decision into two parts with one decision being delivered on 19 December 2011 and the second being rendered on 27 March 2013. The decision dated 19 December 2011 sought to answer principally two questions i.e. first, whether the leaking of the said documents would constitute an offence under the Official Secrets Act, 1989 of the United Kingdom in order to satisfy the test of double criminality,[51] and second and more crucially, whether basis the evidence available it could be concluded at a *prima facie* level that the email ID in question was controlled by Ravi Shankaran.[52]

Broadly put, it was held by the Magistrate that on the basis of a review of the content of the documents,[53] and keeping in mind the geopolitical scenario between India and Pakistan,[54] the documents had serious security implications and consequentially would have infringed Section 2 of the Official Secrets Act, 1989 (UK) so as to satisfy the test of dual criminality.[55] Additionally, relying largely on the statement recorded by Khushwaha, a former employee of Ravi Shankaran, the Magistrate concluded that a case to answer had been raised against Ravi Shankaran, for the purposes of Section 84 of the UK Extradition Act.[56]

This aside, the Magistrate also rejected arguments raised by Ravi Shankaran to the effect that (a) his extradition was barred, as the request amounted to an abuse of process,[57] (b) if extradited, his rights under Article 5 of the ECHR to not be unlawfully deprived of his liberty would be infringed on account of the substantial period it would take to secure bail, pending trial,[58] and (c) since the statement of Mr. Khushwaha was inadmissible in light of the decision in *Nadeem Akhtar Saifi v The Governor of Brixton Prison* there actually existed no evidence on the basis of which a case to answer was made out.[59] Thereafter, the

49 ibid [2].
50 ibid [13].
51 *The Government of India v Ravi Shankaran* (n 6) [16].
52 ibid [32].
53 ibid [14] – [15].
54 ibid [22].
55 ibid [27].
56 ibid [32] – [34]. (Note: The additional evidence tendered by the Defence was considered by the Magistrate at [37] – [44]).
57 *The Government of India v Ravi Shankaran* (n 6) [46] – [49].
58 ibid [50] – [54]. (Note: It is interesting that the applicability of this bar to extradition was rejected only on the basis of the undertaking given by the CBI, which aspect it discussed in some detail later.).
59 [2001] 1 WLR 1134; ibid [56] – [62]. (Note: In *Nadeem Akhtar Saifi v The Governor of Brixton Prison,* the Court held as inadmissible statements of witnesses as they were uncertified translated versions of statements actually recorded in Hindi. The Court held that a deposition which is recorded in a foreign language but unaccompanied by a certified translation, may not necessarily

matter was referred to the SSHD.

Naturally, Ravi Shankaran appealed the decisions of the District Judge under Section 103 of the UK Extradition Act, and the decision of the SSHD, directing that he be extradited, under Section 108 of the Act. The High Court *de novo* appreciated the evidence and contentions of the Appellant, an aspect that is discussed in greater detail in Part 5 of this Paper.[60] The High Court in the context of Section 84 framed the same questions as the District Judge.[61] While the High Court upheld the decision of the Magistrate in relation to the first question,[62] on a reappraisal of the evidence, including the evidence adduced by Ravi Shankaran in specific the expert evidence of Professor Lau and the additional affidavit produced by Khushwaha, the Court concluded that in fact there was no case to answer for the purposes of Section 84 of the Extradition Act.[63] Although the High Court denied the extradition request basis this point, the High Court nevertheless upheld the decision of the Magistrate in every other respect, denying all other arguments forwarded by the accused i.e. abuse of process,[64] the specialty argument,[65] and that extradition would violate the Article 5 (ECHR) rights of the accused.[66]

IV. Raymond Varley and The Convenient Psychologist

Varley was involved in the sexual abuse of numerous orphans in Goa, who were in the care of one Dr. Freddie Peats, during the years 1989 – 1991.[67] Dr. Freddie Peats ran an orphanage in Goa and, in addition to sexually abusing the children himself, also permitted various foreigners to sexually abuse the children who were in his care. Dr. Freddie Peats was convicted of these offences in March of 1996 and sentenced to life imprisonment, while others accused in the case were extradited from their countries of residence and were convicted in India.[68] In relation to Varley, the arrest warrant was issued by the competent Indian Court in October of 1996, at which time he was living in Thailand.[69] While no formal request was issued against Varley during his time in Thailand, he was deported from Thailand for unconnected reasons in 2012[70] and was eventually arrested in the United Kingdom, based on an extradition request made by India in 2012.[71]

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lead to the deposition being inadmissible although, generally speaking, certified translation is necessary. Generally reference may be made to paragraphs [42] – [49] of the decision.)

60 *Ravi Shankaran* (n 7) [18].
61 ibid [22].
62 ibid [28] – [30]
63 ibid [31] – [44].
64 *Ravi Shankaran* (n 7) [46] – [48].
65 ibid [49] – [52].
66 ibid [62] – [66].
67 *Martin Ashley* (n 4) 2.
68 ibid [2(i)]. (Note: Mcbride was extradited from New Zealand to India and was sentenced to 7 years while Werner Ingo was extradited from Australia and was sentenced to 10 years.).
69 *Raymond Andrew Varley* (n 5) [6].
70 ibid [6].
71 *Martin Ashley* (n 4) [1].

The Magistrates Court was presented with an overwhelming amount of evidence in the form of the statements of the victims as well as other documentary evidence which permitted it to easily return a finding that there was a case to answer for the purposes of Section 84 of the UK Extradition Act.[72] As a consequence, the Magistrate's decision was concerned mainly with the bars to extradition, as the three main arguments raised by Varley were, (a) that since there had been a substantial passage of time since the alleged offences it would be unjust or oppressive to extradite him;[73] (b) that the prison conditions were such that to extradite him to such conditions would amount to a violation of his rights under Article 3 of the ECHR;[74] and (c) that since his mental condition was such that he would be unable to participate in his trial upon extradition, it would be unjust or oppressive to extradite him.[75]

The Magistrate rejected arguments (a) and (b), on the basis that the passage of time per se did not make oppressive the extradition of the accused,[76] and that the prison conditions of India, basis the expert reports, were not such that it could be said that it would violate Article 3 of the ECHR.[77] The rejection of the argument based on prison conditions was particularly significant as this was the first instance where the Government of India had given permission for foreign experts to evaluate prison conditions. In fact, Lord Ramsbottam's report proceeded on the basis that the evaluation on prison conditions was to take place with respect to the attitude of the jail authorities vis-a-vis the inmates.[78] Despite having been commissioned by Varley, Lord Ramsbottam's report was in fact relied upon by the Indian Government.[79]

However, in relation to the argument under Section 91 of the Extradition Act, 2003, the Magistrate's Court relying on the evidence given by one Linda Atterton, a chartered psychologist, came to the conclusion that Varley was suffering from dementia which maybe Alzheimer's, and which would render it impossible for him to participate in his trial. Therefore to extradite him in such condition, the Magistrate's Court held, would be unjust and oppressive and would therefore be barred under Section 91, Extradition Act, 2003.[80]

The Government of India appealed on the limited aspect that the Magistrate's Court had erred in accepting the evidence of Linda Atterton and returning a finding that the extradition of the accused would be unjust or oppressive for the purposes of Section 91 of the Extradition Act, 2003.[81] The High Court held that since the Magistrate was in a better

72 ibid [7] – [8].
73 ibid [9] – [10].
74 ibid [11].
75 *Martin Ashley* (n 4) [12].
76 ibid [10].
77 ibid [11].
78 ibid [11].
79 ibid [11]. (Note: Even the subsequent expert commissioned by Varley i.e. Professor Rod Morgan did not support Varleys case of Article 3 violations.)
80 *Martin Ashley* (n 4) [15].
81 *Raymond Andrew Varley* (n 5) [1].

position to appraise the evidence, the scope of appeal would only be limited to a review of the decision.[82] In this backdrop, the High Court upheld the view of the Magistrate's Court that the evidence of Linda Atterton was sufficient to return a finding that the accused was in fact suffering from dementia and accordingly the extradition of the accused would be barred by Section 91 of the Extradition Act, 2003.[83] Additionally, the High Court rejected the undertaking provided by India, to the effect that, if it were to be found after extradition, that the accused was unable to stand trial as per Section 329 – 331 of the Code of Criminal Procedure, 1973 ('Cr.P.C.') within a period of 18 months, the accused would be repatriated to the United Kingdom.[84]

V. Contradictions and Inconsistencies

A review of these decisions side by side throws up many internal inconsistencies and startling errors in analysis, that leave one with the impression that the denial of extradition in the abovementioned cases lacked cogent legal reasons, with superfluous legal analysis being conducted to impart the veneer of due process.

First, the High Court in Ravi Shankaran and the High Court in Varley clearly took a diametrically opposite view on the scope of an appeal before the High Court. In the case of Ravi Shankaran, it was held that since trial had not taken place before the District Judge, the High Court was in as good a position to make an assessment of the evidence and that in considering an extradition appeal, the High Court should carry out its own assessment *de novo*.[85] In contradistinction, the High Court in the case of Varley came to the conclusion that the scope of the appeal was limited to a review of the District Judge's decision and that since it could not be said that the conclusion was perverse or manifestly against the weight of the evidence, there was no scope for interference in the Magistrate's Decision.[86] This inconsistency in opinion aside, the view taken by the High Court in Ravi Shankaran was clearly wrong in light of the decision of the High Court in *Mariusz Artur Wiejak v Olsztyn Circuit Court of Poland,*[87] wherein Lord Justice Sedley described the scope of appeal under the Extradition Act, 2003 in the following terms:

> The effect of sections 27(2) and (3) of the Extradition Act 2003 is that an appeal may be allowed only if, in this court's judgment, the District Judge ought to have decided a question before her differently. This places the original issues very nearly at large before us, but with the obvious restrictions, first, that this court must consider the District Judge's

82 ibid [33], [45].
83 *Raymond Andrew Varley* (n 5) [32] – [35].
84 ibid [42].
85 *Ravi Shankaran* (n 7) [18].
86 ibid [33], [45].
87 [2007] EWHC 2123 (Admin) (Note: In context of Part I Extradition, but Section 27 closely mirrors Section 104) (See Also: *Polish Judicial Authorities v Celinski* [2015] EWHC 1274 (Admin) [23])

> reasons with great care in order to decide whether it differs from her and, secondly, that her fact-findings, at least where she has heard evidence, should ordinarily be respected in their entirety.[88]

Second, a common theme in both judgements is the presence of so-called experts - in the case of Ravi Shankaran, Professor Lau and in the case of Varley, Ms. Linda Atterton. Professor Lau's 'expert deposition' on the value of Section 161 statements versus Section 164 statements under the Code of Criminal Procedure, 1973 ('**Cr.P.C.**') is an aspect the High Court held could not be ignored.[89] Unfortunately, this understanding is totally contrary to Indian law, as it is a settled proposition that Section 164 statements are usually recorded to bind down an untrustworthy witness to a statement which need may not be felt where the witness is considered trustworthy.[90] Such a basic mistake in the understanding of the law, clearly belies the claims to expertise. Furthermore, one would not come amiss to describe the Professor as a stock witness on South Asian law, despite which the Court has expressed no caution while considering his opinion.[91] A similar 'expert' is the basis of the decision in the case of Varley. Ms. Linda Atterton is admittedly not a doctor and is not competent to make a formal or pathological medical finding and certainly not a finding that involves the diagnosis of the medical condition in the future, an aspect that she seemingly admits in her cross examination.[92] However, despite this dubious background, her evidence was considered reliable and sufficient to be the sole basis for rejecting the extradition of an accused paedophile.[93]

This brings one to the clearly insufficient evidence relied upon by the High Court to defeat the extradition claims of India. First with respect to the evidence adduced in the case of Ravi Shankaran, it is a settled position of law that the process of authenticating witness evidence in extradition proceedings under Section 202 of the UK Extradition Act allows statements taken abroad to be submitted as evidence in place of the witness giving live evidence against the subject of the extradition request.[94] Despite the incriminatory

88 [2007] EWHC 2123 (Admin) [23].

89 *Raymond Andrew Varley* (n 5) [39], [43].

90 *Ram Charan v State of UP* AIR 1968 SC 1270 [10]; *Krishan Kumar Malik v State of Haryana*; 2011 (7) SCC 130 [39]; *R Shahji v State of Kerala* (2013) 14 SCC 266 [27] – [29].

91 Professor Martin Lau was also called as an expert in *Hanif Mohammed Umerji Patel v Government of India* [2013] EWHC 819 (Admin) [21].

92 *Raymond Andrew Varley* (n 5) [25].

93 *Kennedy v Cordia (Services) LLP (Scotland)* [2016] UKSC 6. (Note: The Supreme Court in paragraph [44], specifically held that 4 considerations govern the admissibility of skilled evidence i.e. (i) whether the proposed skilled evidence will assist the court in its task; (ii) whether the witness has the necessary knowledge and experience; (iii) whether the witness is impartial in his or her presentation and assessment of the evidence; and (iv) whether there is a reliable body of knowledge or experience to underpin the expert's evidence. It is clear that the District Judge has not considered the evidence of Linda Atterton within the context of principles (ii) (iii) and (iv).)

94 *Hanif Mohammed Umerji Patel v Government of India* [2013] EWHC 819 (Admin) [38], [31] – [46].

statement of Khushwaha having been properly received, in the eyes of the High Court, what was one of the most clinching factors was the affidavit filed before the Magistrates Court, through the Defence, by the same Khushwaha who now disowned his statement 5 years later.[95] A similar situation was faced in the case of *R v Governor of Pentonville Prisons, Ex. Parte Alves*.[96] There, the statement of a co–accused implicating the requested person was also withdrawn before the Magistrate, despite which the House of Lords noted:

> He however submitted that the magistrate was obliged to look at the whole of the evidence emanating from Price and that, since Price had retracted his Swedish evidence in so far as it implicated the applicant, that evidence must be regarded as worthless and wholly unreliable, and so incapable of forming the basis of a committal. In my opinion, that submission was too sweeping. There can, after all, be more than one possible explanation why a witness may retract evidence given by him on a previous occasion; and, as must have been contemplated in Reg. v. Donat, 82 Cr.App.R. 173, one possibility may be that it is the later retraction, rather than the earlier evidence, which is not worthy of belief. At all events in the present case the question whether, in the light of Price's subsequent retraction before the magistrate, his Swedish evidence was sufficient to justify the applicant's committal, was essentially a matter for the decision of the magistrate, who had heard Price give evidence before him. Indeed, if Mr. Newman was right, retraction in this country of evidence previously given in the requesting state would ipso facto discredit the evidence so given and so deprive the magistrate of any power to commit on that basis. I do not think that that can be right.[97]

To permit this evidence, which clearly was an afterthought on the part of Khushwaha at the instance of Ravi Shankaran, is to encourage a hit and run approach in extradition evidence, with witnesses being encouraged to sing different tunes before the authorities of the requesting state and before the courts of the requested state.[98]

Of similar effect is the quality of the evidence tendered by Linda Atterton. Despite his purportedly advanced stage of dementia, the accused had the wherewithal to self-diagnose himself, locate, contact and instruct her.[99] Despite this glaring inconsistency, she repeatedly asserted that there was no possibility of the accused having faked the conditions or his symptoms.[100]

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95 *Ravi Shankaran* (n 7) [43].
96 [1993] AC 284.
97 [1993] AC 284, 291 – 292 (emphasis added).
98 *Ravi Shankaran* (n 7) [43]. (Note: Affidavit of Jennifer Mirza, the appellant's co – director at Interspiro, should not have been given any credence in as much as it was obviously self – serving as Ms Mirza stood to gain substantially if Ravi Shankaran, the accused, were not to face trial.)
99 *Raymond Andrew Varley* (n 5) [11].
100 ibid [21].

In the case of *Gary Beck v Ministry of Defence*,[101] the Senior Courts of England and Wales held that the permission to instruct new expert should be on the terms that the report of the previous expert be disclosed, so as to prevent expert shopping.[102] In the case of Varley, he had initially been referred to one Dr. Sarah Canning, a clinical psychologist who had begun the investigation, and had recommended a head scan for the purposes of the medical investigation.[103] Presumably not liking the direction of investigation conducted by an actual medical doctor, in the words of the High Court, Varley '*took matters into his own hands*' and located Ms. Linda Atterton, on the internet.[104] Applying the principle from *Gary Beck*, the Magistrate and High Court should have at least adverted to the findings of Dr. Sarah Canning and viewed the evidence given by Ms. Atterton from the prism of expert shopping. Furthermore, given the tenuous nature of the evidence, the High Court should have at least considered the undertaking provided by the Government as a suitable via media, instead of dismissing it outright.[105]

Further, it was held by the Magistrate in the case of Varley, at the very outset, that the burden to establish by way of positive evidence that there would be substantial prejudice for the purposes of Section 91 of the Extradition Act, 2003, was on the accused.[106] However despite this finding, it is apparent that the Magistrate and High Court have proceeded on the basis that since the accused had entered evidence, despite it being admittedly flimsy, it became incumbent upon India to displace that proof by way of leading its own experts.[107] While the High Court[108] cited the case of *The Government of the Republic of South v Shrien Dewani*,[109] it did not consider the evidence of Linda Atterton against the high standard of proof available in that case i.e. two leading professors of psychology, who worked in hospitals, who came up with an agreed set of findings on the medical condition of the patient which was supplemented by the treating doctor's evidence and their own oral statements.[110]

Another troubling aspect, is the seemingly divergent approaches on the value to be given to a sovereign undertaking by India. In *Ravi Shankaran*, the High Court heaped high praise on India:

> It is true that India is not party to the ECHR or other international treaties that accord specific human rights to those within its jurisdiction. Nevertheless, it is a democracy governed by the rule of law with a

101 2005 1 WLR 2206 ('*Gary Beck*').
102 ibid [24], [27], [30], [35].
103 *Raymond Andrew Varley* (n 5) [9]. (Note: The scans were neither before the District Judge nor ever disclosed)
104 ibid [11].
105 ibid [42].
106 *Martin Ashley* (n 4) [17].
107 *Raymond Andrew Varley* (n 5) [36], [43].
108 ibid [28].
109 (2012) EWHC 842 (Admin).
110 *The Government of the Republic of South v Shrien Dewan* (2012) EWHC 842 (Admin) [40] – [41].

> developed and effective system of law. It has a constitution requiring respect for fundamental rights including the protection of life, liberty and access to a court. There have been long and extensive bi-lateral relations between the governments of the United Kingdom and India. India is a leading member of the Commonwealth and there have been friendly exchanges between the judiciary of the United Kingdom and India.[111]

In this light both the High Court[112] as well as the Magistrate[113] were pleased to accept the undertaking provided by the CBI, to the extent that it would not oppose any bail application moved by the accused, if he were to be extradited, thus allaying any apprehensions that the Article 5 ECHR rights of the accused would be violated.

However, in the case of Varley, an undertaking by the Under-Secretary of State on behalf of India, to allay the concerns under Section 91 of Extradition Act, 2003, was rejected by the High Court.[114] The undertaking was to the effect that if the accused were to be extradited, and if it were to be found that he was unfit to participate in the trial within the meaning of Section 329 to 331 Cr.P.C. within a reasonable period of about 18 months, then the accused would be repatriated to the United Kingdom.[115] The High Court on the basis that the evidence was not before the Magistrate and because of the imperative nature of Section 91, rejected this undertaking without any cogent reasoning as to why this safeguard would not be sufficient.[116] It is interesting to note that a similar undertaking was called upon by the High Court in *Government of the Republic of South v Shrien Dewani*[117] as a precondition for permitting the extradition of the accused therein, holding as follows:

> 60. The circumstances of this case are such that we consider on the findings made by the District Judge, it would be unjust and oppressive to return him without such an undertaking. It must be for the Government of the Republic of South Africa to decide whether it wishes to give such an undertaking to the following effect. In the event of the appellant being found unfit to be tried, he will be free to return to the UK, unless there is found to be a realistic prospect of his being tried within a year (or other stated reasonable period) of that finding and the trial takes place within the period. In any event the appellant must be free to return in the event a Court in South Africa, having found him unfit to be tried, embarked on the process of determining under the Criminal Procedure Act 1977 whether he did the act.

111 *Ravi Shankaran* (n 7) [66].
112 ibid [62] – [69].
113 *The Government of India v Ravi Shankaran* (n 6) [50] – [54].
114 *Raymond Andrew Varley* (n 5) [42].
115 ibid.
116 ibid.
117 [2014] EWHC 153 (Admin). (This decision is rendered 9 months prior to the decision of the High Court in Varley.).

> 61. If such an undertaking was given, then it would not be oppressive or unjust. A similar course was suggested in *Sullivan v United States* [2012] EWHC 1680 (Admin) in a case where one possible eventuality was that the requested person would be liable to an order of civil commitment in flagrant denial of his Convention rights.

While in the case of *Shrein Dewani*, the High Court was pleased to record the importance of delivering justice in the following terms:

> The death of the appellant's wife Anni occurred over three years ago. The interests of justice, including the interests of her family who like other families of murdered persons wish to see a trial take place as soon as is practicable, require expedition and that there should be no further delay, provided that proper protection is afforded to the appellant in the manner we have set out.[118]

No similar homilies were delivered for the victims of Varley, who were innocent hapless orphans, and despite the insurmountable evidence, Varley walked away scot free without ever standing trial for his crimes.

VI. Conclusion

This paper has set out a number of inconsistencies in the judgements in the cases of Ravi Shankaran and Varley, to make not only the point that the same are erroneous and require to be reconsidered, but also to make the broader point that these inconsistencies leave one with the impression that the decision to refuse was inevitable. While there is little that can be done in relation to these cases, the current lethal combination of lack of specialization, political will and diplomatic effort, continue to ensure that India's track record in extraditions remains abysmal.

On specialization, the need of the hour is to create a specialised unit within the CBI and National Investigation Agency, which would be responsible for extraditions and in assisting other investigative units from the outset where the case might involve extradition of fugitives. This would present a number of advantages and would ensure speedy follow up on the extradition process and obviate delays.

One must not lose sight of the fact that extradition is an executive process governed by legal standards and the importance of India leveraging its diplomatic relations to secure a better position cannot be underestimated. India must go on a diplomatic offensive to point out the unfair nature of rulings in extradition cases and negotiate its way into Category 1 of the Part II nations for the Extradition Act, which would mean that it would not have to establish a *prima facie* case for the purposes of Part II of the Extradition Act.

118 ibid [62].

Unless the government of the day is willing to critically reappraise this framework, future and current extradition requests of India to the United Kingdom are bound to end with the same results, regardless of the accompanying histrionics.

PATENT LAW AND COMPETITION LAW: IDENTIFYING JURISDICTIONAL METES AND BOUNDS IN THE INDIAN CONTEXT

J Sai Deepak*

The primary object of this article is to understand the relationship between patent rights and competition law from a jurisdictional perspective under the existing Indian legal framework. While the position has become relatively clear after the judgement of the Delhi High Court in Telefonaktiebolaget LM Ericsson (PUBL) v Competition Commission of India & Anr., the roles of other fora in resolving various aspects of a dispute which involves patent rights and anti-trust issues, remains without judicial guidance. Consequently, it has become imperative to examine the statutory allocation of roles to different fora. In undertaking such an examination and arriving at his conclusions, the author has independently applied established principles of statutory interpretation to the relevant provisions of the Patents Act, 1970 and the Competition Act, 2002, apart from drawing from the judgement of the Delhi High Court and Expert Committee Reports. All opinions expressed by the author are personal and purely academic, and hence liable to change.

I. INTRODUCTION

Intellectual Property Rights (IPRs) and competition law are usually perceived as sharing an uneasy relationship given their seemingly contrasting goals. However, to pit one against the other without the necessary qualifications and riders may not do justice to the nuances of their respective natures, roles, goals and their interplay.

The system of IPRs is premised on the assumption that grant of exclusive rights for a limited term pushes the envelope of innovation, contributing to enlarging the basket of choices available to consumers and thereby promoting competition. In theory, therefore, incentivising innovation through the mechanism of IPRs elevates the level of competition from static to dynamic, which is in contrast to the adversarial perception of IPRs and

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competition law.

That being said, in practice, even the most stringently regulated right is susceptible to abuse at the hands of a determined and motivated right owner to the detriment of competition, which necessitates the existence of a safety valve in the form of competition law. Simply put, the goal of competition law with respect to IPRs is to ensure that the said species of rights is exercised within the limits prescribed by law and in a manner which is beneficial to consumers and promotion of competition. Therefore, an IP owner would run into conflict with competition law if she attempted to, or actually distorted the competitive landscape through anti-competitive or abusive practices.

In this article, the validity of this general proposition will be examined and tested specifically in relation to patent rights in the Indian context. The aim of the author is to ascertain if the provisions of Competition Act, 2002 (hereinafter referred to as 'the Competition Act') can check restrictive and abusive trade practices resorted to by a patentee, and if so, to what extent. It is also the objective of the author to understand the roles played by other fora such as the civil Courts and the Controller of Patents in tackling the restrictive and abusive practices of patentees.

II. Treatment of Patent Rights By The Patents Act, 1970

The scope of a patent right is governed by Section 48 of the Patents Act, 1970 (hereinafter referred to as the 'Patents Act') the language of which makes it clear that the right so granted under the statute is not absolute.[1] The provision expressly states that the right granted by and under Section 48 is '*subject to other provisions*' of the Patents Act and the conditions specified in Section 47.[2] These 'other provisions' include exceptions and defences to infringement of patents under Sections 107 and 107A,[3] and the right of the Central Government to use and acquire patented inventions under Section 100.[4]

In addition to the said provisions, Section 140 enumerates those restrictive covenants which could render patent-related agreements unlawful. It is pertinent to note that Section 140 does not specify the authority or the forum which has the power to invalidate such restrictive covenants or agreements containing any of the proscribed restrictive covenants.[5] Importantly, it does not vest the Controller of Patents with the express power to invalidate such restrictive covenants.[6]

Of particular interest to this discussion is Chapter XVI of the Patents Act which provides for grant of Compulsory Licenses ('CLs') under various circumstances, subject to conditions spelt out therein. The general principles applicable to the working of patented

1 Patents Act 1970, s 48.
2 ibid.
3 Patents Act 1970, ss 107 and 107A.
4 Patents Act 1970, s 100.
5 Patents Act 1970, s 140.
6 ibid.

inventions, as enumerated in Section 83, serve as guiding lights in understanding the purpose behind the grant of both patents and CLs under the statute. Reproduced below is the said provision:

> 83. General principles applicable to working of patented inventions– Without prejudice to the other provisions contained in this Act, in exercising the powers conferred by this Chapter, regard shall be had to the following general considerations, namely;–
>
> that patents are granted to encourage inventions and to secure that the inventions are worked in India on a commercial scale and to the fullest extent that is reasonably practicable without undue delay;
>
> that they are not granted merely to enable patentees to enjoy a monopoly for the importation of the patented article;
>
> that the protection and enforcement of patent rights contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations;
>
> that patents granted do not impede protection of public health and nutrition and should act as instrument to promote public interest specially in sectors of vital importance for socio-economic and technological development of India;
>
> that patents granted do not in any way prohibit Central Government in taking measures to protect public health;
>
> that the patent right is not abused by the patentee or person deriving title or interest on patent from the patentee, and the patentee or a person deriving title or interest on patent from the patentee does not resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology; and that patents are granted to make the benefit of the patented invention available at reasonably affordable prices to the public.[7]

Based on a plain and literal reading of the section, it is evident that not only does it set out the obligations of a patentee, but also lists the broad considerations that go into the grant of CLs by the Controller. Pertinently, abuse of patent rights and adoption of restrictive trade practices by the patentee are to be expressly considered while granting CLs, as mentioned in sub-sections (6) and (7) of Section 84.[8] Further, Section 83 imposes

7 Patents Act 1970, s 83.
8 Patents Act 1970, s 84.

a positive obligation which requires the patentee to make the patented invention available to the public at 'reasonably affordable prices'.[9]

That being said, it is important to note that the aforementioned provisions of Chapter XVI only go so far as to state that in granting a CL, the Controller shall have regard to anti-competitive practices resorted to by the patentee and may grant a licence to remedy the same.[10] However, none of these provisions specify as to who has the power to adjudicate and conclude that a certain practice of a patentee is anti-competitive or amounts to abuse of the patentee's position of dominance. The provision that sheds a modicum of light on the jurisdictional aspect of this issue is Section 90(1)(ix) of the Patents Act which envisages the grant of a CL 'to remedy a practice determined after judicial or administrative process to be anti-competitive'.[11]

It is worth noting that this provision does not expressly speak of the Controller as having the power to adjudicate on the competitive or anti-competitive nature of the patentee's conduct, as the case may be. In fact, it appears to refer to a forum or body other than the Controller of Patents.

In other words, it could be argued that the reference to a 'judicial or administrative process' in the provision is a reference to adjudication by the Competition Commission either under Section 3 or Section 4 of the Competition Act which deal with anti-competitive agreements and abuse of dominance respectively.[12] Such an interpretation would also be consistent with the recommendations of Justice N. Rajagopala Ayyangar in the Report on the Revision of the Patents Law submitted in 1959 (popularly known as the 'Ayyangar Committee Report'), which forms the basis of the Patents Act, 1970, as we will see henceforth.

In Paragraphs 175-203 of the Report, Justice Ayyangar has identified three types of abuses, namely (a) abuse of patent rights through non-working and importation; (b) abuse of patent rights to extend monopoly through insertion of conditions for sale, lease or license of the patented processes/products; and (c) use of patents or a group of patents to form monopolistic cartels and combinations to control production and distribution.[13]

The grant of Compulsory Licenses has been identified as the measure to counter the first type of abuse.[14] To deal with the second type of abuse, a provision on the lines of the current Section 140 was recommended.[15] However, for the third type of abuse, which he rightly recognised as resulting from excessive concentration of economic power, Justice

9 Patents Act 1970, s 83.
10 Patents Act 1970, s 90(1)(ix).
11 Patents Act 1970, s 90.
12 Competition Act 2002, ss 3 and 4.
13 Justice N Rajagopala Ayyangar, 'Report on the Revision of the Patents Law' (1959) para 190-203.
14 ibid para 175-189.
15 ibid para 192-195.

Ayyangar recommended the creation of a separate legislation and constitution of a separate commission. Extracted below are the relevant portions of the Report:

> 200. I have set out these facts to emphasise that monopolistic combinations and restrictive trade practices are a universal feature of capitalistic economy and that special legislation is needed to protect the public from these practices. The rule enacted in Section 27 of the Indian Contract Act regarding contracts in restraint of trade is much too weak to touch even the fringe of the problem.
>
> 201. I am however, not dealing with this matter in any detail for two reasons; first, though patents might sometimes form a convenient nuclei on which monopolistic combinations (and restrictive practices which are the concomitant of combinations and to effectuate which the combination might come into existence) are based, the problem cannot be solved by any amendment of the Patents law but only by dealing with it comprehensively so as to touch the manifold forms which these combinations might assume and in which they could operate. This has been the manner in which legislation in other countries has tackled the problem and with reason. There are no materials available on the basis of which this information could be gathered. It does not need any argument to establish, that without an evaluation of the evil, its nature and extent, the remedy to counter it cannot be devised.
>
> ….203. I would therefore recommend the appointment of a commission to enquire into its existence of monopolies in the country in the sense in which the term is understood in this field of the law and the prevalence of restrictive trade practices which are detrimental to the interests of the public generally and to suggest measures to remedy the evil if found to exist. In the context of large scale industrialisation of the country that is proceeding apace, I consider that such an enquiry would be found to yield fruitful results and constitute an assurance to the general public that the economic advantages resulting from the country's advance are being diverted to individual aggrandisement.[16]

These observations and recommendations of Justice Ayyangar reveal that the Patents Act was never meant to deal with market distortion since the nature of the enquiry is beyond the pale of the Act.

Importantly, Justice Ayyangar struck a distinction between abuse of patent rights by non-working and abuse of economic power accrued by virtue of holding of a patent or group

16 ibid para 200-203.

of patents.[17] While the former is dealt with by the CL mechanism, the latter was meant to be looked into by a separate commission having the necessary mandate and wherewithal to deal with anticompetitive behaviour, which clearly points to the Competition Commission. In light of this distinction, it becomes imperative to examine the treatment of patent rights and patent-related abuse under the Competition Act.

III. Treatment of Patent Rights Under The Competition Act, 2002

Section 3 of the Competition Act expressly forbids anti-competitive agreements.[18] The two exceptions to this statutory injunction that have been carved out in the provision are:

a) the Proviso to Section 3(3), which permits agreements entered into by way of joint ventures if they result in increasing efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services; and[19]

b) Section 3(5), which permits action taken by an IP owner to restrain infringement of her/his right, or 'reasonable conditions' imposed by the IP owner which are necessary for protection of any of her/his bundle of rights which comprise the IP right.[20]

It is this exception which is of relevance to the instant discussion.

