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Editor-in-Chief,
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www.nludelhi.ac.in
email: nludslj@nludelhi.ac.in
Tel. No : 011-28034255
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Contents

THE KASHMIR CASE: HOW NOT TO HANDLE A CONFLICT

- Dr. Aman Hingorani*

I. Introduction

A discussion was held on 21 December 2019 at the prestigious Army War College at Mhow on *The Future Contours of Kashmir: A Whole of Government Approach*.[1] The opening paragraph of the Approach Paper for the discussion ran as under:

> In a momentous decision that should mark the beginning of a new chapter in Kashmir's history, on 5 Aug 2019, the President of India issued the notification to revoke Article 370 and 35A. In one stroke, the state of J&K has transmuted from being **disputed territory to undisputed territory,** sovereign to India.

These lines capture all that has been wrong with New Delhi's approach to the Kashmir issue since 1947 till date!

The erstwhile princely state of Jammu & Kashmir (J&K) became an integral part of India when its sovereign ruler acceded to India on 26 October 1947, and remains an integral part of India. This is not because I say so but because the very principle that created modern day India and Pakistan says so, as will be evident shortly. It is equally true that it was New Delhi that accepted such accession provisionally in 1947 and made it subject to a reference to the people of J&K. In other words, it was New Delhi that gave a 'disputed territory' tag to J&K before proceeding to then internationalise the Kashmir issue by taking it to the United Nations Security Council (UNSC) in 1948, committing on the floor of the UNSC to hold a plebiscite in J&K under United Nations (UN) auspices and consequently conferring standing upon every member of the UN (including Pakistan) to comment on the happenings in J&K. But then, does, or can, such 'disputed territory' tag conferred by New Delhi upon J&K in 1947 get 'transmuted' to 'undisputed territory sovereign to India' by

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* Aman M Hingorani is a lawyer and mediator in the Supreme Court of India and the High Court of Delhi. Dr Hingorani has also acted as an arbitrator and as adjunct faculty to teach law students and run training courses for judicial officers, lawyers and law teachers. Dr Hingorani has been invited to address national and international audiences, including various stakeholders, on the Kashmir issue. He is the author of the highly acclaimed book titled 'Unravelling the Kashmir Knot' which has inspired this article.

1 'The Future Contours of Kashmir: A Whole of Government Approach' (Approach Paper, Army War College, Mhow 2019).

the Presidential notification in 2019 to revoke Article 370 and 35A? This article examines this question and also how terribly misconceived New Delhi's policy on J&K has been from 1947 onwards.

As a point of departure, let us consider the circumstances that led New Delhi to confer the 'disputed territory' tag upon J&K in 1947. For this, I narrate the following facts, which have been set out in greater detail in my book, *Unravelling the Kashmir Knot*, with each fact being documented and referenced from authoritative sources cited in the book.

II. British Policy to Partition India

Declassified British archives disclose the British colonial politics that led to the partition of the Indian sub-continent on 15 August 1947. This was facilitated in no small measure by the utter ineptitude and political naivety of eminent Indian leaders of undivided India. The British archives establish that the partition was ruthlessly scripted by the British for their own geo-strategic interests during their 'Great Game' (the precursor to the Cold War) with the then Soviet Russia, and to prevent Russian influence from travelling southwards towards the oil-rich Middle East. The British devised many strategies towards this end. One of the strategies was to use Islam as an ideological boundary, as the territory along the then Soviet Union right from Turkey to China was Islamic. The north west frontier of colonial India fell in this Islamic crescent, and included the North West Frontier Province (NWFP) and the Gilgit region of J&K.

The British knew that they would soon have to transfer power to Indian hands, and that independent India would be governed by the Indian National Congress (INC) which was spearheading the freedom struggle. Faced with INC not supporting Britain's Second World War effort, the British strategists found it necessary to keep *a slice of India* that would include the strategic NWFP. Hence, a friendly sovereign state, 'Pakistan', was to be created; friendly to the British and their allies for their defence and strategic purposes. And since the territory from Turkey to China straddling the then Soviet Union was Islamic, the two-nation theory was to be mouthed by the Muslim League as the justification for creating an Islamic Pakistan. The Muslim League itself was a creation of the British to give effect to its official policy to communalise Indian politics by sharpening the existing Hindu-Muslim differences; a policy unhesitatingly expressed in the telegrams exchanged between successive Viceroys on the sub-continent and successive Secretaries of State in London. It was at the instance of Victor Alexander John Hope Linlithgow, the then Viceroy, that Muhammad Zafarullah Khan, a member of the Viceroy's executive council, was asked to submit a map of the two dominions. A telling telegram is that of 12 March 1940 sent by Linlithgow to the then Secretary of State to the effect that[2]:

> Upon my instruction Zafarullah wrote a memorandum on the subject. Two Dominion States. I have already sent it to your attention…. Copies

2 Wali Khan, *Facts are Facts: Untold Stories of India's Partition* (Sangam Books Ltd 1987) 40.

> have been passed on to Jinnah…. While he, Zafarullah, cannot admit its authorship, his document has been prepared for adoption by the Muslim League with a view to giving it the fullest publicity.

Ten days later, Mohammad Ali Jinnah, the politically ambitious barrister heading the Muslim League, presented the two-nation theory at the All-India Muslim League session held from 22 March 1940 to 24 March 1940 at Minto Park, Lahore.

It mattered little to the British if such partition of the sub-continent would be drenched by communal bloodshed and lead to perpetual warfare. Witness the letter sent by Leopold Charles Maurice Stennet Amery, the then Secretary of State, to Linlithgow in the summer of 1940[3]:

> Now India has a very natural frontier at present. On the other hand, within herself she has no natural or geographic or racial or communal frontiers—the northwestern piece of Pakistan would include a formidable Sikh minority. The northwestern part has a Muslim minority in the United Provinces, the position of Muslim princes with Hindu subjects and vice versa. In fact, an all-out Pakistan scheme seems to me to be the prelude to continuous internal warfare in India.

Yet, successive political 'plans' formulated by London to transfer power to Indian hands contained provisions that would inevitably fracture the sub-continent. London chose to ignore its own governors in British India, for instance, the Punjab Governor, Betrand Glancy who had warned that '(i)f Pakistan becomes an imminent reality we shall be heading straight for bloodshed on a wide scale'.[4]

The blueprint of the partition plan of British India was drawn up by Archibald Wavell, the then Viceroy, in New Delhi towards the end of 1945 and communicated in a top-secret telegram to the then Secretary of State on 6 February 1946.[5] This blueprint of the future 'Pakistan' was implemented almost to the letter in the form of the Radcliffe Award about 18 months later.

Jinnah announced on 27 July 1946 in Bombay that the Muslim League should 'bid goodbye to constitutional methods' and take 'direct action', that is, communal killings.[6] He declared 16 August 1946 as the 'direct action day'. The killings started in Calcutta. Not surprisingly, the British Brigadier in charge of law and order in Calcutta, JPC Makinlay, 'ordered his troops confined to barracks for the day, leaving the city naked for the mobs'.[7]

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3 Narendra Singh Sarila, *The Shadow of the Great Game: The Untold Story of India's Partition* (Harper Collins 2009) 65.

4 ibid 187.

5 ibid 194-95.

6 ibid 222.

7 ibid 223.

During their meeting on 27 September 1946, Wavell actually cited the Calcutta killings to pressurize Mohandas Karamchand Gandhi and Jawaharlal Nehru of the INC to concede to the demands of the Muslim League, warning that else 'India is on the verge of civil war'.[8] By the time the 46 year old Louis Francis Albert Victor Nicholas Battenberg, or simply Louis Mountbatten, the last Viceroy of India, reached the Indian subcontinent on 22 March 1947, the entire sub-continent was burning, with every fresh communal fight normalizing the most brutal and depraved actions of the previous fight. This increasing orgy of communal violence forced the INC to agree to the political agreement of partition of 3 June 1947 driven by the British and the Muslim League.

The NWFP, which was strategically crucial for Britain's Great Game, had the largest majority of Muslims in British India. The INC was, however, the popular political body in the NWFP. In the 1936 general election held under the Government of India Act of 1935, the INC had routed the Muslim League all over the NWFP. In the general elections of 1945, the INC won 30 seats as against 17 seats by the Muslim League. Even in the following elections for the all-India Constituent Assembly held in July 1946, the INC won three of the four seats allotted to the province. The book details the steps taken by the British to remove the Congress influence in the NWFP for a 'Pakistan' to be formed, and their smokescreens to get the INC to agree, firstly, to the holding of a referendum in the NWFP in July 1947 on whether or not to join Islamic 'Pakistan' and, secondly, to the INC abstaining from participating in such referendum.[9] The result of such reference was thus predetermined to enable 'Pakistan' to materialize.

But then, the hilly NWFP would not be viable as a sovereign state. And so, the fertile plains of West Punjab would need to be in 'Pakistan' along with other territory. The two-nation theory came in handy for the British to justify the partition of Punjab. The partition of the Bengal province was merely a logical consequence of the application of that theory.

Such political scheme of partition was reflected in the Indian Independence Act of 1947. Section 2 of this Act specified the territories of the new dominions.[10] The territory of Pakistan was to be the territories of a partitioned Punjab and Bengal as described in the schedules to the Act, the province of Sind and the Chief Commissioner's province of British Baluchistan. The Act provided for referendum in the NWFP and Sylhet district of the Assam province, and for such territories to form part of the territory of Pakistan should Pakistan win the referendum.

It may be noted here that as of 15 August 1947, there were two kinds of territories on the sub-continent under British rule. One was the British provinces, and the other comprised of 560 odd princely states. Following the first war of independence in 1857, the British had discontinued the policy of annexation of further Indian territory and had sought

8 Jaswant Singh, *India- Partition Independence* (Rupa and Co. 2009) 553.

9 Aman Hingorani, *Unravelling the Kashmir Knot* (Sage Publications and Co. 2017) 70, 74.

10 Indian Independence Act 1947, s 2.

that the sovereign rulers of these states must declare their allegiance to the British Crown. The British Cabinet Mission Plan of 1946 had made it amply clear that on the transfer of power to Indian hands, the British paramountcy over these states would lapse. Section 7 of the Indian Independence Act of 1947 declared that as of 15 August 1947 'the suzerainty of His Majesty over the Indian States lapses'.[11] The Government of India Act of 1935 was amended to inter alia provide in Section 6 that 'a princely Indian state shall be deemed to have acceded to either of the dominion on the acceptance of the Instrument of Accession executed by the Ruler thereof'.[12] J&K was one such princely state.

III. J&K and The Partition

While planning the partition to secure the NWFP for the Great Game, the British had assumed that J&K, being predominantly Muslim and contiguous to Pakistan, would accede to Islamic Pakistan or at least be associated with it. The strategic Gilgit region of J&K would accordingly be within the sphere of influence of the British. However, the Dogra (Hindu) ruler of J&K did not want to accede to Islamic Pakistan. The ruler did not want to accede to India either, particularly since Sheikh Abdullah, the popular leader in the erstwhile state had been averse to the ruler and had strong affinity with Jawaharlal Nehru, India's first Prime Minister. Nehru, on his part, had expressed the view that rulers do not count in the new mood in India. The ruler feared he would be reduced to a figure-head if he acceded to India. The ruler, therefore, wanted to retain his sovereignty. The book documents the unsuccessful efforts of Pakistan, and the British, to persuade the ruler to accede to Pakistan.[13] This was followed by the Pakistani tribal invasion in October 1947 into J&K with British complicity, which helped the ruler make up his mind.

The ruler of J&K executed the instrument of accession in favour of India on 26 October 1947. However, such accession would adversely impact the Great Game for the British and defeat the very rationale for creating 'Pakistan'. That said, the British did not need the whole of J&K to be kept free from Indian control. They just needed the Gilgit region for the Great Game, and the strip of land known as the supposed 'Azad Kashmir' to act as a buffer zone to protect Pakistan from liquidation should India go to war with Pakistan.

Consequently, the British, in violation of the aforesaid British statutes as also every conceivable principle of international law, effected a coup of Gilgit on the night of 31 October 1947, and carved out such territory which had become part of Indian territory, and handed it over to Pakistan.[14]

It may be recalled that India remained a British dominion till 1950 and Pakistan till 1956. The King of the United Kingdom was the formal head. Neither dominion had yet

11 Indian Independence Act 1947, s 7.

12 Government of India Act 1935, s 6.

13 Aman Hingorani (n 9) 136, 146.

14 ibid 138, 140.

established full control over their respective armies; rather, it was British officers who were heading the armies in both the dominions. The British general heading the Indian Army was able to stop the advance of his own army in getting the occupied territory of J&K vacated of Pakistani tribals and irregulars. The lines demarcating the supposed 'Azad Kashmir', which was occupied by Pakistani tribals and irregulars, were drawn by British officers heading the Indian and Pakistani armies. It also did not help matters that right up to 1948, New Delhi let Mountbatten, as Governor-General of Independent India, formulate India's J&K policy as chair of the Emergency Committee and the Defence Committee of the Indian Cabinet. It was the Defence Committee that decided the Kashmir war policy, and not the Indian Cabinet as a whole. Accordingly, 'all the key decisions of the Government of India about Kashmir at the end of October 1947 were taken under the leadership of the Governor-General, for they were decisions in terms of defence against the tribal invasion'[15], and since Mountbatten chaired the Defence Committee of the Indian Cabinet, he could support General Roy Bucher, the acting British commander-in-chief of the Indian Army, in opposing the plan of General Kulwant Singh, GOC, Kashmir Operations in November 1947 to clear the territory of J&K of the Pakistani invasion.[16]

Having thus earmarked and secured the two areas of J&K to be kept free from Indian control, the British sought to undo the effect of accession of J&K to India and to keep the door open for Pakistan by making the accession subject to a plebiscite. Mountbatten has disclosed in an interview that[17]:

> I said to Nehru, here's the instrument of accession. As a Constitutional Governor-General, I'll only sign it at your request. But I also added, 'I'll countersign it on condition you offer a plebiscite'. Then we discussed the plebiscite. Nehru made one stipulation to which I agreed. That this could only be done in peaceful conditions, with the tribesmen withdrawn….

To place the question of plebiscite in J&K in context, it may be noted that around the time of the accession of J&K to India, there had been the somewhat controversial instances of the accession of the princely states of Hyderabad and Junagadh. Let us consider the significance of these accessions for the accession of J&K.

IV. Accession of Junagadh and Hyderabad

While J&K had a predominantly Muslim population and a Dogra (Hindu) ruler, the Hindu majority of the princely states of Hyderabad and Junagadh had Muslim rulers. The Nizam of erstwhile Hyderabad, like the ruler of J&K, had expressed his inclination to retain his independence. But it was in the matter of the accession of Junagadh that Jinnah

15 HV Hudson, *The Great Divide: Britain-India-Pakistan* (Hutchinson & Co. 1969) 448.

16 Narendra Singh Sarila (n 3) 358.

17 Lapierre Dominique & Larry Collins, *Mountbatten and Independent India: 16 August 1947-18 June 1948* (Vikas Publishing House 1984) 39.

outwitted the INC into laying down the policy that where the ruler of a princely state belonged to one community and the people to the other community, the people of that state should decide the future of the state. After all, since Jinnah had consistently been 'against according any democratic right to the people who lived in the Princely States' and since the Muslim League 'did not consider it necessary to consult the people of the states', it would have been uncharacteristic of the Muslim League to propound any such policy.[18]

If the rule contained in the British statutes was adhered to—that is, the sovereign ruler of the princely state alone was to decide the question of accession—Pakistan could, at best, secure the accession of Junagadh, whose territory was only about 4,000 square miles. Moreover, Junagadh was not contiguous to Pakistan but was surrounded by states that had acceded to India. Thus, should the Nawab of Junagadh have acceded to Pakistan, it would have been a liability for Pakistan. However, if the 'wishes of the people' were to be the deciding factor on the question of accession of a princely state, instead of the will of the sovereign ruler of that state, Pakistan could at least stake a claim to the Muslim-majority J&K, with a territory of 84,471 square miles. The trap was to get New Delhi to formulate and act upon such policy so that Pakistan could then take advantage of this policy for the 'parallel case' of J&K.

The instances of accession of Hyderabad and Junagadh were raised at the UNSC. In the case of Hyderabad, Pakistan alleged that its ruler, the Nizam, had sought to retain independence for his state but New Delhi refused to accept that position and demanded that the state should accede to India unconditionally. The *Yearbook of the United Nations, 1948-49*, records that the representative of India 'pointed out that, as early as August 1947, the Indian Government had suggested a plebiscite on the issue of Hyderabad's accession, but the Hyderabad Government had rejected that proposal'.[19] Pakistan claimed that when the Nizam did not agree, New Delhi marched its troops into Hyderabad and announced that the Nizam had acceded to India. New Delhi denied such an allegation and contended that the Hyderabad government had been forcibly taken over as the result of a coup d'état carried out by the extremist elements in the state. New Delhi claimed that the Nizam had ceased to be a free agent and had, after being released from the control of a group of extremists, voluntarily acceded to the dominion of India.

New Delhi declared before the UNSC that it would be prepared to accept any democratic test in respect of the accession of Junagadh to either of the two dominions. Junagadh acceded to Pakistan on 15 September 1947. New Delhi termed such accession 'as an encroachment on Indian sovereignty and territory' and sought a plebiscite in the state.[20] Pakistan alleged that a 'Provisional Government of Junagadh was set up in Indian

18 Wali Khan (n 2) 22, 169.

19 *Yearbook of the United Nations*, 1948-49, The Hyderabad Question< https://www.un.org/en/sc/repertoire/46-51/Chapter%208/46-51_08-19-The%20Hyderabad%20question.pdf> accessed 15 August 2020.

20 UNSC Verbatim Record (7 February 1950) UN Doc S/PV/463 31,32.

territory' and then, on 9 November 1947, India 'marched its troops into Junagadh and forcibly annexed the State which had acceded to Pakistan'.[21] Subsequently, 'a farcical plebiscite was held—India was in military occupation of the state—and the state was formally incorporated into the Indian Dominion'.[22] New Delhi refuted this version of the happenings in Junagadh. New Delhi informed the UNSC that the Dewan (Prime Minister) of Junagadh, who was in Karachi with the Nawab of Junagadh and 'in very close touch with members of the Pakistan Government', wrote to the Government of India, asking the latter to take over the responsibility of the Junagadh, which had acceded to Pakistan, because the popular view in Junagadh had been that the administration of the state be handed over to the Union of India.[23]

New Delhi evidently did not find it strange that the Dewan of Junagadh, sitting in Karachi with the Nawab of Junagadh and being 'in very close touch with members of the Pakistan Government', should write to the Government of India at all.[24] The trap was obvious—it was to induce New Delhi to reiterate and act upon its policy that the 'wishes of the people' would settle the question of accession of the princely state in the case of disputed accessions. And New Delhi did just that—it even held a plebiscite in Junagadh to declare before the world that the people had voted in favour of the accession of the state to India. New Delhi happily told the UNSC that New Delhi was quite prepared to hold another plebiscite under international auspices.

Thus, the significance of the accession of Hyderabad and Junagadh to India lay in the formulation of the policy, and that too by New Delhi, that in the case of a dispute regarding the accession of a princely Indian state to either of the dominions, the 'wishes of the people' would prevail. New Delhi apparently did not pause to consider that such policy was, in fact, politically unnecessary in view of the geographical location of Junagadh and Hyderabad. Indeed, as Mountbatten put it[25]:

> I always said in all the speeches I made about accession that there were certain geographical compulsions. I mean the idea that Junagadh could join Pakistan, across all the other Kathiawar states was just stupid. The idea that Hyderabad could join Pakistan was equally stupid.

V. Plebiscite in J&K

It was against this backdrop of New Delhi having formulated a policy of ascertaining the wishes of the people in the case of disputed accessions that New Delhi agreed to Mountbatten's pre-condition of a plebiscite in J&K before he (as Governor General)

21 ibid 33.

22 ibid.

23 UNSC Official Record (23 April 1948) UN Doc S/PV/287 5.

24 Wali Khan (n 2).

25 Lapierre Dominique, Larry Collins (n 17) 43.

accepted the instrument of accession. New Delhi accordingly *pledged* that it would regard the accession of J&K to be purely provisional and to be settled by a reference to the people.

But that was not enough for the British, since such promise of plebiscite was made to a section of the Indian people, and hence was within India's domestic jurisdiction. The book details how Mountbatten went on to persuade New Delhi to involve the UNSC on the pretext of stopping the fighting in J&K, but with the purpose of taking the Kashmir issue out of India's domestic jurisdiction and to confer the international community (including Pakistan) standing with respect to J&K.[26] The British strategy was to have the UNSC call for cease-fire without requiring Pakistan to first vacate the areas of J&K that it had occupied through aggression – which it did – and to have the UNSC look the other way when Pakistan consolidated its control over such occupied territory - which again it did. New Delhi was thus compelled by the UNSC to respect the ceasefire line and to helplessly watch Pakistan consolidate its control over the occupied territory. Thus, in the guise of the UNSC directed cease-fire, Pakistan (and through Pakistan, the British) got to retain precisely those areas of J&K that the British needed for the Great Game.

Mountbatten also succeeded in persuading New Delhi to commit before the UN a plebiscite in J&K under international auspices. The UNSC would then bypass India's complaint of aggression and hold India to its offer of plebiscite in J&K – which yet again it did. It was a trap laid by the British at the UNSC for New Delhi to confer a 'disputed territory' status upon J&K, and New Delhi fell for it. India is the only country in history that has gone to the UN complaining of aggression against its territory and returned with a commitment to hold a plebiscite to first decide whether that territory even forms part of the country.

VI. Territorial Status Quo

New Delhi soon realized that the UNSC was being subverted by the political expediency of its members, but by then it was too late—the UNSC had tied India's hands and pre-empted it from recovering a substantial portion of the state. And so, New Delhi took the easy way out—it simply disowned the occupied territory of J&K and its unfortunate people, who happen to be citizens of India under the Indian Constitution but continue to remain under foreign rule. New Delhi sought to avoid the UNSC resolutions for plebiscite by pointing out that such resolutions were premised on Pakistan vacating the occupied territory of J&K, and since Pakistan had failed to do so, New Delhi was not bound to hold the plebiscite. Moreover, as per New Delhi, there had been changes in circumstances over the years, releasing New Delhi from any such international engagement.

Instead, New Delhi now followed the policy of territorial status quo – India would keep that part of J&K which was with it, and Pakistan could keep the occupied territory of J&K. New Delhi even indicated its inclination to partition J&K along the lines recorded in the

26 Aman Hingorani (n 9) 198, 208.

UN Yearbooks. New Delhi, therefore, went on to tell the UNSC on 15 February 1957 that it considered that it had 'a duty not to re-agitate matters' and had decided to 'let sleeping dogs lie so far as the actual state of affairs is concerned'.[27] And so, when the Indian forces reclaimed Haji Pir (part of the territory of J&K) during the 1965 Indo-Pakistan war, New Delhi actually handed back such Indian territory to Pakistan in 1966 at Tashkent. Earlier, when Pakistan cheekily gifted a part of the occupied territory to China in 1963, New Delhi confined itself to making formal, and impotent, protests. Such territory is apart from the Aksai Chin region of J&K that China quietly occupied in the 1950s.

New Delhi unilaterally decided that the UNSC had nothing to do with J&K. It somehow forgot that it was the one who had taken the Kashmir issue to the UN. New Delhi adopted the position that the Kashmir issue must be resolved bilaterally with Pakistan in terms of the Simla Agreement of 1972 and the Lahore Declaration of 1999. New Delhi even forgot that the Kashmir problem is an international issue – it cannot but be one when the territory of the erstwhile state is under the control of three sovereign countries, India (about 45%), Pakistan (about 35%) and China (about 20%). New Delhi jumps with joy at the slightest hint of any country endorsing the Kashmir issue to be a 'bilateral' one with Pakistan and it terms it as a major diplomatic victory. All of New Delhi's energies have been frittered away in seeking to check the internationalisation of the Kashmir issue at considerable national cost, little realizing that each time it terms the Kashmir issue to be a bilateral one, it reiterates that Pakistan has a standing in the matter other than as an aggressor.

New Delhi continues to emphasize the 'inviolability' of the Line of Control (LOC) at every conceivable occasion in light of the Simla Agreement of 1972 and to strive, though unofficially, for the conversion of the LOC into the international border, notwithstanding the Parliamentary Resolution of 1994 requiring Pakistan to vacate the occupied territory of J&K.[28] It is content with lodging protests at the annexation by Pakistan of the Gilgit region and at Pakistan directly administering the supposed 'Azad Kashmir'. Indeed, New Delhi's protest was equally low key against the recent seven-judge decision of the Pakistan Supreme Court in *Civil Aviation Authority v Supreme Appellate Court Gilgit-Baltistan* which in effect gives the Gilgit region the status of a Pakistani province and treats its residents as Pakistani citizens.[29] Nor has New Delhi been particularly worried about the China Pakistan Economic Corridor being conceived through the Gilgit region i.e. Indian territory. China has vigorously launched its One Belt, One Road (OBOR) initiative and continues to invest heavily in the region and to attract international support. More than 100 heads of state are reported to have attended China's OBOR agenda in Beijing in April

27 UNSC Verbatim Record (15 February 1957) UN Doc S/PV/769 38.

28 Parliamentary Resolution, *Resolution on POK* (Parliamentary Resolution No. 2977, 1994).

29 Civil Aviation Authority v Supreme Appellate Court Gilgit-Baltistan (*Live Law*, 17 January 2019) <https://www.livelaw.in/pdf_upload/pdf_upload-360488.pdf> accessed 15 August 2020.

2019.[30] New Delhi seemed satisfied by just staying away from the meet.

VII. Fallout of New Delhi's Policy on J&K

The crucial fallout of New Delhi's stand on the accession of J&K to India has been on world opinion which still feels that it is India that has refused to honour its word—a perception that has altered the entire international political discourse on the Kashmir issue. When Pakistan makes itself hoarse, protesting against the denial of 'the right to self-determination' of the Kashmiri people, one does not even expect a rebuttal from New Delhi, having itself introduced the 'wishes of the people' to determine accession. Despite being the aggressor, Pakistan has been able to paint India, the victim, black. Indeed, the current international opinion is that while it may not be feasible to hold a plebiscite in J&K today, the erstwhile state remains a 'disputed territory' between India and Pakistan and that the Kashmir issue must be resolved keeping in mind the wishes of the Kashmiri people.

With New Delhi disowning the residents of the occupied territory of J&K, it is not even in the public consciousness in India that such residents are Indian citizens living under foreign rule. Indeed, even such residents have forgotten their identity as Indian citizens. As a result of New Delhi's unofficial policy of territorial status quo and conversion of the LOC into the international border, Pakistan has merrily consolidated its control over the occupied territory of J&K while staking a claim to the part of J&K with India. The further fallout of New Delhi's policy has therefore been to distort what constitutes the Kashmir issue by confining it to only that part of J&K which is with India, and more specifically to the Kashmir Valley – an area which is just about 9% of the entire J&K!

What makes such a state of affairs even more unfortunate is the fact that New Delhi's J&K policy is contrary to the constitutional law that binds New Delhi. Let us briefly consider the legality of New Delhi's stand of holding a referendum to settle the accession of J&K, and its subsequent stand of territorial status quo and conversion of LOC into the international border.

VIII. Legality of New Delhi's Policy on J&K

While India is an ancient civilization, it is evident from the above narration that modern day India and Pakistan are creations of the partition agreement of 3 June 1947, which was crystallized in the British statutes mentioned earlier. However, as per these very statutes, all the princely states were to regain full sovereignty and such sovereignty vested in the ruler, regardless of the religious complexion of the people of the state concerned. It was the ruler alone who could decide to accede to India, Pakistan or remain independent. These British statutes were accepted by both India and Pakistan. In fact, there is no doubt about the legitimacy of the states of India and Pakistan created by such statutes, and that such

30 Aman Hingorani, 'Pakistan SC Decision: Another Wake-Up Call for New Delhi' (*Live Law*, 2 May 2019) <https://www.livelaw.in/columns/pakistan-sc-decision-another-wake-up-call-for-new-delhi-144700> accessed 13 August 2020.

statutes comprised the constitutional law governing both India and Pakistan.

The sovereign ruler of J&K unconditionally acceded to India on 26 October 1947 in the manner prescribed under the aforesaid constitutional law. As noted above, New Delhi viewed the accession as being purely provisional and subject to the wishes of the people. By doing so, New Delhi overlooked the fact that once a political decision (the partition agreement) had been crystallized into law (the British statutes), the executive created by that law could not act contrary to the terms of that very law. It is well settled that a state cannot, by making promises, clothe itself with authority which is inconsistent with the constitution that gave it birth. The constitutional law creating modern day India mandated that it was *only* the sovereign ruler who could decide on the accession of his state to India. New Delhi had no power to lay down a contrary policy that the accession would be decided by the wishes of the people.[31] Further, since the accession of J&K to India by its ruler was in terms of the same constitutional law that created Pakistan, it would be fair to say that the law that gave birth to Pakistan itself made J&K a part of India. Moreover, it is not open in international law for a state (Pakistan) to challenge the accession made by a sovereign state (J&K) to another sovereign state (India), such accession being an Act of State. The ruler of J&K has never challenged the accession as being fraudulent or based on violence. Rather, the ruler acceded to India unconditionally in the areas of external affairs, defence, communications and ancillary matters and expressly retained his sovereignty qua the remaining matters. The UN, and every state 'contracting' with India (including Pakistan) are held in international law to have had the knowledge that New Delhi exceeded its powers under the said constitutional law by pledging to hold a plebiscite in J&K to settle the question of accession, and, that too, in the absence of its sovereign ruler. As a result, not only was New Delhi's 'pledge' of holding a plebiscite in J&K unconstitutional and not binding on India, the UNSC resolutions for holding the plebiscite were themselves without jurisdiction and in violation of the UN Charter.

As regards the policy of territorial status quo, it is implicit in such policy that New Delhi may cede national territory. New Delhi apparently failed to notice that it lacks competence under the Indian Constitution to do so. The Supreme Court had held in *Berubari Union*[32] that Parliament could amend the Constitution to cede national territory, such power of cession being an essential attribute of sovereignty. However, in the later thirteen-judge decision in *Keshavananda Bharti*[33], the Court took the view that Parliament lacked the power to tinker with the basic structure of the Constitution, which the Court

31 This view will not enable Pakistan to re-open the accession of the erstwhile states of Junagadh or Hyderabad to India in as much as plebiscite in Junagadh was tacitly approved by its sovereign ruler while the plebiscite in Hyderabad was followed by its sovereign ruler executing the instrument of accession in favour of India.

32 *Reference by the President of India under Article 143(1) of the Constitution of India on the implementation of the Indo-Pakistan Agreement relating to Berubari Union and Exchange of Enclaves* AIR 1960 SC 845, 856.

33 *Keshavananda Bharati v State of Kerala* AIR 1973 SC 1461, 1628.

identified to include the unity and territorial integrity of the country. The Court, in its nine-judge decision in *S.R. Bommai*, reiterated that '(d)emocratic form of Government, federal structure, *unity and integrity of the nation*, secularism, socialism, social justice and judicial review are basic features of the Constitution'.[34] As a result, Parliament cannot amend the Constitution to give away Indian territory. New Delhi has evidently been barking up the wrong tree by following its unofficial policy of territorial status quo or seeking to convert the LOC into the international border.

Further, the inevitable consequence of the territorial status quo policy has been that New Delhi has at least from the 1950s onwards focused only on the happenings in the part of J&K with India, a process that has culminated in the Presidential notification of 5 August 2019. In order to appreciate how terribly misguided, and unnecessary, the Presidential notification is, let us summarily consider the constitutional and political developments in J&K since its accession to India.

IX. Constitutional and Political Developments in J&K

J&K was an independent and sovereign state as of 15 August 1947 as per the British statutes creating modern day India and Pakistan, and has been held to be so by the Supreme Court in its Constitution Bench decision in *Prem Nath Kaul*[35]. It was in terms of such law that the ruler of J&K, who was the sole repository of power in the erstwhile state, chose to accede to India through the instrument of accession of 26 October 1947 making J&K an integral part of India. Such accession by the ruler, though unconditional, was only in matters of external affairs, communications and defence and certain ancillary matters. The instrument of accession expressly declared that nothing therein would affect the continuance of the sovereignty of the ruler in or over J&K. The eleven-judge decision of the Supreme Court in *Madhav Rao*[36] held that the instrument of accession was an Act of State on the part of the sovereign ruler of a princely state and bound all concerned, and that relations between the princely state and India were strictly governed by such instrument. Indeed, the Supreme Court observed in *Prem Nath Kaul* that it was not, and could not have been, within the contemplation, or competence of the Constitution makers to impinge even indirectly, on the plenary powers of the ruler of J&K. Indeed, it is settled law that independent states may 'have their sovereignty limited and qualified in various degrees, either by the character of their internal constitution, by stipulations of unequal treaties of alliance, or by treaties of protection or of guarantee made by a third Power'.[37] There are judicial precedents in common law for the proposition that 'a state may, without ceasing to be a sovereign state, be bound to another more powerful state by an unequal alliance'.[38]

34 *SR Bommai v Union of India* AIR 1994 SC 1918, 2045.

35 *Prem Nath Kaul v State of Jammu and Kashmir* AIR 1959 SC 749.

36 *Madhav Rao* v *Union of India* (1973) 3 SCR 9, 37.

37 *Duff Development Company Limited v Government of Kelantan and Anr* 1924 AC 797, 830.

38 ibid 807-808; *Gurdwara Sahib v Piyara Singh* AIR 1953 Pepsu 1(B).

It may be stated here that the instrument of accession executed by the ruler of J&K was identical to the instruments of accession executed by the rulers of the other princely states, and all such instruments were limited to the same three matters. However, other princely states executed supplementary instruments ceding further subjects and also executed instruments of merger, merging their territory with the Indian Union. Such merged territory was subsequently reorganized through the *States Reorganisation Act of 1956*. However, the ruler of J&K did not execute any supplementary instrument nor any merger instrument in favour of India.

Even so, it was not contemplated that a ruler would remain the constitutional head of a state within a democratic Indian republic. Hence, there was to be a transfer of power from the ruler of J&K to a duly elected state constituent assembly. And so, the Indian Constitution itself contemplated in Article 370 that J&K would have its own constitution framed by its own constituent assembly.[39] However, there was still to be a transition from monarchy to a form of government that was to be decided by a state constituent assembly which was yet to be set up, and which would also finally determine the constitutional relationship of J&K with the Indian Union. Thus, Article 370 was described as a temporary provision and placed under Part XXI of the Indian Constitution which deals with 'Temporary, Transitional and Special Provisions'. To appreciate such import of the temporariness of Article 370, one needs to only go through the decision of the Constitution Bench of the Supreme Court in *Prem Nath Kaul*. Significantly, the Supreme Court emphasized that it was for the state Constituent Assembly to finally determine the constitutional relationship of J&K with the Indian Union.[40]

Accordingly, the Indian Constitution was made applicable to J&K only through Article 370, and it was through Article 370 that Article 1 of the Constitution (which lists the States of India and their territories) was extended to J&K. Article 370(1) provided that Parliament could make laws for J&K only with respect to matters in the Union and Concurrent Lists which, in consultation with the J&K government, are declared by the President to correspond to the matters specified in the instrument of accession. Parliament was empowered to make laws in respect of such other matters in the said Lists as, with the 'concurrence' of the J&K government, the President may specify. Further, the President could apply other provisions of the Constitution to J&K relating to matters specified in the instrument of accession as identified above but only in 'consultation' with the J&K government, while such application in respect of other matters required the 'concurrence' of the J&K government. Article 370(2) stipulated that whenever the state government gave its 'concurrence', before the state Constituent Assembly for the purpose of framing state Constitution was convened, it shall be placed before such Assembly for such decision as it may take thereon. The proviso to Article 370(3) mandated a recommendation from the same state Constituent Assembly to the President to declare Article 370 inoperative before

39 The Constitution of India, art 370.

40 Prem Nath (n 35) [38].

he could do so.

Article 370, therefore, was enacted to give effect to the terms of the instrument of accession and left it for the state Constituent Assembly to finalize the constitutional relationship with India. It was the instrument of accession, and not Article 370, which formed the basis of the relationship between J&K and the Indian Union. Article 370, in fact, did not confer 'special status' on J&K nor use any such term. Rather, there was nothing in Article 370 that could have prevented the state Constituent Assembly from ceding all matters to the Indian Union or merging the territory of J&K into the Indian Union, had it chosen to do so.

The state Constituent Assembly, set up in 1951, regarded the constitutional relationship of J&K with the Indian Union as one of an autonomous republic within the Indian Union. This relationship was later crystallized in the Delhi Agreement, 1952, which was duly ratified by the Indian Parliament on 7 August 1952 and the state Constituent Assembly on 21 August 1952. The Delhi Agreement inter alia permitted the state legislature to make laws conferring special rights and privileges upon the state subjects.[41] The President of India, in exercise of the power under Article 370, then issued the Constitution (Application to Jammu & Kashmir) Order, 1954, which inserted provisions like Article 35A to give effect to the Delhi Agreement and also applied further articles of the Indian Constitution to J&K (with modifications).[42]

Another provision inserted by this 1954 Order was the proviso to Article 3 of the Indian Constitution. This provision mandates that 'no Bill providing for increasing or diminishing the area of the State of Jammu and Kashmir or altering the name or boundary of that State shall be introduced in Parliament without the consent of the Legislature of that State.'[43] In other words, J&K did not only not merge its territory into the Indian Union, it explicitly preserved its territorial integrity as well as identity.

The state Constituent Assembly framed the Constitution of Jammu & Kashmir by 1956, and effected the transfer of power from the ruler to the people of the erstwhile state. The state Constitution declared J&K to be an integral part of India. The state Constituent Assembly dispersed without making a recommendation that Article 370 should cease to be operative.

It appears that, initially, New Delhi did honour such autonomous status of the part of J&K with India. Thereafter, successive regimes at New Delhi issued a series of executive Presidential Orders under Article 370(1) over the decades to apply almost the entire Indian Constitution to J&K, and that too, often with modifications that would have been impermissible for other parts of the country. Thus, ironically, the part of J&K with India did

41 Delhi Agreement 1952 <http://jklaw.nic.in/delhi1952agreemnet.pdf> accessed 14 August 2020.

42 Constitution (Application to Jammu & Kashmir) Order 1954, CO 48.

43 The Constitution of India, art 3.

get a 'special status', though certainly not that of an autonomous republic within the Indian Union. Rather, it found itself at the other end of the spectrum, with mere executive directions by New Delhi deciding its fate. New Delhi justified its actions, as also the introduction of draconian penal laws, to the generous export of cross border terrorism by Pakistan. The book documents how the reckless strategies adopted by Pakistan to wrestle the part of J&K with India has reduced Pakistan to become a breeding ground for terrorism. That does not, however, absolve New Delhi from emasculating the constitutional guarantee of Article 370 conferred by the Indian Constitution itself or introducing penal legislation like the Armed Forces Special Powers Act 1958, which not only gave the security forces virtually a licence to kill, but also provided a legal cover to shield them from prosecution. The Supreme Court has unfortunately upheld such coercive laws.[44] The book analyses the fatal infirmities in these judicial decisions, including the overlooking of larger binding precedents, that would have compelled the Court to strike down such laws as unconstitutional.[45]

X. The Kashmir issue and Article 370

Such focus of New Delhi only on the part of J&K with India led to differing perceptions in India about what comprises the Kashmir issue. The Indian polity, faced with demands for autonomy in J&K, the proxy war by Pakistan and the turmoil in the Kashmir Valley, started equating the Kashmir issue with Article 370. The Indian security forces viewed the Kashmir issue as a law and order problem, with Pakistan stoking mischief in the Valley. Many in the Valley saw the Kashmir issue in terms of the dilution of Article 370, enforcement of draconian penal laws and human rights violations. The Kashmiri Hindus (Pandits) defined the Kashmir issue through the prism of the terrible happenings in the early 1990s, which rendered them as refugees in their own country. For the majority in Jammu and Ladakh, the Kashmir issue was about breaking the hegemony of the Valley and equal representation and even development in J&K.

Forgotten in such varying, albeit important, perceptions was the fact that the Kashmir issue is not only about the part of J&K with India, but the entire erstwhile state. The Kashmir issue is not about Article 370. The genesis of the Kashmir issue is not located in Article 370 nor its solution. In my view, the abrogation of Article 370, as has been sought to be done by the Presidential notification and subsequent steps taken by New Delhi, is, therefore, not of much relevance from the point of view of finding a solution to the Kashmir issue.

Without getting into the merits (or otherwise) of New Delhi's justification – that Article 370 was the root of terrorism in J&K, had stalled its integration and development, prevented proper health care and education and blocked industries; and so on so forth – I believe that New Delhi's move is, even otherwise, constitutionally vulnerable. Let us consider what New Delhi has done.

44 Aman Hingorani (n 9) 446-474.

45 ibid.

Legality of New Delhi's moves on Article 370

On 5 August 2019, the President, in exercise of his power under Article 370(1), issued the Constitution (Application to Jammu & Kashmir) Order. This Presidential notification superseded the 1954 Order and further inter-alia provided that all the provisions of the Indian Constitution shall apply to J&K along with a 'Clause 4' inserted in Article 367. Clause 4 made certain provision pertaining to the Governor of J&K and in effect replaced in the proviso to Article 370(3) the expression 'Constituent Assembly' with 'Legislative Assembly'.[46]

Post such Presidential notification, Parliament enacted the Jammu & Kashmir Reorganisation Act of 2019, which bifurcated J&K into two Union Territories – J&K with a legislature and Ladakh without a legislature.[47] The President, on the recommendation of Parliament, also issued the 'Declaration under Article 370(3) of the Constitution' in exercise of his powers under Article 370(3) read with Article 370(1), to declare that all clauses of Article 370 would cease to be operative from 6 August 2019, except the clause to the effect that '(a)ll provisions of this Constitution, as amended from time to time, without any modifications or exceptions'[48] shall apply to Jammu & Kashmir (J&K), notwithstanding anything contrary contained in the Constitution or the J&K constitution or 'any law, document, judgement, ordinance, order, by-law, rule, regulation, notification, custom or usage having the force of law in the territory of India, or any other instrument, treaty or agreement as envisaged under Article 363 or otherwise'.[49]

The consequences of these measures has been three-fold - firstly, it superseded the 1954 Order that had given effect to the preferential status of J&K and applied the entire Indian Constitution to J&K; secondly, it has bifurcated J&K into Union Territories; and thirdly, it has made the state legislative assembly (instead of its Constituent Assembly) the competent authority to make the recommendation to the President to declare Article 370 inoperative.

At the outset, it may be noted that New Delhi has dealt with Article 370 at a time when J&K was under President's Rule contemplated in Article 356 of the Constitution. Article 356 is an emergency provision that empowers the President to assume the functions of the state government and Parliament to exercise the powers of the state legislature in a situation in which the governance of the state cannot be carried out in accordance with the Constitution.[50] Article 356 is not meant to be used to take far reaching decisions but is to be resorted to sparingly. Furthermore, the exercise of the power under Article 356 is limited by time as provided in Article 356 itself. It is a temporary arrangement only until

46 Constitution (Application to Jammu & Kashmir) Order 2019, GSR 551(E).

47 Jammu and Kashmir Reorganisation Act 2019, s 3.

48 Declaration under Article 370(3) of the Constitution 2019, GSR 562(E).

49 ibid.

50 The Constitution of India, art 356.

the government of the state can be carried on in accordance with the Constitution.

Coming to the legality of New Delhi's moves, let us consider each measure one at a time. The first measure was the supersession of the 1954 Order and the application of the entire Indian Constitution to J&K. But then, almost the entire Indian Constitution had anyways been made applicable to J&K much before the Presidential notification of 5 August 2019. Article 370 had virtually been emptied of its contents over the decades. Be that as it may, it may be recalled that Article 370 requires the 'concurrence' of J&K with respect to matters not specified in the instrument of accession. Since J&K was under President's Rule, New Delhi exercised the powers of the state government and state legislature. Hence, the President, apparently with the 'concurrence' of his own nominee, the J&K Governor, who has been equated with the state government, issued the Presidential notification superseding the 1954 Order that had given effect to the preferential status of J&K, followed by the application of the entire Indian Constitution to J&K.

As regards the bifurcation of J&K into Union Territories, it is true that the Indian Constitution does not guarantee the territorial integrity of the constituent states of the Indian Union. Article 3 of the Constitution provides that Parliament may by law form a new State and alter the areas, boundaries or names of any State. The proviso to Article 3, however, provides that no Bill for such purpose will be introduced in Parliament unless the Bill has been referred by the President to the state legislature for expressing its views thereon when the proposal contained in the Bill affects the area, boundaries or name of that state.[51]

The only exception so far was J&K. Article 370 applied Article 1 to J&K thereby recognizing it as a constituent state within the Indian Union. The 1954 Order applied Article 3 to J&K with an additional proviso as aforesaid that mandated that 'no Bill providing for increasing or diminishing the area of the State of Jammu and Kashmir or altering the name or boundary of that State shall be introduced in Parliament without the consent of the Legislature of that State.'

Assuming the Presidential notification (which supersedes the 1954 Order and applies the entire Indian Constitution to J&K) to be valid, Parliament could have by law altered the areas, boundaries and name of J&K without the consent of the state legislature. However, it was still a requirement of the proviso to Article 3 for the J&K Reorganization Bill to have been referred to the state legislature for expressing its views thereon.

But then, with J&K being under President's Rule, there was no state legislature that could have expressed its views on the J&K Reorganization Bill. Instead, Parliament exercised the power of the state legislature to effectively dismember the state itself! In this context, it may also be noted that while the Indian Constitution is not strictly federal in nature, it is also not strictly unitary in nature – it is often described as quasi-federal. In fact,

51 The Constitution of India, art 3.

the state in relation to which the Constitution was closest to being federal was J&K, due to historical reasons. The thirteen-judge decision of the Supreme Court in *Keshavananda Bharati* has gone to the extent of viewing the federal character of the Constitution as part of its basic structure.[52] Parliament, by exercising the power of the state legislature to bi-furcate J&K into Union territories, has plainly violated the federal structure of the Constitution.

Coming to New Delhi's measure of making the state legislative assembly the competent authority to make the recommendation to the President to declare Article 370 inoperative, it may be recalled that the proviso to Article 370(3) mandated a recommendation from the state Constituent Assembly (which was to be convened for the purpose of framing the state Constitution) to the President to declare Article 370 inoperative before he could do so. Since the state Constituent Assembly dispersed after framing the state Constitution by 1956, without making any such recommendation, it follows that the competence of any organ of the Indian State to declare Article 370 inoperative no longer existed.

Now, the Presidential notification adds to Article 367 of the Indian Constitution (an Interpretation clause) a provision to the effect that the state Constituent Assembly referred to in the proviso to Article 370(3) shall be read as the state legislative assembly. Simply put, New Delhi has sought to exercise the power under Article 370(1) to nullify or circumvent the protection given to J&K by Article 370(3). That runs counter to the elementary proposition of law that a constitutional provision cannot be used to defeat another constitutional provision or to render it nugatory.

Further, recourse is usually taken to an interpretation clause where there is ambiguity, thus requiring the aid of interpretation. There is no ambiguity in Article 370, which expressly states that it is the state Constituent Assembly (convened to frame the State constitution) which would be the competent authority to make a recommendation to the President to declare Article 370 inoperative. There is, accordingly, no warrant to use Article 370(1) to substitute the reference to the state Constituent Assembly in Article 370(3) with the state legislative assembly. Clearly, the intent was to denude the protection guaranteed by Article 370(3). To allow New Delhi to do so would amount to it indirectly amending Article 370(3) – which in turn would violate Article 370(1) (c) and (d) that mandate that the provisions of Article 370 shall apply to J&K and that it is only other provisions of the Constitution that may be modified in their application to J&K.

The effect of the Presidential notification, with J&K under President's Rule, is that the power to make the requisite recommendation has been taken away from the state Constituent Assembly and vested in the state legislative assembly only to have been eventually exercised by Parliament. And so, New Delhi (Government of India) needed a 'yes' only from New Delhi (Parliament) to declare Article 370 inoperative! Surely that cannot be the position in law.

52 (n 33).

The crux of New Delhi's measures has been to let New Delhi define the constitutional relationship of J&K with the Indian Union; instead of J&K deciding such relationship. This action is therefore inconsistent with the binding terms of the instrument of accession, the constitutional mandate of Article 370, the Delhi Agreement and also the view taken by the Supreme Court, notably in *Prem Nath Kaul.*

Fallout of New Delhi's moves on Article 370

Regardless of the legality of New Delhi's action, India and the world have been presented with a fait accompli. New Delhi has already got away with what it wanted to do. However, the fallout of such action by New Delhi has again been on the world opinion, not least because of the attendant communication lockdown in J&K being the longest in history and detention of political leaders there. India has yet again lost the public relations battle, with its international standing as a country wedded to the rule of law and protection of human rights taking a huge hit. What is even more unfortunate is that New Delhi still does not appreciate that the abrogation of Article 370 or conversion of J&K into Union Territories will not get rid of the 'disputed territory' tag conferred upon J&K by New Delhi. New Delhi has kept on harping about J&K being an integral part of India – the rest of the world has simply not agreed. Abrogation of Article 370 or bifurcation of J&K into Union Territories will not convince the world community that the entire erstwhile state is Indian territory or that Pakistan and China must vacate the occupied territory. Nor will it help New Delhi recover the occupied territory of J&K or reclaim the residents of such territory as Indian citizens or even stop cross border terrorism. Abrogation of Article 370 or conversion of J&K into Union Territories is premised on the view that the Kashmir issue is confined to the happenings in the part of J&K with India, and discounts the occupied territory of J&K. Such J&K policy, due to the very parameters within which it is formulated, cannot 'transmute' J&K 'from being disputed territory to undisputed territory, sovereign to India'.

XI. Conclusion

The Kashmir case serves as a good example of how not to handle a conflict. Due to numerous misconceived polices on J&K since 1947 till date, New Delhi does not really have a military, diplomatic, economic or political solution to get rid of the 'disputed territory' tag on J&K or to even break the political stalemate with Pakistan and China who have continued to occupy more than 50% of J&K for decades. And so, if New Delhi wants to seriously attempt to resolve the Kashmir issue, it must aim to change the current political discourse surrounding this vexed problem, both internationally and nationally. The book pieces together a practical and realistic way forward, which includes having the principal judicial organ of the UN, i.e. the International Court of Justice (ICJ), examine eight propositions formulated in the book to give an authoritative pronouncement to the effect that the entire erstwhile state is Indian territory in terms of the very law that created

modern day India and Pakistan.[53] Since it was New Delhi that had, in the first place, created doubts about the unconditional nature of the accession of J&K to India, internationalized the Kashmir issue and conferred a 'disputed territory' status on J&K, it is New Delhi that needs, as a first step, to confirm, as it were, its title deeds to J&K so as to remove the 'disputed territory' tag on J&K. Given that India is entitled in law to the entire territory of J&K, it lies in India's interest to have the ICJ examine the Kashmir issue, regardless of the issue of enforceability of ICJ decisions or the dynamics of international politics. Such examination is not precluded by the Simla Agreement or any other bilateral agreement between India and Pakistan.

In light of India's past experience with the UNSC, one can understand the concerns of Indian observers at the prospects of taking the Kashmir issue to the international stage. But then, the UNSC is a political body, while the ICJ is a judicial one. India already has in place its Commonwealth reservations to the jurisdiction of the ICJ which it can cite to block any possible widening of the scope of examination by the ICJ at the instance of Pakistan beyond the eight propositions. Simply put, the ICJ can be asked to examine only what New Delhi would want it to examine.

And so, New Delhi should not shy away from taking the Kashmir issue to the ICJ, it being an effective way of depoliticizing the matter. While the Kashmir issue is certainly a political one, it is possible for New Delhi to separate the legal from the political aspect of the issue, so that it can vindicate its claim to the entire territory of J&K based on legal rights. If the ICJ gives a verdict in India's favour, and it is likely to do so in view of the legal principles formulated in the book, the very presence of Pakistan and China in the territory of J&K would constitute 'aggression' under international law, and the international community would be under an obligation to put an end to that illegal situation as illustrated by the ICJ decision in *Namibia.*[54] No country can then extend even 'moral' support to the supposed 'freedom struggle' in J&K. New Delhi must realize that it needs the international community to pressurize Pakistan to vacate its aggression and to stop cross-border terrorism. But for that to happen, New Delhi must first obtain a finding from the ICJ, whose views are authoritative for the world community, to confirm that the entire territory of J&K is a part of India.

Further, in the unlikely event that the ICJ decides against India by opining that the future of J&K will be decided by the wishes of the people, New Delhi still stands to lose nothing. New Delhi has always maintained that the people of J&K have endorsed the accession of J&K to India, as is evident from the resolution of 15 February 1954 of the elected state Constituent Assembly. Indeed, the Assembly, which had been set up in 1951 by the sovereign ruler of J&K, framed the Constitution of Jammu & Kashmir by 1956

53 Jaswant Singh (n 8) 368-405.

54 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 726 (1970)*, *Advisory Opinion*, ICJ Reports 1971, 52.

declaring J&K as an integral part of India. New Delhi can simply fall back on its official stand.

It is true that law alone cannot resolve the Kashmir issue, but a confirmation of the correct legal position by the ICJ will help alter the current political discourse, both nationally and internationally, and swing political opinion in India's favour to create a momentum for winning the confidence of the people of J&K and for bringing peace to the region. New Delhi must take steps to regain the moral authority to be in J&K and to undo past mistakes, as detailed in the book, its success being dependent on the character of the Indian State and of the men and women who run it.

'IT TAKES A VILLAGE TO RAISE A CHILD!' - THE DEVELOPMENT OF CORPORATE INSOLVENCY LAW IN INDIA FOR REAL ESTATE COMPANIES

- Amit K Mishra and Shivam Pandey*

I. Introduction

The Insolvency and Bankruptcy Code, 2016 (IBC/Code) came into effect on 28 May 2016.[1] Before this Code, there was no single law in India that dealt with insolvency and bankruptcy. The provisions pertaining to insolvency and bankruptcy were scattered across separate statutes like the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA), the Recovery of Debt due to Banks and Financial Institutions Act, 1993 (RDDB Act), the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI), and the Companies Act, 2013. While remedies were available under different legislations, to add to the chaos, these statutes provided for creation of multiple fora, such as Board of Industrial and Financial Reconstruction (BIFR), Debt Recovery Tribunal (DRT) and National Company Law Tribunal (NCLT), and their respective appellate tribunals. On the contrary, the liquidation process used to be concluded under the judicial supervision of the High Courts, and bankruptcy and insolvency of an individual was dealt by courts under the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920. In simple words, the pre-existing framework was ineffective, inadequate, and resulted in undue delays.

As per the long title of the IBC, it was enacted with an objective to consolidate and amend the laws relating to the reorganization and resolution of insolvency of corporate persons, partnership firms and individuals in a time-bound manner tilted towards maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interest of all stakeholders. It was deemed to provide an effective legal framework for timely resolution of insolvency and bankruptcy, which would, in turn, support the development of the credit market in India. The incidental benefit that comes with the Code cannot be discounted, which is that it promises to improve the ease of doing business in India and facilitate more investment, leading to higher economic growth and

* Mr Amit K Mishra is a Partner and head of Litigation and Dispute Resolution practice at P&A Law Offices. He can be reached at akmishra@palaw.in. Mr Shivam Pandey is an Associate of the Litigation and Dispute Resolution team at P&A Law Offices. He can be reached at spandey@palaw.in. The views expressed herein are personal.

1 The Insolvency and Bankruptcy Code 2016.

development.

However, the Code as it was enacted, found it difficult to cater to the ground-level realities of the real estate industry. The business model of real estate companies is such that the allottees (generally termed as homebuyers), despite being crucial stakeholders, had no say in the corporate insolvency resolution process (CIRP). This paper aims to highlight the peculiar issues faced in the CIRP of a real estate company and how the legislature, judiciary, and the stakeholders have worked together to develop a practical mechanism under the provisions of the Code, which could accordingly assist the CIRP of a real estate company. The author, while traversing the genesis of the industry-specific provisions in the Code, argues that to attain the objectives of the Code, every stakeholder must work in a concerted manner.

II. The Genesis of Real Estate Industry-specific Provisions in Code

The controversy was first highlighted when in June 2017, the Reserve Bank of India identified a list of the top 12 defaulters in the country, including one real estate company – Jaypee Infratech Limited, that were declared to be in default of an amount approximately of Rs. 8,000 crores to their lenders (the dirty dozen).[2] The RBI issued an advisory to the lenders of dirty dozen who, subsequently, initiated actions under Section 7 of the Code. The debt owed by the dirty dozen originated from the public deposits of the banks and financial institutions, who are answerable to their stakeholders. The Parliament thereafter enacted the Banking Regulation (Amendment) Act, 2017[3] to amend the Banking Regulation Act, 1949 (BR Act). This amendment introduced Section 35AA and Section 35AB in the structure of the BR Act, empowering the Central Government to authorize the RBI, by an order,[4] to issue directions to any banking company to initiate the CIRP in respect of a default as understood under the Code. The RBI constituted an Internal Advisory Committee (IAC) consisting primarily of its independent directors. The IAC took up for consideration accounts which were classified as either partly or wholly non-performing from amongst the top 500 exposures in the banking system, as on 31 March 2017. As a first step, the IAC recommended all such non-performing asset accounts with fund and non-fund based outstandings exceeding INR 5,000 crores. The IAC had initially taken up twelve accounts involving total exposure of INR 1,79,769 crores.[5] The dirty dozen consisted of these twelve accounts, against which directions were issued for banks to initiate the CIRP under the Code.

While Jaypee Infratech Limited (Jaypee) was undergoing proceedings under Section

2 N Kulkarni, S Jain and K Khandelwal, 'Market Reaction to the Banking Regulation (Amendment) Ordinance, 2017' (2017) RBI Mint Street Memo Series No. 03. See also GK Nidugala and A Pant, 'Lessons from NPAs crisis in Indian banks' (2017) 17(4) Journal of Public Affairs.

3 Banking Regulation (Amendment) Act 2017.

4 Banking Regulation Act 1949, s 35AA.

5 *Chitra Sharma v Union of India & Ors* (2018) 18 SCC 575.

35AA of the BR Act read with section 7 of the Code, two separate cases under the Code concerning the peculiarities posed by CIRP for real estate companies puzzled the NCLT and National Company Law Appellate Tribunal (NCLAT). These were the cases concerning *AMR Infrastructure Ltd*. and *Earth Organics Infrastructure*. The controversy emanated around the term 'financial debt' as defined under section 5(8) of the Code. The Code defines 'financial debt' to mean a debt along with interest, if any, which is disbursed against the consideration for the time value of money[6] and *inter alia* includes money borrowed against payment of interest, etc. The confusion was whether the payments made by homebuyers to these companies fall within the definition of financial debt under the Code.[7] In both these cases, the NCLAT categorized the homebuyers as financial creditors due to the 'assured return' scheme in the contract, which was an arrangement wherein it was agreed that the seller of the apartments would pay 'assured returns' to the homebuyers till the possession of the property was given. It was held that such a transaction was in the nature of a loan and constituted 'financial debt' within the Code. However, it must be noted that these judgments were rendered, considering the terms of the contracts between the homebuyers and the seller/real estate company, making it a fact-specific categorization where a majority of the contracts entered into by homebuyers do not have clauses like those in the two cases. Nonetheless, these cases did bring to light the importance of homebuyers as vital stakeholders in a CIRP of a real estate company.

The substantial discussion on the importance of the homebuyers in the CIRP of real estate companies was catapulted by the proceedings emanating from the Jaypee case. IDBI Bank Limited initiated an action against Jaypee, which was admitted by NCLT, Allahabad Bench, unopposed by Jaypee and its management.[8] Resultantly, an interim resolution professional (IRP) was appointed and an order of moratorium under section 14 of the Code was also issued.[9] The effect of a moratorium is such that it prohibits the institution of suits and the continuation of pending proceedings, including execution proceedings against the corporate debtor.[10]

This moratorium created a cacophony among the homebuyers of Jaypee, which included approximately 25,000 families.[11] The financial distress of Jaypee had been apparent for quite some time by then, as it regularly defaulted in its payments to the banks and failed to construct and deliver flats to the homebuyers in time. Many of these homebuyers had

6 Insolvency and Bankruptcy Code 2016, s 5(8).

7 *Col Vinod Awasthy v AMR Infrastructure Ltd* 2017 SCC OnLine NCLT 16278; *Nikhil Mehta v AMR Infrastructure* 2018 SCC OnLine NCLAT 219; *Anil Mahindroo & Anr v Earth Iconic Infrastructure (P) Ltd* 2017 SCC OnLine NCLAT 216.

8 *IDBI Bank Ltd v Jaypee Infratech Ltd* 2017 SCC OnLine NCLT 12613.

9 ibid.

10 Insolvency and Bankruptcy Code 2016, s 14.

11 The Constitution of Committee of Creditors, as available on the website of the Corporate Debtor <http://www.jaypeeinfratech.com/communication/2019/Constitution_of_CoC-18_06_2019.pdf> accessed 27 August 2020.

obtained loans from financial institutions as well. As a result of the delay in handing over possession, numerous homebuyers had filed consumer complaints before the State and National Consumer Disputes Redressal Commissions. Such consumer complaints were subjected to a moratorium imposed under Section 14 of the Code.

Aggrieved by the order, various homebuyers approached the Hon'ble Supreme Court of India (Supreme Court) in a batch of petitions invoking its jurisdiction under Article 32 and Article 136 of the Constitution of India, to protect the interests of homebuyers who had been left in the lurch. The lead matter in the batch petitions was captioned as *Chitra Sharma & Ors. v. Union of India & Ors*.[12] While the matter was still pending before the Supreme Court, two key things were happening at around the same time, which would go on to become a refined CIRP for real estate companies.

Firstly, The Supreme Court acted akin to an adjudicating authority under the Code, and supervised the CIRP of Jaypee, formulating a workable solution via its interim orders that later found substantial replication in the Code by the means of amendments. For example, the Supreme Court directed the IRP to proceed with the CIRP and appointed a representative to attend meetings of Committee of Creditors (CoC) on behalf of homebuyers and assist the CoC in their interest. This was later seen as an amendment to the Code[13] wherein a position of authorised representative was inserted to participate in the CoC meetings on behalf of a class of creditors.

Secondly, the legislature worked simultaneously to assuage the grievances of the homebuyers. For example, on 18 August 2017, the Insolvency and Bankruptcy Board of India (IBBI) released a press note clarifying that the homebuyers could fill Form-F for their respective claims, as they then did not fall strictly within any class of operational creditors or financial creditors.[14] Furthermore, the Insolvency Law Committee, 2018 provided substantial recommendations in this regard, which culminated into the Insolvency and Bankruptcy (Amendment) Ordinance, 2018.

Section 5(8) of the Code has been amended by the Insolvency and Bankruptcy (Amendment) Ordinance, 2018 with effect from 06 June 2018.[15] The real estate allottees (comprising both homebuyers and commercial structure buyers) were brought to the stature of a financial creditor under the Code. The amendment added an Explanation to section 5(8)(f) to state that 'any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of borrowing'. It further provides that the expressions, 'real estate project' and 'allottee' shall have the same

12 *Chitra Sharma* (n 5).

13 Insolvency and Bankruptcy Code 2016, s 21(6A).

14 CIRP Regulations, reg 9A.

15 The Insolvency and Bankruptcy (Amendment) Act, 2018 on 17 August 2018, deemed to be in effect from 06 June 2018 <https://www.ibbi.gov.in/webadmin/pdf/whatsnew/2018/Aug/The%20Insolvency%20and%20Bankruptcy%20Code%20(Second%20Amendment)%20Act,%202018_2018-08-18%2018:42:09.pdf> accessed 27 august 2020.

meaning assigned to them under section 2(zn) and 2(d) of the Real Estate (Regulation and Development) Act, 2016 (RERA).

This amendment provided the homebuyers with three important rights under the Code: (i) Right to initiate the CIRP; (ii) Right to be on the CoC; (iii) The guarantee of receiving at least the liquidation value, under the resolution plan. This was done because most of the funding in real estate projects is done by the homebuyers, and it was imperative to protect their rights under the Code.

The amendment was enforced, even before the Supreme Court could finally decide the case of *Chitra Sharma & Ors. v. Union of India & Ors*. Hence, the Supreme Court allowed Jaypee to undergo another round of the CIRP, under the provisions of the amended Code.

At first blush, this seemed to be the conclusion of the peculiar problems faced during the CIRP of a real estate company. However, the amendment proved to be far from perfect in its ground-level application. There exist several arenas of the CIRP, which warranted further amendments, or a holistic intervention of the NCLT, the NCLAT, and the Supreme Court. In subsequent parts, the authors will bring to light such pitfalls, which are posed by using the current mechanism of the CIRP for real estate companies.

III. The Confidentiality Conundrum

Regulation 13 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) states that the IRP or the resolution professional (RP), as the case may be, shall verify every claim, as on the insolvency commencement date, within seven days from the last date of the receipt of the claims, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it.[16] It further states that such a list should be available for inspection and also be displayed on the website, if any, of the Corporate Debtor.[17] The obvious corollary of this regulation is that the details of the homebuyers, who have invested in a real estate project, would also be available on the website of the Corporate Debtor, after them becoming a financial creditor. However, when data of a large number of homebuyers is sought to be uploaded on a website of a Corporate Debtor, it poses confidentiality concerns, as the details of such homebuyers would be available for the world at large, and leave it vulnerable to be misused. In such a scenario, there can also be a situation, wherein, certain individual allottees would not wish their name to be published in the list.

However, it is the authors' view that there exists a difference between 'privacy' and 'confidentiality'. An information which is confidential does not necessarily have to be

16 CIRP Regulations, reg 13(1).

17 CIRP Regulations, reg 13(2)(c).

private, and vice versa. Confidentiality refers to personal information shared with an attorney, banker, physician, therapist, or other individual that generally cannot be divulged to third parties without the express consent of a person. On the other hand, privacy refers to the freedom from intrusion into one's personal matters, and personal information, such as if someone is homosexual or HIV positive. While privacy is a fundamental right, a right to confidentiality arises from a fiduciary relationship.[18] It is trite law, that any confidential information can be sought to be disclosed through a statutory provision. For example, under the Bankers' Books Evidence Act, 1879, confidential data of a person with the bank can be disclosed.

The fundamental right to privacy cannot be read in isolation. The application of Regulation 13 of the CIRP Regulations, in the present scenario is fair, just and reasonable, which would provide effective resolution of the insolvency of Corporate Debtor. It is concerned with data that is minimal information pertaining to authentication of claims by creditors only, which is retained only for a certain period, and no other personal data is published. Since, the mandatory requirement under Regulation 13 of the CIRP Regulations fulfils the 'three-fold test' as laid down in *Justice K S Puttaswamy (Retd.) and Anr.* v. *Union of India*[19], such publication of data does not violate the fundamental right of privacy of the homebuyers. The NCLT, Allahabad bench was faced with a similar conundrum when the matter of Jaypee was relegated back to have a supervised CIRP before this adjudicating authority. The IRP was hesitant to publish the list of homebuyers on the website of the Corporate Debtor. However, in a detailed order from NCLT, the IRP was directed to publish such list.[20]

IV. The Voting Mechanism

Once insolvency has been admitted against a Corporate Debtor, the management of the Corporate Debtor vests completely with the IRP/RP.[21] The affairs of the Corporate Debtor are monitored by the CoC.[22] Furthermore, the approval of CoC is mandatory for a majority of the actions under CIRP.[23] Section 28 of the Code read with regulations 25, 25A and 26 of the CIRP Regulations, currently provide for the mechanism of how the view of the CoC has to be taken on, by way of voting, on agendas before the CoC. The Code, across its provisions, states that for any resolution/decision to be implemented, such decision should either be assented to by sixty-six per cent of the CoC[24] or else fifty-one per cent of

18 K Vipul, 'Relationship Between Privacy and Confidentiality' (*The Centre for Internet and Society*, 30 December 2014) <https://cis-india.org/internet-governance/blog/relationship-between-privacy-and-confidentiality> accessed 27 August 2020.

19 *Justice K S Puttaswamy (Retd) v Union of India* (2017) 10 SCC 1.

20 *IDBI Bank Ltd* (n 8).

21 Insolvency and Bankruptcy Code 2016, s 17.

22 Insolvency and Bankruptcy Code 2016, s 21.

23 Insolvency and Bankruptcy Code 2016, s 28.

24 For important matters.

the CoC.[25] While amending the Code, to cater to the real estate companies, the legislature had mindfully inserted regulation 25A in the CIRP Regulations, wherein the authorised representative had to vote as per the class of creditors she/he represented.

However, ground-level realities posed practical problems in implementing such a mechanism of voting. Homebuyers are a class of financial creditors distinct from well-organized financial creditors such as Banks, Financial Institutions, Asset Reconstructions Companies and others like non-banking financial companies. These institutions are managed by a systematised, hierarchical set of managers with properly compiled documentation. Homebuyers, numbered in thousands and scattered all across India and abroad, are largely unorganised, while financial creditors consisting of financial institutions would always have high voting shares. It is also pertinent to note that all homebuyers may not have a proper understanding of or access to the voting mechanism; some of the homebuyers may be old and infirm, while others might not be well conversant with computers and the internet and at times be unaware of their rights. Thus in a non-ideal scenario, it is very difficult to ascertain the exact will of the CoC, wherein the homebuyers constitute a lion's share of the CoC. Frequent abstinence and lack of commercial wisdom in homebuyers, therefore, leaves the CIRP decisions vulnerable to failure.

To find a workable solution, it becomes important to interpret section 25A of the Code purposively, in particular, section 25A(3) and the first proviso therein.[26] Purposive interpretation of section 25 has to be in line with the objects and the preamble of the Code. The IBC in its preamble makes it clear that it is 'an act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance of interest of all the stakeholders' (emphasis added).

The long title of the Code itself stipulates that the interest of all stakeholders must be balanced. Thus, where there are different classes of stakeholders, the interest of each stakeholder must be balanced. It follows that homebuyers must be viewed as a distinct class of creditors. Furthermore, regulation 16-A(1) of the CIRP Regulations makes it clear that the authorised representative is to be chosen by the highest number of financial creditors in the class. Moreover, the IRP is required to provide to the authorised representative appointed by the Adjudicating Authority the list of creditors in each class under regulation 16-A(4). In other words, the regulation intrinsically suggests that the authorised representative can represent several classes. Therefore, section 25(3) and the proviso too have to be read in that manner. Another indication in the Code for such an interpretation was provided by

25 For routine matters.

26 It states: 'Provided that if the authorised representative represents several financial creditors, then he shall cast his vote in respect of each financial creditor in accordance with instructions received from each financial creditor, to the extent of his voting share'.

section 21(6A)[27] which, through its sub-section (b), makes it clear that where a financial debt is owed to a class of creditors exceeding the number specified, other than those under section 21(6), an authorised representative can be appointed. Pursuant to this, regulation 2(1)(aa) of CIRP Regulations provided that a class of creditor means a class with at least 10 financial creditors for the purpose of section 21(6A)(b). Section 21(6A) also states that the authorised representative can represent different classes of creditors as stipulated under clause a, b and c of section 21(6A).

It is the authors' view that the net effect of the aforesaid provisions, particularly in the view of the Amendment Act 26 of 2018, read with the amendment to the regulation, is that the Code inherently permits and facilitates voting as a class. The authorised representative can thus represent diverse classes as discussed above. It is in this context that section 25 and Section 25A can be interpreted. If read thus, the proviso would have to be understood that each financial creditor would vote as a class. The sequitur of the aforesaid argument is that in the case of class of creditors, they would vote based on a majority. Therefore, it cannot be contented that the authorised representative would vote for each person in a class separately. Individual votes may be recorded by the authorised representative to reach a majority in the class, but ultimately the authorised representative would vote based on a class in the CoC. Voting has always been understood in law to be an affirmative action signifying acceptance or rejection. Even though a provision may be made (for abstention) that cannot be counted as against, a positive indication of rejection. They have to be ignored as null votes.

Furthermore, merging of categories of all financial creditors (organised financial institutions and spread-out individual homebuyers) and treating them as one would also amount to treating unequals as equals, which may result in a violation of Article 14 of the Constitution. Therefore, providing the same threshold for both categories may result in a declaration that those provisions are ultra vires the Article 14 of the Constitution. However, the Supreme Court in a catena of judgments has laid down that the court should adopt an interpretation that sustains the provisions, rather than leaning towards a declaration that the provisions violate Article 14 of the Constitution. The Supreme Court has provided extensive guidance, prompting that the principle of construction that should be adopted is one that sustains the constitutional validity of a statute rather than that which results in the declaration of ultra vires. It follows that in such a scenario, the Code was necessitated to be construed in a manner so as to make it effective and operative.

The Legislature, though belatedly, recognised such a conundrum faced in the practical implementation of the provisions of the Code and the regulations therein. It amended the Code, yet again in 2019 to insert section 25(A)(3A) which states:

> Notwithstanding anything to the contrary contained in sub-section (3), the authorised representative under sub-section (6A) of section 21 shall

27 Inserted via the Insolvency and Bankruptcy (Amendment) Ordinance 2018.

> cast his vote on behalf of all the financial creditors he represents in accordance with the decision taken by a vote of more than fifty per cent. of the voting share of the financial creditors he represents, who have cast their vote.

The Legislature finally implemented, by way of an amendment, the same conclusion that the authors' intended to draw in the paragraph above. Hence, the conundrum faced in a CIRP of real estate company was yet again addressed by the legislature with a welcome amendment.

V. Should The Debt of The Homebuyers Accrue Interest?

It is the obligation of the IRP, under regulation 14 of the CIRP Regulations to determine the amount being claimed by a financial creditor and subsequently, assign a voting percentage to each financial creditor proportionate to their claims, which mandatorily has to include the interest component, as per the regulation 16(A)(7) of the CIRP Regulations. However, the wording of regulation 16(A)(7) appears to be problematic and amenable for equivocal interpretation; it states '[t]he voting share of a creditor in a class shall be in proportion to the financial debt which includes an interest at the rate of eight per cent per annum unless a different rate has been agreed to between the parties'.

A reluctant interpretation of the above provision can be that the interest component on the debt of the homebuyers should only be for the purposes of assigning voting share in the CoC, rather than providing a positive right to claim interest on the debt of the homebuyers. Such an interpretation, in view of the authors, should not hold ground.

One of the major factors prompting the legislature to include homebuyers as financial creditors, through the Amendment to IBC, was that the builder utilises the disbursements made by the homebuyers towards the construction of the flats in the future. The amount so raised by the builder is used as the cheapest means of financing the real estate project and is thus in effect a tool for raising finance, and on the failure of a project, money is repaid based on the time value of money. Such a transaction unequivocally has the commercial effect of borrowing.[28]

Thus, if a forward sale or purchase transaction is structured as tools or means of raising finance, there is no doubt that the amount raised is classified as financial debt under section 5(8)(f) of the Code. Therefore, in the case of the homebuyers, since the monies raised from them are means of finance in a real estate project, they fall squarely within the entry (f) of section 5(8).

Moreover, the definition of 'financial debt' under section 5(8) of the Code uses the words 'includes'. Thus the kinds of financial debts illustrated are not exhaustive. The phrase 'disbursed against the consideration for the time value of money' has been the

28 Ministry of Corporate Affairs, *Report of the Insolvency Law Committee* (2018) paras 1.1 to 1.9.

subject of interpretation in a few instances. The words 'time value' have been interpreted to mean compensation or the price paid for the length of time for which the money has been disbursed. This may be in the form of interest paid on the money or factoring of a discount in the payment.

The import of the above argument is that the most important factor to qualify the disbursement by homebuyers as financial debt is that there has to be a compensation for the monies paid to the homebuyers for the length of the time such money stands disbursed. Resultantly, it is mandatory to accord a just rate of interest on the money disbursed by the homebuyers and/or provide for a mechanism to factor in an equivalent just discount on the subsequent payments expected from the homebuyers. This is to say that a just interest is the most integral component of 'time value of money'. This argument is buttressed by regulation 16A(7) of the CIRP Regulations, which unequivocally states that 'the voting share of a creditor in a class shall be in proportion to the financial debt **which includes an interest**…'. Hence, in the view of the authors, there is no doubt that the admitted claims of the homebuyers must mandatorily include a just and fair interest on top of the monies disbursed by them.

This issue has yet not received the traction it should have. Also, while properly adjudicating the interest component, the respective clauses of the agreements entered by the homebuyers would also play an important role. However, the authors wish that either the legislature or the judiciary would soon provide an appropriate solution to this conundrum.

VI. Are Homebuyers, Secured Financial Creditors?

The real estate industry, on the whole, has been financially distressed. Considering the capital intensive nature of this industry, it is generally not a viable option for a resolution applicant to take over a distressed real estate company unless and until it can, in the near future, make a profit on such a huge investment. So in a hypothetical scenario wherein a real estate company fails the CIRP and is going to be liquidated, the secured financial creditors such as the bank will end up exhausting the assets of such Corporate Debtor, thus leaving the homebuyers in the lurch. To avoid such a scenario, the authors believe that a compelling case can be made to state that the homebuyers are secured financial creditors.

Section 3(30) of the Code defines the term 'secured creditor' to mean a creditor in favour of whom security interest is created. Subsequently, section 3(31) defines the term 'security interest' to mean right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, '**charge**', hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person.

The import of the above two definitions is that, if any right of a home buyer on the flats allotted to them can be qualified under the definition of 'security interest', the homebuyers

would fall squarely within the definition of a 'secured creditor'. For such qualifications, an enquiry into the nature of rights of the homebuyers is warranted.

Homebuyers become financial creditors because they provide most of the funding for real estate projects through their payments. Such payments are made by the homebuyers in an anticipation of the delivery of the flats. In such scenarios, section 55(6)(b) of the Transfer of Property Act, 1882 (TP Act) is applicable, which provides that unless the buyer improperly declines to accept the delivery of the property, the amount of purchase money paid by the buyer in anticipation of the delivery and for interest on such amount shall remain as a '**charge**' on the property (the flats sought to be bought by the homebuyers), as against the seller (real estate companies). There will be no question of the creation of any other special charge on such properties as the provisions of the TP Act, would automatically apply in the present case.[29]

Furthermore, where there is part payment of purchase price, there is a charge created for such portion of the money that has been paid and charge certainly is an interest in the immovable property.[30] Section 55(6)(b) of the TP Act creates a statutory charge and not a mere charge that can be said to have been created by the conduct of the parties. A charge under section 55(6)(b) of the TP Act arises, when it is shown, that the buyer has not improperly declined to accept the delivery of the property.[31] Hence, in an absence of any declination at the behest of the homebuyers, it can be strongly argued that there exists a statutory charge in favour of the homebuyers because where a buyer in an agreement for a sale does not improperly decline to accept the delivery of property, a charge is created over the property by operation of section 55(6)(b) of TP Act for the averment of advance sale consideration.[32]

It is to be noted that the nature of the contract entered between the homebuyers and real estate companies is that of an executory contract, i.e. where the sale deed has not been executed yet. In such a scenario, where an executory contract is in force, the statutory charge created under section 55(6)(b) of the TP Act would be applicable, till the time an actual sale deed stands executed in favour of the homebuyers.[33]

Under section 55(6)(b) of the TP Act, the buyer has got the charge for the price pre-paid, in anticipation of the completion of the agreement.[34] This charge attaches from the

29 *Anchi v Maida Ram* AIR 1987 Raj 11.

30 *K Mahalakshmi v Venkata Bhaskara* AIR 1964 AP 334.

31 *Abdul Satar v Manilal,* AIR 1970 Guj 12.

32 *Puthiya Purayil Ramakrishnan v Pullani Prabhakaran* AIR 2016 Ker 66.

33 *Sunderaramier v Krishnamachary* AIR 1966 Mad 330; *Adikesavan Naidu v Gurunatha Chetti* AIR 1918 Mad 1315; *Kathmuthu v Subramania Chettiar* AIR 1926 Mad 569; *Krishnaswami Rao v Srinivasa Desikan* AIR 1937 Mad 261.

34 *Meppallipoyli Ibravi v Poolakkandiyil Pokkan* AIR 1990 Ker 169; *Pati v Kunhi Raman Nair* AIR 1959 Ker LT 491.

moment the buyer pays any part of the purchase money.[35] Such a charge is enforceable not only against the seller, but also against any person claiming under him. Furthermore, as it is clear from article 62 of the Limitation Act 1963, the period of limitation for such enforcement of the statutory charge created under section 55(6)(b) of TP Act is twelve years from the date on which it becomes due.

The Supreme Court in the case of *Videocon Properties Ltd.* v. *Bhalchandra Laboratories and Ors.*[36] held:

> … The principle underlying the above provision is a trite principle of justice, equity and good conscience. The charge would last until the conveyance is executed by the seller and possession is also given to the purchaser and ceases only thereafter… This charge is a statutory charge in favour of a buyer and is different from contractual charge to which the buyer may become entitled to under the terms of the contract…

As depicted above, homebuyers have a statutory charge on the flats allotted to them by operation of section 55(6)(b) of the TP Act. A statutory charge differs from a contractual charge and is based upon the principles of justice, equity and good conscience.[37] What should be analyzed now is what the effect of such a charge would be and what rights would a home buyer have by way of such a charge. In such a scenario, section 100 of the TP Act should be investigated. According to section 100, where an immovable property of one person is by act of parties or operation of law made security for the payment of money to another and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property, and all the provisions which apply to a simple mortgage shall, so far as may be, apply to such charge.

Hence, under section 100 of the TP Act, a charge is an obligation to make payment out of the property specified.[38] In order to create a charge, it is not necessary to employ any technical or any particular form of expression. All that is required is that there should be a clear intention to make a particular property as a security for the payment of money. Creation of enforceable security is the essence of the charge with respect to immovable property.[39] The form of the expression or the literal sense is not to be regarded as much as the real intention of the parties which the transaction discloses. If the transaction discloses

35 ibid.

36 *Videocon Properties Ltd v Bhalchandra Laboratories* AIR 2004 SC 1787.

37 *MV Krishnamachari v Dhanalakshmi* AIR 1968 Mad 142; for contractual charge: An example of contractual charge can be seen from Section 2(16) of the Companies Act, 2013, wherein the company has subsequent liability to report such charges under Section 77 of the Companies Act, 2013.

38 *Muthuswami Gounder v N Palaniappa Gounder* (1998) 7 SCC 327.

39 *Hindustan Machine Tools Ltd v Negdugandi Bank Ltd* AIR 1995 Kant 185; *Gangamoni Devi v Kumud Chandra Mazumdar* AIR 1950 Pat 478.

an intention to make property security for payment of a debt, a charge arises.[40]

What is also to be borne in mind is that it is not necessary that there should be a pre-existing liability. Such a charge can be validly created for the discharge of future or contingent liability.[41] It is not a condition precedent that there should be a pre-existing liability.[42] Such a charge comes into existence immediately and can be on future produce.[43]

On a review of various financial terms of agreements between homebuyers and builders and the manner of utilisation of the disbursements made by homebuyers to the builders, it is evident that the agreement is for disbursement of money by the home buyer for the delivery of a building to be constructed in the future.[44] The amount so raised is used as a means of financing the real estate project and is thus, in effect, a tool for raising finance. On failure of the project, money is repaid based on the time value of money and has an effect of borrowing. Such borrowing has been provided with the status of financial debt.

The above rights provide an arguable indication, that the homebuyers are indeed secured creditors of real estate companies because a secured debt includes a debt secured by a charge under section 100 of the TP Act.[45]

The Supreme Court in the case of *Raghuraj Singh* v. *Murari Lal*[46] has held:

> The High Court seems to be in error when it held that under the definition of "secured debt" only such debts as are secured by a mortgage come in and not debts which are secured by a charge. It seems to have overlooked that part of the definition of the word "mortgage" which lays down that a mortgage will include a charge as defined in Section 100 of the Transfer of Property Act. Therefore, **even though a debt may be secured by a charge it will be a secured debt**…

A prima facie counter-argument to the above can be raised owing to the various provisions of terms and condition documents signed by the homebuyers, which in generic sense state that the allottee shall have no rights, interest or title whatsoever in the premises sought to be bought by them, until and unless an indenture of conveyance is executed in favour of them. The authors believe that such concerns can be tackled appropriately because as stated above, the charge being created in favour of homebuyers is not a contractual charge but it is a statutory charge. The Supreme Court has explained such distinction in the

40 *Janardhan v Anant* (1908) 32 Bom 386.

41 *Kesari Mal Umrao Singh v Tansukh Rai-Kidar Nath* (1935) 16 Lah 137.

42 ibid.

43 *Jugal Kishore v Ram Narain* AIR 1923 All 199.

44 Ministry of Corporate Affairs, *Report of the Insolvency Law Committee* (2018).

45 *Raghuraj Singh v Murari Lal* AIR 1967 SC 1631.

46 ibid.

case of *Videocon Properties Ltd.* v. *Dr. Bhalchandra Laboratories,*[47] where it stated:

> This charge is a statutory charge in favour of a buyer and is different from contractual charge to which the buyer may become entitled to under the terms of the contract, and in substance a converse to the charge created in favour of the seller under section 55(4)(b). Consequently, the buyer is entitled to enforce the said charge against the property and for that purpose trace the property even in the hands of third parties and even when the property is converted into another form.. ..The said statutory charge gets attracted and attaches to the property for the benefit of the buyer the moment he pays any part of the purchase money and is only lost in case of the purchaser's own default or his improper refusal to accept delivery.

In any event, it is trite law that a statutory provision would override contractual arrangements. The statutory first charge prevails over any other charge and would get precedence over any other existing right. The precedence or priority is not confined to the right to redemption alone.[48] The charge created under section 100 of the TP Act cannot be defeated by a charge which comes into operation at a later stage.[49] Thus, this argument will provide homebuyers with a charge prior to that of the banks/financial institutions.

It must also be noted that such terms of the documents signed by the homebuyers are unconscionable. These terms and conditions form part of standard contracts that are signed by the buyers/allottees in real estate transactions. These contracts are drafted keeping in mind the unequal bargaining power of buyers and such one-sided conditions are imposed as a general industry practice by the developers, taking advantage of the power asymmetry to protect their interest.[50] The National Consumer Redressal Forum while dealing with the dispute of deficiency of service by a developer in *Sheo Gupta & Anr.* v. *Kanpur Development Authority*[51] held such clauses to be unconscionable. Similar directions have been given in other cases too.[52]

It is to be noted that the homebuyers are classified as 'allottees' in a 'real estate project' under RERA. Under RERA, section 2(d) defines '"allottee' in relation to a real estate project, means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or

47 *Videocon Properties Ltd v Dr Bhalchandra Laboratories* (2004) 3 SCC 711.

48 *Canara Bank v State of Kerala* AIR 2005 Ker 50.

49 ibid.

50 *Neelkamal Realtors Suburban Pvt Ltd v Union of India* (2017) SCC OnLine Bom 9302.

51 *Sheo Gupta v Kanpur Development Authority* (2017) SCC OnLine NCDRC 178.

52 *DLF Homes v Himanshu Arora* (2017) SCC Online NCDRC 1992.

building, as the case may be, is given on rent'. This means that any person to whom a plot, apartment or building is allotted or sold or transferred by a promoter is an allottee under the act. The definition also intends to include the person who subsequently acquires the said allotment through sale, transfer or through any other mode.

Furthermore, a 'real estate project' under the Act is defined to mean 'the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartment, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto'.

Section 19 (3) of RERA states that 'the allottee shall be entitled to claim the possession of apartment, plot or building, as the case may be, and the association of allottees shall be entitled to claim the possession of the common areas, as per the declaration given by the promoter under sub-clause (c) of clause (I) of sub-section (2) of section 4. It is necessary to highlight that the object and reasons behind enacting a legislation like RERA was to protect the interest of 'allottees' like the homebuyers in the present situation. Therefore, the homebuyers are granted the right to claim possession of the immovable property allotted in the real estate project. This claim of possession awarded to allottees when read with section 3(31) of IBC, amounts to creation of security interest.

In the present scenario, a claim in property is created through possession. Therefore, by virtue of claim of possession the homebuyers have on their respective flats/apartments, they qualify as 'secured creditors'. This proposition is also buttressed from the negative obligation on the promoter under section 11(4) of RERA, which states that once the promoter has entered into an agreement with an allottee, the promoter cannot create a charge on such apartment, plot or building, as the case may be, and if any such mortgage or charge is made or created then notwithstanding anything contained in any other law for the time being in force, it shall not affect the right and interest of the allottee who has taken or agreed to take such apartment, plot or building. Such arguments can be made to stress that homebuyers have a valid charge on its immovable property, which cannot be tampered with.

The issue as to whether the homebuyers are secured or unsecured financial creditors was agitated before the Supreme Court in the case concerning *Chitra Sharma & Ors. v. Union of India & Ors*. However, the Court, without commenting on the question, decided to leave the issue open. Thereafter, this issue could not be decided appropriately by any court. The Hon'ble Supreme Court in the case of *Pioneer Urban Land and Infrastructure Ltd. v. Union of India*[53] has at various junctures referred to homebuyers as unsecured financial creditors, without providing any finding on this issue. Hence, the conundrum persists. The authors wish that this issue would soon attract traction in an appropriate case.

53 *Pioneer Urban Land and Infrastructure Ltd v Union of India* (2019) SCC OnLine SC 1005.

VII. The Dual Status of The Homebuyers

The homebuyers are not only the financial creditors of real estate companies but also the end consumers of such companies. In this context, a major aberration in the scheme of the Code is highlighted. This issue also requires a prompt solution.

Section 14 of the Code describes the effect of the moratorium.[54] The purpose of the moratorium includes keeping a corporate debtor's assets intact during a CIRP and facilitating orderly completion of the resolution process and ensuring that the corporate debtor may continue as a going concern while its creditors take a view on the resolution of default. This also ensures that multiple proceedings are not taking place simultaneously and helps obviate the possibility of potentially conflicting outcomes of related proceedings. The moratorium ensures a stand-still period during which creditors cannot resort to individual enforcement action which may frustrate the objective of the CIRP.[55] The motivation behind the moratorium is to preserve value for the corporate debtor to continue operations, even as viability is being assessed during the CIRP.[56]

In specific, section 14 prohibits disposing of any assets of the corporate debtor[57] and any action to foreclose/recover/enforce any security interest against the assets of the corporate debtor[58]. It is a settled position of law that after the admission of an application under the Code for initiating the CIRP and once moratorium has been declared, it is not open to any person, including the financial creditors to recover any amount from the corporate debtor.[59]

Furthermore, section 20(1) of the Code imposes two duties upon the IRP. First, to protect and preserve the value of the property of the corporate debtor[60] and second, to manage the operations of the corporate debtor as a going concern.[61]

The Code provides that the IRP should take all steps to not only physically protect and preserve the assets of the corporate debtor but should also take steps to protect and preserve the value of the assets of the corporate debtor. The preservation of the value of the assets during the CIRP is of utmost importance or else the stakeholders will suffer. The task of managing the affairs of the corporate debtor as a going concern is itself crucial. The term 'going concern' is an accounting term for a company that has the resources needed to continue to operate indefinitely until a company provides evidence to the contrary, and

54 Insolvency and Bankruptcy Code 2016, s 14.

55 Insolvency and Bankruptcy Code 2016, Preamble.

56 Bankruptcy Law Reforms Committee, *The Report of the Bankruptcy Law Reforms Committee Vol. 1: Rationale and Design* (2015) Ch 5.

57 Insolvency and Bankruptcy Code 2016, s 14(b).

58 Insolvency and Bankruptcy Code 2016, s 14(c).

59 *Indian Overseas Bank v Dinkar Venkatsubramaniam Resolution Professional for Amtek Auto Ltd* (2017) SCC Online NCLAT 584.

60 Insolvency and Bankruptcy Code 2016, s 20(1).

61 Insolvency and Bankruptcy Code 2016, s 20(1).

this term also refers to a company's ability to make enough money to stay afloat or avoid liquidation.[62]

While the above two provisions (i.e., section 14 and section 20(1)) appear to have the same end goal – preservation of assets of corporate debtor and keeping it as a going concern; for a real estate company to be kept as a going concern, it must keep on constructing the premises and subsequently sell it to the homebuyers and grant them possession.[63] However, this is where the problem arises for a real estate company. The homebuyers are also financial creditors. If they end up taking the possession during the CIRP from an IRP, to keep the corporate debtor as a going concern as is mandatory for the IRP to do under section 20(1) of the Code, it will be in violation of section 14 of the Code, which specifically prohibits disposing of any assets of the corporate debtor[64] and any action to foreclose/recover/enforce any security interest against the assets of the corporate debtor[65].

It is a situation where if the Corporate Debtor must be kept as a going concern, then the end consumers (homebuyers, who are also financial creditors), end up foreclosing their debts or enforcing their security. This violates the specific prohibition under section 14. However, if such violation is not committed then the corporate debtor cannot be kept as a going concern and this will be a violation of section 20(1) of the Code.

When there is a conflict between two or more parts of a statute (as in the present scenario) then the rule of harmonious construction needs to be adopted. The rule follows a very simple premise that every statute has a purpose and intent as per law and should be read as a whole. An interpretation which makes the enactment a consistent whole, should be the aim of the Courts and a construction which avoids inconsistency or repugnancy between the various sections or parts of the statute should be adopted.[66] The Courts should avoid 'a head on clash' between the different parts of an enactment and conflict between the various provisions should be sought to be harmonized. The rule of harmonious construction has been tersely explained by the Supreme Court which has stated that when there are, in an enactment, two provisions which cannot be reconciled with each other, they should be so interpreted, that if possible, effect should be given to both.[67]

In such a scenario, it is warranted that both provisions should be construed harmoniously, and the homebuyers should be allowed to set-off their debt during the CIRP. This can either be done by way of an amendment or by a direction from an appropriate forum. However,

62 *State Bank of India v Director of Mines* (2018) SCC Online NCLT 11920.

63 See CF Floyd and MT Allen, *Real estate principles* (Dearborn Real Estate 2002); See also B Al Dalayeen, 'Working capital management and profitability of real estate industry: An empirical study' (2017) 7(2) Journal of Applied Finance and Banking 49.

64 Insolvency and Bankruptcy Code 2016, s 14(b).

65 Insolvency and Bankruptcy Code 2016, s 14(c).

66 *CIT v Hindustan Bulk Carriers* AIR 2002 SC 3491.

67 *MSM Sharma v Krishna Sinha* AIR 1959 SC 395.

no such step has been taken so far as the issue has not got the appropriate traction.

VIII. Conclusion

By way of the present paper, the authors have endeavoured to bring to light the detailed and groundbreaking work done by the judiciary and the legislature to protect the interest of the homebuyers in the real estate companies which are facing insolvency. The issue of the constitutional validity of a minimum number of homebuyers being required to initiate a CIRP against a real estate company is sub-judice before the Supreme Court of India. The authors welcome the proactive steps being taken by the authorities to iron-out the coarse edges of the CIRP in the case of real estate companies and emphasize that indeed it takes a village to raise a child – in the present case the figurative child being the law and practice of resolution of insolvency of real estate companies.

THE IMMUNITIES OF INTERNATIONAL ORGANISATIONS: JAM V. IFC AND THE NEED FOR EXTERNAL REVIEW MECHANISMS

- Dhruv Sharma*

I. Introduction

On 27 February 2019, the Supreme Court of the United States of America (Supreme Court) gave its judgment in the case of *JAM et al. v. International Finance Corporation* (*Jam*).[1] The case was filed by the Indian NGO, *Machimar Adhikar Sangharsh Sangathan* (MASS), on behalf of specific plaintiffs, against the International Finance Corporation (IFC) for failure to supervise adherence with environmental norms during the construction of a power plant in Gujarat, India. In a brief judgment, the Supreme Court delineated the nature of immunities accorded to international organisations located in the United States, including the IFC, under the International Organisations Immunities Act, 1945 (IOIA). The Court held that, at the time of the enactment of the IOIA in 1945, international organisations in the United States, like foreign governments, enjoyed absolute immunities. However, the enactment of the Foreign State Immunities Act, 1976 (FSIA) restricted the immunities enjoyed by foreign governments by introducing, *inter alia*, a commercial activities' exception.

The majority opinion of the Supreme Court, delivered by Chief Justice Roberts, upon an interpretation of the IOIA, held that the immunities granted to international organisations under the IOIA had been linked to the immunities enjoyed by foreign governments under the FSIA. Consequently, the commercial activities' exception under the FSIA was also applicable to the scope of immunities enjoyed by international organisations.

The present article reviews the judgment of the Supreme Court before undertaking an analysis of the immunities and accountability of international organisations. The article proceeds as follows. Section II provides the factual background that led to the initiation of proceedings at the Supreme Court. The section also discusses the majority opinion of the Court and dissenting opinion of Justice Breyers. Section III identifies and assesses the major issues arising from the judgment. Thereafter, Section IV considers the implications

* The author, an alumnus of the University of Cambridge and National Law University, Delhi, is an advocate based out of Delhi, India. The author is indebted to his time at Lindeborg Counsellors at Law, and to Dr Rutsel Martha and Mr Stephen Bailey who provided valuable inputs in relation to the judgment and the immunities of international organisations.

1 *JAM et al v International Finance Corporation* 139 S Ct 759 (Jam).

arising from the restriction of the immunities of international organisations. Section V addresses the limitations posed by opening up acts of international organisations to review by domestic courts. In Section VI, the article pits the ostensibly conflicting norms of immunities and accountability against each other. Section VII is devoted to a discussion of the legal mechanisms available to review the acts of international organisations, and the need to develop external mechanisms of review before concluding.

II. The Case

1. Background

The IFC is a member of the World Bank Group that provides finance and asset management services to private sector projects based in developing countries. In 2008, the IFC financed the Coastal Gujarat Power Plant (Project) near the port town of Mundra in Gujarat, India.[2] As per the requirements of the loan, the Project was to be developed in compliance with the Performance Standards on Social and Environmental Sustainability laid down by the IFC.[3]

In 2011, MASS approached the Compliance Advisor Ombudsman (CAO), IFC's independent accountability mechanism, alleging non-observance of environment and social norms in the development of the Project. The resultant audit report released by the CAO found that the IFC had failed in supervising project compliance. The CAO specifically held that the review by IFC of its client was not 'commensurate with… risk' posed by the Project including the marine and air emission impact of the Project,[4] and that the IFC had failed to hold adequate and effective consultations with the affected parties.[5]

In response to the audit report, the IFC published its action plan relating to holding community consultations, monitoring air quality and depositing of pollutant deposits in neighbouring communities. Nevertheless, in 2015, the monitoring report released by the CAO observed that the reforms implemented by the IFC were insufficient.[6]

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2 International Finance Corporation, *Tata Ultra Mega: Project Overview* (IFC Project Information Portal and Data Portal, 27 November 2007) <https://disclosures.ifc.org/#/projectDetail/SPI/25797> accessed 26 June 2020.

3 ibid.

4 Office of the Compliance Advisor Ombudsman for the International Finance Corporation Multilateral Investment Guarantee Agency Members of the World Bank Group, *CAO Audit of IFC Investment in Coastal Gujarat Power Limited, India* (Compliance Advisor Ombudsman Audit Report C-I-R6-Y12-F160, 2013), paras 29-30, 35-36 <http://www.cao-ombudsman.org/cases/document-links/documents/CAOAuditReportC-I-R6-Y12-F160.pdf> accessed 26 June 2020.

5 ibid [22].

6 Office of the Compliance Advisor Ombudsman for the International Finance Corporation Multilateral Investment Guarantee Agency Members of the World Bank Group, *Monitoring of IFC's Response to: CAO Audit of IFC Investment in Coastal Gujarat Power Limited, India* (Compliance Advisor Ombudsman Monitoring Report C-I-R6-Y12-F160, 2015), paras 14-22 <http://www.cao-ombudsman.org/cases/document-links/documents/CGPLmonitoringreport

2. Journey through the US Courts

The inadequate supervision of the project by the IFC was supplemented by the lack of any mechanism to enforce the directions issued by the CAO. Despite ensuring stakeholder participation, absent any remedy within the IFC's institutional structure for holding the IFC responsible,[7] the Petitioners filed a suit against the Organisation. The proceedings were initiated before the District Court of the District of Columbia, where the IFC is headquartered.

The suit claimed, *inter alia*, that the Coastal Gujarat Power Plant had adversely impacted the nearby environment, by degrading the local air quality, causing heightened salinity of the groundwater and substantially altering the marine environment. It was further alleged, after reliance on the audit report of the CAO, that the IFC was responsible for negligence, nuisance, trespass and breach of contract.[8]

The District Court, and thereafter the Court of Appeals for the District of Columbia Circuit, dismissed the suit at the threshold, holding that the IFC enjoyed absolute immunity.[9] The Courts, relying on previous precedent set in *Atkinson v. Inter-American Development Bank*,[10] observed that the IOIA did not limit the immunities conferred upon international organisations. Accordingly, the IFC enjoyed absolute protection from any suit brought against it. The complainants preferred an appeal to the US Supreme Court.[11]

The Appeal before the Supreme Court attracted more than 10 amici submissions,[12]

January2015.pdf> accessed 26 June 2020.

7 Benjamin M Saper, 'The International Finance Corporation's Compliance Advisor/Ombudsman (CAO): An Examination of Accountability and Effectiveness from a Global Administrative Law Perspective' (2012) 44 NYU Int'l L & Pol 1279, 1321.