One school of thought believes that the exception carved out with respect to IP rights in Section 3(5) is absolute, and results in the complete ouster of the application of the Competition Act to the conduct of IP owners, including patentees.[21] However, this position may not be correct since the limited window provided for by the provision is with respect to action taken or 'reasonable conditions' imposed in connection with protection of IP rights. In other words, there must be a real and reasonable nexus between the condition imposed on a third party by an IP owner such as a patentee and the object of preventing infringement of the IP right.

Therefore, should the condition fail to pass muster on the anvil of reasonableness with respect to the object of preventing infringement, it would run afoul of the proscription under Section 3, and would therefore fall under the jurisdiction of the Competition Commission. Support for this position may be drawn from the recommendations of the High Level Committee on Competition Policy and Law (also known as 'the S.V.S. Raghavan Committee Report') published in the year 2000. Extracted below is the relevant

17 ibid para [190-191].

18 Competition Act 2002, s 3. (Anti-Competitive agreements refer to agreements entered into by any enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.)

19 Patents Act 1970, s 3(3).

20 Patents Act 1970, s 3(5).

21 Patents Act 1970, s 3(5).

recommendation of the said Committee with respect to application of the Competition law to the conduct of IP owners:

> 5.1.8 There is, in some cases, a dichotomy between Intellectual Property Rights and Competition Policy/Law. The former endangers competition while the latter engenders competition. There is a need to appreciate the distinction between the existence of a right and its exercise. During the exercise of a right, if any anti-competitive trade practice or conduct is visible to the detriment of consumer interest or public interest, it ought to be assailed under the Competition Policy/Law.[22]

Evidently, Section 3(5) embodies this recommendation since it strikes a balance between protection of IP and prevention of anti-competitive practices employed under the garb of IP protection. This position was reiterated in the erstwhile Planning Commission's Report of the Working Group on Competition Policy published in the year 2007. Extracted below is the relevant observation of the Working Group on IP Policy:

> 4.1.13 IPR laws in India have provisions to take care of these potential IPR related competition abuses, including the provision for compulsory licensing. The Competition Act, 2002 does have a specific provision to deal with anticompetitive behaviour arising out of unreasonable restraint imposed by a holder of intellectual property beside being a factor to be considered while determining 'dominance of an enterprise' attained under a statute in the relevant market.[23]

The above extracted observation of the Working Group is consistent with the recommendations of the Expert Committee, the language of Section 3(5) and the author's interpretation of the provision. Although CLs under the Patents Act may be granted to remedy an anti-competitive practice of a patentee, the Competition Act retains the power to adjudicate on the legality of the patentee's conduct.

Pertinently, the observation of the Working Group also alludes to the application of the Competition Act to the conduct of an IP owner who enjoys a position of dominance in the relevant market, which is a clear reference to abuse of dominance by an IP owner within the meaning of Section 4 of the Competition Act as is supported by the phraseology of the section and the framework of the Act.[24]

That being said, what is pertinent to the instant discussion is Section 19(4), which lists the factors the Competition Commission shall have regard for in inquiring whether an enterprise enjoys a position of dominance for the purposes of Section 4.[25] Clause (g)

22 High Level Committee, *Report of the High Level Committee on Competition Law and Policy in India* (Chaired by SVS Raghavan, known as the Raghavan Committee Report, 1999).
23 Planning Commission, *Report of the Working Group on Competition Policy* (2007).
24 Competition Act 2002, s 4.
25 Competition Act 2002, s 19(4).

of Section 19(4) expressly speaks of monopoly or dominant position 'whether acquired as a result of any statute' or by virtue of being a Government company or a public sector undertaking or 'otherwise'.[26] Further, Clause (m) is an omnibus clause which speaks of 'any other factor which the Commission may consider relevant for the inquiry'.[27]

Based on the two aforementioned clauses, it would be fair to argue that the phrase monopolies 'acquired as a result of any statute' encompasses within its broad ambit exclusive and exclusionary rights such as IPRs. Put simply, the conduct of a patentee who enjoys a dominant position by virtue of her/his ownership of a patent or a portfolio of patents falls squarely within the realm of inquiry by the Competition Commission.

This is an unequivocal recognition of the potential for distortion of the market's competitive landscape by an abusive dominant patentee. This is buttressed by section 4(2)(b) which deals with restriction of technical/scientific development by a dominant enterprise.[28] It is clear from the above discussion that the Competition Act expressly deals with anti-competitive practices and abuse of dominance by a patentee. The issue that needs to be addressed next is the practical distribution of adjudication between the Competition Act and the Patents Act.

IV. Allocation of Roles Between The Competition Commission and The Controller of Patents

It must be noted that in granting a CL under Section 84 of the Patents Act, the Controller of Patents regulates and tempers the exercise of patent rights.[29] However, this enquiry does not take into account the distortion of competition in the market. That question is the exclusive preserve of the Competition Commission, as is evident from Section 18 of the Competition Act.[30] In other words, the nature of inquiries in the two fora is fundamentally different.

While the Controller of Patents is seized of an *inter partes* or *in personam* proceeding under Section 84 of the Patents Act which results in the grant of a license,[31] the Competition Commission under Sections 3 and 4 of the Competition Act has a broader purview which addresses a patentee's market practices and the conduct of a dominant patentee with a view to preserve the market's competitive landscape.[32] Clearly, the latter proceeding is not and cannot be treated as adversarial in the conventional sense since it is an *in rem* inquiry. The *in personam* nature of a CL proceeding is further demonstrated by the fact that only a 'person interested' may apply for a CL under the Patents Act and under Section 93 of the

26 Competition Act 2002, s 19.
27 ibid.
28 Competition Act 2002, s 4.
29 Patents Act 1970, s 84.
30 Competition Act 2002, s 18.
31 Patents Act 1970, s 84.
32 Competition Act 2002, ss 3 and 4.

Act a CL is deemed to be a licence deed executed by the parties.[33] This is in stark contrast to the proceeding under the Competition Act which may be initiated by any person or even by the Commission *suo motu*.[34]

In addition to the distinction in the nature of inquiry under the two legislations, the Competition Act contains express provisions which clarify its position in relation to other legislations. In two specific provisions, the Competition Act sets out its position with respect to (a) legislations which are not in conflict with it and (b) those which are at loggerheads with it. The first provision is Section 62, which expressly states that the provisions of the Competition Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.[35]

Therefore, assuming that there is indeed an overlap between Sections 3 and 4 of the Competition Act on the one hand, and Section 84 of the Patents Act on the other, the former shall be available to an aggrieved party in addition to the remedies available under the latter. Simply stated, Section 62 is a departure from the conventional principle of the specific legislation prevailing over the general since it posits the Competition Act as an additional remedy available to an affected party without diluting the remedies the party may be entitled to invoke under the Patents Act.

The second provision is Section 60 of the Competition Act which states in no uncertain terms that the Act shall have an overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.[36] Thus, if Section 84 of the Patents Act is interpreted as being in conflict with or inconsistent to the Competition Act, it is the latter that shall prevail by virtue of Section 60. Since there are no comparable provisions in the Patents Act, the Competition Act is the more specific and therefore the appropriate legislation in so far as a market-related inquiry into the conduct of a patentee is concerned.

It follows that an inquiry into an anti-competitive practice of a patentee or abuse of dominance by the patentee is the sole preserve of the Competition Commission. If the Commission were to arrive at an adverse finding with respect to the patentee, such finding may be relied upon by an aggrieved party to either seek consequential reliefs under Sections 27 and 28 of the Competition Act, or to apply for a CL under Section 84 of the Patents Act based on the findings of the Commission.

Should the aggrieved party opt for the latter, under Section 90(1)(ix) of the Patents Act, the Controller of Patents is required to have due regard to the findings of the Commission in prescribing the terms and conditions of the CL. In the alternative, subsequent to the Commission's finding of contravention of Sections 3 or 4 by the patentee, the aggrieved

33 Patents Act 1970, s 93.
34 Competition Act 2002, ss 19 and 20.
35 Competition Act 2002, s 62.
36 Competition Act 2002, s 60.

party or the Commission may invoke Section 21A of the Competition Act and refer the matter to the Controller of Patents for grant of a CL.[37] Subsequent to the grant of the CL by the Controller, the Commission may pronounce a final decision based on the Controller's decision in the CL application.

Similarly, if an aggrieved party were to approach the Controller of Patents for a CL under Section 84 of the Patents Act, as opposed to informing the Commission of the alleged violation of Sections 3 or 4 of the Competition Act by the patentee, it is possible for the aggrieved party to seek a reference under Section 21 of the Competition Act or for the Controller of Patents to refer the matter to the Commission for a finding with respect to the patentee's conduct under Sections 3 or 4 of the Competition Act. Post the receipt of the Commission's findings, the Controller of Patents may grant a CL based on such findings.

In other words, the Competition Act envisages and facilitates interactive regulation between the Competition Commission and other statutory authorities wherever necessary. Therefore, it would be simplistic to treat the Competition Commission and the Controller of Patents as mutually exclusive authorities/fora who operate in silos.

V. Allocation of Roles Between A Civil Court and The Competition Commission

The issue of allocation of roles between a civil Court and the Competition Commission assumes importance since it poses a different practical concern altogether. The specific question that merits consideration is whether the initiation of a civil suit for infringement instituted by the patentee or a proceeding for revocation of a patent by the defendant may result in preclusion of the Competition Commission's jurisdiction on issues relating to the patentee's conduct.

It is critical to understand that jurisdiction of a forum over a subject-matter is decided based on the provisions of the legislation that govern it and the *prima facie* satisfaction of jurisdictional facts in a given case which cloak the forum with jurisdiction over the subject-matter. Therefore, if the conduct of the patentee *ex facie* warrants the assumption of jurisdiction by the Competition Commission, the institution or pendency of a civil suit or any other proceeding cannot result in ouster of the Commission's jurisdiction.

Importantly, the nature of inquiry again differs significantly between a civil Court seized of a suit for patent infringement under the Patents Act and the Competition Commission seized of an action under Sections 3 or 4 of the Competition Act. Not only are the proceedings before the civil Court adversarial in nature, the suit court's primary mandate is to examine the validity of the asserted patent, test the patentee's claim of infringement and assess if the patentee is entitled to the reliefs available under the Patents Act.

Except for the limited window available under Section 140(3) of the Patents Act,

37 Competition Act 2002, s 21A.

which permits the defendant to raise the defence of restrictive covenant imposed on it by the patentee, the defences available to the defendant are limited to invalidity and non-infringement of the patent. Importantly, the defences under Section 140 are available only in the case of an existing contract and not when the parties are negotiating the terms of a proposed contract.

Clearly, the suit Court is not empowered to look into the effect of the conduct of the patentee on the competition in the market since the Patents Act does not provide for such an inquiry. As noted previously, such an inquiry is the exclusive domain of the Competition Commission. This is further corroborated by Section 61 of the Competition Act which excludes the jurisdiction of civil Courts with respect to any matter which the Commission or the Competition Appellate Tribunal are empowered by the Competition Act to look into.[38] Therefore, initiation or pendency of suit proceedings cannot come in the way of initiation of proceedings against the patentee under the Competition Act by the defendant in the suit.

That being said, it is certainly possible to conceive of situations or circumstances where the suit court may have to await a finding by the Commission before adjudicating on issues before it. For instance, a patentee may sue a party for infringement of its patent. In response, the defendant may raise anti-trust defences, apart from the conventional defences to infringement such as invalidity of the patent and non-infringement.

While an anti-trust defence is not provided under the Patents Act, if the said defence has a bearing on the grant of any relief, injunctive and pecuniary, the defendant could legitimately rely on Section 61 of the Competition Act and seek suspension of the suit proceedings pending an outcome from the Competition Commission under Sections 3 or 4. In the alternative, the defendant may request the suit Court to proceed with adjudication of other outstanding issues and take up the issue of relief subsequent to a finding by the Competition Commission.

This example serves to illustrate the point that even if there is an overlap in the issues before a civil Court and the Competition Commission, the civil Court cannot assume jurisdiction over such issues and must await the findings of the Commission on issues which the latter is exclusively empowered to deal with.

Since neither the Patents Act nor the Competition Act formally recognises a distinction between a 'normal patent' and a patent claimed to be 'Standard Essential', it would be reasonable to argue that even in the case of Standard Essential Patents (SEPs), the exclusive power of the Competition Commission to preside over market or competition-related inquiries cannot be usurped by any other forum. In fact, it could be argued that competition-related concerns arising from assertion of SEPs lend themselves better to the jurisdiction of the Competition Commission given the implications of enforcement of

38 Competition Act 2002, s 61.

SEPs for other stakeholders, including end consumers, in the relevant market.

VI. Analysis of The Judgement of The Delhi High Court

In light of the issues dealt with above, it is evident that the discussion would be incomplete without an analysis of the judgement of the High Court of Delhi in *Telefonaktiebolaget LM Ericsson (PUBL) v Competition Commission of India & Anr.*[39] While the judgement has not yet attained finality in view of the pendency of an appeal preferred by the petitioner before the Division Bench of the High Court, given that there is paucity of judicial guidance on the issues under consideration, the analysis undertaken by the Hon'ble Court is of immense value to students and practitioners of IP and Competition laws.[40] In arriving at its finding that the Competition Commission had jurisdiction over abuse of dominance which is attributable to an entity's patent holding, the High Court had to address a host of issues. Those relevant to the instant article have been discussed hereinbelow.

The first issue the Delhi High Court dealt with was whether an entity which held patents fell within the definition of an 'enterprise', which in turn called for examination of the nature of patent rights and whether such rights fell within the definition of 'goods'.[41]

To conclude that patent rights also qualifed as goods, the Court first applied the broad definition of goods, which applies to all kinds of property other than land, and the all-encompassing definition of property which includes movable property.[42] Based on this conclusion, the Court held that an entity which owned a portfolio of patents would necessarily qualify as an enterprise within the meaning of the Competition Act.[43]

On the question of whether the Patents Act, being a special legislation, would prevail over the Competition Act, the observations of the High Court on the role of Patent law and Competition law are significant in terms of how an Indian Court perceives the interplay between the two. The Court observed that while patent law promoted rights which were akin to a monopoly, competition law was essentially aimed at promoting competition and was therefore opposed to unfair and anti-competitive practices which were associated with monopolies.[44]

Having observed thus, the Court proceeded to address the issue of whether the Patents Act ousted the applicability of the Competition Act. After a review of the history of the Patents Act and the Competition Act, the Court observed that Article 8.2 allowed TRIPS

39 (2016) 232 DLT (CN) 1.

40 Disclosure: Since the author is the Counsel for the Informant before the CCI, the Division Bench of the Delhi High Court and the Suit Court, in the interest of propriety the author shall not discuss the specific facts of the case. Given the strictly academic nature of this article, the author shall limit the scope of his discussion of the Delhi High Court judgement to the Court's analysis of the interplay between Patents Act and Competition Act.

41 (2016) 232 DLT (CN) 1 [90]- [105].

42 ibid.

43 ibid [104].

44 ibid [110].

members to put in place measures to prevent abuse of IP Rights by right holders.[45] Further, the Court observed that Article 31 allowed TRIPS members to permit use of patents without the authorisation of patentees.[46] In other words, according to the Court, use of Competition law to prevent abuse of patent rights or any other form of IP would not be against the grain of India's TRIPS obligations. The Court also drew attention to the Raghavan Committee's observations regarding the spectre of competition law issues arising in respect of IPRs.[47]

While acknowledging the self-contained nature of the Patents Act, the Court held that a combined reading of Sections 60 and 62 of the Competition Act would lead to the conclusion that remedies under the said Act, a general legislation in respect of Competition, were available over and above the remedies available under the Patents Act, a special legislation in so far as patent rights were concerned.[48] Further, despite the Court observing that in the event of a conflict a *non-obstante* clause in a general legislation would not prevail over a special legislation, the Court held that the remedies available under the Patents Act and the Competition Act, while materially different, were not mutually exclusive or destructive.[49]

Further, drawing attention to Sections 21 and 21A of the Competition Act, the Court held that the provisions required the CCI and other statutory authorities such as the Controller of Patents to have regard to each other's opinions before passing orders.[50] The Court further underscored its view by placing reliance on Section 90(1)(ix) of the Patents Act, which was discussed earlier in the article. Importantly, the Court struck a distinction between the *in personam* nature of the remedy of compulsory license under the Patents Act and the *in rem* nature of the orders of the CCI.[51] The manifest difference in the operative width of the two legislations was recognised categorically by the Court.

Discussing the exemption provided to IPRs under Section 3(5) of the Competition Act, the Court observed with clarity that an anti-competitive agreement which imposed unreasonable conditions would not be afforded the safe harbour of Section 3(5) of the Competition Act and would fall foul of Section 3 of the Competition Act.[52] Critically, the Court held that the reasonableness of a certain condition imposed by an IPR owner could be tested only by the CCI and not by the Controller of Patents or the Civil Court. In other words, on this aspect, there was no overlap between the Patents Act and the Competition Act.

The Court then concluded that since there was no irreconcilable conflict or repugnancy between the two legislations, the jurisdiction of the Competition Act over abuse of

45 ibid [138].
46 ibid.
47 ibid [113].
48 (2016) 232 DLT (CN) 1 [147].
49 ibid [147].
50 ibid [169].
51 ibid [169].
52 ibid [172].

dominance in respect of patent rights was not ousted by the Patents Act.[53] It remains to be seen if the Division Bench of the Delhi High Court concurs with these conclusions.

VII. Conclusion

IP statutes, without a doubt, provide for internal corrective mechanisms to address inequities arising out of non-use or abuse of IP rights. However, the scope of analysis undertaken under these mechanisms is limited to verification/examination of achievement of the specific objectives of IP statutes. In other words, these mechanisms lack the sweep and depth of a market-based assessment of the actions of an IP owner under the Competition Act. No single IP regulator, be it the Controller of Patents or the Copyright Board, is charged with the duties of the Commission as reflected in Section 18 of the Competition Act. Nor are they vested with the vast powers that the Commission has been given to deal with market mischief and consumer harm. Therefore, given that the specific object of the Competition Act is to foster sustainable competition in the market, protect the interest of consumers and to ensure freedom of trade, the Competition Commission must be allowed to fulfil its mandate unhindered. This does not, in the author's view, *ipso facto* translate into derogation of Patent law.

53 (2016) 232 DLT (CN) 1 [174].

FIGHTING INDIA'S WAR ON CARBON WITH AN EMISSIONS TRADING PROGRAM

Shubham Janghu and Armin Rosencranz*

With the slow pace of reforms and measures, India's approach towards fighting climate change seems half-hearted and piecemeal. In order to implement a comprehensive approach and join the war on carbon, she must adopt an emissions trading scheme. It is a widely accepted market-based mechanism whereby a cap is set on the emitters and they are allowed to trade their carbon allowances. To effectively implement the scheme, an independent regulatory authority must be set up. We discuss the three roles that it must play — market maker, technical consultant and contingency planner. The decision regarding the inclusion of carbon-intensive industries must lie with the regulatory authority, and with respect to the other industries, the State Governments must be empowered to take the decision on the basis of specific emission profiles, financial position of the entities, and impact on the economy. The ETS must also obligate the emitters to design a 'compliance plan', setting out its own medium and long-term goals, with an explanation of how it would achieve them. As a high and unstable price can sound a death knell for the scheme, we have suggested three measures: safety valve trigger, price-based market stability reserve ('MSR'), and banking. With this skeletal framework, India can be part of the global mission to curb climate change.

I. Introduction

Climate change poses an imminent and grave challenge to humankind. The recent drought in South Africa, widespread wildfires in California, disastrous floods and cyclones across the world, changing agricultural patterns, and increased number of species going extinct, show that climate change is impacting all of our lives.

Anticipating the catastrophic impact of climate change, most countries signed the Paris Agreement in December 2015. As of today, 175 out of 195 signatories have ratified the Agreement.[1] The Agreement aims to keep the rise in global temperature 'well below' 2

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1 'Paris Agreement-Status of Ratification' (*United Nations Framework Convention on Climate*

degrees Celsius above pre-industrial levels and undertakes additional steps to try to limit the rise to 1.5 degrees Celsius above pre-industrial levels.[2] It mandates all the Parties to pool their best efforts through 'intended nationally determined contributions' ('INDCs').[3] India, in its INDC for 2021 to 2030, aims to 'adopt a climate-friendly and a cleaner path', 'reduce the emission intensity of its GDP between 33 to 35 percent by 2030 from its 2005 level', and 'achieve about 40 percent cumulative 'electric power installed capacity' from non-fossil fuel based energy resources by 2030'.[4]

The Indian Government also supports other measures to promote renewable energy such as aiming to achieve 20 gigawatts of solar capacity by 2022 (now increased to 100 gigawatts) under its 'National Solar Mission',[5] increasing the Renewable Portfolio Obligation to 8% by 2019 from 3% by 2022, increasing the coal tax of Rs. 400 per metric tonne of coal produced and imported, and obliging new coal power plants to install renewable energy capacity of at least 10% of the total capacity.

The Government has also introduced the Perform, Achieve and Trade ('PAT') Mechanism – a market-based mechanism aimed to incentivise the 478 energy intensive units to achieve better energy efficiency targets.[6] With respect to the transport industry, the Government has announced plans to leapfrog Bharat Stage V ('BS V') and adopt the more stringent Bharat Stage VI ('BS VI'), thus bringing motor vehicle regulation in alignment with European standards.[7]

The above measures are sector-specific and limited in their scope. The need of the hour is a comprehensive country-wide mechanism. The most cost-effective way to reduce emissions and avoid the worst consequences of climate change is a comprehensive market-based approach that puts a price on carbon.

An emissions trading system ('ETS') works on the 'cap-and-trade' principle. A cap is set on the covered emitters. At the end of the compliance period (typically one year), the emitters are required to surrender equivalent allowances to cover their emissions. If they

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Change, 2018) <https://unfccc.int/process/the-paris-agreement/status-of-ratification> accessed 24 February 2018.

2 Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UN Doc FCCC/CP/2015/10/Add.1 (2015) art 2(1)(a).

3 ibid art 4.

4 'India's Intended Nationally Determined Contribution: Working Towards Climate Justice' (2016) <http://www4.unfccc.int/submissions/INDC/Published%20Documents/India/1/INDIA%20INDC%20TO%20UNFCCC.pdf> accessed 8 March 2018.

5 Cabinet, Government of India, 'Revision of cumulative targets under National Solar Mission from 20,000 MW by 2021-22 to 1,00,000 MW' (*Press Information Bureau*, 2015) <http://pib.nic.in/newsite/PrintRelease.aspx?relid=122566> accessed 1 April 2018.

6 'PAT' (*Bureau of Energy Efficiency*, 2018) <https://beeindia.gov.in/content/pat-3> accessed 24 February 2018.

7 International Council on Clean Transportation, 'Policy Update: India Bharat Stage VI Emission Standards' (*ICCT,* 2016) <https://www.theicct.org/sites/default/files/publications/India%20BS%20VI%20Policy%20Update%20vF.pdf> accessed 18 April 2018.

are successful in reducing their emissions, they can either 'bank' their allowances or sell them to other entities that are falling short of allowances. Many countries and sub-national governments have implemented their version of the ETS to reduce their carbon emissions.[8]

In this article, we aim to provide a framework for ETS in India and discuss aspects and provisions that could be incorporated in it. In Part II we discuss the different functions of a Regulatory Authority that would be set up to implement the ETS. In Part III we discuss how industries must be included under the ETS. In Part IV we discuss how allowances must be divided among all the states in India. In Part V we talk about how compliance plans that are generally used in 'technology forcing' laws can be imported into a carbon market to increase its efficiency. In Part VI we explore three mechanisms (safety valve triggers, price-based market stability reserve and banking) through which price volatility could be contained. In Part VII we show how a top-down approach with standard protocols can be used for carbon offset projects and how such an approach would ease determination of additionality requirements[9] while keeping the administrative and compliance costs low.

II. Regulatory Authority

The Regulatory Authority ('RA') is the most important player in the carbon market. The success or failure of an emissions scheme would depend on its role and performance substantially. An ideal model of an ETS where the regulatory authority adopts a 'hands off' and 'let the market work' approach is not feasible for every country.[10]

In India, where laws are not regularly enforced, decisions might be politically motivated and the information regarding legislations does not percolate down to the public, the RA needs to be independent and play an active role. Professor Lesley McAllister argues that the regulatory authority must play three roles – market maker, technical consultant, and contingency planner.[11] These roles would also complement and supplement the abovementioned proposed provisions of the scheme.

A. Market Maker

In a utopian emissions trading scheme, the market players would have perfect knowledge about all the regulations. But even in the Los Angeles Regional Clean Air

8 New Zealand, Australia, European Union, South Korea, China, Brazil, Japan (Saitama and Tokyo), United Arab Emirates, Kazakhstan, Vietnam, Mexico, Switzerland, California, Quebec, Alberta, Regional Greenhouse Gas Initiative (RGGI), Western Climate Initiative (WCI). See Anita Talberg, 'Emissions Trading Schemes around the World' (Department of Parliamentary Services 2013) 9 <http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/2501441/upload_binary/2501441.pdf;fileType=application/pdf> accessed 18 April 2018.

9 Under the 'additionality' requirement, the question is whether the project would have happened anyway either by way of operation of law or 'business as usual'. For a detailed explanation, refer to Part VI of the paper.

10 Lesley K McAllister, 'Beyond Playing "Banker": The Role of the Regulatory Agency in Emissions Trading' (2007) 59 Admin L Rev 269.

11 ibid 273.

Incentive Market ('RECLAIM'), which was established to cap NO_x and SO_2 in the South Coast Air Basin in California, many of the emitters had raised issues regarding market performance and compliance options.

Similar issues were experienced in the European Union Emissions Trading Scheme ('EU ETS') where initially there was uncertainty, scepticism and lack of interest among the emitters.[12] They did not have sufficient data about the scheme and its consequences. Surveys indicated that many of the firms believed that the EU ETS would be inconsequential. Many firms also took precautionary steps and prepared, trained, and educated the management and the employees, developed strategies and assessed the impact of the EU ETS.[13]

Our proposed framework for the Indian ETS has many compliance options such as trading of allowances, offset projects and credits, and banking. The RA must take proactive steps to educate the covered entities about the scheme, its features and operations. By providing the information to the public, the RA could play a crucial role in decreasing the initial compliance costs on the scheme's emitters.

B. Technical Consultant

Professor Lesley McAllister noted that, ideally, in a market, the market players have more information about the market than the State. However, this might not be true in case of carbon markets.[14] She gives an example of the RECLAIM, where the regulatory agency, in its technical report on the installation costs of the pollution-reducing equipment, had found out that by use of existing reasonably cheap technology, the emitters could easily reduce their emissions.[15] It disseminated this information to the emitters by post.

The RA, in reviewing the individual compliance plans of the emitters (discussed below), could make suggestions to the emitters to cut their emissions.

C. Contingency Planner

If one looks at the history of all the ETSs across the world, one can see that they have all gone through a lot of changes. The Legislature, the Government and the Regulatory Authority have taken steps to counter the problems faced in the initial stages. Even in the EU ETS, the first phase could easily be described as a 'disaster' due to over-supply and low prices of the allowances. Over time, the authorities have amended the scheme and covered the loopholes. A regulatory authority, by playing an active role as a contingency planner, can respond to various contingencies such as sudden spikes in the prices and thus prevent market failures.

12 Thomas L Brewer, 'Business perspectives on the EU emissions trading scheme' (2005) 5 Climate Policy 137.
13 ibid.
14 McAllister (n 10).
15 ibid.

III. Inclusion of Industries

One of the initial questions while framing an ETS is what industries should be included. This decision must consider various factors such as the area-specific emission profile, the financial position of the entities and the impact on the economy. The ETSs of New Zealand and Tokyo show a careful consideration of these factors.

New Zealand has a unique emission profile where the majority of the GHG emissions are from the agriculture sector. The agriculture sector accounted for 47.9% of the total emissions in 2014-15.[16] In contrast to many other developed and developing countries, the transportation and energy sector in New Zealand accounts for only 18.3% and 10.1% of CO_2 emissions.[17] Factoring in this unique emissions profile, the New Zealand Government included the agricultural and forest sector under the ambit of the ETS.[18] Holders of allowances are required to surrender those allowances in case of deforestation.

Similarly, in Tokyo, commercial and residential buildings are accountable for 62.6% of the total CO_2 emissions of the entire city.[19] Tokyo's ETS took the unprecedented step of including those commercial and residential buildings that have a total consumption of fuels, heating and electricity of at least 1,500 kilolitres per year (crude oil equivalent).[20]

We propose that the RA should have the responsibility to include carbon-intensive industries (such as the power industry) within the ambit of the ETS. For the other industries, the State Governments must be empowered to add to the list of the covered entities, giving due regard to the emissions profile of the state, minimising the impact on key economic sectors of the economy, and addressing region-specific socio-economic concerns. For instance, in States such as Madhya Pradesh and Chhattisgarh where the forest density is high, forests must be included under the ETS to encourage increasing forest cover and discourage deforestation.

16 'New Zealand's Greenhouse Gas Inventory' (*Ministry for the Environment*, 2017) <http://www.mfe.govt.nz/climate-change/state-of-our-atmosphere-and-climate/new-zealands-greenhouse-gas-inventory> accessed 24 February 2018.

17 'Review of Climate Change Policies' (*Ministry for the Environment*, 2017) <http://www.mfe.govt.nz/publications/climate-change/review-climate-change-policies> accessed 24 February 2018.

18 The owners, leaseholders or other holders of rights to pre-1989 forest land can voluntarily opt in into NZETS and earn New Zealand Units ('NZUs') for any increase in their carbon stocks and pay NZUs if the forest area reduces. Persons holding rights in pre-1990 forestlands must join the ETS and must pay NZUs in case of decrease in forest cover. Persons emitting methane and nitrous oxide in pursuing agricultural activities are also covered under the ETS. See ibid.

19 Bureau of the Environment Tokyo Metropolitan Government, 'Tokyo Cap-and-Trade Program: Japan's First Mandatory Emissions Trading Scheme' (Tokyo Metropolitan Government, March 2010) 16 <http://www.kankyo.metro.tokyo.jp/en/climate/cap_and_trade/index.files/Tokyo-cap_and_trade_program-march_2010_T.pdf> accessed 18 April 2018.

20 ibid.

IV. Allocation of Allowances

Allocation of allowances involves a number of complex technical and economics-related questions, such as the number of allowances to be allocated to the states and all the sectors, sub-allocation of allowances within a particular industry, and the price at which the initial allowances must be auctioned or awarded.

Like the EU ETS,[21] the Indian ETS could allocate the majority of the allowances (88% in the EU) on the basis of historical emissions. A percentage of the allowances (10% in the EU) could be given to the less developed States in order to give them an opportunity to grow, and the remaining allowances (2% in the EU ETS) could be given to the States as awards for reflecting early efforts to achieve carbon reduction.

The States, in consultation with the RA, must be responsible for distributing allowances amongst the entities covered within its territory. This mechanism would promote cooperative federalism, take care of multiple factors such as historical emissions of every state, offer an opportunity for the less developed States to grow and set up an incentive mechanism for the States to encourage its residents to reduce emissions.

We believe that in the beginning, the allowances must be free of cost. This might serve multiple purposes. It would help in gaining acceptance from the industry and businesses. Due to increased cost of compliance with the new regulations, the businesses are bound to resist the entire plan initially. Giving free allowances would help placate their woes and discomfort. It would prevent the companies from shutting their operations in India and shifting them to other countries where there are no such ceilings and allowances. Global carbon emissions would still remain the same, as this would merely shift the emissions from India to another country while hurting the local economy. Moreover, energy-intensive industries would be protected from international competition.[22]

V. Combining Carbon Markets and 'Technology-Forcing' Laws

We believe that a policy mandating the big emitters to design a compliance plan (generally used in technology-forcing laws) and setting out their own medium and long-term goals with a schedule of installation of carbon-saving technology would increase the effectiveness of the ETS. This model was adopted in RECLAIM, where the regulatory authority, in the face of significant non-compliance, required the power producing entities to submit compliance plans specifying a schedule for installing the Best Available Retrofit Technology. The use of compliance plans was credited for a significant drop in emissions under RECLAIM.[23]

21 Council Directive 2009/29/EC of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community [2009] OJ L140/63 art 10(2).

22 European Commission, 'EU ETS Handbook' (2015) 42 <https://ec.europa.eu/clima/sites/clima/files/docs/ets_handbook_en.pdf > accessed 18 April 2018.

23 McAllister, 'The Overallocation Problem in Cap-and-Trade: Moving Toward Stringency' (2009)

Additionally, in the Indian ETS, the compliance plan must be made enforceable by the sanction of law. It would force the large emitters to get acquainted with the provisions of the ETS and plan their future course of action.

A. Exclusion in case of insignificant emissions

The RA must be empowered to exclude the small emitters, whose administration cost per unit of emissions is not proportionate and subject them to other cheaper carbon-saving measures. Even in the EU ETS, the Member States are permitted to exclude small installations and hospitals from the scope of the ETS, which are then made subject to alternative measures of carbon reductions.[24]

VI. Price Stability Measures

The demand for the allowances in the carbon market keeps on changing due to various reasons such as seasons and economic condition.[25] This can cause the price of the allowances to become volatile.[26] Failure to contain the price of the allowances within a specific desirable range can be fatal to the ETS. If the allowances are priced very high, it might force the emitters to flout the norms or force them to shut down, thereby hurting the economy.[27] Adequate and long-term stable prices encourage investment in low-carbon technologies.[28]

To contain price instability, three mechanisms are being experimented with, namely – safety valve triggers, market stability reserve and banking.

A. Safety Valve Triggers

Safety valve triggers is a mechanism whereby if the prices of the allowances increase above a certain level, certain predetermined actions take place which are expected to drive down the prices. The U.S. Regional Greenhouse Gas Initiative ('RGGI')[29] incorporates three 'safety valve triggers'. Under the *first* price trigger, if the average price of the allowances touches $10 after 14 months from the beginning of the program, the compliance period

43 Colum J Envtl L 395.

24 Council Directive 2003/87/EC of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC [2003] OJ L 275/32 art 27.

25 Susan Battles, Stefano Clò and Pietro Zoppoli, 'Policy Options to Support the Carbon Price within the European Emissions Trading System: Framework for a Comparative Analysis' (2013) Ministry of Economy and Finance Working Papers 3 <http://www.dt.tesoro.it/export/sites/sitodt/modules/documenti_en/analisi_progammazione/working_papers/WP_N_1-2013.pdf> accessed 19 March 2018.

26 ibid.

27 ibid.

28 OECD, *Effective Carbon Rates: Pricing CO2 through Taxes and Emissions Trading Systems* (OECD Publishing 2016).

29 'Elements of RGGI' (*The Regional Greenhouse Gas Initiative*, 2018) <www.rggi.org/program-overview-and-design/elements> accessed 24 February 2018.

can be increased up to three one-year periods, thus allowing emitters to average out their emissions over the extended period. In the *second* safety valve trigger, if after 14 months from the beginning of the program, the average price for allowances reaches $7 for a period of twelve months, the emitters are allowed to offset their allowances awarded from projects located anywhere in North America. The percentage of emissions with which a source may offset its cap would increase to 5% (an increase from 3.3%) of the reported emissions.[30] In the *third* safety valve trigger (if the first trigger occurs twice in two consecutive 12-month periods), the emitters are allowed to offset their emissions with offset credits from any international program. The percentage of emissions with which a source may offset its cap would increase to 10% of the reported emissions.[31]

B. Market Stability Reserve

In the EU ETS, a quantity-based Market Stability Reserve ('MSR') was introduced. If the allowances in the market fall below 400 million in number, then automatically 100 million allowances are released. This 'automatic' trigger is meant to instil confidence and predictability in the minds of the investors.[32]

MSR, as adopted in the EU ETS, has been rightly criticised for creating more price instability. Although back-loading might have a short-term impact on the prices of the allowances, there remains a risk of the price shooting up and increased volatility in the market.[33] To remedy the situation, various policy recommendations have been made. One of the crucial ones is that the auction of allowances from MSR, instead of being triggered by the *quantity* of allowances present in the market, must be initiated on the basis of *price* triggers. This would allow the process to become simpler, more transparent and predictable.[34]

C. Framework for India

We believe that the combined use of both safety valve triggers and price-based MSR could maintain ETS price stability. For an initial increase in prices, safety valve triggers could help reduce prices. Such safety triggers could include increasing the compliance period and/or increasing the limit of using offset credits to comply with the cap. If the price shoots up even further, a price-based MSR coupled with clearly defined rules could be

30 RGGI, 'Memorandum of Understanding on Regional Greenhouse Gas Initiative' (*Regional Greenhouse Gas Initiative*, 2005) <https://www.rggi.org/sites/default/files/Uploads/Design-Archive/MOU/MOU_12_20_05.pdf> accessed 24 February 2018.

31 ibid.

32 Gregor Erbach, *Reform of the EU Carbon Market from Backloading to the Market Stability Reserve* (European Parliament Research Service 2014) <http://www.europarl.europa.eu/RegData/etudes/BRIE/2014/538951/EPRS_BRI(2014)538951_REV1_EN.pdf> accessed 18 April 2018.

33 Jörn C Richstein, Émile JL Chappin and Laurens J de Vries, 'The Market (In-) stability Reserve for EU Carbon Emission Trading: Why it Might Fail and How to Improve it' (2015) 35 Utilities Policy 1, 18.

34 Battles (n 25).

helpful in controlling prices and reducing price instability. RGGI has put in place a similar mix of the two options.[35]

D. Banking

Banking is allowed in almost every emissions trading scheme.[36] It allows the emitters to save a part of their allowances for future use (especially in cases of high price rise). Banking can act as an immediate measure of relief for the emitters and protect them from price shocks.

While drafting the provisions allowing for banking, two factors must be kept in mind: (i) it must aim to maintain an incentive to invest in carbon emissions reduction, and (ii) to prevent any form of concentration of power and resultant market manipulation. With respect to the former, in the trading schemes where there is an oversupply of allowances, it can be reasonably expected that the emitters would bank their allowances for future use.[37] In these circumstances, it is important to ensure that banking is used only as a form of cushion rather than as a means to undermine the entire scheme.

35 Elements of RGGI (n 29).

36 Environment Commissioner of Ontario, *Introduction to Cap and Trade in Ontario*, Greenhouse Gas Progress Report 14 (2016) <https://media.assets.eco.on.ca/web/2016/11/Appendix-A-Introduction-to-Cap-and-Trade-in-Ontario.pdf> accessed 23 March 2018; ICAP, 'China - Beijing Pilot System' International Carbon Action Partnership 2 (2018) <https://icapcarbonaction.com/en/?option=com_etsmap&task=export&format=pdf&layout=list&systems[]=53> accessed 24 February 2018; ICAP, 'China - Chongqing Pilot System' International Carbon Action Partnership 2 (2018) <https://icapcarbonaction.com/en/?option=com_etsmap&task=export&format=pdf&layout=list&systems[]=56> accessed 24 February 2018; ICAP, 'China - Fujian pilot system' International Carbon Action Partnership 2 (2018) <https://icapcarbonaction.com/en/?option=com_etsmap&task=export&format=pdf&layout=list&systems%5B%5D=87> accessed 24 February 2018; European Commission, 'EU ETS Handbook' Climate Action 133, <https://ec.europa.eu/clima/sites/clima/files/docs/ets_handbook_en.pdf> accessed 24 February 2018; Urban Development and Resilience Unit, 'Tokyo's Emissions Trading System A Review of its Operation Since 2010' Directions in Urban Development (2013) <http://documents.worldbank.org/curated/en/607981468253741772/pdf/810580BRI0Toky00Box379819B00PUBLIC0.pdf> accessed 24 February 2018; ICAP, 'Japan - Saitama Target Setting Emissions Trading System' International Carbon Action Partnership 2 (2018) <https://icapcarbonaction.com/en/?option=com_etsmap&task=export&format=pdf&layout=list&systems[]=84> accessed 24 February 2018; IETA, 'Switzerland: The World's Carbon Markets: A Case Study Guide to Emissions Trading' Environmental Defense Fund (2013) <https://www.edf.org/sites/default/files/EDF_IETA_Switzerland_Case_Study_May_2013.pdf> accessed 24 February 2018; Seonghee Kim, 'Current Status and Issues of the Korean Emissions Trading Scheme' IEEJ 2 (2016) <https://eneken.ieej.or.jp/data/6661.pdf; California Cap and Trade https://www.c2es.org/content/california-cap-and-trade/> accessed 24 February 2018; Jonathan L Ramseur, 'The Regional Greenhouse Gas Initiative: Lessons Learned and Issues for Congress' CRS Report 3 (2017) <https://fas.org/sgp/crs/misc/R41836.pdf> accessed 24 February 2018.

37 Chris Busch 'Oversupply Grows in the Western Climate Initiative Carbon Market' (2017) 23 Energy Innovation <http://energyinnovation.org/wp-content/uploads/2017/12/Oversupply-Grows-In-The-WCI-Carbon-Market.pdf> accessed 24 February 2018.

The ETS should only allow banking between consecutive compliance periods.[38] For example, in the Saitama (Japan) Target Setting Emissions Trading System and the Tokyo Cap-and-Trade Program, an emitter would be allowed to bank his unused allowances from the first compliance period into the second compliance period, but the same banking cannot be used in the third compliance period. This would prevent the spill-over of over-supplied allowances onto the subsequent compliance periods.

Banking could also be made subject to a general holding limit. In California, all the emitters are allowed to bank their allowances. Such banked allowances do not expire; however, emitters are allowed to bank allowances only up to a prescribed limit.[39]

VII. Offset Projects

Offset projects add to the element of flexibility of an ETS.[40] They act as an alternative compliance mechanism for an entity to offset its emissions. The emitter can invest in cheaper carbon-saving and use the reduction in emissions achieved from such offset projects to comply with its cap. It offers an economically viable option to them by taking advantage of the other 'low-hanging fruits' in the carbon economy. For instance, a coal-power plant operator might wish to shift to a natural gas-based power plant (less carbon-intensive) in the future to comply with its cap. As this might require substantial investment, the emitter can, meanwhile, engage in carbon offset afforestation to make the project compliant with the cap. The offset allows the RA to divert resources to projects that face investment barriers. Further, offset projects help in engaging the community.

A. Eligibility for Carbon Offset Projects

Across the globe, the most commonly imposed eligibility criterion for offset projects is the 'additionality' requirement. Theoretically, the requirements seek to answer the basic question – 'would the activity have occurred, holding all else constant, if the activity were not implemented as an offset project?'[41] The emissions reduction has to be real, quantifiable and permanent. The additionality requirement ensures that the project developers do not get unjustly enriched and that the offset credits are legitimately used for the carbon-saving projects that require additional financial incentive.

38 ICAP, Japan - Saitama Target Setting Emissions Trading System, International Carbon Action Partnership 2 (2018) <https://icapcarbonaction.com/en/?option=com_etsmap&task=export&format=pdf&layout=list&systems[]=84> accessed 24 February 2018; Urban Development and Resilience Unit, Tokyo's Emissions Trading System A Review of its Operation Since 2010 Directions in Urban Development (2013) <http://documents.worldbank.org/curated/en/607981468253741772/pdf/810580BRI0Toky00Box379819B00PUBLIC0.pdf> accessed 24 February 2018;

39 'California Cap and Trade' (*Center for Climate and Energy Solutions*, 2018) <https://www.c2es.org/content/california-cap-and-trade/> accessed 24 February 2018.

40 Anja Kollmuss and others, *Handbook of Carbon Offset Programs Trading Systems, Funds, Protocols and Standards* (Routledge 2010) 6.

41 ibid 23.

The emissions schemes across the world provide for specific tests to satisfy the principle of additionality. For instance, the Kyoto Protocol's Clean Development Mechanism ('CDM') requires the project developers to satisfy a four-step analysis.[42] The first step is to identify alternatives to the proposed CDM project in consonance with the mandatory laws and regulations. Under the second step, 'investment analysis', the project developer must satisfy the regulatory authority that 'proposed project activity is economically or financially less attractive than at least one other alternative…without the revenue from the sale of [offset credits]'.[43] If the developer is able to satisfy the authorities regarding 'investment analysis,' he can skip to the fourth step. Under the third step, 'barrier analysis,' the project developer needs to identify barriers that might prevent the implementation of the project (such as technological barriers and ecological barriers) and how the offset credits would alleviate such barriers.

The fourth step involves 'common practice analysis', which acts as a credibility check and complements the investment or barrier analysis. This step involves assessing other similar activities in the region based on a similar technology and scale of operation. If similar activities are observed then the determination under the investment or the analysis test is contradicted. The 'common practice analysis' can be satisfied in similar activities if there are essential distinctions between the two set of activities and it can be explained why certain benefits given to the similar activities, which are not available to the proposed offset project render them attractive.[44]

These tests, either in whole or part, have been adopted in other ETSs[45] and voluntary standards for offset projects.[46] Other additionality requirements such as 'regulatory surplus test' (*i.e.*, 'an offset project must be surplus to all federal, provincial/territorial and regional legal requirements and other climate change incentives') have also been developed.[47]

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42 CDM Executive Board, 'Tool for the demonstration and assessment of additionality (version 03)' UNFCCC <https://cdm.unfccc.int/methodologies/PAmethodologies/tools/am-tool-01-v3.pdf> accessed 24 February 2018.

43 ibid.

44 ibid.

45 Chicago Climate Exchange, 'Renewable Energy Systems Offset Project Protocol' CCX (2009) <https://www.theice.com/publicdocs/ccx/protocols/CCX_Protocol_Renewable_Energy.pdf> accessed 24 February 2018; Greenhouse Gas Reduction Targets Act: Emission Offsets Regulation S.B.C. 2007, c. 42, <http://www.bclaws.ca/civix/document/id/loo96/loo96/393_2008> accessed 24 February 2018.

46 'Gold Standard for the Global Goals: Principles & Requirements' (Gold Standard, 2018) <https://www.goldstandard.org/project-developers/standard-documents> accessed 24 February 2018; Deborah Adams, Voluntary Carbon Standard 2007, IEA Greenhouse Gas R&D Programme (2008) <http://ieaghg.org/docs/general_publications/Carbon%20Offsetsweb.pdf> accessed 24 February 2018.

47 Kollmuss (n 40) 86, 90; Regional Greenhouse Gases Initiative, Offset Handbook for Regional Greenhouse Gas Initiative (RGGI) Model Rule Offset Subpart XX-10 and Model Offset Consistency Applications and Model Monitoring and Verification Reports (Version 1.1), RGGI 31 (2015) <https://www.rggi.org/sites/default/files/Uploads/Offsets/Revised_Offset_Handbook_2015_05_13.pdf> accessed 24 February 2018; Chicago Climate Exchange,

B. Framework for Offset Projects

There are two approaches to framing of regulations for offset project, namely the bottom-up approach and the top-down approach.

The former, bottom-up approach, was adopted in the CDM: The developers of a project would submit the proposal for the project to the regulatory authority, which would either approve or reject the project. It requires an individual assessment of the projects on the basis of one or more additionality tests. The latter, top-down approach, is where the certain specified types of projects were deemed to have qualified for the offset project. Such a model was adopted under the RGGI.

The Regulatory Authority, under the above approaches (bottom-up approach and top-down approach), can further analyse the projects either on a case-by-case basis or according to certain predetermined standards.[48] Under the former, the developer would employ its own specific methods and resources to satisfy the regulatory authority regarding the additionality requirements, calculation of carbon reduced and monitoring methodologies, among others requirements. Under the latter, the developer would have to adhere to the standard protocols prepared by the regulatory authority for the above-mentioned purposes.

We believe that to simplify the emissions scheme, provide stability, credibility and predictability, remove subjectivity and minimise the administrative costs, it is better to incorporate a top-down approach in the scheme with certain standardisation measures. California's ETS provides an interesting example: The California Air Resources Board ('CARB') has confined offset projects to forestry (including urban forestry), manure digesters, ozone-depleting substances projects, mine methane capture, and rice cultivation.[49] It has released offset protocols that standardise the entire procedure of setting baselines, ensuring compliance and ensuring adherence to the principle of additionality. The protocols are framed in consultation with the stakeholders.

Renewable Energy Systems Offset Project Protocol, CCX (2009) <https://www.theice.com/publicdocs/ccx/protocols/CCX_Protocol_Renewable_Energy.pdf> accessed 24 February 2018; Climate Action Reserve, Program Manual, CAR 31 (2015) <http://www.climateactionreserve.org/wp-content/uploads/2015/08/Climate_Action_Reserve_Program_Manual_090115.pdf> accessed 24 February 2018; Deborah Adams, Voluntary Carbon Standard 2007, IEA Greenhouse Gas R&D Programme (2008) <http://ieaghg.org/docs/general_publications/Carbon%20Offsetsweb.pdf> accessed 24 February 2018; Climate Community and Biodiversity Standard, CCB Standards: General Criteria, Rainforest Alliance 20 (2017) <https://www.rainforest-alliance.org/business/sites/default/files/site-documents/climate/documents/M2-ccbs-v2-ENG_general-criteria.pdf> accessed 24 February 2018.

48 Therefore, there are four possibilities for the framework– (i) bottom-up approach with the RA analysing the projects on case-by-case analysis, (ii) bottom-up approach with the RA analysing the projects on the basis of pre-determined standards, (iii) top-down approach with the RA analysing the projects on case-by-case analysis, and (iv) bottom-up approach with the RA analysing the projects on the basis of pre-determined standards.

49 'Compliance Offset Program' (*California Air Resources Board*, 2018) <www.arb.ca.gov/cc/capandtrade/offsets/offsets.htm> accessed 24 February 2018.

This framework provides for an easy determination of additionality requirements. While determining which projects would be eligible for an offset project, the RA would take into consideration factors such as methods which have been technologically proven as effective, the presence of barriers to the project and other relevant factors under the additionality requirement. This largely removes the burden on the developer to individually prove additionality. This can be contrasted with a bottom-up approach and a case-by-case analysis. Although a bottom-up approach and a case-by-case analysis can broaden the spectrum of activities that can be covered, they put an enormous regulatory and financial burden on the Regulatory Authority and increase the chances of rejection of proposals, abuse of authority, and corruption.[50]

Under the CDM, the project reports submitted to the authorities were usually 40-60 pages long and in California's Cap-and-Trade Program, they are on an average six pages long.[51] The World Bank has also noted a shift towards the use of top-down and standardised approaches. Even the schemes that were initially designed to be bottom-up have started to adopt the top-down and standardised approaches.[52]

C. Carbon Offset Limits

One of the major criticisms of emissions trading schemes has been that they allow for the big emitters to keep postponing their emissions reduction by engaging in the trade of allowances and offset credits. To counter this criticism, an offset cap could be introduced. For instance, RGGI ordinarily allows the use of offsets up to 3.3% of the reported emissions only.[53]

D. Addressing Concerns regarding Carbon Leakage and Permanency

At this point, we must also note that all the offset project proposals are based on prediction and possibility. In a few cases, the projects might be based on new technology where the data is not adequately available and the calculation for reduction in GHG emissions might be highly speculative. To err on the side of caution, some ETSs mandate a 'discount factor' to be applied to the carbon emissions. For instance, RGGI prescribes a 10% discount on award of carbon allowances for potential reversals of sequestered carbon.

50 Partnership for Market Readiness, Overview of Carbon Offset Programs Similarities and Differences (Technical Note 6), World Bank 10 (2015) <https://www.thepmr.org/system/files/documents/PMR%20Technical%20Note%206_Offsets_0.pdf> accessed 24 February 2018; See also Derik Broekhoff. Expanding Global Emissions Trading: Prospects for Standardized Carbon Offset Crediting. International Emissions Trading Association (2007); Climate Action Reserve, Program Manual, CAR 31 (2015) <http://www.climateactionreserve.org/wpcontent/uploads/2015/08/Climate_Action_Reserve_Program_Manual_090115.pdf> accessed 24 February 2018.

51 ibid.

52 ibid.

53 Regional Greenhouse Gases Initiative, Model Rule Part XX CO2 Budget Trading Program RGGI (2013), <https://www.rggi.org/sites/default/files/Uploads/Design-Archive/Model-Rule/2012-Program-Review-Update/Model_Rule_12_23_13.pdf> accessed 24 February 2018.

This provision is not implemented if the project developer holds approved long-term insurance, guaranteeing replacement of the carbon not successfully sequestered.

Canada, in its Offset System Quantification Protocol, provides for sector-specific discount factors.[54] Similarly, Alberta has developed an 'assurance factor approach', whereby, once the offset credits are discounted, the government of Alberta takes on the liability from the project developer to ensure the permanence of the emissions reduction.[55] Use of discount factors can be helpful in offset projects where the regulatory authority believes that there is an enhanced risk of carbon leakage and doubt regarding the permanency of the carbon emissions reductions. This would promote new technology and not compromise the goal of carbon emission reduction.

VIII. Conclusion

ETS offers the perfect solution to the issue of tackling climate change. It offers flexibility to the emitters and is politically acceptable (in contrast to a carbon tax). It recognises that the cost of installation of new technology for certain entities can be expensive in the short-term and until then, other carbon-saving avenues can be taken advantage of to avert a climate disaster.

It is essential to keep the RA independent of the political branches. Since ETS is a relatively new concept and unknown among most people, it is necessary for the RA to play an active role and prevent market failure. The RA must be empowered to include a minimum number of carbon-intensive industries under the ETS.

To promote cooperative federalism and to factor in area-specific concerns, the State Government must be given the power to add other entities. The emitters must be required to submit compliance plans outlining their emissions reduction goals and means of achieving them. To maintain the price within the desired range, safety valve triggers and a price-based Market Stability Reserve can be employed.

Allowing the emitters to use their unused allowances in the next compliance period, in anticipation of increased prices, can be helpful in providing individualised relief to the emitters. Carbon offset projects, another commonly employed flexibility mechanism in an ETS, allow the emitters to postpone their emissions reduction by investing in other cheaper carbon-saving projects.

With the above framework, India can fulfil its commitments under the Paris Agreement and be a part of the global fight against climate change.

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54 Environment Canada, Canada's Offset System for Greenhouse Gases Program Rules and Guidance for Project Proponents Minister of the Environment 43 (2009) <http://publications.gc.ca/collections/collection_2010/ec/En84-42-3-2009-eng.pdf> accessed 24 February 2018.

55 Alberta Environment, Offset Credit Project Guidance Document, Province of Alberta (version 1.2) 24 (2008) <http://www.assembly.ab.ca/lao/library/egovdocs/2008/alen/165331.pdf> accessed 23 April 2018.

INDIA VERSUS THE INTERNATIONAL CRIMINAL COURT

Shriya Maini [*] ***and William Nunes*** [**]

India, as predicted by Thompson is emerging as the most important country for the future of the world and the global choices she makes today will set the stage for her tomorrow. Over the years, India has played an active role and participated in the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 1998. However, she has abstained from voting maintaining that she would be burdened by the inherent jurisdiction clause contained in the Rome Statute and hence, she has not signed or ratified this treaty in its present form. The authors believe that India misjudged the bigger picture, both in terms of moving a step closer to the development and codification of international criminal law and also realising her ambition of global leadership. As an active champion for the reformation of global institutions, India's position was poised to influence the outcomes. India as well as other Asian States ought to appreciate that the ICC has introduced a new paradigm in international politics. The paper thus argues, from the legal and well as political position, as to why India should ratify the Rome Statute.

I. Introduction

India is more than the sum of its incongruities. In the words of its first Prime Minister, Mr. Jawahar Lal Nehru, 'it is a country held together by strong but invisible threads'. India is an allegory and inkling, a reverie and a visualisation. In the words of the British historian E.P. Thompson, she is 'the most important country for the future of the world.' Her national and global choices today will set the international stage for tomorrow.

Currently, 138 countries (out of a total of 195) have signed and 123 have ratified[1]

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1 UN Treaty Collection Depositary, 'Rome Statute of the International Criminal Court' in 'Status of Treaties' <https://treaties.un.org/Pages/ ViewDetails.aspx?src=TREATY&mtdsg_no =XVIII-

the Statute of the International Criminal Court (popularly known as the 'Rome Statute' or the 'ICC Statute').[2] Despite widespread recognition of the Rome Statute, India has expressed serious legal concerns) in accepting its provisions. Mr. Dilip Lahiri, the then Additional Secretary (UN) Ministry of External Affairs cum Head of the Indian Delegation at 'The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court' at Rome, Italy, on 16 July 1998 made India's position very clear.[3] He maintained that the Rome Statute should be such that it attracts the widest acceptance globally. With only 50 countries that were willing to affix their signatures (in 1998)[4] on the said treaty, his speech drew considerable criticism from the international legal circles which vehemently believed to the contrary. Many said that 'it was more important to have a good Court than to have a bad one with a lot of signatures on it' and that a permanent International Criminal Court ('ICC') was the need of the hour, especially in the aftermath of horrors of Yugoslavia and Rwanda to bring the heads of national governments to trial and punish individuals responsible for the commission of genocide, war crimes, crimes against humanity and aggression in situations when the countries to which they belonged were unable or unwilling to bring them to justice.[5]

Mr. Lahiri however, believed that India was bound to be burdened by the inherent jurisdiction clause contained in the Rome Statute and hence, it should never sign or ratify this treaty in its present form.[6] Evidently, the absence of an opt-out provision[7] certainly threatened an insecure India for the fear that she may lose her state sovereignty.[8] The list of Indian woes seemed endless. It was whispered that a combination of India's own fears of being judged by an International Criminal Court (more specifically, that its own criminal

10&chapter=18&lang=en> accessed on 7 April 2018; See also Coalition of International Criminal Court, *History of the ICC* <http://www.iccnow.org/?mod=icchistory> accessed on 7 April 2018; *Prosecutor v Furundzija* (Judgment) ICTY-95-1-T (10 December 1998) [227].

2 UNGA 'Rome Statute of the International Criminal Court' (17 July 1998) UN Doc A/CONF.183/9 ('Rome Statute').

3 Dilip Lahiri, 'Explanation of Vote on the Adoption of the Statute of the International Court' (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 1998) (Explanation of Vote).

4 The Rome Statute came into force on 1 July 2002.

5 Rome Statute (n 2).

6 Explanation of Vote (n 3).

7 The opt–out provision enables a state to the jurisdiction of the ICC by declaration possibly for a specified period, limited to a particular conduct or conduct committed during a particular period of time.

8 An 'opt-out' provision was present in Article 124 of the Rome Statute, stating that 'Notwithstanding Article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in Article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time.' The introduction of the opt-out model in the ICC Statute resulted in a compromise between unanimity and a universality view, facilitating both the negotiating process and attracting hesitant future State parties. However, the same was deleted on the 11th plenary meeting of the ICC on 26 November 2015 by consensus *vide Resolution ICC-ASP/14/Res.2*.

justice system could plausibly come under the international scanner) and external factors (that the Court might be used with political motives by virtue of the power conferred on the Prosecutor to initiate investigations *proprio motu* and the role assigned to the United Nation's Security Council) might have left India in an increasingly vulnerable position, lined with mounting inquiries. The question on every lip was: will she sign the Rome Statute or not?

II. India's 'No Stance' Policy

Though India actively participated at the 'The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court', she abstained from voting and maintained that she had her own reasons for the same.[9] Today, India's abstention has been primarily linked to her fears over a Kashmir or Punjab.[10] It is argued that the inclusion of the term 'armed conflict not of an international character' in defining 'war crimes' in Article 8 of the ICC Statute[11] could have been a major concern for India.[12] This because three border states, namely Kashmir (insurrection in 1991), Assam (ethnic youth unrests in 1983) and Punjab (anti-Sikh massacres in 1984) have suffered insurgent ferment, evidencing that such a situation (including the recent violence that beleaguered Gujarat) would have been referred to the ICC, had the Indian delegation signed the Rome Statute in 1998.

But in our view India misjudged the bigger picture. Her reasons for abstaining from voting[13] at the Rome Conference were at most substantial political concerns, and they deserved the most measured consideration, but they were fundamentally flawed to the extent that they were cast as legal arguments on the international platform for not signing the ICC Statute.[14] India ought to have taken in her stride the challenges posed by the Rome Statute, instead of appearing to be a country torn between history and hope. She failed to comprehend that the Rome Statute was *sine qua non* for any country that believed in the Rule of Law and respected human rights because it was a step closer to the development and codification of international criminal law – a body of law directed at preventing and punishing the most heinous crimes of global concern, which can only be achieved via effective international cooperation amongst States and establishment of a permanent court of law called the ICC today.

9 Explanation of Vote (n 3).

10 Usha Ramanathan, 'India and the ICC' (2005) 3 Journal of International Criminal Justice 627, 627-634.

11 Article 8(2)(c) of the Rome Statute states '…..In the case of an armed conflict not of an international character…'; Also see Article 8(1) of the ICC Statute – '…The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes' and Article 8(2) which defines war crimes and includes armed conflicts not of an international character within the ambit of war crimes.

12 Ramanathan (n 10).

13 Explanation of Vote (n 3).

14 Diane Orentlicher, 'Politics by Other Means: The Law of the International Criminal Court' (1999) 32(3) Cornell International Law Journal 3.

III. Countering India's Concerns

A. Inclusion of Internal Armed Conflict in defining War Crimes

India failed to comprehend that the inclusion of the term internal armed conflict ('armed conflict not of international character' in defining 'war crimes' in Article 8 of the ICC Statute as a crime that the ICC could try) could have done little to hamper her State sovereignty or interfere in her internal affairs. We are struck by India's misconceived position concerning this reservation. India has ratified the Geneva Conventions, 1960, and has even enacted them, but in practise (with due respect), it seems as though India has overlooked Common Article 3 ('CA 3')[15] in appreciating its special enactments and applicability. It is worth revisiting that torture, hostage-takings and rapes have been pervasive cruelties in the Kashmir valley conflict. Both Indian security forces and armed militants have used rape as a weapon of war: to punish, terrorise, intimidate, humiliate and destroy, but India has fervently debated and declared at the international stage that the threshold required for application of CA 3 is yet not met.[16] Thus, India has not accepted the application of CA 3 of the Geneva Conventions to the situations prevailing in the country by strategically arguing that the nations are best condemned (if need be) out of their own mouths and conduct. She could easily do the same with the Rome Statute. Evidently, the inclusion of the term 'armed conflict not of an international character' in defining war crimes in Article 8 of the ICC Statute was not an anomaly provision that was introduced for the first time by the Rome Statute. Hence, India's concerns about Indian leaders/military commanders being prosecuted by the ICC are highly exaggerated.

B. The Complementarity Doctrine

Complementarity as a tenet of the Rome Statute was developed to supplement, not supplant national jurisdiction of State parties. In simpler words, the complementarity principle (unwilling or unable to prosecute) enshrined in Article 17 of the Rome Statute afforded States the first and foremost choice of exercising primary jurisdiction over their own nationals. This principle assured that the ICC would assist, but not supersede national jurisdiction. Examples of multilateral treaties with a similar provision include the European Convention on Extradition, 1957[17] and the Organisation of American States Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance, 1971.[18]

15 CA 3 provides international law and standards governing the conduct of parties in an internal armed conflict, including government forces and insurgents.

16 While the world vehemently believes that International Law is duty bound to punish persons for crimes and atrocities committed in Kashmir on account of CA 3 (i.e. Kashmiri militants may be tried for murder, kidnapping or other crimes, so long as they are afforded the rights of due process), India argues to the contrary and claims the same to be a domestic issue, arguing that the threshold for CA 3 is not met.

17 European Convention on Extradition, 1957 art 2 and 6(1)(a).

18 Organisation of American States Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance

Willingness to prosecute is not an issue for India because she ardently believes that the toxic culture of impunity must end for justice and peace to prevail worldwide. What she fears most being questioned is her ability to prosecute, amidst the other external concerns revolving around the role of the United Nations Security Council ('UNSC'), as a trigger for investigation and prosecution and deferral of prosecutions; the inherent jurisdiction of the ICC; the office of an independent Prosecutor *et al.*[19] India could certainly argue and easily justify that she is both willing and able to prosecute her own nationals on her own territory, be it the communal violence in Bhagalpur (1989); or the mass disappearances and cremation of unidentified and partially identified bodies in Punjab (1980s-90s); or the Bombay riots and ensuing bombings (1992-93);[20] or the carnage in Gujarat (2002), thereby inevitably ousting the jurisdiction of the ICC, based on complementarity principle. Instead of dreading the locus of an international court to judge her internal courts, India should have faith in her own criminal justice system and procedures that she would be most capable and able to prosecute the accused persons who happen to be her nationals. The case will be admissible before the ICC only where national efforts cannot be considered genuine (not effective) - whether due to unwillingness or lack of capacity to prosecute. The Indian judiciary (at least in theory and in its upper reaches) enjoys a reputation for incorruptibility. Additionally, Rule 51 of the Rules of Procedure and Evidence of the Rome Statute[21] permits the States to invoke the principle of complementarity to show that 'its courts meet internationally recognised norms and standards for the independent and impartial prosecution of a similar conduct'.[22] As for the investigating agencies not being able to conduct fair and free investigation, we believe India should constructively face all allegations, if any by pulling up her domestic investigative agencies and judicial structures to do their best to prosecute genuinely without succumbing to political pressure. Instead of critiquing the complementarity principle on grounds that it requires all nations to prove the viability of their judicial structures on an international scale or that the ICC's jurisdiction

ILM 255 (1971) art 5.

19 Dilip Lahiri, *'Should India continue to stay out of ICC?'* (Observer Research Foundation, 24 November 2010) <http://www.orfonline.org/research /should-india-continue-to-stay-out-of-icc> accessed on 13 April 2018 - '*...The issue of an ICC arrest warrant against the serving President of Sudan for crimes committed within his own country, making him subject to arrest in any country which had ratified the ICC Statutes and to being handed over to the ICC for trial and punishment, would have been unimaginable. In the case of Sudan, which is not a Party to the ICC, it was particularly bizarre to see the UNSC voting to subject it to ICC jurisdiction, when the majority of the permanent members of the Council have themselves stayed out of the ICC.*'

20 UNSC can never refer the aforementioned Indian matters like Punjab militancy or the Bombay riots to the ICC because it is bound by the mandate of *Article 11(1) of the Rome Statute* which does not permit the ICC to adjudge matters retrospectively; See also Luigi Condorelli and Santiago Villalpando, 'Referral and Deferral by the Security Council' in Antonio *Cassese*, Paola Gaeta and John RWD Jones (*eds*), *The Rome Statute of the International Criminal Court: A Commentary* (2002).