8 *Budha Ismail Jam, et al v International Finance Corporation*, 172 F Supp 3d 104, [3-4] <https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2015cv0612-31> accessed 26 June 2020. See also *Budha Ismail Jam*, *et al v International Finance Corporation*, Civil Action No 2015-0612, Class Action Complaint for Damages and Equitable Relief <https://earthrights.org/wp-content/uploads/ifc_tata_mundra_complaint-1.pdf> accessed 26 June 2020.

9 *Budha Ismail Jam, et al v International Finance Corporation*, 429 US App DC 410 <https://law.justia.com/cases/federal/appellate-courts/cadc/16-7051/16-7051-2017-06-23.html> accessed 26 June 2020.

10 156 F.3d 1335 (DC Cir 1998).

11 *Jam* (n 1).

12 See submissions by – International Law Scholars (21 February 2018); Professors of International Organization and International Law (31 July 2018); the United States (31 July 2018); Center for International Environmental Law, *et al* (31 July 2018); Bipartisan Members of Congress (31 July 2018); US Solicitor General (11 September 2018); International Law Experts (17 September 2018); International Bank for Reconstruction and Development, *et al*. (17 September 2018); Member Countries to the IFC and the Multilateral Investment Guarantee Agency (17 September 2018); Former Secretaries of State and Secretaries of the Treasury (17 September 2018); Former Executive Branch Attorneys (17 September 2018) and; African Union, *et al* (International Organisations) (17 September 2018) <https://www.scotusblog.com/case-files/cases/jam-v-international-finance-corp/> accessed 26 June 2020.

with the amici submissions of Multinational Development Banks, Member Countries of the IFC, International Organisations (African Union, Food And Agriculture Organization, and Great Lakes Fishery Commission), former Secretaries of the State, former Executive Branch Attorneys, and a grouping of international organisations supporting the position of the respondent that international organisations enjoyed absolute immunity from suit. The Center for International Environmental Law (Center), Bipartisan Members of the Congress, as well as the US Government on the other hand supported the application of restrictive immunities to international organisations.

Interestingly, three separate amici submissions were made by scholars of international law, with two groups supporting the Petitioners (*International Law Scholars* and *Professors of International Organization and International Law*),[13] and one supporting the application of absolute immunities (*International Law Experts*).[14]

The amici submissions favouring absolute immunities were essentially based on the functional approach to international organisations.[15] This approach argues that the immunities of international organisations are conferred to preclude interference in the performance of their functions by member states. Consequently, the removal of such immunities may not only allow for interference into the acts of the international organisations, but also give one member (for instance, the State where the international organisation is headquartered) undue control over its functioning.[16]

Submissions in favour of restrictive immunity contended that immunities under the IOIA had been pegged to the immunity of States under the FSIA, and therefore any modification

13 *Jam, et al v International Finance Corporation*, Brief of International Law Scholars as Amici Curiae in Support of the Petition For Certiorari <https://www.supremecourt.gov/DocketPDF/17/17-1011/36084/20180221131959432_Jam%20Amicus%20Brief.Final.February.21.2018.pdf> accessed 26 June 2020; *Jam, et al v International Finance Corporation*, Brief of Amici Curiae Professors of International Organization and International Law in Support of Petitioners https://www.supremecourt.gov/DocketPDF/17/17-1011/56033/20180731144108292_17-1011%20tsac%20Professors%20of%20International%20Organization.pdf.> accessed 26 June 2020.

14 *Jam, et al v International Finance Corporation*, Brief of International Law Experts as Amici Curiae in Support of Respondent. <https://www.supremecourt.gov/DocketPDF/17/17-1011/63871/20180917105440500_17-1011%20Amicus%20Brief%20of%20International%20Law%20Experts.pdf> accessed 26 June 2020.

15 *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 ICJ 174 [180]; Chanaka Wickremasinghe, 'International Organizations or Institutions, Immunities before National Courts', *Max Planck Encyclopedia of Public International Law* (2009) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e502> accessed 10 June 2020; See also HG Schermers and NM Blokker, *International Institutional Law* (5th edn, Brill 2011).

16 *Jam, et al v International Finance Corporation*, Brief for Amici Curiae Member Countries and the Multilateral Investment Guarantee Agency in Support of Respondent [3]. <https://www.supremecourt.gov/DocketPDF/17/17-1011/63939/20180917143315903_2018-09-17%20Jam%20v.%20IFC%20Amicus%20Brief%20FINAL.pdf> accessed 26 June 2020.

in sovereign immunity would also alter the immunity of international organisations.[17]

Unlike most amici submissions that limited their arguments to the interpretation of the IOIA, the submissions of the Center and the International Law Scholars also dealt with the principles of public international law that support restrictive immunities.[18]

The amici brief of the Center argued that, apart from legislative evolution, the lack of accountability of international organisations also dictated restriction of their immunities. It argued that the absence of independent accountability mechanisms necessitated a framework allowing for limited litigation in order to maintain effectiveness of international organisations.[19] Similarly, International Law Scholars supporting the Petition submitted that the principles of international law included the right to a remedy that required the removal of absolute immunities of international organisations.[20]

In the end, the case before the US Supreme Court turned on the interpretation of Article 288a(b) of the IOIA. Article 288a(b) states that international organisations would enjoy, '*the same immunity from suit… as is enjoyed by foreign governments*'.[21]

Two interpretations for this terminology were furthered. The Respondent argued that the meaning of the term, 'same immunity' was to be determined as it existed at the time of the implementation of the statute, i.e. 1945. Foreign governments enjoyed absolute immunity in 1945, and therefore the immunity enjoyed by international organisations, suspended in time, was absolute.[22]

The appellant argued that the immunities of international organisations were pegged

17 *Jam, et al v International Finance Corporation*, Brief for the United States as Amicus Curiae Supporting Reversal [13-29] <https://www.supremecourt.gov/DocketPDF/17/17-1011/56087/20180731204649177_17-1011tsacUnited%20States%20-%20REVISED.pdf> accessed 26 June 2020.

18 *Jam, et al v International Finance Corporation*, Brief of Amici Curiae Center for International Environmental Law, et al <https://www.supremecourt.gov/DocketPDF/17/17-1011/56098/20180731223229014_2018-07-31%20Amicus%20Brief%20CIEL%20et%20al%20-%20Jam%20v%20IFC%207-31-18.pdf> accessed 26 June 2020; *Jam, et al v International Finance Corporation*, Brief of International Law Scholars as Amici Curiae in Support of the Petition For Certiorari, [16-21] <https://www.supremecourt.gov/DocketPDF/17/17-1011/36084/20180221131959432_Jam%20Amicus%20Brief.Final.February.21.2018.pdf> accessed 26 June 2020.

19 *Jam, et al v International Finance Corporation*, Brief of Amici Curiae Center for International Environmental Law, *et al* <https://www.supremecourt.gov/DocketPDF/17/17-1011/56098/20180731223229014_2018-07-31%20Amicus%20Brief%20CIEL%20et%20al%20-%20Jam%20v%20IFC%207-31-18.pdf> accessed 26 June 2020.

20 *Jam, et al v International Finance Corporation*, Brief of International Law Scholars as Amici Curiae in Support of the Petition For Certiorari, [16-21] <https://www.supremecourt.gov/DocketPDF/17/17-1011/36084/20180221131959432_Jam%20Amicus%20Brief.Final.February.21.2018.pdf> accessed 26 June 2020.

21 ibid (emphasis added).

22 *Jam* (n 1).

to the immunities enjoyed by foreign governments and any evolution in the latter resulted in a concomitant development in the former. The codification of restrictive immunity for foreign governments through the FSIA, therefore, altered the state of immunities enjoyed by international organisations.[23]

The Supreme Court, with Justice Breyer dissenting, relied on the 'reference' canon of statutory interpretation, and upheld the arguments of the Appellants.[24] It held that the IOIA linked the immunities of international organisations to an external and evolving law thereby making such immunities dependent on an external law (the FSIA).[25]

At the same time, the Court also countered the submissions of the Respondent. Firstly, it rejected the argument that restrictive immunity would enable excessive intervention in the acts of international organisations and thereby adversely impact their functioning. The Court opined that restrictive immunity was only the default rule and international organisations were free to negotiate special rules of immunity with host states to guarantee further protection. Though technically plausible, this observation discounts the complexity of negotiating amendments to agreements that may have been negotiated based on a static reading of the IOIA.

Secondly, the Court dismissed the assertion that potentially all activities of the IFC or such international financial institutions could be classified as commercial. The Court observed that some loan giving activities of certain international financial institutions could be non-commercial.[26] This assertion of the Court ignores the practical difficulties, as identified by Justice Breyer,[27] that may be encountered in identifying the activities benefitting from immunities and the prospect of domestic courts categorising acts of international organisations into commercial and non-commercial heads.

Contrary to the majority opinion, the dissenting opinion of Justice Breyer held that the 'reference' canon and the rules of statutory interpretation, firstly, did not provide an answer to the anomaly posed by the terms 'same as' employed in the IOIA. Secondly, the canon was merely a rule of thumb that did not oust other considerations such as the purpose and historical context of the legislation.[28] The dissent also highlighted the potential ramifications of individual States interfering with the collective decision-making of members states through their domestic courts and creating a divided jurisprudence.[29] Relying on the purpose of the IFC and the context in which the international organisations

23 ibid [6-8].

24 ibid [9-10].

25 ibid [15].

26 ibid [14].

27 *Jam, et al v International Finance Corporation* 139 S Ct 759 (Dissenting Opinion of Judge Breyer) [12].

28 ibid [5-6].

29 ibid [13-14].

came about, Justice Breyer held that the IFC enjoyed absolute immunity.[30]

It is worth bearing in mind that the appeal before the Supreme Court raised the limited question of the immunities of international organisations before US National Courts. The decision, therefore, did not deal with the ultimate responsibility of IFC towards the Petitioners.

This question was remanded to the District Court of District of Columbia. On 14 February 2020, the District Court held that the IFC was in fact immune from the claims brought by Jam as the claims were not 'based upon activity — commercial or otherwise — carried on or performed in the United States'.[31]

Accordingly, despite the adoption of restrictive immunities, several obstacles such as the need to establish a territorial link with the activity and the bar of forum *non-conveniens*, still lie in the path of parties adversely affected by the conduct of international organisations.

III. Critical Assessment – The inapplicability of the absolute and restrictive divide

Under international law, States have enjoyed absolute or restrictive immunity.[32] The former provides immunity for acts *jure imperii* (acts performed in sovereign capacity) and *jure gestionis* (acts that are commercial in nature), whereas the latter only covers acts *jure imperii*.[33]

The dilution of the doctrine of absolute immunity commenced in the 19th century with the proliferation of State acts, and the resultant distinction employed by other States between sovereign and commercial acts of other States.[34] The restrictive approach to immunities achieved specific approval in the US through the Letter issued by the Acting Legal Adviser to the Attorney General[35] and has since become the dominant theory of State immunities.[36] This distinction between sovereign and commercial acts, which forms the basis of restrictive state immunity, has now been applied by the Supreme Court to international organisations.

30 ibid [17].

31 *Jam v International Finance Corporation*, Civil Action No 2015-0612 (DDC 2020), 14 February 2020.

32 Malcolm Shaw, *International Law* (8th edn, CUP 2008) 509-519 (Shaw).

33 ibid; Peter-Tobias Stoll, 'State Immunity (2011) in Rüdiger Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (online ed) (Stoll).

34 Rosanne van Alebeek and Riccardo Pavoni, 'Immunities of States and their Officials' in André Nollkaemper, et al (eds), *International Law in Domestic Courts: A Casebook* (OUP 2018) 104.

35 Jack B Tate, 'Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments' (1952) 26 Dep't St Bull 969, 984–85. The Tate Letter noted the existence of "two conflicting concepts of sovereign immunity" and observed growing trend in the international practice toward the restrictive theory of sovereign immunity.

36 *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (Judgment) [2012] ICJ Reports 99, 124-125; Shaw (n 32) 513-514.

Consequently, the Supreme Court equated the basis of international immunities for international organisations and States and applied the absolute and restrictive divide to international organisations. This assumption that acts of international organisation may be classified into sovereign acts and commercial acts may be misplaced.

At the outset, while a differentiation between sovereign and commercial acts of a state may be factually difficult in certain cases,[37] it is still legally and theoretically possible. On the other hand, no such distinction may be possible for international organisations.[38] Unlike states, international organisations do not have a territory of their own,[39] nor do they have an unrestrained mandate.[40] They rely on territorial and financial provisioning by member states to carry out their functions. A distinction does exist between the functions of organisations flowing from their constitutive charter and implied activities ensuing from their institutional mandate.[41] However, such distinction does not translate into sovereign and commercial acts for three reasons.

Firstly, purely based on terminology, sovereign acts are governmental acts that, unlike commercial activities such as trade, cannot be performed by private parties.[42] Such distinction, as highlighted above, arose with the proliferation of governmental agencies and their increased involvement in purely economic activities.[43] International organisations do not perform sovereign acts, but only functions based on their constitutive instruments. For instance, the function of the IFC is to provide loans to private companies undertaking developmental work. The US Supreme Court has previously held that an activity qualifies as being commercial when it engages in trade or commerce.[44] Therefore, any institutional function performed by the IFC may be characterised as both commercial and functional. Its very mandate is to provide financial assistance in the form of affordable loans to private enterprises. The commercial cannot be delinked from the functional.

Secondly, in the absence of its own territory, the functions performed by an international organisation would necessarily fall within the territory of a sovereign. Sovereign States have the capability of performing acts within their own territories without external intervention

37 M. Sornarajah, 'Problems in Applying the Restrictive Theory of Sovereign Immunity' (1982) 31(4) ICLQ 661.

38 Rutsel Silvestre J Martha, 'International Financial Institutions and Claims of Private Parties: Immunity Obliges' (2012) 3 World Bank Legal Rev 93, 103 (Martha).

39 *Interpretation of the Agreement of 25 March 1951 between the World Health Organization and Egypt,* Advisory Opinion, 1980 ICJ 73 [155] (Separate Opinion, Judge Ago).

40 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Reports 66 [78-79].

41 ibid; *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Reports 174 [182-183].

42 *Shaw* (n 32) 510-512.

43 *Stoll* (n 33).

44 *Republic of Argentina v Weltover Inc* 504 US 607, 614 (1992).

and whilst enjoying the protection offered by such sovereignty.[45] On the contrary, all functions of an international organisations rely on activities performed in one or the other State.[46] International organisations cannot avoid functioning out of their headquarters and are therefore, at all times, amenable to the jurisdiction of the host state, unless the requisite Headquarters Agreement provide for absolute immunity.

Finally, unlike States, that have an undefined and relatively unrestrained mandate, the functionality of international organisations is limited by their constitutive charters, and therefore, an analogy of international organisation with States regarding distinct sovereign and commercial acts is difficult.

A reading of the law to restrict the immunities and privileges based on the nature of activities will certainly influence the loan giving policies of international organisations like the IFC. More generally, distinction between acts *jure imperii* and *jure gestionis* is bound to affect the functioning of international organisations.

IV. Immunities of International Organisations

1. General Implications of Restricting Immunities of International Organisations

The amenability of international organisations to the jurisdiction of domestic courts can have both adverse and favourable implications. It may help improve organisational transparency and disallow States from doing indirectly what they are proscribed from doing directly.[47]

On the negative side, such review may increase the functioning costs of international organisations by the imposition of stricter accountability mechanisms. Oversight may be viewed by member states as a burdensome obligation increasing operational costs in the form of due diligence and assessment.[48] This, in turn, may lead States to renounce their support of international organisations in light of the increased contributory costs and limited potential returns.[49]

A further tangent to this argument is the potential drifting away of States from formal international institutions towards informal means of policy-making and governance, such as

45 Leonardo Díaz-González, 'Fourth Report on Relations between States and International Organizations (Second Part of the Topic)' (1989) 2 YB Intl L Commn (part 1) 153, 158; *Martha* (n 38) 103.

46 *Interpretation of the Agreement of 25 March 1951 between the World Health Organization and Egypt,* Advisory Opinion, 1980 ICJ 73 [155] (Separate Opinion, Judge Ago).

47 Draft articles on the responsibility of international organizations, (2011) II(2) Yearbook of the International Law Commission, art 61.

48 Robert O Keohane, 'International Institutions: Two Approaches' (1988) 32(4) International Studies Quarterly 379, 386-389; See also Charles H II Brower, 'International Immunities: Some Dissident Views on the Role of Municipal Courts' (2001) 41 Va J Int'l L 1.

49 ibid.

intergovernmental cooperation at the executive level, public-private arrangements or even standard-setting by private organisations.[50] Eyal Benvenisti discusses the repercussions of such flight away from international organisations, stating that the same decreases the oversight over decision-making, and allows States to function purely through their executive mandate precluding domestic checks by the state legislature or international checks by an international bureaucracy or judiciary.[51] Finally, it is likely that the imposition of stricter norms of accountability upon IFC and other formal institutions set up in the States with separation of powers would shift the focus toward other international organisations with less comprehensive accountability systems. For instance, newer multilateral development banks such as the New Development Bank, and the Asian Infrastructure Investment Bank do not have any mechanisms, or merely mirror the informal complaints and grievance mechanisms of the older Bretton Woods institutions.[52]

On the positive end, the scrutiny of the acts of international organisations paves way for greater transparency in functioning and decision-making. Absence of immunities begets accountability. This added layer of accountability by review functions in two ways. Firstly, by opening up organisational acts to subsequent internal and, increasingly, external review. Secondly, review mechanisms make decision-making more comprehensive by requiring decision-makers to consult and coordinate with stakeholders and focus on a variety of issues more competently to avoid future dispute resolution costs.[53]

2. Limitations of Review by Domestic Courts

It is arguable that even in the absence of the interpretive device employed by the Supreme Court, the result achieved in the *Jam* case was imminent. The law on immunities of international organisations has been evolving towards a more restrictive reading in light of their increasingly pervasive existence, as reflected from the recent jurisprudence of various domestic courts in Europe.[54]

This development is most significantly borne out from the decision of the European

50 Kal, 'Governing the Internet' (2016) 110(3) AJIL 491; Mauro Bussani, 'Credit Rating Agencies' Accountability: Short Notes on a Global Issue' (2010) 10 Global Jurist 2.

51 Eyal Benvenisti, *The Law of Global Governance* (Brill 2014) 37-42; Eyal Benvenisti and George W Downs, 'Court Cooperation, Executive Accountability and Global Governance' (2009) 41 NYU J Int'l L and Pol 931, 932.

52 Korinna Horta, 'The Asian Infrastructure Investment Bank (AIIB) A Multilateral Bank where China sets the Rules' (2019) 52 Publication Series on Democracy 1, 17-26 <https://www.boell.de/sites/default/files/boell_aiib_studie_0.pdf?dimension1=division_as> accessed 14 June 2020; Javier Solana, 'China's influence on global governance' *Politico* (4 January 2015) <https://www.politico.eu/article/chinas-influence-on-global-governance/> accessed 14 June 2020.

53 Eyal Benvenisti, *The Law of Global Governance* (Brill 2014) 158-161; Daniel C. Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law' (2006) 115 Yale LJ 1490, 1520.

54 August Reinisch, 'The Immunity of International Organizations and the Jurisdiction of Their Administrative Tribunals' (2008) 7(2) Chinese Journal of International Law 285.

Court of Human Rights (ECtHR) in *Waite and Kennedy*.[55] In the decision, the ECtHR observed that the absence of equivalent alternative review mechanisms to adjudicate disputes raised by the complainants would necessitate the exercise of jurisdiction by domestic courts to avoid denial of justice under Article 6 of the European Convention on Human Rights (ECHR).[56] On the facts, the Court did not exercise jurisdiction holding that the Applicant had access to an internal complaints procedure within the organisation.[57] Nevertheless, this observation paved way for the exercise of jurisdiction by various domestic courts.

In particular, the holding was applied by the French Courts in the case of *UNESCO v. Boulois*[58] and *Banque africaine de développement v. M.A. Degboe*,[59] wherein the absence of an alternate remedy available to the complainants was equated to a denial of justice.[60] Similarly, other domestic courts have followed a similar line of reasoning in dealing with the immunities of international organisations from suits.[61]

The law surrounding state immunity arises from the doctrine of sovereign equality and is encapsulated in the principle *par in parem non habet imperium* that proscribes one State from exercising jurisdiction over another.[62] With respect to international organisations no such principle of sovereign equality is applicable[63] and the law has evolved out of a functional necessity to allow unfettered operations.[64] The law of immunities was, therefore, not developed to preclude access to justice and redressal of grievances of victims,[65] but to

55 *Waite and Kennedy v Germany* (Merits) (1999) ECHR 13.

56 ibid [47], [67-68].

57 ibid [69-73].

58 *UNESCO v Boulois, Tribunal de grande instance de Paris* (ord. Réf.), 20 October 1997, Rev Arb (1997) 575.

59 *Banque africaine de développement v. M.A. Degboe*, Cour de Cassation, Chambre sociale, 25 Janvier 2005, 04-41012, (2005) 132 Journal du droit international 1142.

60 August Reinisch, 'The Immunity of International Organizations and the Jurisdiction of Their Administrative Tribunals' (2008) 7(2) Chinese Journal of International Law 285.

61 ibid; Cedric Ryngaert, 'The Immunity of International Organizations Before Domestic Courts - Recent Trends' (2010) 7 International Organizations Law Review 121.

62 Niels Blokker, 'Jurisdictional Immunities of International Organisations – Origins, Fundamentals and Challenges' in Tom Ruys, Nicolas Angelet and Luca Ferro (eds)., *The Cambridge Handbook of Immunities and International Law* (CUP 2019).

63 HG Schermers and NM Blokker, *International Institutional Law* (5th edn, Brill 2011).

64 Leonardo Díaz-González, Special Rapporteur, 'Fourth report on relations between States and international organizations (Second Part of the Topic) (1989) UN Doc. A/CN.4/424 II(I) Yearbook of the International Law Commission 153–168, 157-158; Niels Blokker, 'Jurisdictional Immunities of International Organisations – Origins, Fundamentals and Challenges' in Tom Ruys, Nicolas Angelet with Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (CUP 2019).

65 *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights,* Advisory Opinion, 1999 ICJ Reports 62 [66].

only ensure seamless functioning independent of interference.[66]

In this light, the review of the acts of the international organisations by domestic courts seems like a response to the ineffectiveness of internal review mechanisms and the consequent lack of remedy. Yet, two difficulties arise from piercing the veil of immunity by domestic courts.

Firstly, acquiescence to the exercise of jurisdiction by domestic courts can allow disproportionate control over the organisation by a few member states, particularly the state hosting the headquarters of the organisation.[67] Such control can rear its head by allowing the host State excessive and unnecessary influence over the functions of the organisation through adjudication of the organisation's functions. Further, the control can allow the State to pre-empt the decision-making of the international organisation and expand or limit its functioning.[68] At the same time, the overarching control of a particular State can decrease the scope of control that other member states can exercise over the organisation. For instance, the characterisation of the function of providing financial assistance as sovereign or commercial activity by domestic courts of the US may amount to a classification of the nature of the acts of an organisation by an external actor without consultation with the member states of the organisation. The control exercised over an international organisation has the possibility of having a disproportionate effect upon less developed/developing states who, having gotten a modicum of equality in the form of participation in an international organisation, would now have to contribute to the funding and functioning of the international organisation in accordance with the decisions and vision of transnational domestic courts.[69]

Secondly, an indulgence into the acts of international organisations by domestic courts of different states could lead to the creation of divergent jurisprudence.[70] The divergence may be a result of varying models of interpretation, the domestic legal framework of

66 HG Schermers and NM Blokker (n 63).

67 Eric De Brabandere, 'Immunity of International Organizations in Post-Conflict International Administrations' (2010) 7 Int'l Org L Rev 79, 84; Official Bulletin of the International Labour Office (1945) XXVII (2) 199.

68 Charles H II Brower, 'International Immunities: Some Dissident Views on the Role of Municipal Courts' (2001) 41 Va J Int'l L 1, 46-57; UNHCR 54th Session 12 February 1998 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Mr. Param Cumaraswamy' UN Doc E/CN.4/1998/39, paras 106-116. The Report notes the impediments caused in the functioning of the Special Rapporteur through the filing of numerous lawsuits against him due to which the Special Rapporteur was not "in a position to effectively follow-up his investigations into these allegations".

69 Bhupinder S Chimni, 'International Institutions Today: An Imperial Global State in the Making' (2004) 15 EJIL 1.

70 Peter HF Bekker, *The legal position of intergovernmental organizations: A Functional Necessity Analysis of their Legal Status and Immunities* (Nijhoff 1994); Michael Singer, 'Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns' (1995) 36 Va J Int'l L 53, 130, 134.

the relevant state, or the very approach to international immunities. Similarly, without the existence of binding international precedents guiding different domestic courts, the application of international norms may be at variance or even in complete conflict. An example of this divergence is already seen from the varying underlying bases governing the approach to international immunities followed by the national courts of the US and those in Europe. Following the *Jam* judgment, the US Courts shall now distinguish between sovereign and commercial acts to identify the application of immunities. At the same time, national courts in Europe, since *Waite & Kennedy*, have followed a human rights approach exercising jurisdiction in the absence of alternate review mechanisms. As a result, while the adjudication of a suit against IFC in the US may turn on the nature of the act, courts in Europe may exercise jurisdiction owing to the ineffectiveness of the internal review mechanism of the IFC. This involvement of domestic courts in the adjudication of international organisations could rupture any existing unity in international norms and further fragment the system.

Therefore, despite being an understandable response to the lack of accountability of international organisations, review by domestic courts is not a lasting solution.

V. Immunity and Accountability

It is imperative to recall the principal objective of ensuring transparency in decision-making and accountability of international organisations. Accountability by itself has many facets, including fiscal, and reputational accountability.[71]

Limited accountability may be achieved through transparency and public participation in decision-making. The inclusion of stakeholders in decision-making allows people affected by the decisions of international organisations to highlight their concerns and limits the capture of organisations by special interest groups.[72] Additionally, inclusiveness attaches legitimacy to the organisation by committing the stakeholders to the policy and thereby enhancing implementation.[73]

Similarly, international organisations remain fiscally accountable to the contributing States upon whom the organisations rely for their continued functioning. Periodic performance reviews help assess the utilisation of funds by an organisation, and provide a basis for sanctioning inefficient functioning by limiting future funding. Deviation from mandate can similarly attract penalties in the form of lower funding, or limiting the same for specialised purposes.[74] In addition to this fiscal accountability, we may add reputational

71 Grant Ruth and Robert O Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99(1) American Political Science Review 29.

72 Eyal Benvenisti, *The Law of Global Governance* (Brill 2014) 159-160.

73 Sabino Cassese, 'A Global Due Process of Law?' in Gordon Anthony, Jean-Bernard Auby, John Morison and Tom Zwart (eds), *Values in Global Administrative Law* (Hart 2011).

74 Daniel Nielson and Michael J Tierney, 'Delegation to international organizations: Agency theory and World Bank environmental reform' (2003) 57(2) International Organization 241.

accountability. The working of international organisations attracts plaudits or criticism from a variety of stakeholders. Such informal evaluation affects future functioning and, depending on previous performance, may decrease State cooperation or individual trust. A contemporary example of these forms of accountability may be the functioning of the World Health Organisation (WHO) during the Covid-19 Coronavirus Pandemic (Covid-19).[75] The belated decision-making and subservience of the WHO to one State attracted criticism from several spheres damaging not only the financial independence of the Organisation (for instance, the US announced a moratorium on the WHO's funding), but also adversely affected its public image[76] forcing the WHO to do an independent assessment of its functioning.[77]

These forms of accountability provide certain assistance in restraining organisations. However, they continue to be informal and soft power-based mechanisms. Furthermore, the stick accompanying such mechanisms is often wielded by powerful states, thereby maintaining the global *status quo* and abandoning weaker States or stakeholders.[78]

Legal accountability, instead, proffers an opportunity to individual stakeholders to interrogate the actions of international organisations in judicial or quasi-judicial forums. The law surrounding immunities, at the same time, seeks to preclude intervention into the activities of a subject such as a state or an international organisation. At first brush, this conflict may seem to require resolution through preference of norms.[79]

However, immunities of international organisations are not an anti-thesis of accountability for immunities do not imply impunity. In fact, immunities of international organisations necessitate the establishment of alternate mechanisms to allow for dispute settlement with private parties.[80] Further, preference of one norm over another may be an excessive remedy. For instance, the conferment of absolute immunity without alternate

75 Dhruv Sharma, Kit De Vriese, 'COVID-19: An assessment of the WHO's response' (*TheGlobal. Blog,* 19 June 2020), <https://theglobal.blog/2020/06/19/covid-19-an-assessment-of-the-whos-response/> accessed 26 June 2020; Dhruv Sharma, Kit De Vriese, 'COVID-19, the WHO, and the Failures of Global Governance' (*TheGlobal.Blog,* 30 June 2020) <https://theglobal.blog/2020/06/30/covid-19-the-who-and-the-failures-of-global-governance/> accessed 12 August 2020.

76 Pooja Biraia Jaiswal, 'All ill, No will' *The Week* (10 May 2020) <https://www.theweek.in/theweek/cover/2020/04/30/all-ill-no-will.html> accessed 26 June 2020; Editorial, World Health Coronavirus Disinformation, *Wall Street Journal* (5 April 2020) <https://www.wsj.com/articles/world-health-coronavirus-disinformation-11586122093> accessed 26 June 2020.

77 WHO countries agree 'equitable and timely access' to coronavirus vaccine, 'comprehensive evaluation' of response (*UN News*, 19 May 2020) <https://news.un.org/en/story/2020/05/1064442> accessed 24 August 2020.

78 Grant Ruth and Robert O Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99(1) American Political Science Review 29, 37- 40.

79 Cedric Ryngaert, 'The Immunity of International Organizations Before Domestic Courts - Recent Trends' (2010) 7 International Organizations Law Review 121.

80 *Martha* (n 38) 131.

redressal mechanism would qualify as impunity and the absolute removal of immunities has the potential for misuse, and divergent and overbroad application.

VI. The Way Forward

Thus, balancing the ostensibly conflicting norms of immunity and accountability may be achieved in three ways.

Firstly, as discussed above, there has been a growing trend of taking a qualified approach to immunity by domestic courts to adjudicate upon claims made against the organisations. Immunities may be restricted for the achievement of a particular objective like access to justice – as exemplified by European Domestic Courts – or through differentiation between commercial and functional acts as done in the *Jam* case. However, the exercise of such jurisdiction, in addition to being an improvised mechanism reliant upon the subjectivity and discretion of domestic courts, has the potential of creating a disjointed jurisprudence without a uniform precedent system.

Secondly, immunities may be limited through internal dispute settlement mechanisms. Such internal systems may be divided into two parts, dispute settlement mechanisms adjudicating contractual disputes with employees,[81] or recommendatory bodies such as the CAO at the IFC that may influence policy formulation or reversal through non-binding findings. These internal mechanisms with narrow jurisdiction and directory pronouncements may prove inadequate with the ever-expanding global reach of international institutions and their increasing role in governance, hitherto the domain of the sovereigns.

In contrast to the above mechanisms, States could set up an independent international tribunal to adjudicate private disputes against international organisations. Structurally such a mechanism could culminate in the form of a separate international institution open to membership of international organisations that recognise its jurisdiction.[82] Alternatively, an independent tribunal may be located within the broader institutional structure of individual international organisations. Finally, international organisations could consent to the

81 Statute of the Administrative Tribunal of the International Labour Organisation adopted by the International Labour Conference on 9 October 1946 and amended by the Conference on 29 June 1949, 17 June 1986, 19 June 1992, 16 June 1998, 11 June 2008, 7 June 2016 and 17 June 2019. The Tribunal is open to membership by other international organisations, and is currently empowered to hear contractual complaints by present or former employees of 57 international organisations under Article 2 of the Statute. Also See: Statute of the United Nations Dispute Tribunal adopted by the General Assembly in resolution 63/253 on 24 December 2008, amended by resolution 69/203 adopted on 18 December 2014, amended by resolution 70/112 adopted on 14 December 2015, amended by resolution 71/266 adopted on 23 December 2016, and amended by resolution 73/276 adopted on 22 December 2018; Statute of the United Nations Appeals Tribunal adopted by the General Assembly in resolution 63/253 on 24 December 2008, amended by resolution 66/237 adopted on 24 December 2011, amended by resolution 69/203 adopted on 18 December 2014, amended by resolution 70/112 adopted on 14 December 2015 and amended by resolution 71/266 adopted on 23 December 2016.

82 Statute of the Administrative Tribunal of the International Labour Organisation, art 2.

resolution of non-contractual disputes through *ad hoc* arbitrations.

Such mechanisms have three possible advantages. Firstly, it defines a specific path of redress available for adjudication of non-contractual claims, as against the prevailing scenario of improvising a combination of remedies. Secondly, it provides a binding dispute resolution mechanism. Thirdly, it prevents intervention of domestic courts by providing an alternate mechanism that precludes their jurisdiction *ratione materiae* (subject-matter jurisdiction).[83]

The availability of a binding alternate mechanism is also in line with the overall objective of immunity i.e. the preclusion of intervention without the exclusion of accountability. The case of the European Union (EU) and the International Criminal Police Organization (INTERPOL) are particularly illustrative in this scenario.

The immunities and privileges of the EU and its officials are provided under Protocol 7 on the Privileges and Immunities of the European Union. At the same time the EU has made the right to damages a fundamental right,[84] and provides for claims of damages to be brought against it under the Treaty on the Functioning of the European Union.[85] Finally, the Court of Justice for the EU has exclusive jurisdiction over claims of damages in accordance with the Statute of the Court of Justice of the European Union.

INTERPOL[86] in its Headquarters Agreement with France[87] also allows for the resolution of disputes with private parties according to the Optional Rules for Arbitration between International Organizations and Private Parties of the Permanent Court of Arbitration. Similarly, Article VIII of the Headquarters Agreement between the Organisation of American States (OAS) and the United States of America provides for arbitration of disputes with private parties notwithstanding the immunities of the OAS under the Agreement.[88]

The need for defined accountability mechanisms gains further importance with the steady rise of non-contractual disputes between international organisations and private parties. International institutions increasingly pervade through myriad aspects of individual life. Governance by formal and informal institutions may lead to asset-freezing, and travel bans under the targeted sanction scheme of the United Nations,[89] invade the private space

83 *Martha* (n 38) 125-126.

84 Charter of Fundamental Rights of the European Union, art 41(3).

85 Treaty on the Functioning of the European Union, art 340.

86 On the international legal personality of INTERPOL see generally: Rutsel J Martha, *The Legal Foundations of INTERPOL* (Hart 2010).

87 Agreement between the International Criminal Police Organization - Interpol and the Government of the French Republic regarding Interpol's Headquarters in France (adopted 24 April 2008, entered into force 1 September 2009), art 24(1).

88 William M. Berenson, 'Squaring the Concept of Immunity with the Fundamental Right to a Fair Trial The Case of the OAS' (2012) 3 World Bank Legal Rev 133.

89 Thomas J Biersteker, 'Targeted Sanctions and Individual Human Rights' (2009) 65 Int'l J 99.

through genetic testing,[90] or systemically hamper the development of the fisheries industry in developing states.[91] The absence of an independent accountability mechanisms has led to confrontation between two international institutions as seen in the proceedings relating to the *Kadi* case[92] and through the peer review of the WHO by the EU,[93] and has led to removal of international immunities by domestic courts.

The ILOAT, which serves as the dispute resolution mechanism to employees of more than 57 international organisations, provides a valuable starting point for the design of a Permanent Tribunal for International Organisations. Alternatively, consent to the Optional Protocol of the Permanent Court of Arbitration through amendment of relevant Headquarters Agreements, or through the exercise of implied powers would provide an adequate mechanism for adjudication of non-contractual disputes with private parties.

The provision of such alternate independent mechanism helps separate the issue of immunities and legal accountability while ensuring the fulfilment of the principle informing the two.

VII. Conclusion

Despite the subsequent dismissal of the case in *Jam v. IFC* by the District Court of the District of Columbia, the judgment of the Supreme Court is an important development in the law surrounding immunities of international organisations. While the interpretive methodology undertaken by the Court, combined with a growing need to review ever expanding international organisations, is understandable, the remedy of domestic court review is both provisional and potentially detrimental.

The debate surrounding the accountability of international organisations routinely devolves into a criticism of immunities of international organisations that ostensibly preclude accountability by barring recourse to settled dispute resolution mechanisms. It is important to understand that, in as much as accountability is a legitimate objective, immunities of international organisations are essential for the independent performance of their functions and as a guard against unnecessary state interference.

The present paper is an attempt to separate the issue of immunities and legal accountability and hypothesise alternate redressal mechanisms to ensure achievement of both objectives without their dilution.

90 Michele Krech, 'To Be a Woman in the World of Sport: Global Regulation of the Gender Binary in Elite Athletics' (2017) 35 Berkeley J Int'l L 262.

91 Simon R Bush, et al., 'The 'devils triangle' of MSC certification: Balancing credibility, Accessibility and Continuous Improvement' (2013) 37 Marine Policy 288.

92 Eyal Benvenisti, *The Law of Global Governance* (Brill 2014) 267-270.

93 Parliamentary Assembly, 'The handling of the H1N1 pandemic: more transparency needed', Report, Social Health and Family Affairs Committee, 24 June 2010 AS/Soc (2010) 12; See also Abigail C. Deshman, 'Horizontal Review between International Organizations: Why, How, and Who Cares about Corporate Regulatory Capture' (2011) 22(4) EJIL 1089.

RECOMMENDED MODEL FOR PARALLEL IMPORTATION OF TRADEMARKED GOODS IN ASEAN

- Pankhuri Agarwal*

I. Introduction

The ASEAN Economic Community (AEC), on the lines of the common market of the European Economic Area (EEA), was established on 31 December 2015.[1] One of its aims, as reflected in Article A.1.9 of the AEC Blueprint 2025, is to allow '*competitive, efficient, and seamless movement of goods within the region*'.[2] National restrictions on parallel importation of trademarked goods that have been put on the market anywhere in AEC may affect this desire of free movements of goods within ASEAN. Part II of this paper will discuss the meaning of parallel importation of trademarked goods. Further, Part III will throw light on the arguments for and against allowing parallel importation. Furthermore, it will describe the different parallel importation models adopted by countries around the world and critically analyse those adopted by Singapore and EEA in particular. Finally, Part IV will analyse which model would be most suitable for ASEAN to adopt, keeping in mind both, its aim of seamless movement of goods, as well as the justifications for trademark protection.

II. Meaning of Parallel Importation of Trademarked Goods

Parallel importation of goods means importation of goods sold by or with the consent of the owner of intellectual property rights (IPRs) in a country into another country without the consent of the owner of such IPRs.[3] In the case of trademarked goods, it means importation of trademarked goods sold by or with the consent of the trademark owner

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* Pankhuri Agarwal is an IP law and policy researcher and a Managing Editor at SpicyIP, a blog on IP, innovation law and policy in India. She did her Master of Laws in Intellectual Property and Technology Law from National University of Singapore under a Faculty Graduate Scholarship and won the Michael Hor Prize for Best Student in Freedom of Speech in the year 2016.

1 Ellodie Sellier, 'The ASEAN Economic Community: The Force Awakens?' *The Diplomat* (12 January 2016) <http://thediplomat.com/2016/01/the-asean-economic-community-the-force-awakens/> accessed on 22 July 2020.

2 The ASEAN Secretariat, 'ASEAN Economic Community Blueprint 2025' (November 2015) <https://www.asean.org/storage/2016/03/AECBP_2025r_FINAL.pdf> accessed on 25 August 2020.

3 Massimo Introvigne, 'International Exhaustion of Trademarks in the European Union' (1998) 3 International Intellectual Property Law and Policy 8-1; INTA, 'International Trademark Association Position Paper on Parallel Imports' (2015).

in country A into country B without the consent of the trademark owner. The goods so imported are commonly referred to as parallel imports or grey [market] goods and it is to be noted that these goods are genuine and not counterfeit goods as they are manufactured by or with the consent of the trademark owner.[4] Whether parallel importation of trademarked goods in a country is legal or illegal depends on the theory of exhaustion of trademark rights adopted by the trademark law of that country.[5] A country may choose to follow one of the three theories of exhaustion, namely national, international and regional.[6] National exhaustion means that once a trademarked good has been sold in a particular country by the trademark owner, he cannot control the resale of that good within that country.[7] However, he is entitled to control resale of goods sold in another country as his exclusive rights exhaust only with respect to the goods sold by him in that country.[8] This principle is also known as the principle of territoriality.[9] On the other hand, international exhaustion means that once a trademarked good is sold anywhere in the world by the trademark owner, his rights with respect to that good gets exhausted internationally and thus he cannot control resale of that good in any country.[10] A mix of these two theories is the theory of regional exhaustion, according to which, once the trademark owner sells the trademarked good in any country of a particular region, he cannot prevent resale of that good in any of the countries of that region.[11] In short, the principle of national exhaustion prohibits parallel importation, the principle of international exhaustion allows it and the principle of regional exhaustion allows it from countries within a region. Most countries follow some theory of exhaustion of trademark rights so as to allow free alienation of goods once they have been sold by the trademark owner and thereby promote a free market system.[12]

III. Arguments For and Against Parallel Importation

At present, there is no international standard governing parallel importation of goods.[13] Article 6 of the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS), which lays down minimum standards of IPRs to be adopted by all WTO members, reads as:

4 Stephanie Peatman, 'Moving toward Uniform International Trademark Protection: How Amending the Trips Agreement Will Make Parallel Importing of Gray Goods Less Gray' (2014) 20 Southwestern Journal of International Law 445; Kimberly Reed, 'Levi Strauss v. Tesco and E.U. Trademark Exhaustion: A Proposal for Change' (2003) 23 Northwestern Journal of International Law and Business 139.

5 Cindy Wai Chi Wong, 'Parallel Importation of Trademarked Goods in Hong Kong and China' (2004) 34 Hong Kong Law Journal 151.

6 Peatman (n 4).

7 Reed (n 4); INTA (n 3).

8 Irene Calboli, 'Trademark Exhaustion in theEuropean Union: Community-Wide or International? The Saga Continues' (2002) 6 Marquette Intellectual Property Law Review 47; INTA (n 3).

9 Wong (n 5).

10 Reed (n 4); INTA (n 3).

11 Reed (n 4).

12 Reed (n 4); Calboli, 'Trademark Exhaustion in the European Union' (n 8).

13 INTA (n 3).

'*For the purposes of dispute settlement under this Agreement … nothing in this Agreement may be used to address the issue of the exhaustion of intellectual property rights*'.[14] Thus, the member countries are not obliged to adopt any particular principle of exhaustion and as a result, have adopted different principles. Before proceeding to the examination of the different exhaustion models adopted by countries, it is important to understand the policy considerations that guide them in deciding whether parallel importation should be allowed or not.

1. Arguments against Parallel Importation

Trademark owners argue that parallel importation of goods in a particular country may adversely affect the goodwill of their trademark as well as the interests of the consumers in that country, which the trademark law is designed to protect.[15] They argue that the parallel imports can cause consumers to be confused or deceived into buying a good that is not the good they intended to buy.[16] This is because the goods sold by the trademark owner in another country may not exactly be the same as those sold by him in the country of importation.[17] Goods may often be customised for a country according to consumer preferences, environmental protection and waste management laws, safety and quality control standards or climatic conditions of that country.[18] The language on the packaging and that of the manuals or instructions and the telephone numbers for customer support may also differ from country to country.[19] Further, the parallel imports may not carry a valid warranty in another country or come with the same after-sales services as offered on the goods authorised to be sold in the importing country.[20] Also, improper care during importation may also alter the condition of the goods.[21] The consumers in the importing country who buy such parallel imports without being aware of these differences may be disappointed with the goods bearing a certain trademark not being of the expected and satisfactory quality or standard.[22] Such disappointment and dissatisfaction of consumers negatively impacts the goodwill of the trademark owner.[23] Another argument put forth by the trademark owners is that the parallel importers free ride on their goodwill and investment they made in promotion of the trademarked goods.[24] This according to them

14 ibid.

15 ibid.

16 Clark W Lackert, 'Introduction tothe Parallel Imports Controversy: Trade or Trademark Policy?' (1987) Columbia Business Law Review 151.

17 George SS WEI, 'Parallel Imports and the Tort of Passing-Off and Trade Mark Infringement' (1989) 31 Malaya Law Review 284; Peatman (n 4); INTA (n 3).

18 INTA (n 3); Peatman (n 4).

19 ibid.

20 ibid; Lackert (n 16).

21 Peatman (n 4).

22 INTA (n 3).

23 INTA (n 3); Peatman (n 4).

24 INTA (n 3); Peatman (n 4);Lackert (n 16).

reduces the incentive for them to produce more and thus leads to the limited production of quality goods.[25] Trademark owners are said to indulge in price discrimination, a practice where they price their goods differently in different countries depending on the economic growth and stability of the country in which they are to be sold, so as to widen their market reach.[26] Thus, prices in developing countries are sometimes lower than in developed countries, thereby making it more affordable and beneficial for consumers in the former.[27] However, parallel importation of lower-priced goods into developed countries could divert the sales and profits away from the trademark owner in those countries which may thereby force the trademark owners to adopt uniform pricing throughout the world.[28] This, they argue, would render the goods unaffordable for the consumers in developing countries and place a higher price burden on the consumers in developed countries to make up for the lost market.[29]

2. Arguments For Parallel Importation

There are many who argue for allowing parallel importation. Their basic argument is that once a trademark owner has made a profit by the first sale of the good, he must not be allowed to control further distribution of that good.[30] This is also referred to as the doctrine of first sale. Prevention of parallel importation, they say, creates a barrier against free trade and competition.[31] On the other hand, allowing it protects the consumers against payment of high prices by increasing the supply of trademarked goods and thereby preventing the trademark owner from engaging in monopolistic behaviour like price discrimination.[32] Parallel importation is also said to increase the demand of trademarked goods and thereby increase employment and economic benefits for developing countries.[33] The imported goods may also be exported by these countries for profit.[34] For these reasons, international exhaustion with respect to at least those trademarked goods that are qualitatively the same is said to be line with the function of the trademark to indicate the source and quality of goods and the intra-brand price competition caused by parallel importation is not considered justified for extension of trademark rights to goods that have been once sold.[35]

25 Peatman (n 4).

26 ibid.

27 ibid.

28 ibid.

29 ibid.

30 ibid.

31 Peatman (n 4); Christopher B Conley, 'Parallel Imports: The Tired Debate of the Exhaustion of Intellectual Property Rights and Why the WTO Should Harmonize the Haphazard Laws of the International Community' (2007) 16 Tulane Journal of International and Comparative Law 189, 206.

32 Peatman (n 4); Lackert (n 16); Wong (n 5).

33 Peatman (n 4).

34 ibid.

35 WEI (n 17).

Any confusion likely to be caused by the difference in warranty can be prevented by requiring a simple notice to be given.[36]

IV. Parallel Importation Models Adopted by Different Countries

TRIPS, as mentioned in Part III above, does not oblige member countries to follow a particular principle of exhaustion of IPRs. This has led to a lack of uniformity in approach with respect to legality of parallel importation of trademarked goods as different countries have adopted different rules of exhaustion in their national laws. Many Asia Pacific countries like Singapore, China, South Korea, Japan, Hong Kong, Taiwan, Australia, New Zealand, and South Africa have adopted international exhaustion rule with some limitations.[37] The European countries forming part of the EEA follow the rule of regional exhaustion except in certain circumstances (see part IV-B below). United States (US) enforces a system that is hybrid of national and international exhaustion.[38] The national exhaustion principle has been adopted by very few countries like Russia, Ukraine, Turkey and Brazil (with some exceptions).[39]

For the purpose of evaluating which exhaustion model would be most suitable for ASEAN to adopt, it will be most useful to look at the parallel importation model of Singapore, it being a member state of ASEAN and that of EEA, and a single regional market like AEC.

1. Singapore Model

Singapore has allowed parallel importation of trademarked goods to promote competition and industrial development in its market.[40] Section 29 of Singapore's Trade Marks Act 1998 (Singapore Act) provides for international exhaustion of exclusive rights conferred by a registered trademark with certain exceptions.[41] Section 29(1) provides that a registered trademark is not infringed by the use of a trademark in relation to goods that have already been put in the market, whether in Singapore or outside, under that trademark by its proprietor or by someone else with his express or implied consent. The consent may be conditional or unconditional,[42] which suggests that '*private restraint on parallel imports, such as by restrictive contracts or by putting prohibitive labels on products, will not be interpreted as a sign of non-consent*'.[43] Two exceptions to this rule are laid down in section 29(2). First, the rule does not apply to cases where the condition of the goods has been

36 Lackert (n 16).

37 INTA (n 3).

38 Reed (n 4); INTA (n 3).

39 INTA (n 3).

40 Wong (n 5).

41 Singapore Trade Marks Act 1998, s 29.

42 ibid s 29(1).

43 Wong (n 5).

changed or impaired after they were put in the market. Second, it excludes cases where the use has caused dilution of the distinctive character of the registered trademark in an unfair manner. Section 29(2) has, however, been criticised for being narrow in scope as it does not exclude parallel importation of trademarked goods that are qualitatively different from those sold by the proprietor in Singapore and also in cases where the packaging and not the actual content of the trademarked goods have been tampered with.[44]

Therefore, Singapore's model of parallel importation can be said to be very generous as it does not seem to adequately protect the interests of the consumers and the trademark owners through its statutory exceptions to the international exhaustion rule.

2. EEA Model

The First Council Directive 89/104/EEC of 21 December 1988 (Directive) mandated adoption of the principle of regional exhaustion by the members of the European Economic Community (EC).[45] Article 7(1) of the Directive states that trademark rights could not be used to prevent the use of the trademark in relation to '*goods which have been put on the market in the* [EC] *under that trademark by the proprietor or with his consent*'.[46] The adoption of the Agreement for the EEA of 2 May 1992 (EEA Agreement) extended this principle to the European Free Trade Agreement (EFTA) countries joining the EEA (which were Norway, Iceland, and Liechtenstein).[47] Thus, now all European countries that are EEA members enforce the rule of regional exhaustion of trademark rights.[48]

Article 7(1) of the Directive provides that trademark rights are exhausted in relation to goods that have been sold *in* the EEA, but does not mention anything with respect to the goods put on the market *outside* the EEA. It did not clarify whether the EEA members could adopt the principle of international exhaustion within their national territories.[49] Some countries like Germany, Austria, England and the Netherlands adopted the rule of international exhaustion prior to the Directive.[50] This ambiguity was settled by the

44 Ng-Loy Wee Loon, 'Exhaustion of Rights in Trade Mark Law - The English and Singapore Models Compared' (2000) 22 European Intellectual Property Review 320; Wong (n 5).

45 Official Journal of European Communities, 'First Council Directive of 21 December 1988 to approximate the laws of the Member States relating to Trade Marks' <https://op.europa.eu/en/publication-detail/-/publication/4a573477-c9fe-4df6-8763-e557017f7677> accessed on 26 August 2020.

46 ibid; art 7(1).