21 The Rules of Procedure and Evidence ICC-ASP/1/3, part II A, rule 51.

22 Gary T Dempsey, 'Reasonable Doubt: The Case against the Proposed International Criminal Court' (1998) 6 Cato Policy Analysis <https://object.cato.org/sites/cato.org/files/pubs/pdf/pa-311.pdf> accessed 17 April 2018.

overrides national judiciary,[23] India ought to eliminate her fears of being judged by the ICC on the basis of the aforesaid argument, shielded under the garb of fundamental principles of state sovereignty, sovereign equality of States and non - interference in internal affairs. She must forthwith sign, and subsequently ratify the Rome Statute.

C. Prosecutor's power to trigger prosecution

The Rome Statute sets out three mechanisms by which a prosecution may be triggered: *firstly,* intimation by a state party to the statute,[24] *secondly,* Prosecutor's power to initiate investigation *proprio motu*,[25] and *thirdly,* a referral by the UNSC.[26] However, there are firm defences engrained within the Rome Statute against a politically enthused Prosecutor, and the Prosecutor initiating prosecution of his/her own accord has to attain prior approval and permission from a Pre-trial Chamber of the ICC before proceeding with an investigation.[27] Furthermore, the triggering power of the Prosecutor to initiate an investigation is not an authorisation to commence a prosecution but merely a power to make preliminary examinations. More specifically, it is a power that enables the Prosecutor's office to examine what transpired in an area of which some information was received. Additionally, the jurisdiction of the ICC is founded on the principle of complementarity, which grants absolute priority to States to exercise national jurisdiction. To start with, when the Prosecutor has determined that there is a reasonable basis to commence an investigation, he has to first notify all State Parties which would normally exercise jurisdiction over the crime.[28] Within a month of receipt of that notification, a State may inform the ICC that it is investigating the crime and at the request of that State, the Prosecutor is required to defer the State's investigation.[29] Hence, it is highly unlikely that any Prosecutor could decide to take over

23 Explanation of Vote (n 3).

24 Rome Statute (n 2) art 14. As was the case for Democratic Republic of the Congo, Uganda, Central African Republic on two occasions, and Mali.

25 Rome Statute (n 2) art 13, 15 and 53(1).

26 ibid art 16.

27 The Office of the Prosecutor ('OTP') will first have to convince the judges, at the Pre-Trial phase, that it has sufficient evidence to commit the case to trial. At this stage, the judges will have to decide whether to confirm, decline, or review the charges presented by the OTP against the defendant. If the judges confirm the charges, the case goes to trial. Once at trial, the OTP is first to present its case, and bears the burden of proof that the accused person is guilty beyond reasonable doubt.

28 The OTP conducts a preliminary examination to decide whether there is a reasonable basis to initiate an investigation. In doing so, the OTP is required to assess and verify a number of legal criteria, such as : if the crimes were committed after 1 July 2002, the date of the entry into force of the Rome Statute, the Court's founding treaty; if the crimes took place in the territory of a State Party or were committed by a national of a State Party (unless the situation was referred by the UNSC); if they amount to war crimes, crimes against humanity or genocide; the gravity of these crimes; if there are no genuine investigations or prosecutions for the same crimes at the national level (Complementarity); and if opening an investigation would not serve the interests of justice and of the victims. All these procedures were followed for Kenya, Côte d'Ivoire and Georgia.

29 William A Schabas, 'United States Hostility to the International Criminal Court: It's All About the Security Council' (2004) 15 European Journal of International Law 701, 716.

the prosecution of an ICC crime in India on the basis of the determination that the Indian legal system was unable or unwilling to deal with it. In other words, these safeguards make prosecution by the ICC of Indian officials virtually impossible to conceive.

India further argues that the *proprio motu* power of the Prosecutor ridicules the established position that state consent is a requirement for initiation of investigation and prosecution in India. She believes the position of an independent Prosecutor does not seem right considering that Prosecutors in her own national jurisdiction have to prosecute only when the State directs or wishes to punish and grant immunity to whom it favours. However, one must understand that the ICC Statute does not charge or prosecute States such as India as a whole to its Court; it only picks individuals who commit crimes within the jurisdiction of the Court since it solely deals with individual criminal responsibility and not state responsibility.

D. UNSC Referral

It is also argued that the Rome Statute has made the ICC subordinate to the UNSC and thus, in effect to its permanent members, and their political interferences, by providing the UNSC with the power to refer cases to the ICC (under Chapter VII even for countries who are non-signatories) and the power to block/veto ICC proceedings. Notably, the principle behind this provision was to enable the UNSC to utilise the ICC instead of creating new *ad-hoc* tribunals in situations where international crimes were taking place. In simpler words, India reasons that the Permanent Five (that hold the veto power) with their control and patronage have wide powers of referral and deferral. However, one must remember that all five permanent members of the UNSC would have to agree to such deferral or referral. This in our view is sufficient global indemnification against preferential use of the veto power. Till date the UNSC has only used its power to refer situations in non-party States twice, namely in Sudan (Darfur) in 2005 and in Libya in 2011.[30] Furthermore, there lies an inherent delinquency in excluding the UNSC because the ICC essentially revolves in a jurisprudential cosmos that also comprises of the United Nations Charter. Chapter VII of the Charter which permits the UNSC trigger prosecution cannot be out rightly wiped off; nor can the ICC conceivably dominate the United Nations Charter. Yielding to the role of a UNSC trigger to assume jurisdiction is essentially a compromise that the Rome Statute seems to have made - a perturbed concession, deplorable for a few nations but virtually relentless.[31] Besides, in theory, when the UNSC refers a situation to the ICC (when a nation

30 L Condorelli and A Ciampi, 'Comments on the Security Council Referral of the Situation in Darfur to the ICC' (2005) 3 Journal of International Justice 590.

31 Although framed in terms of international law, the Indian government's position with respect to the role of the Security Council is probably best understood as a claim about the proper allocation of political authority at the dawn of a new century. Just as the United States may have hoped to recreate in the Rome Statute the special status it enjoys in the UN Charter, India may have wished to rewrite the Charter in a fashion that eradicates the special powers of the five permanent members of the Council; See also R Cryer and N D White, 'The Security Council and the International Criminal Court: Who's Feeling Threatened?' in O Bekou and R Cryer (eds),

is unable or unwilling to try suspects of crimes against humanity or war crimes), it involves UN member states, whether they are party states to the ICC or not. Hence, for the referrals made by the UNSC, a non-state party such as India (that objected to the insertion of the UNSC Security Council role triggering the jurisdiction of the ICC clause)[32] would in any event be bound by the jurisdiction of the ICC, irrespective of whether she has signed the Rome Statute.

E. Countering Terrorism

India is also concerned with the Rome Statute's refusal to designate the use of nuclear weapons and terrorism among substantive crimes within the purview of the ICC. The exclusion of international terrorism from the crimes covered by the ICC appears to lend weight to the possibilities of misuse of these provisions of the Rome Statute. Though terrorism is not recognised as a discrete offence, acts of terror (cross-border and externally inspired or aided and abetted, proxy wars) may be squarely covered by the Rome Statute as 'substantive crimes', be it as Crimes against Humanity or War Crimes or Crimes of Aggression.[33] For instance, terrorist acts amount to war crimes subject to prosecution before the ICC when they are committed 'as part of a plan or policy or a part of a large scale commission of such crime'. Additionally, the ICC has jurisdiction over modern crimes including human trafficking and use of nuclear weapons either under Article 7 of the Rome Statute (as a crime against humanity) or Article 8 of the Rome Statute (as a war crime), should all essential requirements including contextual element and admissibility for the particular substantive crime be fulfilled.

IV. India and The ICC Today

India as well as other Asian States ought to appreciate that the ICC has introduced a new paradigm in international politics. The paradigm has shifted from the Westphalian (state centric) prototype to a model of interdependence between nations, wherein the Rule of Law (to ensure peace and respect for the enforcement of international justice) is established via supervision of the UNSC.[34] The task at hand today is hardly comparable

International Criminal Court (UK: Ashgate Dartmouth 2004) 495-523.

32 In notable contrast, the US government preferred that the UNSC play the role of gatekeeper with respect to the ICC's docket. At the Rome Conference, the US delegation supported allowing States Parties to the Rome Statute, as well as the UNSC, to refer situations to the Prosecutor - a position that enjoyed general support.

33 R Galingging, *'Prosecuting Acts of Terrorism as Crimes against Humanity under the ICC Treaty'* (2010) 4 Indonesian Journal of International Law 746; Antonio Cassese, 'Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law' (2001) 12 European Journal of International Law 993; See also Michael P Scharf, 'Special Tribunal for Lebanon Issues Landmark Ruling on Definition of Terrorism and Modes of Participation' (2011) 15 American Society of International Law 6.

34 Fatou Bensouda, 'The International Criminal Court: A New Approach to International Relations' (*Council on Foreign Relations*, 21 September 2012) <https://www.cfr.org/event/international-criminal -court-new-approach-international-relations> accessed 10 January 2018.

to what the original signatories had undertaken. Hard choices are difficult to make and perhaps, it's time for India to make one. There should not be a single hurdle that confronts India today when it comes to signing and ratifying the Rome Statute on the international dais. This is synchronous to Nehru and Gandhi's views on sovereignty, as both espoused a vision of '*One World*' – a world of States governed by meta-sovereign institution like the United Nations.[35]

Furthermore, India has actively championed for the reformation of global institution and participated in various international debates about the creation of a new global order. In these circumstances, she needs to be at the forefront of new global formations and emerging power groupings. India, through constructive cooperation has made continuous efforts to reform the multilateral system of governance as well as economic institutions. Reforming the United Nations has been a continuous issue that has engaged India for several decades.[36] Though conscious as well as critical of the defects of the United Nations, India has never lost (and continues to place) faith in the principle of the UN Charter. India has played a significant role in halting aggression in various parts of the world and has made repeated efforts to reduce tensions across the globe.[37] As a leading member of the Non-Aligned Movement ('NAM') she has sought equitable representation and made obvious her quest for a permanent seat at the UNSC. India has made sustained diplomatic efforts and has also joined the G4 lobby to support the expansion and reformation of the UNSC in both permanent and non-permanent categories. While India's bid for a permanent seat in the UNSC has received strong support from the UN members states (including the United States of America) who have emphasised that the world body must reflect the emergence of the changing world order, some countries (for instance China) have opposed its bid by forming opposition groups called 'Uniting for Consensus' that allege that India is 'stuck in its own time warp and politics'.

Over the past six decades, India's aversion to global negotiations stemmed from the tainted image that international organisations were all based on power capabilities of States and hence, their functioning was *ipso facto* discriminatory. Given the fact that her own

35 Rohan Mukherjee and David M Malone, *'Indian Foreign Policy and Contemporary Security Challenges'* (2011) 87(1) International Affairs 87.

36 The Prime Minister of India Mr. Modi at the General Debate of the 69th Session of The United Nations General Assembly, in September 2014, stated 'Every nation's world view is shaped by its civilization and philosophical tradition… It is this timeless current of thought that gives India an unwavering belief in multilateralism……We must reform the United Nations, including the Security Council, and make it more democratic and participative. Institutions that reflect the imperatives of 20th century won't be effective in the 21st. It would face the risk of irrelevance; and we will face the risk of continuing turbulence with no one capable of addressing it... Let us fulfil our promise to reform the United Nations Security Council by 2015… so that there is new hope and belief in us around the world.'

37 Lt General Nambiar Satish (Retd), 'India and United Nations Peacekeeping Operations' (*Ministry of External Affairs,* 26 January 2014) <http://mea.gov.in/articles-in-indian-media.htm?dtl/22776/India+and+United+Nations+Peacekeeping+Operations> accessed 9 January 2018.

material capabilities have starkly enhanced, India must transform her perspective. Many of the central assumptions of Indian foreign policy have to be reviewed in light of the changed circumstances. India's remarkable economic growth, her rapidly increasing defence and military capabilities, her status as a nuclear power and her unrelenting contributions to the UN peacekeeping programmes – all have given her the right and the privilege to assume a leading role and responsibility at the UN. Despite its shortcomings, the ICC is the sole international institution with jurisdiction to try individuals for international crimes which endanger human rights as well as the peace and security of nation states. As Luis Moreno-Ocampo, the first Prosecutor of the International Criminal Court said 'it is time for political actors to adjust to the law; we have no police and no army, but we have legitimacy and we will prevail.'[38] The Rome Statute is founded on the idea that the ICC – a judicial institution would contribute in the prevention and management of crimes and massive violence against humanity and India should not miss any opportunity to participate and influence the evolution of International Criminal Law, which is still a very young body of law, waiting to be contoured and codified.

V. Conclusion

States do not rise to power only because they possess specific capabilities. A great power achieves its interest through the application of all measures of power: economic, military, demographic, political and cultural. India's capabilities are significantly rising and are poised to influence the outcomes. While terms such as 'emerging power', 'pivotal state', 'rising power' have been used by experts and scholars, India being a responsible State needs to bring great ideas to the international table. As Raymond Aron astutely states, 'the strength of a great power is diminished if it ceases to serve an idea'.[39] Thus, India's ambition for global leadership calls on the leaders and policy makers to make adjustments not only by setting new goals but also by finding her a position at the 'global high table'.[40] By declaring its support for and working with the ICC, India can take a concrete step towards increasing her influence on the world state by moving towards a posture of constructive engagement with it. The international system continues to be entrenched on the dichotomous lines: there is no peace without justice or there is no justice without peace. Major world powers have refused to ratify the Rome Statute on the ground that it infringes state sovereignty, especially in terms of pursuance of their foreign security policies. However, the proponents of ICC believe that it contributes to world peace by deterring crimes, marginalising potential perpetrators and inducing warring parties to

38 L Moreno-Ocampo, 'The International Criminal Court: Seeking Global Justice' (2008) 40 Case Western Reserve Journal of International Law 215.

39 Vineet Thakur, 'Indian Foreign Policy' in Bhupinder S Chimni and Siddharth Mallavarapu (eds), *International Relations: Perspectives for the Global South* (Pearson 2012) 59.

40 The term is Global High Table is borrowed from the title of the book, Tersita C Schaffer and Howard B Schaffer, *India at the Global High Table: The Quest for Regional Primacy and Strategic Autonomy* (India: Harper Collins 2016).

negotiate peace.[41] Though US, China and Russia have voted against it, they have actively and substantially participated in the ICC, including its Review Conference in 2010, unlike India. Though India has been a tenacious supporter of the UNSC reform, she has fervently opposed the ICC. Advocacy for much-needed Security Council reform can only be buttressed with actions that depict seriousness in tackling impunity, and adhering to the rule of law through an institution such as the ICC. Hence, India should re-evaluate her stance on the ICC, now more than ever.

41 Ramanathan (n 10).

MANDATORY RULES AND THE DWINDLING RESTRAINT OF ARBITRABILITY

***Harshad Pathak**[*] **and Pratyush Panjwani**[**]*

The doctrine of arbitrability is perceived to be dead. But this does not mean that the relevance of public interest in international commercial arbitration is reduced to a minimalistic public policy exception. Rather, in light of the gradual decline of the arbitrability doctrine, many former issues of arbitrability must now be reframed as questions of application of mandatory rules, which must apply notwithstanding any agreement to the contrary between the contracting parties. This would involve shifting the responsibility for safeguarding public interests from courts to arbitrators; thereby, precluding the courts from re-tightening the screws of arbitrability due to a sense of distrust in the arbitration machinery. It is in this context that the notion of mandatory rules attains importance. Their relevance is premised on an assertion that although an arbitral tribunal derives its competence from the parties' arbitration agreement, it is not merely a creation of contract. It owes equal allegiance to the rule of law, which includes the mandatory rules of the foundational legal framework that granted the parties their autonomy to arbitrate their disputes in the first place. Simultaneously, an arbitral tribunal's duty to identify and apply relevant mandatory rules is also a component of its duty to render an enforceable award, by reference to the mandatory rules of the arbitral seat and the likely place(s) of enforcement of the eventual award.

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I. Introduction

In the realm of international commercial arbitration, the concept of mandatory rules serves as an important tool to preserve the public policy considerations of a State in an otherwise private method of dispute settlement. It guides an arbitral tribunal as to what content of the applicable law is imperative to the decision-making process, notwithstanding any agreement between the parties to the contrary.

From this perspective, mandatory rules are the proverbial lighthouses in the sea of international commercial arbitration, where a fleet of arbitral tribunals often get swayed by the stormy winds of conflict of laws. Yet, their relevance, although much discussed, remains disputed. Questions are often raised about the source of an arbitral tribunal's supposed duty to apply mandatory rules, and whether it would undermine the principle of party autonomy in international arbitration. This paper is yet another attempt to answer some of these questions, albeit from a different perspective. Though relying on the wealth of literature on this issue, the paper adopts a broad conceptual approach to endorse the relevance of mandatory rules when juxtaposed against the gradual decline of the arbitrability restraint.

To attempt an understanding of mandatory rules in isolation is futile. It is not the only tool that strives to balance the private commercial interests of the disputing parties with any public interest that may be impinged by the arbitral process. Quite to the contrary, the notion of mandatory rules is intrinsically related to the doctrine of arbitrability in as much as both are manifestations of the same eclectic concept of public policy. Thus, the evolving understanding of the latter necessarily affects the perception of the former. To put it differently, while the theoretical sources underlying the duty to apply mandatory rules remain independent, the importance attached to them is contingent on the threshold of arbitrability recognised across jurisdictions. The more the categories of disputes that are considered arbitrable, the greater is the need to recognise and impose on an arbitral tribunal the duty to apply mandatory rules. A relaxation of the arbitrability restraint allows more disputes that ordinarily belong to the domain of national courts to be resolved by arbitration; more disputes that would have been adjudicated by a qualified judge of a State to be decided by an arbitral tribunal. In such a circumstance, the responsibility for safeguarding the public interest element involved in an adjudicatory process must also be shifted from national courts to arbitrators. This is precisely what mandatory rules strive to achieve.

Part II commences by introducing the doctrine of arbitrability and how it is considered to be in decline across jurisdictions. Part III elaborates on the notion of mandatory rules in international commercial arbitration and why they hold significance. Against this backdrop, Part IV proceeds to identify the legal sources for an arbitral tribunal's duty to apply mandatory rules if so required and Part V concludes. Throughout this discussion, the authors' analysis remains conceptual and any references to judicial decisions emanating from different jurisdictions are only illustrative.

II. The Decline of Arbitrability

The doctrine of arbitrability entails a general enquiry into which types of disputes are capable of settlement by arbitration, and which are not.1 It imposes a duty upon national courts to inquire whether the subject matter of the difference between the disputing parties can be arbitrated under the applicable law.[2] Pursuant to the principle of competence-competence,[3] this duty extends to arbitral tribunals as well; particularly since national legal systems often prefer to list the precise classes of disputes that may not be referred to arbitration.[4] Accordingly, when a subject matter is considered inarbitrable under the applicable law, it deprives an arbitral tribunal of its jurisdiction. In other words, if commercial arbitration is construed as a garden of disputes, then the arbitrability doctrine is its proverbial gatekeeper; the first line of defence for keeping disputes unsuited for private adjudication outside its realm.

However, the barrier of arbitrability is increasingly perceived to be dead.[5] The gradual decline of judicial hostility towards arbitration, coupled with an advent of public policy favouring arbitral awards and agreements, has caused significant expansion of the domain of arbitration.[6] In the United States of America, for instance, matters of antitrust law[7] and consumer rights,[8] though traditionally suspected as being inarbitrable, have now made the cut of arbitrability. Chapter 29 of Title 35 of the Code of Laws of the United States of America, which enlists the remedies for the infringement of a patent, also explicitly provides for arbitrability of any dispute relating to patent validity or infringement arising under the contract.[9] It is thus not surprising that the United States has progressively been regarded as one of the jurisdictions most amenable to settlement of disputes through arbitration.[10]

A similar assertion, if not a stronger one, can be made about France, which permits

1 Karim Abou Youssef, 'The Death of Inarbitrability', in Loukas A Mistelis and Stavros L Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009) 47.

2 See Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) art V(2) ('New York Convention'); Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law (1985), arts 34(2)(b)(i), 36(1)(b)(i) (UNCITRAL Model Law).

3 See UNCITRAL Model Law, art 16.

4 Mauro Rubino-Sammartano, *International Arbitration – Law and Practice* (3rd ed, Juris Net 2014) 154; see Italian Rules of Civil Procedure, art 806; Switzerland Federal Act on Private International Law, art 177.

5 Youssef (n 1) 47.

6 Divya Srinivasan and others, 'Effect of bribery in international commercial arbitration' (2014) 4 Int'l J Public Law and Policy 131.

7 *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* 473 US 614.

8 *Sherk v Alberto-Culver* 417 US 506.

9 35 USC §294(a). See generally, William Grantham, 'The Arbitrability of International Intellectual Property Disputes' (1996) 14 Berkeley J Int'l L173.

10 Justice Andrew Rogers, 'Arbitrability' (1992) 1 Asia Pac L Rev 1.

entities to enter into arbitration agreements 'relating to rights of which they have the free disposal'[11]; except 'matters of status and capacity of the persons, in those relating to divorce and judicial separation or on controversies concerning public bodies and institutions and more generally in all matters in which public policy is concerned.'[12] Likewise, Article 177 of the Swiss Federal Act on Private International Law states that any 'dispute involving an economic interest may be the subject-matter of an arbitration.'[13]

In fact, if the United States of America has shown a discernable trend of steadily disarming the gatekeepers of its garden of commercial arbitration, a large part of continental Europe has always had puny gatekeepers to begin with. Couple that with what has colloquially been called a favourable climate for arbitration, and one finds the garden of arbitrable disputes continually blossoming! It is uncanny how commercial arbitration can find blossom and growth in these colder regions of the northern hemisphere, which are otherwise more suited to aridity.

At first glance, this may appear surprising to the tropically bred Indian arbitration lawyers. In India, the general principle remains that all disputes relating to rights *in personam* are amenable to arbitration, while those relating to rights *in rem* are not.[14] However, certain disputes involving *in personam* rights may also be regarded inarbitrable for reasons of public policy.[15] This situation is exacerbated by Indian courts who frequently rely on this exception to proclaim a category of subject matter to be inarbitrable.[16] For instance, disputes relating to eviction or tenancy rights under a special law,[17] claims arising out of a trust deed,[18] consumer complaints,[19] and claims of copyright infringement[20] are considered inarbitrable in India, but perfectly arbitrable in most other jurisdictions. In this regard, the reasoning put forth by Indian courts often places excessive reliance on Section 2(3) of the Indian Arbitration & Conciliation Act 1996, which states that Part I of the Act 'shall not affect any other law for the time being in force by virtue of which certain disputes

11 French Civil Code, art 2059 (Translated by Georges Rouhette and Dr Anne Rouhette-Berton).
12 French Civil Code, art 2060(1) (Translated by Georges Rouhette and Dr Anne Rouhette-Berton).
13 Switzerland Federal Act on Private International Law, art 177(1). But see Case 4A_7/2018, Judgment of 18 April 2018 (Federal Court) on arbitrability of employment disputes in domestic arbitrations in Switzerland.
14 *Booz Allen and Hamilton Inc v SBI Home Finance Ltd and Ors* (2011) 5 SCC 532 [23].
15 ibid [22].
16 See for instance, *Vimal Kishore Shah v Jayesh Dinesh Shah* 2016 SCC Online SC 825; *The Indian Performing Right Society Ltd v Entertainment Network (India) Ltd* (2016) SCC Online Bom 5893.
17 *Booz* (n 14) [22(vi)].
18 *Vimal Kishore Shah* (n 16).
19 *Fair Air Engineers Pvt Ltd v MK Modi* AIR 1997 SC 533; *Skypak Couriers Ltd v Tata Chemicals* 2000 Supp (1) SCR 324; *Rosedale Developers Pvt Ltd v Aghore Bhattacharya* (2015) 1 WBLR (SC) 385; *National Seeds Corp Ltd v M. Madhusudan Reddy & Anr* (2012) 2 SCC 506.
20 *The Indian Performing Right Society Ltd v Entertainment Network (India) Ltd* (2016) SCC Online Bom 5893. But see *Eros International Media Ltd v Telemax Links India Pvt Ltd*, Notice of Motion No 886 of 2013 of Suit No 331 of 2013.

may not be submitted to arbitration.'[21] Therefore, as far as the gateway of arbitrability is concerned, the Indian approach remains anomalous.

In the above circumstance, the decline of the arbitrability doctrine in international commercial arbitration has sparked many a fears, particularly since arbitrators are not traditionally considered to be the guardians of public order.[22] They are understood to derive their jurisdiction only from the parties' arbitration agreement, and for this reason, are expected to display special fidelity to their shared expectations.[23] Consequently, one fears that the relevance of public interest in commercial arbitration may be reduced to minimalistic public policy exceptions; with little scope for judicial intervention at the stage of annulment or enforcement of an arbitral award.[24] It is in this context that the notion of mandatory rules acquires immense significance. And the decline of the doctrine of arbitrability must compel a re-characterisation of some of the former issues of inarbitrability as questions involving the application of mandatory rules, be they of international or domestic origin. But this poses the question – what is the precise meaning of a mandatory rule? And is there a legal basis to corroborate their relevance?

III. The Notion of Mandatory Rules

Unlike its unruly sibling public policy,[25] mandatory rules are indeed capable of being precisely defined. Pierre Mayer describes a mandatory rule as 'an imperative provision of law which must be applied to an international relationship irrespective of the law that governs that relationship.'[26] This is consistent with Article 9 of the Rome I Regulations, which defines mandatory rules as the provisions, 'the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under [the said] Regulation.'[27]

Nonetheless, the question remains – what is the legal basis for an arbitral tribunal to apply a mandatory rule, especially if it is deemed to inhibit the principle of party autonomy?

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21 Arbitration & Conciliation Act 1996, s 2(3).

22 Pierre Mayer, 'Mandatory Rules of Law in International Arbitration', (1986) 2 Arbitration International 274, 286; See *Mitsubishi* (n 7) 9 ('… An international arbitral tribunal owes no prior allegiance to the legal norms of particular states; hence, it has no direct obligation to vindicate their statutory dictates. The tribunal, however, is bound to effectuate the intentions of the parties.')

23 William W Park, 'The Predictability Paradox: Arbitrators and Applicable Law', (2014) Dossier XI of the ICC Institute of World Business Law (ICC Publ No 753E) 1, 7.

24 See for instance, *Cytec Industries BV v SNF SAS*, Cass civ 1er (4 June 2008), (2008) XXXIII Yearbook of Commercial Arbitration, [5] ('[In the context of international public policy], the examination is limited to the flagrant, effective and concrete nature of the alleged violation.')

25 *Richardson v Mellish* 130 ER 294 (1824).

26 Mayer (n 22) 275.

27 Regulation (EC) No. 593/2008 of The European Parliament and of The Council, art 9(1).

In other words, what is the legal basis for the tribunal to have a mandatory rule trump the law stipulated to govern the contract? The answers are multiple.

Mandatory rules, whether they are international or domestic, preserve a particular policy or public interest of a State. Some common examples include competition or anti-trust laws, laws for the protection of the environment, currency controls, as well as laws designed to protect those parties presumed to be in an inferior bargaining position, such as wage-earners or consumers.[28] As such, by their very definition, mandatory rules possess an inherently imperative character. They apply to any commercial transaction made by the nationals of any particular State, notwithstanding the parties' choice of applicable law. Ultimately, it is this imperative character that validates their relevance in international commercial arbitration. This is conceptually similar to the mandate of Section 23 of the Indian Contract Act 1872, which prescribes that the 'object of an agreement is lawful, unless […] if permitted it would defeat the provisions of any law […]'[29]

This assertion has received significant judicial approval. For instance, in *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.* ('*Mitsubishi*'), the petitioner, a noted Japanese automobile manufacturer, was a joint venture between Chrysler International, S.A., a Swiss corporation, and another Japanese corporation. It sought to distribute its automobiles outside of the United States of America through Chrysler's dealers. Toward this end, the Petitioner and Chrysler entered into a sales and distribution agreement with the Respondent, a Puerto Rico corporation, which provided that all disputes arising out of certain articles of the agreement or for the breach thereof shall be resolved through arbitration by the Japan Commercial Arbitration Association. Upon the occurrence of a dispute relating to the slackening of sales, the Petitioner approached the Federal District Court in the United States of America to seek an order to compel arbitration of the disputes in accordance with the arbitration clause. The Respondent, however, objected to such a relief, and instead filed counterclaims asserting certain provisions of the Sherman Antitrust Act. The dispute eventually reached the Supreme Court of the United States of America, which was then required to determine the arbitrability of antitrust disputes arising in the context of an international commercial transaction.

The US Supreme Court found in favour of arbitrability. However, it warned that 'where the parties have agreed that the arbitral body is to decide […] claims, which includes […] those arising from the application of American anti-trust law, the tribunal […] should be bound to decide that dispute in accord with the national law giving rise to the claim.'[30] As such, while antitrust disputes could be referred to arbitration, the Court emphasised that the same may only be adjudicated by the arbitral tribunal by applying the national law

28 Mayer (n 22) 275.

29 Indian Contract Act 1872, s 23.

30 *Mitsubishi* (n 7) 12. See also Mayer (n 22) 280 ('[In *Mitsubishi,*] in holding that arbitrators have a right to apply such rules, the Supreme Court appears to presume that they are in some manner obliged to do so, which in turn makes it possible to trust them in this matter.')

in question, i.e. the Sherman Antitrust Act. Its rationale was that merely by 'agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute. Instead, it only submits to their resolution in an arbitral, rather than a judicial, forum.'[31] To paraphrase, an arbitration agreement is akin to a forum selection clause by which the parties agree to lawfully oust the jurisdiction of the competent national court in exercise of their procedural autonomy. It does not, however, dilute the substantive protection offered by the *lex fori* if the same possesses a mandatory character.

A similar affirmation of mandatory rules was arrived at in *Accentuate Ltd v Asigra Inc*.[32] There, an arbitral tribunal seated in Canada, and mandated to decide under Canadian law, had rejected a claim advanced by an English commercial agent seeking compensation owed under European law for the termination of its contract. Notwithstanding the tribunal's finding, the English Court seized of the same dispute in parallel held to the contrary. It reasoned that notwithstanding the parties' contractual choice of law, it was obligated to give effect to the Claimant's mandatory rights under the applicable European Union ('EU') Regulations.[33]

To support its conclusions, the English Court relied on the decision rendered by the European Court of Justice in *Ingmar GB* ***Ltd v Eaton Leonard Technologies Inc.*** There, the Petitioner was the commercial agent of the Respondent, a company incorporated in California, USA. The agency contract between the two explicitly stipulated that it was governed by Californian law. However, when the Respondent terminated the contract in 1996 without paying commission to the Petitioner, the latter brought legal proceedings before the High Court of England for seeking compensation for damage suffered as a result of this termination. Initially, the High Court held that since the contract was governed by Californian law, the provisions of EU law relating to the payment of compensation to commercial agents did not apply. However, on appeal, the Court of Appeal (Civil Division) asked the European Court of Justice for a preliminary ruling on the compatibility of the English legislation, which generally allowed contracting parties to agree to be governed by the law of another country, with EU law.

While deciding the referred question, the European Court of Justice noted that although the freedom of contracting parties to choose the system of law by which they wish their contractual relations to be governed is a basic tenet of private international law, it can be removed by 'rules that are mandatory.'[34] It then determined that the specific EU regulations in question were of a mandatory nature. Accordingly, they could not have been evaded by a principal established in a non-member country, whose commercial agent carries on his activity within the EU Community, through a choice-of-law clause.[35] On such basis, the

31 *Mitsubishi* (n 7).
32 *Accentuate Ltd v Asigra Inc* (2009) EWHC 2655 (QB).
33 ibid [79].
34 *Ingmar GB Ltd v Eaton Leonard Technologies Ltd* (2000) ECR I-9305 [15].
35 ibid [25].

Court affirmed that such mandatory rules will govern the parties' contract, irrespective of the content of their choice of law clause.[36]

Notwithstanding the aforementioned affirmations, the relevance of mandatory rules in international commercial arbitration continues to be questioned for it tends to undermine the principle of party autonomy.[37] Undoubtedly, the overriding mandatory rules of a jurisdiction can and will, at times, collide with the exercise of party autonomy; especially because an arbitral tribunal is considered to be bound to effectuate the intentions of the parties, and not vindicate a State's statutory dictates.[38] However, there are few caveats that merit some attention here.