47 Calboli, 'Trademark Exhaustion in the European Union' (n 8).

48 *See* UK Trade Marks Act 1994, s 12 and Sweden Trade Marks Act 2010, s 12 that give effect to Article 7 of the Directive.

49 Calboli, 'Trademark Exhaustion in the European Union' (n 8).

50 Calboli, 'Trademark Exhaustion in the European Union' (n 8); Eddie Powell and Catrin Turner, "Fortress Europe': International Exhaustion of Trademark Rights and the EC: The Retailer's Perspective' (2002) 30 International Business Lawyer 3; Thomas Hays, 'The Incorporeal Curtain: The EEA is closed to extra-market gray goods' (2002) 92 Trade Mark Reporter 626.

Court of Justice of European Union (CJEU) in *Silhouette v Hartlauer*[51] (Silhouette) by interpreting Article 7 to lay down regional exhaustion as the exclusive standard and not just the minimum standard. It was held that the countries were not free to adopt international exhaustion as it would defeat the aim of the EC directive to harmonize laws with respect to exhaustion.[52] The same was confirmed by the CJEU in *Sebago v. GB-Unic*.[53] Thus, under the EEA parallel importation model, a trademark owner retains the right to prevent importation of trademarked goods sold *outside* EEA. Only parallel importation of goods first sold *within* the EEA is allowed.

In *Davidoff v A&G Imports*,[54] the High Court of London interpreted *Silhouette* to not prohibit parallel importation of goods sold outside EEA if it is made *with the consent* of the trademark owner. Issues thus arose regarding the meaning of 'consent' for the importation of goods sold outside EEA.[55] The meaning was clarified by the CJEU in 2001 in *Zino Davidoff* and *Levi Strauss*.[56] It was held that consent can be implied but must be unequivocally demonstrated. It must have been expressed positively and cannot be implied from silence as to any restriction. The burden of proof was said to be on the importer to show it had consent, and it was not found to be of relevance that the restrictions were not communicated to the importer. It was held that importer can be said to have consent only if an affirmative right is given to the first purchaser to sell in EEA.[57] Questions have often come up before CJEU on the interpretation of 'trademark owner's consent' in Article 7(1) as well.[58] The interpretation by the court has been such that the trademark owner would not be considered to have consented to the first sale of the good in the EEA unless he has given 'express and unequivocal consent' for it.[59] Such narrow interpretation of 'consent' has been criticized for impacting the free movement of goods not only between EEA and other countries but also within the EEA and overly rewarding the trademark owners.[60]

51 Case C-355/96 *Silhouette International Schimed GmbH & Co. KG v Hartauer Handelsgesellschafmbh* [1998] ECR I-04799.

52 ibid.

53 Case C-173/98 *Sebago Inc. and Ancienne Maison Dubois & Fils SA v G-BUnic SA* [1999] ECR *I-04103.*

54 *Zino Davidoff SA v A & G Imports Limited* [1999] 3 All ER 711.

55 Hays (n 50); Davidoff SA (n 58); C-415/99 and C-416/99 *Levi Strauss & Co. v Tesco Stores Ltd.* and *Levi Strauss v Costco Wholesale* (High Court of Justice of England and Wales, Chancery Division, 22 July 1999).

56 Joined Cases C-414/99 to C-416/99 *Zino Davidoff SA v A & G Imports Ltd, Levi Strauss & Co. v Tesco Stores Ltd* and *Levi Strauss & Co. v. Costco Wholesale UK Ltd.* [2001] ECR I-08691.

57 Hays (n 50).

58 Calboli, 'Trademark Exhaustion in the European Union' (n 8).

59 Irene Calboli, 'Reviewing the (Shrinking) Principle of Trademark Exhaustion in the European Union (Ten Years Later)' (2012) 16 Marquette Intellectual Property Law Review 257.

60 ibid; (discussing Case C-324/08, *Makro Zelfbedieningsgroothandel CV v Diesel SpA.*, 2009 E.C.R. 1-10019; Case C-59/08, *Copad SA v. Christian Dior Couture SA*, 2009 E.C.R. 1-03421; Case C-127/09, *Coty Prestige Lancaster Group GmbH v Simex Trading AG*, 2010 E.C.R. 1-04965; Case C-324/09, L'Oreal SA v. eBay).

The rule of regional exhaustion of trademark rights under Article 7(1) of the Directive is not absolute. Under Article 7(2) intra-EEA parallel importation also can be prevented for legitimate reasons. Article 7(2) reads as '[Article 7(1) shall not apply where there exist legitimate reasons for the proprietor to oppose further commercialisation of the goods, especially where the condition of the goods is changed or impaired after they have been put on the market'.[61] Similar to that in the Singapore Act, an express exception has been made for cases where the condition of the goods is changed or impaired after their first sale by the trademark owner. However, the scope of Article 7(2) is much broader than section 29(2) of the Singapore Act as it allows the trademark owners to prevent parallel trade for any other 'legitimate reasons' as well. In many cases, the CJEU has been called upon to decide questions on the interpretation of 'legitimate reasons'.[62] The court has given this exception a very broad interpretation. Not only have material change or impairment in the condition of goods by removal of serial or identification numbers applied or repackaging (except in cases of pharmaceutical products provided the repackaging company's name is stated on it) and de-branding[63] been held to be 'legitimate reasons',[64] but even serious damage to the reputation of the mark in cases where the sale of the trademarked goods in discounted stores or use of a trademark for advertising by the importer can affect the 'aura of luxury' and exclusivity of the goods.[65] Thus, not only has parallel importation been prevented for protecting consumers against confusion as to the origin of the trademarked goods, but also for protection the goodwill or reputation of trademarks especially those that are famous or identify luxury goods.[66] This expansive interpretation has been criticized to threaten the free movement of goods within the EEA and also to go against historical justifications for trademark protection that focus on prevention of confusion and unfair competition and only indirectly the goodwill of the trademark owner.[67]

Therefore, EEA model of parallel importation can be said to be too restrictive as a result of its narrow interpretation of 'consent' with which the goods sold outside EEA can be imported and of 'consent' with which goods, if sold in EEA, can be imported and broad interpretation of 'legitimate reasons' for which the parallel importation can be prevented

61 First Council Directive (n 45) art 7(2).

62 Calboli, 'Reviewing the (Shrinking) Principle of Trademark Exhaustion in the European Union' (n 59).

63 ibid; (discussing Case *C-558/08, Portakabin Ltd. v Primakabin BV*, 2010 E.C.R. 1-06959).

64 ibid.

65 ibid; (discussing Case C-59/08, *Copad SA v Christian Dior Couture SA*, 2009 E.C.R. 1-03421; Case C-337/95 and Case *C-558/08, Portakabin Ltd. v Primakabin BV*, 2010 E.C.R. 1-06959).

66 Calboli, 'Trademark Exhaustion in the European Union' (n 8); Calboli 'Reviewing the (Shrinking) Principle of Trademark Exhaustion in the European Union' (n 59) (citing Joined Cases C-427, C-429 & C-436/93, *Bristol-Myers Squibb v Paranova* A/S, 1996 E.C.R. 1-3457; Case C-349195, *Loendersloot v Ballantine & Son Ltd.*, 1997 E.C.R. 1-6227 and Case C-337/95, *Parfums Christian Dior SA v Evora BV*, 1997 E.C.Rt 1-6013).

67 Calboli, 'Reviewing the (Shrinking) Principle of Trademark Exhaustion in the European Union' (n 59).

by the trademark owner.

V. Recommended Parallel Importation Model for ASEAN

The EEA model of regional exhaustion of trademark rights may appear to be the obvious model for AEC to adopt for the reason that AEC establishes a single market for ASEAN countries as the EEA does for a group of European countries. However, as noted above, the EEA model has not been free from criticism. Recommendations have been made by some for the adoption of international exhaustion in the EEA.[68] Also, the CJEU in *Silhouette* disallowed countries to opt for international exhaustion in their national territories not because it considered that international exhaustion, if mandated for all, would hinder the free flow of goods within the EEA, but because the option, if given, would disturb the uniformity of exhaustion systems in the region leading to the creation of trade barriers within the internal market.[69] Therefore, in my opinion, an independent assessment must be made as to whether ASEAN must adopt a national, regional or international exhaustion model keeping in mind the ASEAN's desire for seamless movement of goods as well as the justifications for conferment of exclusive rights on the trademark owner.

Restrictions on parallel importation of trademarked goods can impact ASEAN's desire to have 'a seamless movement of goods' within ASEAN. This is because of the lack of uniformity in the exhaustion regimes adopted by ASEAN countries.[70] Although many ASEAN countries like Malaysia[71] and Singapore abide by the international exhaustion principle, some countries like Cambodia[72] follow the principle of national exhaustion.[73] This means that the trademarked goods that have been once sold by the trademark owner or with his consent anywhere in the ASEAN region cannot be legitimately imported and resold in the ASEAN countries that follow a national exhaustion model without the consent

68 Reed (n 4); United Kingdom Trade and Industry Committee, *Trade Marks, Fakes and Consumers (Eighth Report)* (1999 HC 380).

69 Silhouette (n 51); Carl Baudenbacher, 'Trademark Law and Parallel Imports in A Globalized World-Recent Developments in Europe with Special Regard to the Legal Situation in the United States' (1998) 22 Fordham International Law Journal 645.

70 *See* Peatman (n 3) ("the exclusive rights afforded by national laws to trademark owners could be an obstacle to the creation of a unified internal market...the distinctive approaches to exhaustion deter international trade and business"); Calboli (n 59) ("In the formative years of the European Economic Community (EEC), the European Community Commission (the "Commission") and the European Court of Justice (ECI) argued that the exclusive rights afforded by national laws to trademark owners could be an obstacle to the creation of a unified internal market.")

71 'Parallel Import Law Clarified' *Mirandah* (10 November 2011) <http://www.mirandah.com/pressroom/item/320-parallel-import-law-clarified> accessed 22 July 2020 (suggesting that Malaysia's law allows parallel importation in Malaysia by referring to the High Court of Malaysia's decision in *Tien Ying HongEnterprisesSdnBhdvBeenionSdnBhd* [2010]).

72 Law Concerning Marks, Trade Names and Acts of Unfair Competition of the Kingdom of Cambodia 2001, art 11(c); David Mol and Sokmean Chea,'Parallel Imports in Cambodia' (*Lexology,* 29 February 2016) <https://www.lexology.com/library/detail.aspx?g=817150f3-c0b7-4053-a49b-dbb1ec51354c> accessed 22 July 2020.

73 Mol and Chea (n 72).

of the trademark owner, thereby creating a barrier to the creation of a common market for free trade. Therefore, all ASEAN countries must be mandated to allow parallel importation of those goods that have been put on the market, at least, in the AEC by the trademark owner himself or with his consent. In other words, at the minimum, the principle of regional exhaustion of trademark rights must be adopted by ASEAN for free intra-ASEAN trade.

Although adoption of a regional exhaustion model after regional exhaustion model: ,instead an international exhaustion model, would be in line with ASEAN's aim to allow seamless movement of goods *within* ASEAN, it would not be backed by justifications for trademark protection. Trademark law confers upon the trademark owner the right to exclude others from using his trademark on their goods primarily for preventing harm to the consumers (caused by confusion as to the source or quality of those goods) and the owner. When trademarked goods, first sold outside a particular country by or with the consent of the trademark owner, are imported and sold in that country seeking his consent, the consumers are *generally* not likely to get confused as to the source and quality of the goods. Any harm or loss to the trademark owner is also unlikely to be caused by such import and sales, as they have already earned a profit once from the first sale of those goods outside the country. Thus, adoption of a regional exhaustion model that prevents parallel importation of goods that have been first sold *outside* the region by or with the consent of the trademark owner is not supported by the justifications for trademark protection,[74] and unduly benefits the trademark owners at the cost of free movement of goods between the region and the outside. Therefore, in my opinion, the rule of international exhaustion, as opposed to that of regional exhaustion, must be adopted by ASEAN.

However, this rule must not be absolute or otherwise, it runs the risk of not protecting, in certain cases, the very interests that the trademark law is designed to protect. Thus, Singapore model of providing for international exhaustion of trademark rights with some exceptions must be adopted by ASEAN, but the exceptions must not be limited to those provided in section 29(2) of the Singapore Act. Parallel importation must not be allowed in any case where the consumers are likely to be confused or deceived as to the origin, quality, condition, warranty, after-sales services, instructions of use and the legal compliance of the trademark goods. This will include not only those cases where the condition of the goods themselves has been changed or impaired after their first sale but also where the goods have been de-packaged, repackaged, de-branded or relabelled or where the goods imported were those that were made qualitatively different or otherwise customised for a different country by the trademark owner himself. However, the focus in evaluating whether parallel trade must be prevented even in these cases must always be on likelihood of consumer harm. Its prevention must not be held justified merely on the ground of harm to the reputation of the brand caused by the sale of imported trademarked goods along with counterfeit goods or at discounted stores etc.

74 *Davidoff* SA (n 54) (refer to the criticism of *Silhoutte* in Opinion of Justice Laddie in the decision).

VI. Conclusion

In light of the above, it is concluded that ASEAN must adopt the rule of international exhaustion of trademark rights and thereby allow parallel importation of trademarked goods irrespective of whether they are first sold within the ASEAN region or outside it. However, to protect the interests that trademark law is designed to achieve, an exception must be made to the rule in cases where trademarked goods imported in a country from another country are different than those that are sold in that country by or with the consent of the trademark owner, if the differences (including those in packaging) are likely to deceive or cause confusion in the minds of the consumers.

THE RIGHT TO LAND: A STUDY ON LEGALITY OF FORCED EVICTIONS

- Radhika Chitkara and Khushboo Pareek*

I. Introduction

On 13 February 2019, the Supreme Court of India issued an order for evictions of those whose claims under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act (Forest Rights Act/FRA) have been rejected 'with finality'.[1] On 28 February 2019, this order was put 'on hold' to determine whether due process had been followed in the rejection of claims, and under what law evictions may be carried out since the Forest Rights Act does not provide for evictions.

While presently kept in abeyance, this is not the first time that Indian constitutional courts have contemplated or attempted forced evictions of forest-dwellers from their customary lands and forests. Constitutional courts such as the High Courts and the Supreme Court have previously issued eviction orders or, at the minimum, indicated towards the need for evictions translating into eviction drives by the forest department on the ground, twice in 2002[2] and again in 2009,[3] among other instances. In these cases, the presumption is that forest-dwellers occupying forest land in the absence of established title are 'encroachers' on State forests, and as a direct corollary, they are liable to be evicted.

The legal and rights implications of judicial eviction orders against forest-dwellers remains relatively under-studied, even as these historical moments themselves have been catalytic in political movements for legal and institutional reform.[4] The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 itself emerged out of social and political movements that started in the aftermath of one inchoate

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* Radhika Chitkara is Assistant Professor of Legal Practice at the Jindal Global Law School; Khushboo Pareek is a Delhi-based Advocate working on issues of land and forest rights. The authors express gratitude to Ms. Shomona Khanna, Ms. Puja, Ms. Astha Saxena and Ms. Sanghamitra Dubey for their invaluable insights and inputs into this paper.

1 *Wildlife First v Ministry of Forest and Environment* 2019 SCC OnLine SC 238. Later put "on hold" *vide* order dated 28 February 2019.

2 *TN Godavarman Thirumalpad v Union of India* (2002) 9 SCC 502. This was done through orders dated 07 May 2002 in I.A No. 502 and order dated 29 October 2002 in IA No. 276 with IA Nos. 413, 437, 453 and 454.

3 *Nature Lovers Movement v State of Kerala and others* (2009) 5 SCC 373.

4 Shankar Gopalakrishnan, 'Political Economy of Environmental Questions' (2017) 52(31) Economic and Political Weekly.

eviction order issued by the Supreme Court in 2002.[5]

The need for such scrutiny is particularly relevant in light of established and emerging constitutional jurisprudence relating to the fundamental right to land and autonomy of forest-dwellers, as judicial orders for evictions are frequently issued without statutory backing, and in neglect of the constitutional architecture of self-rule and autonomy over customary land and forests.

This paper, accordingly, analyses the legality of the power of the State to forcibly evict forest-dwellers from their lands and forests, and argues that the Constitution casts a positive obligation on the State to prevent evictions through a recognition of the right to land. To do so, the paper searches for statutory and constitutional bases for the presumed power of the State to forcibly evict through a sample study of forest and revenue laws relating to evictions of forest-dwellers in five *adivasi*-dominated central Indian states. It concludes by finding that not only are forced evictions a negation of the State's positive obligation to uphold autonomy and customary rights of *adivasis* and forest-dwellers, but there is scant statutory support for the power of the State to evict.

The paper proceeds in three Sections. The first Section establishes a right to land with a content of autonomy and self-rule, as nestled within a holistic reading of Part III in direct nexus with Parts IX and X of the Constitution. The second Section places this right to land within a specific historical context of dispossession through the legal category of 'encroacher', and describes the content of State obligation from this contextual reading of encroachers and rightsholders. The last Section presents an analysis of the existence and contents of eviction procedures under forest and revenue laws in Maharashtra, Madhya Pradesh, Odisha, Telengana and Tamil Nadu against due process and the foregoing framework on the right to land.

As land, water, forests and other natural resources are part of a composite and inseparable ecosystem, references to 'land' in this paper should be read to encompass the forest ecosystem as well.

II. Land as The Bulwark of life

> 'I want to stress from the Adibasi point of view, that land is and must be the bulwark of aboriginal life.'[6]

For *adivasis* and forest-dwellers, right to life is inextricably linked to access, control and rights over customary lands, forests and natural resources. Formally identified as

5 Godavarman (n 2).

6 Constituent Assembly Debates, speech by Jaipal Singh Munda on 30 April 1947 <https://www.constitutionofindia.net/constitution_assembly_debates/volume/3/1947-04-30> accessed on 25 February 2020.

Scheduled Tribes (STs) and Other Traditional Forest-Dwellers (OTFDs),[7] forest-dwellers enjoy a historical relationship with their lands and forests, which are essential to their existence as people itself.

1. Establishing a Right to Land

ST and non-ST forest-dwellers continue to rely directly or indirectly on forests for their primary livelihood needs, including through agriculture, pastoralism and animal husbandry, crafts and cottage industries. As per the Census of India 2011, 66% of STs continue to be engaged predominantly in the primary sector (agriculture and allied activities).[8] Here, agriculture encompasses not only cultivation, but also collection of forest produce, for which there is significant reliance on common lands. Forest commons continue to be one of the most important sources of health, livelihood and food security, especially for landless forest-dwellers.[9]

The High Level Committee on Socio-Economic, Health and Educational Status of Tribal Communities in India, 2014 (Xaxa Committee Report) notes that alienation from their traditional resource base, either due to dispossession or ecological devastation has severely affected their traditional livelihood options. 'As a result, the already vulnerable tribes [are] exposed to all kinds of exploitation and marginalization in the new, unfamiliar urban space. Those who continue to live in their original habitats diversified their occupations to ensure their sustenance.'[10]

Forests secure not only livelihoods, but also define their histories as peoples, traditions and cultural identities, and has been recognized to be the most important asset for their '*equality… dignity… and means to economic and social justice*':[11]

> Land is their most important natural and valuable asset and imperishable endowment from which the tribals derive their sustenance, social status, economic and social equality, permanent place of abode and work and living. It is a security and source for economic empowerment. Therefore, the tribes too have great emotional attachment to their lands. The land on which they live and till, assures them equality of status and dignity of person and means to economic and social justice and potent weapon of economic empowerment in social democracy.

Similarly, the Bhuria Committee on Scheduled Areas and Scheduled Tribes

7 Forest Rights Act, s 2.

8 Ministry of Tribal Affairs, Government of India, *Report of the High Level Committee on Socio-Economic, Health and Educational Status of Tribal Communities of India* 197 (May 2014) (Report).

9 *ibid* 96.

10 ibid 97.

11 *Samatha v State of Andhra Pradesh* (1997) 8 SCC 191.

Commission, Government of India, reiterated 'the deeply spiritual relationship between indigenous peoples and their land as basic to their existence':

> The concept of land among tribal societies is radically different: Land is not something you inherit from your ancestors, rather something you borrow from your children ... It is essential to know and understand the deeply spiritual special relationship between indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions and culture ...of the most basic human rights - including the right to maintain their ancestral lands, their cultures and their traditional way of life ... Their land is not a commodity which can be acquired, but a material element to be enjoyed freely.
>
> (page 124, Vol.1, Bhuria Committee Report 2002-04)

This multi-dimensional relationship extends beyond forest-dwellers' labour and dependence on forests for nutrition and livelihoods, to historical, cultural and religious ties. In fact, while international instruments such as the UN Declaration on Rights of Indigenous Peoples (UNDRIP) refrain from defining 'indigenous peoples' except through the principle of self-determination, a crucial indicator of indigenous status is the relationship with their land and territories as '*the basis of their continued existence as peoples*', or in other words, a collective civilizational right to life tied to their lands and territories:[12]

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

Thus, the complex, multi-dimensional relationship of *adivasis* and forest-dwellers with customary land and forests is intricately related to the exercise of their rights to life, equality, dignity and culture under Part III of the Constitution, both as a group and as individuals.

2. The Content of Autonomy and Self-Rule

In identifying the content of rights guaranteed by the Constitution, it is well-established that 'the isolation of various aspects of human freedom, for purposes of their protection,

12 Jose R Martinez Cobo, *Study of the Problem of Discrimination against Indigenous Populations* (United Nations, Vol V, 1987, E/CN.4/Sub.2/1986/7/Add.4) 379.

is neither realistic nor beneficial but would defeat the very objects of such protection.'[13] In other words, the Constitution must be read as a whole, and not as water-tight compartments, in protecting these fundamental rights guarantees.

A holistic reading of the Constitution in relation to the right to land and forests reveals the inextricable link between Part III, and Parts IX and X related to local self-governance and administration of Tribal and Scheduled Areas. The Fifth and Sixth Schedules, emerging from Article 244 in Part X, provide for the autonomy of customary institutions and primacy to customary laws in matters relating to land and forests either through the specific demarcation of Scheduled Areas, Tribal Areas etc., or generally wherever there is a high density of *adivasi* populations.[14] For those not formally recognized as STs or SAs, Part IX of the Constitution serves to meet the same goals through devolution of decision-making authority to local units of self-governance.

The Supreme Court has noted that: [15]

> …the Fifth and Sixth Schedule form an integral scheme of the Constitution with direction, philosophy and anxiety to protect the tribals from exploitation and to preserve valuable endowment of their land for their economic empowerment to elongate social and economic democracy with liberty, equality, fraternity and dignity of their person in our political Bharat.

Within the meaning of the Fifth and Sixth Schedules, autonomy implies that the use, access and control of land and forests are to be determined under the rubric of self-rule over land and resources through customary institutions and customary laws. In the Sixth Schedule, Autonomous Councils are empowered to legislate over land and forests to the exclusion of central and state laws, while in the Fifth Schedule, the Governor under the advice of the Tribes Advisory Council is empowered to specifically exclude the application of certain laws.[16] These exclusions of formal law pave the way for the *quasi*-legislative and *quasi*-executive powers of customary institutions such as *gram sabhas* to govern land and forests as per customary laws relating to ownership, use and access, and to ensure the protection of their rights and resources.[17]

The guarantee of autonomy is the key that unlocks the wide spectrum of fundamental rights of *adivasis* and forest-dwellers, most notably to their land, liberty, equality and dignity. The Supreme Court also recognized the centrality of local self-governance and

13 *Maneka Gandhi v Union of India* (1978) 1 SCC 248, 202.

14 CR Bijoy (*eds*), *India and the Rights of Indigenous Peoples: Constitutional, Legislative and Administrative Provisions Concerning Indigenous and Tribal Peoples in India and their Relation to International Law on Indigenous Peoples* (Asia Indigenous Peoples Pact Foundation 2010).

15 Samatha (n 11) [71].

16 Asia Indigenous Peoples Pact Foundation 2010 (n 14).

17 Maneka (n 13).

autonomy for the protection of life, lands and culture of the Dongria Kondhs in *Orissa Mining Corporation* v *Ministry of Environment and Forests*.[18] Here, the Supreme Court of India set aside clearance for a proposed mining project in the Niyamgiri hills in Kalahandi absent approval from the *gram sabha*, as the *Dongria Kondhs* argued that the mine will destroy the rich Niyamgiri hills that are of cultural and spiritual relevance to them.[19] The Court upheld the decision-making power of *Gram Sabhas* for preserving tribal autonomy, culture, economic empowerment and social justice. Accordingly, the state government was directed to hold *Gram Sabha* meetings in all affected villages in a free and transparent manner to seek their decision on the diversion of forests for mining purposes.

Thus there is a direct and overarching nexus between the life, liberty, equality, culture and dignity of forest-dwellers, and their right to land and autonomy under other parts of the Constitution. This constitutional mandate extends beyond a negative obligation to refrain from violations of rights, to a positive obligation on the State to actively take steps to secure the full enjoyment of fundamental rights.

Such a scheme casts a positive obligation on the State to respect, protect and fulfill the land and forest rights of forest-dwellers through the recognition of their autonomy and customary rights by way of law. The burden lies on the State to ensure that pre-existing customary rights of *adivasis* and forest-dwellers to their land and autonomy are duly recognized through appropriate legislation and executive action.

III. Evictions as a violation of the Right to Land

The foregoing analysis demonstrates that the right to land and forests is a fundamental right, and there is a positive obligation on the State to ensure that these pre-existing rights are translated into formal recognition under the framework of autonomy of customary institutions and customary laws.

1. 'Encroachments' in Historical Context

Rights do not exist in the abstract in a vacuum, but emerge in response to historical and continuing deprivations. Placing the right to land and forests within its historical and present legal context enables a clearer identification of corresponding State obligations. The context of the right to land encompasses a wide spectrum of legal, political, economic and cultural processes of dispossession and destruction of identities.[20] However, this Section focuses specifically on the legal construct of 'encroachment' as one of the foundational colonial actions rupturing customary land rights of forest-dwellers, which also presently sets the stage for attempted and actual evictions by way of law.

The order of 13 February 2019 follows a long line of other judicial orders, executive

18 (2013) 6 SCC 476.

19 ibid [66].

20 Report (n 8).

action and statutes which operate on the logic that any use of forests and forest resources by forest-dwellers to meet livelihood needs is an 'encroachment' under law. Consider, for instance, the definition of 'forest offences' laid down under the paradigmatic law, the Indian Forest Act 1927 (IFA). The IFA criminalizes collection of forest produce (leaves, barks etc.), cultivation, burning of fuel collected from the forest, cattle-grazing etc., for different categories of forests respectively.[21]

This criminalization of forest-based livelihoods emerges from the colonial project of appropriating land, forests and natural resources of indigenous populations. This was pursued through the simultaneous strategies of establishing State dominion over land, forests and resources, while extinguishing the lawful customary rights and regimes of use of forest-dwellers.[22] Guha and Gadgil have extensively documented the incremental appropriation of forests by the colonial government from the late nineteenth century, finally culminating in the paradigmatic IFA in 1927.[23] This law creates three categories of forests, namely reserved, protected and village. All three come into existence only by way of executive action, and establish the sovereign prerogative of the exclusive use and distribution of forests and forest resources. The three categories differ not in substance but only in the degree of livelihood activities that may be permitted within those forests. Customary rights and autonomy of forest-dwellers over land now stood reduced to mere 'rights, privileges and concessions' granted by the State within a narrow window for their settlement.[24] Rights not settled within this narrow window stood extinguished by default, neglecting the complete inaccessibility of the colonial legal and administrative apparatus to forest-dwellers.

Consequently, forest-dwellers came to be dispossessed through unimplemented state-driven settlement of 'rights and privileges', criminalization of livelihoods, expropriation of forests towards commercial and industrial purposes, accompanied by atrocities and human rights violations.[25]

It is the cumulative effect of these processes that rendered forest-dwellers as encroachers

21 IFA 1927, s 32.

22 Lavanya Rajamani, 'Community Based Property Rights and Resource Conservation in India's Forests', Aileen McHarget (eds), *Property and the Law in Energy and Natural Resources* (OUP 2010) 455-457.

23 Madhav Gadgil and Ramachandra Guha, *This Fissured Land: An Ecological History of India* (OUP 1993) 108-128.

24 ibid 110.

25 People's Union for Democratic Rights, 'Undeclared Civil War: A Critique of Forest Policy' (1982) 6 <https://pudr.org/sites/default/files/2019-02/undeclared_civil_war.pdf> accessed 1 September 2020; Ramachandra Guha, 'Forestry in British and Post-British India: A Historical Analysis', 18 Economic & Political Weekly 1882-1896 (1983); Christoph von Fürer-Haimendorf, *Tribes of India: The Struggle for Survival* (University of California Press 1982) 79-96; Walter Fernandes and Sanjay Barbora, 'Tribal Land Alienation in the Northeast: An Introduction' in Walter Fernandes and Sanjay Barbora, *Land, People and Politics: Contest over Tribal Land in Northeast India* 5 (North Eastern Social Research Centre and IWGIA 2009).

on their own lands. The logic is that pre-existing rights gain visibility in law only through narrow State-driven processes of settlement of rights. Forest-dwellers are presumed encroachers under these laws, unless they are able to establish that they hold some forms of limited rights, privileges or concessions granted by the State. This presumption of encroachment, absent formal recognition, is in itself a violation of the historical right to land of forest-dwellers.

The extinguishment of customary regimes of ownership, use and access, in favour of formal law was in itself a crucial step in the establishment of colonial sovereignty over indigenous land, as it extinguished the authority of customary institutions.

The same logic extends beyond the IFA, to both colonial and postcolonial laws relating to land and forests, including the Land Acquisition Acts in their various iterations, Forest Conservation Act etc., that are geared towards the dispossession of forest-dwellers from their customary lands for the re-allocation of resources from livelihood to commercial and industrial purposes. It further permeates the legal architecture governing conservation and wildlife protection, further criminalizing livelihood uses of forests as the cause behind destruction of forests. Such causation not only contradicts established evidence that livelihood uses in fact regenerate forests destroyed by commerce and industry,[26] but also re-entrenches the extinguishment of autonomy, a move globally considered as a bad practice in climate change mitigation.[27] Increasingly, evictions of forest-dwellers is justified under the guise of conservation through the establishment of 'inviolate' areas,[28] or through judicial action.

Pertinently, the IFA itself does not provide for evictions as lawful action that may be taken against encroachers, but provides a range of other punishments. The absence of a penalty of eviction under the IFA 1927 is indicative of the fallacy of the argument that rejection, or non-settlement of rights, is a *de facto* ground for evictions. As the final Section of this paper shows later, there is very limited statutory basis for evictions even in cases of encroachments. This is an exceptional power limited to narrow circumstances in few states, pursuant to laws enacted after the enforcement of the Constitution. As the last Section also shows, the constitutionality of these laws is also suspect.

Nevertheless, it does bear mentioning that eviction drives undertaken by the forest or other executive departments are often not supported by law, and the same issue also plagues judicial orders for eviction issued in the absence of law. This issue came to the forefront pursuant to the order of the Supreme Court on 28 February 2019 placing the 13

26 Council for Social Development and Vasundhara, *Forest Dwelling Communities and Forest Rights Act 2006: Evidence From 24 States* (2020).

27 Stan Stevens (eds), 'Recognizing and Respecting ICCAs Overlapped By Protected Areas: A Report For The ICCA Consortium' (Report for the ICCA Consortium 2016) 45-66.

28 Nitin D Rai, 'Views from the Podu: Approaches for a Democratic Ecology for India's Forests' in S Lele and A Menon (eds) *Democratizing Forest Governance in India* (Oxford Scholarship India 2014).

February eviction order on hold, where the Supreme Court sought clarifications from state governments on the laws applicable to evictions and encroachments.[29]

Evictions rupture the relationship of members of forest-dwelling communities with their forests and others in the community, impacting not only livelihoods but their collective ethnic identities and culture. The United Nations Special Rapporteur on the Right to Adequate Housing in fact views forced evictions of indigenous peoples from their lands and territories as a grave human rights violation impacting a range of fundamental rights and freedoms.[30]

The ILO Convention No. 169 (the Successor to Convention No. 107) includes safeguards to prevent the forced eviction of indigenous peoples from their land. Where this is unavoidable, it should be only as an exceptional measure. Such exceptional relocation should only take place with their free and informed consent. Further, they have the right to return to their traditional lands as soon as possible.[31] The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is the defining international instrument on the human rights of indigenous persons, and in whose favour India voted at the time of its adoption. UNDRIP was the result of years of negotiations between indigenous peoples and States, and provides the global community with a common framework for realization of cultural, historical, social and economic rights. Article 10 affirms that indigenous peoples 'shall not be forcibly removed from their lands or territories.' As an exception, if such forcible removal is unavoidable, it cannot be done without their free, prior and informed consent.[32]

These international instruments supplement the constitutional obligations of the State under Parts III, IX and X of the Constitution, as identified in the previous Section. This categorization of forest-dwellers as encroachers on their own lands stands transformed under the Indian Constitution through the recognition of their fundamental right to land and forests. This constitutional and legislative architecture recognizes the rights of forest-dwellers previously extinguished under colonial laws, reinstates their lawful authority of self-rule over customary land and forests, and removes them from the category of 'encroachers' into the category of rightsholders.

This content of state obligation enables a resolution to the challenge of encroachments and evictions under an exclusionary formal legal framework.

29 Wildlife (n 1). Referring to subsequent order dated 28 February 2019.

30 United Nations Special Rapporteur on the Right to Adequate Housing, *Report Of The Special Rapporteur On Adequate Housing As A Component Of The Right To An Adequate Standard Of Living* (2018 A/HRC/4/18) [57],[70].

31 International Labour Office, *Handbook for ILO Tripartite Constituents, Understanding the Indigenous And Tribal Peoples Convention* (1989) No *169* 22; Alexandra Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (CUP 2007) 67-90.

32 Alexandra Xanthaki (n 31) 262.

2. Resolving the Challenge through State Obligation

In furtherance of the positive obligation under Parts III, IX and X, the Parliament of India has enacted the Panchayats (Extension to Scheduled Areas) Act in 1996 (PESA), the Forest Rights Act in 2006, laws prohibiting the alienation of *adivasi* land, among a host of other policies. Prior to these, the colonial government itself had enacted the Chhota Nagpur Tenancy Act, 1908 and the Santhal Parganas Tenancy Act, 1949 applicable to parts of Jharkhand, all of which recognize the right of forest-dwellers on the common land, and to control, protect and administer their own forest resources. These legislations provide the statutory framework by which the pre-existing rights to land and autonomy are to be formally recognized. This part focuses on the PESA and FRA as these are laws of general applicability.

These laws are not ordinary statutes, but emerge specifically from the constitutional mandate of securing the right to land, forests and autonomy for forest-dwellers, and are instruments by which the state fulfills its positive obligation for the full exercise of fundamental rights. The recognition of land and forest rights through these statutes reverses the presumption of encroachment identified earlier, in favour of the existence of rights, and creates a positive obligation on the State to formally recognize them by way of law.

PESA has been enacted following the constitutional mandate under Article 243(M) which states that the provisions of the constitution and state legislations relating to panchayats will not extend to the Scheduled Areas. If the panchayat system is to be extended to the Scheduled Areas, it has to be done through a law which specifically provides modification under which the panchayat system is extended. Therefore, PESA though not enforceable on its own, is a model legislation that has been adopted into law, with some modifications, by ten states with a high population of forest-dwellers.

Unlike the provisions of Part IX, PESA gives very central role to the Gram Sabhas, Section 4(b) states that 'a village shall ordinarily consist of a habitation or a group of habitations or a hamlet or a group of hamlets comprising a community and managing its affairs in accordance with traditions and customs.'

Under Section 4(d), PESA recognizes the authority of the *Gram Sabhas* to 'safeguard and preserve the traditions and customs of the people, their cultural identity, community resources…'

Section 4(m) obligates state legislatures to enable *Gram Sabhas* to function as units of local self-governance through the formal recognition of their powers and authorities. Specifically, *Gram Sabhas* are empowered to address illegal encroachments over their customary lands, and have the power to 'prevent alienation of land in the Scheduled Areas and to take appropriate action to restore any unlawfully alienated land of a Scheduled Tribe'. PESA, among other powers also empower the *Gram Sabha* to approve plans and

projects[33], and provides mandates consultation with *Gram Sabha* before acquisition of land for developmental projects, and before resettlement of project affected people[34], ownership of minor forest produce[35].

The Forest Rights Act, 2006 represents a milestone in Indian legislative history with Parliament acknowledging the historical injustice done to India's tribal and other traditional forest-dwelling communities during the consolidation of the state forests.[36] As per the Preamble to the FRA:

> 'AND WHEREAS the forest rights on ancestral lands and their habitat were not adequately recognized in the consolidation of State forests during the colonial period as well as in independent India resulting in historical injustice to the forest dwelling Scheduled Tribes and other traditional forest dwellers who are integral to the very survival and sustainability of the forest ecosystems…'

The Forest Rights Act also follows the scheme which has the *Gram Sabha* as the central authority. The Act has three major provisions: (a) the rights that may be claimed in all categories, including Protected Areas; (b) the authorities and the procedures for receiving and verifying the claims; and (c) the empowerment of right-holders and /or *Gram Sabhas* for conservation of forests, wildlife, and biodiversity and their natural and cultural heritage.[37]

The Act specifies 13 claimable rights providing individual and /or community tenure. Claimable rights over forest land include land under occupation, land disputed between forest-dwellers and the Forest Department due to faulty forest settlements. Claimable community forest rights include right to nistar (usufructs); water bodies; community tenure over community habitat in case of pre-agricultural communities; seasonal resource access for nomadic and pastoral communities; other traditional rights and most importantly Section 3(1)(i) recognizes the collective right of forest-dwellers to 'protect, regenerate or conserve or manage any community forest resource…'.[38] Section 5 of the Forest Rights Act elucidates the powers and duties of the *Gram Sabha* to protect wildlife, biodiversity, water sources, and the rights of forest-dwellers within their customary forests. It also vests in the *Gram Sabha* the power to ensure compliance of their decisions under this Section, and to stop activities adverse to biodiversity and their rights. Section 6 treats the *Gram Sabha* as the primary authority for fact-finding on the existence and extent of right holding in forests.

33 Panchayats (Extension to Scheduled Areas) Act, 1996, s 4(e)(i).

34 Panchayats (Extension to Scheduled Areas) Act, 1996, s 4(i).

35 Panchayats (Extension to Scheduled Areas) Act, 1996, s 4(m)(ii).

36 Madhu Sarin, 'Undoing Historical Injustice: Reclaiming Citizenship Rights and Democratic Forest Governance through the Forest Rights Act' in S Lele and A Menon (eds), *Democratizing Forest Governance in India* (OUP 2014).

37 ibid 126.

38 Madhu (n 36) 126.

This has laid down foundation for democratization of forest governance and reverses the presumption of 'encroachers' on the millions of the forest dwelling communities. Section 4 declares forest rights to be 'vested' in forest-dwellers upon the immediate enactment of the law, which is then to be formalized through processes for recognition of rights under Section 6. It is for the same reason that the Forest Rights Act does not provide for evictions, but in fact, guarantees against arbitrary and unlawful evictions.

Cumulatively, these constitutional laws uphold the application of customary laws relating to ownership, use and access over forests, and the autonomous decision-making authority of *gram sabhas* over matters relating to their land and forests, including but not limited to the right of free, prior and informed consent. These also recognize pre-existing rights which may have been extinguished under formal law or are disputed.

As the legal category of 'encroacher' stands transformed to that of a 'right holder' under these laws, there is insufficient basis for evictions based on encroachments. A reversal of the presumption of encroachments in favour of right holding implies a State obligation for the formal recognition of these pre-existing rights. The implementation of these laws is part and parcel of state obligation emerging from Parts III, IX and X.

Accordingly, the invisibility of right holding under formal law, or, in other words, the absence of formal legal title is indicative not of encroachment, but of a failure of State obligation. The failure of the State to formally recognize these rights does not justify penalties on right holders who may or may not be recognized specifically under formal law.

Although FRA emerged as a legislative response to a national grassroots movement to record the rights of forest dwelling communities, but the access to the rights, and implementation by the State depicts the failure on the part of the State to recognize the rights. According to the Promise and Performance Report, 2016 only 3 percent of the minimum potential of Community Forest Resource (CFR) rights has been achieved in 10 years.[39] The report highlights the poor performance of FRA with deep structural and institutional issues. Additionally, the lack of capacity building in the nodal agency Ministry of Tribal Affairs, low budgetary support and lack of political will reflects no vision to implement land and forest reform. The Ministry of Environment Forest & Climate Change continue to bring in policies through acts such as Compensatory Afforestation Fund (CAF) Act, 2016 which are in contradiction to the Forest Rights Act.

The following Section turns its attention to particular laws providing for evictions, and assesses their constitutionality in light of the foregoing analysis and overall compliance with due process.

39 Citizens' Report as part of Community Forest Rights-Learning and Advocacy process, 'Promise & Performance Report, Ten Years of The Forest Rights Act in India' (Rights and Resources Initiative, 2017) 17 <https://rightsandresources.org/wp-content/uploads/2017/11/India-Promise-and-Performance-National-Report_CFRLA_2016.pdf> accessed 19 July 2020.

IV. Existing Procedures for Eviction from Forest Lands: A Sample Study

As forests are a part of the concurrent list where the centre and state both have legislative powers, this Section evaluates laws which vest powers of eviction both at the central and state level, with specific focus on Madhya Pradesh, Maharashtra, Odisha, Tamil Nadu and Telangana. These are states with a high population of forest-dwellers and reported instances of evictions, and other than Tamil Nadu, have significant geographical areas notified as Scheduled Areas under the Fifth Schedule. This is a sample study, focusing on forest and revenue laws applicable in these states, and does not extend to specific legislations relating to protection of tribal lands, prevention of alienation, and restoration. In addition, the analysis of central laws brings attention to amendments made by eight states which have introduced evictions. Such a study enables an examination of laws and procedures for evictions against the benchmark of fundamental rights of forest-dwellers including the right to life, land and autonomy.

1. Central Forest Laws Along With State Amendments

The Indian Forest Act 1927 (IFA), under which the colonial state established its eminent domain over all forests in the country, and which continues in post-Independence India, does not provide for evictions of forest-dwellers. This reflects the colonial mandate of establishing dominion over forests to enable resource exploitation, where the pre-existing 'rights and privileges' of communities are to be settled as per procedures laid down in the statute itself. Even so, the IFA does not prescribe any penalty or procedure for evictions, but identifies a range of acts as forest offences, where the maximum punishment (imprisonment extending to two years, or fine, or both) is awarded for counterfeiting or defacing marks on timber or standing trees, or alteration of boundary marks of forest land. Forest offences include creating fire, trespass of cattle, causing damage to trees by negligence, collecting forest produce, among others.

At the level of central laws, only the Wild life (Protection) Act, 1972 has provisions with respect to eviction from forest lands, but which are limited to evictions from protected areas. Section 34A of the Wild life (Protection), 1972 authorises officers of the rank of Assistant Conservator of Forests or above to evict a person from a wildlife sanctuary or a national park who is in unauthorized occupation, and also to remove structures, tools, effects belonging to such person from such land. The provision requires that prior to any such order, the affected person must be given an opportunity to be heard.

However, certain states, have made amendments to the IFA and added provisions with respect to eviction. These states include Gujarat, Maharashtra, West Bengal, Uttar Pradesh, Uttarakhand, Bihar, Punjab and Madhya Pradesh.

These amendments are analysed below, based on the procedures for evictions stipulated by law.

1.1. Where eviction can be undertaken pursuant to a conviction for a forest offence

In Gujarat[40] and Maharashtra,[41] Sections 26 and 33 of the IFA have been amended through which provisions relating to eviction have been added. Under unamended IFA, Section 26 provides a list of acts prohibited in Reserved Forests, the penalty for which is imprisonment, or fine, or compensation for damage done to the forest, but only pursuant to a conviction by Court. In Gujarat and Maharashtra this provision has been amended and the penalty of evictions has been added for trespass, pasturing cattle or clearing land. Such evictions can be carried out by a forest officer, police officer or revenue officer only after the Court orders eviction upon conviction for the offences. Similarly under Section 33 of unamended IFA, a list of acts are prohibited in Protected Forests upon issuance of notification and rules by the State Government. The penalty for having done any of the prohibited acts is imprisonment, or fine, or both. In Gujarat and Maharashtra this provision has been amended and penalty of eviction has been added for cases where conviction for all the listed prohibited acts but only when the State Government has issued notification and made rules with respect to this. These prohibited acts includes feling of trees, defacing trees, quarrying stones, clearing land, setting forest on fire etc. The evictions can be carried out by a forest officer, police officer or revenue officer once the person has been convicted for any of these offences.

In Uttar Pradesh,[42] Sections 61A has been added to the IFA. Under Section 61A, the court has been given the power to direct evictions pursuant to convictions for fresh clearing, trespassing, pasturing cattle or clearing land. The amendments do not clarify who is the rightful authority and the procedure to be followed for evictions after such conviction.

1.2. Where Forest Officer is vested with magisterial powers to initiate for eviction

In Bihar[43], Section 66A has been added to IFA, 1927 dealing with eviction of encroachment from government forest land. This Section makes encroachment in Government Forest Land a cognizable and non-bailable offence whereby a forest officer not below the rank of Divisional Forest Officer has been given the power to evict the encroachment. The Officer is conferred the powers of Magistrate under the Bihar Public Encroachment Act, 1956.

In Punjab[44], Section 66A has been added to IFA, 1927 dealing with eviction of encroachment from government forest land whereby a forest officer not below the rank of Divisional Forest Officer has been given the power to evict the encroachment. The Officer is conferred the powers of Executive Magistrate under the Punjab Public Land Premises

40 The Indian Forest (Gujarat Unification and Amendment) Act, 1960.

41 The Indian Forest (Maharashtra Unification and Amendment) Act, 1960

42 The Indian Forest (Uttar Pradesh Amendment) Act, 1965.

43 The Indian Forest (Bihar Amendment) Act, 1989.

44 The Indian Forest (Punjab Amendment) Act, 2004.

and Land (Eviction and Rent Recovery) Act, 1973.

The Forest Officer under these laws is conferred with the power to issue a show cause notice to a person whom they believe to have been in unauthorized occupation of land. Such person will be provided with an opportunity to be heard and the final authority to make the decision lies with the Forest Officer.

1.3. Where Forest Officers can summarily evict persons from forest land

In Uttar Pradesh[45], Section 61B has been added to IFA and in Uttaranchal Section 61A has been added to IFA. These provisions provide for evictions in cases of unauthorized occupation of land in Reserved or Protected Forests. Here, the Divisional Forest Officer or those above him in rank, may be authorized to evict pursuant to a summary proceeding. The procedure stipulates that a show cause notice must be sent to a person suspected of unauthorized occupation and after considering the cause, the officer is satisfied that the land is under unauthorized occupation, a reasoned order for eviction can be passed. There exists a provision to file an appeal against the order of the Forest Officer to the Conservator of Forests.

In Madhya Pradesh,[46] Section 80A has been added to the IFA. This provision provides for eviction in case of unauthorized possession of any land in Reserved or Protected Forests. Here, a Forest Officer not below the rank of Divisional Forest Officer has been given the power to evict. However, the Section makes it clear that no eviction order can be passed unless a reasonable opportunity of showing cause has provided. Further, a person aggrieved by an order of the Forest Officer can appeal against the order to the State Government or to any officer authorized.

1.4. Where a Forest Officer can evict without serving notice

In West Bengal also,[47] Sections 26 and 33 of the IFA, have been amended, simply stating that any forest officer has the power to evict persons for trespass, cattle-grazing or clearing land. No procedure has been stipulated at all.

It is notable that the original IFA does not recognize any powers of the State to evict in partial deference to the prior customary claims of forest-dwellers. However, states have made amendments to these laws providing such powers in contravention of the constitutional mandate as well as prior customary rights of forest-dwellers.

While we submit that evictions of forest-dwellers from their customary lands is unconstitutional *per se*, a perusal of these state amendments shows that they fail to meet even minimum due process guarantees under the Constitution. None of these procedures

45 The Indian Forest (Uttar Pradesh Amendment) Act, 1965.

46 Indian Forest (Madhya Pradesh Amendment) Act, 1965.

47 The Indian Forest (West Bengal Amendment) Act 1988.

recognize the power and authority of *Gram Sabhas* to protect, preserve and conserve their customary lands and forests, and by virtue of this alone, are violative of the constitutional scheme of rights protection of *adivasis*. The right of *Gram Sabhas* to collectively manage and protect their forests and resources is a constitutionally guaranteed right, which also includes the right to free, prior and informed consent. Any evictions of forest-dwellers by authorities other than the *Gram Sabha* are violative of Fifth Schedule, PESA and FRA. Instead, under these laws, the Forest department has been entrusted with powers of eviction, when the forest department itself is an interested party in the proceedings. This fails to provide adequate checks and balances against the arbitrary exercise of power by the forest department, and therefore violates the principles of natural justice. Shockingly, in some states, evictions may be carried out without any procedure at all. This is *ex facie* unconstitutional and *ultra vires* Article 21. For other states, proceedings do not guarantee a reasonable opportunity of being heard. The Forest Department is empowered to evict summarily, which is inadequate for state action carrying such grave implications on the right to life. As *adivasis* are generally unfamiliar and unable to navigate formal legal systems, they may not have complete knowledge of their rights, due process, as well as evidence that may be provided in response to show cause notices. Also, there is no guarantee of legal aid, or any requirement for official documents to be translated and explained so that forest-dwellers are able to appropriately have their case heard.

2. State Forest and Revenue Laws

Different states have different statutory frameworks governing land and forests, sometimes multiple legislations in a single state. Based on the formal categorization of land, these include:

- state forest laws,
- revenue laws relating to encroachments on government lands and public premises,
- other laws.

This Section focuses on state forest laws and revenue laws in the states of Madhya Pradesh, Maharashtra, Odisha, Tamil Nadu and Telengana. Out of these, Madhya Pradesh and Maharashtra have amended the central IFA as analysed above, while the other three states have enacted their own forest laws. All five states also recognize the power of eviction under revenue laws relating to encroachments on government property and public premises.

STATE	**STATE FOREST LAWS**	**REVENUE LAWS re GOVT. PROPERTY/ PUBLIC PREMISES**
MADHYA PRADESH	NA	Madhya Pradesh Land Revenue Code, 1959
MAHARASHTRA	NA	Maharashtra Land Revenue Code,1966

ODISHA	The Orissa Forest Act, 1927	The Prevention of Land Encroachment Act, 1972; The Public Premises (Eviction of unauthorised Occupants) Act, 1972
TAMIL NADU	The Tamil Nadu Forest Act, 1882	The Tamil Nadu Land Encroachment Act, 1905
TELANGANA	The Andhra Pradesh Forest Act, 1967	Telangana Land Encroachment Act, 1905; The Telangana Public Premises (Eviction of unauthorised occupants) Act, 1968

2.1. State forest laws

Several state legislatures have exercised their legislative power to enact their own forest legislations, supplanting the central Forest Act. Interestingly, although these legislations are almost identical to the central law, all the state forest legislations examined (Odisha, Tamil Nadu and Telangana) have made additional provisions for eviction from forest lands.