At the outset, it is apposite to acknowledge that practitioners and scholars take the existence of party autonomy for granted, even though there is little discussion as to the principle's origins.[39] And the principle surprisingly rallies unquestioned support as an expression of tradition common to developed nations.[40] Nonetheless, the concept of party autonomy is not absolute.[41] It always remains subject to the countervailing public interest of a State, which may have proximity to the parties or the dispute.[42] As succinctly noted in the Dissenting Opinion attached to *Mitsubishi*, 'it is improper to subordinate the public interest in enforcement of antitrust policy to the private interest in resolving commercial disputes.'[43] Many of the similarly placed public interests of a State are codified in its statutory laws, which an arbitral tribunal must not overlook under the garb of some unbridled loyalty to party autonomy. Just like the parties' procedural autonomy is subject to certain core principles, such as equality between the parties,[44] the parties' autonomy to subject their dispute to any legal regime of their choice is also circumscribed by the relevant mandatory rules. There are many instances to exemplify this proposition.

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36 ibid.

37 See Alexander KA Greenawalt, 'Does International Arbitration need a Mandatory Rules method?' (2007) 18 American Review of International Arbitration 103; Carolina Pitta e Cunha, 'Arbitrators and Courts Compared: The Long Path towards an Arbitrator's Duty to apply International Mandatory Rules' (2016) 21 Young Arbitration Review 26.

38 *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* (n 7) 9.

39 H M Watt, 'Party Autonomy in international contracts: from the makings of a myth to the requirements of global governance' (2010) 3 ERCL 1, 4 ('… Indeed, its centrality in the European tradition is so taken for granted, or at least, appears to be so solidly rooted in the history of western private international law that astonishingly little attention has been paid to the function with which it is henceforth invested.')

40 See for instance, H Heiss, 'Party autonomy', in F Ferrari and S Leible (eds), *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe* (Sellier de Gruyter 2009). ('Party Autonomy: The Fundamental Principle in European PIL of Contracts. Party autonomy has been and will remain the fundamental principle in European private international law in matters of contractual obligations.')

41 See Michael Pryles, 'Limits to Party Autonomy in Arbitral Procedure' (2007) 24(3) J of Int'l Arb 327.

42 Gary B Born, *International Commercial Arbitration* (Kluwer Law International 2014) 1609.

43 *Mitsubishi* (n 7), Dissenting Opinion of Justices Stevens, Brennan and Marshall, 33.

44 UNCITRAL Model Law, art 18.

For instance, in *Hyderabad Precision Mfg Co Pvt Ltd v Government of India*,[45] an arbitration clause between two Indian parties stipulated that the Indian Arbitration & Conciliation Act 1996 shall not apply to any arbitration commenced pursuant thereto. However, the then Chief Justice of the High Court of Andhra Pradesh found this stipulation 'providing for non-applicability of the Arbitration and Conciliation Act 1996 [as] void under the provisions of Section 23 of the Indian Contract Act'.[46] This is because such a constraint was considered to have an unlawful object, which if permitted, would defeat the provisions of law. Notably, a derogation from the procedural law applicable to arbitration has also been looked at favourably by some courts.[47] However, a proposition that most courts do subscribe to, at least insofar as substantive law is concerned, is found in *TDM Infrastructure Pvt Ltd v UE Development India Pvt Ltd*,[48] where Justice S B Sinha had held that 'Indian nationals should not be permitted to derogate from Indian law [because this] is part of the public policy of the country.'[49]

What emerges from the above is that any assertion to the contrary, in favour of unbridled party autonomy, will make both domestic and international commercial arbitration a fertile ground for evading mandatory rules that would otherwise apply to a dispute. Such concerns are certainly not new. In 2003, Judge Cudahy in his Dissent in *Baxter International Inc v Abbott Laboratories*[50] had already cautioned that '[t]oo deferential an attitude by courts when the rights of the consuming public are at stake […] will open a royal detour around the anti-trust laws.'[51] Therefore, any over-emphasis on party autonomy bears the potential to, and in fact has previously 'allowed economic actors to escape from the internationally mandatory provisions which would otherwise have been applicable before their natural forum.'[52] It then does not take tremendous foresight to see how this tendency affects the institutional credibility of commercial arbitration as whole; something which arbitral tribunals must take responsibility for.[53]

In light of the above, one may draw two alternative conclusions, both of which support

45 *Hyderabad Precision Mfg Co Pvt Ltd v Government of India* 2013 (6) ALD 492.

46 ibid [6].

47 *GMR Energy Limited v Doosan Power Systems India Private Limited &Ors* 2017 SCC OnLine Del 11625.

48 *TDM Infrastructure Pvt Ltd v UE Development India Pvt Ltd* (2008) 14 SCC 271.

49 ibid [20]. see also *Aadhar Mercantile Private Limited v Shree Jagdamba Agrico Exports Private Ltd* 2015 SCC OnLine Bom 7752.

50 *Baxter Int'l Inc v Abbot Laboratories* 315 F 3d 829 US Court of Appeals (7th Cir 2003), Dissenting Opinion of Judge Cudahy.

51 ibid [28].

52 H M Watt, 'Party Autonomy in international contracts: from the makings of a myth to the requirements of global governance' (2010) 3 ERCL 1, 20.

53 Mohammad Reza Baniassadi, 'Do Mandatory Rules of Public Law Limit Choice of Law in International Commercial Arbitration?' (1992) 10(1) International Tax & Business Lawyer 59, 65 ('An arbitrator considers mandatory public laws […] also to safeguard the credibility of arbitration as an effective mechanism for the settlement of disputes arising from commercial contracts.')

the application of mandatory rules notwithstanding the parties' choice of law.

Firstly, as posited by Jan Kleinheisterkamp, the issue is not about denial of party autonomy, but rather 'about ensuring that the party autonomy can be exercised without infringing upon third party rights and public interests, and that contractual freedom is protected for all in the long run.'[54] If the legislature had the competence to legislate, then it follows that the enacted provisions must be given full effect.[55] *Secondly,* in the alternative, even if arbitration is viewed exclusively as a derivative of the parties' autonomy, any limitation placed by a State's mandatory rules upon this autonomy also constitutes a limitation imposed upon the arbitrator's consequent authority. The parties may only empower an arbitrator to decide disputes by applying or ignoring certain rules, which they are permitted to do in the first place by the national laws governing their capacity to contract. In either scenario, mandatory rules, being imperative in nature, bind the parties and therefore, an arbitral tribunal constituted to effectuate their contractual intentions. In this sense, what may have once been issues relating to the doctrine of arbitrability can and certainly must, now be reframed as questions of the application of mandatory rules in international commercial arbitration.

IV. Sourcing a Legal Duty

The previous sections dealt with *why* must arbitral tribunals apply mandatory rules in deciding a dispute and share some responsibility for safeguarding any public interests involved. But this still leaves the question as to *how* they may do so, open. To put it differently, even if an arbitral tribunal is desirous of applying a certain mandatory rule not falling within the parties' chosen legal framework, how can it source the authority to deviate from the parties' agreed choice of law? The fundamental concern in this regard emanates from the conflict between an arbitrator's mandate to apply the parties' chosen substantive law to decide a dispute versus the arbitrator's duty to render an enforceable award.[56] Accordingly, one rightly questions whether an arbitral tribunal has the authority to apply a mandatory rule that does not constitute part of the rules of law as chosen by the parties. Answering this question is a rather delicate exercise, encompassing a multitude of theoretical and pragmatic considerations; the first of which concerns ascertaining the conceptual nature of an arbitral tribunal.

A. Arbitral Tribunal as a Creation of Contract?

It is accepted that an international arbitration tribunal is a different animal as compared to a national judge.[57] While the latter finds the source of its powers in the *lex fori*, these

54 Jan Kleinheisterkamp, 'Legal Certainty, Proportionality and Pragmatism: EU Overriding Mandatory Laws in International Arbitration', Working Paper, 9.

55 ibid.

56 UNCITRAL Model Law, art 28(1).

57 Pierre Lalive, 'Internationalization of International Arbitration: Some Observations' in *Internationalization of International Arbitration* (Martinus Nijhoff 1995) 49, 50.

rules do not bind an arbitral tribunal, since it is not an organ of a State.[58] Thus, it does not come as a surprise that an arbitral tribunal sitting as far back as in 1958 had acknowledged that it 'does not have a *lex fori*.'[59]

The *lex fori* has always been a fundamental presence in private international law.[60] It provides a national judge with conflict of law rules that contain connecting factors that are relevant in determining the applicability of a foreign law and also play a part in regulating potential fraudulent evasions of the law.[61] But having no *lex fori*, an international arbitral tribunal is the subject of a two-pronged legal regime made of the *lex arbitri* and the *lex contractus*. Of course, if the parties do not designate a *lex contractus,* the arbitral tribunal has no conflict of law rules at its disposal to determine the applicable law. In such a situation, it may proceed to apply whatever conflict of law rules it deems appropriate[62] or whatever rules the arbitral seat prescribes.[63] However, where the parties have designated a *lex contractus,* it remains to be answered whether and how an arbitral tribunal can apply a mandatory rule or law of another State if the circumstances so require?

To answer this question, one must delve deeper to decipher the theoretical underpinnings of an arbitral tribunal and comprehend the sources of its juridical existence. In this regard, the Contractual Theory and the Jurisdictional Theory constitute the two opposite pillars of the vast spectrum of explanations surrounding an arbitrator's legal creation.

On the one hand, the *Contractual Theory* views the arbitral process as rooted solely in the contract between the disputing parties, specifically their arbitration agreement. On such basis, the theory posits that an arbitral tribunal owes its authority *only* to this contract.[64] This is exemplified by the fact that it is primarily for the parties to an arbitration proceeding to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings,[65] and it is only failing such agreement that the tribunal may conduct the arbitration proceedings in such manner as it considers appropriate.[66] Similarly, the tribunal is also mandated to decide the dispute before it in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.[67]

58 Piero Bernardini, 'The Role of the International Arbitrator' (2004) 20(2) AI 113.
59 *Saudi Arabia v Aramco*, Award of 23 August 1958 (1963) 27 ILR 117, 161-62.
60 Albert Ehrenzweig, 'The *Lex Fori* – Basic Rules in the Conflict of Laws' (1960) 58(5) Michigan LR 637, 645.
61 Yves Derains, 'Public Policy and the Law Applicable to the Dispute in International Arbitration' in *Comparative Arbitration Practice and Public Policy in Arbitration* (Kluwer Law International 1987) 227, 232.
62 UNCITRAL Model Law, art 28(2).
63 German Arbitration Law 1998, s 1051(2); Switzerland Federal Act on Private International Law, art 187(1).
64 Geoffrey Hartwell, 'Arbitration and Sovereign Power' (2000) 17(2) Journal of International Arbitration 11, 13.
65 UNCITRAL Model Law, art 19(1).
66 UNCITRAL Model Law, art 19(2).
67 UNCITRAL Model Law, art 28(1).

However, the Contractual Theory is marred by some evident shortcomings. On the face of it, the theory restricts an arbitral tribunal to the contents of the parties' contract, notwithstanding the legal feasibility of such content. This implies that unless the notion of public policy forms part of the *lex contractus*, the arbitrator would be free to ignore it.[68] The authors find it difficult to endorse such an absolute proposition.

On the other hand, the *Jurisdictional Theory* posits that an arbitral tribunal always sources its adjudicatory powers in the first place from the permission granted by any sovereign State to the arbitral mechanism.[69] As a corollary, this theory attributes the relationship between the arbitral tribunal and the parties to the tribunal's status as an appointee that acts in the interest of a State.[70]

Interestingly, many challenge the Jurisdictional Theory on the premise that it undermines the principle of party autonomy, which, as discussed above, has been recognised as being central to international commercial arbitration. But it is important to note that while the principle of party autonomy is indeed fundamental to arbitral jurisprudence, it exists not because of its centrality to international commercial arbitration, but because nation States allow it to sustain. After all, pursuant to the social contract theory,[71] it is the primary responsibility of a State to provide its nationals a functional judicial mechanism for the settlement of disputes. Thus, any possibility of departing from this State-provided-mechanism through the exercise of party autonomy remains subject to the State's will. In other words, the parties' freedom to experiment with the envisaged dispute resolution processes[72] and exercise control over all aspects of their arbitration,[73] must necessarily be sourced to a permissive legal system; failing which, it has no independent existence or sanctity.

For instance, Section 28(a) of the Indian Contract Act, 1872 renders void agreements, which restrict a party 'absolutely from enforcing his [or her] rights under or in respect of any contract by usual legal proceedings in the ordinary tribunals.'[74] Ordinarily, this would be sufficient to negate any arbitration agreement. However, the Indian arbitration machinery, premised on the principle of party autonomy, nonetheless exists because of the statutory exceptions to the said provision. These exceptions provide that the provision shall neither render illegal 'a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall

68 Andrew Barraclough and Jeff Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration' (2005) 6 Melbourne JIL 205, 211.

69 FA Mann, 'Lex Facit Arbitrum' in *International Arbitration: Liber Amicorum for Martin Domke* (Martinus Nijhoff 1967) 157.

70 Lord Mustill and Stewart Boyd, *Commercial Arbitration* (2nd edn, LexisNexis 1989) 223.

71 See generally Jean Jacques Rousseau, *The Social Contract* (Penguin 2006); Peter Nygh, *Autonomy in International Contracts* (OUP 1999).

72 Rau, 'The Culture of American Arbitration and the Lessons of ADR' (2005) 40 Tex Int'l L J 449, 534.

73 Born (n 42) 1609.

74 Indian Contract Act 1872, s 28(a).

be referred to arbitration'[75] nor 'affect any provision of any law in force for the time being as to references to arbitration.'[76]

Viewed from this perspective, to assert that arbitrators are immune from a States' statutory dictates or policy considerations is convenient, but mistaken. This allows one to look beyond the status of an arbitral tribunal as a mere creation of the parties' contractual agreement and entertain the possibility of applying mandatory rules. To put it differently, according to the Jurisdictional Theory, there is nothing in the nature of arbitral tribunals *per se* that prohibits them from applying a mandatory rule that lies outside the legal framework specifically agreed to by the parties. After all, the primary allegiance of arbitral tribunals remains not with the parties, but with the rule of law.

Yet, the Jurisdictional Theory also poses certain avenues for concern. It seems to postulate that an arbitral tribunal is restricted to applying the *lex contractus* only to the extent that the law of the seat, which is the sole source of the tribunal's legitimacy, permits its application.[77] This creates a situation where the arbitrator, in addition to ignoring the mandatory rules that may constitute part of the public policy of other potentially relevant States, may also be incentivised to ignore the *lex contractus*.

This is precisely why many advocate for a middle ground, i.e. a hybrid of both the Contractual and the Jurisdictional Theory, which acknowledges that while an arbitral tribunal is a creation of contract, it must also act in conformity with certain statutory requirements of public law.[78] This hybridised characterisation is considered to be a more apposite representation of the modern arbitrator, since it tranquilises the overreaching consequences of both the theories.

What emerges from the above is that a pure, unbending allegiance to either of the theoretical conceptualisations of an arbitral tribunal's juridical existence is insufficient to appropriately address the question of application of mandatory rules. While these theories do provide a reliable starting point, they certainly do not proffer a conclusive answer to this question. Instead, they leave us in search of a hybridised amalgamation of the two theories. Such a hybrid would represent the common denominator that both the Contractual and the Jurisdictional Theories subscribe to; a higher value that theorists from neither faction would decline the existence of. This common denominator comes in the shape of the arbitrator's duty to render an eventually enforceable award.

B. The Duty to Render an Enforceable Award

It is interesting that while both the Contractual and the Jurisdictional theory fall at opposite ends of the spectrum, neither denies the existence of an arbitral tribunal's duty to

75 Indian Contract Act 1872, s 28(a), Exception 1.
76 Indian Contract Act 1872, s 28(a), Exception 2.
77 Barraclough and Waincymer (n 68) 212.
78 Emilia Onyema, *International Commercial Arbitration and the Arbitrator's Contract* (Routledge 2010) 39.

render an enforceable award, even if they do differ on the extent of its importance.[79] The Jurisdictional theorists treat a breach of this duty as a breach of the law of the seat, whereas the Contractualists treat it as a breach of the arbitral contract.[80]

Irrespective of which lens one uses to view this issue, it is incongruous to deny that an arbitrator has a general duty to endeavour to render an enforceable award. Indeed, the parties' agreement to arbitrate is premised on an implicit legitimate expectation that this method will prove effective, and that the arbitral process will culminate in an enforceable award.[81] This would require that an arbitral tribunal, in addition to meeting the formal and procedural mandates of the arbitration agreement and the *lex arbitri*, must also endeavour to observe a concerned State's public policy, which includes its mandatory rules.[82] This is because the New York Convention of 1958, which forms the basis of enforcing foreign arbitral awards, permits refusal of enforcement of an award if such enforcement is contrary to the public policy of the enforcing country.[83] The same is also a ground for annulment in most arbitral legislations.[84] Consequently, an arbitral tribunal's duty to render an enforceable award can be taken a step further, so as to impose on it a duty to apply a mandatory rule of law. Such mandatory rules could emanate from *firstly*, the arbitral seat where the award may be challenged,[85] and *secondly*, the likely place(s) of enforcement of the award.[86] The authors address these two avenues individually.

Firstly, as far as the seat of arbitration is concerned, there is no hurdle in the application of its mandatory rules, since an arbitral tribunal is appropriately situated to be aware of the law of the seat, and thus take into consideration any of its relevant mandatory rules. And while it is debatable that the legitimate expectations of the parties would encompass an application of the mandatory rules of their chosen seat of arbitration, the mandatory rules of the arbitral seat nonetheless assume importance pursuant to the 'close connection' test.[87]

The close connection test, which is a fundamental principle of private international law enjoying significant acceptance, finds place in many legal instruments having domestic and international origins. For instance, Article 7 of EU's Rome Convention on the Law Applicable to Contractual Obligations provides that States may give effect 'to the mandatory rules of the law of another country with which the situation has a close

79 Günther Horvath, 'The Duty of the Tribunal to Render and Enforceable Award' (2001) 18(2) Journal of International Arbitration 135, 137-8.
80 Onyema (n 78) 45 - 48.
81 Greenawalt (n 37) 112.
82 Jan Kleinheisterkamp, 'The Impact of Internationally Mandatory Laws on the Enforceability of Arbitration Agreements' (2009) 3 WAMR 91; Pierre Lalive, 'Enforcing Awards' in *International Arbitration: 60 Years of ICC Arbitration* (ICC 1984) 317, 321.
83 New York Convention, art V(2)(b).
84 UNCITRAL Model Law, art 34(2)(b)(ii).
85 See Jan Kleinheisterkamp (n 54); Cunha (n 37).
86 Mayer (n 22) 284.
87 Convention on the Law Applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980 (80/934/EEC), art 7(2).

connection.'[88] The Rome Convention, which contains many other stipulations of the close connection test to ensure that weaker parties such as consumers and employees do not lose protection of certain mandatory rules,[89] has been implemented across Europe. For instance, there are secondary legal instruments enacted by the European Parliament and/or Council to deal with situations where the close connection test would apply within the European context and where it would apply to contracts governed by the law of a non-EU Member State.[90] Moreover, there are domestic legislative instruments, for instance in Belgium and in the Nordic States, which stipulate the application of the close connection test, albeit in many different contexts.[91] Similarly, Article 19 of the Swiss PILA, though not concerned with international arbitration, also prescribes that when 'interests that are legitimate and clearly preponderant according to the Swiss conception of law so require, a mandatory provision of another law than the one referred to by this Act may be taken into consideration, provided that the situation dealt with has a close connection with such other law.'[92] In fact, scholarly opinion suggests that at least until 1997, the prevailing view in Switzerland was that a tribunal 'having its seat in Switzerland has to have regard, and moreover, should directly apply the relevant competition laws even if they pertain to a foreign legal order (i.e. to a legal order which is outside the law governing the contractual relationship).'[93]

On applying this principle in the present context, it follows that the seat of arbitration bears a close connection with an arbitral proceeding, for it is the jurisdiction where the resultant award's validity may be assessed at the stage of annulment. Consequently, since an annulled award is not ripe for enforcement,[94] an arbitral tribunal's duty to render an enforceable award constrains it to take into account any relevant mandatory rule of the jurisdiction where the arbitral seat is situated.

Secondly, an arbitral tribunal's supposed duty to take into account the mandatory rules of the likely place(s) of enforcement is not without criticism. In many cases, an arbitral

88 Convention on the Law Applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980 (80/934/EEC), art 7(1).

89 Convention on the Law Applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980 (80/934/EEC), arts 5 and 6; see generally H Matthew Horlache, 'The Rome Convention and the German Paradigm: Forecasting the Demise of the European Convention on the Law Applicable to Contractual Obligations' (1994) 27(1) Cornell International Law Journal 173.

90 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, Official Journal of the European Union L 177/6; Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011, Official Journal of the European Union L 304/64.

91 Swedish Law No 1512 of 15 December 1994, s 13; Danish Law No. 1098 of 21 December 1994, s 38d; Law of 9 December 1998 (*Moniteur*, 23 December 1998), art 4, s 2.

92 Switzerland Federal Act on Private International Law, art 19(1); see generally *Ampaglas v Sojia*, 129 Journal des Tribunaux, 1981-111-71.

93 Marc Blessing, 'Mandatory Rules of Law versus Party Autonomy in International Arbitration' (1997) 14(4) Journal of International Arbitration 23.

94 New York Convention, art V(1)(e).

tribunal is either not aware of the potential place(s) of enforcement of its eventual award, or faces a situation where its award may in fact be enforceable in multiple jurisdictions.[95] For this reason, many even deny an arbitral tribunal's duty to render an enforceable award as a definitive source of its authority to apply any mandatory rules in the first place.[96]

However, the above reasoning merely points out the difficulty in identifying the place(s) of enforcement in a plurality of cases, without necessarily refuting an arbitrator's general duty to render an enforceable award *per se* based on the legitimate expectations of the parties. One must also question what percentage of commercial arbitration disputes actually poses this difficulty. The absence of any empirical data on this aspect undermines the credibility of this objection, which in any event is based on a presumption of multi-jurisdictional enforcement that does not necessarily apply to a significant number of commercial disputes. Thus, barring exceptional circumstances, an arbitrator's duty to render an enforceable award is ordinarily sufficient for it to apply mandatory rules of the likely place(s) of enforcement, where circumstances so require.

In this regard, the arbitral tribunal, in view of its understanding of the case, appears to be well placed to envisage the probable places where the resultant award might be enforced, and apply their mandatory rules.[97] Theoretically, such an expedition is justified in the legitimate expectations of the parties to have an enforceable award.[98] If the assets of the award-debtor are only in one State, then the tribunal must apply the mandatory rules of that State.[99] In the event the assets are located in multiple jurisdictions, more than one of which prescribe conflicting mandatory rules, the tribunal should endeavor to apply all the rules cumulatively to the extent that it can, so as to ensure that its ultimate award is the most enforceable one possible.[100] Needless to say, in any of these scenarios, it is incumbent upon the tribunal to consult the parties about the application of these mandatory rules to the facts of the case, as opposed to applying them *suo motu.* After all, the legitimate expectations of the parties also envisage the expectation to not be surprised by an award that applies laws or rules, on which they were not afforded the opportunity to make submissions. Of course, the ideal scenario is for the arbitral tribunal to ask the parties to concede on the application of a particular mandatory rule, as was done by the Court in *Mitsubishi.*

At this juncture, it is important to remind ourselves of the barter that took place in *Mitsubishi*. There, the Court agreed to relax the threshold of arbitrability on the basis of its expectation, and the agreement of the parties that the arbitral tribunal will necessary apply

95 Greenawalt (n 37) 112.
96 ibid.
97 Yves Derains, 'Public Policy and the Law Applicable to the Dispute in International Arbitration' in *Comparative Arbitration Practice and Public Policy in Arbitration* (Kluwer Law International 1987) 255.
98 ibid.
99 Barraclough and Waincymer (n 68) 218.
100 Nathalie Voser, 'Mandatory Rules of Law as a Limitation on the Law Applicable' (1996) 7 ARIA 319, 352-4. See ICC Award No 3916 of 1982, (1984) JDI 930.

the mandatory rule in question, i.e. the Sherman Antitrust Act, where the circumstances so warrant. It even warned that 'in the event the choice-of-forum and choice-of-law clauses operated […] as a prospective waiver of a party's right to pursue statutory remedies for anti-trust violations, [the Court] would have little hesitation in condemning the agreement as against public policy.'[101] The ultimate implication being that where the parties submit their contract to a foreign law, the party requesting arbitration must have 'the opportunity to show to a court that the protection afforded by the *lex contractus* is equivalent to that of the *lex fori*.'[102] If such equivalence is demonstrated, or if the parties consent to the application of mandatory rules like in *Mitsubishi*, then the national courts are likely to refer the matter to arbitration notwithstanding any concerns of inarbitrability. However, any deliberate blindness to this caveat is likely to invite judicial hostility, possible annulment or non-enforcement of the award, and in the longer run, an eventual re-tightening of the arbitrability doctrine.

V. Conclusion

The above discussion allows one to draw several conclusions. In the first place, it cannot be denied that the realm of what were traditionally considered to be inarbitrable disputes is progressively shrinking across jurisdictions. It is thus not surprising that Professor Albert Jan van den Berg's reworked New York Convention presented during the ICCA Conference of 2008, celebrating 50 years of the Convention, did not specifically mention arbitrability as a ground for refusal of enforcement either of the arbitration agreement or the arbitral award.[103] His explanation was that the ground for arbitrability should be 'subsumed in the public policy ground' itself.[104] However, the gradual decline of the relevance of the arbitrability barrier does not indicate a corresponding deterioration of the relevance of public interest in international commercial arbitration. Rather, in light of the decline of the arbitrability doctrine, many former issues of arbitrability must now necessarily be reframed as questions of application of mandatory rules, which apply notwithstanding any agreement between the parties stating to the contrary. This would involve a shift in the responsibility for safeguarding public interests from courts to arbitrators, who are being trusted more and more to resolve a variety of commercial disputes. In other words, as and how the gatekeepers of the garden of commercial arbitration become more permissive in nature, the gardeners themselves, i.e., the arbitrators, need to assume a greater responsibility in maintaining the flora with utmost care. The authors insist that this responsibility can be

101 *Mitsubishi* (n 7) 12, Footnote 19.

102 Kleinheisterkamp (n 54) 27.

103 Albert Jan van den Berg, 'Text of the Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards' (2009) ICCA Congress Series No. 14, Dublin, in Albert Jan van den berg (ed.), *50 Years of the New York Convention* (Kluwer Law International 2009) 667.

104 Albert Jan van den Berg, 'Explanatory Note to the Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards' (2009) ICCA Congress Series No. 14, Dublin, in Albert Jan van den berg (ed.) *50 Years of the New York Convention* (Kluwer Law International 2009) 649.

exercised by giving more credence to the notion of mandatory rules.

In the second place, the relevance of mandatory rules in international commercial arbitration is preserved by looking at an arbitral tribunal as a creation, not merely of the parties' contract, but also of a permissive legal system's rule of law. It is this underlying legal system around which an arbitral tribunal operates, and which creates a framework that permits the parties to exercise their autonomy to arbitrate their disputes in the first place. This outlook of an arbitral tribunal helps defend, in adequate terms, the tribunal's duty to render an enforceable award, which forms part of the legitimate expectations of the parties arbitrating their dispute and the legal framework(s) relevant to the arbitration proceeding. In turn, an arbitral tribunal's duty to identify and apply relevant mandatory rules forms a component of this duty to render the most enforceable award possible. In this regard, it is intriguing that the New York Convention does not provide a basis to refuse recognition and enforcement if an arbitral tribunal were to apply a mandatory rule not forming a part of the parties' choice of law.[105] However, an arbitral tribunal's failure to apply a mandatory rule may leave the award vulnerable for violating the public policy of a State whose mandatory rule has been overlooked.[106]

This discussion evokes memories of Joanne K. Rowling's fabled prophecy for Harry Potter and Voldemort that 'neither can live while the other survives'. But unlike Harry and his adversary, the survival of the notion of mandatory rules and the doctrine of arbitrability shares no mutuality. Quite to the contrary, their inimitable bond warrants that the decline of arbitrability must fuel an acceptance of an arbitral tribunal's duty to apply mandatory rules. In that sense, the latter must live if the former does not survive. Consequently, this tendency, coupled with an arbitral tribunal's duty to render an enforceable award, empowers and obligates a tribunal to apply mandatory rules of jurisdictions that share a 'close connection' with the dispute or the disputing parties. These typically include mandatory rules of the arbitral seat, the nationality of the parties, as well as the likely place(s) of enforcement of the eventual award.

105 See New York Convention, art V.
106 See New York Convention, art V(2)(b).

PRESERVING CONSENT WITHIN DATA PROTECTION IN THE AGE OF BIG DATA

Kritika Bhardwaj*

The principles of notice and consent have come to form the bedrock of most modern data protection statutes. With the rise of big data technologies, which are inherently based on the collection and processing of a large amount of personal information, the effectiveness of consent as the basis for data processing is increasingly being called into question. This paper attempts to refocus the debate on consent in the context of autonomy and choice, which is integral to the right to privacy. It argues that in light of the Indian Supreme Court's categorical finding to this effect, the principle of consent must not only be retained but also further strengthened under India's imminent data protection statute.

In this light, this paper critically examines a few proposed alternatives to the notice and consent paradigm. However, being alive to the practical constraints in implementing the consent principle successfully, this paper advocates for additional legal and regulatory safeguards in order to reinforce and strengthen the principle, instead of replacing it altogether.

I. Introduction

The right to privacy has famously eluded a concrete definition.[1] Over time, concepts such as secrecy, confidentiality, the right to be let alone, surveillance and freedom from search and seizure have been associated with it, depending on the context.[2] However, there is a surprising coherence in ascribing a definite, beneficial value to the right,[3] as most recently affirmed by the Supreme Court of India, where it identified the right to privacy as being essential for liberty, autonomy and the ability to live with dignity.[4]

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1 Ruth Gavison, 'Privacy and The Limits Of Law' (1980) 89 The Yale Law Journal 421.

2 Daniel J Solove, 'Conceptualizing Privacy' (2002) 90 California Law Review 1087.

3 Tom Gerety, 'Redefining Privacy' (1977) 12 Harvard Civil Rights – Civil Liberties Law Review 233; Alan F Westin, *Privacy and Freedom* (first published 1967, IG Publishing 2015); Edward J Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39 New York University Law Review 962.

4 *K Puttaswamy v Union of India* (2017) 10 SCC 1 (Puttaswamy Case).

The recognition of autonomy as an inherent facet of the right to privacy is of great significance in the context of data protection. Data protection legislations, which seek to regulate the flow of personal information from individuals to public and private entities, have largely come to rely on the principle of consent to facilitate autonomy and individual choice.[5] In practice, however, consent has proven to be ineffective in adequately shielding individuals from privacy violations.[6] Further, the emergence of big data has only raised more questions about the appropriateness of consent in safeguarding privacy.

This paper looks at the recent debates surrounding the obsolescence of the consent principle through the lens of autonomy, and emphasises on its importance in understanding and securing privacy. It explores the constitutional foundations of consent and advocates for its inclusion within the data protection framework, albeit with added technological or regulatory safeguards.

The paper is divided into five parts. The second part explains the principle of consent under data protection law in greater detail. It also locates the principle within Indian constitutional jurisprudence on the right to privacy and argues for its incorporation into India's imminent data protection law on this basis. The third part discusses the causes and consequences of an imperfect consent regime and highlights a few proposed alternatives to the prevailing model. The fourth part critiques these alternatives and advocates the incorporation of consent within a principle-based data protection framework based on, and in furtherance of, the fundamental right to privacy.

II. Locating Autonomy in Data Protection Law – Notice and Consent

Data protection statutes typically seek to regulate the uncontrolled collection, use and dissemination of personal information.[7] Data protection began emerging as a global concern almost forty years ago. While the first data protection legislation was enacted by the German state of Hesse as far back as 1970,[8] promulgation of similar statutes gained momentum with the introduction of 'fair information practices' in the United States and the issuance of principle-based guidelines by the Organisation for Economic Cooperation

5 Yvonne McDermott, 'Conceptualising The Right To Data Protection In An Era Of Big Data' (2017) 4 Big Data & Society 1.

6 Daniel Solove, 'Privacy Self-Management and the Consent Dilemma' (2013) 126 Harvard Law Review 1880; Policy and Research Group of the Office of the Privacy Commissioner of Canada, 'Consent and Privacy: A discussion paper exploring potential enhancements to consent under the Personal Information Protection and Electronic Documents Act' (Office of the Privacy Commissioner of Canada 2016) <https://www.priv.gc.ca/media/1806/consent_201605_e.pdf> accessed 2 June 2018 (Consent and Privacy); Rahul Matthan, Beyond Consent – A New Paradigm for Data Protection, Takshashila Discussion Document, 2017-03 <http://takshashila.org.in/takshashila-policy-research/discussion-document-beyond-consent-new-paradigm-data-protection/> accessed 10 March 2018.

7 '101: Data Protection' (*Privacy International*, 2018) <https://privacyinternational.org/explainer/41/101-data-protection> accessed 9 March 2018.

8 ibid.

and Development ("OECD") in 1980.[9] This section of the paper explores the conceptual foundations and principles that have come to form the bedrock of data protection statutes globally – the principles of notice and consent.[10] It argues that notice and consent are more than mere contractual tools for facilitating the transfer of personal information. As set out more fully below, these principles embody the concept of autonomy and informational self-determination, which are fundamental to the right to privacy.[11]

The impetus to regulating the use of data can largely be attributed to the digitisation of information.[12] As society's use of computers grew, there was a growing need to secure to individuals the right to control information about them.[13] Therefore, the objective of most data protection statutes as set out succinctly in the European Data Protection Directive (the 'EU Directive'),[14] is to protect fundamental rights and freedoms, particularly the right to privacy, while ensuring the free flow of data at the same time.[15] The General Data Protection Regulation (the 'GDPR'), which came into force on 25 May 2018 and repealed the EU Directive, states its objectives in similar terms.[16]

As already stated, privacy as a concept has always been elusive to being defined with any precision. Famously defined as the 'right to be let alone' in Warren and Brandeis' seminal essay,[17] privacy has also been held integral to secrecy, personhood and freedom from surveillance.[18] However, despite undergoing constant evolution in light of newer challenges, there is broad consensus on some of its core elements.[19] One of the most fundamental conceptualisations of privacy is its recognition of autonomy and the right of every individual to make the choices that impact their lives.[20] This includes one's right to

9 Privacy International 2018 (n 7); 'OECD Guidelines on The Protection of Privacy and Transborder Flows Of Personal Data' (*Organisation for Economic Cooperation and Development*, 1980) <http://www.oecd.org/sti/ieconomy/oecdguidelinesontheprotectionofprivacyandtransborderflowsofpersonaldata.htm> accessed 9 March 2018.

10 Paul M Schwartz, 'Privacy and Democracy in Cyberspace' (1999) 52 Vanderbilt Law Review 1607, 1614; Neil Richards and Woodrow Hartzog, 'Taking Trust Seriously in Privacy Law' (2016) 19 Stan Tech L Rev 431,436.

11 Consent and Privacy (n 6); *Puttaswamy Case* (DY Chandrachud J) (n 4).

12 Frits W Hondius, 'A Decade of International Data Protection' (1983) 30 Netherlands International Law Review 103.

13 ibid.

14 Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31 (EU Directive).

15 EU Directive (n 14), art 1.

16 Council Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L119/1 art 1 (General Data Protection Regulation).

17 Samuel D Warren and Louis D Brandeis, 'The Right to Privacy' (1890) 4 Harvard Law Review 193.

18 Solove, 'Conceptualizing Privacy' (n 2).

19 *Puttaswamy Case* (n 4) [102], [118], [127], [320] (DY Chandrachud J).

20 Solove, 'Conceptualizing Privacy' (n 2); Alan Westin (n 3).

control access to, and use of, their personal information. 'Informational self-determination' is, therefore, one of the core guarantees of a right to privacy.[21]

In India, the importance of consent in securing the right to privacy was first recognised by the Supreme Court in *R. Rajagopal v State of Tamil Nadu.*[22] The Court held that publication related to certain kinds of personal information was contingent on prior consent.[23] Subsequently, the Court also went on to recognise consent and autonomy as facets of privacy in the context of a woman's right to make reproductive choices.[24]

In 2017, a nine-judge bench of the Indian Supreme Court delivered its judgment in *K.S. Puttaswamy v Union of India* ('Puttaswamy').[25] This landmark ruling built on the Court's earlier jurisprudence on privacy and unequivocally recognised choice and autonomy as inherent aspects of the right to privacy.[26] The Court located privacy of choice in Articles 19(1)(a) – 19(1)(c) (the right to freedom), Article 20(3) (the right against self-incrimination), Article 21 (the right to life and personal liberty) and Article 25 (the right to freedom of religion).[27] It further held that the right to privacy is not merely a negative right that acts as a restraint on the powers of the state. The positive content of the right imposed an obligation on the state to take all necessary measures to protect the privacy of individuals.[28] This finding becomes important in light of a Committee of Experts having been constituted by the Ministry of Electronics and Information Technology for framing a data protection law in India.[29] As a result of the Supreme Court's ruling, any proposed law must, therefore, strive to give meaning to the autonomy and choice of individuals when asked to part with personal information in return for services.

In the context of data protection, one of the most visible illustrations of informational self-determination is through the principles of notice and consent.[30] Notice requires that the entity collecting personal information (the 'data controller') inform the individual parting with her personal information (the 'data subject') what data it intends to collect, and how

21 Bundesverfassungsgericht, decisions volume 65, p 1(FCC) (The German Census Case); *Puttaswamy Case* (n 4).

22 (1994) 6 SCC 632 [26].

23 ibid. However, the Court did carve out a few notable exceptions, including with respect to public officials and publication based on public records.

24 *Suchita Srivastava v Chandigarh Administration* (2009) 9 SCC 1.

25 (2017) 10 SCC 1.

26 *Puttaswamy Case* (n 4) [248], [297] (DY Chandrachud J), [510] (RF Nariman J.).

27 *Puttaswamy Case* (n 4) [412], [413], [415] (SA Bobde J), [521] (RF Nariman J).

28 Puttaswamy Case (n 4) [326] (DY Chandrachud J).

29 Surabhi Agarwal, 'Justice BN Srikrishna to Head Committee for Data Protection Framework' *The Economic Times* (01 August 2017) <https://economictimes.indiatimes.com/news/politics-and-nation/justice-bn-srikrishna-to-head-committee-for-data-protection-framework/articleshow/59866006.cms> accessed 27 June 2018.

30 McDermott (n 5); Article 29 Data Protection Working Party, 'Opinion 15 / 2011 on the definition of consent' (This Working Party was set up under Article 29 of Directive 95/46/EC, 2011) <http://www.pdpjournals.com/docs/88081.pdf> accessed 2 June 2018; Consent and Privacy (n 6).

it will process it.[31] Similarly, the consent principle stipulates that personal data can only be collected and used pursuant to the data subject's consent.[32] An important corollary to this principle is the power to withdraw consent and opt out from the continued processing of one's personal information.[33]

The rationale for data processing being contingent on informed consent is rooted in empowering the individual to exercise control over the collection, use and storage of her information.[34] Accordingly, consent can only be informed if the notice clearly describes the intended use by the data controller.

Therefore, the relegation of consent to a purely contractual device – that of acceptance of the data controller's offer - is somewhat simplistic in the context of privacy law. Instead, the salience of notice and consent in most modern data protection statutes is indicative of the importance of autonomy as a facet of privacy. This was also recognised by the Supreme Court in *Puttaswamy.*[35]

However, as elaborated below, the extensive use of standard form contracts in the shape of lengthy and complicated privacy notices has led to concerns about the efficacy of a consent-based data protection model.[36] Recent technological developments have complicated this further, leading to growing calls about replacing consent with other principles to effectively secure privacy.[37] The following section of the paper outlines these concerns in greater detail and discusses some of the alternatives that have been put forth.

III. Big Data and Consent Fatigue

Successful implementation of the consent principle is based on the ability of an

31 *Report Of The Group Of Experts On Privacy* (Planning Commission of India 2012) <http://planningcommission.nic.in/reports/genrep/rep_privacy.pdf> accessed 9 March 2018 (Privacy Report 2012).

32 ibid; However, it is useful to clarify that despite the emphasis on consent, it is not the only ground for the processing of personal information. Under most data protection statutes / regulations, processing is permissible if it is necessary for the performance of a contract to which the data subject is a party, or in public interest, among other grounds. See for example, General Data Protection Regulation, art 6.

33 Privacy Report 2012 (n 31).

34 ibid; McDermott (n 5).

35 *Puttaswamy Case* (n 4) (DY Chandrachud J).

36 *Report To The President- Big Data And Privacy: A Technological Perspective* (Executive Office of the President 2014) <https://bigdatawg.nist.gov/pdf/pcast_big_data_and_privacy_-_may_2014.pdf> accessed 9 March 2018 (Report To The President).

37 Kate Crawford and Jason Schultz, 'Big Data and Due Process: Toward a Framework to Redress Predictive Privacy Harms' (2014) 55 BCL Rev 93; Fred Cate, Peter Cullen and Viktor Mayer Schönberger, *Data Protection Principles For The 21St Century: Revising The 1980 OECD Guidelines* (University of Oxford 2014) <https://www.oii.ox.ac.uk/archive/downloads/publications/Data_Protection_Principles_for_the_21st_Century.pdf> accessed 9 March 2018; Omer Tene and Jules Polonetsky, 'Big Data for All: Privacy and User Control in the Age of Analytics' (2013) 11 Northwestern Journal Technology & Intellectual Property 239.

individual to make an informed decision after reading a privacy notice.[38] This requires that the notice be accessible and easy to understand in terms of setting out the data controller's information practices. However, for several reasons, this has been difficult to achieve.

Most privacy notices are worded in a complicated fashion and usually run into several pages, making it difficult for most people to understand the full import of what they are consenting to.[39] Further, notices are often not available in local languages, preventing a large portion of the population from accessing them.[40]

With the rapid growth of, and reliance on, online services, this accessibility problem has compounded in recent times.[41] Technologically, the advancement of computing power and the steady reduction of storage costs has led to a situation where the retention of data is the norm, and its deletion the exception.[42] Big data – which envisages the use of large data sets to gain unprecedented insights[43] – has, therefore, become a big industry.[44] Big data techniques are particularly intrusive as they enable the creation of detailed profiles from seemingly innocuous and interrelated data.[45] The better part of the last decade has seen tremendous support for the use of big data analytics to facilitate innovation, efficiency and productivity.[46] As a result, both businesses and governments are keen to explore its results to gain greater insights into trends, behaviours and patterns, ostensibly resulting in better targeting of services, products, and policy.[47]

However, big data diminishes the value of consent as it inherently relies on the collection of large amounts of personal data and its continued use for purposes other than what it was

38 Amber Sinha and Scott Mason, 'A Critique Of Consent In Information Privacy' (*The Centre for Internet and Society*, 2016) <https://cis-india.org/internet-governance/blog/a-critique-of-consent-in-information-privacy#_ftn3> accessed 9 March 2018.

39 Susan E Gindin, 'Nobody Reads Your Privacy Policy or Online Contract? Lessons Learned and Questions Raised by the FTC's Action Against Sears' (2009) 8 Northwestern Journal Technology & Intellectual Property 1.

40 Sinha and Mason (n 38).

41 Fred H Cate, 'The Limits of Notice and Choice' (University of Hong Kong 2015) <http://www.lawtech.hk/pni/wp-content/uploads/2015/04/Fred-H-Cate.pdf> accessed 14 March 2018; Report To The President (n 36).

42 Viktor Mayer Schönberger, *Delete: The Virtue of Forgetting in the Digital Age* (Princeton University Press 2010) 52.

43 Crawford (n 37) 96.

44 Tene and Polonetsky (n 37) 243.

45 Crawford (n 37) 98; Viktor Mayer Schönberger and Yann Padova, 'Regime Change? Enabling Big Data Through Europe's New Data Protection Regulation' (2016) 17 The Columbia Science and Technology Law Review 315.

46 James Manyika and others, 'Big data: The next frontier for innovation, competition, and productivity' (McKinsey Global Institute 2011) <http://www.mckinsey.com/Insights/MGI/Research/Technology_and_Innovation/Big_data_The_next_frontier_for_innovation> accessed 10 March 2018 (MGI Report); Erik Brynjolfsson, Lorin Hitt and Heekyung Kim, 'Strength in Numbers: How Does Data-Driven Decision-Making Affect Firm Performance?' (April 2011) <http://www.a51.nl/storage/pdf/SSRN_id1819486.pdf> accessed 10 March 2018.

47 MGI Report (n 46).

originally collected for.[48] This information can be used to gain newer insights or make decisions about an individual, giving rise to legitimate concerns regarding discrimination and loss of autonomy.[49]

In view of the unprecedented volume of processing, it is increasingly argued that mandating explicit consent for every use of personal data is no longer practical.[50] Shoe-horning big-data practices into the current regulatory framework has had the unintended consequence of individuals parting with large amounts of personal information pursuant to vague and broadly worded privacy notices.[51]

The growing unease with the centrality of consent within the data protection framework has led to suggestions that the consent principle be replaced with other alternatives. In 2012, Tene and Polonetsky argued that consent and data minimisation principles be 'loosened' in favour of stronger access and transparency rights.[52] They advocated for data processing to be more open to scrutiny, enabling individuals to have more knowledge about how their information was used and how decisions were taken on the basis of it.[53] It was also suggested that giving individuals access to these newer insights would enable them to alter their own choices for the better.[54]

More recently, there have been proposals to replace consent altogether with the principle of accountability.[55] Arguing that the consent model places an unrealistic expectation on individuals to give informed consent for all data use, this proposal, as advocated by Rahul Matthan, seeks to shift the burden of evaluating privacy risks onto the data controller.[56] Accordingly, the accountability principle stipulates that data controllers are responsible for any harm resulting from the data collected or used by them.[57] One particular proposal contemplates strict financial penalties in case of proven 'harm'.[58] Under this model, fiduciary duty over personal data absolves the data controller of seeking consent for its collection and consequently of any restrictions on the uses it can be put to.[59] The proposal is instead based on the right to fair treatment, data security and the right to opt-out, in order to safeguard the rights of individuals.[60] The last guarantee is curious, as despite being

48 Tene and Polonetsky (n 37) 240, 242, 259.
49 Crawford (n 37).
50 Solove, 'Privacy Self-Management and the Consent Dilemma' (n 6); Report To The President (n 36).
51 Viktor Mayer Schönberger and Yann Padova (n 45).
52 Tene and Polonetsky (n 37) 263.
53 ibid 34.
54 ibid 32.
55 Rahul Matthan (n 6); Consent and Privacy (n 6).
56 ibid.
57 ibid. Fred Cate, Peter Cullen and Viktor Mayer-Schönberger, *Data Protection Principles for the 21st Century* (*Maurer School of Law*, 2013) <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1022&context=facbooks> accessed 14 March 2018.
58 Matthan (n 6) 8.
59 ibid.
60 ibid 5-6.

projected as an alternative to consent, the model guarantees a right to opt-out, which is an inherent aspect of consent.

Besides the above, noted privacy scholar Anita Allen has advocated for 'modest paternalism', arguing that in certain circumstances, regulations must bar individuals from waiving their privacy.[61] While Allen acknowledges the dichotomy between favouring individual autonomy and advocating for paternalism in regulation, she justifies her stance by labelling privacy as a 'primary good', essential for dignified co-existence in society.[62]

What emerges from the above is that there is deep unease with the status quo in privacy regulation. There is growing concern that consent ought not to be the sole basis for processing of personal information, as individuals are unable to engage meaningfully with businesses or governments collecting their data. While this concern is legitimate, the above alternatives appear to focus on finding replacements for the consent model, instead of exploring possible methods to strengthen it. The weaknesses of the above proposals and a possible way forward is explored in some detail in the following section.

IV. Why Consent Must Stay

The primary criticism of all these alternatives, as acknowledged by Allan and further articulated by Daniel Solove,[63] is that there is an inherent contradiction in taking away consent in order to safeguard privacy - given that the right serves to enable freedom in decision-making.

The principal issue in favouring accountability over, and instead of consent, stems from the fact that it tends to infantilise the data subject. Irrespective of the practical experience with the consent model, a framework for the protection of privacy based on principles cannot proceed on the basis that individuals are incapable of making meaningful decisions. Here, it is important to create a distinction between the present context and other instances where paternalism is justified – such as mandating seat-belts or helmets for motorists. When the object of the law itself is to protect privacy, the ends cannot be achieved by taking away individuals' autonomy over who accesses their data and how it may be used.

Further, any emphasis on access, transparency or accountability is premised on taking corrective action only *post facto*. That is, both proposed models arm the data subject with rights only after extensive personal information has already been collected and presumably shared with a host of entities. The absence of checks at the time of collection also results in the complete go-by of other essential principles of data protection – that only data that is strictly essential be collected, and that its use be restricted to the purpose it was collected for. In their defence, proponents of the above alternatives envisage this but largely argue that, along with consent, principles of data minimisation and purpose limitation serve to

61 Anita Allen, *Unpopular Privacy: What Must We Hide?* (OUP 2011).
62 ibid.
63 Solove, 'Privacy Self-Management and the Consent Dilemma' (n 6) 1896.

limit the potential of big data.[64]

Besides the above, a more fundamental objection to the entire debate on big data, and consequently the relevance of consent, is that privacy is looked at as an obstacle to the potential advantages of big data.[65] This framing, which pits innovation against privacy, is problematic. Innovation or other related benefits are only desirable if they further individual autonomy, and not if they come at the cost of it.[66]

Accordingly, any articulation of data protection must further individuals' right to autonomy, and give meaning and colour to the Supreme Court's recognition of privacy as a fundamental right. In this context, the recent GDPR serves as an excellent example. Despite being cognizant of recent technological challenges,[67] the framers of the Regulation decided to further strengthen the requirements for valid consent for the processing of personal information.[68] The continuing emphasis on consent in Europe stems from its recognition of protection of personal data as a fundamental right under the Charter of Fundamental Rights of the European Union,[69] and its explicit acknowledgement in the GDPR that 'processing of personal data should be designed to serve mankind.'[70] Therefore, far from doing away with consent, further technological and regulatory safeguards must be introduced to give consent the vigour it requires. However, before attempting to flesh out what these might be, two other clarifications are important.

First, it is a fallacy to view consent as the only basis for processing of personal information. Most data protection statutes, including the GDPR, recognise several other grounds as justification for collection and use of personal information.[71] These include legitimate interests of the controller,[72] processing necessary for compliance with a legal obligation,[73] and public interest.[74]

Similarly, consent should not be allowed to override other mandatory principles of data protection, especially data minimisation and purpose limitation.[75] These are independent

64 Tene and Polonetsky (n 37) 22-23; Matthan (n 6) 242, 259.

65 Submissions by legal academics and advocates to the Justice Srikrishna Committee of Experts on Data Protection (31 Jan 2018) <http://privacyisaright.in/wp-content/uploads/2018/02/Detailed-Answers-to-the-Justice-Srikrishna-Committee-White-Paper-1.pdf> accessed 10 March 2018 (Submissions to White Paper).

66 ibid.

67 General Data Protection Regulation, Recital 6.

68 ibid art 7.

69 Charter of Fundamental Rights of the European Union [2000] OJ C364/01, art 8(1).

70 General Data Protection Regulation, Recital 4.

71 ibid art 6(1).

72 ibid art 6(1)(f).

73 ibid art 6(1)(c).

74 ibid art 6(1)(e).

75 Article 29 Data Protection Working Party, 'Guidelines on Consent Under Regulation 2016/679' (17/EN WP259, 2017) <https://iapp.org/media/pdf/resource_center/wp29_consent-12-12-17.pdf> accessed 13 March 2018.

principles and data controllers must be required to demonstrate compliance with them independent of consent. In other words, privacy notices with broad and vaguely worded purposes should come under scrutiny irrespective of the data subject's consent.

There have been several suggestions for strengthening the existing consent model, all of which deserve due consideration. For instance, Solove recommends adopting partial privacy self – management, where individuals can exercise their consent for the collection and use of their data, but the default option 'nudges' them towards a more privacy-friendly decision.[76] He further suggests that privacy laws forego neutrality in favour of a more value-driven approach – by codifying or classifying certain practices or forms of data collection as being particularly troublesome.[77]

It has also been argued that lawmakers draw from existing safeguards under Indian law, for example under the Contract Act 1872, to supplement the principle of consent with legal rules regarding the validity of a contract.[78] Similarly, the concept of fairness under consumer protection law could also be applied to the data protection context, not just with respect to the terms of the contract, but also in determining how an individual was made to enter it.[79] A related development could also be to mandate a certain degree of granular choice with respect to parting with some kinds of personal information, as opposed to the prevailing 'take it or leave it' approach. This could include an option to the data subject to not part with personal information that is not strictly required by a data controller to provide its product or services.[80] Another means to supplement the consent framework is to mandate a data breach notification mechanism, where, in the event of a data breach and depending on its nature and extent, a data controller would be required to report the breach to the affected data subject(s), allowing them to take necessary corrective action.[81]

The crux of these proposals, therefore, is that the overarching architecture of data protection be strengthened in a manner that facilitates the effective exercise of one's right to consent. This is not merely the correct approach for framing any data protection legislation in India, but also necessary in light of the Supreme Court's landmark decision in *Puttaswamy*. By virtue of the Court locating autonomy within the heart of privacy, and holding that the state had a positive obligation to fulfil this right, the framers of India's data protection law are under an obligation to preserve and strengthen the role of consent in the processing of personal information.

76 Solove, 'Privacy Self-Management and the Consent Dilemma' (n 6).

77 ibid.

78 Smitha Krishna Prasad, 'Back to Basics: Framing a New Data Protection Law for India' (2018). <https://ssrn.com/abstract=3113536 > accessed 10 March 2018.

79 Michiel Rhoen, 'Beyond Consent: Improving Data Protection through Consumer Protection Law' (2016) 5(1) Internet Policy Review <https://policyreview.info/articles/analysis/beyond-consent-improving-data-protection-through-consumer-protection-law> accessed 10 March 2018.

80 Smitha Krishna Prasad (n 78).

81 General Data Protection Regulation, art 34.

V. Conclusion

The primary focus of this paper has been that the principle of consent must not, and indeed cannot be done away with when formulating principles for a data protection law in India. Consent embodies the concept of autonomy, which is inherent to privacy. With this being expressly recognised by the Indian Supreme Court, the framers of India's data protection law must strive to give it more meaning than it currently has.

However, this paper also acknowledges the legitimate problems with implementing informed consent, especially in light of the widespread use of standard form contracts and the rise of big data. This has given rise to substantial scholarship on the failure of the consent model and several alternatives have been proposed over the last few years.

Nonetheless, as this paper attempts to point out, each of these proposals is not without its flaws. Further, any alternative to consent would entail losing some degree of autonomy over the collection and dissemination of one's personal information. Such a framework would go against the letter and spirit of the Supreme Court's ruling in *Puttaswamy.* Therefore, this paper argues that lawmakers must look to fixing the gaps instead of replacing consent with other alternatives. As outlined above, some of these potential 'fixes' already exist under contract law or consumer protection law and may be moulded appropriately to make India's data protection law more effective. Similarly, a stricter interpretation of free or informed consent can be used to compel data controllers to be more transparent about their data practices, ensuring that data subjects understand what they are consenting to. Regulation could also play a role in mandating data controllers to disclose which information is strictly necessary for the performance of their obligation and which is required solely or largely for advertising purposes.

To conclude, the entire premise of the legislative exercise of drafting a data protection law must be based on the acceptance of a principle-based approach that seeks to enhance citizens' choices. As long as there is a consensus that individual rights and freedoms lie at the centre of a data protection statute, consent will continue to play a vital role.

RIPPLE, IF NOT THE WAVES EFFECT: ANALYSING THE WAY(S) IN WHICH PROXY ADVISORY FIRMS CAN AFFECT CORPORATE GOVERNANCE IN INDIA, IN THE 'LONG RUN'

Priya Garg*

'Effective corporate governance' as a phrase has been trending in India. There have been a bucketful of reforms to encourage shareholders' participation, particularly that of minority shareholders, in improving companies' corporate governance. This certainly has and will continue to cast an impact on institutional investors (IIs) as minority shareholders. Additionally, the reforms aimed at improving the inflow of Foreign Institutional Investment in India should increase the role of IIs as shareholders. Moreover, legal reforms have been, and are further proposed to be introduced to create a nudge-effect among IIs in this direction. Against the backdrop of these developments, a new vacuum appears. For instance, the overriding factor of cost in the cost-benefit analysis of IIs due to factors such as their dispersed shareholding, fear of free-riding by other minority shareholders in investee companies, existence of legal hurdles in their path of acting in cooperation with other IIs, etc. may discourage their involvement. Amidst this scenario, intermediaries such as proxy advisory firms enter the Indian landscape. By enjoying the benefits of economies of scale, division of labour and specialisation in their research endeavours and other operational activities, these firms can reduce the cost element in the cost-benefit analysis of IIs while they decide whether or not to participate in influencing their investee companies' corporate governance. There are other additional ways in which these firms can encourage shareholder-activism among IIs and other minority shareholders. Such is the likely 'potential' of these firms in affecting India's corporate governance. The present paper elaborates on these aspects. It also highlights if barriers exist against the firms' materialisation of this 'potential'. This paper is thereby the first of its kind to analyse in detail the SEBI Regulations regulating these firms and the role these firms can play, if any, in the 'long run' in improving India's corporate governance.

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I. Introduction

Proxy advisory firms are new entrants in India's corporate governance landscape. The central feature common to them is that they act as research analysts or advisory bodies.[1] They conduct thorough research on relevant companies, industries, sectors, laws and other disciplines to offer reliable recommendations to their shareholder clients (especially IIs) regarding the stance that the latter should adopt in relation to any resolution proposed to be passed by their investee companies.[2] In India, however, due to the limited reach of IIs as shareholders, these firms provide recommendations only in relation to a specific set of listed companies.[3]

In 2010, with the founding of Ingovern, India witnessed the establishment of the country's first proxy advisory firm.[4] Within a span of less than five years, two more competing proxy advisory firms, namely Stakeholders Empowerment Services (SES) and Institutional Investor Advisory Services India Limited (*IiAS*), entered the picture.[5]

Besides offering proxy advisory services, these firms have diversified into offering a host of other allied services. For instance, IiAS, besides offering voting advisory services, additionally provides the facility of preparing corporate governance scorecards for its clients.[6] This scorecard can be useful for companies, investors, creditors as well as regulators in relation to any business entity.[7] Similarly, another one of India's proxy advisory firm, SES, offers the service of investors' education.[8] ISS, a prominent firm of the US, offers assistance to its clients regarding their class-action suits.[9] In addition to offering advisory services to their shareholder clients regarding the votes that they are willing to cast upon their investee company's resolutions, these firms also provide continuous guidance

1 S Subramanian, 'Proxy Advisory Industry in India' (2016) 13(2) Corporate Ownership & Control 371; 'Who We Are' (*Institutional Investor Advisory Services,* 2018) <https://www.iiasadvisory.com/about> accessed 21 May 2018; 'Services' (*Ingovern*) <http://www.ingovern.com/services/> accessed 21 May 2018; 'About SES' (*Stakeholders Empowerment Services*) <https://www.sesgovernance.com/about-us> accessed 21 May 2018.

2 ibid.

3 Subramanian (n 1) 375; As of April 2014, Ingovern offered voting recommendations for more than 500 listed firms while as of August 2015 IiAS provided voting recommendations for over 300 companies.

4 'Tag Archives: Proxy Advisory' (*Ingovern*) <http://www.ingovern.com/tag/proxy-advisory/> accessed 18 September 2017.

5 Bhuma Shrivastava, 'Proxy Advisory Firms Give a Boost to Shareholder Activism' *Livemint* (19 September 2017) <HTTP://WWW.LIVEMINT.COM/COMPANIES/HEUG8SPSW3ZXE4SUYHECQN/PROXY-ADVISORY-FIRMS-GIVE-A-BOOST-TO-SHAREHOLDER-ACTIVISM.HTML> accessed 20 September 2017.

6 'Governance Scorecard' (*Institutional Investor Advisory Services*) <https://www.iiasadvisory.com/governance-scorecard> accessed 18 September 2017.

7 ibid.

8 'Services Offered' (*SES*) <http://www.sesgovernance.com/investors-education> accessed 18 September 2017 (SES).

9 'Securities Class Action Services' (*ISS*, 2018) <https://www.issgovernance.com/securities-class-action-services/> accessed 18 September 2017.

to these investors regarding several matters including the general affairs of the company.[10]

At the micro-level, their emergence in India could be viewed as an entrepreneurial strategy aimed at tapping the opportunities that several developments present. Some of these developments relate to the rise in the role of institutional investors as shareholders, a growing clamour for improving corporate governance, and increased shareholders' activism.[11] At the macro-level, their rise can influence the country's corporate governance landscape. However, there has been a serious dearth of literature regarding the actual impact these firms can have on India's corporate governance.[12]

Therefore, in this paper, I firstly elaborate upon the reasons for the recent emergence of proxy advisory firms and the role they can 'potentially' play in improving India's corporate governance in Part II. Given the range of services these firms offer, I clarify that while analysing their influence upon the country's corporate governance landscape, I would focus primarily on their advisory function. However, occasionally I would also take into account the role that the ancillary services provided by them could potentially play in the long run in this regard. I also flag the roadblocks that presently exist in the path of these firms in India towards reaching the goal of making their presence felt in the country's corporate governance matters in Part III. In Part IV, I present my conclusion.

II. Analysis of The Reasons Behind The Emergence of Proxy Advisory Firms in India and The Role They Could Potentially Play in Improving The Country's Corporate Governance

Recently, there has been a growing clarion regarding the need to improve corporate governance in the country.[13] This has paved the way for the development of means,

10 SES (n 8).

11 Umakanth Varottil, 'The Advent of Shareholder Activism in India' (2012) 1(6) Journal of Governance 582; Rajesh Naidu and Ashutosh R Shyam, 'Shareholder activism, stringent disclosures helps India improve corporate governance score' *The Economic Times* (3 October 2014) <https://economictimes.indiatimes.com/news/company/corporate-trends/shareholder-activism-stringent-disclosures-helps-india-improve-corporate-governance-score/articleshow/44144468.cms> accessed 21 May 2018; OECD, *Improving Corporate Governance in India Related Party Transactions and Minority Shareholder Protection* (OECD Publishing 2014) 11 <https://www.oecd.org/daf/ca/Improving-Corporate-Governance-India.pdf> accessed 21 May 2018.

India has over the years pursued and introduced several measures to improve corporate governance standards including the introduction of a new Company Bill in 2013. However, further measures are needed to improve minority shareholder protection, support a higher degree of transparency and disclosure, and promote greater accountability of controlling shareholders.

12 Subramanian (n 1) 377.

13 Umakanth Varottil, 'Shareholder Activism and Proxy-Advisory Firms' (*IndiaCorpLaw*, 6 December 2011) <https://indiacorplaw.in/2011/12/shareholder-activism-and-proxy-advisory.html> accessed 18 September 2017; Aveek Datta, 'India Inc improves corporate governance standards: IFC report' (*Forbes India,* 21 February 2018) <http://www.forbesindia.com/article/work-in-progress/india-inc-improves-corpo-rate-governance-standards-ifc-report/49493/1> accessed 21 May 2018; Rishabh Shroff, Tanmay Patnaik and Kavya Keshari, 'India's Tough

mechanisms and tools for increasing shareholders' activism.[14] For instance, company law in India has permitted shareholders' casting of votes by e-voting to encourage their participation in the governance of investee companies.[15] Similarly, company law has recently allowed shareholders to participate in shareholders' meetings *via* video conferencing.[16] Under the Companies Act 1956, there existed the requirement of obtaining regulatory approval or/and a mere board approval regarding these matters.[17] However, under the Companies Act, 2013, the role of shareholders in an investee company's governance has been increased by making their prior consent mandatory in case of several matters or upon various resolutions.[18] Moreover, there has been a noticeable increase in the general level of awareness among shareholders towards the need to improve corporate governance.[19]

The role of minority shareholders has also been made more prominent under India's business laws. This further incentivises them to participate in their investee company's affairs. For instance, provisions relating to Related Party Transactions (RPTs) prohibit the participation of 'interested' shareholders (who are in most cases promoters or/and their relatives) in resolutions wherein permission is granted to the concerned company to enter into a related party arrangement.[20] As a result voting strength of minority or unrelated shareholders increases in these resolutions.[21] This furthers shareholder activism and a message that votes of minority shareholders could be impactful is sent far and wide. Similarly, in order to safeguard the interests of minority shareholders, the incorporation of an entrenchment provision into company's Articles of Association (AoA) has been made more difficult under the Companies Act, 2013.[22] For such incorporation, in the case of 'private company' consent of all the shareholders is needed while in case of 'public

New Corporate Governance Regime – Impact on Promoters' (*Cyril Amarchand Mangaldas*, 23 April 2018) <https://privateclient.cyrilamarchandblogs.com/2018/04/indias-tough-new-corporate-governance-regime-impact-promoters/> accessed 21 May 2018.

14 'Shareholder Activism in India' (*Law Times Journal,* 6 August 2017) <http://lawtimesjournal.in/shareholder-activism-india/> accessed 18 September 2017.

15 Companies Act 2013, s 108 (Concept of e-voting has been introduced by the Companies Act 2013); ICSI, *E-Voting* (ICSI 2014) 2 <https://www.icsi.edu/webmodules/CompaniesAct2013/E-VOTING%2018-08-14.pdf> accessed 21 May 2018; Varottil, 'The Advent of Shareholder Activism in India' (n 11) 586.