In Odisha[48], The Orissa Forest Act, 1972 has provisions for eviction against certain acts committed in both reserved and protected forests. Section 27 provides grounds for eviction from a reserved forests. It states that the court may order eviction of a person from the forest land who has been convicted of an offence of making fresh clearing or setting fire to a reserved forests or breaks land for any purpose. Section 37 provides grounds for eviction from protected forests.

In Tamil Nadu,[49] the Tamil Nadu Forest Act, 1882 deals with eviction from reserved forests and land at the disposal of the government. It provides that a person can be summarily evicted if found in unauthorized occupation of a government land. The Forest officer or Tahsildar has the power to evict after serving notice and giving an opportunity for representation.[50]

In Telangana,[51] the Andhra Pradesh Forest Act, 1967 deals with eviction. It states that a Forest Officer or Police Officer or Revenue Officer can evict a person from the forest land who trespasses, pastures cattle or breaks land after providing an opportunity to be heard.

2.2. Revenue laws relating to encroachments on government property and public premises

Most states have enacted state level legislations enabling eviction from the government property or the public premises. A survey of the definitions of Government Property and Public Premises makes it clear that forests are not included in these definitions *per se*. Therefore, it remains questionable on whether or not these laws apply to evictions from

48 Orissa Forest Act 1972, s 27 and 37.

49 Tamil Nadu Forest Act 1882, s 68A.

50 Tamil Nadu Lands (Eviction of Encroachments) Rules 1981, rule 2 and 3.

51 Andhra Pradesh Forest Act 1967, s 20.

forests in the first place. Nevertheless, we analyse the procedures specified under these laws for Odisha, Telangana, Tamil Nadu and Madhya Pradesh to clarify their due process content in case of attempted evictions from revenue land.

In Madhya Pradesh, Section 126 of the Madhya Pradesh Land Revenue Code, 1959 is regarding eviction from land in case of unauthorised possession with no prescribed procedure.

In Maharashtra, Sections 53 and 242 of the Maharashtra Land Revenue Code, 1966 deals with eviction from the government land in case of unauthorised occupation whereby the Collector can evict such person by serving a notice and providing an opportunity to be heard.

In Odisha, the Prevention of Land Encroachment Act, 1972 and The Public Premises (Eviction of unauthorised Occupants) Act, 1972 has provision with regard to eviction. Sections 4, 6 and 7 of the Orissa Prevention of Land Encroachment Act, 1972 provides authority to the Tahsildar for imposing rent, penalty and evict the person who is found in unauthorised occupation of government land by serving a notice and granting an opportunity to make representation. Sections 4 and 5 of the Public Premises (Eviction of unauthorised Occupants) Act, 1972 has provision for eviction from public premises by providing authority to the Estate Officer, with same powers as civil court, to issue an order for eviction after notice and hearing.

However, the Prevention of Land Encroachment Act, 1972 in Odisha operates under the logic of recognition of the right to land and livelihoods by protecting landless and homesteadless persons. Here, in case any person is found in unauthorized occupation, then instead of evicting or imposing rent/ penalty, the authority is obligated to recognize and settle rights in their favour.[52]

In Telangana, eviction provisions are contained in the Telangana Land Encroachment Act, 1905 and the Telangana Public Premises (Eviction of unauthorised occupants) Act, 1968. Section 3 of the Telangana Land Encroachment Act gives power to the Collector/ Tahsildar to impose rent, penalty and evict the person found in unauthorised occupation of government property by serving notice and granting an opportunity to make representation. According to Section 6 of the Act, if a group of persons are found in occupation of a Government property, they can be evicted immediately by the District Collector by an order without even serving any notice. Section 4 and 5 of the Telangana Public Premises (Eviction of unauthorised occupants) Act, 1968 has provision for eviction from public premises by providing authority to the Estate Officer, with same powers as civil court wherein order for eviction can be issued after serving notice and hearing.

In Tamil Nadu, evictions can be undertaken under Sections 3, 5 and 6 of the Tamil

52 Orissa Prevention of Land Encroachment Act 1972, s 7.

Nadu Land Encroachment Act, 1905 wherein the Collector/Tahsildar can impose rent, penalty and evict the person found in unauthorised occupation of government property by serving notice and granting an opportunity to make representation.

The examination of the laws where the states have their own forest legislation clearly breaks down that in some cases absolute power to evict has been vested in forest officer without having prescribed any procedure at all. In other cases, the authority to determine whether or not the person has been in unauthorized occupation of land is also bestowed on the forest department. This grant of ultimate authority in the hands of the Forest Department while depriving the forest dwellers of their customary land and rights is gross violation of their fundamental rights and the special framework established for protection of their rights in the constitution.

With respect to the revenue laws, states must first establish that the land from which they are seeking to evict any forest-dweller is government property or public premises. As the FRA vests pre-existing rights in forest and revenue lands both, no such presumption of state ownership of land can be raised in these cases unless established through necessary notifications. However, the analysis of the provisions in the revenue laws also establishes that in some cases eviction can be carried out without any established procedure. The authority is under no obligation to provide notice or an opportunity to make representation. In others, along with imposition of rent and penalty, the provision to evict has been given. A bare perusal of eviction procedures under most of these laws reveal gross violations of principles of natural justice and minimum due process guarantees.

V. Conclusion

This paper set out to ascertain the legality of forced evictions of forest-dwellers for encroachment in the context of a constitutional right to land. At the central level, the IFA, which applies to a majority of states, does not empower the State to forcibly evict forest-dwellers for offences relating to encroachment. Even so, the legal category of 'encroacher' is premised on the exclusive dominion of the State over land and forests to the exclusion of pre-existing rights and regimes of use. The creation of forest offences and the category of encroacher came into existence precisely to establish such dominion through the extinguishment of customary rights and authorities, and the criminalization of forest-based livelihoods of forest-dwellers. Under this logic, all livelihood-based uses of forests are presumed to be encroachments, unless they are specifically recognized for individuals under formal law.

This study also analysed forest and revenue laws at the state level in specific states in the search for the legality of the presumed power of the State to evict. In addition to amendments made by some states to the IFA, some state forest laws and revenue laws applicable to government property and public premises do contain the power of forced eviction. These laws extend the appropriatory logic of the IFA to provide for forced evictions as penalty for encroachment. However, a bare perusal of these laws reveals that they fail

to comply with principles of natural justice and minimum standards of due process. In many instances, forced evictions may be carried out without following any procedure at all, while in others, low-ranking officials of the forest department are empowered to evict after issuing a show-cause notice. In such proceedings, the procedure does not provide checks against the arbitrary exercise of power by the forest department, as not only are they interested parties in the dispute, but there are no safeguards (such as free legal aid, mandatory translation of notices, reasonable period to respond) to enable forest-dwellers to adequately present their case. Final adjudication of the existence of fundamental rights cannot be entrusted to executive functionaries who are also parties vested with an interest in the outcome of the hearing.

None of these laws (except one provision in the Madhya Pradesh Land Revenue Code) respect the authority of customary institutions such as *gram sabhas* over matters relating to their forests, either through the power of restitution or the right to free, prior and informed consent. On these grounds alone, these statutory provisions are invalid and *ultra vires* the Constitution on account of their manifest arbitrariness and violation of natural justice. Only the state forest law in Odisha provides some safeguards, by requiring evictions only pursuant to conviction by a court for a forest offence, and in case specifically ordered by the court from among other alternatives of rent or fines.

Laws and judicial orders relating to evictions raise challenges beyond violations of due process standards alone. The concept of encroachment is tied to the colonial presumption in favour of State ownership of all lands and forests within its territories, which stands reversed under a combined reading of Parts III, IX and X of the Constitution. These recognize a right to land with a content of autonomy of customary institutions as nestled within the guarantees of life, substantive equality, culture and dignity of *adivasis* and forest-dwellers under Part III, in nexus with the guarantee of self-rule under Parts IX and X. This right to land reverses the presumption of encroachment, into a presumption of rightsholding, and accordingly births positive State obligations to formally recognize pre-existing customary land and forest rights of forest-dwellers and uphold the autonomy of customary institutions.

The State has enacted a host of laws and policies in furtherance of this State obligation, most notably, PESA and the Forest Rights Act. Both of these recognize land and forest rights of various kinds and formally recognize the decision-making authority of *gram sabhas* over matters relating to land and forests. The Forest Rights Act expressly vests pre-existing rights immediately upon enactment of the law, to be then followed by procedures for the formal recording of these rights. Some parts of the Odisha Land Revenue Code also operate on this reversal of presumption by prohibiting evictions of landless or homesteadless persons and mandating the grant of title in their favour. In such a scenario, the absence of formal title is not evidence of encroachment, as under the colonial logic, but of the failure of State obligation under the constitutional logic. Accordingly, this paper finds that forced evictions are a violation of State obligation, and are supported neither by valid law nor by the Constitution.

THE DOCTRINAL DECAY OF *JUS AD BELLUM*

- Sagnik Das*

I. Introduction

At around 1 am, on January 3, 2020, a sedan and a minivan were on an access road departing from the Baghdad International Airport. The streets were characteristically silent, when an MQ-9 Reaper drone struck the vehicles several times, killing all ten individuals inside the two cars. Among them, was Iranian major general Qasem Soleimani.[1] What followed over the coming days, were standard incantations of 'future attacks', 'imminent', 'threat', and of course, 'Article 51', which every government official across the US, and indeed the world, knows *must* be invoked in such situations.

The modern armed conflict today is a 'complex battlespace'[2], with multiple actors interacting simultaneously,[3] to produce an image of surgical precision, an in-and-out, swift and sudden blitzkrieg. Drones are at the centre of this battlespace.[4] Between January 2019 and March 2020 alone, the Bureau of Investigative Journalism recorded more than 6900 (minimum confirmed) US drone strikes in Afghanistan, Yemen and Somalia.[5] The numbers

* Assistant Professor, Jindal Global Law School, India; LL.M. (Harvard Law School); B.Sc. LL.B. (Hons.) (National Law University, Jodhpur). I am thankful to Rakesh Roshan and Shubhangi Agarwalla for their research assistance. I am also thankful to Sannoy Das, Ashrutha Rai, Samuel Hickey, Radhika Kapoor and Prabhakar Singh for helpful conversations and comments on earlier drafts of the paper. Needless to say, any errors are solely mine. Email: sagnik@jgu.edu.in.

1 Ken Dilanian and Courtney Kube, 'Airport informants, overhead drones: How the U.S. killed Soleimani' (*NBC News*, 10 January 2020) <https://www.nbcnews.com/news/mideast/airport-informants-overhead-drones-how-u-s-killed-soleimani-n1113726> accessed May 30, 2020; Michael Crowley, Falih Hassan & Eric Schmitt, 'U.S. Strike in Iraq Kills Qassim Suleimani, Commander of Iranian Forces' *The New York Times* (2 January 2020) <https://www.nytimes.com/2020/01/02/world/middleeast/qassem-soleimani-iraq-iran-attack.html> accessed May 27, 2020.

2 Winston Williams & Christopher Ford (eds), *Complex Battlespaces: The Law of Armed Conflict and the Dynamics of Modern Warfare* (Oxford Scholarship Online 2019).

3 David Kennedy, *Of War and Law* (Princeton University Press 2006) 19 (Kennedy - Of War and Law).

4 Human Rights Council, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Advance Unedited Version* (44th Session, 29 June 2020) [5] <https://www.statewatch.org/media/1216/un-sr-extrajudicial-kilings-drones-report-29-6-20.pdf> accessed July 14 2020 (Agnès Callamard Report).

5 The Bureau of Investigative Journalism, Drone Warfare, <https://www.thebureauinvestigates.com/projects/drone-war> accessed May 27 2020.

in Syria are suspected to be astoundingly high.[6] The US is also, by no means, alone in conducting drone strikes. Sometimes the victims are 'high value' targets like Qasem Soleimani. In others, however unintentionally, they are often civilians like Mayada Razzo; sleeping in their houses, along with many others who are 'uncounted'.[7]

It is entirely hackneyed to point out the oddity in the fact that a sudden strike in a western country would be classified as murder or extra-judicial execution, but that a similar occurrence in Syria or Yemen (even in areas outside active conflict zones), would trigger conversations on 'NIAC', 'unable or unwilling', 'PPG' or 'collateral civilian casualty'. Modern wars are as intensely fought on the ground as they are on the legal terrain and legal justifications are central to the war effort.[8] Yet, these 'legal' justifications today, so far as the resort to force is concerned, are primarily *law-like* – they have legal jargon and law-sounding characteristics. However, they are entirely unfaithful and inaccurate insofar as *real* international law doctrine is concerned. In Modirzadeh's words, they are 'folk international law'.[9] Folk international law in the realm of *jus ad bellum* is pliant and elastic. It is at once modern and legitimate but also rooted in the traditional. Remarkably too, it is all claimed to be derived from a combined reading of Article 2(4) and Article 51 of the United Nations Charter.

This paper seeks to make sense of doctrinally inaccurate *jus ad bellum* justifications, in respect of one situation – the use of force by a state in the territory of another state, against a non-state armed group, when the latter state is not responsible for an armed attack on the former (in other words, when the latter is an 'innocent' state because the acts of the armed group are not attributable to it[10]). Part II of the paper recaps the correct *jus ad bellum* position on such uses of force. In doing so, it briefly summarises and refutes the arguments made by 'expansionists'[11] who suggest that such uses of force are legal. Here, I must clarify what I mean by the 'correct' *jus ad bellum* or the 'real' international law doctrine. It is not my claim that *all* doctrinal questions concerning *jus ad bellum* (much less all international

6 Azmat Khan and Anand Gopal, 'The Uncounted' *The New York Times* (16 November 2017) <https://www.nytimes.com/interactive/2017/11/16/magazine/uncounted-civilian-casualties-iraqairstrikes.html>(The Uncounted).

7 The Uncounted (n 6).

8 Kennedy - Of War and Law (n 3) 33-37.

9 I borrow this term from Naz K Modirzadeh as a shorthand to refer to these 'law-sounding' arguments surrounding modern *jus ad bellum*. Naz K Modirzadeh, 'Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance' in Jens David Ohlin (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* (CUP 2016) 192–231 (Modirzadeh); Agnès Callamard terms such arguments as legal 'distortions' – *See,* Agnès Callamard Report (n 4) [53] , [62].

10 Dire Tladi, 'The Nonconsenting Innocent State: The Problem with Bethlehem's Principle 12' (2013) 107 Am J Int'l L 570 (Tladi - Nonconsenting State).

11 Like others who have previously written on the question of self-defence, I use this term as a shorthand for scholars who take an expansive view of the right to use force in self-defence against non-state actors. In other words, they argue that such a right exists (in some or all circumstances).

law) can necessarily have only one correct answer and that an interpretation of the rules cannot lead to different conclusions. It is my position, however, that contemporary *jus ad bellum* arguments in the context of the 'war on terror'[12] and self-defence against terrorist groups are more than just incorrect. Rather, they are *implausible*, since they attempt to fundamentally revise (and ultimately render otiose) the UN Charter's regime governing the use of force. If the Charter exists (as it does), then such arguments are unrecognizable as international law doctrine. In that regard, the move to muddy *jus ad bellum* waters is an attempt to ensure that *some* powerful states can use international law-sounding vocabulary to shield their political decision to continue fighting an endless war.

With that background premise, Part III of the paper then analyses how such doctrinally implausible *jus ad bellum* arguments have come to be made routinely, looking at the current international law moment. I must also clarify here that it is not my argument that such *jus ad bellum* justifications are made by a majority of states or scholars. In fact, in subsequent parts of the paper, I illustrate how these arguments are not backed by widespread state practice and a substantial number of scholars do not ascribe to these views either. It is my claim, however, that a group of powerful minority states, assisted by (some) international law scholars, now routinely seem to be espousing such problematic legal justifications. Part IV looks at why, despite such evident doctrinal inaccuracy, these *jus ad bellum* arguments seem to be progressively gaining traction in broader conversations about war today. Finally, Part V proffers some general conclusions, looking at why a mushy *jus ad bellum* facilitates the continuation of the seemingly endless 'war on terror' and how reclaiming the doctrinal space may serve *some* (albeit limited) function in arresting this.

II. Law Governing Resort to Force Against Non-State Actors

1. The 'Traditional' Use of Force Doctrine

There has been a massive volume of scholarship since 9/11 discussing the legality of the use of force against non-state actors where their acts are not attributable to any state, adopting a whole range of views.[13] In some cases, scholars frame legality in a *less-more*

12 I use the term 'war on terror' as a convenient way of referring to extraterritorial uses of force post 9/11 aimed at countering the terrorism threat and not because I agree with the nomenclature. For a critique of the term, *see*, Frédéric Mégret, 'War? Legal Semantics and the Move to Violence' (2002) 13(2) Eur J Int'l L 361.

13 *See for instance*, Daniel Bethlehem, 'Principles Relevant to the Scope of a State's Right of Self Defense against an Imminent or Actual Armed Attack by Nonstate Actors' (2012) 106 Am J Int'l L 769 (Bethlehem); Jutta Brunnée & Stephen J Toope, 'Self-Defence Against Non-State Actors: Are Powerful States Willing but Unable to Change International Law?' (2018) 67 ICLQ 263; Sean D Murphy, 'Terrorism and the Concept of Armed Attack in Article 51 of the U.N. Charter' (2002) 43 Harv Int'l L J 41; Mary O'Connell, Christian Tams and Dire Tladi (eds) *Self-Defence against Non-State Actors* (CUP 2019); Irène Couzigou, 'The Right to Self-Defence against Non-State Actors – Criteria of the "Unwilling or Unable" Test' (2017) 77 ZaöRV 53; Monica Hakimi, 'Defensive Force against Non-State Actors: The State of Play' (2015) 91 Int'l L Stud 1; Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (OUP 2010); Federica I Paddeu, 'Use of Force against Non-State Actors and the Circumstance Precluding Wrongfulness of Self-

binary, rather than the usual *on-off* (where it is either illegal or legal) one.[14] Here, instead of entering a detailed analysis that deals with each instance of state practice or state any novel hypothesis regarding the doctrine, I summarise the key issues concerning this question. In doing so, I do not attempt to be exhaustive; instead, I seek to capture and refute the main arguments made by those advocating for an expansive right of self-defence. The problem is simple: does a state have the right to use force in the territory of another state against a non-state actor, when the latter state is not responsible for an armed attack on the former? This problem arises where the actions of the non-state group are not attributable to the state from whose territory the group operates. Any attacks on a foreign state committed by the non-state group would therefore not be attributable to the territorial state. If such groups were to operate only from the high seas, for instance, states would be able to use force against them without concomitantly using force against any other state. However, these groups operate from the territory of states; therefore, any use of force directed against the group, without the consent of the state on whose territory force is used, would violate Article 2(4) of the UN Charter (as against the territorial state).[15] As a result, there arises the need for some justification.

The UN Charter provides that 'all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.'[16] An argument often made is that some uses of force do not violate this prohibition since they are not inconsistent with the purposes of the UN or are not against the territorial integrity or political independence of any state.[17] In the context of non-state armed groups, this argument suggests that force directed at a militant group operating from a state's territory is in reality not aimed against that state and hence does not violate its territorial integrity or political independence.[18] However, a reference to the *travaux* shows us that this argument

Defence' (2017) 30(1) LJIL 93.

14 *See for instance*, Arnulf Becker Lorca, 'Rules for the "Global War On Terror": Implying Consent and Presuming Conditions for Intervention' (2012) 45 NYU J Int'l L & Pol. 1, 76 (Lorca); *See also,* Tom Ruys & Sten Verhoeven, 'Attacks by Private Actors and the Right of Self-Defence' (2005) 10(3) Journal of Conflict and Security Law 289 (Tom Ruys & Sten Verhoeven).

15 Alexander Orakhelashvili, 'Undesired, Yet Omnipresent: Jus ad Bellum in its Relation to other Areas of International Law' (2015) 2 Journal on the Use of Force and International Law 238, 251. *(Force directed only against non-state group targets, without the territorial state's consent, still violates Article 2(4). This also leads to a situation where the territorial state may actually claim that the attack on its territory (even if targeting the non-state group alone) was an armed attack, in response to which it could claim the right of self-defence against the attacking state, leading to the kind of escalation in a conflict that the Charter sought to prevent.) See,* Dire Tladi, 'The Use of Force in Self-Defence against Non-State Actors, Decline of Collective Security and the Rise of Unilateralism: Whither International Law?' in Anne Peters & Christian Marxsen (eds) *Self-Defence against Non-State Actors* (CUP 2019) (Tladi-Use of Force).

16 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) art 2(4).

17 Derek Bowett, *Self-Defence in International Law* (Manchester University Press 1958) 152.

18 Committee on Use of Force, *Final Report on Aggression and the Use of Force* (International

is incorrect. The Charter's drafters intended the widest possible prohibition on the use of force and the phrases 'territorial integrity or political independence' and 'or in any other manner inconsistent with the purposes of the United Nations' were inserted to assure weaker states that force could not be used against them for any purpose whatsoever and that their sovereignty was inviolable.[19] Since *any* non-consensual use of force violates the Charter's prohibition, we must then look to the realm of defences to use of force to find an answer.

The Charter provides for two exceptions to the prohibition on the use of force. The first is when the Security Council authorises the use of forcible measures under Chapter VII and the other, at the centre of this paper's discussion, is the right of self-defence under Article 51. Article 51, in its relevant part, provides – 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.'

Proponents of the right of self-defence against non-state armed groups highlight that the provision does not mention who the author of an armed attack must be, and hence, one may conclude that it need not emanate from another state.[20] Yet, this argument is inconsistent with ordinary canons of treaty interpretation that require one to consider the treaty as a whole. The prohibition on the use of force codified in Article 2(4) is doubtlessly inter-state in character ('all *members* shall refrain'). The fact that Article 51 is intended to operate as an exception to the prohibition under Article 2(4) means that it covers self-defence only against an armed attack by a state. Moreover, it is also irreproachable that only states may commit an act of aggression.[21] Therefore, if the arguments of expansionists are to be believed, only states may commit an act of force (as under Article 2(4)) and an act of aggression (as under Resolution 3314), but somehow non-state actors may commit an armed attack (as under Article 51) – which is nothing but a grave form of the use of force.[22] Finally, invoking Article 51 against non-state actors is misconceived for the reason that

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Law Association, Sydney 2018) 5.

19 Ian Brownlie, *International Law and the Use of Force by States* (OUP 1963) 265-67; The delegate of the United States confirmed this understanding of Article 2(4) at the San Francisco conference during the drafting of the UN Charter. *See*, UN Information Organization, *Documents of the United Nations Organizations, San Francisco* (UNX.341.13 U51, 1945) 335.

20 Karl Zemanek, 'Armed Attack' in Rudiger Wolfrum (ed), *Max Planck Encyclopedia of International Law* (OUP 2013) 16; *See also*, Karin Oellers-Frahm, 'Article 51 – What Matters is the Armed Attack, not the Attacker' (2019) 77 ZaöRV 49.

21 UNGA, 'Definition of Aggression' U.N.G.A. Res. 3314 (XXIX) (14 December 1947) art 1; *See also*, ILC's commentary to the crime of aggression: 'Therefore, only a State is capable of committing aggression by violating this rule of international law which prohibits such conduct.' ILC 'Report of the Committee to the General Assembly on the work of its forty-eighth session' (1996) A/CN.4/SER.A/1996/Add.l (Part 2) 44, [4].

22 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Judgment) [1986] ICJ Rep 14 [191].

there exists no prohibition on the use of force against non-state actors in the first place.[23] Rather, the prohibition is against states.[24] The opposite argument – that Article 51 could be invoked against a non-state actor – would mean that international legal personality would be bestowed upon terrorist groups. This could also lead to the rather strange conclusion that a terrorist group could be able to claim a right of self-defence against an armed attack by a state.[25] Hence, Article 2(4) and Article 51 together, only apply to inter-state uses of force.

The prohibition on the use of force is a peremptory norm of international law, as recognised by the ILC[26] and the ICJ.[27] This means that the prohibition in Article 2(4), along with the rule on self-defence in Article 51, constitutes a *jus cogens* norm.[28] *Au contraire,* it has also been suggested that the prohibition enshrined in Article 2(4) is a peremptory norm of itself, with self-defence and the Security Council's authorisation under Chapter VII constituting the only two recognised exceptions to this norm.[29] For some though, the entire *jus ad bellum* regime is a peremptory norm.[30] However, irrespective of how one views the structure of the peremptory norm, at a minimum, it is irreproachable that a new exception to the prohibition on the use of force cannot be created (without that exception itself achieving *jus cogens* status).[31] Insofar as expansionists advocate for a right of self-defence against non-state actors, the *jus cogens* nature of the norm mandates a conservative, rather than a force-permissive interpretation to Article 51.[32] The presumption of the *jus cogens* norm militates towards a situation of peace rather than war.[33]

Another consequence of a norm having *jus cogens* character is that none of the circumstances precluding wrongfulness can be used as a justification for the violation of such a norm.[34] In the context of the use of force, this conclusion is important, since some

23 As mentioned earlier, if there was a way of attacking a non-state armed group, without using force on any portion of a state's territory, there would be no *jus ad bellum* violation.

24 Olivier Corten, 'The 'Unwilling or Unable' Test: Has it Been, and Could it be, Accepted?' (2016) 29 Leiden Journal of International Law 777, 795 (Corten-Unwilling or Unable).

25 *See*, Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Bloomsbury Publishing 2010) 173 (Corten-Law Against War).

26 International Law Commission 'Draft Articles on the Law of Treaties with commentaries' (1966) 2 YILC 247.

27 *Nicaragua* (n 22) [190].

28 Mary Ellen O'Connell, 'Self-Defence, Pernicious Doctrines, Peremptory Norms' in Anne Peters & Christian Marxsen (eds), *Self-Defence against Non-State Actors* (CUP 2019) 232 (O'Connell).

29 Ian Sinclair, *The Vienna Convention on the Law of Treaties* (CUP 1984) 222-23.

30 *See for instance,* Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006) 51.

31 The VCLT defines a peremptory norm as one from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 51.

32 O'Connell (n 28) 244.

33 ibid 247.

34 'Responsibility of States for Internationally Wrongful Acts' *Yearbook of the International Law*

authors advocating for an expansive right argue that force can be used in situations of necessity.[35] Where necessity is invoked as a circumstance precluding the wrongfulness of the use of force, the ILC Articles on State Responsibility themselves render such an argument untenable.[36] In the war on terror context, however, expansionists often use necessity as understood within the law of self-defence to justify resort to force.[37] That argument is also fundamentally misconceived since it puts the cart before the horse. Necessity and proportionality are additional requirements that every force used in self-defence must adhere to, to be legal. However, necessity cannot justify recourse to self-defence in the first place, which remains conditioned, according to Article 51, on the existence of an armed attack. The argument is also incorrect because it in effect splits self-defence under Article 51, invoking the armed attack requirement against the non-state actor while evaluating the necessity requirement against the territorial state.[38]

Expansionists place reliance on the *Caroline* incident to argue that a right of self-defence against non-state actors has always been recognised in international law and is protected by Article 51, which recognises self-defence as an 'inherent' right.[39] The *Caroline* is an incident which is more than a century and a half old and yet its continuous invocation to justify modern uses of force proves that it is the *jus ad bellum* gift that just keeps giving. Incidentally, the *unable or unwilling* phrase was also first used in diplomatic exchanges after the *Caroline* incident.[40] Without getting into details regarding the facts, there are several reasons why the references to *Caroline* as a justification for force against non-state actors today, is inapposite. The Caroline incident happened at a time when the use of force (or making war) was perfectly legal, and Britain advanced self-defence as a justification

Commission (vol 2, 2001) art 26.

35 *See for instance,* W Wengler*,* 'L'interdiction du recours à la force. Problèmes et tendances' (1971) 7 RBDI 417 cited in Corten-Law Against War (n 25) 198; RA Friedlander 'Retaliation as an Antiterrorist Weapon: The Israeli Lebanon Incursion and International Law' (1978) 8 Israel Ybk Human Rts 77 cited in Peter Malanczuk*,* 'Countermeasures and Self-Defense as Circumstances Precluding Wrongfulness in the International Law Commission's Draft Articles on State Responsibility' (1983) 43 ZaöRV 705, 732.

36 Article 25(2)(a) of the ILC Articles of State Responsibility states that necessity cannot be invoked as a ground for precluding wrongfulness if the international obligation in question excludes this possibility. The UN Charter can be said to impliedly exclude the possibility of invoking any circumstance other than self-defence to justify a resort to force. *See*, Corten-Law Against War (n 24) 200. The ILC Articles on this point are representative of customary international law. *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ 7 [50]-[52].

37 *See for instance*, Ashley S. Deeks, 'Unwilling or Unable: Toward a Normative Framework for Extraterritorial Self-Defense' (2011) 52 Va. J. Int'l L. 483, 495 (Deeks).

38 Corten-Unwilling or Unable (n 24) 796.

39 *See for instance*, Sean D. Murphy, 'Terrorism and the Concept of Armed Attack in Article 51 of the U.N. Charter' (2002) 43 Harv Int'l LJ 41, 50.

40 Craig Forcese, *Destroying the Caroline: The Frontier Raid that Reshaped the Right to War* (Irwin Law 2018) 74 (Forcese) - 'The authorities were either unwilling or unable to prevent aggression against Canada', citing Sir George Arthur to Lord Glenelg (17 December 1838), Doc 575, in Sir George Arthur, *The Arthur Papers Vol. I* (University of Toronto Press 1957) 456.

only for political optics. Forcese, in his detailed historical analysis of the incident, shows how *Caroline* was incapable of generating any sound legal principle that could live on even today. First, contemporaneous exchanges from the time show that contrary to popular belief, the UK and the US were not *ad idem* on the applicable rules or the lawfulness of the incident.[41] Second, all the relevant actors in the diplomatic exchanges (which purportedly laid down the law concerning self-defence) had conflated the concept of self-defence with that of 'self-preservation', the latter having no place in international law today.[42] Instead, the positions advanced by both states were a 'muddled mix' of political justifications and legal arguments.[43] However, in contemporary *jus ad bellum*, *Caroline* has been 'shorn of its facts'[44] and has become a 'pliable tool that can be shaped according to the political needs'[45] of states using force.

2. Post 9/11 practice and 'Modern' Law Governing Resort to Force

The other most common argument made to justify the permissibility of an expansive self-defence norm bases itself on post 9/11 practice. Referring to subsequent practice is an admissible mode of treaty interpretation, but the threshold of practice required is high.[46] The post 9/11 practice on the question is not unequivocal, clear and extensive, by any metric, for self-defence against non-state actors to be considered a permissible exception to the prohibition in Article 2(4). In fact, most post-9/11 uses of force were based on arguing attribution of the non-state actor's conduct to the territorial state, or consent, or were unclear as to the legal justification advanced.[47] The US in Afghanistan and Israel in Lebanon made some variation of the attribution argument, rather than claim self-defence against the non-state actor alone.[48] The US in Pakistan (Abbottabad) seemed to have argued that the latter consented to Operation Neptune Spear (either *ex-ante* or *ex-post*).[49] Other instances of

41 *See generally,* Forcese (n 40) 103-115. The US in fact seemed to indicate that in the absence of attribution there could not be a lawful attack on US territory – *see,* Forcese (n 40) 87.

42 ibid 190.

43 ibid 126.

44 ibid 190.

45 ibid 212.

46 *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)* (Judgment) 2014 ICJ 226 [83] – 'Article VIII expressly contemplates the use of lethal methods, and the Court is of the view that Australia and New Zealand overstate the legal significance of the recommendatory resolutions and Guidelines on which they rely. First, many IWC resolutions were adopted without the support of all States parties to the Convention and, in particular, without the concurrence of Japan. Thus, such instruments cannot be regarded as subsequent agreement to an interpretation of Article VIII, nor as sub- sequent practice establishing an agreement of the parties regarding the interpretation of the treaty within the meaning of subparagraphs (a) and (b), respectively, of paragraph (3) of Article 31 of the Vienna Convention on the Law of Treaties.'

47 Christine Gray, *International Law and the Use of Force* (OUP 2018) 208-10 (Gray); Tladi-Use of Force (n 15) 80.

48 Tladi-Nonconsenting State (n 10) 575; Gray (n 47) 210.

49 Christian Schaller, 'Using Force Against Terrorists 'Outside Areas of Active Hostilities'—The Obama Approach and the Bin Laden Raid Revisited' (2015) 20 Journal of Conflict Security Law

Colombia in Ecuador, Turkey in Iraq and Israel in Gaza, remain unclear as to their legal justifications.[50]

Some authors also argue that the Security Council has recognised such a right through its resolutions adopted in the aftermath of 9/11.[51] Specifically, Resolutions 1368 and 1373 mention the 'inherent' right of self-defence in their preambles.[52] However, neither state any more than that. There is no reference to non-state actors at all, much less any indication that such a right could be exercised in the absence of attribution. In any case, the Council's interpretive powers, so far as the Charter is concerned, are not considered to be legal.[53] That apart, as a body that is less representative than the General Assembly, it is doubtful how useful the Council's resolutions are in evidencing practice of states concerning the interpretation of Article 51.

Given the sparsity of actual state practice in favour of the doctrine, proponents of an expansive view often rely on the silence of other states in response to invocations of self-defence against non-state actors to argue acquiescence in favour of the rule.[54] The silence argument, however, does not hold merit for two reasons. First, as a factual claim, it is incorrect to say that the majority of states have remained silent to such self-defence claims. The Non-Aligned bloc of countries have, for instance, expressly opposed such claims.[55] Second, and more importantly, only *deliberate* inaction where a response is called for can give rise to legally significant silence.[56] States choose to remain silent for a multitude of

195, 219 (Schaller); Since the legal justification for this operation was unclear, it has been argued that this operation could also be characterised as an application of the unable or unwilling rule – *See,* David Kretzmer, 'US Extra-Territorial Actions Against Individuals: Bin-Laden, Al Awlaki, and Abu Khattalah – 2011 and 2014' in Tom Ruys & Olivier Corten (eds), *The Use of Force in International Law: A Case-Based Approach* 770 (OUP 2018) (Kretzmer).

50 Gray (n 47) 216-17, 223-25.

51 *See for instance*, Christian Tams, 'Self-Defence against Non-State Actors: Making Sense of the 'Armed Attack' 'Requirement' in Anne Peters & Christian Marxsen (eds), *Self-Defence against Non-State Actors* (CUP 2019) 149 (Tams); Tom Ruys & Sten Verhoeven (n 14) 297; Thomas Franck, 'Terrorism and the Right of Self-Defence' (2001) 95 Am J Int'l L 839, 840-41.

52 UN SC Res. 1368, S/Res/1368 (2001); UN SC Res. 1373, S/Res/1373 (2001).

53 Dustin A Lewis, Naz K Modirzadeh & Gabriella Blum, 'Quantum of Silence: Inaction and Jus ad Bellum' (2019) Harvard Law School Program on International Law and Armed Conflict 43-45 (Quantum of Silence).

54 ibid 4 – 'Though not a universal practice, over the years several scholars have expressly invoked silence in relation to jus ad bellum. The bulk of these writers have relied on the purported silence of States (and other international actors, such as the Security Council) as proof of support for particular legal positions. These invocations by scholars of silence are, by and large, most often made in support of relatively wide claims to resort to force, not least in purported exercise of the right of self-defense.'

55 *See,* Tladi-Use of Force (n 15) 88.

56 The International Law Commission, for instance, has refused to give much weight to 'silence' under Art 31(3)(b) of the Vienna Convention on the Law of Treaties, which considers subsequent practice of states in the application of a treaty as an interpretative tool. *See*, Draft Conclusion, 10, [2], Draft Conclusion, 13, [3], Commentary to Draft Conclusion 13, [18], p.113, Draft

reasons other than evidencing their belief that a particular action was legal (*opinio juris*). Specifically, in the context of *jus ad bellum*, the role of silence in producing legal effects is all the more questionable, since as the recent Harvard Law School Program on International Law and Armed Conflict study demonstrates, other states are rarely made aware of Article 51 communications made to the Security Council by a state.[57] Silence or acquiescence in *jus ad bellum* questions must therefore not 'be lightly presumed'.[58]

The ICJ has also had the chance on some occasions to weigh in on the requirement of attribution in an armed attack under Article 51. In *Nicaragua*, the Court proceeded on the assumption that attribution of acts of 'armed bands, groups, irregulars or mercenaries' to the state was necessary for there to be an armed attack.[59] The Court is widely understood to have set a high attribution threshold.[60] More important, however, are three other decisions of the ICJ, which have required that an armed attack under Article 51 be attributable to a state to claim self-defence – all decided after 9/11. In *Oil Platforms*, the Court noted that to claim self-defence, the US would have to 'show that attacks had been made upon it for which Iran was responsible'.[61] In its reasoning, the Court proceeded '[o]n the hypothesis that all the incidents complained of are to be attributed to Iran.'[62] In its *Wall Advisory Opinion*, the Court was more assertive. It noted that Article 51 recognised an inherent right of self-defence in case of an armed attack by one state against another.[63] Since Israel did not

conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, Yearbook of the International Law Commission, 2018, vol. II, Part Two. *See also,* Quantum of Silence (n 53) 32.

57 Quantum of Silence (n 53) 52.

58 ibid 8.

59 "There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" (inter alia) an actual armed attack conducted by regular forces, "or its substantial involvement therein". This description, contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law." *Nicaragua* (n 22) [195].

60 The Court applied the *effective control* test for attribution of acts of non-state actors to a state in the context of the law on state responsibility. *Nicaragua* (n 22) [115]. It has been noted however, that the ICJ used a different attribution threshold – whether the state was 'substantially involved' in the operations of the non-state actor – insofar as the right of self-defence was concerned. Craig Martin, 'Challenging and Refining the "Unwilling or Unable" Doctrine' (2019) 52 Vanderbilt Journal of Transnational Law 387, 432 (Martin). *See, Nicaragua* (n 22) [195]. In either case, the threshold required by the Court is a high one.

61 *Oil Platforms (Islamic Republic of Iran v. United States of America)* (Judgment) [2003] ICJ 161 [51] (*Oil Platforms).*

62 *Oil Platforms* (n 61) [64].

63 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ [136] - [139] (*Wall Opinion*).

claim that the attacks against it were attributable to any state, Article 51 was inapplicable.[64] Finally, in *Armed Activities*, the Court found that Uganda's self-defence claim had to be rejected since there was 'no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC.'[65] The Court also noted that 'even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC.'[66] Expansionists can thus claim no support from the jurisprudence of the principal judicial organ of the UN before or after the 9/11 'watershed' moment.

3. The 'Unable or Unwilling' State

Syria, in 2014, presented the need for the US to make an argument based on the 'unable or unwilling state' doctrine.[67] Unlike Taliban and Afghanistan, or Hezbollah and Lebanon, no attribution (however loose a standard set) case could be made. Bashar al-Assad's government was itself fighting the *ad-Dawlah al-Islamiyah* (or Da'ish). Unlike in Yemen or even Abbottabad, no consent argument (again however loosely defined) could be plausibly attempted either, given that Assad's government had rejected any attempt to intervene in the civil war without its consent. As a consequence, some new weapon had to be deployed from the legal arsenal. The answer came in the form of the unable or unwilling doctrine, an old foot-soldier used first a century and a half ago, ironically against the US itself.[68] Deeks' work on the doctrine in 2012 in the context of the war on terror had sufficiently laid the legal groundwork.[69] In September 2014, in its Article 51 letter to the Security Council, the US claimed that Syria was unable or unwilling to act against the ISIL and hence the US' use of force in Syrian territory was lawful.[70] Next year, Australia, Canada and Turkey in their Article 51 letters to the Council also claimed that Syria was unable or unwilling to prevent attacks from ISIL.[71] In its 2016 Report on the Legal and Policy Frameworks Guiding the Use of Military Force, the US government stated that the unable or unwilling rule is a part of customary international law.[72]

64 *Wall Opinion* (n 63) [139].

65 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Judgment) [2005] ICJ [168] , [146] (*Armed Activities*).

66 *Armed Activities* (n 65) [146].

67 Corten-Unwilling or Unable (n 24) 778.

68 Forcese (n 40) 74.

69 Deeks (n 37).

70 Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, S/2014/695 (23 Sept 2014).

71 Letter dated 31 March 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council, S/2015/221 (31 Mar 2015); Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council, S/2015/693 (9 Sept 2015); Letter dated 24 July 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council, S/2015/563 (24 July 2015).

72 The White House, *Report on the Legal and Policy Framework Guiding the United States' Use*

To some, the 'unable or unwilling' rule is a facet of the *necessity* requirement of self-defence.[73] It has also been suggested that the rule is intended as a principle of attribution of conduct of terrorist groups to states.[74] Insofar as the necessity argument is concerned, I have previously addressed how it misconceives the requirement for self-defence to be legal.[75] Inasmuch as the rule purports to be one of attribution, the claim is either that the rule lowers the threshold of state involvement required by the ICJ in *Nicaragua*, or that it establishes attribution through the violation of a state's due diligence obligations to ensure that its territory is not used by terrorist groups.[76] However, the doctrine cannot be made sense of through either prisms. It cannot be classified as an attempt to set an attribution threshold, because it plainly seeks to do away with attribution altogether. Whereas the ICJ has set the threshold of 'effective control' or 'substantial involvement' in *Nicaragua,* this doctrine tries to bring it down to *no* involvement. This is precisely the opposite of the logic underlying the ILC Articles of State Responsibility as well. Apart from the exceptional situation in Article 10, at all times, the Articles require *some* degree of direct state involvement and control for attribution, based on the notion that all acts that take place within a state's territory cannot be vicariously attributed to it.[77] On the 'unable or unwilling' standard, crucially, no direct state involvement in the conduct of the non-state actor is required whatsoever. If a state does not act (or acts insufficiently) against a terrorist group (for whatever reason), this doctrine deems the conduct of the group attributable to the state.[78] This would be an exercise in radical revisionism of the rules of attribution. In fact, even post 9/11, the ICJ has impliedly rejected the proposition that mere tolerance of armed groups by a state within its territory is sufficient attribution for the other state to claim the right of self-defence.[79] The argument with respect to due diligence, while attractive at

of Military Force and Related National Security Operations (2016) 10 (US Legal and Policy Framework).

73 US Legal and Policy Framework (n 72) 10; Noam Lubell, 'Fragmented Wars: Multi-Territorial Military Operations against Armed Groups' (2017) 93 Int'l L Stud 215, 219-220.

74 Erika de Wet, 'The Invocation of the Right to Self-Defence in Response to Armed Attacks Conducted by Armed Groups: Implications for Attribution' (2019) 32 LJIL 91, 103-104 (Erika de Wet); Bethlehem (n 13) 7; Olivia Flasch, 'The Legality of the Air Strikes Against ISIL in Syria: New Insights on the Extraterritorial Use of Force Against Non-State Actors' (2016) 3 Journal on Use of Force and International Law 37, 54-57.

75 See page 5-6.

76 Erika De Wet (n 74) 103-104.

77 Paulina Starski, 'Right to Self-Defense, Attribution and the Non-State Actor' (2015) 75 ZaöRV 455, 466 (Starski).

78 In the context of Syria, which was deemed by the US and other countries to be unable or unwilling, this would have the bizarre consequence that despite the Syrian government being in an armed conflict against the ISIL, the latter's actions would be attributable to Syria.

79 'During the period under consideration both anti-Ugandan and anti- Zairean rebel groups operated in this area. Neither Zaire nor Uganda were in a position to put an end to their activities. However, in the light of the evidence before it, the Court cannot conclude that the absence of action by Zaire's Government against the rebel groups in the border area is tantamount to "tolerating" or "acquiescing" in their activities. Thus, the part of Uganda's first counter-claim alleging Congolese responsibility for tolerating the rebel groups prior to May 1997 cannot be

first blush, is equally flawed. Undoubtedly, a state has a due diligence obligation of not knowingly allowing its territory to be used in a manner (by a private actor/terrorist group) that causes harm to other states.[80] However, this is an obligation on the state and a violation of this rule leads to state responsibility by itself. Importantly, it does not *attribute* the private actor's conduct to the state.[81] Since Article 51 requires the attribution of an 'armed attack' to a state,[82] a violation of due diligence obligations by a state cannot give rise to the right of self-defence.

Finally, it has been suggested that the doctrine has its basis in the laws of neutrality, whereby a state is allowed to use force against the enemy's armed forces in a third (neutral) state, if that state knowingly allows the use of its territory by the enemy armed forces.[83] In that situation, the third state by its lack of due diligence, loses its claim to neutrality. However, after the UN Charter, this aspect of the law of neutrality has become obsolete and no longer reflects *jus ad bellum*.[84] In any case, the law of neutrality applies in an international armed conflict between states.[85] However, the US has consistently maintained that it is in a boundary-less 'global NIAC' with terrorist groups.[86] That classification may itself be problematic (and doctrinally incorrect), but it simultaneously renders the invocation of the law of neutrality inapposite.

In the manner that this rule has been given content to, it would also be plausible to argue that a state which does not consent to the US' military intervention (or any other state willing to use this doctrine) may be considered *unwilling* on that ground alone.[87] The rule

upheld.' *Armed Activities* (n 65) [301].

80 *Corfu Channel case* (Judgment) [1949] ICJ 4 [22]; Starski (n 77) 479; Liability for due diligence obligations are fault-based. This means that if the state, given its situation and capabilities, has taken reasonably appropriate measures, then it has discharged this obligation. *See, Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Judgment) [2010] ICJ 14 [197]. Therefore, due diligence obligations consider a state's capacity to take measures against terrorist groups. For a state that is *unable* to act, owing to its circumstances, there is no violation of this obligation. Holding otherwise, would transform due diligence to a standard of strict liability, which has been rejected, even in the terrorism context. *See,* Starski (n 77) 482.

81 Martin (n 60) 429-432.

82 ibid 5.

83 Deeks (n 37) 498, 499.

84 'This is because the Charter regime prohibits the use of force unless a state has suffered an armed attack from another state.' Kretzmer (n 49) 778.

85 Kevin Jon Heller, 'Ashley Deeks' Problematic Defense of the "Unwilling or Unable*"* Test' (Opinio Juris, 2011) <http://opiniojuris.org/2011/12/15/ashley-deeks-failure-to-defend-the-unwilling-or-unable-test/> accessed 10 June 2020.

86 US Legal and Policy Framework (n 72) 19.

87 For instance, Daniel Bethlehem, one of the key proponents of the unable or unwilling doctrine, notes – "The seeking of consent must provide an opportunity for the reluctant host to agree to a reasonable and effective plan of action, and to take such action, to address the armed activities of the nonstate actor operating in its territory or within its jurisdiction. The failure or refusal to agree to a reasonable and effective plan of action, and to take such action, may support a conclusion that the state in question is to be regarded as a colluding or a harboring state." Bethlehem (n 13)

would then operate as a catch-all; it is difficult to think of a situation where one could not at least attempt to make an unable or unwilling argument (with some degree of success), where other *traditional* justifications for the resort to force cannot be plausibly argued. Resultantly, this rule sounds the death knell for the Charter's regime for prohibiting the use of force, unravelling the collective security system.[88]

4. The Soleimani Incident and the 'Unable or Unwilling' Rule

With the US and other intervening states in Syria relying on some variant of the 'unable or unwilling' test, it became easier for subsequent interventions to use this law-like justification while referencing Article 51 of the Charter. Already by 2015, it was considered a popular argument.[89] Importantly, thus far, the 'unable or unwilling' argument was made only in the context of non-state actors. But folk international law is almost like an 'unruly horse'[90]; if reiterated often enough, such arguments can go down a slippery slope or assume a life of their own, which then are available for ready deployment as justifications for *any* use of force.[91] This is illustrated in the Soleimani incident.

Let us take the US' case at its highest. Let us believe that Soleimani was 'plotting imminent and sinister attacks'[92] on US territory. Let us also assume that international law allows an exercise of anticipatory self-defence at the stage of *plotting* an armed attack. As against Iran, the self-defence argument works because there is attribution - Soleimani was one of the most influential people in the Iranian government.[93] Given these assumptions then, the self-defence claim passes the Article 51 test (necessity and proportionality would ostensibly also be satisfied).

Crucially, however, Soleimani was killed on Iraqi territory. His killing by the drone strike would meet the Article 2(4) threshold as a use of force by the US against Iraq.[94] It was,

7; *See also* Dawood I Ahmed, 'Defending Weak States against the Unwilling or Unable Doctrine of Self-Defense' (2013) 9 J Int'l L & Int'l Rel 1, 18.

88 Gray (n 47) 246; Corten-Unwilling or Unable (n 24) 797-98.

89 Schaller (n 49) 202.

90 I borrow this term from the famous decision in *Richardson v Mellish* (1824) 2 Bing 229 – 'I, for one, protest, as my Lord has done, against arguing too strongly upon public policy; it is a very unruly horse, and when once you get astride it you never know where it will carry you.'

91 The recent report of the Special Rapporteur on Extrajudicial Executions goes one step ahead in this regard – 'In other words, the targeted killing of General Soleimani, coming in the wake of 20 years of distortions of international law, and repeated massive violations of humanitarian law, is not just a slippery slope. It is a cliff.' Agnès Callamard Report (n 4) [64].

92 Mark Hosenball, 'Trump says Soleimani plotted "imminent" attacks, but critics question just how soon' (*Reuters*, 2020) <https://www.reuters.com/article/us-iraq-security-blast-intelligence/trump-says-soleimani-plotted-imminent-attacks-but-critics-question-just-how-soon-idUSKBN1Z228N> accessed 31 May 2020.

93 Nectar Gan, 'Who was Qasem Soleimani, the Iranian commander killed by a US airstrike?' (*CNN*, 2020) <https://edition.cnn.com/2020/01/03/asia/soleimani-profile-intl-hnk/index.html> accessed 31 May 2020.

94 Agnès Callamard Report (n 4) Annex [68].

after all, a non-consensual drone attack on Iraqi territory. Hence, the self-defence argument must work with respect to Iraq too.[95] While the US' Article 51 report to the UN does not include any justification as against Iraq, it has been suggested that this was an extension of the unable or unwilling doctrine.[96] That would be, of course, immensely problematic. Even if one assumes that a state must act against terrorist groups within its territory and if it does not, it opens itself up to the unable or unwilling argument, Soleimani was a major general in the Iranian military. Therefore, this was not a case of a state harbouring or being unable to act against a designated terrorist (Bin-Laden in Pakistan) or terrorist group (Da'ish in Syria). Soleimani was most likely visiting Iraq on state/diplomatic work. The application of the unable or unwilling doctrine in this context would imply that a state that welcomes a state official from another country (which the US has hostile relations with and considers to be 'plotting attacks' against it) opens itself up to a use of force from the US.[97] Ostensibly then, military personnel, high ranking government officials, or even heads of states from such countries can be targeted on the territory of *any* state in the world. An unreasonable proposition needless to say, yet a necessary consequence of the burgeoning of folk international law.

III. How Did We Get Here?

The question then is why such doctrinally incorrect arguments are being made routinely, and with impunity, in modern armed conflicts. One answer could be to blame it on the lawyer – government lawyers in liberal democracies that fight the war on terror can be credited with finding, reiterating and ultimately 'making legal' such doctrinally unsound propositions. For instance, government lawyers in the Bush administration post-9/11 felt compelled to advance dubious legal justifications so as to not be seen as inhibiting the war on terror.[98] The law was repeatedly manipulated to provide the arsenal needed by the administration.[99] There are also scholars, overwhelmingly from the west who have

95 Marko Milanovic, 'The Soleimani Strike and Self-Defence Against an Imminent Armed Attack' (*EJIL: Talk!*, 2020) <https://www.ejiltalk.org/the-soleimani-strike-and-self-defence-against-an-imminent-armed-attack/> accessed 31 May 2020.

96 Charlie Dunlap, 'The killing of General Soleimani was lawful self-defense, not 'assassination'' (Lawfire, 2020) <https://sites.duke.edu/lawfire/2020/01/03/the-killing-of-general-soleimani-was-lawful-self-defense-not-assassination/> accessed 31 May 2020; *See also,* the January 02, 2020 statement of the US Secretary of Defense, where he states that he has asked Iraqi leadership 'multiple times over recent months, urging them to do more.' <https://www.defense.gov/Newsroom/Releases/Release/Article/2049227/statement-by-secretary-of-defense-dr-mark-t-esper-as-prepared/> accessed 15 July 2020; *See also,* Agnès Callamard Report (n 4) Annex [71]-[72].

97 *See*, Agnès Callamard Report (n 4) [63] – 'The international community must now confront the very real prospect that States may opt to "strategically" eliminate high ranking military officials outside the context of a "known" war, and seek to justify the killing on the grounds of the target's classification as a "terrorist" who posed a potential future threat.'

98 Gabriella Blum, 'The Role of the Client: The President's Role in Government Lawyering' (2009) 32(2) Boston College Int'l & Comp L Rev 275-287 (Blum-Role of Client).

99 ibid 286.

participated in that endeavour, pushing such problematic justifications as *legal*. Many of them have often held, or continue to hold crucial advisory positions in the governments of their home states. Academic studies by organisations like the Chatham House Principles[100] and the Leiden Policy Recommendations[101] have also assisted this move. These studies, conducted by academics largely from the west, profess to lay down the law governing self-defence in international law. As with the work of many scholars, these studies make a familiar move – to claim that an expansive right of self-defence is now doubtlessly accepted and settled. This, despite the fact that such academic studies cannot change international law in the absence of widespread state practice (particularly for *jus cogens* norms).[102] What is also interesting about the argument of expansionist scholars and studies is that many of them seem to use similar phrasing on the lines of – 'it is *now* well accepted' (that self-defence applies to armed attacks by non-state actors).[103] Being written at different points of time after 9/11, it becomes difficult to glean when the 'now' exactly happened, in the

100 Chatham House, *Principles of International Law on the Use of Force in Self-Defence* (ILP WP 2005) (Chatham House Principles). Principle 6 of the Chatham House Principles state – 'Article 51 is not confined to self-defence in response to attacks by states. The right of self-defence applies also to attacks by non-state actors.' 'If the right of self-defence in such a case is to be exercised in the territory of another state, it must be evident that that state is unable or unwilling to deal with the non-state actors itself, and that it is necessary to use force from outside to deal with the threat in circumstances where the consent of the territorial state cannot be obtained.'

101 Nico Schrijver & Larissa van den Herik, *Leiden Policy Recommendations on Counter-terrorism and International Law* (CUP 2010) (Leiden Policy Recommendations). Paragraph 38 of the Leiden Policy Recommendations states – 'The recognition in Article 51 of the inherent right of individual or collective self- defence in the event of an armed attack makes no reference to the source of the armed attack. It is now well accepted that attacks by non-state actors, even when not acting on behalf of a state, can trigger a state's right of individual and collective (upon request of the victim state) self-defence.'

102 Gray analyses previous instances to show how state practice in support of an expansive right of self-defence against non-state actors is insufficient and inconsistent. Gray (n 47) at 226; Tladi-Use of Force (n 15) 86 – '[S]uch a shift, even if desirable, cannot be achieved by separate and dissenting opinions of the judges of the International Court of Justice or the writings of commentators based on acts that either do not receive the acceptance of other States or that may be explained in terms of the Nicaragua test of attribution.'

103 *See for instance,* Jutta Brunnée & Stephen J Toope, 'Self-Defence against Non-State Actors: Are Powerful States Willing But Unable to Change International Law?' (2018) 67 ICLQ 263, 282 – 'It is now widely accepted that States can exercise the right against attacks or threats posed by non-State actors.'; Christian Henderson, 'Non-State Actors and the Use of Force' in M. Noortmann *et.al.* (eds), *Non-State Actors in International Law* (Hart Publishing 2014) 6 – 'Furthermore, state practice since 9/11 would now seem to suggest that – if indeed it ever was the case that the law required state involvement in an 'armed attack' before self-defence could be invoked – international law has now developed to allow for self-defence against 'armed attacks' perpetrated by NSAs'; Leiden Policy Recommendation (n 101) 13 – 'It is now well accepted that attacks by non-state actors, even when not acting on behalf of a state, can trigger a state's right of individual and collective (upon request of the victim state) self-defence.'; Bethlehem (n 13) 5 – 'It is by now reasonably clear and accepted that states have a right of self-defense against attacks by nonstate actors—as reflected, for example, in UN Security Council Resolutions 1368 and 1373 of 2001, adopted following the 9/11 attacks in the United States.'

absence of requisite state practice decidedly pointing that way.[104]

One must also understand the international law moment we are currently in: wars are being fought in an intensely legal space.[105] Law affords a universal vocabulary for debating the legitimacy of wars today.[106] Yet this has not always been the case – examples even in the recent past show that international law was not necessarily the bank which minted the legitimacy currency. Take, for instance, NATO's intervention in Kosovo in 1999, which several international law scholars[107] as well as the Kosovo Commission[108] argued was probably *illegal* but was *legitimate*. Doubtlessly, there are many problems with that move. Orford highlights the politics of such anti-legalism and how it advances the interests of power.[109] Roberts points out how such exceptionally 'legitimate' instances of practice could nonetheless provide handy precedents for future interventions.[110] In the early days of the war on terror, the Bush administration and some scholars seemed to have been making a similar move. They based their arguments on the *legitimacy* of such a war, removed from questions of its *legality* in international law.[111] International law was viewed

104 *See* Part II above. *See also,* Martin (n 60) 414 where the author analyses how self-defence claims against non-state actors rely on sparse practice overwhelmingly from a few western states – 'Thus, those who assert these claims of custom tend to overly privilege and weight the practice of a handful of Western First-World states, and to either ignore or discount the inconsistent practice and explicit objections emanating from the Global South."'

105 Kennedy - Of War and Law (n 3) 24.

106 David Kennedy, 'Lawfare and Warfare' in James Crawford & Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP 2012) (Kennedy-Lawfare and Warfare).

107 Thomas Franck, *Recourse to Force, State Action against Threats and Armed Attacks* (CUP 2004) 172 (Franck); Louis Henkin, 'Kosovo and the Law of "Humanitarian Intervention"' (1999) 93 Am J Int'l L 824, 826 *See*, Anthea Roberts, 'Legality vs Legitimacy: Can Uses of Force be Illegal but Justified?' in Philip Alston & Euan Macdonald (eds.) *Human Rights, Intervention, and the Use of Force* (CUP 2008) 179, 182 (Roberts) – 'Many commentators ended up adopting the ambivalent position that NATO's use of force was formally illegal but morally justified.'

108 Independent International Commission on Kosovo, *The Kosovo Report* (2000) 4.

109 Anne Orford, 'The Politics of Anti-Legalism in the Intervention Debate' in David Held and Kyle McNally (eds), *Lessons from Intervention in the 21st Century: Legality, Feasibility and Legitimacy* (GPe Books 2014) (Orford).

110 Roberts (n 107) 205, 211.

111 For instance, Glennon argues in 2002 that – 'The international system has come to subsist in a parallel universe of two systems, one de jure, the other de facto. The de jure system consists of illusory rules that would govern the use of force among states in a platonic world of forms, a world that does not exist. The de facto system consists of actual state practice in the real world, a world in which states weigh costs against benefits in regular disregard of the rules solemnly proclaimed in the all-but ignored de jure system. The decaying de jure catechism is overly schematized and scholastic, disconnected from state behavior, and unrealistic in its aspirations for state conduct. The upshot is that the Charter's use-of-force regime has all but collapsed. This includes, most prominently, the restraints of the general rule banning use of force among states, set out in Article 2(4). The same must be said, I argue here, with respect to the supposed restraints of Article 51 limiting the use of force in self-defense. Therefore, I suggest that Article 51, as authoritatively interpreted by the International Court of Justice, cannot guide responsible U.S. policy-makers in the U.S. war against terrorism in Afghanistan or elsewhere.' Michael J Glennon, 'The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United

far less as a companion, rather much more as a hindrance, or even dangerous, in the Bush administration's initial war on terror.[112]

To be sure though, we are no longer in that moment now. Slaughter called for a new international law where what was legitimate would also be legal, and we seem to have arrived at that stage.[113] Since the Obama administration made express its position on international law concerning the war on terror,[114] it has been increasingly sold to the 'court of world public opinion'[115] as being *legal*, which necessarily makes its *legitimacy* a given. NATO's intervention was characterised as 'technically' or 'formally' illegal by many scholars, but morally legitimate.[116] In that view, legality was seen as pedantic, doctrinaire and inflexible, while legitimacy was considered the exact opposite; the latter therefore being more suitable for judging conduct in contemporary security challenges.[117] A similar move is seen when scholars advocating for a right of self-defence against non-state actors consider 'traditional' *jus ad bellum* insufficient in addressing the more pressing 'modern' security issues.[118] International law's credibility and relevance is presented as being dependent on whether it accommodates such uses of force in response to new challenges. Those adhering to the restrictive view on self-defence are dismissed as being narrow and

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Nations Charter' (2002) 25 Harv JL & Pub Pol'y 539, 540-41.

112 Melissa Kim, 'Applying International Law to the War on Terrorism' (2006) 8(2) Int'l Stud Rev 309, citing the 2005 National Defense Strategy of the United States of America, US Department of Defense; *See also,* Modirzadeh (n 9) 227 – 'Many in IHL and IHRL, by that point, had struggled for years with the U.S. government against the claim that international law was "quaint," with the Bush Administration seeming to reject the idea that international law—as law—had any place in this new war.'

113 Anne-Marie Slaughter, 'Good Reasons for Going Around the U.N.*' The New York Times* (18 March 2003) <https://www.nytimes.com/2003/03/18/opinion/good-reasons-for-going-around-the-un.html> accessed 2 Jun 2020.

114 Modirzadeh (n 9) 226-27 - Modirzadeh identifies this moment as Harold Koh's 2010 address at the American Society of International Law's Annual Meeting.

115 Kennedy - Of War and Law (n 3) 96.

116 Roberts (n 107) 184-85. Roberts highlights – 'A number of scholars insert a qualifying word before the term 'illegal', such as 'formally' or 'technically' illegal, in order to soften the problem of illegality or to suggest that it is merely a formal issue. However, the notion that the use of force, even for a good cause, may be merely 'technically' or 'formally' illegal is highly suspect.'. However, 'unilateral uses of force are not illegal because they breach a technical rule; they are illegal because they breach a fundamental Charter obligation.' Roberts (n 107) 185-86.

117 Orford (n 109) 1,4.

118 *See for instance*, Tams (n 51) 95 – 'While general and comprehensive, the ban on force is purposefully limited: it prohibits the use of force by States 'in their international relations'. This was traditionally read to refer to 'the international relations between States"; Tams (n 51) 119 – "First, it proceeds from a traditional understanding of the Charter's peace and security scheme, which emphasises the absence of military conflict between States. This traditional understanding remains prominent, but is no longer dominant.' *See also*, The Rt Hon Jeremy Wright QC MP, 'The Modern Law of Self-Defence' (*EJIL: Talk!*, 2020) < https://www.ejiltalk.org/the-modern-law-of-self-defence/> accessed 2 June 2020.

dogmatic.[119] They are the 'theorists' as against the 'practitioners' of international law[120] — no prizes for guessing which international lawyer is à la mode. This move from *legitimacy* to *legality* has been assisted by growing folk international law. The modern, pragmatic and flexible view of international law thus presents the same advantages which *legitimacy* did in the late 1990s and early 2000s. This folk international law is, therefore, legality fused with legitimacy.

To understand why this conversational shift in the war on terror has happened – from arguing it is *legitimate* (even if not legal) to it is *legal* – perhaps we must look at the broader neoliberal moment in which we find ourselves. Law is fundamental to the neoliberal project, and arguing based on law is central to the state's actions.[121] The neoliberal preoccupation with *legality* makes it the only criterion on which to evaluate legitimacy, particularly in the US.[122] Additionally, legal arguments increasingly have great weight in the 'ideological marketing' that liberal democracies engage in while fighting their wars.[123] Hence, a conversation on the law is vital for gaining the currency of legitimacy. However, in that endeavour, doctrinal fealty is inessential; so long as the arguments are 'law-sounding', the perception or legitimacy battle has already been won. The growth of law as a shared elite vocabulary of expertise has meant that guns and law are deployed simultaneously in war.[124] In that view, law obviates the need to advance political justifications or address political costs – the decision to go to or continue war can be outsourced to law.[125] As law becomes *the* 'global vernacular of legitimacy',[126] it becomes vital for states to soften doctrinal rigours and keep a handy set of legal justifications available to persuade, whoever

119 Franck (n 107) 67.

120 *See for instance*, Kenneth Watkin, *Fighting at the Legal Boundaries: Controlling the Use of Force in Contemporary Conflict* (OUP 2016) - 'The disconnect between traditional theorists and practitioners of international law continues to be problematic.'

121 Kenneth Vietch, 'Law, Social Policy, and the Neoliberal State' in Honor Brabazon (ed), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (OUP 2017); *See,* David Singh Grewal & Jedediah Purdy, 'Introduction: Law and Neoliberalism' (2014) 77 Law & Contemporary Problems 1, 8– 'Neoliberalism is always mediated through law.' In some ways, modern war too (like law) may be considered central to the neoliberal project. *See for instance*, Gordon Lafer, 'Neoliberalism by other Means: The "War on Terror" at Home and Abroad' (2004) 26(3) New Political Science 323, 324 – 'I believe that, in its broadest logic, the war must be understood as a means of advancing the neoliberal agenda of global economic transformation.'

122 On legality and legitimacy in the US context, *see generally*, Blum-Role of Client (n 98) at 278 - 'For Americans, both past and present, the law is a metonymy for the line that separates right from wrong, inviting wrongdoers to justify their immoral behavior by arguing they have done nothing illegal, and making it difficult to justify illegal behavior as nonetheless morally just.' ..…..'Hence, we arrive at a confluence of legality and legitimacy, of what is permissible and what is desirable, a confluence which is often questionable both pragmatically and ethically.'

123 Gabriella Blum, 'The Paradox of Power: The Changing Norms of the Modern Battlefield' (2019) 56 Hous L Rev 745, 778 (Blum-Paradox of Power).

124 *See generally*, Kennedy-Lawfare and Warfare (n 106) 160-62.

125 Kennedy - Of War and Law (n 3) 141-43.

126 ibid 163.

needs to be persuaded (Parliament, citizenry, other states, global audience), that their war is a just one, as opposed to that of their opponents.[127]

IV. How are These Arguments Passing Muster?

What remains to be understood is why such dubious *jus ad bellum* arguments like unable or unwilling are made regularly and are in some senses, passing muster before the world audience. One reason could be the securitisation discourse that has steadily been built across liberal democracies, particularly after 9/11. The fixation of modern democracies with 'security' is ever-expanding.[128] The global war on terror has created an all-encompassing narrative of conflict which 'supersedes other 'securitisations' between regions and states and frames the international security discourse.'[129] Its framing as a 'war' is meant to evoke a visceral fear among the public, allowing governments to claim that *any* extraordinary measures necessary to tackle the threat are justified. Military responses are justifiable because it is a *war* and a security issue.[130] Moreover, consistently, the public has been reminded of the novelty of the war that it currently finds itself in, one where the 'traditional' rules could not apply.[131]

Using this securitisation discourse as the background enables governments 'to move beyond the politicisation of the concept, through the legalisation of responses, and to persuade their respective citizenries to accept previously unconscionable measures'[132] to combat the terrorism threat. Simultaneously, the terrorist is painted as the 'universal enemy' who is 'rootless, fanatical and brutal.'[133] All of this ensures that *jus ad bellum* concerns have receded to the far background in this war. The framing of the securitisation discourse ensures delegitimisation of other possible responses to terrorism.[134] In that conversation, first-order *ad bellum* questions are hardly relevant. If they are to be, the *traditional* view must necessarily be abandoned for a flexible, *modern* one which keeps international law on the use of force (and the United Nations) relevant in contemporary times.[135] The restrictive

127 ibid 95-116.

128 Talal Asad, 'Thinking about Terrorism and Just War' (2010) 23 Cambridge Review of International Affairs 3, 8 (Talal Asad).

129 Lydia Davies-Bright, 'Terrorism: A Threat to Security?' in Mary Footer (ed), *Security and International Law* 220 (Bloomsbury 2016) (Davies-Bright).

130 ibid 223.

131 Robert G Patman, 'Globalisation, the New US Exceptionalism and the War on Terror' 27 (2006) Third World Quarterly; Helen Duffy, *The 'War on Terror' and the Framework of International Law* (Cambridge University Press 2005) 249.

132 Davies-Bright (n 129) 222.

133 Darryl Li, 'A Universal Enemy?: "Foreign Fighters" and Legal Regimes of Exclusion and Exemption under the "Global War on Terror"' (2010) 41(2) Columbia Human Rts L Rev 355, 356.

134 Davies-Bright (n 129) 247.

135 This kind of framing ignores what it means to keep international law "relevant" in modern times. One could as well argue that insisting on a strict prohibition on the use of force with narrow

view is not merely incorrect; it is absurd in its insistence on preserving a legal order that is out of step with the security challenges that terrorism poses. The conundrum is framed in binary terms - either adhere to restrictive rules and do nothing while being relentlessly attacked by terrorists, or use force to combat this grave threat.[136] The UN Charter cannot be a suicide pact.[137]

Additionally, one must consider the vital role that international humanitarian law (IHL) plays in modern armed conflicts. Liberal democracies are more IHL-compliant in their military operations today, than ever before.[138] IHL has had tremendous success in constraining how states deploy force and has managed to bring down civilian casualties significantly.[139] There are examples of states going even beyond what IHL requires during military operations. Israel warning people in Gaza by sending text messages to their phones or distributing leaflets before conducting an attack is one such example.[140] However, the minimisation of civilian deaths serves to obfuscate focus from the illegality of resort to war (the *ad bellum* question) and makes it harder to criticise the use of force.[141] A 'war without civilian deaths' is likelier, therefore, to continue longer without popular resistance.[142] Strict IHL compliance takes care of the optics problem with the domestic citizenry, and the 'CNN effect' becomes less pronounced. In some ways then, IHL serves to shift the conversation around armed conflict away from *jus ad bellum*.

For instance, this is most evidently the case in the context of drone strikes by the US. In the controversial Anwar Al-Aulaqi memorandum, the Office of the Assistant Attorney General in the US looks only at *jus in bello* justifications for targeted killing in Yemen,

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exceptions, is precisely what would keep international law the most relevant at a time when the use of force globally is ever increasing. Existing international law in restricting the situations where force can be used, may be equally incorporating values of legitimacy. *See for instance*, Roberts (n 107) 207.

136 In the context of the NATO intervention in Kosovo, for instance, Roberts discusses how a false dichotomy was created between either conducting air strikes, or doing nothing, excluding all other possible actions. Roberts (n 1) 188.

137 George Shultz used this expression in a speech at the National Defense University in 1986, drawing from a famous US constitutional law decision. Geoffrey M Levitt, 'Intervention to Combat Terrorism and Drug Trafficking' in Lori Fisler Damrosch & David J Scheffer (eds), *Law and Force in the New International Order* 225 (OUP 2018).

138 Blum-Paradox of Power (n 123) 747. I am thankful to Prof Gabriella Blum for previous discussions on this point generally.

139 Blum-Paradox of Power (n 123) 747, 752-53.

140 Steven Erlanger & Fares Akram, *Israel Warns Gaza Targets by Phone and Leaflet*, *The New York Times* (8 July 2014) < https://www.nytimes.com/2014/07/09/world/middleeast/by-phone-and-leaflet-israeli-attackers-warn-gazans.html> accessed 3 June 2020.

141 Samuel Moyn, 'A War Without Civilian Deaths?' (*The New Republic,* 23 October 2018) <https://newrepublic.com/article/151560/damage-control-book-review-nick-mcdonell-bodies-person> accessed 3 June 2020 (Moyn); Blum-Paradox of Power (n 123) 785.

142 Moyn (n 141).

completely ignoring the *jus ad bellum* questions.[143] Similarly, the 2016 Legal Framework Report states that once the US has lawfully used force against a non-state actor in one country, the *jus ad bellum* analysis need not be made continuously for subsequent uses of force against the same actor.[144] This shift away from the *jus ad bellum* conversation is perhaps both due to the optics value that IHL compliance adds and the way that IHL doctrine is itself structured. IHL application does not depend on *jus ad bellum* legality; hence, a state may be in flagrant violation and impeccable compliance of either side of the law governing armed conflict at the same time. Arguably, in certain situations, IHL is structured in a manner that *enables* violations of *jus ad bellum* to continue.[145] In this view, IHL may be one of the accomplices in allowing doctrinally unsound *jus ad bellum* arguments to pass muster in important conversations (before the global audience) regarding modern armed conflicts.[146]

143 US Department of Justice, Office of Legal Counsel, Memorandum for the Attorney General, *Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi* (July 16, 2010).

144 US Legal and Policy Framework (n 72) 11.

145 An example of this could be the way IHL deals with a situation of occupation. A situation of occupation is meant to be temporary and in most cases is a continuous *jus ad bellum* violation (especially for prolonged occupations – it is nearly impossible to argue that a prolonged occupation would be justified for reasons of self-defence under Article 51) and a violation of the self-determination principle. However, the rules of IHL on occupation are of such detail that one would not be mistaken in thinking that IHL envisages, and perhaps implicitly condones, prolonged occupation. For instance, one interpretation of Article 43 of the French text of the Hague Regulations ("*la vie publics*") postulates that the occupier is obliged to maintain conditions conducive to 'social functions and ordinary transactions which constitute daily life' or maintain 'public life and order in modern and civilized State at the end of the twentieth century.' *See*, UNCTAD, *The Economic Costs of the Israeli Occupation for the Palestinian People and their Human Right to Development: Legal Dimensions* (UNCTAD/GDS/APP/2017/2, 2018) 10. However, a situation of occupation is anything but the idea of 'daily life' and imposing obligations of maintaining normalcy on the occupier serves to obfuscate the fact that occupation itself is grossly illegal and has a profound impact on the population of the occupied territory (by the fact of occupation itself, irrespective of the occupier's level of IHL compliance). Similarly, some IHL rules may have the effect of facilitating prolonged occupation. For example, the rule that if the population of an occupied territory is inadequately supplied, the occupying power shall agree to relief actions by humanitarian organizations (Article 59 GC IV; Articles 69–71 AP I) could practically ensure that the costs of the occupation are defrayed to some extent by a humanitarian organization, making the continuation of the occupation less expensive for the occupying power. *See also,* Gabriella Blum, 'The Fog of Victory' (2013) 24 Eur. J. Int'l. L. 391, 402, noting that – 'The Geneva conception of occupation seemed, however, more tolerant toward lengthy, even transformative occupations than the more restrictive Hague Convention regime.' Finally, there is also the optics issue with IHL compliance in an occupation. Better IHL compliance reduces the 'CNN effect' and makes it easier for the wider international audience to ignore the fact that an occupation is continuously illegal. *See for instance*, Orna Ben-Naftali, Aeyal M Gross & Keren Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory' (2005) 23 Berkeley J Int'l L 551, 552, where the authors note that most of the international legal scholarship (till the time of writing) overwhelmingly focussed on obligations of Israel as an occupier and almost none on the legality of occupation itself. I am thankful to Prof Naz K Modirzadeh for general conversations on this issue.

146 Blum-Paradox of Power (n 123) 786. This is not to say however that all IHL arguments made in

The preoccupation with, and the centrality of IHL discourse in the law governing armed conflict is problematic in some ways. Doubtlessly, IHL rules on targeting and conduct of hostilities, such as proportionality and distinction, have served to reduce the number of civilian casualties in armed conflicts drastically. Yet, the strictest IHL regime still admits of *some* civilian casualties,[147] not to mention the entirely permissible killing of all combatants at all times (other than when they are *hors de combat*).[148] IHL does not prohibit taking lives; instead, it legally privileges certain kinds of killing in particular places and particular manners, also serving to shift the political or moral choice to kill someone into a legal question.[149] Therefore, if the project is to minimise death and suffering in the world (which is incidentally IHL's avowed project), then *jus ad bellum* may be a more effective terrain on which to have the armed conflict conversation.

Finally, arguments like unable or unwilling catch on in broader *ad bellum* conversations when states with diverse power quotients make such arguments – creating the illusion that the argument commands the backing of a wide range of states across the world. The power implications of this doctrine have been discussed elsewhere,[150] but it is safe to say that such a principle will majorly be used to justify interventions in weaker states in the global south by the more powerful.[151] Recently, India seems to have invoked this doctrine in its military operation in Balakot in Pakistan. The precise facts concerning this strike are unclear – but India claimed to have attacked Jaish-e-Mohammad training camps in Balakot in response to the group's suicide bombing in Pulwama (in Kashmir) a week earlier.[152] While not expressly using the phrase, India's official statement did seem to rely

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the context of the war on terror are doctrinally sound. Far from so. Modirzadeh notes how the Bush administration's arguments in the initial war on terror were considered serious perversions of IHL. Modirzadeh (n 9) 238 – 'The concern was not only that the United States would walk away from IHL in carrying out its own global war on terror, but that it would burn down the house on its way out the door.' Similarly, the Obama administration's use of the "global NIAC" idea was also a distortion of IHL rules on classification of armed conflicts. *See,* Naz K Modirzadeh, 'A Reply to Marty Lederman*'* (*Lawfare*, 2020) <https://www.lawfareblog.com/reply-marty-lederman> accessed 4 Jun 2020.

147 In the context of drone strikes by the US, the number of civilian casualties is often much more significant than what the administration admits. Many civilian casualties remain 'uncounted'. *See,* The Uncounted (n 6); *See also,* Agnès Callamard Report (n 4) [19].

148 *See generally,* Gabriella Blum, 'The Dispensable Lives of Soldiers' (2010) 2 Journal of Legal Analysis 69 where Blum argues that the legal regime on conduct of hostilities should not consider all combatants at all times as 'fair game'.

149 Kennedy - Of War and Law (n 3) 141, 163.

150 *See for instance*, Ntina Tzouvala, 'TWAIL and the "Unwilling or Unable" Doctrine: Continuities and Ruptures' (2015) 109 AJIL Unbound 266 (Tzouvala).

151 Tzouvala (n 150) 267 – '[I]n in virtually all cases the state deemed "unwilling or unable" is a state of the Global South, confirming the argument that the doctrine is not even nominally neutral but targets certain forms of statehood and specific counterterrorism policies.'

152 Maria Abi-Habib, 'After India's Strike on Pakistan, Both Sides Leave Room for De-escalation' *The New York Times* (26 February 2019) <https://www.nytimes.com/2019/02/26/world/asia/india-pakistan-kashmir-airstrikes.html> accessed 7 June 2020.

on the unable or unwilling argument in justifying its use of force.[153] The fact that India would choose to invoke this expansive doctrine to justify its use of force is interesting, although not altogether surprising, given its *sui generis* international standing.[154] It is at once a global power to reckon with and a postcolonial state still resisting many imperialist doctrines of international law. However, postcolonial or global south states do not necessarily always advance distinctly third world arguments to justify their actions under international law. Instead, their approach is more issue-specific, interest-based and *ad hoc*. States will deploy arguments that win them this round, without necessarily considering where those arguments independently fall in the north-south divide.[155] However, India's invocation may give currency to the view that a doctrine like unable or unwilling is backed by representative state practice. To be clear, such sparse invocations do not come close to the threshold of state practice that international law requires for it to constitute a norm of customary international law.[156] Yet, when states with diverse positioning in the global order make use of such arguments to justify their questionable uses of force, the terrain for resistance gets somewhat weakened.

V. Conclusion

Something is grossly amiss with the *jus ad bellum* arguments made today. Legal arguments in the context of the war on terror are routinely a confusing mishmash of IHL, IHRL and domestic law propositions.[157] Further, as this paper has recounted, they misconceive and mischaracterise the *jus ad bellum* regime under the United Nations Charter. In some situations, the *jus ad bellum* arguments are not even considered relevant

153 Statement by Foreign Secretary, 'On the Strike on JeM training camp at Balakot' (26 February 2019) <https://www.mea.gov.in/pressreleases.htm?dtl/31091/Statement_by_Foreign_Secretary_on_26_February_2019_on_the_Strike_on_JeM_training_camp_at_Balakot> accessed 3 June 2020 – 'Information regarding the location of training camps in Pakistan and PoJK has been provided to Pakistan from time to time. Pakistan, however, denies their existence. The existence of such massive training facilities capable of training hundreds of jihadis could not have functioned without the knowledge of Pakistan authorities. India has been repeatedly urging Pakistan to take action against the JeM to prevent jihadis from being trained and armed inside Pakistan. Pakistan has taken no concrete actions to dismantle the infrastructure of terrorism on its soil.' *See also*, Christian Henderson, 'Tit-for-Tat-for-Tit: The Indian and Pakistani Airstrikes and the Jus ad Bellum' (*EJIL: Talk!*) < https://www.ejiltalk.org/tit-for-tat-for-tit-the-indian-and-pakistani-airstrikes-and-the-jus-ad-bellum/> accessed 3 June 2020.

154 Tharoor notes, 'Our foreign policy today has also outgrown much of its earlier post-colonial rhetoric.' Shashi Tharoor, *Pax Indica: India and the World in the Twenty-First Century* (Penguin 2012) 16.

155 *See generally,* Michelle L Burgis, *Boundaries of Discourse in the International Court of Justice: Mapping Arguments in Arab Territorial Disputes* (Brill 2009) where the author maps arguments made by states in certain territorial disputes at the ICJ and shows how third world/postcolonial states do not hesitate in raising arguments with clear colonial overtones so long as it helps them win the dispute.

156 *North Sea Continental Shelf* (Judgment) [1969] ICJ 3 [74] required state practice to be 'extensive and virtually uniform' for a norm to constitute custom.

157 Modirzadeh (n 9) 229; Agnès Callamard Report (n 4) Annex [63].

– this is often the case with targeted killing and drone operations, where the justifications focus instead on IHL and IHRL. Where there is a *jus ad bellum* justification, the doctrinal arguments are far from what good-faith interpretations of the Charter would allow. Aided by an overarching security discourse, the result is that this 'modern' law on the use of force effectively softens the distinction between war and peace.[158] States can use force at any time and any place even outside 'hot battlefields'[159]. We are now in a permanent 'state of exception'[160].

Notably, the unable or unwilling argument makes the Charter's regime governing the use of force increasingly irrelevant. It is not my (naive) argument in this paper, however, that rejecting the incorrect doctrinal position and the misguided broad reading of the right of self-defence will constrain *all* uses of force by states. Since 1945, states have used force unilaterally on countless occasions despite what the Charter says. It is unlikely that in the war on terror, powerful states will automatically (and immediately) stop using force against non-state actors in another state's territory if the unable or unwilling doctrine is suddenly emphatically rejected by international law scholars. However, setting the law right helps in somewhat reclaiming the legal terrain for resisting the unending, ever-expanding war on terror.[161] It provides a vocabulary through which an alternate conversation can be had – one which does not assume that the *only* possible response to threats of terrorism can be the use of armed force, effectively delegitimising all other options. It helps in problematising the binaries - it is not exactly a choice between suffering relentless attacks with no recourse and the use of unilateral armed force.[162] There were terrorist attacks before 9/11 as well. International law itself permits a series of alternative actions short of the use of force, and where the attribution requirement is satisfied, then force in self-defence as well.[163] Making

158 Kennedy - Of War and Law (n 3) 9, 45, 166; Talal Asad (n 128) 16.

159 US Legal and Policy Framework (n 72) 11.

160 Giorgio Agamben, *State of Exception* (University of Chicago Press 2005).

161 As an aside, the question of 'who' the most effective actor(s) is/are to reclaim the *jus ad bellum* doctrinal space is an interesting one, although beyond the scope of this paper. Renowned scholars have, and are trying to do so. The recent report of the Special Rapporteur on Extrajudicial Executions (Agnès Callamard), submitted for the 44th session of the Human Rights Council, is an excellent example of an attempt to set out clearly what *jus ad bellum* mandates and point out how some powerful states have been 'distorting' the legal regime. The role of such scholars is crucial – given that Article 38 of the ICJ Statute expressly considers their work to be a subsidiary source of international law. Perhaps also, the International Court of Justice in a future dispute could be more explicit if such a question arises. Or states that consider such uses of force as illegal, could be more emphatic in their condemnation of these arguments.

162 *See for instance,* Roberts (n 107) 188.

163 Apart from the range of non-forcible alternatives, obtaining the authorisation of the Security Council for using force remains an option. The collective security system of the UN is designed to prevent, as far as possible, the use of unilateral force. If the Council is unable to act at a particular time owing to the absence of political consensus, that in itself is not sufficient to argue for a wider right of self-defence. *See*, Tladi-Use of Force (n 15) 35. The General Assembly at the World Summit Outcome also stated that threats of terrorism must be dealt with within the framework of the UN Charter A/RES/60/1 (24 October 2005) [85]. Additionally, there

something as problematic as unable or unwilling legal, risks justifying the use of force as the first and default option in all cases.[164] A force-permissive view also assumes a universal moral consensus that the use of force is justified in such situations and hence, necessarily, the law must catch up (or as is claimed, has caught up) to allow for this.[165]

Setting the doctrine right may also serve a symbolic function – that there exists the idea of an international rule of law which meaningfully regulates when states may use force. Additionally, it may mean that while states may continue to use force, at least their arguments will have to be firmly grounded in correct (or plausibly correct) interpretations of the UN Charter. States will have to adjust their arguments before the 'court of world public opinion'[166] according to the Charter, rather than the Charter expanding to accommodate their arguments, which is where we are now. A squishy *jus ad bellum* however, makes it harder to call out states on their violations.[167] Clarifying the *jus ad bellum* position may, more optimistically, aid in nudging the 'transnational legal process' in a way which ensures that even the most powerful states will someday not resort to (or at a minimum, think twice before) the use of armed force as the most obvious response to a terrorism threat.[168] International law matters in various interactions between diverse actors. It could matter in conversations in Parliament/Congress, before one's citizenry, in domestic courts etc.[169] If states nonetheless decide to use force unilaterally, they must sell it to the relevant audiences as being necessary despite being illegal – a task which would be decidedly harder for

is the possibility of addressing threats of terrorism through the domestic criminal law and transnational law enforcement framework. For instance, for terrorist acts before 9/11, the US applied its domestic criminal law framework, rather than characterising it as a war. *See*, Mary Ellen O'Connell, 'The Choice of Law Against Terrorism' (2010) 4 J Nat'l Sec L & Pol'y 343, 347. *See also*, Corten-Law Against War, (n 25) 174.

164 *See generally,* Davies-Bright (n 129) 241.

165 *See for instance,* Orford (n 109) 3.

166 Kennedy - Of War and Law (n 3) 139, 159.

167 This is precisely what the Special Rapporteur on Extrajudicial Executions asks States to do in her recent report – 'Call out any use of force not in compliance with the UN Charter and reject their purported legal underpinnings.' Agnès Callamard Report (n 4) [85].

168 Harold Koh's idea of a transnational legal process is broadly, that in a globalized world with continuous interactions between multiple actors, no state, from the most powerful to the most deviant, can afford to remain in non-compliance with its international legal obligations. When states interact, as they must, international legal norms seep in and are internalized. Harold Hongju Koh, 'Transnational Legal Process: The 1994 Roscoe Pound Lecture' (1996) 75 Neb L Rev 181, 199.

169 As one example of how the transnational legal process in the 'war on terror' can work, in March 2019, a German Administrative Court expressed serious doubt as to whether US drone strikes in Yemen, using the Ramstein Air Base in Germany, complied with international law. The Court also noted that German authorities have an independent obligation to review their own compliance with international law even if other states violate it using German territory. The Court also entered into a *jus ad bellum* analysis of the legality of US' drone strikes in Yemen. On this decision, *see,* Leander Beinlich, 'Drones, Discretion, and the Duty to Protect the Right to Life: Germany and its Role in the US Drone Programme Before the Higher Administrative Court of Münster, (2019) MPIL Research Paper Series No. 2019-22.

them.[170] The operation of this transnational legal process could then create *some* constraints on the state deciding to resort to force. That is what the UN Charter is meant to do - to make harder (even if it is unable to prohibit) the decision to use force. It is not, at any rate, meant to be a pliant companion in that decision.

170 This has the advantage of preserving the sanctity of law (not just as a reified concept, but as a tool of resistance in other cases) and ensuring that states must take on the harder task of having to argue that a certain action while illegal, *had* to be undertaken. In the *jus ad bellum* context, this approach, to my mind, would be useful in restricting the situations in which force is used by states. *See generally*, Blum-Role of Client (n 98) 284-286.

THE RIGHT TO LEGAL REPRESENTATION DURING SEBI INVESTIGATION

- Sumit Agrawal & G S Sreenidhi*

I. Introduction

The right to legal representation and the importance of due defence is almost universally upheld. In the Indian context, the right to legal representation (albeit in a criminal proceeding) finds place among the Fundamental Rights, being the only 'profession' that has a mention under Part III of the Constitution of India. Article 22 of the Constitution of India guarantees a right to be defended by a legal practitioner to every person who is arrested. Beyond fundamental rights, legal representation is a *sine qua non* in any judicial proceeding and there is little scope for challenge or ambiguity with regards to legal representation in such proceedings before Courts.

However, in the context of quasi-judicial, civil or administrative proceedings, when one begins to unravel the aspect of legal representation, the question arises — to what extent is such representation a matter of right? Extension of the right to proceedings before tribunals and quasi-judicial bodies seems to be a natural corollary to representation before courts. Going a few steps further, there come inquiries, investigations, disciplinary proceedings, and a host of different proceedings under various specialized legislations where the question of legal representation is not set out in clear terms and has been a subject of varying interpretation.

The focus of this piece is to view the right to legal representation within the architecture of regulatory laws, more particularly, securities laws. Broadly, while regulatory laws have specialised legislations, statutory bodies and specialised tribunals; in most cases, the jurisprudence is studied against the backdrop of administrative laws.

II. Representation under Advocates Act

Section 30 of the Advocates Act, 1961 lays down the right of advocates to practice. The Section provides as below:

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* Sumit Agrawal is the Founder of Regstreet Law Advisors, author of a book on the SEBI Act and a former SEBI official. G S Sreenidhi is an Associate at Regstreet Law Advisors and a graduate from Maharashtra National Law University, Mumbai. The authors can be reached at info@regsla.com.

Right of advocates to practise

30. Subject to the provisions of this Act, every advocate whose name is entered in the State roll shall be entitled as of right to practise throughout the territories to which this Act extends,—

(i) in all courts including the Supreme Court;

(ii) before any tribunal or person legally authorised to take evidence; and

(iii) before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practise.

While Section 30 of the Advocates Act grants a right to the advocate to practice, as a necessary inference, the provision confers a right upon a party to engage an advocate for appearing before courts, tribunals, persons legally authorised to take evidence, and before any authority or person before whom an advocate is entitled to practice. The Karnataka High Court in *M/s Kothari Industrial Corporation Ltd & Anr v M/s Chamundi Curing Works & Anr*[1] observed in this regard that,

> ....The right of an Advocate to practice before any Court or Tribunal is closely related to the right of his client to engage him for appearance before any such Court or Tribunal. Stated conversely the right of a litigant to be represented by a Counsel is circumscribed by the right of the Advocate to appear before such Court, Tribunal, Authority or person. If the Advocate has in terms of Section 30 of the Advocate's Act, 1961, the right to practice before any Court, Tribunal, Authority or person, it would necessarily mean that a litigant before any such Court, Tribunal, Authority or person will have a right to engage and avail of the services of an Advocate[2]

Section 30 of the Advocates Act is broad in its scope inasmuch as it allows an advocate to practice before the following bodies:

- All courts including High Courts
- Any Tribunal
- Any person legally authorised to take evidence
- Any authority/person before whom the Advocate is entitled to practice under law

In the context of applicability of Section 30, the Hon'ble Supreme Court of India has interpreted the Advocates Act to be a general legislation and has adopted the principle of *generalia specialibus non derogant*, i.e., the general words would not derogate from

1 ILR 1999 KAR 2235.

2 ibid [4].

special provisions. The Supreme Court in the case of *Paradip Port Trust v Their Workmen*[3] observed, in the context of Standing Orders and Industrial Disputes Act, that:

> …the Industrial Disputes Act is a special piece of legislation with the avowed aim of labour welfare and representation before adjudicatory authorities therein has been specifically provided with a clear object in view. This special Act will prevail over the Advocates Act which is a general piece of legislation with regard to the subject-matter of appearance of lawyers before all courts, tribunals and other authorities.[4]

Notably, the Apex Court, in the judgment in *Paradip Port Trust* noted that this interpretation would have held good even if Section 30 of the Advocates Act was in force.[5] While this interpretation was in a different era and in a specific context, today most financial regulatory laws have a provision that makes those regulatory laws in addition to and not in derogation of other laws,[6] rarely providing an overriding effect.[7]

III. Securities Market:

In the specific context of the securities market, the regulator is the Securities and Exchange Board of India (SEBI), established under the Securities and Exchange Board of India Act, 1992 (SEBI Act). The powers of SEBI are infamously far-reaching and the Supreme Court in *Clariant International Ltd & Anr v SEBI*[8] held that:

> The SEBI Act confers a wide jurisdiction upon the Board. Its duties and functions thereunder, *run counter to the doctrine of separation of powers*. Integration of power by vesting legislative, executive and judicial powers in the same body, in future, *may raise a several public law concerns* as the principle of control of one body over the other was the central theme underlying the doctrine of separation of powers…. ….The Board exercises its legislative power by making regulations, executive power by administering the regulations framed by it and taking action against any entity violating these regulations and judicial power by adjudicating disputes in the implementation thereof. The only check upon exercise

3 (1977) 2 SCC 339.

4 ibid [23].

5 Section 30 of the Advocates Act, 1961 came into force w.e.f June 15, 2011 *vide* Gazette notification no. S.O. 1349(E) dated June 09, 2011.

6 See for instance, Section 32, SEBI Act, 1992 which reads as, 'Application of other laws not barred. 32. The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.'

7 See for instance, Section 60 of Competition Act, 2002 which reads as, 'Act to have overriding effect. 60. The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.'

8 (2004) 8 SCC 524.

> of such wide ranging power is that it must comply with the Constitution and the Act….[9]

The key legislations governing the securities laws are the SEBI Act, the Securities Contract (Regulation) Act, 1956 (SCRA), the Depositories Act, 1996 and certain provisions of the Companies Act, 2013 which are administered by SEBI. Each of these legislations allow an appeal against an order by SEBI/Stock Exchanges/Depositories/ Clearing Corporations to lie before the Securities Appellate Tribunal. These legislations specifically allow an appellant to authorise *inter alia* a 'legal practitioner' to present the case on its behalf.[10]

Under Section 15-I of the SEBI Act, SEBI has the power to initiate inquiry proceedings for adjudging under Sections 15A, 15B, 15C, 15D, 15E, 15EA, 15EB, 15F, 15G, 15H, 15HA and 15HB of SEBI Act. The Appointment of Adjudicating Officer, if any, and holding of the inquiry is undertaken in accordance with SEBI (Procedure for Holding Inquiry and Imposing Penalties) Rules, 1995 (SEBI Inquiry Rules). Under the SEBI Inquiry Rules, the Board or adjudicating officer, while holding an enquiry, *inter alia* has the power to take evidence, issue summons for attendance or producing of documents:

> **SEBI (Procedure for Holding Inquiry and Imposing Penalties) Rules, 1995**
>
> **Holding of inquiry.**
>
> **4.** (1) In holding an inquiry for the purpose of adjudging under Sections 15A, 15B, 15C, 15D, 15E, 15EA, 15EB, 15F, 15G, 15HA and 15H whether any person has committed contraventions as specified in any of Sections 15A, 15B, 15C, 15D, 15E, 15EA, 15EB, 15F, 15G, 15HA and 15HB the Board or the adjudicating officer shall, in the first instance, issue a notice to such person requiring him to show cause within such period as may be specified in the notice (being not less than fourteen days from the date of service thereof) why an inquiry should not be held against him.
>
> …
>
> (4) On the date fixed, the Board or the adjudicating officer shall explain to the person proceeded against or his lawyer or authorised representative, the offence, alleged to have been committed by such person indicating the provisions of the Act, rules or regulations in respect of which contravention is alleged to have taken place.

9 ibid [75], [77] (emphasis added).

10 See SEBI Act, Section 15V, Section 22C, SCRA and Section 23C, Depositories Act, 1996 providing for the Right to Legal Representation, allowing an appellant to authorise one or more legal practitioners to present his case before the Securities Appellate Tribunal.

> (5) The Board or the adjudicating officer shall then give an opportunity to such person to produce such documents or evidence as he may consider relevant to the inquiry and if necessary the hearing may be adjourned to a future date and in taking such evidence the Board or the adjudicating officer shall not be bound to observe the provisions of the Evidence Act, 1872 (11 of 1872) :
>
> …
>
> (6) *While holding an inquiry under this rule the Board or the adjudicating officer shall have the power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which, in the opinion of the Board or the adjudicating officer, may be useful for or relevant to, the subject-matter of the inquiry.*
>
> …
>
> (emphasis added)

Under Section 23-I of the SCRA, SEBI has the power to initiate inquiry proceedings for adjudging under Sections 23A, 23B, 23C, 23D, 23E, 23F, 23G and 23H of the SCRA. Appointment of the Adjudicating Officer, if any, and holding of the inquiry is undertaken in accordance with Securities Contracts (Regulation) (Procedure for Holding Inquiry and Imposing Penalties) Rules, 2005 (SCR Inquiry Rules). Similar to the SEBI Inquiry Rules, under the SCR Inquiry Rules, the Board or adjudicating officer, while holding an enquiry, *inter alia* has the power to take evidence, issue summons for attendance or production of documents.[11]

Under Section 19H of the Depositories Act, 1996, SEBI has the power to initiate inquiry proceedings for adjudging under Sections 19A, 19B, 19C, 19D, 19E, 19F, 19FA and 19G of the Depositories Act, 1996. The appointment of Adjudicating Officer, if any, and holding of the inquiry is undertaken in accordance with Depositories (Procedure for Holding Inquiry and Imposing Penalties) Rules, 2005 (Depositories Inquiry Rules). Similar to the SEBI Inquiry Rules and SCR Inquiry Rules, under the Depositories Inquiry Rules, the Board or adjudicating officer, while holding an enquiry, *inter alia* has the power to take evidence, issue summons for attendance or production of documents.[12]

As can be seen from the provisions above, under Rule 4 of each of the above Rules, a notice is issued under the respective Acts to a person to show cause why an inquiry should not be held against her and if it is determined that an inquiry is to be held, the noticee shall be given an opportunity of hearing during which she may appear in person or through her

11 Securities Contracts (Regulation) (Procedure for Holding Inquiry and Imposing Penalties) Rules 2005, rule 4.

12 Depositories (Procedure for Holding Inquiry and Imposing Penalties) Rules 2005, rule 4.

lawyer.

The above provisions which clearly allow legal representation pertain to 'Inquiry Proceedings' by SEBI.

Following is a look at legal representation and the ambiguity in case of investigations.

Apart from the above Inquiry proceedings, SEBI has the power to investigate under Section 11C of SEBI Act. Under Section 11C(5) of SEBI Act, the Investigating Authority is empowered to, and in this regard is also empowered to 'examine on oath' 'any manager, managing director, officer and other employee of any intermediary or any person associated with securities market in any manner' and in this regard also has the power to require such persons to appear before the Investigating Authority in person. Further Section 11C(6) of the SEBI Act prescribes the punishment for failing to respond to the summon (for personal appearance or production of documents / information / records or for making statements) under Section 11C(5) which includes 'imprisonment for a term which may extend to one year, or with fine, which may extend to one crore rupees, or with both, and also with a further fine which may extend to five lakh rupees for every day after the first during which the failure or refusal continues.'

There have been hundreds of cases where, for non-compliance with summons issued by SEBI's investigating officer, SEBI has imposed monetary penalty under Section 15A(a) or under Section 15 HB of SEBI Act. Under Section 15A(a) and Section 15HB of SEBI Act, the minimum penalty is one lakh rupees and maximum penalty is one crore rupees. It may be noted that these monetary penalties are separate and distinct from criminal prosecution for imprisonment as stated above.

From the scheme of the investigative powers of SEBI, including the power to examine on oath and criminal prosecution for failing to produce information or appear in person as required under Section 11C(5), it is clear that the Investigating Authority is 'authorised to take evidence'. Further, Section 11C(7) specifically states that any information provided or statement made under Section 11C(5) may be used in evidence against the party providing such information or making such statement. Even though the constitutionality of such a provision is dubious, it has remained unquestioned so far.

Therefore, the nature of SEBI's investigative powers are wide-ranging and even prior to initiation of inquiry proceedings, have grave civil and criminal consequences. In light of the ruling of Supreme Court in *Paradip Port Trust*[13] it must be noted that the SEBI Act does not contain any specific provision to exclude the application of the Advocates Act, more particularly Section 30.

Ostensibly, SEBI's Investigating Authority, while examining on oath and requiring personal appearance of a person, should also permit the presence of a legal representative

13 *Paradip Port Trust* (n 3).

considering its powers attract Section 30(ii) of the Advocates Act. However, SEBI has not set a standard/permitted legal representation at the stage of investigation. Interestingly, SEBI manual or guidelines on the process of investigation have remained opaque and discretionary, unlike that of other regulators such as the US Securities and Exchange Commission. In the absence of a specific ruling in the context of securities laws, one turns to the precedents under administrative tribunals and statutes.