16 ICSI 2014 (n 15) 598; Companies Act 2013, s 173 read with Rule 3 of the Companies (Meetings of Board and its Powers) Rules, 2014 has laid down elaborate procedures for conducting meeting through video conferencing at Board Meetings.

17 ibid.

18 Companies Act 2013, s 197. In case any company intends to pay its managerial personnel, a remuneration, higher than the maximum limit prescribed, shareholders' prior consent is required now.

19 Khusboo Narayan, 'The Advent of Shareholder Activism in India' *Livemint* (27 November 2014) <http://www.livemint.com/Companies/hri4Acn53de1Q48RFAcNwJ/The-advent-of-shareholder-activism-in-India.html> accessed 19 September 2017.

20 Companies Act, 2013 s 188(1).

21 Sachin P Mampatta, 'Small Guys Can Punch above Their Weight' *Business Standard* (29 July 2014) <http://www.business-standard.com/article/markets/small-guys-can-punch-above-their-weight-114082901000_1.html> accessed 28 May 2018.

22 Companies Act, 2013, s 5(3).

company', consent of its members through special resolution is required.[23] Additionally, the provision existing under Companies Act, 2013 granting minority shareholders the right of class-action suits has been brought into effect.[24] This further strengthens the role of minority shareholders in companies.[25]

As equity shareholders, IIs at present mostly hold minority shares.[26] Therefore these recent winds of change encourage active participation by them in their investee company's governance. Further, their stakes as equity shareholders are on the rise in India due to the promotion of Foreign Institutional Investors (FIIs) and FDI in the country.[27] This can have a positive impact on corporate governance for FIIs are known to have acted in the recent past as active shareholders in relation to the investee companies, unlike their domestic counterparts.[28] Actions are also being taken to ensure that retail investors participate in the company's shareholding indirectly through institutional investors.[29] This would further improve the shareholding percentage of institutional investors in companies in India.[30]

Recently, the Indian government has been bent upon producing a nudge-effect amongst domestic IIs to encourage their participation in investee companies' governance.[31] For instance, in 2010, the Securities and Exchange Board of India (SEBI) required mutual

23 Companies Act, 2013, s 5(4).

24 Companies Act 2013, s 245 (Notification of Section 245 of Companies Act 2013 MCA vide notification number S O 1934(E) dated June 01 2016 has notified the aforesaid section of the Companies Act 2013 keeping in view the constitution of National Company Law Tribunal).

25 Shreeja Sen, 'Class Action Suits in Indian Company Law, Explained' *Livemint* (10 July 2016) <http://www.livemint.com/Companies/OhvhdZ4oAPmUCy5Ji9bWjM/Class-action-suits-in-company-law-explained.html> accessed 18 September 2017.

26 M Sabarinath, 'BSE, 3 Others Buy 74% in Proxy Advisory Firm IIAS: Tatas, Fitch &HDFC to Together Hold 44% Stake, While BSE Will Own 30% in Company' *Times of India* (23 November 2011) <http://epaper.timesofindia.com/Repository/getFiles.asp?Style=OliveXLib:LowLevelEntityToPrint_ETNEW&Type=text/html&Locale=english-skin-custom&Path=ETM/2011/11/23&ID=Ar00600> accessed 18 September 2017.
Though most of India's leading IIs such as Reliance Industries and those belonging to the Tata Group, are part of an industrial Group and are run by a dominant shareholder, others such as ICICI Bank, L&T, HDFC and ITC do not have identifiable promoters and are majority-owned by institutional shareholders.

27 Subramanian (n 1).

28 Atisha Singh, 'Role of Proxy Advisory Firms in Corporate Governance' (*Legal Services India*) <http://www.legalservicesindia.com/article/2303/Role-of-Proxy-Advisory-Firms-In-Corporate-Governance.html> accessed 28 May 2018.

29 Pitabas Mohanty, 'Institutional Investors and Corporate Governance in India' <https://www.nseindia.com/content/research/Paper42.pdf> accessed 18 September 2017; Sudipto Roy, 'Ensuring Corporate Governance' *Money Today* (June 2010) <http://www.businesstoday.in/moneytoday/cover-story/ensuring-corporate-governance/story/8727.html> accessed 18 September 2017.

30 ibid.

31 Dhirendra Kumar, 'Why MFs Should Play a Bigger Role in Corp Governance Issues' *Economic Times* (18 September 2017) <http://economictimes.indiatimes.com/markets/stocks/news/why-mfs-should-play-a-bigger-role-in-corp-governance-issues/articleshow/60286031.cms> accessed 18 September 2017.

funds to disclose their voting behaviour on shareholder resolutions.[32] In 2014, SEBI further required these funds to make public the rationale behind their voting decisions.[33]

There has been a growing clamour to impose a fiduciary obligation upon IIs towards their individual investor clients.[34] This would also oblige IIs to participate in investee companies' governance, including casting their votes on behalf of their individual investors.[35] This is because improved corporate governance in the investee entity is likely to pave the way for higher returns on investments made by IIs on behalf of their clients.[36] Though such fiduciary obligation has not been hitherto imposed on IIs in India, it may be imposed on them contractually by individual investors. Similarly, institutional funds are increasingly being set up as trusts.[37] This also imposes a fiduciary duty upon IIs and obligates them to participate in investee companies' governance.[38]

However, against this backdrop of developments, a new vacuum appears. Where on one hand, the casting of votes and participation in meetings by shareholders (and more specifically the minority shareholders) is being encouraged, the dearth of adequate information among investors such as IIs regarding the investee company's affairs has appeared as a hassle.[39]

This problem of information asymmetry is likely to be felt even more prominently

32 SEBI, Circular for Mutual Funds, SEBI/IMD/CIR No.18/198647/2010, (15 March 2010).

33 SEBI, All Mutual Funds/Asset Management Companies (AMCs)/ Trustee Companies/ Boards of Trustees of Mutual Funds/ Association of Mutual Funds in India (AMFI), CIR/ IMD/DF/05/2014, (*SEBI*, 24 March 2014) <https://www.sebi.gov.in/legal/circulars/mar-2014/enhancing-disclosures-investor-education-and-awareness-campaign-developing-alternative-distribution-channels-for-mutual-fund-products-etc_26537.html> accessed 21 May 2018.

34 Allan L McCall and David F Larcke, 'Researchers: the Power of Proxy Advisory Firms', (*Stanford Business*, 13 January 2014) <https://www.gsb.stanford.edu/insights/researchers-power-proxy-advisory-firms> accessed 18 September 2017; 'Institutional investors at the heart of good corporate governance', *The Economic Times* (26 May 2017) <https://cfo.economictimes.indiatimes.com/news/institutional-investors-at-the-heart-of-the-good-corporate-governance/58854036> accessed 21 May 2018.

35 Subramanian (n 1).
A major breakthrough came in 1988, when the U.S. Department of Labor took the position that the voting of proxies of shares of stock owned by a pension plan was part of the plan's fiduciary duty to manage employee benefit plan assets. This development prompted managers of employee retirement plan assets to seek help from the proxy advisory industry to satisfy their fiduciary responsibilities to vote proxies in the best interests of their clients.

36 ibid.

37 Aik Win Tan and Trish Keeper, 'Institutional Investors and Corporate Governance: A New Zealand Perspective', (2008) 65 Centre for Accounting, Governance and Taxation Research School of Accounting and Commercial Law, Victoria University of Wellington <https://www.victoria.ac.nz/sacl/centres-and-institutes/cagtr/working-papers/WP65.pdf> accessed on 28 May 2018.

38 'Fiduciary Duties during Administration of Trusts and Estates' (*Wolcott Rivers Gates*, 30 September 2013) <http://www.wolcottriversgates.com/blog/fiduciary-duties-during-administration-of-trusts-and-estates/> accessed 18 September 2017.

39 Singh (n 28); Subramanian (n 1) 371, 372.

by IIs as shareholders.[40] This is because they often hold diversified portfolios in several distinct companies instead of holding concentrated shareholding in a few companies.[41] Therefore, they are likely to find themselves spread too thin while allocating their time and resources towards attending meetings and participating in other ways in the governance of their numerous investee companies.[42] Further, companies' shareholders' meetings are often scheduled around the same period in a year.[43] This overloads IIs holding diversified portfolios if they want to effectively participate in every resolution of the investee companies.[44]

These investors are guided by their own business motives, which places them under a constant burden to generate high returns for their investor clients.[45] Therefore, these investors constantly undertake a cost-benefit analysis to decide whether to participate in corporate governance matters of their investee company(ies).[46] In cases where the cost of gathering information and arriving at a decision exceeds the benefit of their involvement, IIs abstain from participating. And this is often the case that their cost of participation would exceed the benefits generated.[47] This is because, in addition to the reasons stated above, each II alone holds only a meagre percentage of shares in a company at a given point in time.[48] This dis-incentivises these investors from contributing towards improving the investee company's governance. They apprehend that despite their small shareholding, if they incur costs on improving corporate governance while other investors do not, then they alone would have to bear the price of free riding by the latter.[49] However, amidst this issue of holding a small percentage of shares, one possible way out is if all IIs within a company show mutual cooperation with each other while participating in the company's governance.[50] This is needed to reduce the cost of their participation and to deal with their fear of free riding by other IIs as shareholders.[51]

40 Subramanian (n 1) 371, 373.
41 ibid.
42 ibid. Mohanty (n 29); Center On Executive Compensation, 'A Call for Change in the Proxy Advisory Industry Status Quo: The Case for Greater Accountability and Oversight' *The Wall Street Journal* (January 2011) 65 <http://online.wsj.com/public/resources/documents/ProxyAdvisoryWhitePaper02072011.pdf> accessed 21 May 2018; Tan & Keeper (n 37).
43 OECD, 'The Role of Institutional Investors in Promoting Good Corporate Governance' (OECD Publishing 2011) <http://www.oecd.org/daf/ca/49081553.pdf> accessed 18 September 2017; Singh (n 28); Centre on Executive Compensation (n 42); ibid.
44 ibid.
45 Mohanty (n 29) 25, 26.
46 ibid.
47 Subramanian (n 1) 374.
48 Mohanty (n 29) 19. The median stake of all the institutional investors is a mere 4.8% in India.
49 Rinkal Sanghavi and Dr Pankaj Trivedi, 'Role Played by Mutual Funds as an Institutional player in Corporate Governance of Listed Companies in India' (2017) IOSR Journal of Economics and Finance 63, 68.
50 Mohanty (n 29) 25.
51 OECD (n 43).

However, such a cooperative relationship has been found as being a difficult one to foster.[52] This is because these investors are often competing against each other,[53] and feel apprehensive about sharing information with each other regarding their own business strategies, issues and concerns.[54] Further, there exist certain indirect legal barriers to their cooperation. For instance, these investors fear that their collective actions may make them qualify as 'promoters' (by virtue of their 'control') as per Section 2(69) of the Companies Act, 2013 or as 'officers' (by virtue of their influence) under Section 2(59) of the Companies Act, 2013 or as 'persons acting in concert' under the Section 2(e) of the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011 (Takeover Code). This would thereby impose upon them a burden of unintended legal obligations that exist in relation to promoters, officers, persons acting in concert etc.[55] Additionally, by their very nature, several IIs hold shares in one company for too short a duration to incentivise them to indulge in the long-term investment in the form of improving corporate governance in their investee companies.[56]

Similarly, even the imposition of fiduciary duties towards their clients cannot guarantee the participation of the IIs in the governance of the investee company.[57] This is because the fiduciary duty is imposed upon them solely in relation to their individual investor clients who have contributed to that particular institution's funds[58] and not towards the shareholders or other stakeholders in the investee company. Therefore, IIs would be obliged to vote upon the investee company's governance matters only when it would suit their investor clients' interests.[59] As a result, where the cost of participation would exceed the benefits arising thereon, the existence of fiduciary duty would itself 'justify' the absenteeism of IIs from their participation in governance matters or their conformist behaviour even while they are participating.[60]

Moreover, regarding FIIs, it is felt that administrative/logistical hindrance in relation to cross-border voting might hinder their active participation in investee company's affairs in India.[61]

Amidst these tearing circumstances, proxy advisory firms appear in the scene. As per well established economic principles, division of work, specialisation and avoidance

52 OECD (n 43).
53 ibid.
54 ibid.
55 ibid.
56 Mohanty (n 29) 2.
57 Tan and Keeper (n 37).
58 ibid; Center On Executive Compensation (n 42).
59 ibid.
60 OECD (n 43).
61 Peter Montagon, 'Shareholder Rights are an Antidote to Company Regulation' *Financial Times* (9 March 2006) <http://www.ft.com/cms/s/0/c92b62b6-af11-11da-b04a-0000779e2340.html?ft_site=falcon&desktop=true#axzz4t0idGHvo> accessed 18 September 2017.

of duplication of actions increases the efficiency of work.[62] Since proxy advisory firms constantly dedicate their resources towards the task of observing companies and their personnel, relevant industry and sectoral trends, economic and other factors, they can enjoy the benefits of economies of scale, division of labour and specialisation in their research endeavours.[63] Therefore, they can offer cost-effective means for IIs to obtain adequate information that they might require to participate in an investee company's governance.[64] This factor plays an even more crucial role in relation to small IIs having limited resources. As a result, proxy advisory firms could encourage institutional investors' participation in the governance of investee companies wherever such participation is voluntary and could reduce for these investors the cost of such participation, where such participation has been mandated by law. In fact, had these firms not entered India immediately post SEBI's regulations which require mutual funds to disclose their voting policies and behaviours,[65] such regulations might have had the counter-effect of discouraging mutual funds from investing in equity share capital if, in any case of the funds' cost-benefit analysis, cost would have emerged victorious. Therefore, as a corollary, the proliferation of proxy advisory firms may encourage the State to introduce a greater number of regulations nudging IIs to participate in investee corporations' affairs. Moreover, the cost-effective nature of recommendations offered by proxy advisory firms would narrow the exception to the IIs' fiduciary duty to participate in the investee companies' governance on account of high cost.

Since these firms can also sometimes offer similar advice to several IIs within a company, they may thereby inadvertently galvanise minority shareholders' opinion in such company in one direction.[66] Further, these firms issue general guidelines and opinions regarding several large companies on their websites. This may assist retail investors in their participation in such companies' affairs.[67] The ancillary services, as stated above, offered by these firms may also contribute towards promoting better corporate governance in India for obvious reasons.[68] The possibility of an invitation to contribute towards the formulation of policies, laws, regulations and guidelines for improving corporate governance in India in the future cannot be ruled out.

Therefore, *prima facie*, these firms possess a huge potential for affecting corporate governance in India in the long run. But for the actualisation of this potential, they must overcome the several hurdles that lay in their paths.

62 Subramanian (n 1) 372.
63 ibid.
64 Varottil, 'The Advent of Shareholder Activism in India' (n 11) 602, 603.
65 Kumar (n 31).
66 Varottil, 'The Advent of Shareholder Activism in India' (n 11) 603.
67 ibid 600.
68 Shriram Subramanian, 'Role of Proxy Advisory Firms in India' (*Ingovern*) <http://www.ingovern.com/2013/06/role-of-proxy-advisory-firms/> accessed 18 September 2017.

III. Highlighting The Hurdles Existing in The Path of Proxy Advisory Firms

A. Challenges posed by the weak position of IIs as shareholders in the Indian companies

Since proxy advisory firms primarily cater to IIs' needs of participating in investee companies' corporate governance, the impact that these firms can have on India's corporate governance is largely determined by the role IIs can play in Indian companies' corporate governance in the long run.[69]

In India, despite the growing share of equity shareholding of IIs, their total shareholding in listed companies continues to remain confined to an average of 17% overall and 25% in case of large companies,[70] as opposed to that existing at 76% in the US in 2007.[71] Coupled with this, in India, a significant portion of shareholding in both listed and unlisted companies continues to be held by promoters/promoter group.[72] However, in the UK and the US, the shareholding pattern is dispersed.[73]

The cumulative result of these two factors is that in India, the impact that IIs can have even in the long run on company's governance by virtue of their shareholding remains somewhat insignificant.[74] Therefore, in terms of the cost-benefit analysis undertaken by IIs, even when the presence of proxy advisory firms can reduce the 'cost' element, the lack of 'benefit' element in the form of visibility of influence/impact of participation may be an overwhelmingly discouraging factor for institutional investors against their participation.[75] However, this may not be the case where IIs would feel compelled to participate in the governance of the investee company in order to tick the checkbox of legal compliance. However, this proposition should not *ipso facto* lead to an inference that imposition of greater legal obligations on IIs by the State to coerce them into participating in the corporate governance of their investee companies would be the appropriate strategy. This is because in absence of clear evidence of the possibility of a positive role played by intermediaries like proxy advisory firms towards corporate governance in India (this proposition will

69 Centre on Executive Compensation (n 42).

70 OECD (n 43).

71 ibid.

72 Kulbeer Kaur, 'Corporate Governance: A Comparison between India and China' (2014) 3(7) International Journal of Management and Social Sciences Research 18, 20; 'Improving Corporate Governance in India Related Party Transactions and Minority Shareholder Protection' (OECD Publishing 2014) 11, 41 <https://www.oecd.org/daf/ca/Improving-Corporate-Governance-India.pdf> accessed 21 May 2018.

73 Michela Scatigna, 'Institutional Investors, Corporate Governance and Pension Funds' (2008) 11 Working Paper 13/01 Center for Research on Pensions and Welfare Policies <http://www.cerp.carloalberto.org/wp-content/uploads/2008/12/wp_13.pdf> accessed on 28 May 2018.

74 Sarita Meena, 'Corporate Governance and The Role Institutional Investors' (*Scribd,* 21 March 2014) <https://www.scribd.com/document/215122996/Corporate-Governance-and-the-Role-of-Institutional-Investors> accessed 18 September 2017; Varottil, 'The Advent of Shareholder Activism in India' (n 11) 627, 628.

75 Sanghavi & Trivedi (n 49); Varottil, 'The Advent of Shareholder Activism in India' (n 11) 604.

be asserted in subsequent part of this Section),[76] the government's move to coerce IIs to participate in governance matters by placing sheer reliance on the framework such as that of proxy advisory firms may turn out to be counter-productive. The cost of regulation may divert the allocation of resources by IIs away from equity capital to other investment avenues. Similarly, due to sparse shareholding by IIs in India, the possibility of free riding by non-participating investors would continue to loom large among the former despite the existence of proxy advisory firms.[77]

As a result, despite the presence of proxy advisory firms in India, change in the passive attitude of IIs regarding the management of investee companies' affairs may continue to remain lukewarm even in the long run.[78] For instance in the US, the emergence of the proxy advisory industry took place when a) the presence of promoter shareholding dwindled in 'numerous' US corporations, b) overall shareholding pattern became dispersed, and c) the shareholding of IIs became significant enough amidst the 'dispersed' shareholders to cast a visible impact on companies' governance.[79]

Further, unlike in the UK or the US, in India, the reach of IIs as somewhat significant shareholders remains confined to a handful of listed companies[80] while the issue of corporate governance extends to improving governance in all those companies where Type 1, Type 2 or Type 3 agency problems exist. This limits the scope of the impact that proxy advisory firms could cast on India's corporate governance. Some scholars even opine that even if IIs begin demonstrating some active participation in the governance of investee companies due to above- stated reasons, the same may be only limited to certain key resolutions.[81] Furthermore, in a sharp contrast to the situation existing in the US or the UK, IIs as a body may not be developed and organised enough in India so as to participate in and contribute effectively towards corporate governance of investee companies.[82]

In addition to that, IIs often face the situation of the existence of a conflict of interest with an investee company, which makes them disinclined to adopt an aggressive stance against such company.[83] IIs may not readily embrace the new culture of blowing the whistle against such company's objectionable policies for hitherto they have been habituated to act

76 Singh (n 28).
77 Subramanian (n 1) 374; Sanghavi & Trivedi (n 49) 64.
78 Vandana Shroff, 'Shareholder Activism & Engagement' (*Getting the Deal Through*) <https://gettingthedealthrough.com/area/84/jurisdiction/13/shareholder-activism-engagement-2017-india/> accessed 18 September 2017.
79 Subramanian (n 1).
80 OECD (n 43).
81 Subramanian (n 1).
82 Scatigna (n 73).
83 Naren Karunakaran, 'Proxy Firms Wade through Proposed Resolutions' *The Economic Times* (29 November 2011). <http://economictimes.indiatimes.com/articleshow/10913732.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst> accessed 18 September 2017.

hand in glove with such companies.[84] This problem regarding the existence of a conflict of interest in the minds of IIs may pose a greater hurdle in India than in the UK or the US due to the concentrated share ownership by promoters in Indian companies. Therefore, by the sheer virtue of concentrated shareholding, promoters can manage to turn vindictive against IIs' interests in case the II's choose to oppose the promoters. The shareholders in the UK or the US corporations may be unable to do so because of their dispersed shareholding.

These factors paint a dismal picture against the role proxy advisory firms may actually end up playing in influencing corporate governance in India. However, there are factors that may brighten the perspective on the state of things.

First, the present composition of IIs' holdings in equity capital in India can act as an encouraging factor. This is because there are significant variations in the manner in which each type of II strategises and functions. Significant shareholding in companies by long-term IIs, such as pension funds, investment funds and insurance companies is considered as a positive change.[85] On the other hand, IIs including hedge funds, whose tenure with a company is short-term are not considered as desirable investors from the perspective of improving corporate governance.[86]

Mutual funds are more reliable than hedge funds in this regard.[87] In the UK and the US, where IIs have contributed positively towards corporate governance, the dominant shareholding has been that of pension funds in the UK and pension funds and investment funds in the US, followed by mutual funds in both countries.[88] In India as well, the present composition of its institutional investors is healthy, at least theoretically. This is because, among domestic IIs, insurance companies (long-term investors) hold the most dominant presence.[89]

Insurance companies as IIs may thereby be interested in managing the affairs of investee companies, though currently, they have been acting merely as passive players. Hence, the possibility that the presence of intermediaries such as proxy advisory firms can encourage the participation of insurance companies in investee companies' corporate governance, in the long run, cannot be ruled out. The presence of proxy advisory firms can also encourage responsible behaviour among pension funds and mutual funds in their showing of interest

84 Mohanty (n 29).

85 Setu Niket, 'India: Does the Involvement of Institutional Investors Lead to Higher Financial Performance?' (Mondaq, 26 October 2015) <http://www.mondaq.com/india/x/437478/Fund+Management+REITsDoes+The+Involvement+Of+Institutional+Investors+Lead+To+Higher+Financial+Performance> accessed 18 September 2017.

86 ibid.

87 Niket (n 85).

88 Gregory Jackson, *Understanding Corporate Governance in the United States* (Düsseldorf 2010) 9 <https://www.boeckler.de/pdf/p_arbp_223.pdf> accessed 18 September 2017; Serdar Çelik and Mats Isaksson, 'Institutional Investors and Ownership Engagement' 2013 2 OECD Journal: Financial Market Trends 93, 98.

89 Sabarinath (n 26).

towards participation in an investee company's affairs in the long run whereas presently both of them have been demonstrating hedge-fund like behaviour in India.[90] The entry of pension funds in the equity market in India[91] and disclosure norms laid by SEBI in relation to mutual funds, as per anecdotal evidence, have encouraged the participation of mutual funds in corporate governance of investee companies.[92] The proposal to introduce in India a code similar to the UK's Stewardship Code[93] for all IIs, rising shareholding of institutional investors in Indian companies etc. offer optimism regarding the role IIs 'may' play in the long run in improving Indian Inc.'s corporate governance.[94]

Amidst this, it would be too early to comment on the role IIs may play in the long run in impacting corporate governance practices in India.[95] Therefore, it would be too early to predict the possible impact proxy advisory firms can have upon corporate governance in India in the long run.

B. Uncertainties regarding the degree of dependence of IIs on proxy advisory firms and the firms' exercise of their influence

Additionally, the role that proxy advisory firms can play in improving corporate governance depends upon the importance that IIs and investee companies accord to these firms. Despite the existence of these firms, IIs in India on account of their cost-benefit analysis may choose not to resort to these firms for recommendations. Further, IIs may not pay heed to the recommendations offered by these firms. There exists no empirical study in India to indicate positive or negative compliance of proxy advisory firms' recommendations by their clients.[96]

These firms may not exercise their stronghold upon IIs in India, which US's first proxy advisory firm ISS did and continues to do.[97] This is due to several reasons. First, unlike the US's ISS, which continued to exercise a monopoly in the proxy advisory business industry

90 Karunakaran (n 83).

91 Subramanian (n 1) 376.

92 McCall (n 34); Sanghavi & Trivedi (n 49) 66.

93 Financial Reporting Council, *The UK Stewardship Code, 2012* (September 2012) <https://www.frc.org.uk/getattachment/d67933f9-ca38-4233-b603-3d24b2f62c5f/UK-Stewardship-Code-(September-2012).pdf> accessed 21 May 2018; 'The Role of Institutional Investors in Corporate Governance - a UK Perspective', Address to the Harvard Law School and Harvard Business School (*Standard Life Investments*, 3 October 2012), <https://www.standardlifeinvestments.com/CG_Harvard_Lecture_Oct/CG_Harvard_Lecture_Oct.pdf> accessed 18 September 2017.

94 Amit Tandon, 'Amit Tandon: The Case for an Indian Stewardship Code' *Business Standard* (28 December 2016) <http://www.business-standard.com/article/opinion/amit-tandon-the-case-for-an-indian-stewardship-code-116122801175_1.html> accessed 18 September 2017; Jayshree P Upadhyay, 'India to draft rules for institutional investors voting on company matters' *LiveMint* (6 March 2017) <https://www.livemint.com/Companies/0teJ9go8GQPOOrxuAadTeJ/India-to-draft-rules-for-institutional-investors-voting-on-c.html> accessed 21 May 2018.

95 Kaur (n 72) 20.

96 Singh (n 28).

97 Sagiv Edelman,'Proxy Advisory Firms: A Guide for Regulatory Reform' (2013) 62 Emory Law Journal 1369, 1377.

for decades,[98] in India, competition among proxy advisory firms has existed from the very beginning.[99] Therefore, in India, no 'one' firm can immensely influence IIs or investee companies. This means that there would be a diversity of opinion over the same issues because only where there is a monopoly in the proxy advisory industry can a single firm exercise enhanced influence. In the absence of competition, dissenting views in the proxy advisory industry do not exist. Therefore, unlike in India where there are more than one proxy advisory firms, in the US and the UK, the issue of having split opinions by different proxy advisory firms, which in turn reduces the overall deeper impact of such opinion, did not exist for long in the beginning.[100]

Further, in absence of such monopoly in India, investee companies may not have the incentive to resort to these firms for their advice on improving the former's corporate governance policies, which is what they did when monopoly existed in the US's proxy advisory industry for the sake of obtaining favourable reviews from such proxy advisory firms in their rendering of advice to their institutional investor clients.[101] However, a counter-argument may be that while due to the lack of monopoly in India's proxy advisory industry, a 'single' firm cannot exercise absolute influence on corporate governance practices, proxy advisory firms as an 'industry' may still cast their impact. The existence of competition may informally pave way for increased ethical practices in the industry right from the beginning.[102] This, in turn, may amount to greater reposition of faith by investors and companies in this industry, thereby leading to an overall growth in the impact cast by the proxy advisory industry in India.[103]

Another hindrance that exists for proxy advisory firms in India against their lasting impact is that they are yet to prove their credibility and mettle here. This is unlike the situation in the UK and the US where they have already established themselves.[104] Therefore, these firms' influence on Indian soil may remain low for a substantial period of time.

Moreover, in the US, proxy advisory firm ISS performs both consultative functions for investee companies and advisory functions for IIs in relation to such companies.[105] This, in turn, gives rise to a vicious circle of influence that ISS gets to exercise over corporate governance in the USA. In such a situation, investee companies in the US feel motivated to resort to ISS for its advice on improving their corporate governance practices merely for the sake of obtaining favourable reviews from it while it renders its advisory services to its

98 Centre on Executive Compensation (n 42).
99 Ingovern (n 4); Shrivastava (n 5).
100 Tao Li, 'Outsourcing Corporate Governance: Conflicts of Interest and Competition in the Proxy Advisory Industry', Working Paper No. 389/2013, ECGI (November 2013).
101 Centre on Executive Compensation (n 42).
102 Singh (n 28).
103 ibid.
104 Singh (n 28); Centre on Executive Compensation (n 42).
105 Centre on Executive Compensation (n 42).

II clients.[106] This situation does not exist in India, as presently though proxy advisory firms offer consultative/governance research services to investee companies, these may not be availed by Indian companies. This is because companies in India, both listed and unlisted, continue to remain largely averse to interference by and impact of outsiders in their internal governance matters.[107]

However, a large number of these factors are based on volatile environmental factors adding to the ambiguity of the actual impact that proxy advisory firms can have on IIs in the long run.

C. Challenges faced by the proxy advisory industry in general and their relevance in India's context

In jurisdictions where it is firmly believed that proxy advisory firms exercise influence on country's corporate governance,[108] it is still questionable if such influence is indeed positive, given that the proxy advisory firms industry presents three major challenges in these countries.[109]

First, there is a dearth of competition in the industry.[110] In the US, ISS continued to enjoy a monopoly for decades.[111] Even after the entry of new firms in the US landscape, the first-mover advantage gained by ISS continues to have its impact, one which has been strong enough to drive the majority of other players who entered this market much later to either take an escape route or to merge by way of consolidation.[112] This problem is faced in Europe as well.[113] A corollary to this is the problem of the resultant existence of entry barriers within the industry.[114] The stronghold established by the existing few proxy advisory firms has been dominating and intimidating enough to make new firms face serious survival issues upon entry.[115] For instance, the access to inside information

106 ibid.
107 Subramanian (n 1) 378.
108 Singh (n 28); Centre on Executive Compensation (n 42); Joseph Muraca and Antony Freeman, 'Regulation of proxy advisory firms' (*King & Wood Mallesons*) <http://www.kwm.com/en/au/knowledge/insights/regulation-proxy-advisory-firms-influence-voting-20170303> accessed 21 May 2018.
109 Edelman (n 97); Object Clause, Corporate Governance Reform and Transparency Act, 2017; David Mendicino, 'Proxy Advisory Firm Regulation – Canadian Securities Administrators Propose Guidance, not Rules' (*McMillan*, May 2014) <https://mcmillan.ca/Proxy-Advisory-Firm-Regulation--Canadian-Securities-Administrators-Propose-Guidance-not-Rules> accessed 21 May 2018; Bryce C Tingle, 'The Agency Cost Case for Regulating Proxy Advisory Firms' [2016] 49:2 UCB Law Review; House Committee on Financial Services, 'Examining The Market Power and Impact of Proxy Advisory Firms', Serial No 113–27 (5 June 2013) <https://financialservices.house.gov/uploadedfiles/113-27.pdf> accessed 21 May 2018.
110 Li (n 100).
111 Subramanian (n 1) 372.
112 ibid.
113 Centre on Executive Compensation (n 42).
114 ibid 74.
115 ibid.

about investee companies that big players like ISS have by virtue of their market standing cannot be gained easily by a new entrant.[116] In fact, this has been one of the reasons that in countries like the US and the UK, regulators have abstained from introducing mandatory regulations to control the conduct of proxy advisory firms.[117] It was surmised that if the burden of regulations was imposed on all proxy advisory firms, new entrants might find it difficult to survive due to the costs imposed by legal obligations.[118]

Second, concerns exist that proxy advisory firms provide distorted advice to IIs to serve their own business interests on account of the existence of a serious conflict of interest *vis-a-vis* subject companies or their clients or otherwise.[119] For instance, in the US, two firms, ISS and Glass-Lewis which occupy a 97% share of the entire proxy advisory industry have been criticised for operating with conflicts of interest, among other allegations.[120] This concern becomes aggravated against the backdrop of the existence of the dearth of regulations and a reasonable level of market competition.[121] These conflicts are more direct and serious when these firms rendering advisory services to IIs simultaneously offer consultancy services to investee companies due to which these firms are likely to be motivated to offer distorted advice to IIs to keep their consulting business with investee companies profitable.[122] Similarly, conflicts of interest can arise on account of the ownership structure of proxy advisory firms given that their investors or owners are often IIs. This is likely to prejudice these firms in favour of IIs. Due to these ownership structures, these firms can favour investors in their recommendations (also known as pro-investor bias).[123]

Third, the accuracy and quality and thereby, the reliability of recommendation provided by these firms has been frowned upon.[124] For instance, in the US, concerns have been raised

116 ibid.

117 Tingle (n 109) 24, 25.

118 Centre on Executive Compensation (n 42) 74.

119 ibid 3. Santiago Ramírez Reyes, 'Proxy Advisory Firms (On the Opportunity for an International Convention)' (2017) 49(148) Mexican Bulletin of Comparative Law 337, 345; Anuradha Verma, 'Yes Bank Buys 5% Stake in Proxy Advisory Firm IiAS', (*VCCircle*, March 12, 2016) <https://www.vccircle.com/yes-bank-buys-5-stake-proxy-advisory-firm-iias/> 42; Centre on Executive Compensation (n 39). Yes Bank Ltd, India's fifth-largest private-sector lender, has acquired a little over 5 per cent equity stake in an investor advisory firm IiAS from BSE Ltd… Other investors in IiAS include Axis Bank Ltd, BSE Ltd, Fitch Group Inc., Housing Development Finance Corp (HDFC), ICICI Prudential Life Insurance, Kotak Mahindra Bank Ltd, Tata Investment Corp and UTI Asset Management Co Ltd, according to information available on the company's website.