IV. Legal Representation – Administrative and Regulatory Laws

While 'Courts' and 'Tribunals' have an unambiguous 'judicial' flavour to them and therefore leave little doubt as to the applicability of Section 30 of the Advocates Act, the Regulators, a creation of statutes, often exercise quasi-legislative, quasi-executive and quasi-judicial powers. This makes the circumstances regarding entitlement to legal representation before regulators fall into a grey area.

Highlighting the difference between a 'Regulator' and a Court / Tribunal, the Supreme Court in *Lafarge Umiam Mining Pvt Ltd v Union of India*[14] held that:

> The difference between a regulator and a court must be kept in mind. The court / tribunal is basically an authority which reacts to a given situation brought to its notice whereas a regulator is a pro-active body with the power conferred upon it to frame statutory Rules and Regulations. The Regulatory mechanism warrants open discussion, public participation, circulation of the Draft Paper inviting suggestions.[15]

In the context of regulators, administrative bodies and various proceedings under specialised legislations, the stage at which 'legal representation' becomes a matter of right has been subject to varying interpretations, largely based upon the person in authority. A key yardstick that maybe adopted in view of Section 30 of the Advocates Act is to practice before 'any person authorised to take evidence'. In case of regulators, several officers at different stages such as investigation, inquiry, disciplinary proceedings, adjudication proceedings etc., are empowered to record statements and examine persons on oath. Whether an entity is entitled to legal representation at the stage of investigation continues to remain unsettled.

The Supreme Court in *Poolpandi & Ors v Superintendent & Ors*[16] dealt with the question of entitlement of presence of lawyers in questioning during investigation under the Customs Act, 1962 or the Foreign Exchange Regulation Act, 1973. It rejected the contention that the appellant in the case was entitled to the company of his choice during questioning and being questioned without the assistance of a lawyer violated his constitutional right. The Court observed that:

14 (2011) 7 SCC 338.

15 ibid [122].

16 (1992) 3 SCC 259.

> The purpose of enquiry under the Customs Act and the other similar statutes will be completely frustrated if the whims of the persons in possession of useful information for the departments are allowed to prevail. For achieving the object of such an enquiry if the appropriate authorities be of the view that such persons should be dissociated from the atmosphere and the company of persons who provide encouragement to them in adopting a non-cooperative attitude to the machineries of law, there cannot be any legitimate objection in depriving them of such company. The relevant provisions of the Constitution in this regard have to be construed in the spirit they were made and the benefits thereunder should not be "expanded" to favour exploiters engaged in tax evasion at the cost of public exchequer.

In the same year, the Supreme Court in *Crescent Dyes and Chemicals Ltd v Ram Naresh Tripathi*[17], relying on decisions of English Courts, took the view that the right to be represented by counsel of one's choice is not absolute and can be controlled, restricted or regulated by law, rules or regulations. This view came with a rider that in case of a serious or complex charge against a delinquent, the request for legal representation could be conceded. It was also observed that in India the right to representation is not an element of the principles of natural justice. In the context of Industrial Disputes and connected legislations, the apex court observed in *Crescent Dyes* that, 'the requirement of the rule of natural justice insofar as the delinquent's right of hearing is concerned, cannot and does not extend to a right to be represented through counsel or agent.'[18]

In *Kothari Industrial*, the Karnataka High Court dealt with the question of whether the Chief Coffee Marketing Officer before whom proceedings were initiated would constitute a 'Court, Tribunal or Authority' and consequently, whether a right to engage an advocate before such proceedings is available to an individual. In case of a person 'legally authorised to take evidence' due to a contract as opposed to a statute, as was the case with the Chief Marketing Officer, the Karnataka High Court held that the proceedings before this officer were not in the character of those before a Court and therefore there existed no entitlement of a litigant to be represented by an Advocate.[19]

In 2010 while deciding writ petitions seeking a mandamus for permitting the petitioner to be allowed to be accompanied by an advocate for proceedings under the Foreign Exchange Management Act, 1999, the Madras High Court in *P Giribabu v Prakash R Shah*[20] held that:

> ....Whether, the petitioners will be treated as accused of contravention

17 (1993) 2 SCC 115.

18 ibid [16].

19 *Kothari* (n 1) [5].

20 (2010) 326 ITR 575.

> of the provisions of FEMA or whether they would be treated as witness would be decided after preliminary enquiry or investigation by the authorities concerned. Even at the initial stage itself, before the adjudicating authorities comes to a conclusion to proceed further or not, there need be no assistance to the petitioners either by an Advocate or by a Chartered Accountant
>
> ....Thus, considering the overall aspects of the judgement cited above, I am of the considered view that the petitioners have no right to take their counsels along with them at the time when their statement is recorded by the respondent or his officials.[21]

While the above decisions have largely adopted the view that at a 'preliminary' stage of an inquiry proceeding, the right to legal representation cannot be availed,[22] there is an increasing trend of decisions that have allowed legal representation and the presence of an advocate with some safeguards, during such preliminary stages of proceedings as well.

In securities laws, this in fact may not even be applicable in view of Section 11(3) of the SEBI Act which reads thus:

> **Securities and Exchange Board of India Act, 1992**
>
> **Functions of Board .**
>
> **11** …
>
> (3) Notwithstanding anything contained in any other law for the time being in force while exercising the powers under clause (i) or clause (ia) of sub-Section (2) or sub-Section (2A), the Board shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely :—
>
> (i) the discovery and production of books of account and other documents, at such place and such time as may be specified by the Board;
>
> (ii) summoning and enforcing the attendance of persons and examining them on oath;
>
> (iii) inspection of any books, registers and other documents of any person

21 ibid [7.7], [7.8].

22 It may be noted that none of these judgements are in the context of regulatory laws by institutions such as SEBI, Competition Commission of India, Telecom Regulatory Authority of India, Insurance Regulatory and Development Authority of India, Pension Fund Regulatory and Development Authority etc., which have in-built provisions under their respective statutes providing for serious civil and criminal consequences arising *inter alia* out of investigation/ enquiry.

> referred to in Section 12, at any place;
>
> (iv) inspection of any book, or register, or other document or record of the company referred to in sub-Section (2A);
>
> (v) issuing commissions for the examination of witnesses or documents.

On a related note, in an order passed in respect of a broker with the Ahmedabad Stock Exchange, *inter alia* for violations of SCRA, SEBI (Stock Brokers) Regulations, 1992[23] (Broker Regulations) and bye-laws of the exchange, the Gujarat High Court in *Mitesh Manubhai Sheth v Secretary, Government of India and Others*[24] ruled in favour of the broker's right to be defended through a lawyer. The petitioner, being a stock broker facing enquiry following deficiencies observed during the course of inspection, challenged the constitutionality of the proviso to the then Regulation 28 of the Broker Regulations.[25] While declaring the proviso as unconstitutional, the court observed thus:

> I have failed to persuade myself as to why there should be any objection to the presence of a lawyer in a case which involves complicated questions of law and fact. The presence of a lawyer cannot only be useful to the delinquent but also to the tribunal or enquiry committee to arrive at a just and appropriate decision. It is now well-settled that, in an enquiry affecting the legal rights of a person by a judicial or quasi-judicial or even administrative decision, the party affected should be permitted to be represented through a lawyer, if facts of the case so warrant. While it is true that, before a particular tribunal a lawyer should be allowed or not is a matter of policy, but keeping in view the mandate of article 21 of the Constitution of India, a decision reached by the Tribunal held to be vitiated on the ground that the enquiry was held in violation of the principles of natural justice as the delinquent was not afforded a reasonable opportunity to defend himself in the enquiry. *The cancellation of the registration of a stock-broker has definitely serious civil consequences and if the intricacy of the case so warrants, it will be denial of justice if*

23 Then called the SEBI (Stock Broker and Sub-Brokers) Regulations, 1992.

24 1997 SCC OnLine Guj 253.

25 Regulation 28 of the Broker Regulations (as published in the Gazette of India on October 23, 1992 *vide* No. S.O. 780(E)) read as,
"28. Manner of holding enquiry-
…
(5) Before the enquiry officer, the stock-broker may either appear in person or through any person duly authorised on his behalf;
Provided that no lawyer or advocate shall be permitted to represent the stock broker at the enquiry;
Provided further that where a lawyer or an advocate has been appointed by the Board as a presenting officer under sub-regulation (6), it shall be lawful for the stock broker to present its case through a lawyer or advocate".

> *the authority concerned is not even vested with power to consider that in the facts of the case, representation of a stock-broker through lawyer is expedient. The statutory provisions are required to be in consonance with the principles of natural justice inasmuch as the right of a person having serious civil and pecuniary consequences are not jeopardised, except by a fair procedure.* The extent of the application of course depends upon the framework of the statute. Bearing in mind the scheme of the SEBI Act and the regulations, as discussed, a complete embargo under the proviso to sub-regulation (5) of regulation 28 on the enquiry officer or the appropriate authority even to consider a request of the delinquent stock- broker to permit him to be defended through lawyer, in my view, is bound to lead to considerable hardships affecting the civil rights of a person arbitrarily and unreasonably which deserves to be struck down being violative of articles 19 and 21 of the Constitution of India. The contention of learned counsel for the SEBI that no request was made by the petitioner that he may be permitted to appear through lawyer, has no force as in view of the proviso to sub-rule (5) of regulation 28, such a prayer could not be made. As the petitioner was deprived during the enquiry to make a request to be defended through a lawyer and so the enquiry being in violation of the principles of natural justice, the entire enquiry proceedings against the petitioner deserved to be quashed and set aside and so also, all the proceedings subsequent thereto.[26]

Notably, the proviso to Regulation 28, along with certain other provisions of the Broker Regulations, was omitted by the SEBI (Procedure for Holding Enquiry by Enquiry Officer and Imposing Penalty) Regulations, 2002, which stands repealed with effect from May 26, 2008 by virtue of the SEBI (Intermediaries) Regulations, 2008.

The Supreme Court in *Nandini Satpathy v PL Dani*[27] has held that at the stage of police investigation in a criminal proceeding "if an accused person expresses the wish to have his lawyer by his side when his examination goes on, this facility shall not be denied, without being exposed to the serious reproof that involuntary self-crimination secured in secrecy and by coercing the will, was the project.'[28]

Senior Intelligence Officer, Directorate of Revenue Intelligence v Jugal Kishore Samra,[29] in the context of Narcotic Drugs and Psychotropic Substances Act, 1985, differed from the decision of *Poolpandi*[30] and allowed the respondent's advocate to be present during interrogation. However, the court specifically directed that 'the advocate or the

26 *Mitesh Manubhai* (n 23) [28] (emphasis added).

27 (1978) 2 SCC 424.

28 ibid [63].

29 (2011) 12 SCC 362.

30 *Poolpandi* (n 16).

person authorised by the respondent may watch the proceedings from a distance or from beyond a glass partition but he will not have consultations with him in the course of the interrogation.'

The Delhi High Court in a decision involving the rights and privileges during an investigation/enquiry under the Foreign Exchange Regulation Act in *KT Advani v The State*[31] held that 'as for the right of counsel to appear in an enquiry or investigation, the question has also to be answered in the affirmative. Section 30 of the Advocates Act entitles an advocate to practise, inter alia, before any Tribunal or "person legally authorised to take evidence".'[32] Further, while considering the provisions which are in the nature of preliminary enquiry and investigation, the Court observed that mere use of the term 'evidence' in a marginal heading would not deem the proceedings judicial and held that:

> The expression "evidence" used in Section 40 must, therefore, be given its ordinary meaning of oral or written statement and documents. There is, therefore, no escape from the conclusion that an advocate would be entitled, as of right, to practise before any person who is legally authorised to take evidence.[33]

There are other High Courts which have upheld the right to legal representation in a pending investigation or proceedings before designated committees. The Allahabad High Court in *Chandradev Ram Yadav v Lokayukta UP*[34] held that:

> The Lokayukta has got right to call for and ensure personal appearance of person against whom the investigation is pending, and to pass appropriate order in compliance of the statutory provisions during the course of investigation. However, the Lokayukta may not restrain the Advocates from appearing before him/her to contest the cause of a person against whom investigation is pending under the Act.[35]

The Madras High Court has increasingly favoured the presence of legal representatives during administrative proceedings. In a case involving proceedings before the Privilege Committee of the Tamil Nadu Legislative Assembly in *E Edwig v Tamil Nadu Legislative Assembly*[36], it interpreted the powers of the committee in light of Section 30 of the Advocates Act to hold that the 'Privilege Committee, which is undoubtedly empowered to record evidence, cannot deny the assistance of a counsel in the absence of any rule legally prohibiting such appearance'.[37]

31 1985 Cri LJ1325.

32 ibid [11].

33 ibid [11].

34 2012 SCC OnLine All 485.

35 ibid [17].

36 2013 SCC OnLine Mad 253.

37 ibid [23] (emphasis added).

The trend of allowing an advocate to be present, but at a distance so as to not disturb the proceeding, has begun to emerge as somewhat of a middle-ground while reconciling the right of an accused/entity facing proceedings and the nature of the proceedings. In case of a summons issued under the Customs Act, 1962 in *Vijay Sajnani & Anr v Union of India,*[38] the Supreme Court allowed the presence of an advocate during the interrogation of the petitioner with the condition that the advocate 'should be made to sit at a distance beyond hearing range, but within visible distance and the lawyer must be prepared to be present whenever the petitioners are called upon to attend such interrogation'.[39]

Similarly, in *B Narayanaswamy v Deputy Director, Enforcement Directorate*[40] the Madras High Court, while recognising the right of practice of an Advocate under Section 30 of the Advocates Act, held that:

> ....When such being the right conferred on the Advocate, the respondents cannot curtail such right, if the petitioner seeks such assistance. But at the same time, it should also be borne in mind that presence of such lawyer should not be a hindrance to the enquiry either by his interference with queries or by his prompting the person, who is being examined, to say this way or that way. If that is permitted then it would defeat the very object and purpose of enquiry. *However, the object of permitting the lawyer to be present at the time of enquiry is to see that such enquiry is conducted without giving any room for complaint as if the statement was obtained from the person so summoned under threat or coercion or harassment or physical torture.*
>
> Therefore, I am of the view that the petitioner must be permitted to have his choice of lawyer to be present along with him at the time of interrogation/enquiry, however, by making it clear that such lawyer should sit within a visible distance but beyond hearing distance.[41]

In the context of the Competition Commission of India (CCI), an antitrust regulator similar to the capital markets regulator, the Delhi High Court in *Oriental Rubber Industries Private Limited v Competition Commission of India*[42] held that the officials of the petitioner summoned by the 'Director General' (DG) of investigation shall be entitled to be accompanied by the advocate(s). The contentions of the CCI included *inter alia* –

(a) That the Competition Act belongs to the family of legislation which deals with economic offences such as Foreign Exchange Regulation Act etc and Courts have consistently held that a person who is called to give his statement by way of

38 2012 SCC OnLine SC 1094.

39 ibid [5].

40 MANU/TN/3086/2019.

41 ibid [22], [23] (emphasis added).

42 2016 SCC OnLine Del 2438.

evidence cannot insist as a matter of right that he be accompanied by a lawyer;

(b) That the person who is called to give his statement is not an accused and the question of his self-incrimination would not arise;

(c) Larger public interest calls for expeditious investigation;

(d) That the CCI is not barring advocates from practicing before it but a person being investigated has no right to be represented by an advocate during investigation when there is only a fact finding.

However, the High Court found it difficult to accept the arguments put forth by the CCI/DG and noted that:

(a) The powers of the DG during such investigation are far more sweeping and wider than the power of investigation conferred on Police under the Code of Criminal Procedure Code. While the Police has no power to record evidence on oath but the DG has been vested with such a power; and

(b) It is no answer that no prejudice would be caused to the person/enterprise being investigated. The credibility and competitive position of a public company is affected in the business world even though in the end it may be completely exonerated.

(c) The High Court took note that the Advocate Act, 1961 confers a right to practice on Advocates and it provides that every advocate shall be entitled to practice throughout India in all Courts and Tribunals or before person legally authorized to take evidence. It further said that right to practice would include accompanying a person who has been summoned before the DG for investigation.

In appeal, the Delhi High Court Division Bench in *Competition Commission of India v Oriental Rubber Industries Private Limited*[43] upheld the view of the earlier bench with the modification that the counsel / advocate shall not sit in front of the witness giving a statement before the DG. With a focus on avoiding hindrance to the efficacy of DG's investigation, the Court held that:

> ....Therefore, while the party is allowed his right to be accompanied by an advocate, the DG's investigations are not unnecessarily hindered. The Commission having regard to the appropriate best practices across jurisdictions in antitrust matters may formulate such procedures and incorporate them in regulations; till then, it is open to the DG to make appropriate procedural orders. This court feels additionally that this precautionary note is essential, because often there can be situations where the prominent presence of a counsel might hinder questioning of

43 2018 SCC OnLine Del 9192.

> the witness by the investigating officers or the Director General. Apart from non-verbal communication, the counsel might restrict the element of surprise that is essential when collecting such evidence. Therefore, the DG shall ensure that the counsel does not sit in front of the witness; but is some distance away and the witness should be not able to confer, or consult her or him.[44]

Since then the CCI has been allowing legal representation during investigation, however, SEBI till date is mired in opaqueness.

V. Concluding Remarks

The trend of the courts therefore has been leaning towards protecting constitutional rights by permitting the presence of legal representatives at the stage of enquiries, and certainly during investigation. In case of financial regulators, the authorities are empowered to record statements on oath at the time of investigation itself. Such enquiries/investigations, rather, become a basis for recommending Himalayan penalties, debarment from securities market, attachment of bank and demat accounts, cancellation or suspension of certificates of registration and criminal prosecution for imprisonment and fine.

Specifically, in the context of securities laws, considering the far-reaching civil and criminal consequences of statements made at the stage of enquiry and/or investigation, presence of one's legal representative assumes tremendous significance and not allowing proper and fair legal representation to the party being examined/summoned vitiates any fairness, leading to annulment of entire proceeding(s) that may follow.

Presence of advocates is in fact in the interest of such an enquiry/investigation involving deposition/interrogation/statements on oath, as an advocate can also be a witness to a recorded statement and witness to the fact that neither coercion nor undue influence, if any, was exerted on a deponent during the course of the examination/recording of statement(s). This will also avoid allegations of graft against investigating/enquiry/adjudicating officers and ensure credibility to the process as advocate(s) appearing on behalf of a noticee can be made to sign the statement as a witness, to avoid any possible allegations subsequently.

Therefore, while one will have to wait to have this important issue judicially settled in the context of securities laws, it is the need of the hour for regulators like SEBI to make a policy decision in this regard and set an example by ensuring due process and that its powers are not open to be misused.

44 ibid [26].

A MULTILATERAL FRAMEWORK FOR INVESTMENT PROTECTION: THE MISSING PIECE IN THE PUZZLE OF ISDS REFORM?

- Tania Singla*

I. Introduction

As one of the more vibrant disciplines in international law, international investment law has given the global community much cause for celebration in the past few years. However, in the wake of growing concerns regarding imbalances within the Investor-State Dispute Settlement (ISDS) framework, the once swiftly growing appeal of ISDS is now steadily waning in various parts of the world.[1] In the recent past, there has been a marked transformation in the attitude of governments, whose enthusiasm has given way to hostility and fierce opposition, along with dramatic reassertion of State control over the international investment regime.[2] This discontent surrounding ISDS is arguably the most forceful within the European Union; in fact, the European Commission has been focusing on the issue of ISDS reform so strongly that many view far-reaching reform as inevitable.[3]

Since 2015, the European Commission has been advocating for a '*modern and reformed approach to investment dispute resolution*',[4] which must not only address but also overcome the drawbacks of ISDS.[5] The Commission envisages that a permanent judicial body must be established to resolve investment disputes – the so-called Multilateral Investment Court (MIC) – that will replace the '*old style*' ISDS framework based on

* Tania Singla is an Indian-qualified lawyer and advises clients on issues relating to international arbitration and international law. She is an alumna of National Law University Delhi B.A., LL.B. She also holds an LL.M. in European and International Law from Europa-Institut (Germany) and a second LL.M. in International Dispute Settlement from the MIDS-Geneva programme (Switzerland). She can be contacted at tania.singla@mids.ch.

1 Stephan Schill, *International Investment Law And Comparative Public Law* (OUP 2010) 1, 6.

2 Andreas Kulick, *Reassertion Of Control Over The Investment Treaty Regime* (CUP 2017) 3, 8.

3 Anthea Roberts, 'Incremental, Systemic, And Paradigmatic Reform Of Investor-State Arbitration' (2018) 3 American Journal of International Law 410, 416; See also, Nikos Lavranos, 'European Commission and the EU Member States' in Kulick (n 2) 309, 311.

4 'The Multilateral Investment Court Project' (*European Commission*, 21 December 2016) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608> accessed 30 May 2020.

5 Colin Brown, 'The European Union's Approach to Investment Dispute Settlement' (The 3rd Vienna Investment Arbitration Debate, 2018) <https://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157112.pdf> accessed 30 May 2020.

commercial arbitration.[6] In the view of the Commission, the MIC is the only mechanism that can ensure the requisite transparency, neutrality and legitimacy that it considers to be absent within the ISDS regime.[7]

The EU initially attempted to establish the MIC on a bilateral basis as the 'Investment Court System' (ICS), first during the negotiations of the proposed Transatlantic Trade and Investment Partnership and subsequently in the trade and investment agreements with Canada, Singapore, Vietnam and Mexico.[8] However, the Commission soon realized that the bilateral setting would not address adequately the lasting reform that it seeks to achieve with the ICS. Therefore, the EU decided that UNCITRAL should be the prime forum to conduct the debate for ISDS reform and creation of the MIC at the multilateral level.[9] In July 2017, UNCITRAL entrusted Working Group III with a '*broad mandate to work on the possible reform of investor-State dispute settlement*', including identifying concerns regarding ISDS and developing relevant solutions for ISDS reform.[10] As of date, the deliberations among the Member States are still ongoing.[11]

While the structure and composition of the MIC remain subject to these negotiations, the Commission has publicly acknowledged that its vision for the MIC was inspired by the WTO dispute settlement body, stating that '[t]he multilateral investment court should be for investment dispute settlement what the World Trade Organisation is for trade dispute settlement, thus upholding a multilateral rules-based system.'[12]

6 News Archive, 'Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations' (*European Commission*, 16 September 2015) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1364> accessed 30 May 2020.

7 Directorate-General for Trade (EC), 'Inception Impact Assessment: Establishment of a Multilateral Investment Court for Investment Dispute Resolution' (*European Commission*, 2016) <https://ec.europa.eu/smart-regulation/roadmaps/docs/2016_trade_024_court_on_investment_en.pdf> accessed 30 May 2020, 2 ; News Archive, 'The EU Moves Forward Efforts at UN on Multilateral Reform of ISDS' (*European Commission*, 18 January 2019) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1972> accessed 30 May 2020.

8 'Concept Paper: Investment in TTIP and Beyond – the Path for Reform' (*European Commission*) <https://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF> accessed 30 May 2020. Lavranos (n 3) 320-321.

9 European Commission, 'Discussion Paper for Expert Meeting: Establishment of a Multilateral Investment Dispute Settlement System' (Expert Meeting, Geneva, December 2016); President Jean-Claude Juncker, 'State of the Union Address' (European Parliament, 13 September 2017) < https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_17_3165> accessed 30 May 2020.

10 UNIS, 'Press Release, UNCITRAL to Consider Possible Reform of Investor-State Dispute Settlement' (14 July 2017) UNIS/L/250 <http://www.unis.unvienna.org/unis/en/pressrels/2017/unisl250.html> accessed 30 May 2020.

11 The UNCITRAL Working Group III has conducted five sessions on the issue of Investor-State Dispute Settlement reform. The sixth session was scheduled for 30 March – 4 April 2020 but has been postponed until further notice <https://uncitral.un.org/en/working_groups/3/investor-state> accessed 30 May 2020.

12 European Commission, 'A Multilateral Investment Court <https://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf> accessed 30 May 2020 (emphasis added).

However, the fact remains that, unlike the WTO, there is no multilateral rules-based system currently in place for ISDS. At present, the ISDS framework is underlined by a loose and fragmented network of international investment agreements (IIAs) consisting of nearly 3,300 treaties (including BITs and investment chapters in free trade agreements).[13] Neither the EU nor the UNCITRAL Working Group III has shown any concrete inclination to change the *status quo* with respect to the operation of IIAs. In fact, any discussion involving multilateral rules has been largely absent from deliberations regarding ISDS reform at the multilateral level.

Against this background, this article argues that effective and lasting reform of ISDS must necessarily involve the substantive reform of existing IIAs, and the MIC project can only be sustained upon a multilateral framework of investment rules if we seek to truly tackle the drawbacks of the existing ISDS framework and outcomes. To establish its case, **Part II** leads the discussion with an analysis of how the complaints associated with ISDS are rooted in the language and text of existing IIAs and outlines the policy considerations for substantive reform. **Part III** then examines the need for a multilateral framework on investment and the challenges involved. **Part IV** offers a study of the various pathways that could lead to a multilateral framework on investment incrementally. **Part V** focuses on the role of the EU in future reform of the investment regime and how its current approach could pave the way for a multilateral framework of investment rules. Finally, **Part VI** provides the conclusions and key observations of this study.

II. IIA Reform: Rationale and Policy Considerations

I. Reform of IIAs as a Necessary Element of ISDS Reform

In recent years, the international investment law regime has come under close scrutiny with heated parliamentary debates and street demonstrations taking place in several countries. NGOs and special interest groups have severely criticized the lack of transparency and accountability in ISDS, which they argue has no place within a system that scrutinizes State conduct and is funded by taxpayers' money, also referred to as the '*democratic deficit*'.[14] The rigidity and inconsistency of arbitral tribunals in some cases has generated a strong '*backlash*' against ISDS for its unacceptable intrusion into sovereign autonomy.[15]

Some commentators even refer to these overwhelming concerns as a legitimacy crisis,[16] and argue that 'the sphere of BITs has become too large for states to control, too

13 UNCTAD, 'International Investment Policymaking in Transition: Challenges and Opportunities for Treaty Renewal' (IIA Issues Note, 2013) 1.

14 ibid 256.

15 Tania Voon, 'Consolidating International Investment Law: The Mega-Regionals as a Pathway Towards Multilateral Rules' (2015) World Trade Review 1, 5.

16 Susan Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) Fordham Law Review 1521, 1523;

complicated for companies to profit from, and too complex for stakeholders in general to monitor'.[17] These concerns have evoked stiff reactions from many stakeholders, and some states have already withdrawn from leading multilateral treaties such as the ICSID Convention and the Energy Charter Treaty.[18] Several States are revising their model IIAs[19] while many others have already commenced a general overhaul of their BIT regime by terminating their existing IIAs,[20] or at least, reviewing them.[21]

A shared consensus has now emerged that comprehensive reform of the international investment law regime is critical to ensure that ISDS works effectively for all stakeholders.[22] However, public debate regarding ISDS has focused almost exclusively on procedural reform, i.e. replacing investor-state tribunals with the MIC and seeking to tackle the systemic deficiencies of ISDS.[23] These include concerns of legitimacy and transparency, consistency of arbitral decisions, costs and duration of arbitral proceedings, absence of an appeal mechanism and arbitrators' independence and impartiality. However, a closer examination would reveal that the key problems plaguing ISDS are not entirely systemic – they also relate to the substantive deficiencies in the language and design of existing IIAs.

Broadly speaking, these substantive deficiencies arise from the following: (1) limited scope of treaty objectives; (2) overly broad definitions of 'investor' and 'investment'; (3) vague standards of investment protection; (4) lack of clarity on policy space for host states; and (5) wide discretion to investor-state tribunals.

1. Limited Scope of Treaty Objectives

A vast majority of contemporary IIAs are prefaced with a preamble, wherein the contracting parties state their negotiating goals and objectives for the conclusion of the

Lone Wandahl Mouyal, *International Investment Law and the Right to Regulate: A Human Rights Perspective* (1st edn, Routledge 2016) 16.

17 ibid.

18 Tania Voon and Andrew Mitchell, 'Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law' (2016) ICSID Review Foreign Investment Law Journal, 421.

19 UNCTAD, 'Recent Trends IIAs and ISDS' (2015) <http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf> accessed 30 May 2020. .

20 Christian Leathley & Daniela Paez, 'Ecuador's Legislative Branch Approves the Termination of 12 Bilateral Investment Treaties' (*Herbert Smith Freehills*, 5 May 2017) <http://hsfnotes.com/arbitration/2017/05/05/ecuadors-legislative-branch-approves-termination-of-12-bilateral-investment-treaties/> accessed 30 May 2020.

21 UNCTAD, *World Investment Report 2017, Investment and the Digital* Economy (2017) 1, 112.

22 UNCTAD, 'UNCTAD's Reform Package for the International Investment Regime' (2018) 14 <https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf> accessed 30 May 2020.

23 UNCTAD, *World Investment Report 2013, Global Value Chains: Investment and Trade for Development* (2013).

agreement.[24] Most contracting parties often draft the preamble with little attention because, unlike the substantive provisions, the preamble does not create legally binding rights and obligations.[25] Tribunals, however, often rely on the preamble as an important source for identifying the goals and objectives of the treaties.[26]

The traditional BITs were concluded in the specific economic context of the 1950s, 1960s and the 1970s, when a wave of economic nationalism had rendered foreign investments in several developing states susceptible to expropriation and legal uncertainty.[27] Thus, the core object of these traditional BITs was the protection of foreign investors and investments against arbitrary action of host states and investment promotion.[28] Consequently, the preambles of these BITs focus chiefly on economic objectives such as stimulating investment flows, fostering economic cooperation between the contracting parties and ultimately increasing the economic prosperity of both parties.[29] This is also the case for the preamble of the ICSID Convention, which stresses the '*need for international cooperation for economic development*' and the '*role of private international investment therein*'.[30]

Economic objectives in the preambular text have influenced the analysis of many tribunals, particularly while interpreting the definitions of 'investor' and 'investment'.[31] Tribunals have also considered the preamble to interpret the scope of substantive treaty provisions.[32] For instance, in *SGS v. Philippines*,[33] the tribunal relied on the BIT preamble to reason that ambiguities in the interpretation of the umbrella clause must be construed in

24 UNCTAD, 'Bilateral Investment Treaties 1995-2006: Trends in Investment Rule-Making' (2007) UNCTAD/ITE/IIA/2006/5, 3.

25 Jeswald Salacuse, *The Law of Investment Treaties* (OUP 2010) 127.

26 *Mera Investment Fund v Serbia* (Decision on Jurisdiction) (2018) ICSID Case No. ARB/17/2, 121; ibid.

27 Simon Lester, 'Reforming the Investment Law System' (2015) Maryland Journal of International Law, 70-81.

28 Federico Ortino, 'Substantive Provisions in IIAs and Future Treaty-Making: Addressing Three Challenges' (2015) ICTSD 1.

29 ibid.

30 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1968, Preamble; Christoph Schreuer, 'International Centre for the Settlement of Investment Disputes' <https://www.univie.ac.at/intlaw/pdf/101_icsid_epil.pdf> accessed 30 May 2020.

31 *Tokios Tokeles v Ukraine* (Decision on Jurisdiction) (2004) ICSID Case No. ARB/02/18, 31; *Phoenix Action, Ltd. v Czech Republic* (Award) (2009) ICSID Case No. ARB/06/5, 106; *Telefónica S.A. v The Argentine Republic* (Decision of the Tribunal on Objections to Jurisdiction) (2006) ICSID Case No. ARB/03/20, 77.

32 *Siemens AG v Argentina* (Decision on Jurisdiction) (2004) ICSID Case No. ARB/02/8, 81; *Noble Ventures v Romania* (Award) (2005) ICSID Case No. ARB/02/8, 52.

33 *SGS Société Générale v Philippines* (Decision of the Tribunal on Objections to Jurisdiction) (2004) ICSID Case No. ARB/02/6.

favour of the foreign investor.[34]

Such interpretive outcomes have contributed to a general perception among host states that investor-state tribunals are unfairly biased in favour of investors.[35] However, this perceived bias is convincingly supported by the current language in investment treaties, which places great emphasis on investment protection. Thus, if states decided to include other objectives in the preambular text, it is more likely that the tribunals (or the MIC) would find themselves bound to weigh matters of public interest with great care.[36] Some treaty parties have already updated the preamble of their IIAs to clarify that investment protection and promotion must also respect other key public policy objectives such as public health and the environment.[37] The preambular text in recent IIAs and Model BITs also includes an emphasis on corporate social responsibility, sustainable development and human rights.[38]

2. Overly Broad Definitions of 'Investor' and 'Investment'

In ISDS practice, investor-state tribunals control the scope of these expansive definitions through the process of interpretation.[39] In the absence of concrete guidance within the text of IIAs, tribunals have often relied upon this analytical process to justify different outcomes while interpreting similar, even identical terms, particularly for the definitions of 'investment' and 'investor'.[40] They have even sought to 'modernize' the traditional notions of investor and investment, thus leading to surprising outcomes in some cases.[41] In *Abaclat v Argentina,* the tribunal did not find it necessary that 'investment of purely financial nature be further linked to a specific economic enterprise or operation taking place in the territory of the Host State'.[42] It concluded that sovereign bonds qualify as protected investments because 'it would be contrary to the BIT's wording and aim to attach a further condition to the protection of financial investment instruments'.[43]

34 ibid 116.

35 Nicholas Hachez & Jan Wouters, 'Arbitration & Preservation of Public Interest', in Freya Baetens (eds), *Investment Law Within International Law: Integrationist Perspectives* (CUP 2013) 429.

36 Alison Giest, 'Interpreting Public Interest Provisions in International Investment Treaties' (2017) Chicago Journal of International Law 1, 321, 338.

37 UNCTAD 'Bilateral Investment Treaties' (n 24) 3-4.

38 Kun Fan, 'Rebalancing the Asymmetric Nature of International Investment Agreements?' (*Kluwer Arbitration Blog*, 30 April 2018) <http://arbitrationblog.kluwerarbitration.com/2018/04/30/rebalancing-asymmetric-nature-international-investment-agreements/?doing_wp_cron=1590654119.7012450695037841796875> accessed 30 May 2020.

39 Maximilian Clasmeier, *Arbitral Awards as Investments – Treaty Interpretation and the Dynamics of International Investment Law* (Wolters Kluwer 2017) 53.

40 Rudolf Dolzer, 'The Notion of Investment in Recent Practice', in Steve Charnovitz (eds), *Law in the Service of Human Dignity: Essays in Honour of Florentino Feliciano* (2005 CUP) 275.

41 *Abaclat v Argentine Republic* (Decision on Jurisdiction) (2011) ICSID Case ARB/07/5, 387.

42 ibid 375.

43 ibid.

These outcomes have taken the host states by surprise, who have discovered that certain transactions that were not considered as investments at the time of entering into the treaty could now fall within the scope of the IIA due to the open-ended nature of the definitions.[44] States have slowly realized their broad exposure to investor claims, including the risk of multiple claims arising under one or more IIAs albeit from the same investment.[45] Moreover, tribunals have often restricted their judicial review to the formal nationality of a party when a question has been raised regarding whether the applicant truly qualifies as an 'investor' under the IIA, thus skipping a deeper analysis.[46] These issues have exposed the risks associated with open-ended treaty definitions, as well as the potential negative impacts on the host state.[47] While ISDS may have been a contributing factor in compounding these risks, the root cause of concern is the nature of definitions adopted by treaty parties in their IIAs.

3. Vague Standards of Investment Protection

Traditionally aimed at providing protection to foreign investments, IIAs contain standards of protection that specify the treatment that must be accorded to investments once they have been made in the territory of the host state.[48] It is widely acknowledged that these standards of treatment are generally expressed in terms that are ambiguous, vague and imprecise.[49] In the case of most traditional IIAs, treaty parties have neglected to include specific criteria for what may constitute, for example, unfair or inequitable treatment, or 'full' protection and security.[50] Often, IIAs do not even define these standards, or provide any reference to international law or other criteria for determining the scope of the standards.[51]

With the dramatic rise in the number of investment disputes, it has fallen to the arbitral tribunals to identify the meaning and scope of these standards of treatment.[52] However, tribunals have routinely struggled to define the extent of protection offered by these

44 Maximilian Clasmeier (n 39) 76.

45 Suzy Nikièma, 'Best Practices – Definition of Investor' (2012) International Institute for Sustainable Development Best Practices Series, 6, <https://www.iisd.org/sites/default/files/publications/best_practices_definition_of_investor.pdf> accessed 30 May 2020.

46 *Yukos Universal v Russian Federation* (Interim Award on Jurisdiction and Admissibility) (2009) Case No. 2005-04/AA227.

47 Suzy Nikièma (n 45) 6.

48 Jeswald Salacuse, *The Law of Investment Treaties* (n 25) 131.

49 Christain Tietje & Kevin Crow, 'The Reform of Investment Protection Rules in CETA, TTIP and Other Recent EU FTAs: Convincing?' in Stefan Griller (eds), *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations* (OUP 2017) 87, 90.

50 ibid 95.

51 Jeswald Salacuse, *The Law of Investment Treaties* (n 25) 131.

52 UNCTAD, 'Investor-State Dispute Settlement and Impact on Investment Rule-Making' UNCTAD/ITE/IIA/2007/3 (2007) ix.

standards.[53] This has led to varying interpretations based on each tribunal's understanding of fairness, and even controversial outcomes. In ISDS practice, the wide application of these treaty standards has exposed further uncertainties and risks. *First*, tribunals have found it challenging to determine the appropriate standard of liability, i.e. how grave or manifest the alleged state conduct should be to constitute a violation of the standard.[54] *Second*, since tribunals have derived the substantive content of these standards on a case-to-case basis, there have been major concerns regarding the growing lack of consistency and predictability within the ISDS regime.[55] *Third*, some tribunals have interpreted the standards of protection in an even-handed manner, without any due consideration of the economic and political circumstances of host states.[56] The threshold admitted by tribunals has proved to be rather onerous for most states but even more so for developing and least developed states.[57]

Admittedly, these risks can be addressed only partially by incorporating more detailed and specific language in the IIAs. The structure and rationale of the investment law regime requires that the standards of protection have a certain degree of 'vagueness', which allows tribunals some flexibility to adapt these treaties in changed circumstances.[58] This means that tribunals (or the MIC) will continue to possess considerable power to interpret these provisions, irrespective of their drafting.[59] However, reformulating these treaty standards can reduce the arbitrators' overwhelming discretion and streamline the exercise of their power to achieve more even outcomes in ISDS awards.

4. Lack of Clarity on Policy Space for Host States

During the last few years, investors have challenged a wide range of government measures, from general legislation, to executive orders, to decisions of the national supreme court.[60] It has been suggested that ISDS has allowed transnational corporations to unfairly constrain the ability of a host state to regulate in public interest, thus undermining state sovereignty.[61]

53 Jeswald Salacuse, *The Law of Investment Treaties* (n 25) 132.

54 UNCTAD, 'Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II' (2012) UNCTAD/DIAE/IA/2011/5 https://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf> accessed 30 May 2020..

55 Federico Ortino (n 28) 1.

56 UNCTAD, 'Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II' (2012) UNCTAD/DIAE/IA/2011/5 <https://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf> accessed 30 May 2020.

57 In *CME v Czech Republic*, the compensation awarded to the investor was US $269,814,000, which was roughly equivalent to the annual healthcare budget of the Czech Republic.

58 Christain Tietje & Kevin Crow (n 49) 87, 90.

59 ibid.

60 ibid.

61 Tarald Berge & Axel Berger, 'Does Investor-State Dispute Settlement Lead to Regulatory Chill? Global Evidence from Environmental Regulation' (2019) <https://www.peio.me/wp-content/

Some foreign investors have reportedly used the threat of arbitration to compel governments to 'reconsider' their proposed legislative or regulatory activities intended for the benefit of the public at large.[62] This phenomenon, which is commonly known as '*regulatory chill*', has impacted not only developing states but also developed states.[63] For instance, in 1994, the Canadian government was debating plain packaging regulations to tackle the widespread concern for the adverse impacts of tobacco on public health. Relying on NAFTA's investment chapter, a leading tobacco company sent a letter to the government claiming that plain packaging would amount to illegal expropriation of a protected trademark and could require Canada to pay hundreds of millions of dollars as compensation.[64] According to some sources, this threat deterred the Canadian government from taking concrete legislative action on plain packaging.[65]

ISDS tribunals have been criticized for failing to balance the investors' rights regarding investment protection with the host state's right to regulate in public interest, which has considerably shrunk the policy space for host states and their flexibility to exercise public authority.[66] This criticism has emerged not only from the international community but also from arbitrators within the ISDS regime as well.[67]

The structure and text of IIAs follow the narrow theme of 'investment protection',[68] and create rights for foreign investors on the one hand and obligations for host states on the other.[69] IIAs do not typically include specific obligations for investors, or references to other policy objectives of the host state (such as public health, national security and the environment), or the state's right to regulate in public interest.[70] There is little clarity within these treaties to indicate whether tribunals can extend '*a margin of appreciation*' to state

uploads/2019/01/PEIO12_Paper_78.pdf> accessed 30 May 2020.

62 Alison Ross, 'Uruguay Urged to Fight On In Cigarette Claim' (*Global Arbitration Review*, 13 August 2010) <https://globalarbitrationreview.com/article/1029513/uruguay-urged-to-fight-on-in-cigarette-claim> accessed 30 May 2020.

63 Matthew Porterfield & Christopher Byrnes, 'Phillip Morris v. Uruguay: Will Investor-State arbitration Send Restrictions on Tobacco Marketing Up In Smoke?' (*Investment Treaty News*, 12 July 2011) <https://www.iisd.org/itn/2011/07/12/philip-morris-v-uruguay-will-investor-state-arbitration-send-restrictions-on-tobacco-marketing-up-in-smoke/> accessed 30 May 2020.

64 ibid.

65 ibid.

66 Vera Korzun, 'The Right to Regulate in Investor- State Arbitration: Slicing and Dicing Regulatory Carve-Outs' (2016) The Fordham Law Archive of Scholarship and History 355, 374.

67 *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada* (Award on Jurisdiction and Liability) (2015) UNCITRAL PCA Case No. 2009-04, Dissenting Opinion of Professor Donald McRae, 48-49.

68 David Gaukrodger, 'The Balance between Investor Protection and the Right to Regulate in Investment Treaties: A Scoping Paper' (2017) 2 OECD Working Papers on International Investment 17.

69 Federico Ortino (n 28) 1.

70 ibid.

measures while conducting their analysis.[71]

In response, States are gradually incorporating more safeguard provisions, i.e. provisions that safeguard the host states' right to regulate, within the text of IIAs to replace the old-generation BITs.[72] Some states have adopted various techniques in their recent IIAs, such as general or specific exceptions, carve-outs, standards of review, reservations, limited scope of substantive protections (especially Fair and Equitable Treatment (FET) and MFN clauses) and non-precluded measures.[73] The scope and form of these safeguard provisions vary greatly, and they may cover the whole treaty, an individual chapter, or a particular substantive protection obligation.[74]

However, most States concluding these new-generation IIAs continue to remain parties to various traditional IIAs, which offer little indication regarding preservation of policy space for host states.[75] From a systemic perspective, there is thus a high risk of incoherence for all countries, especially developing states that often lack the requisite expertise and negotiating power in the development of investment rules.[76] Going forward, it is essential that states adopt clear and precise text in their IIAs as a matter of consensus, which not only offers much-needed clarity to ISDS tribunals but also clarifies their role and responsibility in balancing investment protection with the host state's right to regulate.

5. Wide Discretion to Investor-State Tribunals

States have long expressed deep concerns regarding the inconsistencies in arbitral decision-making in ISDS awards, which has now evolved into a major challenge to the system's credibility and legitimacy.[77] According to States, the mere divergence in outcomes is not the issue *per se*; they were more concerned about those cases where the same investment treaty standard or same rule of international law was interpreted differently without any justifiable ground for the distinction.[78]

It is well-settled that there is no doctrine of binding precedent in ISDS, and tribunals are not bound to any previous legal interpretations rendered in other awards.[79] For this reason, ISDS tribunals can 'decide each case on its own merits, independently of any apparent

71 Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2006) 5 European Journal of International Law, 907-940.

72 Vera Korzun (n 66) 355, 387.

73 David Gaukrodger (n 68), 29.

74 Vera Korzun (n 66) 355, 388.

75 UNCTAD, 'Investor-State Dispute Settlement' (n 52) ix.

76 ibid.

77 Federico Ortino (n 28) 1.

78 UNCTAD, 'Investor-State Dispute Settlement' (n 52) 21.

79 August Reinisch, 'Investment Arbitration – The Role of Precedent in ICSID Arbitration' in Christian Klausegger (eds), *Austrian Arbitration Yearbook 2008* (2008 Stämpfli Verlag) 498; Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?' (2007) Arbitration International Vol 23(3) 357, 368.

jurisprudential trend'[80] and arrive at different conclusions on matters of jurisdiction and liability.[81] Commentators have suggested that inconsistency is an inherent feature of ISDS due to certain features of the investment law regime.[82] The definitions and treaty standards in IIAs are typically drafted in extremely broad and unqualified terms, which are designed to apply to a wide range of situations and are therefore open to different interpretations.[83] Most IIAs offer little or no guidance to tribunals regarding the normative content and the scope of application of the various standards.[84] This results in legal uncertainty regarding the meaning and can give rise to inconsistent, even contrary, interpretations.[85]

However, given the nature of ISDS as a 'legal system', consistency and predictability is acknowledged as a desirable goal by all stakeholders, a view that is also shared by some ISDS tribunals.[86] According to the tribunal in *Saipem v. Bangladesh,*[87] there is 'a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law'.[88]

The rise in the number of investment disputes has tested the wisdom of drafting IIAs with extremely broad and open-ended treaty standards, thus delegating the task of defining the meaning and scope of these legal concepts to ISDS tribunals.[89] This delegation vests in the tribunal a certain discretion to give meaning to the treaty provisions.[90] The interpretative authority of tribunals is conditioned by various sources of law.[91] Studies report that the use of these sources by individual tribunals depends heavily on the arguments of the parties to the dispute.[92] In the absence of treaty guidance or any other process that can offer interpretative guidance, tribunals have placed different weights on these rules based

80 *Burlington Resources v Ecuador* (Decision on Liability) (2012) ICSID Case No. ARB/08/5, 187.

81 IBA, 'Consistency, Efficiency and Transparency in Investment Treaty Arbitration' (2018) 6 accessed on <https://www.ibanet.org/Document/Default.aspx?DocumentUid=A8D68C6C-120B-4A6A-AFD0-4397BC22B569>.

82 Thomas Schultz, 'Against Consistency in Investment Arbitration', in Zachary Douglas (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014) 297, 305.

83 IBA (n 82).

84 Federico Ortino (n 28) 2.

85 UNCTAD, 'Investor-State Dispute Settlement and Impact on Investment Rule-Making' UNCTAD/ITE/IIA/2007/3 (2007) 9.

86 ibid.

87 *Saipem SpA v The People's Republic of Bangladesh* (Decision on Jurisdiction) (2007) ICSID Case No ARB/05/07 67, 67.

88 ibid.

89 ibid.

90 UNCTAD, 'IIA Issues Notes', 2011 (2011) 3.

91 Ole Kristian Fauchald, 'The Legal Reasoning of ICSID Tribunals – An Empirical Analysis' (2008) 19(2) European Journal of International Law 301, 303.

92 ibid 310.

on the parties' arguments, thus giving rise to 'different solutions for resolving the same problem'.[93]

Most traditional IIAs do not provide treaty parties any mechanism to intervene during the arbitration proceedings or control the interpretation of IIA obligations by providing authentic and authoritative interpretations.[94] While some treaties like NAFTA allow treaty parties to file submissions before the arbitral tribunal, their submitted interpretations do not bind the tribunal while adjudicating the dispute.[95] This was the case in *GAMI v. Mexico*, wherein the home state of the investor intervened to submit the interpretation of certain treaty provisions as intended by the treaty parties.[96] However, the submitted interpretation was rejected by the tribunal.[97]

Against this background, it can be seen that ISDS tribunals actually function under the umbrella of their respective IIAs.[98] Therefore, these issues associated with the overly wide discretion of tribunals are rooted in the broad and imprecise language in IIAs, which can be effectively remedied by states as drafters of the IIAs.[99] Thus, states share interpretative authority with tribunals,[100] and treaty interpretation must be understood not as a monologue but as a 'constructive dialogue between investment tribunals and treaty parties'.[101]

It is thus clear that the practice of ISDS tribunals and IIAs are closely intertwined. For this reason, reform of IIAs must be treated as a necessary element of international deliberations to achieve lasting and comprehensive reform of the investment law regime.

II. IIAs must Adapt to the Changing Landscape of Investment & Policy

Efforts to achieve lasting and comprehensive reform of ISDS must not only target the drawbacks of the existing system but also adapt to meet 'the needs and realities of today and tomorrow'[102]. IIAs, like most other treaties, are a product of the specific historic,

93 *AES v Argentina* (Decision on Jurisdiction), ICSID Case No ARB/02/17, 30; Sergio Puig, 'The Death of ISDS' (*Kluwer Arbitration Blog*, 16 March 2018) <http://arbitrationblog.kluwerarbitration.com/2018/03/16/the-death-of-isds/> accessed 30 May 2020.

94 UNCTAD, 'Investor-State Dispute Settlement and Impact on Investment Rule-Making' UNCTAD/ITE/IIA/2007/3 (2007) 138.

95 North America Free Trade Agreement (entered into force 1 January 1994) 32 ILM 289 (NAFTA), art 1128: "On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement."

96 *GAMI Investments v Mexico* (Final Award) (2004) UNCITRAL, 11.

97 ibid 29.

98 UNCTAD, 'Investor-State Dispute Settlement' (n 52) 9.

99 UNCTAD, 'IIA Issues Notes' (2011) 3. UNCTAD, IIA Issues Note, 2011, [3.3].

100 ibid.

101 Anthea Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 1 American Journal of International Law 225.

102 UNCTAD, 'Press Release: UNCTAD Report Proposes Ways to Reform International Investment Agreement System' (24 June 2015) <https://unctad.org/en/pages/PressRelease.aspx?OriginalVersionID=254> accessed 30 May 2020..

economic and social context of the time during which they were negotiated.[103] Today, IIAs must adapt to a new context and respond to new challenges.

1. A New Paradigm for 'Responsible Investment'

While investment remains the primary driver of economic growth and development, the expectations regarding the role and contribution of investment to the economy of the host state have changed.[104] A paradigm shift in investment policy from 'a strong emphasis on interests of private property protection towards a more comprehensive approach'[105] is emerging, as states increasingly seek to promote 'responsible investment' i.e. investment that places social and environmental goals on the same footing as economic objectives.[106] Accordingly, investment policy and IIAs cannot be recalibrated in isolation; they need to be harmonized to fit in with the wider policy agenda of sustainable development.[107]

Traditional IIAs, with their focus on investment protection, must be replaced by new treaties that seek to balance investor rights and obligations, preserve the right of the host state to regulate in public interest, and recognize the significance of economic as well as social and environmental goals in their provisions and design.[108] This view has also entered the mainstream of investment policymaking at the international level,[109] with international organizations such as UNCTAD offering detailed frameworks and alternative models for the recalibration of IIAs.[110]

The ongoing process of ISDS reform presents an opportunity to restore balance within the investment regime by entrenching obligations and standards for corporate responsibility within the text of the IIAs.[111] In order to ensure 'responsible investment', states are increasingly expecting investors to uphold standards of responsible business conduct in areas such as human rights, labour, environmental issues, corruption and corporate

103 UNCTAD, 'UNCTAD's Reform Package for the International Investment Regime' (2018) 14 <https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf>.

104 ibid 15.

105 Steffen Hindelang and Markus Krajewski, 'Towards a More Comprehensive Approach in International Investment Law' in Steffen Hindelang and Markus Krajewski (eds), *Shifting Paradigms in International Investment Law* (OUP 2016) 1,5.

106 UNCTAD, 'Investment Policy Framework for Sustainable Development' (2015) UNCTAD/DIAE/PCB/2015/5, 17.

107 ibid 6.

108 Peter Munchlinski, 'Negotiating New Generation International Investment Agreements: New Sustainable Development Oriented Initiatives' in Steffen Hindelang & Markus Krajewski, *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (OUP 2016) 41.

109 UNCTAD Secretariat Note, 'Recent developments in the international investment regime: Taking stock of phase 2 reform actions' (2 September 2019) TD/B/C.II/42, 1.

110 UNCTAD, 'Investment Policy Framework' (n 106).

111 ibid.

governance.[112] Going forward, by including clear standards for investor conduct in IIAs, states can ensure that investments truly advance social, economic and environmental policy goals.[113]

6. The Greater Role of Governments in Economic Regulation

Over the past four decades, the global investment and development challenges faced by governments have transformed radically.[114] Public health, environmental protection, poverty alleviation, social equity and conservation of natural resources have fostered a new context for government policy, both nationally and internationally.[115] In the face of these new challenges, states have increasingly moved away from deregulation and adopted a stronger role, especially with regard to developmental strategies including economic development.[116]

Investment policy has thus become a component of a much broader and intricate development policy agenda.[117] Today, policymakers seek to steer investment by devising policies that place inclusive growth and sustainable development at the heart of efforts to mobilize foreign investment.[118] This has wider implications for investment policy at the international level. There is a clear imperative to strengthen the development dimension of IIAs, and preserve the flexibility of host states to adopt social and environmental regulations along with maintaining a generally favourable investment climate.[119]

The necessity of a multilateral framework on investment has long been felt within the international community but it has never been as acute as it is today.[120] Given that economies across the world are becoming intricately linked due to forces of globalization, the international community needs '*global rules for a global economy*'[121] that establish

112 Lorenzo Cotula & Terrence Neal, 'UNCITRAL Working Group III: Can Reforming Procedures Rebalance Investor Rights and Obligations?' (2019) South Centre Investment Policy Brief <https://www.southcentre.int/wp-content/uploads/2019/03/IPB15_UNCITRAL-Working-Group-III-Can-Reforming-Procedures-Rebalance-Investor-Rights-and-Obligations_EN-1.pdf> accessed 30 May 2020.

113 ibid 2.

114 Peter Munchlinski (n 108) 41.

115 ibid.

116 UNCTAD, 'UNCTAD's Reform Package for the International Investment Regime' (2018) 16 <https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf> accessed 30 May 2020.

117 Lise Johnson (eds), 'Clearing the Path: Withdrawal of Consent and Termination as Next Steps for Reforming International Investment Law' (2018) CCSI Policy Paper <http://ccsi.columbia.edu/files/2018/04/IIA-CCSI-Policy-Paper-FINAL-April-2018.pdf> accessed 30 May 2020.

118 UNCTAD, 'Investment Policy Framework' (n 106) 6.

119 ibid.

120 Wenhua Shan, 'Toward a Multilateral or Plurilateral Framework on Investment' (2005) E15 Initiative Think Piece 1.

121 Karl Sauvant, 'The Evolving International Investment Law and Policy Regime: Ways Forward' (2016) ICTSD Policy Options Paper 33 <http://e15initiative.org/wp-content/uploads/2015/09/

stable, predictable and transparent governance for all stakeholders within the investment regime including foreign investors and host states as well as ISDS tribunals (or the MIC).

III. The Case for a Multilateral Framework on Investment

While the focus thus far has been largely on individual aspects of investment law and policy and how they could be improved, the ongoing legitimacy crisis offers an unprecedented opportunity to comprehensively reform the framework of IIAs on a global scale.[122]

A multilateral framework on investment would define, in a clear and coherent manner, the relationship between states and foreign investors and offer the legal certainty and stability that global investment requires, while facilitating the flow of sustainable FDI for sustainable development.[123] If and when achieved, a multilateral framework on investment could eliminate the struggles associated with a fragmented regime based on a wide network of IIAs. This would benefit both foreign investors, who would no longer have to deal with disparate and varying commitments in IIAs for different jurisdictions, and governments which would be able to promote investment flows and guarantee investment protection without compromising their other policy objectives.[124]

It has become imperative to develop a holistic and comprehensive approach to the governance of international investment, and one that is ideally the outcome of a multilateral consensus.[125] In this context this article advocates that the current global scenario offers the right setting for the negotiation of a multilateral framework on investment, even as it recognizes the challenges that threaten such an endeavour.

I. Growing Need for Harmonization of Investment Rules

In the current scenario, there are three major compelling reasons to take concerted action for the harmonization of investment rules through multilateral consensus. They are: (1) rise of global value chains and a 'global economy'; (2) fragmentation within the international investment law regime; and (3) structural asymmetry in existing IIAs.

1. Rise of Global Value Chains and a 'Global Economy'

Global Value Chains (GVCs) refer to fragmented supply chains where the tasks and activities associated with production are dispersed across different countries.[126] GVCs may be organized as sequential chains or complex networks, whether at the global or the regional level, and represent the broader economic phenomenon of 'integrated international

WEF_Investment_Law_Policy_regime_report_2015_1401.pdf> accessed 30 May 2020.

122 Wenhua Shan (n 120) 6.

123 ibid.

124 Karl Sauvant (n 121) 34.

125 ibid 33.

126 UNCTAD 'World Investment Report 2013' (n 23) 125.

production' for goods and services.[127] GVCs are typically coordinated by transnational corporations ('TNCs'), which often possess borderless networks of affiliates, contractors and arm's length suppliers.[128]

The phenomenon of GVCs has brought together actors and economic forces from continents and regions all over the world, thus signalling the emergence of a 'global economy'.[129] Forces of globalization and remarkable advances in technology have allowed TNCs to expand their international production networks and engage in cross-border production.[130]

As GVCs become increasingly global in scale and impact, bilateral or regional regulatory frameworks are no longer sufficient for investment protection and need to be replaced by a multilateral framework of governance.[131] In a global economy, 'industry needs a truly global framework for investment, set up in a forward looking and strategic manner and able to cope with a diverse and constantly changing reality'.[132] There is a greater need for coordination in investment policymaking which can ensure coherence and sustainability in policies for investment protection and promotion, irrespective of the jurisdiction where the foreign investment is located.

2. Fragmentation within the International Investment Law Regime

Unlike international trade in goods and services that is governed by the WTO Agreement and its Annexes, there is no legal equivalent for the governance of foreign investment at the international level.[133] On the contrary, the proliferation of IIAs has created a 'spaghetti bowl' of criss-crossing treaty relationships, with little attention to coherence among treaty provisions or to the implications of such divergence for stakeholders in global markets.[134] The 'overlapping, supporting and possibly conflicting'[135] obligations across IIAs are far from consistent, nor can they be consistently interpreted and applied by the hundreds of *ad*

127 ibid 122.

128 ibid.

129 MA Forere, 'New Developments in International Investment Law: A Need for a Multilateral Investment Treaty?' (2018) 21 PER / PELJ 6.

130 Victor Fung, 'Preface: Governance in a Changing World', in Deborah Elms & Patrick Low, *Global Value Chains in a Changing World* (WTO Publications 2013) xix, xxi.

131 Forere (n 129).

132 Herbert Oberhänsli, 'Regulatory Competition in Globalising Markets for Improved Conditions for Private Investment' (2015) E15 Initiative 6.

133 Anne van Aaken, 'Fragmentation of International Law: The Case of International Investment Protection' in Tuomas Tiittala, *Finnish Yearbook of International Law, Vol. XVII* (Bloomsbury Publishing 2008) 91, 95.

134 Richard Baldwin & Patrick Low, *Multilateralizing Regionalism: Challenges for the Global Trading System* (CUP 2009) 1, 5.

135 Simon Lester (eds), *Bilateral and Regional Trade Agreements: Commentary and Analysis* (CUP 2015) 3, 4.

hoc arbitral tribunals specifically constituted for each case.[136]

The 'spaghetti bowl' effect of IIAs has also generated structural problems, the most significant being the creation of an inconsistent and disjointed body of investment law.[137] The variable standards and rules for investment protection under IIAs have allowed investor-state tribunals to give unique interpretations across treaties even for similarly-worded treaty provisions, which has led to divergent, or even contradictory, outcomes.[138] This has compounded the fragmentation within the investment law regime and weakened its coherence and credibility.[139]

This fragmentation highlights the need for harmonized investment regulation that would allow governments to apply a single set of legal rules to investment flows in general.[140] On one hand, harmonization of investment rules would offer uniform protection to foreign investors across jurisdictions and eliminate the potential for treaty shopping, and on the other, states would no longer need to negotiate individual IIAs or resolve conflicts among overlapping IIAs, thus leading to lower transaction costs for both parties.[141] Further, ISDS cases have often demonstrated tensions between IIAs and other areas of international law such as trade, labour, human rights, environmental and tax law.[142] These linkages between IIAs and other areas of international law are vital for public policymaking but governments can effectively address the interaction between IIAs and other policy areas only once harmonization of investment rules is achieved to a certain degree.[143]

3. Structural Asymmetry in Existing IIAs

The contemporary framework of international investment law is highly asymmetrical in its basic normative architecture.[144] Under the traditional BITs, investors hold both substantive and procedural rights but the host states and the communities that are affected

136 Wenhua Shan (n 119) 2.

137 David Howard, 'The Need for a Supranational Organization in Foreign Investment' (2008) 2 Notre Dame Journal of International & Comparative Law 15, 24.

138 August Reinisch, 'The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs. the Promise of a More Effective System? Some Reflections from the Perspective of Investment Arbitration' in Isabelle Buffard and others (eds), *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner, Netherlands* (Martinus Nijhoff 2008) 107, 114.

139 ibid.

140 Mark Feldman, Rodrigo Monardes and Cristian Rodriguez Chiffelle, 'The Role of Pacific Rim FTAs in the Harmonisation of International Investment Law: Towards a Free Trade Area of the Asia-Pacific' (2016) 4.

141 Stephan Schill, *The Multilateralization of International Investment Law* (CUP 2009) 69.

142 UNCTAD, *World Investment Report 2017, Investment and the Digital* Economy (2017) 129.

143 ibid 130.

144 Frank Garcia and others, 'Reforming the International Investment Regime: Lessons from International Trade Law' (2015) 4 Journal of International Economic Law 861, 869.

by such investments have neither.[145] Further, the host state has no leverage in investment treaty arbitration to hold investors accountable for the negative consequences of their investment activities, as states cannot initiate ISDS claims due to the one-sided dispute settlement terms of the BITs.[146] To address this asymmetry, states are now recalibrating their IIAs to foster a more balanced approach, and many newer IIAs include references to business and human rights instruments, global standards and other international agreements to impose corporate social responsibility.[147] However, due to the largely bilateral nature of these efforts, such references remain rare within the overall network of IIAs.[148]

Clearly, the solution to the structural asymmetry embedded within the investment regime cannot be piecemeal, nor can it be tackled sufficiently on a bilateral or regional basis.[149] In order to create a truly balanced regime that provides a level playing field to investors and treaty parties, one-sided treaty norms (whether they favour investors or host states) must be replaced with a balanced and harmonized configuration of investment rules that can preserve the rights and interests of both stakeholders.

III. Change and Convergence in State Interests

In the past, efforts to develop a multilateral framework have failed largely due to the historic divergence in the interests of developing and developed countries.[150] However, modern trends indicate that 'the constellation of interests of countries has changed profoundly over the past decade, and in a manner that favours a more universal approach'.[151]

In the 1950s and 1960s, the global market for foreign direct investment (FDI) was marked by intense competition, particularly among developing countries that perceived FDI as a necessary road to economic development.[152] This fostered a clear divergence between the interests of *capital-importing* countries, which sought to attract FDI and stimulate investment flows into their territories, and of the *capital-exporting* countries, which wished to protect their nationals and their investments abroad with guarantees of extensive legal protection under BITs.[153] For this reason, governments were able to define

145 Alessandra Arcuri and Montanaro Francesco, "Justice for All? Protecting the Public Interest in Investment Treaties" (2018) 8 Boston College Law Review 2791, 2793.

146 Frank Garcia (n 144) 870.

147 Kun Fan (n 38).

148 UNCTAD, *World Investment Report 2017* (n 21).

149 Mavluda Sattarova, 'Investor Responsibilities from a Host State Perspective: Qualitative Data and Proposals for Treaty Reform' (2019) American Society of International Law 22, 26.

150 Kate Supnik, 'Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law' (2009) 2 Duke Law Journal 343, 345.

151 Karl Sauvant (n 121) <http://e15initiative.org/wp-content/uploads/2015/09/WEF_Investment_Law_Policy_regime_report_2015_1401.pdf> accessed 30 May 2020.

152 Zachary Douglas, *The International Law of Investment Claims* (CUP 2005) 1-2.

153 Jeswald Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 3 The International Lawyer 655, 660; More

their policy interests at the multilateral level based on their role either as home states or host states.

However, the map of global FDI flows looks radically different today.[154] FDI outflows from developing economies (or traditional capital-importing countries) have grown twenty-fold in the last two decades, and accounted for nearly one-fifth of the global FDI flows in 2015.[155] Multinational corporations headquartered in these economies have emerged as significant and outward dynamic investors.[156] Accordingly, developing economies today define their policy interests not only as host countries but also as home countries, which are interested in protecting their nationals and facilitating their investments abroad.[157]

On the other hand, developed economies (or traditional capital-exporting countries) have realized that they are also important recipients of FDI inflows, which include significant inflows from foreign investors based in emerging markets.[158] Further, the number of ISDS cases against developed countries as host states have been on the rise and they are increasingly respondents to claims challenging broad regulatory policies.[159] In response to these shifts, developed economies identify not only as home countries but also as host countries, which are interested in preserving ample policy space to pursue legitimate public policy objectives.[160]

Incidentally, the trend towards more balanced IIAs was started by the United States with its NAFTA treaty partners, Canada and Mexico.[161] Following their experience with a number of high-profile ISDS cases, the three NAFTA states introduced a number of pioneering provisions to balance investment promotion and the host state's right to regulate.[162] One could observe a similar debate in recent IIA negotiations involving developed and developing countries, such as the Trans-Pacific Partnership, the EU-Viet Nam IPA and the Regional Comprehensive Economic Partnership.[163] These agreements

generally, for the economic function of IIAs, see also, Alan Sykes, 'The Economic Structure of International Investment Agreements with Implications for Treaty Interpretation and Design' (2019) 3 The American Journal of International Law 482-534.

154 UNCTAD, 'Investment Trends Monitor, No. 33' (2020) UNCTAD/DIAE/IA/INF/2020/1 3.

155 World Bank, *Global Investment Competitiveness Report 2017-2018* (2018) 9.

156 ibid.

157 Karl Sauvant (n 121).

158 UNCTAD, 'Investment Trends Monitor, No. 33' (2020) UNCTAD/DIAE/IA/INF/2020/1 3.

159 UNCTAD, 'Recent Developments in Investor-State Dispute Settlement (ISDS), IIA Issues Note No. 1 2014 (2014) UNCTAD/WEB/DIAE/PCB/2014/3 2.

160 Karl Sauvant (n 121).

161 Axel Berger, 'Developing Countries and the Future of the International Investment Regime' (*Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH* 2015) 8 <https://www.die-gdi.de/uploads/media/giz2015-enStudy_Developing_countries_and_the_future_of_the_international_investment_regime.pdf>.

162 ibid.

163 Rodrigo Polanco, 'The No of Tokyo Revisited: Or How Developed Countries Learned to Start Worrying and Love the Calvo Doctrine'(2015) 1 ICSID Review 172, 173.

could lead to a more harmonized approach to investment policymaking and if concluded, they could become important stepping stones for a multilateral framework on investment.[164] Thus, the convergence between policy interests of host and home countries offers an ideal springboard to finally pursue a common approach at the multilateral level.

IV. Current Challenges to Building Multilateral Consensus

In the past, the international community has made several attempts to conclude a multilateral investment treaty but these efforts have been largely unsuccessful.[165] To this day, a host of multilateral forums such as the United Nations, the OECD and the WTO have failed to develop multilateral consensus, leaving countries to negotiate investment treaties on the bilateral and regional level.[166] While it is true that the general attitudes of states towards investment governance have changed profoundly and in favour of a more common approach, it is no guarantee for reaching consensus at the multilateral level.[167]

Negotiating a multilateral framework on investment is bound to face considerable challenges even today due to the mixed views and considerable passion surrounding IIAs.[168] These challenges include determining the costs and benefits of a multilateral treaty framework for a global community, and the struggles involved in designing an international instrument that can accommodate the heterogenous interests of multiple potential signatories.[169] There is a palpable risk that the outcome of multilateral negotiations would simply be a 'lowest-common-denominator agreement', which could undermine the benefits that have already been achieved through the practice of existing bilateral and regional IIAs.[170] There is also the matter of the appropriate forum for facilitating these negotiations, whether it should be the WTO, the OECD, the UNCITRAL Working Group III, or any other forum.[171]

One would also have to consider whether a multilateral agreement, if concluded, would supersede that existing IIA commitments of signatory states, or merely provide a floor of standards and obligations for all signatories, including those countries that have

164 Karl Sauvant (n 121).

165 Kate Supnik, 'Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law' (2009) 2 Duke Law Journal 343, 357.

166 Efraim Chalamish, 'The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement' (2009) 2 Brooklyn Journal of International Law 303, 334.

167 Jan Wouters, Philip De Man and Leen Chanet, 'The Long and Winding Road of International Investment Agreements: Toward a Coherent Framework for Reconciling the Interests of Developed and Developing Countries' (2009) 3 Human Rights and International Legal Discourse 263, 288.

168 Karl Sauvant (n 121).

169 ibid.

170 Anders Åslund, *'The World Needs a Multilateral Investment Agreement'* (Peterson Institute for International Economics 2013) 7.

171 ibid.

not concluded IIAs.[172] It must be also considered how this multilateral framework would interact and operate in conjunction with other plurilateral and multilateral agreements, such as the GATS and the TRIMS agreements under the WTO.[173]

The challenges enumerated above are not exhaustive, and additional issues will arise for clarification during multilateral negotiations. However, if achieved, a multilateral framework on investment could 'help overcome the deficiencies of the current patchwork of bilateral, regional, sectoral and few multilateral rules of investment by establishing a framework of transparent, stable, and predictable rules'[174] at both substantive and procedural levels. Therefore, despite the costs and challenges, a multilateral framework on investment is definitely a goal worth striving for in order to achieve lasting and comprehensive reform.

IV. Pathways For A Multilateral Framework on Investment

Despite the resistance that we have witnessed to multilateral efforts in the past, governments today continue to show great willingness in making rules for international investment, as is reflected in the proliferation of bilateral and regional IIAs.[175] This presents the potential to build multilateral consensus over critical substantive and procedural matters among major actors in international investment. Although current political trends suggest that concluding a single overarching multilateral investment treaty may not be feasible at this time, a multilateral approach adopted *incrementally* could shape the future of the investment policymaking by narrowing the differences in ideology and interests of the stakeholders in the investment field.[176]

This section examines three such pathways that offer new possibilities for the gradual pursuit of multilateral rules on investment: (1) mega-regional agreements; (2) plurilateral framework in the WTO; and (3) a draft framework through a stand-alone process.

I. Mega-Regional Agreements

In recent times, there has been a marked shift towards regionalism in the fields of both trade and investment.[177] The interplay between these two fields has become increasingly significant as states actively negotiate regional trade agreements ('RTAs') with investment

172 Karl Sauvant (n 121).

173 Peter Draper, Beatrice Leycegui, Alejandro Jara and Robert Lawrence, 'Foreign Direct Investment as a Key Driver for Trade, Growth and Prosperity: The Case for a Multilateral Agreement on Investment' (*World Economic Forum* 2013) 29.

174 Stefan Amarasinha and Juliane Kokott, 'Multilateral Investment Rules Revisited' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *Oxford Handbook of International Investment Law* (OUP 2008) 119, 130.

175 Karl Sauvant (n 121).

176 Voon, 'Consolidating International Investment Law: The Mega-Regionals as a Pathway Towards Multilateral Rules' (n 15) 3.

177 Emmanuel Laryea, 'The Globalisation versus Regionalism Debate' (2013) 2 Global Journal of Comparative Law 167, 174.

chapters, among which Mega-regional agreements now occupy centre stage.[178] Mega-regionals are 'deep integration partnerships between countries or regions with a major share of world trade and foreign direct investment (FDI), and in which two or more of the parties are in a paramount driver position, or serve as hubs, in global value chains.'[179] The geographical scope of the mega-regionals encompasses developed and emerging markets across regions,[180] and they typically cover not only substantive obligations relating to trade and investment but also other issues such as labour standards and the environment.[181] Given their coverage and reach, they may form the '*nucleus of global economic governance in the future*'.[182]

Mega-regional agreements, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), Transatlantic Trade and Investment Partnership (TTIP), Regional Comprehensive Economic Partnership (RCEP), EU-Canada Comprehensive Economic and Trade Agreement (CETA), are often seen as stepping stones to the creation of a far-reaching multilateral framework on investment.[183] Despite the current climate of uncertainty regarding the future of these agreements, the investment chapters in the Mega-regionals '*converge to an astonishing degree*'[184] and thus carry great potential for multilateralization of investment rules.[185] Given the sheer number of countries involved and the uniformity in the approaches to standards of investment liberalization and protection[186] these agreements are likely to have a major impact on global investment rulemaking and

178 August Reinisch, 'Investment Protection and Dispute Settlement in Preferential Trade Agreements: A Challenge to BITs?' (2009) 2 ICSID Review – Foreign Investment Law Journal 416, 417.

179 Ricardo Meléndez-Ortiz, 'Mega-regional Trade Agreements Game-Changers or Costly Distractions for the World Trading System?' (*World Economic Forum* 2014) 6.

180 Chris Brummer, *Minilateralism: How Trade Alliances, Soft Law and Financial Engineering are Redefining Economic Statecraft* (CUP 2014) 55.

181 Tomas Hirst, 'What Are Mega-Regional Agreements?' (*World Economic Forum* 09 July 2014) <https://www.weforum.org/agenda/2014/07/trade-what-are-megaregionals/> accessed 30 May 2020.

182 Stephan Schill and Heather Bray, 'The Brave New (American) World of International in Investment Law: Substantive Investment Protection Standards in Mega-Regionals' (2016) 2 British Journal of American Legal Studies, 419, 421.

183 Voon, 'Consolidating International Investment Law: The Mega-Regionals as a Pathway Towards Multilateral Rules' (n 15) 3; See also Stefanie Schacherer , 'TPP, CETA and TTIP Between Innovation and Consolidation—Resolving Investor–State Disputes under Mega-regionals' (2016) 3 Journal of International Dispute Settlement 628, 649.

184 Catherine Titi, 'The Evolution of Substantive Investment Protections in Recent Trade and Investment Treaties' (ICSTD 2018) 4.

185 Leon Trakman, 'The Status of Investor - State Arbitration: Resolving Investment Disputes under the Transpacific Partnership Agreement' (2014) 1 Journal of World Trade 1, 2.

186 Anna Joubin-Bret, 'Preferential Trade and Investment Agreements and Regionalism: A Stepping Stone Towards a Multilateral Set of Investment Rules or Another Type of Noodles in the Spaghetti Bowl?' in Rainer Hofmann, Stephan Schill and Christian Tams (eds), *Preferential Trade and Investment Agreements: From Recalibration to Reintegration* (Nomos 2013) 289, 294.

may even lead to a new generation of investment rules.[187]

Investment chapters in Mega-regionals adopt formulations that are far more specific than the broad and vague principles of investment protection contained in the old-style BITs.[188] They not only clarify the scope of investor rights but also the extent of regulatory powers of host states through more detailed treaty drafting, while seeking to create a textual balance between investment protection and the policy space of host states.[189]

Overall, treaty drafters have sought to recalibrate the treaty text by limiting the scope of application of investment protection standards, developing better formulations of substantive standards of treatment to accommodate more regulatory space for states and creating new institutional safeguards that allow treaty parties to exercise greater control over the dispute settlement framework.[190] For instance, the TTIP gives specific meanings to the terms 'direct expropriation' and 'indirect expropriation',[191] and clarifies:

> except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives…do not constitute indirect expropriation.[192]

A similar policy exception for indirect expropriation is also present in the CPTPP.[193] More generally, the Mega-regionals contain, without exception, a separate provision or exception that preserves host states' regulatory powers for legitimate public welfare objectives, including for the protection of the environment, public health and safety.[194]

That said, Mega-regionals do not represent simple improvements on traditional BITs but are unique agreements that have recalibrated standards of protection in ways that are both innovative and ambitious. *First*, mega-regionals have assumed an expanded role

187 UNCTAD, 'World Investment Report 2014, Investing in the SDGs: An Action Plan' (2014) 118-121.

188 Stephan Schill and Heather Bray, 'The Brave New (American) World of International in Investment Law: Substantive Investment Protection Standards in Mega-Regionals' (n 182) 425.

189 Karsten Nowrot, 'Of "Plain" Analytical Approaches and "Savior" Perspectives' (2017) <https://www.wiso.uni-hamburg.de/fachbereich-sozoek/professuren/koerner/fiwa/archiv/publikationsreihe/heft-10-nowrot-investment-chapters-in-mega-regionals.pdf> accessed 30 May 2020.

190 Stephan Schill and Heather Bray, 'The Brave New (American) World of International in Investment Law: Substantive Investment Protection Standards in Mega-Regionals' (n 182) 425.

191 Transatlantic Trade and Investment Partnership (TTIP), Annex I, 1 and 2.

192 TTIP, Annex I, 3.

193 The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (2018) (CPTPP), Annex 9-B, 3(b).

194 TTIP, art 2.1; CPTPP, art 9.10.3(h); Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part OJ L 11, art 19.2(2).

to become instruments for investment liberalization, by including greater market access commitments and applying standards of national treatment and MFN treatment to the entry of foreign investments.[195] This can be witnessed in the CETA, which imposes limitations on states' ability to restrict access for foreign investors while providing for non-discriminatory treatment at the pre-establishment phase.[196] *Second*, due to the increased public scrutiny and need for greater transparency, mega-regionals include provisions that grant greater access to the public to case documents and arbitral hearings, and that allow *amici curiae* to make submissions in arbitration proceedings.[197]

Finally, Mega-regionals have increased the potential for consensus-building between states by facilitating cross-deals between trade and investment, and allow states to concede certain level of protection in one sector for favourable protection in another sector.[198] This combination of trade and investment also offers great opportunity for cross-fertilization, as is reflected in the general exception clauses in some mega-regionals that mirror GATT Article XX and Article XIV of the GATS.[199]

Given these new developments, the Mega-regionals have offered a template and platform to enhance consensus that is already emerging, and which, given the right conditions and participation, could evolve into a multilateral framework for investment in the future.

II. Plurilateral Framework in the WTO

There has been overwhelming support in academic literature to pursue reform of investment rules within the framework of the WTO.[200] It is widely believed that 'the WTO offers the best platform for trade and investment regimes to be combined and consolidated, as a unified system providing systematic legal and institutional support for the future growth of GVCs'.[201] This is for a variety of reasons, including the nearly global membership of the WTO, the success of its dispute settlement body and its broad mandate over trade and

195 Stephan Schill and Heather Bray, 'The Brave New (American) World of International in Investment Law: Substantive Investment Protection Standards in Mega-Regionals' (n 182) 425.

196 CETA, arts 8.4, 8.6 and 8.7.

197 Trans-Pacific Partnership Agreement (signed 4 February 2016), art 9.24(2); Free Trade Agreement Between the European Union and the Republic of Singapore (signed 19 October 2018) (EU-Singapore FTA), Annex 9-C, art 2; CETA, art 8.36.

198 Stephan Schill and Heather Bray, "The Brave New (American) World of International in Investment Law: Substantive Investment Protection Standards in Mega-Regionals" (n 182) 444.

199 CETA, art 28.3.

200 For example, see Rafael Lael-Arcas, *International Trade and Investment Law: Multilateral, Regional and Bilateral Governance* (Edward Elgar 2010) 258–259; Stefan Amarasinha and Juliane Kokott, 'Multilateral Investment Rules Revisited' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *Oxford Handbook of International Investment Law* (OUP 2008) 119, 136-, Anders Åslund, *'The World Needs a Multilateral Investment Agreement'* (Peterson Institute for International Economics 2013) 7.

201 Wenhua Shan (n 120) 12.

investment matters.[202]

However, attempts to conduct negotiations for multilateral investment rules straightaway in the WTO are likely to be mired in controversy, as is reflected in the shadow and pitfalls of past failures. During the 2003 WTO Ministerial Conference in Cancún, WTO members discussed whether the WTO should be mandated to negotiate a multilateral investment agreement.[203] No agreement could be reached,[204] however, due to the irreconcilable differences in interests and priorities of the developed and developing states.[205] The General Council ultimately held in 2004 that the issue of trade and investment 'will not form part of the Work Programme set out in [the Doha] Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round',[206] thus putting an end to any potential progress on a multilateral investment framework under the umbrella of the WTO.[207]

Even today, given the flailing performance of the WTO's negotiating arm in recent years,[208] the outlook for conducting negotiations for a multilateral investment framework does not seem very promising within the WTO. Against this background, a better approach would be to move forward through a plurilateral framework on investment within the WTO.

Plurilateral agreements are the singular exception to the 'single undertaking' principle of WTO agreements and are recognized in Article II:3 of the WTO Agreement, which provides that such agreements are binding only on the signatory Members and do not create rights or obligations for other WTO Members.[209] States can utilize the considerable

202 Silvia Fiezzoni, 'Striking Consistency and Predictability in International Investment Law from the Perspective of Developing Countries' (2012) 4 Frontiers of Law in China 521, 542.

203 WTO, 'The Fifth WTO Ministerial Conference (2003) <https://www.wto.org/english/thewto_e/minist_e/min03_e/min03_e.htm> accessed 30 May 2020.

204 WTO, *Carlos Perezdel Castillo, Closing Remarks* (WTO General Council: Follow Up to the Cancun Ministerial Conference, 16 December 2003) <https://www.wto.org/english/news_e/news03_e/stat_gc_chair_16dec03_e.htm> accessed 30 May 2020.

205 Elizabeth Smythe, 'From Singapore to Cancún: Knowledge, Power and Hegemony in the Negotiation of Investment Rules at the WTO', (Paper presented at the Annual Meeting of the International Studies Association, Quebec, 2004) 5.

206 WTO, *Doha Work Programme* (1 August 20014) WT/L/579 <https://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm> accessed 30 May 2020.

207 Jan Wouters, Philip De Man and Leen Chanet, 'The Long and Winding Road of International Investment Agreements: Toward a Coherent Framework for Reconciling the Interests of Developed and Developing Countries' (2009) 3 Human Rights and International Legal Discourse 263, 288.

208 Rudolf Adlung and Hamid Mamdouh, 'Plurilateral Trade Agreements: An Escape Route for the WTO?', WTO Working Paper 2016, 8 <https://www.wto.org/english/res_e/reser_e/ersd201703_e.pdf> accessed 30 May 2020. See also Michitaka Nakatomi, 'Plurilateral Agreements: A Viable Alternative to the WTO?' ADBI Working Paper 2013 5 < https://www.adb.org/sites/default/files/publication/156294/adbi-wp439.pdf> accessed 30 May 2020.

209 Article II:3, Agreement Establishing the World Trade Organization (signed 15 April 1994) 1867 UNTS 154 (Marrakesh Agreement). Two such agreements have expired (Marrakesh

room and flexibility offered by plurilateral agreements to jumpstart negotiations as well as build consensus gradually for a multilateral investment framework among a '*critical mass*' of WTO Members at first, instead of its entire membership.[210] Ideally, such a multilateral framework should be designed with flexibility so that it can accommodate relevant differences without requiring a Member state to relinquish its key interests and bargains.[211] The concept of '*variable geometry*' found in WTO Agreements shows that multilateralism does not necessitate a 'one-size-fits-all' approach and parties can instead adopt different standards for different types of countries or actors within a broader multilateral framework.[212] Once such a plurilateral agreement is concluded, it could be opened for future accessions by other WTO Members.

There is also a possibility that such a plurilateral agreement could cover not only investment rules but also matters related to investor-state dispute settlement. It has been suggested that the WTO Dispute Settlement Body could play a greater role in settling investor-state disputes[213] which seems rather implausible given the current legal structure of the WTO and the ongoing Appellate Body crisis. Nevertheless, any future outcome and understanding reached under the aegis of the UNCITRAL Working Group III discussions could also be easily incorporated into the plurilateral framework in the WTO by the Members and could even become the nucleus around which the multilateral framework on investment is built.

III. Draft Framework through a Stand-Alone Process

A stand-alone process presents another appealing option, especially considering how structured and systematic multilateral initiatives in the OECD and the WTO have failed in the past.[214] There are other precedents for similar stand-alone negotiations at the international level that have been effective in the past. For instance, in 1990, the UN General Assembly established the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, which operated independently and outside the UN framework, with its own secretariat. The Committee developed the text of the Framework Convention, and it

Agreement, annex 4(c) (International Dairy Agreement); Marrakesh Agreement, annex 4(d) (International Bovine Meat Agreement. Two such agreements are currently in force (Marrakesh Agreement, annex 4(a) (Agreement on Trade in Civil Aircraft); Marrakesh Agreement, annex 4(b) (Agreement on Government Procurement).

210 Michitaka Nakatomi (n 208) 7, 8.

211 Voon, 'Consolidating International Investment Law: The Mega-Regionals as a Pathway Towards Multilateral Rules' (n 15) 13.

212 Craig Van Grasstek and Pierre Sauvé, 'The Consistency of WTO Rules: Can the Single Undertaking Be Squared with Variable Geometry?' (2006) 4 Journal of International Economic Law 837, 837.

213 Nicolette Butler, 'Possible Improvements to the Framework of International Investment Arbitration' (2013) 4 Journal of World Investment & Trade 613, 615.

214 Wenhua Shan (n 120) 11.

was adopted in May 1992.[215] More recently, in March 2013, negotiations were commenced outside the WTO for a trade agreement to liberalize trade in services – the Trade in Services Agreement (TiSA).[216] The negotiations are currently ongoing among 23 member states of the WTO, and negotiating parties intend to transform TiSA into a WTO agreement that will be open to accession by other states in the future.[217]

Going forward, any consensus-based process to develop a multilateral investment framework would have to be government-driven and government-owned.[218] However, in the absence of any constraints of organizational membership, stand-alone negotiations can include a wide range of actors and stakeholders, both governmental or non-governmental. By discarding the typical inter-governmental setting, this process can foster an open and inclusive discussion of the fundamental issues concerning the investment regime, thus allowing parties to take a holistic view of the reforms and build upon the significant progress achieved by various international organizations.[219] Broader participation and a transparent process can allow the members to develop solutions to advance the relationship between investors and host states, and make the global flows of FDI more sustainable and responsible for international communities.[220]

In terms of outcome, the process could lead to a draft framework that can serve as a model template for governments to guide their efforts to reform the investment law and policy regime in the short-term and the long-term.[221] This approach has been used by OECD with reasonable success. In 2006, a task force consisting of government officials from 60 OECD and non-OECD countries developed the *OECD Policy Framework for Investment* through consultations across different regions of the world.[222] Leading institutions such as the World Bank and UN and a number of business, labour and civil society organisations participated in the process and contributed to the development of the Framework. The Framework assists governments to design and implement policy reforms for creating a sturdy environment for domestic and foreign investment.[223] More recently, in 2014, it was updated in light of the changes to the global economic landscape and the need to improve

215 United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.

216 European Commission, 'Trade in Services Agreement (TiSA)' <https://ec.europa.eu/trade/policy/in-focus/tisa/> accessed 30 May 2020.

217 Government of Canada, 'Trade in Services Agreement (TiSA)' <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/services/tisa-acs.aspx?lang=eng,> accessed 30 May 2020.

218 Karl Sauvant (n 121).

219 ibid.

220 ibid.

221 ibid.

222 OECD*, Policy Framework for Investment* (2006).

223 OECD, *Update of the Policy Framework for Investment* (2015).

investment conditions.[224]

A similar approach could be adopted for developing a draft framework for multilateral investment rules and an international body or institution such as the G-20 could provide the necessary leadership and momentum to the policy dialogue among the various stakeholders.[225] This draft framework could eventually form the foundation for a binding, inclusive and consensus-based multilateral framework, which reflects a plurality of interests of the negotiating states, as well as of the people and the communities that state actors represent on the international level.

V. European Union As The Driving Force Behind Reform

Since 2009, the European Commission has been working actively to centralize and consolidate the legal framework for investment protection in the EU.[226] The Commission has indicated that it seeks to harmonize the rules for investment liberalization and protection as well as create a level playing field for investment.[227] More recently, it has emerged as one of the fiercest critics of ISDS, and has become the driving force behind the proposal to establish the MIC that seeks to replace the ISDS mechanism altogether.[228]

The EU, taken as a whole, constitutes one of the largest and most influential trading blocs in the world, and the policy choices that EU institutions make regarding trade and investment can have far-reaching impact on various regions and economic sectors even outside the EU.[229] Further, the EU is the world's largest source and the top global destination for FDI[230] and has become a formidable power in international economic governance. Given the weight that EU exercises in international investment negotiations, it is uniquely positioned to lead from the front and 'set a new agenda for investment protection and investor state dispute settlement provisions'[231] that can transform the face of international

224 ibid.

225 Wenhua Shan (n 120) 11.

226 Carrie Anderer, "Bilateral Investment Treaties and the EU Legal Order: Implications of the Lisbon Treaty" (2010) 3 Brooklyn Journal of International Law 851, 854.

227 European Commission, 'Towards a Comprehensive European International Investment Policy' (07 July 2010) COM(2010)343 final <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0343:FIN:EN:PDF> accessed 30 May 2020.

228 For details and analysis, see Catherine Titi,'The European Union's Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead' (2017) 1 Transnational Dispute Management.

229 Sean McClay, 'Can It Lead from behind: The European Union's Struggle to Catch up in International Investment Policy Making in the Wake of the Lisbon Treaty' (2016) 2 Texas International Law Journal 259, 260.

230 European Commission, 'Investment' <https://ec.europa.eu/trade/policy/accessing-markets/investment/> accessed 30 May 2020.

231 European Commission, 'Factsheet: Investment Protection and Investor-to-State Dispute Settlement in EU Agreements' (26 November 2013) <http://www.sice.oas.org/TPD/USA_EU/Studies/tradoc_151916__Investment_e.pdf>.

investment law as we know it.[232]

While a multilateral framework on investment does not seem to be on the EU policy agenda for the moment,[233] the EU has certainly made an independent push for substantive and systemic reform of IIAs in recent years that could pave the way for a multilateral framework in the future.

I. Towards a New Generation of EU IIAs

With its new investment policy, the EU seeks to create a '*better balance*' between the state's right to regulate for public policy objectives and the need to protect investors.[234] In the view of the European Commission, this can be achieved by clearly defining the scope of investment protection standards and leaving no room for interpretive ambiguity.[235] The Commission is also aware that the EU is in 'a strong position to convince its trading partners of the need for clearer and better standards' and has therefore adopted bilateral negotiations with third countries as the primary route for substantive reform of EU IIAs.[236] However, it has expressly rejected the idea of an 'EU Model BIT' as a template for IIA negotiations to avoid any limitations on its negotiation freedom.[237]

Over the last decade, the EU has been engaged in bilateral negotiations with several states including Canada, India, Singapore, Japan, China and Vietnam for investment protection agreements (IPAs) or comprehensive trade agreements that will also include an investment chapter.[238] According to the latest draft texts of these agreements, the EU has adopted a uniform approach towards improving investment protection rules in three main areas: (1) host state's right to regulate; (2) FET standard of protection; and (3) protection against expropriation.

1. Host State's Right to Regulate

The new generation of EU agreements for investment protection, from the CETA to the EU-VietNam IPA, contain provisions that expressly affirm the right of host states to regulate

232 Catherine Titi, 'International Investment Law and the European Union: Towards a New Generation of International Investment Agreements' (2015) 3 European Journal of International Law 639, 654.

233 The EU has chosen bilateral negotiations as its primary vehicle for create better and clearer standards. See European Commission, 'Factsheet: Investment Protection and Investor-to-State Dispute Settlement in EU Agreements' (26 November 2013) <http://www.sice.oas.org/TPD/USA_EU/Studies/tradoc_151916__Investment_e.pdf> accessed 30 May 2020.

234 ibid 1.

235 ibid 6.

236 ibid 1.

237 European Commission, 'Towards a Comprehensive European International Investment Policy' (07 July 2010) COM(2010)343 final <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0343:FIN:EN:PDF> accessed 30 May 2020.

238 European Commission, 'Negotiations and Agreements'< https://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/> accessed 30 May 2020.

to achieve legitimate public policy objectives.[239] Further, they also clarify that the mere fact that a state amends its regulatory framework that results in a negative impact on a foreign investment would not constitute a breach of the treaty obligations.[240] In addition to this section on the right to regulate, the treaty texts also include general exceptions modelled on Article XX of the GATT, which are applicable to certain investment provisions.[241] They also include, *inter alia*, national security exceptions,[242] prudential carve-outs,[243] limited application to taxation measures,[244] and exceptions for activities of central banks.[245] Thus, these agreements make it abundantly clear that the regulatory autonomy of the treaty parties must be preserved and respected by future tribunals (or the MIC).

2. FET Standard of Protection

Another item on the EU's investment agenda is to ensure that key substantive standards of investment protection such as FET are drafted in a *'detailed and precise manner*'.[246] The recent EU investment chapters and IPAs provide an exhaustive list of conduct that qualifies as breach of the FET standard: denial of justice in criminal, civil and administrative proceedings; fundamental breaches of due process; manifestly arbitrary conduct; harassment, coercion, abuse of power or similar bad faith conduct.[247] Notably, the element of legitimate expectations of a covered investor does not feature in this list.[248] According to the draft texts, legitimate expectations would be created based on a state's '*specific or unambiguous representations to an investor*' and can only be '*taken into account*' by the tribunal as a factor while determining whether the FET standard has been breached.[249] By choosing such innovative language, the EU seeks to exercise a greater level of control over the application of the FET standard with the twin objective of limiting arbitral discretion and protecting the regulatory space of host states.[250]

239 CETA, art 8.9 (1); Investment Protection Agreement between the European Union and its Member States of the one part, and the Republic of Singapore, of the other part (signed 19 October 2018) (EU-Singapore IPA), art 2.2(1); EU-Viet Nam Investment Protection Agreement (signed 30 June 2019) (EU-Viet Nam IPA), art 2.2(1).

240 CETA, art 8.9 (2); EU-Singapore IPA, art 2.2(2); EU-Viet Nam IPA, art 2.2.(2).

241 CETA, art 28.3; EU-Singapore IPA, art 2.3(3); EU-Viet Nam IPA, art 4.6.

242 CETA, art 28.6; EU-Singapore IPA, art 4.5EU-Viet Nam IPA, art 4.8.

243 CETA, art 28.8; EU-Singapore IPA, art 4.4; EU-Viet Nam IPA, art 4.5.

244 CETA, art 28.7; EU-Singapore IPA, art 4.6; EU-Viet Nam IPA, art 4.4.

245 CETA, art 28.5; EU-Singapore IPA, art 4.7; EU-Viet Nam IPA, art 4.7.

246 European Commission, 'Factsheet: Investment Protection and Investor-to-State Dispute Settlement in EU Agreements' (26 November 2013) <http://www.sice.oas.org/TPD/USA_EU/Studies/tradoc_151916__Investment_e.pdf> accessed 30 May 2020..

247 CETA, art 8.10(2); EU-Singapore IPA, art 2.4(2); EU-Viet Nam IPA, art 2.5(2).

248 Catherine Titi, 'International Investment Law and the European Union: Towards a New Generation of International Investment Agreements' (2015) 3 European Journal of International Law 639, 656.

249 CETA, art 8.10(4); EU-Singapore IPA, art 2.4(3); EU-Viet Nam IPA, art 2.5(3).

250 Catherine Titi, 'International Investment Law and the European Union: Towards a New

3. Protection against Expropriation

The second standard that the EU wishes to specify in its investment agreements is the protection against expropriation. While the basic elements of expropriation have not been changed, the draft texts include annexes with detailed provisions that: (i) describe 'direct expropriation' and 'indirect expropriation', (ii) specify which factors could be taken into account while deciding whether a measure constitutes indirect expropriation, and (iii) exclude state measures adopted to protect legitimate policy objectives '*except in rare circumstances*'.[251] Further, EU has also clarified the provisions relating to compensation, stating that it shall amount to the '*fair market value of the covered investment immediately before its expropriation or impending expropriation became public knowledge plus interest at a commercially reasonable rate*.'.[252] These detailed provisions seek to provide concrete guidance to arbitrators on how to decide whether a government measure constitutes indirect expropriation and thus prevent investors from abusing the system.[253]

While other non-EU IIAs have also included the innovative language and detailed formulations seen in recent EU IIAs, these revisions demonstrate the clear determination of the EU to recalibrate the balance in the investment protection regime - a desire that also seems to be shared by its influential treaty partners. While its current approach to investment negotiations is largely bilateral, the EU has the necessary political will and policy capacity to become the driving force behind substantive reform at the multilateral level and lead the efforts to create a global framework on investment.

II. Leading the Way for Systemic Reform

The investment law regime is currently standing on a complex web of nearly 3,300 treaties, out of which more than 2,500 IIAs in force today are 'old' treaties, i.e. first-generation treaties that were concluded before 2010.[254] The continued existence of these treaties has become a systemic problem; it creates overlaps and fragmentation in treaty relationships and perpetuates inconsistencies that can be exploited by foreign investors.[255] Most of the recently concluded IIAs do not clarify whether the 'new' treaties replace the pre-existing treaties between the same treaty partners, which has led to the parallel application of outdated and new treaties.[256] This increases the complexity in an already

Generation of International Investment Agreements' (n 248) 58, 82.

251 CETA, Annex 8-A; EU-Singapore IPA, Chapter 4 – Annex 1; EU-Viet Nam IPA, Chapter 4 – Annex 4.

252 CETA, art 8.12(2); EU-Singapore IPA, art 2.6(2); EU-Viet Nam IPA, art 2.7(2).

253 European Commission, 'Factsheet: Investment Protection and Investor-to-State Dispute Settlement in EU Agreements' (26 November 2013) 8 <http://www.sice.oas.org/TPD/USA_EU/Studies/tradoc_151916__Investment_e.pdf> accessed 30 May 2020.

254 UNCTAD, 'International Investment Policymaking in Transition: Challenges and Opportunities for Treaty Renewal' (IIA Issues Note, 2013) 1.

255 UNCTAD, 'IIA Issues Note, 2017' (2017) 7.

256 UNCTAD, 'Reform of the International Investment Agreement Regime: Phase 2' (2017) TD/

complex system.[257]

The EU, however, has developed a pioneering approach aimed at consolidation within the IIA network. When the EU concludes an IIA with a third state, the new agreement replaces all pre-existing BITs and IIAs that were concluded by individual EU member States with that state. For example, CETA is scheduled to replace eight prior BITs between Canada and individual EU member States.[258] Similar provisions have also been incorporated in the EU-Singapore IPA and the EU-VietNam IPA, which will replace twelve and twenty-one pre-existing treaties respectively.[259] The EU thus ensures an effective transition from the 'old' to the new treaty regime by establishing uniform and modern rules for all treaty partners.[260] From a systemic reform perspective, the EU approach has the dual effect of modernizing investment rules and reducing fragmentation and gaps in treaty relationships within the IIA network.[261] The EU's focus and attention on consolidation would prove to be a powerful asset while creating a future multilateral framework on investment, which would necessarily require states to abrogate their pre-existing IIAs and replace them with a single framework of investment rules.

VI. Conclusion

Considering the mounting criticism that the investment law regime has been facing lately, it is clear that comprehensive and lasting reform is necessary to ensure that the ISDS system works effectively for all stakeholders. States are already deliberating on proposals to replace ISDS but they have opted for bilateral or plurilateral negotiations as the primary vehicle for addressing the substantive flaws of IIAs. This study has shown that procedural reform of ISDS is likely to be inadequate and short-lived unless efforts are made to create a multilateral rules-based framework on investment to tackle the substantive deficiencies of the IIAs. While it is true that such efforts have failed in the past, the current political context and recent economic trends offer an unprecedented opportunity to reconsider a multilateral framework on investment due to greater convergence in the interests and positions of states in relation to FDI. Negotiations for a multilateral investment treaty do not seem very plausible at this time but there are various pathways that could incrementally lead to multilateral consensus.

This study also considers that the EU could emerge as the driving force behind large-scale reform of the investment law regime. It has already refined the treaty language and design of its IIAs to recalibrate the balance of investor rights and state obligations,

B/C.II/MEM.4/14, 8.

257 ibid.

258 CETA, art 30.8.

259 EU-Singapore IPA, Annex 5; EU-Viet Nam IPA, Annex 6.

260 UNCTAD, 'Reform of the International Investment Agreement Regime: Phase 2' (2017) TD/B/C.II/MEM.4/14 9.

261 ibid 8.

which have been adopted by its influential treaty partners such as Canada, Singapore and Vietnam. The EU has also placed considerable emphasis on consolidation of its IIAs by including provisions to replace pre-existing and overlapping treaties, thus resulting in broader systemic reform.

It remains to be seen whether the idea of a multilateral framework on investment would capture the attention of governments just yet. However, as *Voon* puts it, 'the energy that many States are continuing to put into plurilateral and mega-regional agreements is capable of being harnessed towards the longer-term pursuit of multilateral rules as a tool for reform of the beleaguered investment regime',[262] and it is hoped that states realize this sooner than later.

262 Voon, 'Consolidating International Investment Law: The Mega-Regionals as a Pathway Towards Multilateral Rules' (n 15) 30.

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DELHI
NATIONAL LAW UNIVERSITY, DELHI
Sector-14, Dwarka, New Delhi-110078
Tel. No : 011-28034255, Fax No:011- 28034254
www.nludelhi.ac.in