120 'U.S. Chamber of Commerce Corporate Governance Update: Public Company Initiatives in Response to the SEC Staff's Guidance on Proxy Advisory Firms' (2015) <https://www.centerforcapitalmarkets.com/wp-content/uploads/2013/08/021874_ProxyAdvisory_final-1.pdf> accessed 21 May 2018.

121 Muraca and Freeman (n 108).

122 Centre on Executive Compensation (n 42) 7.

123 Tingle (n 109) 45.

124 Carol Hansell and Robert Murphy, 'The Role of the Proxy Advisory Firm' (*Davies Ward Phillips & Vineberg LLP*) <http://www.cscs.org/Resources/Documents/summit/Resources/Day1/Issuers/3.%20Proxy%20Adviosry%20Paper__Carol%20Hansell.pdf> accessed 18 September

regarding the sample size that firms like ISS employ in order to collect its data to arrive at its inferences[125] or the lack of clarity that exists in relation to the manner in which these firms incorporate the feedback they receive during the open comment period from the investee companies. For example, ISS once suggested a draft rule whereby it recommended the investor clients to vote against the company directors who had not abided by a shareholder proposal receiving majority support during the last year. The firm justified the rule by stating that as per its survey 86% of IIs who participated in the survey expected that the directors should implement a shareholder proposal that receives support from a majority of shares cast.[126] It explained that this rule would help in increasing the level of accountability of directors. However, executives at various companies opposed such a rule arguing that it can run contrary to the board's fiduciary duties itself. ISS nevertheless went ahead with adopting the rule without even mentioning the conditions under which the board's non-acceptance of shareholders' proposal would be justified on the ground of their fiduciary duties.[127]

Similarly, in Canada, in a five-year timeframe, merely 13% of the members belonging to the Canadian Investor Relations Institute reported that there were no factual inaccuracies in the proxy firms' work.[128] Likewise, in a survey, the response of a company in relation to which Glass Lewis provided recommendation was that the firm Lewis did not calculate 'pay for performance' correctly which led to a 'D' compensation rating for the subject company.[129]

One of the reasons for the inaccuracies is that these firms are not required by law to make sufficient or specific disclosures regarding the materials and methods they deploy to arrive at their estimates and inferences. Hence the element of accountability under the law is non-existent. Another hurdle is that some voting recommendations require information that is not publicly available to a proxy advisory firm. For instance, as per the ISS Guidelines, a director should be targeted if he or she attended lesser than 75% of the board and committee meetings. This is because his absenteeism, for obvious reasons, could be seen as an abdication of his responsibilities because a director, unlike a shareholder, is responsible for directing and supervising the affairs of his company.

However, under the policy, an exception has been carved out if the absenteeism is on account of 'illness or company's business.' The difficulty lies in the fact that this sort of

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125 David F Larcker, Allan L McCall, and Brian Tayan, 'And Then A Miracle Happens!: How Do Proxy Advisory Firms Develop Their Voting Recommendations?' (*Stanford Closer Look Series*, 25 February 2013) 2 <https://www.gsb.stanford.edu/sites/gsb/files/publication-pdf/cgri-closer-look-31-proxy-firms-voting-recommendations.pdf> accessed 21 May 2018.

126 ibid 3.

127 ibid 3.

128 Tingle (n 109) 39.

129 Centre for Executive Compensation (n 42) 59.

information is not disclosed anywhere in the public domain in most cases.[130] This makes the recommendations of proxy advisory firms vulnerable to errors.[131] Therefore, there are some kinds of resolutions in relation to which proxy advisory firms, as outsiders, cannot possibly offer guidance unless there is a mechanism for adequate correspondence with the investee company.[132] This is one of the reasons why in some countries, to ensure the reliability of the advice rendered by the proxy advisory firms, this aspect has been regulated by law in detail.[133] Another commonly cited reason for creeping in of inaccuracies is the tight timeframe under which proxy advisory firms function in generating their reports for their clients.[134]

Another issue is that once a mistake has been committed and even if the issuer discovers it, proxy advisory firms have demonstrated a poor track record of correcting them. For instance, in Canada, only 28% of the errors located in the draft proxy advisory reports were rectified. In the US, 43% of the mistakes were corrected.[135] Furthermore, regarding the accuracy of advice given, it is also lamented that these firms provide 'one size fits all' or non-customised advice to IIs without taking into account the unique circumstances of an investee company operating at any given time or other relevant factors such as the local business circumstances or legal environment existing/operating around a particular business entity.[136] Moreover, the voting guidelines suggested by these firms are also found to be vague or ambiguously termed in some cases which can lead to the problem of interpretation by their clients or the members of the public.[137] One of the other reasons for erroneous advice can also be the temptation these firms face to keep their cost of generating information or reports low to make their services feasible for their clients, with respect to the cost-benefit analysis between a) finding information on their own and approaching a proxy advisory firm for recommendations and b) between approaching these firms for advice to cast their votes in discharge of fiduciary obligations and excusing themselves from the voting process itself by arguing non-breach of fiduciary obligations owed towards their investor clients through citing the exorbitant cost of information gathering as the

130 Tingle (n 109) 32-34.
131 ibid 34.
132 ibid 32-33.
133 This point will be explained in detail in the later part of this Section i.e. while critiquing the SEBI's Regulations relating to proxy advisory firms.
134 Centre for Executive Compensation (n 42) 58.
135 Tingle (n 109) 40.
136 ibid 5. Harvey Pitt, 'Examining the Market Power and Impact of Proxy Advisory Firm' (5 June 2013) 8 <https://www.centerforcapitalmarkets.com/wp-content/uploads/2010/04/2013-6.3-Pitt-Testimony-FINAL.pdf> accessed 21 May 2018.
137 Tingle (n 109) 29.
Sometimes the ambiguity is built into the language of the guidelines. A 'withhold' vote can be recommended against a director, for example, for failing to 'facilitate constructive shareholder engagement,' failing to 'replace management as appropriate,' or allowing 'material failures of governance' and 'stewardship.' There is nothing inherently incorrect about these guidelines, but they are obviously subject to a great deal of interpretation.

reason.[138] Yet again, this concern regarding the lack of quality and accurate information and advisory services gets deeper in light of the dearth of a regulatory framework and competition in the proxy advisory industry.[139] However, the Indian situation is distinct to some extent because unlike the US and the UK, there exist both competition and mandatory regulations right from the emergence of these firms.[140]

Unlike the situation in the US and the UK, within a period of five years of the establishment of the first proxy advisory firm in India, two other competitors appeared.[141] This presence of competition informally pressurises Indian proxy advisory firms against indulging in unnecessary conflicts of interest.[142] For instance, even in the US, the growth of Glass Lewis as a competitor of ISS brought ISS under pressure to create a Chinese Wall between its proxy advisory wing and its consultative office.[143] Further, the existence of competition stimulates firms to voluntarily disclose material conflict of interests to arouse confidence among their clients and produce quality and reliable advice.[144] However, due to reasons highlighted in Section III.B of the paper, intense competition poses its own set of challenges against the growth and sustenance of proxy advisory firms in India.

Within a few years of the emergence of proxy advisory firms in India, SEBI introduced regulations namely the SEBI (Research Analysts) Regulations, 2014 (hereinafter, the Regulations) primarily to address concerns such as conflicts of interest, transparency in operations and reliability of advice rendered by these firms.[145]

The Regulations prescribe a minimum level of educational qualifications that the employees of these firms should possess.[146] They require these firms to lay down internal policy and mechanism to ensure that their employees abstain from indulging in or disclosing the transactions resulting in a direct or indirect conflict of interest with relation to the subject company.[147] The Regulations impose a fiduciary duty on these firms along with obligations to observe professionalism and offer detailed disclosures wherever required under law and

138 Tingle (n 109) 38.

139 Tao Li 'Outsourcing Corporate Governance: Conflicts of Interest within the Proxy Advisory Industry' (2016) Management Science <http://pubsonline.informs.org/doi/abs/10.1287/mnsc.2016.2652?journalCode=mnsc> accessed 18 September 2017; Centre for Executive Compensation (n 42) 55.

140 Subramanian (n 1) 378.

141 Shrivastava (n 5).

142 Li (n 139).

143 Subramanian (n 1) 374.

144 Li (n 139).

145 Mampatta (n 21); 'Consultation Paper on Proposed Regulation of Research Analysts' (*SEBI*, November 2013) 7 <https://www.sebi.gov.in/sebi_data/attachdocs/1385713647782.pdf> accessed 21 May 2018; 'Consultation Paper on Amendments/Clarifications to the SEBI (Investment Advisers) Regulations, 2013' (*SEBI*, October 2016) <https://www.sebi.gov.in/sebi_data/attachdocs/1475839876350.pdf> accessed 21 May 2018.

146 Securities and Exchange Board of India (Research Analysts) Regulations, 2014, regs 6, 7, 23 (proviso).

147 Securities and Exchange Board of India (Research Analysts) Regulations, 2014, regs 15, 16, 18.

the Regulations.[148] Additionally, the Regulations impose obligations upon these firms and their employees to base their advice on reliable material and offer unbiased advice[149] and also oblige them to disclose to the public, the basis of their recommendations.[150] It seems that this has been done to ensure that the concerns that exist in other jurisdictions relating to proxy advisory firms are nipped in the bud.

This paper shall not deal with the critique of the content of the individual provisions under the Regulations, such as *inter alia* the sufficiency of the disclosure requirements or management of conflict of interest provisions or transparency obligations due to the fact that the actual effect of each of the provisions in terms of their content remains to be seen. Not only are the Regulations somewhat new, but also such regulations for proxy advisory firms in other jurisdictions, be it by way of mandatory regulations or guidelines or regulations adopting the 'comply or explain' model,[151] have also been recently introduced or are yet to be brought into effect.[152]

However, this Section critiques the Regulations in terms of their broad structure and the presence or absence of certain kind of provisions, which exist in the regulations on proxy advisory firms in other jurisdictions.

First, the Regulations suffer from one serious drawback. As their nomenclature suggests, they have been structured and drafted primarily to regulate the registration and business endeavours of research analyst firms wherein research analysts have been defined in the Regulations as the persons who are primarily involved in activities such as preparing or publishing research reports with respect to securities that are listed or to be listed in a stock exchange.[153] On the other hand, proxy advisory firms render advisory services regarding

148 Securities and Exchange Board of India (Research Analysts) Regulations, 2014, regs 19, 23, Third Schedule under Regulation 24(2) (Code of Conduct for Research Analyst).

149 Securities and Exchange Board of India (Research Analysts) Regulations, 2014, regs 15, 20.

150 Securities and Exchange Board of India (Research Analysts) Regulations, 2014, reg 23.

151 Directive (EU) 2017/828 Of The European Parliament And Of The Council Of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement [2017] OJ L132/1, art 3i(1); Tingle (n 109) 18.

152 Dimitri Zagoroff, 'House Bill 4015 and the Proposed Regulation of Proxy Advisors' (*Harvard Law School Forum on Corporate Governance and Financial Regulation*, 1 November 2017) <https://corpgov.law.harvard.edu/2017/11/01/house-bill-4015-and-the-proposed-regulation-of-proxy-advisors/> accessed 21 May 2018; 'Proxy Advisory Firm Regulation – Canadian Securities Administrators Propose Guidance, Not Rules' (*McMillan*, May 2014) <https://mcmillan.ca/Proxy-Advisory-Firm-Regulation--Canadian-Securities-Administrators-Propose-Guidance-not-Rules> accessed 21 May 2018; 'In Short: Informal Agreement Reached on Revised Shareholder Rights Directive' (*William Fry*, 10 February 2017) <https://www.williamfry.com/newsandinsights/news-article/2017/02/10/in-short-informal-agreement-reached-on-revised-shareholder-rights-directive> accessed 21 May 2018; 'New Proxy Advisory Code Seeks To Resolve Concerns From Listed Companies Over AGM Voting Reports' (*AIRA*, 8 May 2017) <https://www.aira.org.au/images/AIRA_News/Media_Release_Role_of_Proxy_Advisers_Updated.pdf> accessed 21 May 2018.

153 SEBI issues draft norms to regulate research analysts, *Business Standard* (29 November 2013) <http://www.business-standard.com/article/markets/sebi-issues-draft-norms-to-regulate-

the subject company's internal governance matters and not necessarily in relation to its securities.[154] Hence, regulating proxy advisory firms by way of the Regulations meant for research analysts can be a misguided and an insufficient policy.[155] This will also become evident upon reading the definition of 'research report' as stated in the Regulations. This term is significant because, under the Regulations, numerous obligations exist in relation to the preparation, presentation, publication or dealing otherwise with the research report.[156] Under Regulation 2(w), a research report has been defined as a communication, including research analysis, recommendation or opinion, concerning securities or public offer, providing a basis for an investment decision.

As per the definition, the term is broad enough to include the terms 'research analysis' and 'recommendations'.[157] Hence, the subject matter underlying this term would constitute the scope and ambit of the terms 'research analysis' and 'recommendations' also.

However, the subject matter underlying the term research report is narrow so as to include only the opinion etc. about securities or public issue by companies.[158] Hence, matters revolving around a company's governance issues would fall outside the ambit of 'research report', 'research recommendation', 'research opinion' as well as 'research analyses'. Therefore, the provisions under the Regulations that prescribe duties with respect to the research report, would not apply to the research report, opinion, analysis or recommendation that does not deal with subject issuer company's governance matters. If this were to be the position of law under the Regulations, then a major portion of the tasks that proxy advisory firms perform would go unregulated.

However, the most obvious counter that can be offered to this line of argumentation is under Regulation 23(1),[159] where it has been explicitly provided that all the provisions under Chapters II, III, IV, V and VI of the Regulations will apply '*mutatis mutandis*' to

research-analysts-113112900643_1.html> accessed 21 May 2018. 'The latest proposals are based on recommendations by The International Organisation of Securities Commissions (IOSCO) which has also suggested to Sebi that research analysts need to be subjected to appropriate oversight and regulation.'.
'Note on Draft SEBI Regulations, 2013' (*FINSEC Financial Regulations Forum*, 13 January 2014) <http://finseclawforum.com/2014/note-draft-sebi-research-analyst-regulations-2013/>. In the earlier draft of these regulations, proxy advisory firms were even exempted from the requirement of registration like is the case with investment advisers, asset management companies and fund managers still.

154 Sachin Mampatta, 'Three Things that will change under SEBI's new research analyst regulations' *Business Standard* (21 July 2014) <http://www.business-standard.com/article/markets/three-things-that-will-change-under-sebi-s-new-research-analyst-regulations-114072100250_1.html> accessed 21 May 2018. 'It was earlier believed that they may be kept out of the ambit of research analyst regulations since they did not give 'buy' or 'sell' recommendations like typical research reports'.

155 ibid.

156 SEBI Research Analyst Regulations 2014, regs 15(1)(iii), 16(2), 18, 19, 20, 22.

157 SEBI research Analyst Regulations, 2014, reg 2(w).

158 SEBI Research Analyst Regulations, 2014, regs 2(l)(ii), 2(u).

159 SEBI Research Analyst Regulation, 2014, reg 23(1).

the proxy adviser. It can be contended that as a result, the provisions of the Regulations will apply to any kind of research report, analysis, recommendation or opinion that proxy advisory firms prepare/present/publish, even when it does not relate to the matters such as the subject company's issue of securities or public issue.

However, this is only one manner of interpreting the implication of having the phrase '*mutatis mutandis*' under Regulation 23(1). This interpretation emanates from the application of the rules of statutory interpretation namely, the rules of purposive interpretation[160] and the rule of interpretation against absurd consequences.[161] The meaning of these rules should be sufficiently clear from their nomenclatures. The drafter of the Regulations logically ought not to have intended, while extending the application of the Regulations to the proxy advisory firms, that the research reports that proxy advisory firms prepare which relate to company's governance matters remain outside the scope of the Regulations.

However, the alternate approach to interpreting the implication of the term '*mutatis mutandis*' is that it exists only in relation to the application of Chapter II to VI and not in relation to the definition of 'research report' because it has been defined under Part I so as to even include those research report, analysis, opinion or recommendation which do not relate to company's securities. This line of reasoning involves the technical or pedantic interpretation of Regulation 23(1).

As a result of this ambiguity regarding the implication of the term '*mutatis mutandis*' under Regulation 23(1), there can be two ways forward to improve the Regulations to further tighten the noose around proxy advisory firms.

One of them is to alter the language of Regulation 23(1) to explicitly clarify that the term '*mutatis mutandis*' under the provision means that the Regulations would extend even to the research reports not dealing with securities or public offer. Alternatively, Regulation 23(1) could be amended to state that all the provisions of Chapter I (in addition to those of Chapters II, III, IV, V and VI) shall apply *mutatis mutandis* to proxy advisory firms. This alteration would ensure that even the definition of the research report, and not just the provisions from Chapter II to VI, applies to proxy advisory firms with necessary alterations. Given that nothing under the Regulations deals with the concerns that proxy advisory firms also face in their operations except the narrow definition of a research report, this kind of alteration would be helpful. The Regulations deal with the aspects such as handling conflict of interest, ensuring transparency and enhancing the reliability of research reports that are relevant for proxy advisory firms as well.

The other approach could be to instead have separate regulations for proxy advisory firms as is suggested or has been done in case of other jurisdictions such as the US, UK, Canada and Australia. Proxy advisory firms in these jurisdictions have begun playing

160 *Bennion on Statutory Interpretation* (LexisNexis 2012) 943-944.
161 ibid 969.

a somewhat crucial role in the country's corporate governance landscape.[162] In these jurisdictions where there are already the regulations governing research analysts,[163] they have not been extended to additionally control the conduct of proxy advisory firms.[164]

One added advantage that would come with the latter option is that the structure of Regulations and the provisions underlying them could be such which deal in sufficient detail with the issues that proxy advisory firms specifically face and not necessarily the research analysts.

For instance, the issue of relations (including in the form of correspondence) between proxy advisory firms and subject companies is a crucial matter when it comes to regulating the conduct of proxy advisory firms.[165] In the US, under the recent law proposed for governing proxy advisory firms, the 'thorniest provision'[166] has been the one which mandatorily requires the firms to communicate their report/recommendation/analysis/opinion to the issuer company before releasing it to their clients or before the members of public.[167] In these regulations, it has been provided that for the resolution of conflict that may arise between the subject company and the proxy advisory firm regarding the content of research report/analysis, the latter would have to appoint an ombudsman.[168] Similarly, in Australia recently in 2017, the Australian Investor Relations Association issued a draft voluntary code to foster relations between listed companies and proxy advisors.[169] Its primary objective is to guide the correspondence or engagement between listed companies and proxy advisory firms.[170] Under these guidelines as is the case of the US Bill,[171] reliance has been placed on this element of correspondence to ensure the reliability and factual correctness of the research report/recommendation that proxy advisory firms issue.[172] Under Principle 3 of the draft voluntary code, it has been provided that there should be a mechanism for feedback upon the work of proxy advisory firms by the subject companies whereby the Australian Investor Relations Association would act as a facilitator to make the feedback scheme function.[173] Canadian Securities Administrators' National Policy 25-

162 Adam O Emmerich, William Savitt, Sabastian V Niles and S Iliana Ongun, 'The Corporate Governance Review - Edition 7: United States' (*The Law Reviews*, 5 May 2017) <https://thelawreviews.co.uk/chapter/1140933/united-states> accessed 21 May 2018.

163 'Consultation Paper on Proposed Regulation of Research Analysts' 4 (*SEBI*) <https://www.sebi.gov.in/sebi_data/attachdocs/1385713647782.pdf> accessed 21 May 2018.

164 'Proxy advisers now face real scrutiny' (*Rediff*, 22 July 2014) <http://www.rediff.com/business/report/proxy-advisers-now-face-real-scrutiny/20140722.htm> accessed 21 May 2018.

165 'Regulating Proxy Advisory Firms' (*Guerdon Associates*, 2018) <http://www.guerdonassociates.com/articles/regulating-proxy-advisory-firms/?print=pdf> accessed 21 May 2018.

166 Zagoroff (n 152).

167 Corporate Governance Reform and Transparency Act 2017, s 3(a)(g)(1).

168 Corporate Governance Reform and Transparency Act 2017, s 3(a)(g)(1); Zagoroff (n 152).

169 AIRA (n 152)

170 ibid.

171 Corporate Governance Reform and Transparency Act of 2017, s 3(a)(g)(1).

172 AIRA (n 152).

173 ibid.

201 Guidance for Proxy Advisory Firms also deals with this specific issue separately.[174] On the other hand, in the Indian scenario, since there are no separate regulations to govern proxy advisory firms, regarding this crucial issue, only one provision exists. It states that the proxy adviser shall disclose, in addition to the disclosures required under other chapters under the regulations, the policies and procedures for interacting with issuers, informing issuers about the recommendation and review of recommendations.[175] Hence, under these regulations, in absence of sufficient and specific guidance, immense flexibility has been given to the proxy advisory firms to frame their policy of interaction with the subject companies. The obvious flipside to this flexibility would be that the proxy advisory firms could frame an insufficient or inappropriate policy for correspondence.[176]

Similarly, another issue that is specific to proxy advisory firms is the issuance of proxy advisory guidelines by them. Proxy voting guidelines are the guidelines regarding the corporate governance matters that proxy advisory firms release to the members of public or their clients to guide them regarding how to cast their votes.[177] In this regard, Canadian Securities Administrators' National Policy 25-201 Guidance for Proxy Advisory Firms, can be looked into.[178] Among other matters, the guidelines deal with the development of proxy voting guidelines.[179] They explicitly require that the vote recommendations of proxy advisory firms are determined in a consistent manner and in accordance with their own proxy voting guidelines and that if they are not in compliance with their own proxy voting guidelines, the firms have to disclose the reasons for such deviance.[180] Additionally, there is a whole section dedicated to the manner of developing these guidelines.[181] This kind of guidance is over and above the guidelines that exist alongside on the aspects of conflict of interest, transparency and accuracy of vote recommendations.[182] However, under the SEBI's regulations, no separate provision exists regarding preparation of or need for adherence by proxy advisory firms to their proxy advisory guidelines.[183]The only provision that can be deemed to be relevant under the Regulation is the vague and broad obligation

174 'National Policy 25-201 Guidance for Proxy Advisory Firms', Part 2.4 (30 April 2015) <https://www.bcsc.bc.ca/Securities_Law/Policies/Policy2/PDF/25-201__NP___April_30__2015/> accessed 21 May 2018 (Canadian Securities Administrators).

175 SEBI Research Analyst Regulations, 2014, reg 23(2)(ii).

176 Gaia Balp, 'Regulating proxy advisors through transparency: pros and cons of the EU approach' [2017] 14 1 ECFR 21.

Similar criticism exist against the revised shareholders' directive of the EU where the regulations are completely lacking in provisions concerning the exchange of information between the issuer under analysis and the proxy advisor

177 'Proxy Advisory Firms Update Proxy Voting Guidelines' (Wachtell, Lipton, Rosen & Katz, 10 November 2014) <http://www.wlrk.com/docs/ProxyAdvisoryFirmsUpdateProxyVotingGuidelines.pdf> accessed 21 May 2018.

178 Canadian Securities Administrators (n 174).

179 ibid, Part 1.1, 1.2 and 2.3.

180 Canadian Securities Administrators (n 174).

181 ibid, Part 2.3

182 ibid, Part 2.1 and 2.2.

183 SEBI Research Analyst Regulations, 2014.

of good faith and honesty that has been *mutatis mutandis* applied for proxy advisory firms as per Schedule III.[184] Perhaps, these kinds of omissions would not have happened in the Indian legal landscape had there been separate regulations meant specifically for proxy advisory firms.

There are other points of critique against the Regulations as well. It remains dubious if the introduction of regulations 'at this juncture' when this industry is only in its burgeoning stage is a sound move.[185] In several other jurisdictions where the industry of proxy advisory firms has become far more mature, regulators have already been apprehensive about regulating this industry.[186] This is firstly because it remains unestablished there if these firms exercise strong enough an influence to justify the 'costs' of regulating them and the costs that exist in the form of red-tapism and other aspects of the implementation of regulations.[187] Further, it has been felt that the existence of regulations may hamper the firms' autonomy.[188] In presence of regulations, investee companies would obtain the *locus standi* to sue proxy advisory firms for alleged violation of regulations. This is a matter of concern because as opposed to several large companies with huge financial resources, proxy advisory firms that are few in number, especially the new entrants, may not have enough resources to indulge in the battles of litigation.[189] Furthermore, in other jurisdictions, it has been opined that in place of introducing regulations, the State ought to take measures to enhance the level of competition in the industry which in turn would itself take care of the malpractices alleged to be taking place by these firms.[190] Therefore, it is felt that in India introduction of legislation at this stage is redundant as in the country competition as a form of 'informal' regulator already exists. It is further feared that once registered, the rendering of advice by these firms may unnecessarily and wrongfully send a message of credibility of their advice to the market, which may not be true.[191]

However, all these opinions that exist against the appropriateness of regulating the proxy

184 SEBI Research Analyst Regulations, 2014, Third Schedule.

185 Muraca and Freeman (n 108).

186 ibid; Mampatta (n 21); Reyes (n 119); 'Best Practice Principles', *Glass Lewis* <http://www.glasslewis.com/best-practices-principles/> accessed 21 May 2018; Frederic Duguay, 'Proposed National Policy 25-201 Guidance for Proxy Advisory Firms' (*Hansell Advisory*, 23 July 2014) 3 <http://hanselladvisory.com/upload/files/Proposed_National_Policy_25-201_Guidance.pdf> accessed 21 May 2018; Muraca and Freeman (n 108).

The issuance of non-binding policy guidance encouraging proxy advisory firms to establish, maintain and apply policies to identify and manage conflicts (Canada) and a binding regulations proposed in the US, a comply or explain model as suggested in the EU; The Case for Regulating Proxy Advisory Firms - Both the SEC and Canadian Securities Administrators make it clear that there are problems in the way proxy advisors go about their business, but neither country's regulators feel regulation is required or appropriate.

187 Subramanian (n 1) 373; Muraca and Freeman (n 108).

188 Reyes (n 119).

189 Centre on Executive Compensation (n 42) 74.

190 ibid 7.

191 ibid 74.

advisory firms have their own set of counter-arguments, which are also equally strong.[192] For instance, it is argued that even in jurisdictions where regulations do not exist till now in relation to proxy advisory firms, there has been a growing consensus to introduce them.[193] Similarly, scholars have also opined that while injecting greater competition among the proxy advisory firms can informally regulate their conduct, nevertheless, it may not be enough to substitute the need for a full-fledged, formal law.[194]

Further, criticism arises in relation to the effectiveness of certain provisions under the Regulations.[195] For instance, though SEBI, in order to enhance the legitimacy of advice rendered by proxy advisory firms, has laid down the minimum educational requirements for their employees, these requirements are so low that they may not serve the underlying purpose.[196] Further, turning a deaf ear to the growing clamour in several countries to absolutely ban the conflict of interest relation that arises when proxy advisory firms simultaneously offer advisory service to investors and consultancy services to investee companies,[197] SEBI has abstained from imposing such a ban.[198] Furthermore, application of several regulations under the Regulations can be waived off or compromised with if such waiver takes place in accordance with the internal policy and management of proxy advisory firms.[199] While this possibility of waiver may equip proxy advisory firms with the required level of flexibility in their operations, it is felt that it is the limitation of the Regulations that these internal mechanism and policy formulated by proxy advisory firms do not require a prior approval by the SEBI. Another event highlighting the deficiency in law[200] recently propped up when ITC Limited filed a Rs. 1,000 crore defamation suit against the Indian proxy advisory firm, IiAS in the Calcutta High Court alleging that the latter had made 'defamatory' statements against the company as well as its directors.[201] Irrespective of the veracity of these claims made by ITC, it is crucial to note that given the whistle-blowers' role[202] played by proxy advisory firms such defamation suits against these

192 Subramanian (n 1) 374, 377; Muraca and Freeman (n 108); Li (n 139); Edelman (n 106).
193 ibid.
194 ibid.
195 Securities and Exchange Board of India (Research Analysts) Regulations, 2014.
196 SEBI (Research Analysts) Regulations, 2014, regs 6, 7, 23 (proviso).
197 Centre on Executive Compensation (n 42) 12.
198 Singh (n 28).
199 Securities and Exchange Board of India (Research Analysts) Regulations, 2014, regs 15, 16, 18.
200 Securities and Exchange Board of India (Research Analysts) Regulations, 2014.
201 'Proxy Firms Not Cowed', The Telegraph (8 September 2017) <https://www.telegraphindia.com/1170908/jsp/business/story_171491.jsp> accessed 18 September 2017; Sundaresh Subramanian, 'Should SEBI Save Analysts From Their Subjects?', Business Standard (12 September 2017) <https://www.pressreader.com/india/business-standard/20170912/281981787749511> accessed 18 September 2017.
202 ibid. Shukla, 'Pravin Rao's Pay Hike Fair, Want Murthy to List Governance Woes at Infosys: Experts' (*Moneycontrol*, 18 September 2017) <http://www.moneycontrol.com/news/business/companies/experts-disagree-with-narayana-murthy-want-him-to-list-corporate-governance-issues-at-infosys-2252223.html> accessed 18 September 2017.

firms may become commonplace.[203] In the absence of special protection accorded to proxy advisory firms in this regard, the independence of these firms may stand threatened. Hence, this lacuna in the law demands attention.[204] Similarly, unlike other jurisdictions such as the US,[205] under the Regulations in India, there are no reporting or regular filing requirements or the requirement to appoint a compliance officer to monitor legal compliance upon proxy advisory firms in relation to the obligations imposed on them.[206] This also puts into question the actual implementation of the Regulations.

Lastly, since the Regulations have been enacted by the SEBI, they apply only in cases where proxy advisory firms deal with listed companies, though, unlike the jurisdictions such as Australia[207] and the EU,[208] the same has not been clarified or specified explicitly under the definition of 'proxy advisory firms' as given under Regulation 2(p). This is because, under Regulation 2(p), proxy advisor has been defined as any person who provides advice, through any means, to institutional investor or shareholder of a company, in relation to exercise of their rights in the company.[209]

Hence, conclusively stating, given the existence of equally strong contentions on both sides in each part of this Section on each points, it remains unclear if a) Indian proxy advisory firms would face similar issues of conflict of interest and lack of reliable advice and to the same extent as faced by proxy advisory firms in the UK and the US, b) if competition among the proxy advisory firms would play a dominant positive role to overcome its negative impact if any, c) if introduction of regulations for this burgeoning industry has been an appropriate decision of the State and d) if the regulations so introduced are effective to address the underlying concern. These further increases the ambiguity regarding the exact role proxy advisory firms may play in addressing corporate governance issues in India in long run.

IV. Conclusion

Due to the lack of sufficient literature and given that the introduction of proxy advisory

203 Subramanian (n 1).

204 ibid.

205 In the US, there is a provision for the need to prepare annual report under Corporate Governance Reform and Transparency Act of 2017 and under the amendment suggested under provision 3 of Corporate Governance Reform and Transparency Act of 2017 by insertion of Section 15H(h) to the Securities Exchange Act of 1934, it is required of proxy advisory firm to appoint a compliance officer.

206 SEBI (Research Analysts) Regulations, 2014.

207 Directive (EU) 2017/828 of the European Parliament anZd of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement, art 1(d). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017L0828> accessed 21 May 2018.

208 In Australia the Code has been developed by the Australasian Investor Relations Association (AIRA) with the intent of creating a balanced set of principles to foster effective engagement between 'listed' companies and proxy advisory firms.

209 SEBI (Research Analysts) Regulations, 2014, reg 2(p).

firms in India and SEBI's regulations governing them have been a recent phenomenon, uncertainty prevails regarding the precise role these firms would play in affecting India's corporate governance in the long run.[210] Even when these firms may begin to affect corporate governance in India in the long run, it remains unclear if such impact would be a positive one or a distorted one, as apprehended in other jurisdictions as well.

However, given the fact that shareholders' activism in India is on the rise and that institutional investors are somewhere managing to create a niche for themselves as shareholders in Indian Inc., it may be inferred that proxy advisory firms have a sure shot at creating a ripple effect, even if not the waves effect, in the ocean of Indian corporate governance.[211] However, this would be so only when these firms continue to sustain themselves in the face of the burdens imposed by SEBI's regulations and market competition apart from other factors.

210 Singh (n 28); Varottil, 'Shareholder Activism and Proxy-Advisory Firms' (n 13).
211 Varottil, 'Shareholder Activism and Proxy-Advisory Firms' (n 13).

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